IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1228/6/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23 January 2015

Before:
THE RT. HON. LORD JUSTICE SALES
(Chairman)
DERMOT GLYNN
CLARE POTTER

Sitting as a Tribunal in England and Wales

BETWEEN:

AXA PPP HEALTHCARE LIMITED

Applicant

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

- and -

BRITISH MEDICAL ASSOCIATION
BUPA INSURANCE LIMITED
ASSOCIATION OF ANAESTHETISTS OF GREAT BRITAIN AND IRELAND

Interveners

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HEARING DAY ONE

APPEARANCES

Ms. Kelyn Bacon QC and Ms. Sarah Love (instructed by Linklaters) appeared for AXA PPP Healthcare Limited.

Ms. Kassie Smith QC and Mr. Brendan McGurk (instructed by the Treasury Solicitor) appeared for the CMA.

Mr. Aidan Robertson QC (instructed by the Legal Department) appeared for the BMA.

Ms. Anneli Howard (instructed by Hogan Lovells) appeared for AAGBI.

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THE CHAIRMAN: Yes, Ms. Bacon?

MS. BACON: Sir, I appear with Ms. Love on behalf of the applicant, AXA. To my right Ms. Smith and Mr. McGurk are here for the CMA. Ms. Howard is here for the AAGBI, and Mr. Robertson on the far right is for the BMA. I should also note that Mr. Ward represents BUPA, which has intervened in support of us, but has not served a Skeleton Argument and is not here today.

Can I just check that you have everything that I have? In front of you, you should have two pages. One is an outline of submissions that I am going to make today, a kind of checklist so that you can see where I am at any point in my submissions.

THE CHAIRMAN: Yes, thank you.

MS. BACON: The second is a chronology. I do not propose to refer to it as such, but I thought it might be useful, especially as I am taking you through the background materials. That explains where everything is, if it is there at all in our bundles, and most of it is there. The material points in the chronology that are not reflected in the documents in the bundle, I will just summarise what they are when I come to them.

THE CHAIRMAN: Thank you. May we mention a few matters just before we get into the argument. First of all, we feel that we should mention that members of the Panel all have private health insurance, either with BUPA or AXA. We mention it so that there is no misunderstanding about that.

We saw from the communications that we had about the breakdown of the time until lunchtime on Monday, that you hoped that we might sit early on Monday. I do not think you should assume that we will. We do not at the moment see any need for that. When you are adjusting your submissions you need to take that into account.

So far as the timetable is concerned, what we suggest, by way of outline, but this will be for discussion and you can tell us if you would prefer to break up your time differently, is that AXA go until one o'clock, resume and then go until three o'clock.

MS. BACON: That is what I had in mind, Sir.

THE CHAIRMAN: Then the CMA will start this afternoon and go to 11.45 on Monday. Then BMA from 11.45 until 12 on Monday, and AAGBI from 12 to 12.15, and then AXA get 45 minutes in reply.

MS. BACON: Sir, that is the breakdown I had in mind.

MR. ROBERTSON: Sir, just one change in the batting order, it will be AAGBI before the BMA.

THE CHAIRMAN: All right.

MS. BACON: Sir, I should say that our correspondence with the Tribunal did not imply a request to sit early. In principle, I should be able to finish my submissions within three and a half hours today. I was just concerned that if there were a lot of questions from the Tribunal that there might not be sufficient time. We had a brief debate and Ms. Smith seems to think that she will be able to fit within the time available. I just had a concern about my time, given the opening period. However, let us see how we get on.

THE CHAIRMAN: The other thing is how we are going to deal with open and closed sessions.

MS. BACON: Yes, I did have a proposal, which I floated with my learned friends, which is that the points I would like to make in the closed submission do not fit naturally at the end of my submissions. What I would propose to do is deal with them either shortly before the short adjournment, in say ten minutes, or after the short adjournment, but one way or the other one side of the short adjournment, and I will carry on with my submissions after that in an open session.

THE CHAIRMAN: So you think you can deal with it in a self-contained block like that?

MS. BACON: I hope so. We did float the idea of doing all of Grounds 4 and 5 in closed session, and Ms. Smith did not like the idea. I do have concerns. I am going to do my best. My concern was more that people may slip and say things. If they do, we will just have to address that at the time and make sure it comes off the transcript.

THE CHAIRMAN: I think we are content to proceed in that way. Ms. Smith, is that satisfactory to you?

MS. SMITH: Yes, Sir.

THE CHAIRMAN: I think you hold up your hand and say when we need to go into closed session. We will have a determinate block of time. I am very concerned to avoid people going in and out of closed session. It uses up time.

MS. BACON: I have structured my submissions to avoid that.

THE CHAIRMAN: Thank you very much for that. The last thing that we need to mention is that we have got what I will call the super confidential version of the Report, which is basically what we will be looking at as the hearing progresses. However, even in those, there are deletions. So we were reading chapter 7 and relevant figures have been deleted from that. Our understanding is that that has occurred because no one asked for those passages to be undeleted.

MS. BACON: I am content to proceed on the blue version, which is the super confidential version.

THE CHAIRMAN: Right. Even with the deletions ----

MS. BACON: We are not requiring any unredactions. We have asked for the names of some of the other groups and we have been given those by the CMA, and I will come to those, particularly in the closed session. I have structured my submissions on the basis of the blue version as it is. The pink version will also suffice, because actually, for the purpose of our submissions, there is no difference between the blue and the pink.

THE CHAIRMAN: All right. It is a question of whether the Tribunal should have the completely non-redacted version. I think my feeling is that we should have the same as the parties have. It would not be right for us to have anything different.

MS. BACON: We can see how we get along. If there is anything, when we are reading that part of the Report, that the Tribunal thinks we ought to have then we deal with it.

THE CHAIRMAN: I think that our base position, subject to what anyone wants to say, is that we should have the same as the parties. It would not be right for us to be looking at something that the parties have not got in front of them.

MS. BACON: We have never had a completely unsnipped version of the Report.

THE CHAIRMAN: All right, we will proceed in that way. Thank you very much, Ms. Bacon.

MS. BACON: As you will see from my outline, what I propose to do is, first of all, show the Tribunal the relevant parts of the background documents and then briefly the Report to explain what the CMA did in this case. Then I am going to make my submissions on Grounds 3 to 5. What I propose to do in relation to the legal framework, in particular the CC3 guidelines, is to cover that under Ground 3 because it most closely relates to that argument. It does, of course, have a bearing on the later arguments under Grounds 4 and 5, but rather than having a big gap between introducing the law and then actually getting to my legal submissions, I will deal with it as much as I can under Ground 3.

I will start off with the groups. The issue of anaesthetist groups has a long history. Concerns about anaesthetist groups forming and charging collective prices dates back to at least the early 2000s, when, as the Report says (annex 7.1, para.3), there was a spike in group formation after the entry into force of the Competition Act. Various complaints were made to the OFT about the formation of those groups and the setting of collective prices. While the OFT did start an investigation, it closed that in 2003 on the grounds that most of the groups had actually formed partnerships, and were, therefore, single undertakings, and so they fell outside the scope of Chapter 1 or Article 101. I will not ask you to go to it, but just for your note the Decision is at volume 3 of the core bundles, tab 24.

What happened then was that the OFT looked at the issue again in its Market Study of the private healthcare market which was launched in March 2011. As part of that Market Study

it sent questionnaires to various undertakings and organisations, including insurers such as my client, and industry associations such as the AAGBI. Again, I will not take you to it, but for your note, the AAGBI response, which is cited in our pleadings, is at volume 2, tab 11. I am now going to go through the relevant documents in volumes 2 and 3 of the hearing bundle, not the authorities bundles. Could you take up volume 2? I should say that volume 1 of our Notice of Application bundle is effectively superfluous because that was our original version of the Report, so that can be put to one side. We are not using that. We are going to just use volumes 2 and 3 of our hearing bundle and then the authorities bundles.

THE CHAIRMAN: Thank you.

MS. BACON: The OFT Market Study Report is in what in my version is labelled annex 3. These are called annexes because they were all annexes to our Notice of Application.

THE CHAIRMAN: Did you have a tab that you can give us?

MS. BACON: The tab says annex 3 on it.

THE CHAIRMAN: We have numbered tabs. Tab 12 is OFT Private Healthcare Market Study.

MS. BACON: I am going to have to try and remember what these are when we are going through. That is tab 12. Can I just take you to a few points on this? Would you turn to p.51 in the numbering at the bottom, you will see para 4.70, "Conclusion on geographic market". You will see at the bottom of the page:

> "… the OFT considers that there are likely to be both local and national relevant geographic markets, with potentially some regional aspects to competition."

The same point is reiterated at para.4.73.

If you then turn forward to p.111 at the bottom, you will see that there is a discussion on "Concentration of Anaesthetists", with some background information, and I am not going to read all this out. Particular points to note, over the page, 7.5, p.112, the last sentence:

> "The OFT is also aware that typically AGs …"

AGs is the common abbreviation for anaesthetist groups -

> "… set a common fee level for their members.
>
> According to a survey conducted by the AAGBI, around 44 per cent of anaesthetists active in the PH market are involved in an AG."

An estimate of the number of anaesthetist groups puts them as growing from 22 in 2006 to over 45 in 2011. Then the observation made by a number of PMI providers:

> "… that anaesthetists are the sub-speciality with which the PH patient is most likely to experience a shortfall."

Just to explain that term, it is when the fees set by the anaesthetist fall above the schedule of fees for which the private insurer is willing to reimburse the patient.

Then comments about complaints from patients at 7.7. Then the comment at 7.8 that it is difficult for patients to switch to alternative anaesthetists. That is because the first time you usually meet your anaesthetist is when you are lying on the table in the room prior to going into surgery.

The only points that I needed to show you in this Report, 7.12, p.113:

> "Furthermore, PMI providers have provided evidence suggesting increased instances of anaesthetists bills being above PMI fee schedules …"

that is a shortfall point, and then a conclusion on the concentration of anaesthetists at para.

> 7.14, and over the page the OFT says that these complaints are supported by submissions and evidence from PMI providers as part of the Market Study, that high concentration of AGs in some local markets may raise prices and, as a result the OFT suspects the prevalence of AGs is also a feature of the market which may reduce price competition in local markets.

So that is the OFT's provisional conclusion on anaesthetist groups. There may be a problem in some local markets. Then you will see the terms of reference right at the end of that tab at p.156. Those are also extracted in the Report in any event.

I am being given a key to the tabs now. Chronologically, the next thing to occur is a Statement of Issues by the CC after the market reference had been made to it. The Statement of Issues is at the next tab, which should be tab 13 in your bundle. This is where the CC set out its theories of harm, and the relevant theory of harm in relation to anaesthetists group is the second theory of harm, and that is summarised at para. 20, p.6, using the numbering at the bottom of the page. "The theories of harm we have identified are:"

> "(b) theory of harm 2: market power of individual consultants and/or consultant groups in certain local areas."

Because they were not only looking at groups but the possibility that some individual consultants might also have market power. The theory of harm is then developed on the next page starting at para. 27, where they set out the hypothesis that consultants or consultant groups in certain local areas have market power over their patients, and then develop that at para. 28: "Consultant market power may be caused by several factors…" – (a) "a limited number of consultants in a particular local area", "(b) the way that referrals are made" and "(c) the joint setting of prices (for anaesthetists)."

The next section addresses the effects of local market power which include possible pricing effects, so that is dealt with separately there.

There were then various responses already to the Issues Statement. Again, just for your note, because I am not going to go to them now, some of these included a response from BUPA of which there are extracts in, unfortunately, two different places in your bundle. There is one extract attached to BUPA's Statement of Intervention, which is in core bundle tab 6. I am not going to ask you to go to it now. There is another extract attached to our Reply which is at core bundle tab 10B. We also submitted comments, but they are not in the bundle, and I am not going to take you to our comments.

After the Issues Statement there was then an Annotated Issues Statement a little over six months later, this is not in the files, but I should tell you it existed because it is referred to in some of the later documents that I am going to. What the Annotated Issues Statement did was to develop a little more the theories of harm. In this particular case noting that the CC's current view was that some anaesthetist groups appeared likely to have market power, and setting out the seeds, in fact more than the seeds, some green shoots of the pricing analysis, because what it had done already by the time of the Annotated Issues Statement is to identify a sample of six treatments, and identify some case study groups in relation to each ---

THE CHAIRMAN: You seem to be referring to this document in some detail, should we not have a copy of it?

MS. BACON: No, I am just telling you what it did because there is a critique of that in the AAGBI comments, so I am just explaining what it did. If you want to see the Annotated Issues Statement we can have copies made, but I think all I need to do is say that is where the first mention is made of the six sample treatments and the case study groups. At that stage it did contain what became case studies A and C. I do not need to take you to the findings made in that but if you would like we can try and have copies of that brought to you over the short adjournment.

THE CHAIRMAN: Yes, please.

MS. BACON: There were then various comments on the Annotated Issues Statement, including the next document in your tab, which is the AAGBI comments, and that should be tab 14 in your bundle.

THE CHAIRMAN: Yes, thank you.

MS. BACON: This is why I wanted to explain what the Annotated Issues Statement had done.

At para. 79 of these comments, which is at p.5, using the numbers at the bottom of the page, the AAGBI noted that from the initial evidence set out in the Annotated Issues Statement:

> "…it might be concluded that there is a small amount of evidence of dubious quality presented to conclude that **some** anaesthetic groups, (10-16%) appear likely to have market power, but the evidence more importantly suggests that the substantial majority (84-90%) do not."

Then they say: "We are glad that the CC intends to analyse this area further." Then they make some comments on the data and this is because, as I said, the CC had already selected some six treatments as a sample, and the AAGBI comments that two out of six were inappropriate, and over the page you will see further comments about why those two out of six are inappropriate.

Just pausing there, I should note that that criticism was accepted by the CMA and those two treatments were replaced by others in the Provisional Findings and the Final Report.

The next paragraph of the AAGBI comments, which is the second full paragraph on p.6, makes several arguments. It makes the argument there that the PMI had only expressed concerns apparently about nine groups whereas there were 91 others that had not raised concerns the AAGBI says. That, as far as I can see, is the first indication that on the AAGBI's evidence there were about 100 groups. We had seen earlier that the OFT had proceeded on the assumption that there are about 45 anaesthetist groups.

THE CHAIRMAN: This is talking about groups surveyed.

MS. BACON: Groups surveyed, yes. So the AAGBI seems to think that there are 100 groups.

THE CHAIRMAN: Surveyed?

MS. BACON: Surveyed. I think this is talking about its survey, or evidence that it has provided but I am just drawing your attention to that because by now we have a recognition that there are about 100 anaesthetist groups.

The next point that is made by the AAGBI is that because anaesthetists' fees are only a small percentage of the total cost of treatment they were insignificant, and they were inviting the CC to focus its resources on other issues. That is a point that the CMA did not accept, so there is nothing in the Report or the other consultation documents, as far as I am aware, to suggest that because of the small percentage of the overall cost point raised by AAGBI here the CMA was treating anaesthetist groups as a lower priority.

Attached to this document was a survey by the AAGBI and this may be what is referred to when it makes the comment about the 100 groups surveyed, that is in the second half of this tab. If you turn to p.7 of that survey -----

THE CHAIRMAN: Is that appendix A to the ----

MS. BACON: Appendix A to its response, and at the bottom it explains that the survey has been carried out by Enventure Research, presumably on behalf of the AAGBI. There is a table here and a bar chart, which sets out that according to this survey carried out on behalf of the AAGBI 66 per cent of groups surveyed said that their members set their fees at the level agreed by the group. So, I am presuming that that was the survey that was referred to.

I do not want to take you to anything else in the AAGBI response right now.

The next document, in your bundle, which should be at tab 16 ----

THE CHAIRMAN: Sorry, 66 per cent, but that is 21 groups – 21 is not 66 per cent of 100.

MS. BACON: I am sorry, the base number is 32, so I am assuming that 32 responded to this question. I am afraid I cannot really help you as to where these figures come from, I am merely showing you the 66 per cent figure. Presumably Ms. Howard can take you to the methodology in more detail if she wants to make a submission on it.

THE CHAIRMAN: But you seem to be making some point which suggested that the actual numbers were significant, the 100 you emphasised.

MS. BACON: No, I was not taking a particular point about the 100, I am simply saying that, whereas the OFT had said to its knowledge there were 45 anaesthetist groups, something in the results that the AAGBI had obtained suggested that by then it realised or it considered that there were about 100 groups, so the number has gone up. That number of 100 groups is then repeated in the Report, and I will take you to that section later.

THE CHAIRMAN: So far as the survey is concerned, I am not sure we are told how many ----

MS. SMITH: It is on p.5.

MS. BACON: I am being shown it, 32 groups took part in the survey.

THE CHAIRMAN: Yes, that is 32 completed responses were received, p.4. So, I go back to my point, I have not detected from the survey how many questionnaires were sent out and then they just got 32 back; what we know is they got 32 back.

MS. BACON: We can see if we have anything more on that, but I would suggest that it is probably more a question for Ms. Howard than me.

THE CHAIRMAN: So you are not basing anything in your submissions on the numbers.

MS. BACON: Yes, I am just drawing your attention to the percentage that they give.

THE CHAIRMAN: Right.

MS. BACON: To be fair, it is common ground between us and the CMA that a large percentage of anaesthetist groups set collective fees, that is not a point that is in dispute. What we say is that that is of greater relevance than the CMA found in its Report.

MR. GLYNN: Can you tell us where is the best explanation of why they set prices?

MS. BACON: I am going to come to the AAGBI guidance at the end, and according to the AAGBI guidance, one of the reasons for forming partnerships is to set collective prices, and my understanding is that prior to the entry into force of the Competition Act this could be done, it was not within any of the prohibitions. When the Competition Act came into force that meant if the anaesthetist groups were not in the form of a single undertaking and they did set collective fees that would be caught by the Competition Act. That is why there was a spike in group formation or, rather, to put it more precisely, transformation of some groups from a loose association which had set its fees into formal partnerships so that would fall outside the Competition Act prohibition. We do not take any point on that, we acknowledge that the setting of fees within a group does not fall within the Article 1 or Chapter 1 prohibition. We are not saying that it is actually an infringement of the Competition Act, but that helps to explain why these groups either formed in the first place or transformed from a loose association into a formal partnership so they could fall outside of that prohibition. As to why they originally set fees that seems to be something that has happened as a matter of history, and it has happened for a long time. People have been complaining about it for a long time.

MR. GLYNN: (No microphone) There is no clear explanation of why they set the fees in this particular way?

MS. BACON: No, and there is some mention in some of the submissions, and particularly the AAGBI submissions, of other benefits from forming groups, such as efficiency benefits, which were not really picked up in the Report, but as far as we are aware – I might have missed something but I am being told from behind there is not a clear explanation of why it was necessary to set collective fees.

MR. GLYNN: Thank you.

MS. BACON: And I am sure if there is something I will be corrected in due course by my learned friends. If I could then ask you to turn to the next document in your bundle, which is tab 15, the Provisional Findings. This is a large document and much of it is replicated in the Final Report. So you will be pleased to hear that I am not going to dwell on this but I just wanted to note a few points. On p.250 there is a further recitation of the theory of harm at para. 7.3, again, some consultants, or consultant groups may have local market power.

Then, over the page to 252 at (d) a specific reference to anaesthetist groups jointly negotiating or setting prices.

The next point I wanted to take you to specifically was on p.257, at footnote 17, and this is the point that I made about the number of anaesthetist groups. At footnote 17 it is recorded that the "AAGBI provided some information about anaesthetist groups", and the CC also got information from PMIs and hospital operators. As a result of that the CC identified over 150 potential anaesthetist groups in the UK and they then got details for approximately 100 groups, and they then sent out their own survey to those 100 groups.

We know from comments elsewhere ----

THE CHAIRMAN: The reference to "questionnaire" there, that is the CC's?

MS. BACON: That is the CC's questionnaire, that is right, and we know from the comments and the Report, which I will come to in due course, that of those 100 groups, only 45 groups provided what the CMA later describes as full answers to the questionnaire, giving the names of all of their members. Just for your notes – I will take you to it – that is at paras. 3 and 9 of Appendix 7.1 to the Report.

So, the CMA, when it was comparing pricing of anaesthetists within groups, and those outside the groups, the within group set was the anaesthetists within that 45. Let us put it in inverted commas, the "non-group" set was all of the other anaesthetists who were not in the 45, and because it had sent out 100 surveys it knew that there were at least 55 other groups out there. So when it had a "non-group" comparator, what we are really talking about is a blended set – some genuine independents, but some anaesthetists who were in any of the, maybe 55 other groups, maybe even 100 other groups, because we know that the CC did not have details of all the groups for which to send its survey and that is relevant to the interpretation of some of the results which we will come to later.

I also wanted to draw your attention to footnotes 18 and 19, which list the six treatments which the CC used as a sample, and explain those account for around 18 to 19 per cent of observations by volume and value. The last two of those treatments were the two that it replaced following the comments of the AAGBI.

If you could then turn to p.262, there is an important finding here in the Provisional Findings, para. 7.25, which was that at that point provisionally the CC believed that barriers to entry were low. Just pausing there again to give some commentary, this particular finding was objected to vociferously by both my clients and BUPA, and the CMA asked for further evidence on that point, which I will come to, as a result of which the CMA in the

Final Report abandons that finding, but just to note here at this stage provisionally the CC had concluded that the barriers to entry were low.

Then the conclusion at para. 7.26:

> "On balance, we consider that the evidence we have received and reviewed does not demonstrate an AEC resulting from anaesthetist groups in any local areas".

Again, this differs from the Final Report in that here there is no suggestion that pursuing this line of inquiry was not justified on grounds of resource or lack of data. It is simply a conclusion that on balance, they conclude that the evidence does not demonstrate an AEC.

There were then various submissions on the Provisional Findings, including a number of submissions by my clients, and can I ask you now to put away that volume and take up vol. 3 of the hearing bundle?

THE CHAIRMAN: Yes.

MS. BACON: There was an initial AXA submission on 20th September 2013, which is at tab 16, and just to glance at two paragraphs on the first page: 1.3, where AXA said:

> "It would seem to us, in principle, that price agreements/arrangements between significant concentrations of anaesthetists in an area are likely to have an adverse effect on competition."

Then at para. 1.5: "We consider that the CC may have missed an important point of principle", and then a reference to something which is highlighted – this is confidential and cannot be read out in open court. At the end of para. 1.5: "This would appear to be a clear feature of the market in [X] which is adverse to competition." However, they do not develop the point because, over the page at para. 1.12 they invite the CC to reconsider its position but say we have a number of thoughts on which we are going to revert separately.

That separate reversion then comes at the next tab, which is tab 17.

THE CHAIRMAN: It is a Linklaters letter of 23rd September 2013.

MS. BACON: Yes – where they develop the point that they had foreshadowed in their previous letter and, in particular, on the second page of that letter they go on to develop the point that where there was collective price setting and the collective price setting was implemented by a group covering a large proportion of anaesthetists in a given area it was not necessary to produce positive evidence showing prices were higher. Of course, as you know, this became and is our Ground 3.

That ground was set up in this chain of correspondence which started with their previous letter, developed in this particular letter.

There was then an oral hearing when submissions were made by AXA, and then there was a further submission on the same point put in by Linklaters on 17th October 2013, and that is the next tab in your bundle, tab 18. Just to explain the highlighting and the red text: the highlighting is material that is confidential and cannot be read in open court. You will see some of that starting on p.3 and going over the page. The red text is some material that was originally redacted but following, I believe, comments from Mr. Robertson, that is unredacted, so we can refer to it in open court unless anyone contradicts me.

The letter makes one specific point and a couple of general points. The specific point concerns Gloucestershire, and that is the red stuff. AXA says that at least for the Gloucestershire Group, the evidence is so compelling that the CC should find an AEC. You will see that on p.4, especially at paras 8 to 9. The first general point is at paras. 13 to 14 and that is the legal point which is trailed in the previous correspondence and developed further here, which is now Ground 3. So this is the point that a large group, which sets prices, itself ought to be regarded as an AEC and it should be unnecessary to adduce specific price evidence, although the price evidence may, they fairly say, assist the CC. It is not a pre-requisite, they say.

The second general point is developed over the page at paras. 17 to 18, and that is a criticism of the CC's assessment of the evidence in the Provisional Findings, and they make there essentially the same point we are now making under Ground 4. I just invite the Tribunal to read those paragraphs – not now, otherwise I am going to be here forever. But the conclusion at para. 22: "However, none of these difficulties are proof that there is *no* competition problem", and you will remember that the Provisional Findings conclusion had been effectively: "We do not find there to be an AEC".

Just for your note, again I am not going to take you to it, BUPA's response to the Provisional Findings is annexed in full to our Reply, and that is in core bundle tab 10A.

The CC reviewed those submissions and it asked AXA for further data on independence in respect of several anaesthetist groups - the relevant page is in tab 19 of the bundle.

AXA's response is set out at tab 21, and that is a response of 12th December 2013. This is quite a detailed response. I am not going to ask you to go through it now, but again this is something that I would invite you to read. AXA provided the further data requested ----

THE CHAIRMAN: Sorry, this is tab 21?

MS. BACON: 21, yes. You will see there is detailed data on a number of groups, and in this most of the text referring to the names of the groups is in red, so I am assuming that those have been unredacted. I am told that the names are in the public version of the Report, so I

think I can refer to them in open court. There was detail provided on the Gloucestershire Group and the Norwich Group and the Bath Group. This is all in red so it can be read in open court because it is in the public version of the Report.

There is some text, which is highlighted in yellow, and that cannot be read in open court. The yellow text includes, for example, AXA's calculation of the market shares in respect of those three groups, and you will see that, for example, for Gloucestershire on p.5. The Norwich market shares are on p.9 and the Bath market shares are on p.11 and those specific figures are confidential.

THE CHAIRMAN: Yes.

MS. BACON: The next tab is the Provisional Decision on Remedies. I do not need to take you to this. This was in the bundle because it was relevant to our Grounds 1 and 2. This is not relevant to our Grounds 3 to 5, because as you know the CC had decided that there was nothing to be remedied, so it did not need to include anything on this in the Provisional Decision on Remedies.

Then the further document in the bundle is the document that I said to Mr. Glynn I would take you to, which is at tab 25, the AAGBI Guidance, and I just wanted to show you one paragraph, which is a paragraph referred to in our pleadings on p.27. This is the explanation of why a formal partnership agreement is necessary. Two paragraphs up from the bottom:

> "Without a legally drafted partnership agreement, the group acting as a partnership will be regarded as a "sham" partnership and will not benefit from the legal advantages of a real partnership such as the ability for all partners to charge the same fee without an accusation of price fixing."

Although we do not take issue with a point that is made by some of those against me that not all anaesthetists do follow the group price levels, the point that we are drawing from this document is the AAGBI guidance explicitly specifies the ability to set collective prices as a reason for being a member of a formal partnership.

I think that is all I wanted to show you from the background materials, and I would like now, with the Tribunal's permission, to go to the Report. I would like at this stage to just give you a brief overview of the relevant parts of the Report, which on my calculation is around 20 pages in total out of the over 1,000 pages of the Report. When I go to the specific grounds of appeal we will get into more detail of the specific parts of the reasoning.

As discussed at the start, I am going to use the bound blue version of the Report. I should

say, if anyone is using the pink version, that is not paginated. I am going to refer to the page numbers in the right hand corner at the bottom, but I will also give paragraph numbers. In the main Report the theories of harm are articulated at paras.4.4 and 4.5, p.64. Para 4.5(b) theory of harm is that individual consultants or consultant groups in some local areas may have market power over their patients.

I am just showing you the theory of harm, and you will already have seen that in the Issues Statement and the same theory of harm is set out in the Provisional Findings.

En passant, before we get to the specific points on anaesthetists, I should show you p.85, which is the conclusion on the geographic market, because that is then cross-referred back to later. What they say at para.5.70 is that we treat the geographic scope of competition as local for both consultant and hospital services.

> "(b) In relation to consultant services, for the purposes of our analysis we did not consider it necessary to identify these local geographic markets, it being sufficient to understand them as similar in scope to hospital services markets."
>
> (c) In relation to hospital services, we have defined the local geographic markets on the basis of the location of suppliers."

Those are the findings on local markets, which are then referred back to when we get to the discussions of anaesthetist groups which starts at p.197, section 7 of the Report. You will see there para.7.2, referring back to section 5:

> "We also found that, as with private hospital services, the geographic market is local. We have not, however, needed to define each such local area for the purposes of our final report."

Then there are some general comments on the factors suggesting that some consultants and/or consultant groups may have local market power, and I flag up particularly sub-para.(c), which makes the point, which I have already shown you, that the consultant selects the anaesthetist.

Then the CMA goes on to note the concerns of BUPA and AXA, in particular setting these out at para.7.8 to 7.10. I think this is the point about the names being given of the illustrative case studies submitted by AXA. I think that is the reason why those names were then unredacted, although they were initially redacted by us from the letter that I showed you.

Over the page you will see that what the CMA did first is address the market power of individual consultants, with which we are not concerned.

Then it addressed consultant groups and in particular the anaesthetist groups. First of all, there was a discussion as to the approach to be taken in principle at paras.7.20 to 7.22, and those are paragraphs that we have cited extensively in the pleadings, and I do not need to repeat them. That is where the CMA rejects the submission that we made that is now Ground 3.

It then goes on to explain how it has conducted its price analysis, and that goes from 7.23 onwards. It explains how it had covered a number of local areas and specifically 11 groups that it had selected on the basis of the groups that the PMIs had complained about. That is set out in para.7.25.

Then at 7.26 it explains that it had selected six sample treatments, because it was not going to analyse the price for every single treatment performed by every anaesthetist over the period of time.

Over the page from 7.27 onwards it explains the different kinds of analysis that it had carried out. 7.27(a) is the explanation of its national analysis, and then its different sorts of regional analysis. 7.28 and 7.29 are important because they give what the CMA regards as its hierarchy of importance of the different sorts of analysis of the case studies. I am going to come back to that later. Those are the paragraphs from which we derive that there are a most useful, a second best, a third best, and so on.

The following paragraphs then go on to set out the results of the various types of analysis, and I will come back to those later. 7.37 is another hierarchy comment, because it comments on the value of the national and regional analysis compared to the six case studies and says that although they:

> "… generally suggest a price effect of anaesthetist groups, we have placed less weight on these analyses as they do not control for geographical differences."

Then there is another important paragraph, 7.38, which is where the CMA comments on barriers to entry. You will recall that the initial assessment in the Provisional Findings was that barriers to entry were low. I have shown you the request for extra information and the response that AXA submitted. You will see here that, as a result of those submissions presumably, the point about barriers to entry being low is abandoned and instead what the CMA says is that it has decided not to assess barriers to entry because of its findings on the pricing evidence. It says:

> "As we have found mixed price effects in relation to the formation of anaesthetist groups, we decided not to prioritize our resources in carrying out a detailed assessment of barriers to entry."

So it asked for information and evidence on barriers to entry. We put it in and in this paragraph it is saying, "We have not actually looked at that because of the results that we found on the price effects".

The overall analysis and conclusions on consultant groups are then set out at para.7.39 to 7.41, and these are very important paragraphs, and I will come back to them later. In outline you will see that at para.7.39 the CMA says that results were mixed, and that the pricing evidence did not indicate that anaesthetist groups were leading to higher prices, although it fairly says that the results did show consistent evidence of price effects in one case - and there you can put (c). Then it says mixed evidence in two cases. Those are (a) and (b), and no price effects in the other three - that is (d), (e) and (f).

Then 7.40 says that the CMA did not undertake an area by area competitive assessment as that would have required consideration of various issues such as barriers to entry and buyer power.

Then 7.41 gives the reason why it did not look at those other issues, which was, given the results of its pricing analysis, and the difficulties it had in obtaining data and the constraints on time and resources, the CMA did not consider that it would be beneficial to carry out any further work to decide whether in any local market there was an AEC. That is the paragraph that we say indicates clearly that what the CMA is doing here is reaching a non-finding, it is saying, "We did not actually complete the analysis for various reasons", and the CMA characterises this as a finding positively that there was not an AEC.

Then there are a few paragraphs which address the specific point raised by BUPA about the market power of CESP, which is a group of ophthalmic surgeons.

Then over the page at 7.47:

> "On balance, the assessment we have carried out does not lead us to find that the formation of anaesthetist groups or other consultant groups adversely affects competition."

That is the conclusions and assessment that is set out in the main Report.

I just need to show you, and I am not going to go through this in detail now, the relevant bits in the annex. I have the impression from your earlier comments that you have read annex 7. Would you like me to just skip that, or do you want me to develop it?

THE CHAIRMAN: We have read it. If you want to highlight any particular things, do that.

MS. BACON: I will just highlight a few points in it now so that I can cover this, because I have trailed a few points in my submissions already. This then starts at p.1027. The few points I wanted to mention: para.3 is the point I made earlier about the 45 anaesthetist groups who

provided full answers to the CMA questionnaire, and also the reference for the spike in group formation, which I mentioned earlier.

Paragraph 4 is the point about the 11 local areas.

Paragraph 9 is the paragraph where the CMA explains that the 45 groups that did provide full responses gave the names of their members, and they used that information to identify the anaesthetists in its database of members of groups.

THE CHAIRMAN: So in the responses to the questionnaires from the Competition Commission rationales were given behind forming their groups?

MS. BACON: Yes, and I have not seen those. We have not asked to be shown those responses.

THE CHAIRMAN: Can I just ask on that, there are comments in the main Report as to the rationale for having groups, and so there was evidence based on which those ----

MS. BACON: Yes, and as I explained in my interchange with Mr. Glynn earlier on, the AAGBI in particular made comments about efficiency benefits, and so on. As I said, I am not aware of anything that specifically explains why it was necessary to set reflective prices, which was the particular question that was asked.

THE CHAIRMAN: Yes.

MS. BACON: I am just being reminded that in the AAGBI guidelines, which I showed you at tab 25 at the end of volume 3, there is, on p.26, a set of rationales of the practice, and that includes maximising income as an economic benefit but also other points about practice costs and expenses. So that sets out concisely a number of the rationales that that AAGBI includes, and including income and strength of negotiating with private hospitals. There is no doubt that one of the rationales is to be able to negotiate collectively and maximise income, but, quite fairly, I should say that the AAGBI has put forward group benefits, but those were not assessed in the Report specifically as a reason why the CMA was going to conclude that there was no AEC.

I was taking you to para.11 of appendix 7.1. Paragraph 11 is where the CMA explains that it has used six sample treatments, and in its footnote it sets out the 6, and those are the six that I showed in the Provisional Findings.

It then in para.12 goes on to give more detailed descriptions of the various types of regional and national analysis, and the case studies, and that is followed by a detailed description of the results of those case studies. I will come to that when I am addressing the Tribunal on Ground 4.

I then turn to my submissions on Ground 3. The way I propose to structure this is to first give you a summary of our case on Ground 3; then show you the legal framework, in

particular the CC3 guidelines; thirdly, address you on how we say that legal framework should have been applied in this case; and lastly, address some of the counter-arguments of the CMA and the interveners, the main counter-arguments as we have been able to identify them.

So the summary is this: given the evidence that the CMA had of the high, and indeed in some case almost monopoly, market shares of anaesthetist groups in some areas, and given the evidence that the CMA also had of collective price setting by anaesthetist groups, that, in our submission, was enough for the CMA to find AECs in at least some local areas, absent compelling evidence to the contrary. To put it another way, as we have said repeatedly from the start of our submissions, which I have shown you, if there is, in essence, no price competition within the group, and if the group accounts for almost all of the market, then there is no price competition within most of the market. In our submission, it is difficult to see how, in that case, there is no *prima facie* adverse effect on competition. On the contrary, our submission is that the CMA did not need to go further and demonstrate that, as a result of their high market share and collective prices, the anaesthetist groups were, in fact, charging higher prices than independents. That is because, and it is an AEC test - adverse effect on competition - not an AEP test - adverse effect on price. That, I should emphasise, is not a submission that price evidence was irrelevant to the AEC question, or should have been ignored by the CMA. We have always accepted, and I have shown you our submissions where, in our letters to the CC, we did accept that price evidence is something that the CMA was entitled to look at among the other evidence that it was considering. Our submission is that if the available price evidence did not decisively support the CMA's theory of harm in relation to anaesthetist groups, that should not have prevented the CMA from finding an AEC on at least some local markets on the basis of the totality of the other evidence before it.

Put the other way round, given the evidence before it, which is largely undisputed as to high market shares and collective price setting, the CMA could only lawfully have found there to be no AEC in relation to particular markets if the price evidence had pointed compellingly in the opposite direction. So that is our central case. That is the central case that we have set out in our pleadings and we are not drawing back from it. In that respect, we agree with the CMA when it says in its Skeleton Argument that we are maintaining the case that we set out in our Notice of Application.

I am aware that the AAGBI take the point on admissibility. I am going to deal with that when I come to that specific submission. That was the preamble, if you like, and I will now

come to the legal framework. Could the Tribunal take up the second of the authorities bundles, I want to start with tab 29 which are the relevant provisions of the Enterprise Act. Just to tell you, we have added two things to the end of this tab. One is s.169, right at the end, and that is the duties of relevant authorities to consult. That is where you get an articulation of the duty to consult. I just thought you ought to have that since I have taken you through all the consultation documents, but I am sure you are aware of it anyway. The last page in tab 29 is, I hope, the earlier version of s.131, which refers to the OFT. The reason I have put that in is that the version that you have ----

THE CHAIRMAN: Sorry, the last page?

MS. BACON: It is the second last page. You have the earlier version of s.131, and that is because at the time that the reference was made it was the OFT. The current version, which we had originally copied, the current version talks about the power of the CMA to make references. That is the position as it is now, but I thought you ought to have the earlier version under which the reference was actually made.

THE CHAIRMAN: Thank you.

MS. BACON: If you go back to the current version of 131 which we can just use for the time being, the power of the CMA to make references. That took effect from 1st April last year. You will see there that there is the power to make references:

> "… if the CMA has reasonable grounds for suspecting that any feature, or combination of features, of a market … restricts or distorts competition …"

Then sub-para.(2) is a definition of what is meant by "feature of the market", and that is a reference to:

> "(a) the structure of the market concerned or any aspect of that structure;
>
> (b) any conduct of one or more than one person who supplies or acquires goods or services in the market concerned; or
>
> (c) any conduct relating to the market concerned of customers of any person who supplies or acquires goods or services."

That is a definition of what is meant by "features of the market".

Then if you turn forward a few pages and look at s.134. Section 134 is the key section that we are concerned with, because this concerns the duty of the CMA, as it is now, and it used to be the CC, to decide whether a prevention, restriction or distortion arises from any feature of each relevant market. So the CMA has to define what are the relevant markets it is looking at, and that is the purpose of its market definition, and then decide whether a restriction or distortion of competition arises on any of them. You will see s.134(2), if there

is a restriction, etc, of competition on a relevant market, that is an AEC. So that is where the term "adverse effect on competition" is defined.

Then at sub-para.(4), what the CMA do. If it has found an AEC, it then has to decide several additional questions, which are whether action should be taken to remedy either the AEC itself, or any detrimental effect on customers - so there are disjunct possibilities here - and if so, what that action should be.

Then sub-para.(5) defines the detrimental effect on customers as being higher prices, lower quality and less choice, and so on.

So, on the face of s.134, and this is a point we have made, a distinction is drawn between the AEC itself and the effects of the AEC, such as price effects. The AEC is the market feature, or features, that prevent, restrict or distort competition. That is sub-para.(2). A consequence of the AEC is that there may be higher prices, lower quality and less innovation, etc, but the fact of there being higher prices or lower quality is not the AEC itself, that is simply a possible consequence of the AEC, because it is a symptom of there being weak rivalry.

To take an analogy suggested by the happy state of my learned junior, the fact that Ms. Love has got a large bump is a pretty clear indicator that she is pregnant, but having a large bump is not decisive for whether she is pregnant or not. I say I have made that analogy with Ms. Love's explicit encouragement and endorsement!

That is the Enterprise Act. Then if you turn to tab 32, you will then see the CC3 guidelines, and I do want to take you to a number of parts of this.. Paragraph 10 on p.7, which we have cited, sets out what the CMA understands by competition, which is the process of rivalry, and I hope that that is not controversial.

Paragraphs 13 to 15 set out the ways in which competition may be impeded, including one or more firms exhibiting market power, barriers to entry, and actual or tacit co-ordination, and so on.

Paragraph 18 makes the point about the market investigation regime sitting alongside other important mechanisms, such as the Chapter 1 and Chapter 2 prohibitions.

Then a few pages further on, paras.28 to 32 set out the test for an AEC, including a reference back to the sub-paragraph that I took you to, s.131(2) of the Act, which defines the features of the market, and that is set out at para.31 of these guidelines.

The next section is quite a long section which sets out how the CMA conducts its market investigation in terms of its procedure, and the only point I would flag up in this regard is para.36, which is a point that the CMA carries out the analysis that it considers necessary to

reach a decision on the statutory questions, and that it will prioritise the use of its resources so that it can undertake the analysis that is relevant. We do not have any point on that, but I just show you that that is there.

Then part 3 of these guidelines deals with the AEC test in detail, and that starts at p.24. Paragraph 94 is a paragraph cited by my learned friend, Ms. Smith, and it explains that what the CMA will do is to look at three things: the main characteristics of the market and the outcomes of the competitive process, the composition of the relevant market, i.e. the market definition, and the features of the market which are said to be harming competition. That is, again, entirely uncontroversial. What the CMA is saying is that it will consider, as it is required to do, the features of the market that are said to represent the AEC, but as part of that analysis it will obviously define the market - that is (b); and it will look at the main market characteristics and how competition is working on the market. As the CMA says in the next paragraph, there is no strict chronology for these various facets of its analysis.

What it then does in the guidelines is to go through the issues in turn. Starting with the market characteristics, para.97 onwards, we see here that the main issue is the market share data for the suppliers of the relevant products or services as well as other background about market characteristics.

Then over the page, p.26, under the heading "Market outcomes", you see that prices and cost are mentioned, and the CMA says that these may be useful in quantifying the extent or nature of competition and can be helpful in measuring customer detriment, but also notes that there are other less quantifiable factors, such as quality and innovation.

At the end of this discussion of the different market outcomes and in particular at the end of its discussion of the different sorts of price analysis which it sets out over the next couple of pages, we have an important paragraph which we have cited, and it is para.126 at the bottom of p.29 where the CMA says this, and the heading is "Indicators - not features", and this is my bump versus pregnancy point:

> "In summary, the CC will consider prices and profitability in the context of its overall assessment of the market. While useful, findings that price-cost margins are wide or profitability is high in a market do not on their own provide conclusive evidence that the market could be more competitive."

Then an important sentence:

> "Such findings are not in themselves causes of competitive harm - they are not features of the market for the purpose of the AEC test."

In other words, if the CMA does find price effects, that can be an indicator of an AEC, but it is not, in itself, the AEC that is being addressed.

The next section of the guidelines addresses market definition, and I have shown you the market definition in the Report. The crux then, in my submission, comes in the section on competitive assessment, which starts at p.35, para.154 onwards. Paragraph 154 says this:

> "In deciding whether or not there is an AEC, the CC's core task - given the statutory questions - is to assess the effects of possible features on competition."

The CMA then explains, as it did earlier, that the features may be structural or conduct, and you will see those set out on the next page, structural features, 157 to 158, and conduct features, 159 to 160, and, 162, an emphasis that in some circumstances the harm to competition may be caused by a combination of features.

Then the CMA then sets out a number of theories of harm that it may refer to to provide focus and structure to its assessment, that is at para. 163, and 170 lists the five main theories of harm that it will usually refer to, although it emphasises that the list is not exhaustive.

The first theory is unilateral market power. It deals with that from para. 180 onwards.

The theory of harm addressed at para. 205 onwards is barriers to entry, so that is looking at barriers to entry as a theory of harm, as a market feature in itself.

The third theory of harm is set out at paras. 237 onwards and that is co-ordinated conduct.

One more point I wanted to draw your attention to while we are in this tab, para. 319 "Concluding the AEC test."

> "Having considered evidence of all kinds, the CC comes to a rounded judgment on what may be causing any adverse effects on competition. This judgment entails the CC reaching a finding on whether there is a feature, or combination of features, of a relevant market …"

and so on.

> "In forming its judgment the CC will apply a "balance of probabilities" threshold to its analysis, i.e. it addresses the question: is it more likely than not that features or a combination of features lead to an AEC."

There are a lot of cases that are included in these bundles. I have no intention, nor the time, to take you to all of them right now. I just wanted to show you one paragraph of the Groceries Market Report that, in our submission, underscores the way the analysis is carried out, and effectively applies what has been said already in the guidelines and in the Enterprise Act itself, and that is at tab 35. There is an initial summary, and if you flick

through that you will get to p.16, followed by p.156, and then followed by appendix 2.2. Actually it should be the last page in your tab.

THE CHAIRMAN: Page 2(2)-2?

MS. BACON: Yes, and a paragraph that we have all cited and placed different emphases on, so you should see it, para. 7:

> "The CC does not need to identify specific harm to the interests of customers in order to find an AEC. The relevant statutory framework proceeds on the premise that competition of *itself* is good; as a corollary, an AEC of *itself* is bad. The assumption underlying this premise is that an AEC will necessarily give rise to customer harm, albeit that such harm may be indirect and not readily identifiable. The CC will therefore be more secure within an AEC finding where the feature, or combination of features, adversely affects the interests of present or future customers."

So what they say is that 'We do not necessarily have to find harm to the interests of customers, but if we have it we will feel better about our conclusions'.

So, applying that legal framework to this case, we say that the CMA misdirected itself as to the nature of the exercise that it was supposed to be carrying out. As we have said in our Notice of Application it is an error of approach.

The statutory question that I have shown you asks about market features that give rise to an AEC, and those features, as you have seen can be either structural or conduct. In this case, we say the CMA had compelling evidence of both structural and conduct features that restricted competition.

Structure – it had evidence of very high market shares held by a number of local anaesthetist groups and that came not only from the CMA's analysis of the market, but also the evidence of AXA and BUPA. It was common ground as between the CMA and AXA that for some anaesthetist groups the full market shares were very high indeed. So, in terms of para. 187 of the CC3 Guidelines when talking about unilateral market power, these were highly concentrated markets. So that is structure.

In terms of conduct, it is common ground that there was a widespread practice of groups setting fee schedules. I have shown you the AAGBI survey, indeed, the Report makes the point too (it is at annex 7.1 to the Report) and specifies at para. 33(a) around 60 per cent of anaesthetists follow group fee schedules. So adherence to fee schedules was widespread, that is common ground.

Again, in terms of the section of the CC3 Guidelines on co-ordinated conduct, this was a direct and unambiguous agreement between consultants who would otherwise have been price competitors to set collective prices.

As we have explained in the pleadings, and our Skeleton Argument, and as you have seen in some of the background documents that I have taken you to, it is also common ground from the very outset, from the OFT's Market Report, that the very nature of the service meant that switching to alternative anaesthetists was difficult so that customers had very limited influence or choice about which anaesthetists were used. In our submission, throughout the investigation that combination of features created such an obvious restriction of competition falling within two of the five areas of harm set out in the CC's guidelines, that the correct approach should have been for the CMA to say that there was an AEC unless further evidence pointed compellingly in the other direction. Take, for example, barristers, if every commercial barrister in central London got together and formed a partnership and set collective prices somebody might say that there was an adverse effect on competition. If every plumber in central London got together and formed a partnership and set collective prices, and those plumbers, that partnership of plumbers represented 50 or 60, 70 or 80, or 90 or 100 per cent of the market, somewhere along the line I think it would be acknowledged that there was an obvious competitive problem, an obvious restriction of competition, whether or not one had evidence that it resulted in high prices.

So why have I used in my Skeleton Argument and in our submissions, the term *'prima facie'*? The reason is this: we are not saying that this is an object case. As I said at the start, we accept the CMA was entitled to consider the totality of the evidence, and it is required to do that by the CC3 guidelines. It is required to look at the market in total. It is entitled to look at other market characteristics, price evidence if available, barriers to entry, which is articulated as a separate theory of harm anyway, and buyer power. We accept that if the outcome of that overall market assessment pointed compellingly in the opposite direction the CMA would have been entitled to say that although the market features, as in the very high market shares, and selective price setting prima facie indicates an AEC, that was ultimately displaced by the totality of the other evidence; we accept that. So that is why we used the phrase *'prima facie'*.

But, in our submission, if the other evidence, including price evidence, was not compelling in the opposite direction then the CMA's inevitable conclusion should have been that there was an AEC. It is important to understand that this is not an argument based on a hypothetical presumption without looking at the real life impact on competition as the

AAGBI paints it. We are looking at the real life impact. The real life impact is that in those areas where the anaesthetists group has a very high market share and sets collective prices there is an immediate and obvious loss of price competition, and that is the impact on competition; that is the real life impact on the market.

As the old market investigation reference guidelines, which we cited in our Skeleton Argument, stated, the overarching question for the CMA under s.134 is whether the impugned market features create a situation where suppliers do not compete to the extent they would in a fully competitive market (para. 15(h) of our Skeleton Argument). That is exactly what we say is the situation – the real life market situation – created by an anaesthetists group that has a very high market share and has a collective fee schedule.

MR. GLYNN: Could I ask, when you accept that the anaesthetist groups can be regarded as a single entity as a partnership, does that take out of your argument the effects on competition between individual anaesthetists within the group, or does it leave that as part of your argument?

MS. BACON: No, it is part of the argument. I did not take you in detail to the CC3 guidelines, maybe I should have done, but there is a paragraph in CC3 which we have cited in our Skeleton Argument, which explains that in looking at the theory of harm referring to co-ordinated conduct, there may be conduct that falls within one of the prohibitions, but it is not necessarily the case that the impugned conduct has to fall within one of the prohibitions. As we have explained in our pleadings and our Skeleton Argument, we have the market investigation regime, it is designed to complement - the relevant paragraph is 240 of the CC3 guidance.

MR. GLYNN: I just wanted to be quite clear on this. So your argument is partly that within a partnership the behaviour of the anaesthetists can be different in a way which in itself reduces competition, irrespective of the effects on competition between the group and others?

MS. BACON: We are relying on two different theories of harm operating simultaneously. One is the fact that the group is there and has a specific market share, whether that is 50 per cent, or 100 per cent or somewhere in between, and the other is that within the group the group sets collective prices. So, within that group, say it was Brick Court, Monckton and Matrix all got together and agreed that they were going to set collective prices, that would have an effect on the competition as between me and Ms. Smith, because if we adhered to that pricing schedule, we would no longer be competing with each other on price.

MR. GLYNN: Even if within your Monckton Chambers, say, the barristers were to agree on a common price, that would be one kind of thing which might be quite closely analogous with what might happen within an anaesthetists group?

MS. BACON: Yes.

MR. GLYNN: And that is part of your argument?

MS. BACON: That is part of our argument, and the reason why nobody has investigated Monckton Chambers is it does not have 70, 80 or 90 per cent of the market share – it depends perhaps the way that you define the market but that is the reason why. That is a question for another day, but that is the right analogy, yes.

THE CHAIRMAN: We had a message you wanted a five minute break?

MS. BACON: I think it might be a good idea to have a very short break and then we will continue, because I can then address the CMA and intervener arguments.

THE CHAIRMAN: All right, five minutes.

(Short break)

THE CHAIRMAN: Yes, Ms. Bacon?

MS. BACON: Sir, I have set out our case on Ground 3 and where we say that was derived from the legislation and the guidelines. I just want to rattle quickly through some of the main objections made by the CMA and the interveners as we see them. We see their arguments as essentially being three ----

THE CHAIRMAN: Are we going to go back to the Report for you to comment on that, or have you done what you want to on that?

MS. BACON: No, I have done that.

THE CHAIRMAN: Can I ask you then a question about 7.19 in the Report, p.202, where it said:

> "… there is no general presumption that the formation of consultant groups is anti-competitive. There may be a number of benefits to consumers resulting from the formation of consultant groups … BUPA and AXA PPP agreed that the formation of consultant groups did not in itself give rise to competitive harm but that the collective setting of prices, in particular by anaesthetist groups with a large local market share, inherently had an AEC and that it was not necessary for the CC to demonstrate any pricing effects to find that this lack of rivalry constituted an AEC."

MS. BACON: Yes, and that is a fair statement of our position, as I have just articulated it.

THE CHAIRMAN: Right, but there seemed to be an acceptance that there is at least the potential for positive benefits for consumers from having anaesthetist groups in the first place.

MS. BACON: Yes, we are not saying that the CMA should have found that every single anaesthetist group in the entire country by definition under its very formation gives rise to an AEC. Our point is that if you have ----

THE CHAIRMAN: I am sorry, and your case on Ground 3, as I understand it, is that there is a *prima facie* AEC.

MS. BACON: Not even from the formation of the group.

THE CHAIRMAN: No, it is from market dominance combined with setting the fees.

MS. BACON: Yes.

THE CHAIRMAN: So if it is *prima facie*, what in your analysis could potentially outweigh those features in order to indicate that actually there is not an AEC?

MS. BACON: If, for example, the CMA did a price analysis, and I am going to come to the price analysis shortly, and it found that actually in the AGs that we have most complained about, in all of them the prices went down following the formation of the anaesthetist group then we would not be here today.

THE CHAIRMAN: Why not?

MS. BACON: Because we would say that there was a *prima facie* effect, it had decisive price evidence. If it decided, we have looked at the price evidence, all of the price evidence indicates that there is no adverse effect on competition, because if anything the evidence indicates that somehow something is going on, there is actually effective price competition and prices have gone down.

THE CHAIRMAN: Perhaps they would have gone down more. It is a serious question, perhaps they would have gone down more?

MS. BACON: Down relative to the independents.

THE CHAIRMAN: I do not understand your answer.

MS. BACON: My point is that we would not be challenging that as an exercise of their discretion.

THE CHAIRMAN: Why not? That is why I am pressing you on this: why not?

MS. BACON: Because their answer would be, according to the CC guidelines, they have looked at the market features and they have looked at the totality of the assessment of the market, and they have come to the conclusion that if you looked at all of the other factors, including the price effects, there probably was not an AEC.

THE CHAIRMAN: Why, on your theory of the case, would they be entitled to do that?

MS. BACON: We would not be challenging their exercise of discretion.

THE CHAIRMAN: Why not?

MS. BACON: We have thought about this. We would not be challenging their exercise of discretion because in that case the market outcomes would be so inconsistent with the *prima facie* conclusion that might be reached on the features, that one would then doubt whether you had an AEC arising out of those features.

MR. GLYNN: It goes back to the questions I was asking about what happens within the group. You would not be concerned about any change of behaviour between individual anaesthetists within the group because of an argument about an average effect of the group compared with anaesthetists outside the group.

MS. BACON: Let us take an example. Let us suppose that the anaesthetists group only have 5 per cent. In that case, we would not be saying that, even if there was collective pricing within the group, that gave rise necessarily to an AEC. There might be very different reasons why, overall, market outcomes taken in conjunction with the market features - I am not saying that that is -----

MR. GLYNN: Let us go back to our case, and suppose 80 per cent market share and prices go down. Why would you say no AEC then?

MS. BACON: We are not necessarily saying there would be no AEC. I am saying we would not challenge - actually I am going to precisely that supposition in relation to some of the price evidence. We accept that there is one group in which, despite the fact that it has quite a large market share and it does set collective prices, the indications from the price evidence are not that the price has gone up. That is an outlier. In relation to that group, "We say we do not challenge it if the CMA had said in relation to that group, on balance, because we have looked at the price evidence also, the indicator is so compelling" - this is not what it said, but if it said, "The price evidence is so compelling in the opposite direction that we are not going to find an AEC", that is something that we would not be challenging. What we are saying is ----

THE CHAIRMAN: I am still struggling to understand why you would not do that. The price might have fallen further in other circumstances if you did not have the large market share for that group.

MR. GLYNN: And so the prices for individual anaesthetists within the group could be wildly different.

MS. BACON: The presumption that we are starting from is that the group is specifying a collective price. There could be many different reasons why the price went down. One reason could be that actually, although there is a collective price, members of the group are not adhering to that. We do not have enough information. As you have seen, the CMA

only have quite partial information. In all of these cases it has to go on the best information available to it. There may be various reasons why, despite having a large market share apparently, and despite apparently setting a collective price, the outcome is that there is no weak rivalry.

My point is that the CMA has to look at the totality of the evidence available. That is why I am saying it is a *prima facie* AEC.

THE CHAIRMAN: Can I just ask, leaving aside prices, can there be material which, despite, let us say, large market share and price setting, indicates that, in fact, there is not an AEC because consumers get some other form of benefit from the existence of the co-activity acting together?

MS. BACON: One could look at, for example, barriers to entry. You could look at buyer power, you could look at quality and innovation.

THE CHAIRMAN: I need an answer to my question. What is the answer to my question?

MS. BACON: The answer to your question is that there are other features which may indicate that there is not an AEC.

THE CHAIRMAN: You could get benefits, could you, from the fact of people grouping together, which may have a tendency to affect prices but which is outweighed in the interests of the consumer in some all things considered assessment, which means that, despite that effect, you do not have an AEC - is that right?

MS. BACON: In this case ----

THE CHAIRMAN: No, if you can answer my question first and then come back to this case.

MS. BACON: In principle, there may be other factors that may be taken into account, including, for example, benefits, but we are not in that territory. In this case, the CMA has not made any finding that on the basis of all these other benefits of having the group, which benefit competition - which benefit competition because it is AEC - because of these benefits of competition it is not going to find that there is an AEC. It has not said that there are benefits to innovation, there are benefits to quality, there are benefits to the service that is being offered. In this case - and I am going to show you the pricing evidence - the reason why we describe this as a *prima facie* AEC and not an conclusive AEC is that we would not say, "Take the CC3 guidelines, you are going to write off half of the guidelines, and we are going to scratch out all of the sections that talk about market outcomes". We could not do that. Of course the CMA is entitled to look at those and it is entitled to take those into account in the round.

We come back to the point that those are, with respect, secondary. The primary analysis is the features of the market. So we are not excluding that in a case there may be specific reasons for saying that there was not an AEC despite the fact that the features indicated that there probably was a problem. That is why we describe it as a *prima facie* test.

To go further, I would have to say that actually you do not look at anything else, you only look at the market features, and you close your eyes to any other evidence that may be put forward on barriers to entry or buyer power, and so on.

THE CHAIRMAN: Is there any authority that assists us on the proper approach to identifying AECs?

MS. BACON: The main authority is the guidance that is put forward by the CC itself. I have taken you to the groceries investigation where the point is made that the CMA will feel more secure in its finding if the indicators also point the same way, that the primary test is the features. If you identify specific market features that give rise to an AEC ----

THE CHAIRMAN: To say, "We feel more secure if we have got pricing indicators as well" suggests that there may be reasons why, despite the particular features of the market being large market share and price setting, that there is not an AEC. That is what I am struggling to understand: on your submission, what might those features be, in principle?

MS. BACON: Price effects pointing - and we recognise this - compellingly in the opposite direction, or evidence of, for example, low barriers to entry. That is the point that the CC, as it was then, did actually explore in its Provisional Findings. It put into the mix the fact that it had reached a provisional conclusion that actually, although there were high market shares, the barriers to entry were low. That is one of the factors that we say could be put into the mix because it is relevant. It is cited in CC3 when the CC discusses the unilateral market power theory of harm. It is said that this will often be analysed in conjunction with barriers to entry. One does not simply look at a snapshot of market share. One might look at the durability of that market share, the extent to which that market share may be vulnerable through low barriers to entry. That is why we have not said anything more than a *prima facie* - what the *prima facie* is doing there is saying that, if there are other factors that compellingly point in the opposite direction, then the CMA may, in its discretion, exercise discretion, and looking at all of the factors in the round come to the conclusion that there is no AEC. That is why it is not simply that you add up 1 and 2 and get an AEC without looking at anything else.

THE CHAIRMAN: Thank you.

MS. BACON: Can I just then deal shortly with the arguments of the CMA and the interveners. As I have said, there are essentially three straw men. The first straw man is to say that we are characterising this as an object infringement. That actually relates to the point that I have just been debating with you. We are not saying that this is effectively an object case. As soon as you can identify, under s.134, a large market share and collective pricing, that is a *quasi* object case importing the concept of an object infringement in relation to s.134. We accept that that is a construct used in relation to Article 101 and the Chapter 1 prohibition. The same approach is not taken under s.134. What we have said is that you can look at that by way of a parallel, and you look at it by way of parallel because it is important to interpret s.134 coherently with the general competition principles developed in other areas. We are saying that where you have price fixing by groups with persistently large market shares, your starting point should be that that is an obvious AEC, unless something else points compellingly in the opposite direction.

Straw man number two is to say that what we are doing is creating a presumption under s.134, and the CMA in particular says, "There is no room for presumptions, because we are required by the guidelines, CC3, to look at other factors such as countervailing buyer power and barriers to entry and market outcomes." Again, the point that I am just debating with you, because we are not saying that once you establish high market shares and collective pricing you put the pen down there and find that there is an AEC. We are saying that unless the other evidence that you look at points compellingly in the opposite direction, then the only lawful conclusion is that there is an AEC.

We do not need to describe that as a presumption. It is simply the application of the statutory test and the guidelines.

The third point that is raised against us is the point raised by the CMA in its Defence that our approach to the application of s.134 ignores the importance of a need to identify whether there is evidence of actual competitive harm or consumer detriment. They are saying, "We have to look at consumer detriment". That point seems to us to underlie a lot of what the CMA was saying in its Defence. That is the point we were responding when we said in our Skeleton Argument that if that was the CMA's point it seemed to be confusing the notion of an AEC with the separate notion of consumer detriment. The AAGBI objects that this response on our part, the confusion point, is inadmissible. In our submission, that is a hopeless point because we are simply responding to what the CMA relies on its Defence, to defend its rejection of our case on Ground 3. We are unquestionably entitled to

say that some of the arguments put forward by the CMA wrest from a fallacy. That is all it is.

What is telling is that the CMA in its Skeleton Argument does not say that this confusion is inadmissible. Instead, the CMA quietly retreats from the argument in the Defence about the need to identify whether there is evidence of consumer detriment. The CMA says it has understood the distinction between the AEC on the one hand and consumer detriment on the other, and it recasts its argument as being merely an argument about the necessity of taking market outcomes into account as the overall part of its analysis. On that we are *ad idem* with the CMA. We do not dispute, as I have just said, that the CMA can take into account market outcomes as part of its overall assessment of the market.

THE CHAIRMAN: I have to say, having read all the archaeology of the arguments, you both seem to come out in the same place so far as the law is concerned.

MS. BACON: Exactly, we do, yes. We do say that the CMA can take it into account. The point is, how important that is and how decisive it is. We say that the core part of the assessment is the market features. The market features here were the structure and the conduct, as I have identified. If the market outcomes do not point compellingly the other way, then the conclusion, as a matter of law, should be that there is an AEC.

The distinction here, and this is what separates us from the CMA, is a distinction between taking evidence of market outcomes into account and regarding evidence of a particular outcome, and the particular outcome being a price effect, as the *sine qua non* of an AEC finding. So we say price evidence can be take into account. What they cannot do, and they cannot lawfully do, is to say that unless they have clear evidence of higher prices there is no AEC. So again, coming back to Ms. Love and her bump, one cannot say that unless Ms. Love has a bump she cannot be pregnant.

The conclusion is this: we are in agreement with the CMA on the relevance of the pricing analysis as part of the assessment of market outcomes, but the crucial point is that, in our submission, that analysis should have been secondary to the core analysis of the market features. If the market features indicated that there was a clear and obvious restriction of competition then the conclusion should have been that there was an AEC unless the evidence pointed clearly the other way, and in rejecting that proposition we say that there was an error of approach in the application of s.134.

The consequence of that argument is that if we are right on Ground 3 then, strictly speaking, and we said this in our Notice of Application, we do not actually need Grounds 4 and 5.

The whole point of Ground 3 is that the CMA did not have to have price evidence

corroborating its theory of harm. That was the whole reason we made this argument in the first place, that you do not actually have to find compelling price evidence showing that prices have gone up. It is sufficient if the price evidence is mixed.

So, on the CMA's conclusions in the Report, where it says the price evidence was mixed, and I have taken you briefly to those conclusions, that, in our submission, would have been enough as long as price evidence did not actually show prices going down relevant to independents.

So, strictly speaking, Grounds 4 to 5 only arise if we are wrong on Ground 3 - if the CMA was correct to say that it could only find an AEC if it had corroborative price evidence. If that is the case we say that the CMA's assessment of the price evidence before it was irrational. It is important for the Tribunal to understand that the way that the irrationality case is put has to depend on what the CMA actually decided, and we now get into this debate as to what the decision was.

The CMA says emphatically that it reached a definitive conclusion on the issue and its conclusion, its positive conclusion was that there was no AEC. We see that in its Defence, para.119: this was a positive finding that there was no AEC. The same point is made in the CMA's Skeleton Argument.

If that was the CMA's finding, then our procedural argument about "You did not actually reach a decision" would have to fall away, because the Ground 5 procedural point is that the CMA was not entitled not to reach a decision. On that case, on the CMA's case it did reach a positive decision. So on the CMA's interpretation of the decision, our case is just a rationality one. It is a question about the rationality of the purported positive finding that there was an AEC. On that, our submission is that, on the evidence, that conclusion, if that was what the CMA decided, was completely untenable. The evidence could not conceivably support a finding of no AEC.

Just to trail the point, we do accept that in one single market out of the 11 markets that the CMA studied, which was case study D, if the CMA had concluded that the thrust of the price evidence indicated that there was no AEC, the conclusion would not have been the subject of a challenge by us.

THE CHAIRMAN: It is the same question really, why not?

MS. BACON: I have given our answer to that, which is that in that case we would say the CMA would be entitled to say "CC3 requires us to look at everything, we have looked at everything, and actually the price evidence is so compelling in the other direction". They could have said - they did not say, but they could have said - on balance, in the round, on a

balance of probabilities we are not finding that there is an AEC. If they had done that, we would not have been challenging that conclusion. We say that is not the case for all of the other markets, the other 11 markets.

MR. GLYNN: Sorry, just reiterating a point, when you talk about "the price evidence", you are talking about the difference in price between the group and people outside the group, and you are accepting conceptually that that is what "the price evidence" means. You are uninterested in the difference in prices between members of the group?

MS. BACON: That is because we do not know the precise extent to which all of the members of the group are setting their own prices or not. The CMA's price analysis does not descend to a granular analysis.

MR. GLYNN: It does not, and you are accepting that?

MS. BACON: We accept the CMA's methodology, and I am going to come to the price evidence. We do not say the CMA should have carried out a different kind of price analysis. We are accepting that in the time available the CMA carried out a number of different price analyses, and in principle we are not challenging that methodology. What we are challenging on a JR basis and on a rationality basis is the evaluation of the results of that.

THE CHAIRMAN: Just on this question of whether there is a positive finding, no AEC or not, under s.134(1), am I right in thinking the power to intervene in the market only arises if there is a positive finding that there is an AEC?

MS. BACON: Yes.

THE CHAIRMAN: So the question for the CMA was, "Can we conclude positively that there is an AEC?" Is that right? If it is, then it is sufficient for them to say. "We cannot positively conclude that there is an AEC".

MS. BACON: Yes. The reason why I am hesitating is that there is a requirement to decide whether any feature prevents competition, and so the answer must be, yes, there is a feature that prevents, or, no, there is not. We accept, and we have accepted in our submissions under Ground 5, that in some circumstances the CMA could say - not in this case - could say, "For proportionality reasons, we have decided not to reach a conclusion one way or the other".

THE CHAIRMAN: Why do you say that would be a breach of their duty?

MS. BACON: No, I am not saying that would be a breach of their duty.

THE CHAIRMAN: No, I am asking you, why do you not say that?

MS. BACON: I accept that if the CMA were to say, for example, "We have investigated this provisionally, this looks like an entirely trivial issue, we have concluded that it would be completely disproportionate for us to proceed with this further", then we would not challenge that as a matter of law or rationality if there were good grounds justifying that. It may be that I should not be conceding that, but that is what we have said. We do not exclude that there may be a situation in which the CMA could justifiably down tools and say, "We are not going to pursue that further". That may be something to debate on another day. What we are saying in this case is that there was not such a situation where there was a rational justification for downing tools, and nor has the CMA even put forward anything that could amount in law to a proper justification.

I do not need to go that far. In the same way that I do not need to go so far as to say we do not even take the *prima facie* point, you just have to conclude on the basis of the facts before you that there was an AEC. I just do not need to go that far. I can accept that they could take other things into account, in the same way that I could accept in this case, and I would accept, if the CMA had concluded in relation to Case Study D that there was not AEC, we would not challenge that.

THE CHAIRMAN: In para.7.47 of the Report, p.208, they say:

> "On balance, the assessment we have carried out does not lead us to find that [there is an AEC]."

You say that since there can be cases where they could say that they cannot conclude that there is an AEC, and that would not be a breach of their duty, why is that statement in 7.47 not sufficient for the purposes of this Report, that they do not feel able positively to conclude that there is an AEC?

MS. BACON: The point that we were actually debating is whether they had reached a positive conclusion or a non-finding. If they reached a non-finding and said, "We are not actually going to decide whether or not because it is disproportionate, and here are the following reasons why we simply should not pursue this, because, for example, all of the evidence points in the other way; because, for example, the market here is such a trivial one we are not going to pursue it", I am saying that I do not exclude that it could be lawful for the CMA to do that. I do not need to go there. In this case they did not do that.

The question is whether in this case what they decided was that there was no AEC, or, as you put it, Sir, we are not finding that there is an AEC, or whether they actually decided, "We have taken this analysis so far and we have difficulties and we have got time constraints, and therefore we are not going to go and assess all the information before us".

In our submission the correct construction is the latter, and you see that very clearly in 7.41 where the CMA says:

> ". . . we considered that pursuing this line of inquiry was not justified. In particular, we did not consider that further work to determine whether in any local market an anaesthetists group has local market power […] would be beneficial."

So, in our submission, the correct reading is that they did decide they were not going to look at everything before them. It was not a conclusion that, overall, having looked at everything we have, including evidence on barriers to entry, we do not conclude that there is an AEC, that is a kind of conclusion that was reached in the Provisional Findings, but that is not what they say here.

THE CHAIRMAN: I have slightly lost the thread of your submission. I thought that you just told us it would be fine for them to say it is disproportionate for us to continue an investigation and we cannot conclude it, that would not be a breach of duty, you just seemed to ----

MS. BACON: No, what ----

THE CHAIRMAN: Let me finish my question. You just seem to have pointed us to 7.41 and said that that is what they found.

MS. BACON: What I said was that I could not exclude that in a case, not in this case ----

THE CHAIRMAN: I am now asking you, since you accepted that in principle there can be such a case, why do you say the present one is not such a case?

MS. BACON: Because they have not said the market is so small that it is not worth us pursuing it. What they have said is: "We have looked at the price evidence, and because of our conclusions on the price evidence we are going to put our pen down". My submission is you had mixed conclusions – even if you had mixed conclusions on the price evidence you had other evidence of the market features and, indeed, you had evidence of barriers to entry, which you asked for. You asked for, we provided it, and you are saying here we are not even going to look at the evidence before the CMA. They said we are not going to look at the evidence before us on barriers to entry just because of our conclusion on the pricing effects. We said that is not a lawful reason to down tools at that point. We do not exclude that there may be some cases where the facts are so exceptional that the CMA gets to a certain point in its investigation and decides not to go further. We simply are not excluding that. I do not need to go there. In this case it does not conceivably fall within that kind of a case. But, perhaps I just need to go back to the point I made.

Actually, it is a bit of sterile debate because we are saying that however you look at the Report, whether you look at this as a positive finding that there was no AEC, or whether

you look at the Report as a finding that the evidence was so inconclusive that the CMA just decided that it was not worth - "beneficial" as it puts it in its words – going further, in either case, and this is our Ground 4 point, we say that the evidence does not support that conclusion, and I think what I need to do is to take you through the price analysis, because the point I have just been debating with you is really the Ground 5 point which is: is it ever lawful for the CMA to decide: 'we are not going to pursue this investigation, we are not going to reach a positive conclusion one way or the other'. On the CMA's case that falls away, because they say: 'We have decided that there was not an AEC here' and that was a positive conclusion, not a resource prioritisation conclusion. I am going to make some submissions on that, but I would like to start off with the price evidence, and take you through the price evidence.

You have seen that the description of the various different pricing analysis is set out in two places in the Report, one is in chapter 7 and the other is in annex 7.1. You will have seen a great deal of discussion in the pleadings and the Skeleton Arguments as to the results, so I am going to have to show you in some detail what those results were and I have applied to myself something which I say to my children which is: "If you get bored, do some colouring in", so we have done some colouring in. We have a table which effectively sets out as far as we have it all of the evidence on the price, and I am just going to hand it up – we have coloured it in to make it visually slightly more appealing. (Same handed)

There are two tables. They are marked, helpfully, "Table 1" and "Table 2". We finished this late last night, which is why I have not even tried to agree this with the CMA, but the CMA has got the weekend, so if the CMA thinks there is any error in this it can object. We have a non-confidential version as well, which I think should be doing the rounds. I have given you the confidential version.

The confidential version, there are two tables here, and the highlighted bit are the bits we cannot say in open court, and I will take you to some of the highlighted bits in the closed session.

In my submissions on the pricing evidence I am going to refer to this table. Can I just start with the CMA's comments about the value of the evidence which explains why we have listed the different analyses in the way that we have done. The CMA's position, and this is again something that we agree with, is that although its national and regional analysis can provide an indication of the effect of anaesthetist groups, the relevant markets are local ones, and the national and regional analysis do not control the local market factors. So that is why the CMA has said in the Report that its case studies aim at better controlling the

geographical variations. That is what we put in the case studies, and that is rows 1, 2 and 3, first in the table. The main advantage of these was that they focused on the local markets where the evidence would be local market specific and not to so great an extent undermined by geographic variations. Within the local case studies the CMA ranked the types of evidence in a particular way and that is a paragraph I took you to in the Report which has the ranking that we have picked up in our pleadings. A good analogy for this hierarchy is the different types of evidence that might identify a perpetrator of a crime. So the pre-and post-event analysis which we listed as number 1, and which the CMA described as its most useful, is like a DNA test. It is not entirely infallible, but it is generally the best evidence there is and numbers 2 and 3 are such as CCTV evidence, ID parades, they are useful to take into account but they are not quite as good as the DNA analysis. So that explains the value to be placed on the different categories of evidence.

What I would like to do is just take you through the different results reached by the different pricing analyses that the CMA carried out. Just to explain at the start, where we put a red triangle, that indicates that the preponderance of the evidence pointed in favour of a price effect, and while we have put specific different data points, as in the first line of the table, we have listed those underneath with the smaller red triangles, and where we have got a weighted average, we have also listed that according to whether the weighted average goes up or down. For example, in row 4B in relation to case study D, although the evidence, the descriptor, is that the groups' prices were higher for three out of six treatments, and lower for three out of six treatments, the weighted average is overall negative, and so we put a large green triangle, so that is broadly the methodology that we have used. Where the result of the evidence was that fees were similar to the independent comparator, or the non-group comparator, then we have put an 'equals' sign.

If I can just explain what the CMA did, and I hope that I can finish this by lunchtime. What I want to do is explain broadly the methodology, take you through the general direction of the results that were achieved following that methodology and also explain for each of the different rows whether there was any bias one way or the other, especially where the CMA itself noticed a bias in the direction as a result.

If you start with the pre- and post-event analysis, in economic terms that would be regarded as a 'difference in differences analysis'. It is not a simple comparison of how much group prices differed from the comparator set, but it is a comparison of how much the change in group prices over a period compared with the change in the comparator set over the same period, and that is why, Sir, when you asked: "What if the levels had gone down overall?"

this kind of analysis aims to control that, because if the comparator set shows that over time the level of prices has gone down, and the group prices have also gone down but not by as much as the comparator set then that would show the difference, and that would show the impact of the group pricing, so that is why it is a 'difference in differences' analysis, it does not compare simply a snapshot of the level of prices at one time, but it looks at the overall change of the price results.

In this case, the specific event which was tested was before the group was formed, or became a formal partnership and then after the group became a formal partnership, so the aim is to test as closely as you can while chucking out as many of the other variables as is possible to chuck out, what effect the formation of the group, as a formal partnership, had on prices. What you see there is for the three series for which this could be tested – A, B and C – the data points are almost all in favour of there being a price effect. There are two individual dates points and that means two individual treatments where the comparison was done, one in group A and one in group B, where it is suggested that there was a small reduction in group prices, but the overwhelming majority of the data was to show that there was a clear price effect.

In AAGBI's submissions they say that there were some very small differences, and the CMA makes a similar point, but I would say that that is not the point that the CMA made in its Report, but even leaving aside that point, there is no significance concept for price effects in the market investigation. The CMA have not set out any threshold below which it regards price effects to be insignificant. There is not the same concept in the market investigation of, for example, a small but insignificant increase in price, being, say, 5 per cent or some other figure that the AAGBI seems to suggest. But, even if there were, you can see from these data points that the price change is identified, and this being an analysis that looks at price changes rather than just a snapshot of level, the price changes are not at all trivial, and if you were to take an unweighted average of these you would see that the unweighted average in each of those cells, for each of the groups in the case, is above 5 per cent. Each of those cases, the unweighted average is a significant difference. We know that this is just a sample for six treatments, so the CMA have rightly taken a sample and we do not criticise that. We say that the results are overwhelmingly that there was a price effect, and that is what they could do for case studies A, B and C.

The second row is a comparison between groups and independents in the same hospital. So that is not a before and after event analysis, but it is a snapshot for the six sample treatments, and we see that there wasn't enough data to do analysis on several of the groups

but you can see the results for the other groups where there were enough data, and there are two specific caveats. It is important to know that the caveats that the CMA itself identifies for each of these analyses, one caveat is that the CMA fairly recognises that this particular analysis is susceptible to an error because of the risk of shadow pricing by independents, so they would simply follow the group.

We know the direction of the error, and that means that the shadow pricing by independents indicates that if anything these results understate the price effect. The other caveat, and this was identified by the CMA in relation to case study A, was that it had a very small number of observations so when you see under case study A the result was the fees were broadly the same, the CMA itself says, and this is the appendix 7.1, that this was based on a very small number of independents for the comparison. So, those are the caveats in relation to the second row. So overwhelming point, there is a real risk here of shadow pricing by independents, and that tends to understate the price effect.

The third row is a comparator in a nearby hospital and that is not an independent comparator, it is a comparison of the group's price with the prices charged by a smaller group, so a group in another local hospital where groups are not present or not present to the same extent. We know that actually in all of these cases it was a group in another hospital which had a smaller market share than the group under study in the case study. So you have a limitation immediately which is that the comparator set is not an independent, so you are only comparing one group with another group, but you will see that still you get a similar kind of trend to the trend that you have seen under the second row.

Then if you look at the regional analysis, and we have set out on table 1 the three types of regional analysis. The first is the analysis of fees in the region as a whole for two regions. You will see from the tables that this analysis comprises case studies A and D, and if you look at the second page of the table, group 2 – this is region 1. Region 2 is an analysis done on the other four cases plus groups 8, 9 and 10. For that regional analysis the CMA took average fees in the region for the six treatments and compared that with other anaesthetists in the region that were not identified as belonging to a group. So this was an aggregated regional analysis, not broken down by the case studies.

The major caveats with this analysis - and actually these caveats apply to all of the national and regional analyses – are these: first, these analyses do not control for geographic differences, and that is why the CMA itself, again quite fairly, ranked the national and regional analysis as being less helpful than its specific analysis of groups. The second point is the one I made earlier, when I told you that out of all the groups to which the CMA have

sent its survey only 45 responded. So when the CMA is trying to compare, as it does here, the prices of groups within the 45 with a comparator, the comparator is already blended, it is a blend of some independents, and some people who will be in groups that were not identified by the CMA, or for which the CMA did not have the names of anaesthetists. There is in these regional comparisons no pure comparison between the price of a group and the price of an independent. What you have is the price of a group and the price of a mix of independents and other members of groups as a blended set.

MS. POTTER: Does that point also apply to the pre- and post-event analysis?

MS. BACON: We thought about that very hard. Our conclusion is that it is possible that that blended set comparator point could, to some extent, affect the pre- and post-analysis, and the way it would affect it is if, in one of the comparisons, the extent of blending changed during the period under analysis, because the pre- and post-analysis tries to control for all those variables by looking at the change, and the reason why this is a good comparator is that in the pre- and post-analysis, the nature of the analysis controls the selection bias. So if you have selection bias in your comparator group, looking at the extent of change in each group controls that, but only if the selection bias itself does not change within the period. So if, during the period, your control group changed in the blend as in some people in that group may have then joined groups when they were not in groups before or, if there was a greater prevalence overall of group versus non-group membership, so, yes, we think that it could taint it to some extent, but we think that that is more limited, compared to the tainting effect on the regional and national analysis.

We have discussed this, and we have discussed this with our economists and we think that that is the right answer. We know for a fact that this does taint the regional and national analysis because the CMA itself says in the annex to the Report, the problem is here we have only 45 responses and that means our comparator set is a set of all of the people who were in those 45 responses, so there are going to be some independents and there are going to be some groups in that comparator set.

Again, as I said, the shadow pricing problem, it does not just tell you that the answer is unreliable, it tells you that it is unreliable in a particular direction. So shadow pricing in relation to the group versus independent comparison tells you that the results will likely be understated. The blending problem equally tells you that the results are likely, if anything, to be understated. We know that the scales are weighted against us because the CMA did not have perfect data, but we also know which direction the true result is likely to lie in. So, when you look at these results, and particularly the results under the regional analysis, you

know already what is stated here is the minimum. If there is a price effect there is likely to be a greater price effect if you were able to correct for the blending problem, for example, if the CMA had had complete names of all the anaesthetists, and all of the 100 groups that it sent its survey to. As it happens, it is remarkable that even with the blending problem, and that directional error, the results from the regional analysis are remarkably consistent. They are a series, as we put, a series of red triangles for nearly all of the comparisons down there, for the preponderant majority the price analysis indicated a price effect.

The second regional analysis was slightly different because it was broken down by the groups, and this is what we have listed as 'Regional Analysis 2', or row 4B. It compared a six year average fees charged by the group for each of the six sample treatments with the six year average of the non-group blended set. Again, the results are pretty unambiguous for all but one of the case studies, so all except D.

If you look on the second page of the table that analysis was also carried out for some of the groups for which there could not be an individual case study performed. You will see there in all of those cases the preponderant result was showing a price effect.

Then there is a third regional analysis which we have called 'Regional Analysis 3' for simplicity, but essentially it is a variant on 2. It is a comparison on a year-by-year basis for each of the six sample treatments rather than looking at a six-year average. The results of this are only in relation to the six case studies now on table 1. Again, with the exception of case study D, all the data points show a higher – or predominantly higher – fees charged by the group over the blended comparator.

The last of the analysis was the national analysis and we put that on the second page. You will see there that this was an overall analysis, not broken down by regions, not broken down by groups, and the result was a weighted average of the fees charged by anaesthetists in the 45 groups being around 7 per cent higher than the fees in the blended group, and I have just said if anything that ought to understate the true effect of the price difference.

THE CHAIRMAN: Can I just ask a question on the charts that you have given us. For some boxes you say – I am looking at the second page – group 8, second box down: "group higher for 4/6"

MS. BACON: Yes, that means four out of six of the treatments, because all of these are ----

THE CHAIRMAN: I understand that, my question was: what has happened to the two out of the six there is no legend for?

MS. BACON: We have tried to put the predominant results on here. What it means is that for the other two out of six, either there was no difference or it was lower, but we have put the weighted average.

THE CHAIRMAN: In some boxes if you have moved two to the right, so group 10, second box down, you have given that information, and you just seem to have done it randomly: sometimes you tell us, sometimes you do not.

MS. BACON: It may be a question of fitting the information on to the page. I am just going to ask.

THE CHAIRMAN: I do not think that is going to be the answer! (Laughter)

MS. SMITH: (No microphone) It may assist to compare this table with the table in appendix 7.1.

THE CHAIRMAN: At the moment – this is a forensic document – I just want to understand it.

MS. BACON: I am being told in relation to group 8 this particular statistic is taken from p.1032 of appendix 7. There were four treatments where the group prices were recorded as being higher than the regional average, two when they went down, and the weighted average price difference ----

THE CHAIRMAN: So it is just a defect in the forensic document that you have not given us that information.

MS. BACON: Yes. As I said, I cannot say that there is every single piece of evidence, every single data point is reflected on here. We have done our best to give an overall direction of it, in some cases at least to give a visual impact of the majority of the data points. But where we do have a ----

THE CHAIRMAN: I think, since you put this before us, perhaps on Monday you can bring a fully accurate one so that we have that.

MS. BACON: Yes. I do know that in relation to some simply fitting it legibly in the cell, fitting all of the information that was given in the appendix was not possible, but if you want a larger version, and you want everything included then we are very happy to produce that.

THE CHAIRMAN: I think we should because otherwise we have some cells, for instance in group 10, regional analysis 2, it says "Group higher for 2 out of 6, closer 2 out of 6, lower for 2 out of 6."

MS. BACON: That is a very fair point and if you want a complete table with all of the evidence, including everything that is said about the ones that fell outside of the majority, then we will produce that over the weekend. That probably will have to be on A3 sheets. As I have said, as far as I know – and we were working on this until late yesterday – what is stated there is accurate, but might not have all of the other data points going in the other direction.

You will see that in your version of the table, which is the confidential version, there is a further row below the 4C row on table 1, and below the 4B row on table 2, and it is highlighted, and the entire row, including the row descriptor, is confidential, and I am going to make submissions on that in a closed session at the end.

THE CHAIRMAN: Right, when you say "at the end" – at the end of your submissions?

MS. BACON: No, I do not mean at the end, I mean I am going to make submissions on that in the closed session that I suggest we have immediately after the short adjournment, because I have come to that point, and actually that is very convenient. I would suggest having five or ten minutes after the short adjournment in closed session and I will be able to make our submissions on the price evidence.

THE CHAIRMAN: So it is going to be as short as five or ten minutes.

MS. BACON: It has to be because I have only got until 3 o'clock.

THE CHAIRMAN: Very well, thank you very much. We will rise now, and resume at 2 o'clock.

(Adjourned for a short time)

(For closed session, see separate transcript)

THE CHAIRMAN: Yes, Ms. Bacon.

MS. BACON: The first thing to reiterate is that, while in the open session before the adjournment, I took you through the table row by row to explain what the CMA did in each of its different price analyses. If you are looking at the rationality of the CMA's conclusions you need to look specifically at each column. So effectively you need to cover up all of the table apart from the single columns that you were looking at and look down the table column by column at what the evidence was for each of the local anaesthetist groups. The reason I say that is because the CMA did not ever claim to be looking at this issue, this theory of harm, on a national or indeed even a regional level. From the outset the CC and then the CMA was very clear that it was looking at competition in specific local markets, and I took you to the parts of the Issues Statement and the Provisional Findings, and indeed the theory of harm set out in this Report where the emphasis was on the possibility that there may be consultant groups in some local areas that might have market power over their patients. Indeed, they adopted the same approach in relation to the hospitals issues that formed the subject of HCA's appeal, as you may remember.

THE CHAIRMAN: You are saying that each column is a separate market for the purposes of market analysis?

MS. BACON: Absolutely, because from the outset the geographic market was defined as a local one. They were talking about not one overall national AEC, they were talking about

whether there was a market power in some local areas. I was about to say that they did essentially the same in relation to hospital services. They did not reach the same conclusion in relation to Central London as they did in relation to other areas outside of London.

So the question is not whether there is an AEC in all or even most of the UK, the question is whether there are AECs in some local markets.

For the CMA to reach a conclusion that there was no AEC - this relates to your point, whether there was positively no AEC, or it was not going to find that there was an AEC - for it to reach a conclusion that there was not a problem here, it had to conclude that there was not a problem in each and every one of the markets that it investigated. In other words, on their case, they have to come and say to the Tribunal that for each of these local areas on both tables, for each of the areas A to F, and for each of the groups, 2, 8, 9, 10 and 11, the price evidence indicates so conclusively that the group formation did not result in an AEC that the correct conclusion, the rational conclusion, was that there is not an AEC, despite the evidence that we put forward, and indeed is largely uncontested regarding the large market shares and collective pricing, and the other evidence that we put forward on features such as barriers to entry.

THE CHAIRMAN: Just on the methodology, would it be legitimate for them to cross-refer between different columns? If they were unsure whether a particular effect in one column was due to there being an AEC, would it be legitimate for them to cross-refer to the effects that they might be seeing in other columns as one means of asking themselves whether the effect that they were seeing in the first column was due to an AEC?

MS. BACON: In principle, no. In principle, we say that these are local markets. I say "in principle" for this reason: supposing that in relation to every single of these 11 local areas the CMA had concluded that there was no AEC. Let us take an example, let us suppose that everything except A was shaded green, or had an equals sign, or had no data available. In our submission, the correct analysis there would have been to say, in A it looks like, on the preponderance of the evidence, there is an AEC. The CMA could have done this, it could have said, "Having looked at everything else, and we see A, we think there is something odd going on here, so we are going to go and investigate A further".

Equally, that is one answer to the question that you were posing before the break, before the adjournment, what about D? The CMA could say, "Everything indicates that there is a price effect, D is the outlier. That indicates, or that might indicate, that we have done something wrong in D, or there is some other explanatory variable that leads us to investigate D further". That is one respect in which I would say you can look across

geographic areas. In principle, no, each geographic area is separate. That is what they have already said. They have explained at length why they had to do the case studies in order to control for the variables between different geographic areas, such as different conditions of supply, different conditions of demand. That is why they had to do the case studies.

THE CHAIRMAN: I understood from your tables that you accept, as a matter of principle, that some degree of cross-checking across geographic areas is permissible, because you, yourself, rely on regional analysis.

MS. BACON: I would not describe that as a cross-checking across different geographic areas. I would say that for some parts of the analysis, you can think of it as an opening triangle. At the top of the triangle you have the case studies. Then you have a wider regional analysis which comprises some of the groups in the different case studies ----

THE CHAIRMAN: But necessarily includes other geographical areas, if you are treating that as a potential source of evidence?

MS. BACON: Yes, because that includes the particular group under consideration. We accept that the CMA could have regard, as part of its overall analysis, to the wider regional area and to its national analysis. That is not a cross-check A versus B versus C. That is saying we have got our micro-analysis on the case studies, we have also got a broader analysis of the region, and we have also got a national analysis, and we will take the regional and the national into account. The most probative evidence, and that is why we put it at the top of the table, that is why the CMA rightly put it at the top of its hierarchy, is the case studies where it could do those.

There are some areas for which it could not do the case studies. In those cases we say it is legitimate to look at the broader analysis. We accept in principle the CMA's methodology. What they cannot do is say, because there may not be an AEC - let us say they had concluded and we were not challenging - let us say they concluded that there was no AEC in relation to case study D, we are saying that that does not tell you anything about whether there is an AEC in the area represented in case study A. In the same way that one can say, Ms. Bacon has not got a bump, she is probably not pregnant, that does not tell you anything about whether Ms. Love is pregnant or not. They are two different areas.

That is why we say that in principle one cannot tot up across the different areas. You cannot put the whole of the results of this table into the blender, see what colour sludge comes up, and say, "Is it red, is it green, or is it something in between?" That is simply not a permissible approach. We accept, and this is the only extent that we accept one can look

at the results from other areas, and that is in the broader regional and national analyses that we accept have some probative value, and that is what the CMA say.

MS. POTTER: Can I just check what your case would be in relation to the extent of the duty of the CMA to look at every local market based on this? Obviously we have case studies which were, to some extent, determined by availability of data. Yet if we are saying that it is a local market issue surely you should look at every local market within the UK.

MS. BACON: That comes back to the question of prioritisation. You might recall that before the adjournment I took you to the paragraph in CC3 where it is said that the CC can decide to prioritise its resources, and that is para.36. There is a footnote to that which makes the point that this was actually set out in *Tesco*. It is footnote 23 to that paragraph, it emphasises the need for the CC to focus on the bigger issues in reaching a decision on the statutory questions.

THE CHAIRMAN: Sorry, where were you, CC3?

MS. BACON: CC3 is at volume 2 of the authorities bundle, tab 32, and I took you to para.36, which, as I read out to you, says that the CC carries out the analysis that it considers necessary. Then there is a footnote referring to the need for the CC to focus on the bigger issue, and refers to the *Barclays* and *Tesco* judgments of this Tribunal. It is for that reason, Madam, that I do not take issue with the CC's methodology of picking off the low hanging fruit. I should say that the CMA now says those were the only areas about which insurers complain. We think there are at least a couple of areas that we complained about that were not reflected in the 11. That is not what our appeal is about.

We accept that in prioritising the CC was entitled to, and the CMA is entitled to, go for the areas where insurers have identified that there was a problem. We do not take issue with that. Equally, we do not say the CMA had to go away and do an analysis of all of the treatments. We accept the basic methodology.

If I could go back to my submission as to the effect of what the CMA is now submitting, the CMA is saying that it reached a positive conclusion that there was no AEC. It would have to take the evidence set out in this table and say that on the basis of this evidence, the price evidence was, on its case, so compelling against there being an AEC in any of the local areas that it looked at, that it did not have to do anything else, that it could legitimately down tools and not look at issues such as barrier to entry, and it says explicitly in the paragraph that we have seen of the Report, 7.41, "We did not look at barriers to entry because of the pricing evidence". So what it has to say is that the pricing evidence was so compelling against there being an AEC that they could down tools at that point.

That is not even what the Report says. The Report says, as you have seen, that the results were mixed. Indeed, the CMA properly and fairly accepted that in area C the evidence was consistent in showing a price effect. So that is a long way, even on the wording of the Report and the findings in the Report, that the results were so conclusively against there being an AEC that the CMA could conclude, without more and without doing any further analysis at all, there were no AECs in any of the 11 markets.

You can see from the evidence set out in this table that that suggestion that the price evidence was so conclusively against there being an AEC that the CMA could down tools there and then is completely contradicted by this table, the evidence set out in the table for each and every one of the local areas. Sir, you are right to say that you look at this on an area by area analysis.

Out of all of these 11 areas, as I have said before, we accept that there is one area where the CMA could have said, "We consider that on balance the price evidence shows that there is no AEC", and if it had done that we would not be making a rationality challenge.

It could be that we could go and ask to see all the results in the data room, as HCA did in relation to its pricing analysis, and it could be that on the merits, if one looked at all of that, one could announce a reason why that conclusion was wrong, but on a rationality challenge, which is what we are bringing, we would not say that that conclusion would have been irrational had the CMA reached it, but it did not, it said there was no AEC anywhere.

Let us turn to our interpretation of the decision. What if we are right and the CMA did not conclude that there was positively no AEC? Let us suppose that you, the Tribunal, finds that we are right to say that actually what the CMA concluded was that the results were mixed and it was, therefore, not going to take this further. On that basis, we say that is still irrational, because we say it was irrational to describe the results as mixed. Why do we say that? On a purely literal level "mixed" could mean something other than 100 per cent consistent. If that is what the CMA were saying that would be accurate. The price evidence was not 100 per cent consistent. In our submission, the CMA could not make its decision on that basis, because if it could it would be entitled to decide that there was no AEC, even if out of 100 data points 98 indicated that there was a price effect. So it could not use the word "mixed" to mean there are some, even a few, data points that point in the other direction. That must be particularly the case when you bear in mind that, as I have shown you, the decision has to be reached on a balance of probabilities. So when the CMA uses the word "mixed", for that to be rational at all what they must be saying is that it is not simply there were a few data points that pointed the other way, but rather the evidence was

so inconclusive that they were entitled to stop there and not look at things like barrier to entry, and not take a decision - not take a positive decision - on any of these 11 markets. If you go through each area in turn, the only area where the CMA might rationally have been able to say that is area D. For area C, the CMA, itself, says in the Report there is consistent evidence of price effects. For areas E and F in the Report the CMA says the evidence showed no price effects. That finding is completely inexplicable. You only have to look at the table to see that the evidence was exactly the opposite. The evidence available to the CMA for E and F showed that there were price effects. It is true that there were some gaps in the data available. They could not carry out all of the analysis for every one of the case studies, but the evidence available is consistent, red arrows pointing up, meaning that there is a price effect, however big that was. In some cases if you look at, for example, regional analysis 2, row 4B, it was a significant price effect, weighted average of 10 or 12 points.

We say that to say that E and F showed that there were no price effects is a totally irrational conclusion. For A and B the CMA says the evidence is entirely mixed. Again, we look at that and say that the evidence in front of the CMA does not conceivably support that conclusion unless the CMA is using "mixed" to mean that there are a few, a few tiny data points that go in the other direction. We say that that could not be a rational interpretation of the word "mixed".

In short, in our submission, there is no area other than D where the CMA could have rationally said that the evidence was so conclusive that it could stop there.

That was what I wanted to say about our submissions on Ground 4. Whichever way one puts it, so however you read the Report, whether it is a finding that, as the CMA says, there was no AEC, or whether it is, as you discussed with me before the adjournment, simply a finding that we are not going to say that there is an AEC, or a finding that we are not going to actually make a decision because of resource prioritisation. On any basis, we say that the factual underpinning of that is such that there is no rational basis for reaching that conclusion if you look at the facts before the CMA. This is, of course, assuming that we have lost on Ground 3. This is assuming that price evidence is required.

Can I then just whip through the responses to our analysis and the main arguments, and I hope I am going to get through all of the ones that are on my contents sheet. There are approximately seven main objections to our analysis. Some of them are raised for the first time in the Skeleton Arguments. I am not taking any point on admissibility. I am going to deal with them in so far as I can in the time available. The first response, and this is an

overarching argument that the CMA puts forward, is that it was entitled to look at the picture across the various areas, so it was entitled to tot up across A, B, C, D, E and F, and so on. There are several reasons why that submission is wrong. In the first place, as I have shown you, even if you were to tot up across the areas, you would still get a result that is mainly red. The only area in which the CMA could have said that the price evidence generally did not point in favour of there being a price effect was D.

There is a much more important reason why that is wrong. As I have already discussed with you, we reject, we categorically reject, the idea of totting up across the different local areas for the reasons that I have given. The CMA, itself, from the outset started from the premise that the relevant areas were geographic. That is why it carried out the case studies that it did.

That is why we say that the CMA is simply not entitled to extrapolate from one area to another and say, "You have to set the results in, for example, areas A to C against the results in areas D to F". We say they just have no bearing on each other in that way. That is another reason why the CMA is wrong when it says that we are doing some kind of totting up. They say, "You, AXA, suggest that the CMA's assessment in areas A to C should somehow trump its assessment in D to F", and we are not saying that at all. We are saying there is no trumping going on at all.

We have in our submissions drawn particular attention to areas A to C, because those were the areas that the CMA did its case study analysis and was able to carry out the most probative, the DNA part of its price evidence which was the pre- and post-event analysis. That is why we focused on those and we say in those areas, where you have the best available evidence, the evidence points conclusively in favour of there being a price effect. Almost all of the data points that you obtained using the best category of evidence available to you, which aimed at controlling for all the geographic variations, and as far as possible aimed at eliminating the selection bias. That is the entire nature of a difference in differences test. On the best available analysis you came out with results that indicated conclusively that there was a price effect. That is why we focused on those areas, but we are certainly not saying that you have to be then blinkered to the rest, or that you tot up across all of the areas. We are not saying that, because there is a price effect in A, there definitely is a price effect in D. The only sense in which we would make some submission in that regard is the example I just gave to you where the CMA could have said, "D looks a bit odd shall we do a bit more analysis in that area?"

The CMA's response to our rebuttal of this totting up is to say that the purpose of its analysis was to look and see if there was widespread harm to competition, and therefore that looking at local markets was just a starting point. That seems to be that in its investigation it took the view that it could only find an AEC if it was widespread geographically. If that is what the CMA is saying, we find that an entirely extraordinary proposition. It is not said in the Defence, it is not said in any of the consultations. Indeed, it completely contradicts the basis on which the CMA conducted its investigation. As you have seen from the background materials I have shown you, throughout the investigation the CMA addressed the issue on the basis of whether there were AECs in local markets. So from the start the question about whether there were local AECs was not just the starting point, it was the starting point and the ending point. That was what it was required to do as a matter of law, because the statutory test relates to finding the AEC in a relevant market. The CMA had defined the relevant market as being a geographic one. So, in our submission, if the CMA had done anything else, whatever it says in its Report, if it had done anything else, having found the geographic markets to be local, it could not then lawfully have said, "We are not finding an AEC unless we can say that across the country there were AECs in all of the local areas". I think that gives further flesh to the discussion that we had a minute ago.

In our submission, the references - and there are only a couple of references - in the Report to this phrase "widespread competitive harm" cannot plausibly be read as suggesting that the CMA had resiled from its stated approach of looking at AECs in local markets. If it did indicate that that would be a clear and simple error of law as well as an error of procedure because it would not have been the basis on which the CMA had conducted its consultations.

That is argument number one.

Argument number two is a weighting argument, and the CMA says that AXA's case is all about the CMA's weighting of the pieces of evidence before it. Again, we do not accept that. Actually, as far as any weighting is concerned, we agree with the CMA because in terms of the weighting of the value of all of the different kinds of evidence that the CMA had before it, we broadly agree with the hierarchy that the CMA has proposed, and that is exactly the hierarchy that we set out on the table. We have made the same point in our pleadings and our Skeleton Argument. So the reality is that when the CMA talks about weighting, it does not mean the weight that is given to each of the different types of pricing analysis on which we are in agreement, it actually means the fact that we disagree with the CMA's totting up across the different areas. It is presenting this as a disagreement about

weighting in order to put this in the discretion box. It is all on discretion. It is not an issue of discretion. In our submission, as I have just explained, to do that is simply unlawful. It would be contrary to the statutory test and the basis on which the CMA approached its analysis. There is no rational concept of weighing, let us say, Cambridge against Canterbury and saying, "The results on Cambridge is this, the results on Canterbury is that, we are going to reach some weighting decision as to whether there is an AEC in either of those markets". It is nothing to do with weighting. So this second objection about weighting actually collapses back into the first of the opposing arguments that I addressed on the local versus national point.

Just a footnote on this point, the one party that does seem to disagree with the CMA on weighting is the AAGBI, and the AAGBI says that the comparison of groups versus independents was the most critical benchmark. That is number 2 in the table. In our submission, the answer to that, purely and simply, is that is not what the CMA decided. The CMA rightly decided that the best and most useful piece of analysis was its pre- and post-event analysis. It was the difference. The reason why that is the one analysis, the best out of all of them and aimed to control both the geographical variations and the point about the tainted comparators, the blended set, and the group versus independents analysis suffered from the very serious problem of shadow pricing which the CMA could not control.

Argument number three - just for the avoidance of doubt, this is not necessarily the chronology in which the arguments are presented in the Skeletons and the pleadings, I am just trying to identify the main points.

THE CHAIRMAN: It does strike me that these are really reply points. You can continue, if you want to, for the rest of your 25 minutes or so.

MS. BACON: I think I need to cover them.

THE CHAIRMAN: We are not going to stop you, but it is going to be more useful to us to hear what the other parties actually say and then listen to your reply, rather than going back through the archaeology of the argument.

MS. BACON: In which case I will curtail them and I will focus on the main points, because I do need to set out what our case is, because it helps understand what our case is. The third main argument is the point about consistency, and they say the results were not 100 per cent consistent, they were not entirely consistent, and they were therefore able to look overall and say that they are a bit mixed. I have dealt with that already. We say, "Even if you were

entitled to do some kind of tossing up, there are very few data points which indicate that there was no price effect".

The fourth main argument is about the correlation of the size of the price effects with the market ----

THE CHAIRMAN: Just before you move on from that, in your chart you just take three out of six treatments, and so on. We do not get from your chart - is this right - relative weighting within the treatments?

MS. BACON: That is right.

THE CHAIRMAN: So you could have treatment one, that is 90 per cent of the data points; and treatments two to six are 10 per cent?

MS. BACON: Sir, that is absolutely right. That is why I said before the short adjournment that if you were looking at the significance - and this is in the very first row - of the pre-and post-event results, and you look at the small triangles, the red and a few green, the best that you can do on the CMA's available evidence is to look at an unweighted average. You cannot do a weighted average. That was not the analysis that the CMA did. I come back to the point, this is a rationality challenge. We have not sought to go into the data room, we have not sought to do the archaeology of the weightings of these results and make some very nuanced point about the merits. We are saying, on the evidence that the CMA had available to it and not taking any point as to the principles of the methodology, the conclusion was simply untenable. The CMA's conclusion could not rationally have been that there were no price effects.

There is one analysis for which there is a weighted average given, and that is set out in the table (table 4B), for which the CMA not only sets out the general direction of the results, as in whether they were higher or lower, but it also does give a weighted average. That is done for not only the groups in relation to the lettered case studies, but on the second page of the table they have that also for groups 2, 8, 9 and 10.

The next point I was going to address is the point about the correlation of the side effects with the market share. It is said that the size of the price effect did not correlate to the size of the market shares. There was not a linear relationship between the size of the market share and how extreme the price effects were. I do think I need to answer that because there is not any reason to believe that there would be, given the limitations of this data, a consistently linear relationship between the market share and the size of the price effect. The main reason that is the case is the reason the CMA itself gives for doing different geographic market studies, which is that there are differences in the supply and demand

conditions between different geographic areas. The CMA's own reason for doing the case studies itself in the first place explains why one cannot expect a necessarily linear relationship between the market share and the size of the price effects.

Not only are there, on their face, geographic differences - for example, supply and demand - but also there may be differences such as the strength of the group pre-formation. For example, in relation to B, we know that there was already an informal group operating before 2006, so before the price period. If you were doing a pre-and post-event analysis, depending on how strong the group was in your pre-event period, that may have an effect on how much there is as a price change.

Another reason why one cannot expect a linear relationship is that you do not know the extent of matters such as price shadowing, which can taint any of the analyses. It might be the case that although you have a group with only a 50 per cent market share, in that particular market most of the independents simply follow the group.

There is a whole list of reasons, and we have given those reasons in our Skeleton Argument at para.68 as to why one cannot expect there to be a consistent relationship between the size of the market share and the size of the price effect.

The final point I just wanted to pick up, and I will miss off some of them, is the point about the methodological limitations where the CMA says, "You have pointed out issues such as price shadowing and the blended comparators, that means that we have to exercise caution in interpreting the results". My response to that is the response I gave prior to the adjournment, those methodological limitations do not simply tell you that you have to treat those results with caution. They tell you that there is a particular direction of the error. The direction of the error in both cases is that the result you get is likely to understate, if anything, the price effect.

Sir, if I conclude this part of my submissions, I would like to move on very quickly to Ground 5. As I have explained to you in the preamble, Ground 5 only subsists if you find that my interpretation of the Report is right, and the decision that the CMA reached was not that there was not an AEC, but rather that it was going to not investigate further because of where it had arrived in its price analysis.

If that is the Tribunal's decision, the first part of the response is to say that where you say, "We are not going to proceed because the results were mixed", that finding that the results were mixed is an irrational one. We still maintain the position that even if the CMA did adopt a non-finding, it also conflicts with its statutory duty to reach a decision on the issues referred. As we have said from the outset in our Notice of Application, we are not saying

that there is an absolute duty. That is, apart from anything else, on the basis of the point that I have taken you to in the CC3 guidelines. We are not saying that there is an absolute duty with no possible exceptions, the CMA in every case has to reach a decision one way or the other. We have set out in our Notice of Application the sort of situations in which the CMA could decide not to investigate further. I explained those this morning: for example, that there is such a trivial issue that it would be disproportionate, or where the evidence is so clearly all indicating at a very early stage in the investigation that there is no AEC, that again it would be disproportionate, the CMA simply does not believe that there could be any reasonable grounds, given the overall constraints on its time and resources, to proceed. That is not the case here. In fact, as you have seen from the walk-through of the pre-Report documents the CMA continued to ask for further evidence on this issue right up to the end of 2013, and that was a letter when it asked for us further evidence. You have seen our response to that. It was not saying at some early stage, "We have decided to deprioritise". What it is saying is that it had difficulty getting some data and the results were mixed.

If I go through the CMA's answers, you can see those in the relevant paragraph, 7.41, of the Report, which you have already seen, which we looked at this morning.

THE CHAIRMAN: 7.41 does seem to be a statement of deprioritising.

MS. BACON: Yes, it does, that is how we read it. That is how we read it. That is why we said that ----

THE CHAIRMAN: I am sorry, I just noted your submission, there is no decision to deprioritise.

MS. BACON: I am sorry, there was not a decision taken at an early stage in the investigation that because this was such a trivial issue it was not going to investigate further on grounds of proportionality. This decision was adopted at the last minute. In the Provisional Findings it had adopted a provisional decision that there was not an AEC. I pointed out when we looked at those that actually the language of the Report is different. It says, "We are not going to look at things like barriers to entry, we are going to adopt a resource allocation decision not to go further". I was just going to say that there are three reasons given in this paragraph in the Report for not continuing further. The first is the constraints ----

THE CHAIRMAN: I am sorry, just so that I can understand the structure of your submission, are you saying they could have taken a deprioritisation decision at an early stage, but they cannot do it at this stage?

MS. BACON: I am not saying they could have done it in this case, I am saying that in some cases there might be a situation where you have such conclusive and compelling evidence at an early stage in your investigation that there is no AEC, that you then decide, "We have gone

down this far enough, we have invested certain resources, everything that we have found indicates that there is no AEC, and therefore we are going to concentrate", as the CMA is invited to do, "on bigger issues".

THE CHAIRMAN: Or they might say, "Everything we have found indicates we are unlikely to get to the bottom of whether there is an AEC sufficient for us to conclude that there is".

MS. BACON: That is not what it says. That is not what it ever said. The theory was, until the Provisional Findings, "We do think there is an AEC". They had said initially, "We think there is likely to be a market power in some local markets". Then you get the Provisional Findings.

THE CHAIRMAN: You say it is not what it says. At the moment that is how I read 7.41, as saying that.

MS. BACON: I was going to come back to 7.41.

THE CHAIRMAN: It says, given the difficulties in obtaining data on the anaesthetist groups, the results of the pricing analysis and constraints on time and resources, they are not going to pursue this.

MS. BACON: Can I take those reasons in turn. Let us start with the constraints on time and resources. In our submission, that is obviously not a self-standing ground, it depends on what the CMA has obtained already. The CMA cannot at the end of its investigation, having carried out quite an extensive analysis of the price, having asked the parties for further data on matters such as barriers to entry, suddenly decide without further substantive justification, "We have not got any more time, we are not going" ----

THE CHAIRMAN: If they have asked for all this information about price - I appreciate you say they cannot say it is mixed, and so on, but just suppose that there is a legitimate and rational finding - they have asked for more information, they have done the best they can up to this point, and it is still a mixed picture after BUPA and AXA have done the best they can to give the best material they have got, I struggle to see to see why at that point a decision could not rationally be taken by the CMA to say, "Enough is enough, we have pushed this as far as we think is proper, the picture is confused, we think there are going to be difficulties in getting to a less confused picture, let us stop".

MS. BACON: The reason why they cannot do that is the balance of probability point, they decide on the basis of the balance of probabilities. They carry out their investigation, and we know that they have carried out an extensive investigation. If they genuinely believe that, on the basis of all the available evidence, on the balance of probabilities, there is not an AEC, that is what they decide. If they genuinely believe that, on the basis of all the available

evidence, that there is an AEC, that is what they decide. They cannot get to the point where they have obtained a lot of data and then simply say, "We are not going to look at it because of time and resource implications".

THE CHAIRMAN: I thought that is what you had said before, when you accepted that they could have a decision based on proportionality grounds where they have not reached a positive conclusion that there is no AEC, they have not reached a positive conclusion that there is an AEC, but they can see it is going to be very difficult to get to a position where they get to a positive conclusion one way or the other, and it is then disproportionately absorbing of their time and resources to press on against the speculative hope that they might reach that point. I understood you to have accepted that.

MS. BACON: No, I was accepting that during the course of their investigation they may decide at some point, at an early point, and this is not right at the end of the investigation, having actually pursued quite a detailed investigation.

THE CHAIRMAN: I thought you were making a timing point.

MS. BACON: I was making a timing point.

THE CHAIRMAN: I asked you a question about that. I will press you on it again, since you now make it as a timing point: what is illegitimate about the CMA pushing things as far as they can? They think, "We might get to the bottom of it right at the start of the investigation", they push for more information, they get information, it is still a mixed picture - I am not saying it necessarily is, and I understand you say it is not mixed at all. Just suppose that they get to that position and they have gathered in information and in their assessment it is really a speculative hope that they will get more and better information that is actually going to take them in the right direction. I say, speaking for myself, I struggle to see why, just because they have reached that point after doing all they can and it is late on in the investigation, they are disabled from making a decision in the light of all the information they have acquired up to that, although you accept that they would be able to do it earlier on?

MS. BACON: Because at that stage it is not a time and resources point. They have already spent the time, they have already devoted the resources to it.

THE CHAIRMAN: Forgive me, I really do not think that washes. If you look at 7.41, they specifically say that it is a time and resources point, and of course it is. If you have got to the point where you cannot tell positively one way or the other, and so if you want to try to get beyond that state ----

MS. BACON: The answer to that is ----

THE CHAIRMAN: Please let me just put my point to you: you want to get beyond that state of uncertainty. It is going to be time and resources to try to get beyond that state of uncertainty.

MS. BACON: I am afraid my submission is still that at that point it is a balance of probabilities. If they reach a state of complete uncertainty then you could not say, at that point, having spent the time and devoted the resources, that there was on the balance of probabilities an AEC, and the conclusion would have to be, "We do not conclude on the balance of probabilities that there is an AEC". The time and resources issue is a point that they can legitimately make, but at an earlier stage in their investigation where they are saying, "We have decided not to prioritise this in amongst the other issues that we are going to investigate". In this case they had done most of the work. As I said, they have already, at a stage of the Annotated Issues Statement, done the price analyses in areas A and C and they had set out their methodology, they have asked for further information. They had a great deal of information, and, in my submission, they cannot say when they come to the end of the investigation, having done all this, "We are going to not go further because of a time issue".

If I can move on to the other grounds they referred to: the second point that they make is that the CMA would need to obtain further information on matters such as barriers to entry and countervailing buyer power. As we have said in our pleadings, they had already got that information. They had asked us for evidence on barriers to entry. We supplied it. They had evidence on buyer power, they analysed it in another section of the Report. The truth of the matter is not that they could not obtain that, or they had not been able to obtain that during the time available to them, they had it and as they said explicitly in 7.38, "We decided not to prioritise our resources in carrying out a detailed assessment of barriers to entry". Why? Because of the mixed price effects. So it is not the fact that they did not have the information. They had very detailed ----

THE CHAIRMAN: Forgive me, they had some information that you had provided. If they wanted to get to the bottom of barriers to entry, they are not stuck with what you have given them, they would have to ask the anaesthetists, apart from anything else, would they not?

MS. BACON: That is not a problem of obtaining data. That is a decision ----

THE CHAIRMAN: Forgive me, I seem to be on a different planet. That is precisely the problem of obtaining different data.

MS. BACON: That is not because they cannot do it, or they do not have ----

THE CHAIRMAN: It would involve them having to do it?

MS. BACON: Yes, but they do not say, "We cannot do that", what they say is, "We decided not to take this further", and it is transparently clear from the explicit wording of the Report the reason why they did not take that further. It was not that it was too much work, it was because they reached a mixed conclusion on the price evidence. That is what they say themselves in para.7.38, "We decided not to prioritise our resources in taking this further because of the conclusion on the price evidence". So, in my submission, if you unpick, if you excavate, 7.41, ultimately it does come down to the price analysis. Their position is that the results of the price analysis allowed it to decide not to take the investigation further. They cannot say that they did not have sufficient data. They did have ----

THE CHAIRMAN: Data about what?

MS. BACON: About the price. In that regard they did a very detailed analysis of the six areas. When they say, "We did not undertake an area by area competitive analysis", that is what they had done in their case studies. They had done an area by area analysis of the price. They had actually got six different types of pricing analysis for each of the areas.

MR. GLYNN: When I was reading this part of it, I took them to mean that if they wanted to go thoroughly into this they would have wanted different kinds of information about the nature of competition in the market about what happened in each of these, and given that it had to be a local analysis it would have indeed taken a lot more time and effort to do. I thought that was what they were trying to convey.

MS. BACON: In other words, the methodology that they adopted from the start was, in principle, the correct one, particularly if you look at this through the lens of the statutory test and the guidelines. Even on the CMA's own interpretation of what they were required to do, they did not have to carry out an exhaustive analysis of price. This is looking at indicators of price as part of their overall assessment of the market. If this did come down to saying they wanted more evidence on price, that was not a legitimate reason for saying, "We are going to down tools now". They could have said, "On the basis of the available evidence we are going to reach our conclusion now on the balance of probabilities one way or the other". Sir, I have put my case. This is our position: on Ground 5, which is really the icing on the cake, we say that they failed in their statutory duty, but the primary submission is that the crux of their argument in relation to the case of not taking this further, if that is what they decided to do, was the mixed price evidence, and we say that that conclusion was irrational. Sir, if I could just sum up to conclude our case overall, we know from the CMA's own evidence that there was a spike in the formation of formal anaesthetists partnerships after

the Competition Act came into force, and that one of the reasons for this was to enable collective fees to be set without ----

THE CHAIRMAN: I thought you told us that they were setting collective fees informally before.

MS. BACON: Some of them were, but specifically the reason to change from informal to formal was that this would fall outside the Chapter 1 prohibition. We know that one of the main driving factors behind forming partnerships was to avoid that. We do not say that in any pejorative sense. They did that, they took legal advice and that is what they did. That is set out in the AAGBI guidance. The fact remains that the effects on competition of what they were doing are precisely the same as if the anaesthetists, instead of forming a group, had all got together and decided to set fees at common levels. So that is why we say that there is a clear and obvious restriction of competition, however one looks at it. In some areas it might be that the anaesthetist groups have very small market shares and we have not complained about those. In the areas which we have complained about the groups have enormous market shares. In those areas you have a situation where not just a few anaesthetists in the relevant market, but the majority or even the overwhelming majority have agreed to set fees at the same level.

So our starting point, Ground 3, is that there was a clear and obvious restriction of competition and the CMA did not, even on its own interpretation of the guidelines, need to go further and show conclusively that the price evidence demonstrated higher prices. Supposing I am wrong on that, supposing I do need to show not only that there was, on the features of the market, a restriction of competition, but that as a matter of fact this resulted in higher prices. Supposing for the AEC test, I actually have to show consumer detriment, which we say is separate, and we say that is not in the legislation or the guidance, but supposing that is right and that is the hurdle I have to overcome. We know that that test is a balance of probabilities, so the CMA has to look at whether, on the balance of probabilities, the price evidence, combined with the other evidence, indicated an AEC in some local market. We say that to test whether that was the case the CMA went about gathering the price evidence the right way - in other words, it asked itself the right questions as to how to obtain that price evidence. Of course, the starting point, whether it needed it at all, was wrong, that question was wrong. Having asked that wrong question, it went about adopting what we accept is a sensible approach to paring down the ----

THE CHAIRMAN: Surely the starting point was right, even on your submission, because you say it is a *prima facie* ----

MS. BACON: The wrong starting point was that it had to have price evidence, not that it had to look at it and take it into account, it had to show that there was some evidence of price effects, and that is the wrong question. The *prima facie* is that you can look at it, but it is not conclusive, and you do not need it. They say, "We needed it, we needed price evidence because without having evidence of price effects we cannot conclude that there was an AEC". So that is the wrong question. But having asked that wrong question, we accept that it went about gathering the evidence in a sensible way, it chose its sample treatments, six, it chose its 11 local areas, it carried out seven different types of price analysis, six on various different areas, growing in order of the size of the area from small, concentrated area analyses to the regional analysis and then a national analysis. We know that the CMA had problems in creating its data sets and we know that it was hampered because it only had 45 responses to its 100 questionnaires. So we know that there is a problem about the blended comparator set. We know there is a problem about price shadowing. Those problems stack the deck against finding any price effects. So what is remarkable is that, despite the evidential problems and despite the deck being stacked against finding any price effects, you do see a remarkably consistent picture in all but one geographic area that was being investigated.

So, in our submission, and to conclude, and I am just before three o'clock, in the light of that evidence, however you characterise the CMA's decision, whether it was a positive finding of no AEC or a finding that it was going to stop there and deprioritise investigating this further, on any reading of the decision, in our submission, that decision was so irrational that it cannot be justified. It is completely untenable on the basis of the evidence and should be set aside by this Tribunal.

Unless you have any further questions, those are our submissions.

THE CHAIRMAN: Thank you very much, Ms. Bacon. Yes, Ms. Smith?

MS. SMITH: I am not sure whether you were planning to have a five minute break?

THE CHAIRMAN: I was not, does anyone want one?

MS. SMITH: Often there is a five minute break for the shorthand writer but I am happy to start straight away.

Could I make two points by way of introduction, and then address each of AXA's Grounds 3, 4 and 5 in turn. The first point is that, in our submission, when proper analysed, AXA's Grounds disclose no error of law or irrationality. When they are critically analysed, each of their Grounds collapses into a challenge to the merits, either of the CMA's price analysis or a challenge to the extent of the CMA's investigation. I will make that good as regards each

of their Grounds, but by way of introduction this Tribunal is well aware of the warnings in numerous cases that it must be careful not to blur the distinction between a judicial review under s.179 and an appeal on the merits. Particularly when dealing with the findings of an expert body, it is not, as you are well aware, for the Tribunal to assess the merits or to second-guess or substitute its views for those of the CMA.

So far as the CMA is making evaluative assessments and judgments, which we say it clearly was in this case as regards in particular the pricing analysis, then the CMA has a wide margin of appreciation. AXA accepts of course that it has to establish irrationality.

Sir, the cases that we rely on are all cited at paras.15 to 18 of our Defence. I am sure they are all familiar to you, Sir, and to the other members of the Tribunal. I do not need to take you to them perhaps in the authorities bundle, but just to remind they are in the core bundle, tab 7, p.5, a point I have already made in para.15, a statement from the Court of Appeal in *BSkyB* - for your note that is in authorities bundle 1, tab 15, para.38. I have already made the point about the Tribunal must be careful to avoid blurring the distinction between a s.120 review - here a s.179 review, but the same point applies - and an appeal on the merits. It is one thing to allege irrationality, another to seek to persuade the Tribunal to reassess the weight of the evidence and, in effect, to substitute its views for those of the Commission. The latter is not permissible.

As regards the adequacy of the evidence relied on by the CMA, in para.16 we refer again to the *BSkyB* case and to the *Stagecoach* case in para.17. For your note, the CAT judgment in *BSkyB*, which is cited in para.16, is at tab 12 of the authorities bundle, and the *Stagecoach* judgment is at tab 16 of the authorities bundle, but those cases are reflected in the judgment of the Tribunal in *BAA*, which is cited in para.18. For your note that is in tab 18 of the authorities bundle. I am sure all members of the Tribunal are very familiar with the statements in para.30 and 20 of that judgment. Paragraph 20(3), the extent to which it is necessary to carry out investigations to achieve the objective, the *Thameside* objective of taking reasonable steps to acquaint oneself with the relevant information to enable oneself to answer each statutory question posed, the CMA has a wide margin of appreciation, therefore para.18(b) of the Defence, whether the CMA has taken reasonable steps to acquaint itself with the evidence, is to be assessed with reference to a rationality test.

Sir, you are well familiar with all of that. What we say is that when you actually start critically examining each of the Grounds relied on by AXA they simply collapse into irrationality challenges to the CMA's analysis of price analysis or saying that we did not go far enough in our investigation.

The second introductory point I wanted to make was that AXA's arguments have changed, in some ways quite substantially, between their Notice of Application, to their Reply, to their Skeleton Argument, particularly under Ground 3.

THE CHAIRMAN: Does that matter?

MS. SMITH: I will orally address the points as we now understand them to be made, but AXA has said again today orally that they are not withdrawing any parts of their case as previously pleaded, although it may have been pleaded, we say, in a different way, so I would ask you to have regard to the extent of our written pleadings in response to those cases as originally pleaded, but I will address the Grounds as I now understand them to be made.

Ground 3, AXA's case as we understand it, in essence, in summary is that the CMA erred in its approach to the AEC test under s.134 by holding that a combination of (1) large local market shares, and (2) collective price setting by anaesthetist groups did not give rise to a *prima facie* case of presumption of an AEC.

AXA made clear this morning, Ms. Bacon made clear this morning, that they do not resile from the argument that they made in their Notice of Application. That argument is, I say, different to what is made now. It is useful to have a look at that argument, in my submission, because there was a certain logic to it, but, we say, it was wrong. The argument is made in the Notice of Application which is in the core bundle at tab 5. The argument starts on p.29, para.76 and onwards. In summary, the argument made there, first of all, para.76, I will summarise it, the language of s.134 echoes that of Article 101 and the Chapter 1 prohibition because they both talk about restrict/distort competition.

Paragraphs 78 and 79, there is a presumption under the Article 101, Chapter 1 prohibition case law that object infringements are anti-competitive. That is arrangements that have as their object the prevention, restriction or distortion of competition.

Paragraph 80, an agreement between competitors to set common prices are object infringements. Even though the anaesthetists form partnerships, the nature of the arrangements between them with that partnership are still the same.

Paragraph 81, if the anaesthetists were acting as individuals, rather than in partnership, their price setting would be a hard core object infringement. Therefore, such conduct, para.82, when combined with high market shares, should be regarded as giving rise to a compelling *prima facie* case of an AEC.

Then, finally, para.86, they say that under Ground 3, where there is such a presumption it is not necessary for the CMA to develop and gather such detailed price evidence.

That appears to really be the crux of AXA's case under Ground 3. The only way really that Ground 3 adds anything to their argument under Ground 4 - the whole point, as I understand it, of their Ground 3 arguments which are now made and in fact were made by way of submission to the CMA during the consultation process - is that you can stop once you have found high market shares and collective price setting. You do not need to go any further.

THE CHAIRMAN: I thought that you could run them together, and indeed at certain points in her submissions Ms. Bacon did. You could say that there is a *prima facie* AEC in these certain circumstances, such that you could only rationally conclude that there is no AEC if there is sufficiently strong evidence pointing in the other direction.

MS. BACON: This is where she rows back.

THE CHAIRMAN: Let me finish how I understood one way in which the point could be and was put, that the picture on the pricing evidence was either so mixed, or Ms. Bacon would say more strongly than that, actually the preponderance of it all pointed one way, which would support the presumptive conclusion that there was an AEC, and either taking Ground 4 by itself, it was irrational to find mixed and therefore just looking at the pricing material, the conclusion should have been an AEC; or taking Ground 3 and Ground 4, one would expect a finding of an AEC in these sorts of circumstances, and, what is more, it is either not neutralised or is positively supported by the pricing evidence, therefore irrational not to conclude an AEC.

MS. SMITH: It is difficult to see how that is absolutely right, and I will take you to the Report. The point that was made, as I understand it, by AXA in consultation was that you could stop there and you do not need to look at the price evidence. That is para.7.36 of the Final Report, and we will come back to that.

THE CHAIRMAN: I do not understand Ms. Bacon that it is unlawful to go on and look at the pricing evidence.

MS. SMITH: Once she has accepted that it is lawful for the CMA to go on and look at the price evidence, what is there to this Ground? What more is there except an attack on the rationality of the conclusion that the CMA took from the price evidence?

THE CHAIRMAN: That may be so, but it may be an attack on the rationality in the context of, I think Ms. Bacon might say, quite a strong presumption, *prima facie* position - put it how you like - evidential burden created by the fact that usually where you get very strong market share and a collective setting of prices, that is indicative of an absence of market pressures, unless you then go and say, "Actually there are very low barriers to entry, so in fact there is a kind of lurking competitors' threat".

MS. SMITH: That is where, Sir, in my submission, there is a mistaken and wrong confusion between the tests to be applied under s.134 and the tests to be applied under Article 101 and the Chapter 1 prohibition. In her reply, Ms. Bacon did draw back from the argument that was so starkly put in the Notice of Application. She accepted that s.134 is a self-standing test, which it is, and has a separate legal test from that set out in Article 101 and Chapter 1 prohibition, and she accepts that it involves an effects based test, but she says you can draw an analogy with Article 101.

Could I ask you ----

MR. GLYNN: Could I just ask you: do you agree with her that you can draw an analogy between the two pieces of legislation?

MS. SMITH: No, they use similar concepts to prevent restriction and distort competition, but they involve quite different exercises, and I will take you to ----

MR. GLYNN: They involve quite different legal frameworks and exercises, as you say, but surely the underlying rationale is very similar, such that it would be not unreasonable to say that an analogy could be drawn?

MS. SMITH: Yes, but the fundamental difference is that Article 101 regulates conduct and looks to see whether, in effect, there is an arrangement between competitors which prevents or restricts, or which has the object or effect of preventing, restricting or distorting competition. The effect of putting in those words "object or effect" is that if you are able to find an agreement which has the object of fixing prices between two competitors, it does not matter if it ever had that effect, or if it ever had any effect of restricting competition ----

THE CHAIRMAN: Do you accept that, if one focuses on the "effect" limb of Article 101 that there is an analogy to be drawn?

MS. SMITH: Yes, there is an analogy to be drawn, but it is limited. If you look at s.134 it is about identifying - and I will come to this - an adverse effect on competition. An "adverse effect on competition" is specifically defined as identifying features which prevent, restrict or distort. So there are two elements to s.134. It is about looking at a market and the functioning of a market, rather than the conduct of particular actors in that market. It is about looking at the functioning of that market and whether or not that market is functioning properly. It is about identifying an AEC. That AEC has two aspects to it. There must be features in a market, and they are identified separately, but those features have to have a certain effect, and those features have to prevent, restrict or distort competition.

THE CHAIRMAN: I would have thought that if you have a very large market share of a group of economic operators and price collaboration between them that has quite a strong tendency towards indicating that there are features of the market, the market share and their conduct within that market, and those features prevent or restrict or distort competition.

MS. SMITH: That is right. Those two assets are features of the market. There is a structural feature, the formation of groups with a certain market share, high market shares; that is the structural feature. There is a conduct feature that is that there was, in some circumstances and some instances those anaesthetist groups set prices, so those are the features.

Then you say: do those features prevent, restrict or distort competition in the market? That is what the CMA had to consider, and when you look at what the CMA did, that is all it did. It did not argue reject the relevance of those features, or say that there is no presumption that they would affect competition. It simply said that that is the starting point. We cannot presume an AEC simply on the basis of features, we have to look at whether those features prevent, restrict or distort competition, and that is para. 7.21, p.202 of the Final Report.

> "An AEC cannot be presumed on the basis of collective fee setting even if combined with high market shares. A finding of market power giving rise to an AEC requires more than the presence of collective fee setting and the existence of high market shares. In assessing whether there is market power, we will consider market share changes over time, market outcomes such as prices and profitability, as well as the structure of the relevant market including the nature of any barriers to entry and countervailing buyer power."

So in considering whether these features have the necessary effects, all these are relevant issues. They do not say you have to show price differences, they say that these are all relevant factors, and I do not think there can be any argument that is a correct approach under s.134, and I will come back to show you why. Then, at 7.22, they go on to say:

> ". . . we focused our analysis of consultant groups on anaesthetist groups and in particular anaesthetist groups which set fees. The purpose of our analysis was to identify whether the formation of anaesthetist groups in local areas, which set fees, gave rise to widespread competition harm giving rise to an AEC."

So we were looking there at whether features give rise competitive harm, giving rise to an AEC. We consider that a pricing analysis would be an appropriate starting point to ascertain whether there was widespread competitive harm, so it is not that we will not find an AEC unless we can find higher prices, we have identified, or certain features have been identified to us which may give rise to an AEC and that they may prevent, restrict, distort

competition. We have to look at the market generally, the structure of the market, the market share changes, the market outcomes, the natures of barriers to entry, and a starting point is our pricing analysis, and that is as high as we put it.

MS. POTTER: Although is it not fair to say that then one goes on to actually find that because of the pricing analysis ----

MS. SMITH: Yes, you do not take it any further.

MS. POTTER: -- you do not have to do any of the other things that you have just said you do need to do?

MS. SMITH: Exactly, and that is the second - no, we are saying here that these are the factors that we will consider. I am sorry, the language there is perhaps not that helpful, it says "we will consider", and in my submission what that means is these are the sort of factors we consider in assessing whether there is an AEC. In this particular place, in this particular instance we had started with our pricing analysis as a starting point. We then set out the results of our pricing analysis and concluded that, given those results, there is no point in taking the investigation any further; whether that second decision not to take the investigation any further was a rational one is a separate question, and that is Ground 5 in effect.

MR. GLYNN: Could I go back slightly, because this is terribly fundamental. Just on the facts of the large local market shares and the price fixing would you agree or not agree that that gives a prima facie case for an AEC?

MS. SMITH: But what does that mean? I am not sure we would want to put those sorts of labels on things. Those are features that we will investigate, but to say that there is a presumption that has to be rebutted, or a presumption that can only be rebutted by certain evidence, s.134 does not give rise to anything that suggests that is the approach we should take, and I would not accept that that is the approach that should be taken. You cannot have a presumption that because there are features in the market they will give rise to a competitive harm. You may think in a number of cases these features might give rise to harm to competition.

MR. GLYNN: Well, would we not think that? They seem to be very strong, very prominent features, which ordinarily, on an ordinary understanding of the operation of markets, one would take to be features that tend to restrict and distort competition.

MS. SMITH: But the problem is you are assuming that those features are determined, and that they are correct, just saying there are high market shares and there is collective price setting. Actually, when you look at it things were a lot more nuanced in this case. For example,

what actually was going on - in para. 7.18, which is on p.201 - the CC's survey of consultants:

> "76 per cent of consultants stated that they did not belong to a consultant grouping, anaesthetists were twice as likely to belong to a group as non-anaesthetists, with 39 per cent saying that they belonged to a group compared with 22 per cent . . ."

So that is 39 across the board - the figures may be different on a local level, but across the board it is only 39 per cent. Then, as well, importantly, the fact that you are in a group does not necessarily mean you follow the pricing that is recommended by that group.

> "Anaesthetists are more likely than non-anaesthetists to set their fees in relation to the group's guidelines or at levels specified by the group: 60 per cent of anaesthetists in a group set fees at the level determined by the group."

So bland statements of high market shares, collective price setting can potentially be misleading.

MS. POTTER: But high market shares in the context of the local market.

MS. SMITH: Exactly, and then you go to the local markets, and this is something that is extremely important and I will come back to it. The market shares for the cases studies again differ substantially, and it is a glaring omission from the table that was handed to you today that it does not say what the market shares for each of the case studies was. But, if you look on p.205 of the Final Report, at 7.32 you see for case study A the market share is 80 per cent, yes, that is high. Case study B, 7.33, the market share is 60 per cent. Case study C, 7.34, the market share is above 50 per cent. So even that is nuanced, there are differing market shares. So it is not a simple picture and one has to look at how the market is actually operating, and it would be dangerous to make presumptions on the basis of bland statements like "high market share", "collective fee setting" when the picture is not that simple.

I was taking that all out of turn, but it gives, I hope, the idea of where I am going.

THE CHAIRMAN: You say it is a nuanced picture on 7.32, 7.34, but it is not that nuanced, is it? They are very strong market shares in all three cases.

MS. SMITH: Here, now, yes. I will come back to that because that really is a question of ----

THE CHAIRMAN: If we go back to 7.18 that is not that nuanced, is it? You still get large proportions of anaesthetists belonging to a group and the market share position in relation to studies A to C would tend to support that specifically in relation to those groups. Then, within the groups it is still a very large proportion ----

MS. SMITH: Yes.

THE CHAIRMAN: -- that set fees by reference to the group guidelines.

MS. SMITH: Even if someone has an extremely high market share in a particular market you cannot presume that that has a restrictive effect on competition because, for example, the barriers to entry may be so low into that market ----

THE CHAIRMAN: Well, it does not seem to me that is a very good argument to make here because they put barriers to entry to one side.

MS. SMITH: No, but you are saying in a situation where the CMA is presented with a situation that there is collective price setting and high market shares should it presume that there is an AEC, even if that presumption does not need ----

THE CHAIRMAN: For what it is worth, speaking for myself, at the moment I would rather quibble with the notion of 'a presumption', at least in any legal sense. But, having said that one approaches, or one would hope that the CMA is going to approach analysis of a market with a basic understanding of how markets were even at a fairly simplistic level.

MS. SMITH: Yes.

THE CHAIRMAN: And I would have thought that just as an evidential expectation of where you are looking at a market with a very high market share of a particular group who are setting prices by reference to each other and agreeing as prices, that that would, going back to s.134(2), be a situation where there is a feature, or a combination of features of the relevant market preventing, restricting or distorting competition.

MS. SMITH: Again, I am not sure where that takes you because if there is no ----

THE CHAIRMAN: Putting it another way, if that was the only evidence that you had.

MS. SMITH: Yes, absolutely ----

THE CHAIRMAN: Well, when you say "absolutely" ----

MS. SMITH: If that is the evidence you have then that may be, but the point is what should the CMA have done as a matter of law? There is a number of stages. It cannot be said that the CMA should have stopped. The CMA was required under s.134 simply to see, well, there may be high market shares, there may be some collective price setting, therefore we will stop.

THE CHAIRMAN: I do not understand Ms. Bacon to be saying that this is ----

MS. SMITH: But then what does her case add? There is no legal presumption of an AEC, there cannot be given what is in s.134. Then, the next question is: should the CMA take into account the fact there are high market shares and collective price setting? Of course it should and it did. So, of course, it should take into account the fact there are high market shares. Of course it should take into account the fact there is collective price setting. It did

take those factors into account. However, it then went on to look at other issues such as - it then went on to say there are other factors. It looked at the pricing analysis, came to the conclusion that - and I do not want to confuse the question about whether the conclusion it reached was rational or not, but let us assume for the purposes of argument the conclusion on the pricing analysis it reached was rational - the pricing analysis did not give it confidence that the formation of consultant groups, the combination of high market shares and price setting led to higher prices in those areas. It could not be confident of that in those particular areas, so it came to a conclusion that there was no AEC, because the features that it had identified, the high market shares, and the collective price setting in its view were not having the effect of distorting competition.

THE CHAIRMAN: But might it not be said that they did a price analysis, and let us say that they rationally reached a conclusion it is a mixed picture. If you just had the price analysis as your evidence you would not feel confident drawing any conclusion from that. But, if they were just looking at that, that that has left out of account, the basic features of the market which, if you just had that by itself, would lead you to think that there was distortion and then it might be said that you have got the basic features - high market share, collective setting of prices - ordinarily you expect there to be a distortive effect on competition in those circumstances. Put alongside that the mixed result in the pricing analysis, in other words you cannot give very much weight to any coherent picture from the pricing analysis, so that that leaves you with the basic expectations that one would have as a matter of ordinary economic analysis of the market where you have high market share and collective price setting?

MS. SMITH: In my submission, Sir, there are two legal questions for this Tribunal. They are: first, given the evidence before the CMA was it rational for it to reach the conclusion in para. 7.47 that it was not going to find an AEC without undertaking any further inquiries? The evidence before the CMA consisted of pricing analysis, the existence of groups, the existence of some price setting by some groups, not all of them, some price setting by those groups, a significant proportion of consultants in the groups, but not all of them setting their prices in line with the groups, the fact that there were a number of groups with large market shares, all that evidence which was before the Tribunal, including the price analysis, was it rational for it to decide to reach the decision it did? That is the first legal question. I do not think it can be put any higher than that, or any differently from that.

The second legal question is: are there any considerations that the CMA did not take into account? Did it not take into account the fact that there were high market shares in some of

these areas where the anaesthetist groups have high market shares in some local areas? Did it not take into account the fact that the anaesthetist groups fix prices? In our submission it clearly did take those issues into account. But there are no other legal questions for this Tribunal to consider in my submission on a judicial review. There is no legal presumption that if these features are present there will be an AEC. There is nothing under s.134 that says you should stop once you have identified features; on the contrary, s.134 says that they have to be features that give rise to a restriction, distortion, prevention of competition. So there are no other legal questions. It does boil simply down to, given the evidence in front of the CMA, which includes the pricing analysis it carried out, all the data it collected on the extent of these groups, the extent to which they fixed prices, the extent to which they were present in certain local areas and were not present in other local areas, in light of all that evidence that was in front of the CMA did it come to a rational conclusion? There is really no other question; it does just boil down to a question of rationality in my submission, there is no other legal issue.

THE CHAIRMAN: All that may be so, but it is rationality judged in a very particular context.

MS. SMITH: Yes, but the fact there are features ----

THE CHAIRMAN: That is what I was pressing you on. If all you knew about a market is: very high market share, let us say, 80 per cent of the market operators, and they are coming together to fix their prices in line with each other, and that is all you knew, would it not be irrational to draw the conclusion that you are dealing with a situation which has no AEC about it at all?

MS. SMITH: I cannot say that because it depends on the market. It depends on other issues. It may be that there is a market, for example, a very new technological ----

THE CHAIRMAN: Yes, but let me put it another way: would you not have a very strong expectation that there would be features of the market which constituted an AEC in that situation?

MS. SMITH: I would not want to hypothesise, and I would not want to say that the CMA would not go further and look at other issues, because it depends completely on what market you are talking about. If you are talking about a market where there is new technology at issue, and there are a very small number of people operating in that market because they have only just developed the technology, they have extremely high market shares. You might say there are extremely high market shares in some other feature of the way in which they set prices means it would be irrational not to find an AEC. Well, it may very well be irrational to find an AEC on that basis because in that sort of market there may be very low barriers to

entry and, although those people have got an extremely high market at the moment, if they start trying to ----

THE CHAIRMAN: You see, you go back to barriers to entry, I can fully understand ----

MS. SMITH: Yes, but it depends on the market - sorry.

THE CHAIRMAN: If you have a picture of a market with very high market share of a particular group of operators, but very low barriers to entry I can see that that might well be a situation where you say it is not distorting competition because people can come in and compete with these people very easily.

MS. SMITH: Yes.

THE CHAIRMAN: But very specifically the CMA did not go down that route.

MS. SMITH: But there might be any number of reasons why - there is a very high market share but the prices are constrained.

Perhaps I could cut through this by taking you to the Statute.

THE CHAIRMAN: I do not want to press you but what I am struggling for is the obverse submission from you of what I was struggling to get from Ms. Bacon.

MS. SMITH: Yes.

THE CHAIRMAN: Ms. Bacon says it is a presumption, but accepting it is a rebuttable presumption where you have a high market share, and the collective setting of prices. So I was very concerned to understand from her what she says, in principle, are the matters which could be relied upon in that situation to rebut the presumption, and she gave me answers which I will have to go away and assess. I am really asking you the same question. Maybe it is unfair to say that you have accepted that if all you know about a market is high market share ----

MS. SMITH: No, I certainly have not accepted that that creates any sort of ----

THE CHAIRMAN: All right, just assume against yourself that we think that that might be a proper position to adopt in relation to this market, not in the legal presumption but just as an expectation on the facts, what do you say could, in principle, indicate that, contrary to first impressions, that situation did not disclose an AEC?

MS. SMITH: You have to show, first of all, that the features that you have identified, which you say are features that one might expect generally to give rise to an AEC, an adverse effect on competition, you first need to establish whether they actually do. Then you need to establish whether those effects are offset by benefits.

If I could take you to the relevant Statute, s.134 ----

THE CHAIRMAN: 134(2) is the ----

MS. SMITH: Yes, I am going to start with s.131, it is tab 29 of authorities bundle 2. If I could start with s.131, which is the second page behind tab 29, p.170, this is, first of all, power to make a reference. What is important is that s.131 is the first section that sets out the test and the two elements of the test. Under s.131(1) you can make a reference if there are reasonable grounds for suspecting in the first instance:

> "that any feature, or combination of features, of a market in the United Kingdom for goods or services prevents, restricts or distorts competition . . ."

So, as I said, there are two aspects. There is the identification of features first of all----

THE CHAIRMAN: Just on that, would it be features - high market share and group price setting?

MS. SMITH: Well, that is why I am taking you on to 131(2), which is the definition of the features of the market.

> "For the purposes of this Part any reference to a feature of a market in the United Kingdom for goods or services shall be construed as a reference to—
>
> (a) the structure of the market concerned or any aspect of that structure;
>
> (b) any conduct (whether or not in the market concerned) of one or more than one person who supplies or acquires goods or services in the market concerned . . ."

So, as I said, a structural feature of the market is the existence of groups with high market shares, those are structures of the market.

The conduct feature of the market is the setting of collective prices. So those are the features, that is only the first element of what needs to be established under s.134. If you go on to s.134(2), p.178: "For the purposes of this Part . . . there is an adverse effect on competition . . ." so there is an AEC: ". . . if any feature, or combination of features, of a relevant market prevents, restricts or distorts competition in connection with the supply. . ." etc.

So an AEC is made up of two elements, features and the prevention, restriction and distortion of competition. So you have to prove that there are features, but you also have to prove that there are features that have this result.

MR. GLYNN: If one of the features was collective price fixing, then would that not, in itself, prevent, restrict or distort competition?

MS. SMITH: My submission is that it depends on the circumstances. If there were collective price setting it depends whether it is constrained by what is going on in the rest of the market. Is it constrained by the prices that are being set by those who are not engaging in

the collective price setting? Are those prices constrained by the fact that there were a number of different groups that are setting prices so they may ----

MR. GLYNN: If the price setting had no economic effect, then it would not matter.

MS. SMITH: Exactly. So it depends very much on the circumstances, and it requires, in my submission, the CMA to carry out an assessment.

I can take you to the CC's guidance, which is at tab 32 of the bundle, this is guidance published under s.171 of the Enterprise Act. If I could take you first in that guidance to para. 18, on p.8. It explains how, in the CC's view, the market investigation regime works and how it sits within the spectrum of competition law. So para. 18 makes the point that it sits within the broad spectrum of competition law operating alongside other regulatory mechanisms including prohibitions.

> ". . . by allowing the competition authorities the opportunity to assess whether competition in a market is working effectively, where it is desirable to focus on the functioning of the market as a whole rather than on a single aspect of it or the conduct of particular firms within it. A market investigation may examine any competition problem and identify the feature causing the problem. It aims only to see if competition within the particular market under review is working well or can be improved and is not seeking to establish general rules and obligations for firms".

Then at 19:

> "Its overarching framework allows the investigation to tackle adverse effects on competition (AECs) from any source. As well as being able to look into the conduct of firms, the CC can probe for other causes of possible AECs, such as structural aspects of the market (including barriers to entry and expansion) or the conduct of customers . . ."

So it is looking for the causes of AECs, the features that give rise to the AECs, the feature that gives rise to the restriction on competition, that gives rise to the competitive harm.

> "However, the focus of an investigation is always on competition. There may be other problems in the market . . . which fall outside the ambit . . ."

Then it goes on to make points about remedies and about the fact that if a market is found not to be functioning properly then it does not mean that those involved in the market are necessarily breaching prohibitions. So that is how the market regime generally works. The definition of an AEC is considered in paras. 28 to 30 in p.11, and that again makes the point about there having to be features which prevent, restrict or distort competition.

THE CHAIRMAN: So two anaesthetists agree: "I won't compete against you, we'll set our price"?

MS. SMITH: Yes.

THE CHAIRMAN: That sounds like a distortion of competition. You say not?

MS. SMITH: Does it affect competition? How does one judge whether it affects competition, or whether it has a -----

THE CHAIRMAN: Well, for example, it affects competition between those at least, does it not?

MS. SMITH: But the problem is you have to determine whether those prices that they are charging would be charged the same as prices that are charged in a competitive market. If they are the same as prices that would be charged in a competitive market then there is no adverse effect on competition.

MR. GLYNN: If the agreement has any effect it would be an adverse effect on competition, would it not?

MS. SMITH: The agreement does not have any effect because the fact of setting the prices is not enough alone, that is simply an object, that is collapsing back in to Article 101, which is saying that it is enough to find an agreement to fix prices, even if it is not working, or if it is having no effect because the prices that they are setting are the same as those which would be set in a competitive market, and that is not the purpose of the market investigation regime. It is not to punish individuals for their conduct in the market, it is about looking at whether the market as a whole is working well. So, if this conduct is having no effect in that the outcomes, the market outcomes are the same as there would be in a competitive market, then the market investigation regime is not interested in that conduct.

If I could take you to p.24 of the CC's Guidance, para. 94 sets out what the CC will look at when assessing whether or not an AEC has arisen.

> " (a) the main characteristics of the market and the outcomes of the competitive process;
>
> (b) the composition of the relevant market within which competition may be harmed (market definition); and
>
> (c) the features, if any, which are harming competition in the relevant market . . ."

Paragraph 95 says:

> "Analyses of these issues are not conducted as distinct chronological stages of the investigation but as overlapping and continuous pieces of work, which often feed into each other."

Then, para. 97:

> " To develop robust findings on whether or not features in a market are harming competition, the CC needs to understand how a market operates and reach a view about its performance. A part of its investigation is therefore the collection and analysis of information about the main characteristics of the market referred and he outcomes of the competitive process within that market. The CC's evaluation of characteristics and outcomes goes on throughout an investigation . . ."

So what the market investigation regime is concerned with is whether the market is functioning well or whether there are AECs in the market that harm competition. Paragraph 97 talks about the characteristics of the market and the outcomes of the competitive process within that market. So you look at characteristics (paras.98 onwards), and then you look at market outcomes (para. 103, p.26):

> "Outcomes of the competitive process in their different forms in a market – eg prices and profitability, levels of innovation, product range and quality - can also provide evidence about its functioning. Evaluating these outcomes helps the CC determine whether there is an AEC and, if so, the extent to which customers may be harmed by it, ie the degree and nature of 'customer detriment'. This can be an important factor in any later consideration of possible remedies."

Paragraph 104:

> " Prices and costs are among the more observable and measurable outcomes and an analysis of these may be useful in quantifying the extent and nature of competition and . . ."

- I stress "and":

> ". . . can be helpful in measuring customer detriment. However, the other, less - quantifiable factors, such as quality and innovation, are no less important to customers."

Paragraph 105:

> "Although the outcomes of the competitive process may differ in character, there may be linkages between them, and the CC does not therefore consider each in isolation."

The point made against us in Ms. Bacon's Skeleton is that the CMA confused the question of whether there was an AEC, which is to be considered under s.134(1) and (2) of the Act, with whether there was a question of consumer detriment, which is a separate issue, and subsequent issue to be considered under s.134(4) and (5).

Section 135(4) and (5), if you go back to tab 29 ----

THE CHAIRMAN: I am sorry, if we are just moving away from CC3, may I ask you to look at para. 94(c): "the features, if any, which are harming competition in the relevant market (the competitive assessment — which the CC frames using 'theories of harm')" ----

MS. SMITH: Yes.

THE CHAIRMAN: Would I be right in thinking that a theory of harm is the CC's assessment, just from general background understanding of markets, what one would expect ----

MS. SMITH: Yes.

THE CHAIRMAN: -- given markets have a particular feature.

MS. SMITH: So the theory of harm, yes, it is possibly what, Sir, you were asking about, is this the way you should approach it? The theory of harm was set out in this case in the Final Report on p.64, the relevant theory of harm - Ms. Bacon took you to it - was theory of harm 2. Paragraph 4.5, p.64: "individual consultants or consultant groups in some local areas may have market power over their patients". And so theory of harm 2 is then explained at para. 4.10 on p.65.

> ". . . we identified that individual consultants and/or consultant groups in certain local areas may have market power over their patients, arising from three particular factors: (a) there may be a limited number of consultants . . . (b)the way in which patients are referred to consultants . . ."

Those both, I think, refer to the individual consultants.

> "(c) joint setting of prices by some consultant groups. In relation to the last of these factors, we concentrated on anaesthetist groups, as patients generally have little input into the selection of their anaesthetist …"

And it then went on to examine those issues in section 7.

So the features, in effect, that have been drawn to the CMA's attention gave rise to it saying that there does appear to be a theory of harm. That is your starting point - maybe 'presumption' is not the right word, but it is your starting point.

THE CHAIRMAN: That is what I was going to come back to. Might it not be said that this is the Competition Commission's own assessment, based on their understanding of markets, what one would expect ----

MS. SMITH: Yes, and then you go on to test it.

THE CHAIRMAN: -- in other words distortion of the market, and then you look to see whether there is anything, contrary to your expectations, based on your knowledge of the market at a fairly superficial level and your understanding of the theory ----

MS. SMITH: And then you go on to test it.

THE CHAIRMAN: -- knocks you away from that.

MS. SMITH: Yes.

THE CHAIRMAN: But then I come back to put to you again the question that I was putting before. If your theory of harm can lead you to expect that there is a distortion of competition and you then go further, and your pricing analysis gives you mixed results, might it not be said that nothing has arisen which is of sufficient weight to move you away from the theory of harm?

MS. SMITH: Only if the theory of harm is given some legal weight of some sort of presumption.

THE CHAIRMAN: No, no, actual weight.

MS. SMITH: Sir, my submission goes back then to saying that you cannot give this theory of harm, or this identification of features, or whatever you want to call it, some special weight, or some special status, it is simply a starting point ----

THE CHAIRMAN: But it is a starting point because that is what you would expect.

MS. SMITH: Yes, exactly, but you then go on to test it and you test it ----

THE CHAIRMAN: And your testing is?

MS. SMITH: And your testing is carrying out, in this case, the price analysis, and then the question is you have carried out the price analysis, you have the search and results, you take those results, you take the facts you started with and you decide no AEC without undertaking any further investigation, and then the question is whether it is rational. But you do not give your starting point some special weight. The theory of harm is, if I could take you to CC3 - I have been helpfully shown para. 163 of CC3, on p.37 at tab 32.

> "To provide focus and structure to its assessment of the way competition is working in a market the CC sets out one or more 'theories of harm'. A theory of harm is a hypothesis of how harmful competitive effects might arise in a market and adversely affect customers."

So it is your hypothesis on the basis of what you might expect to happen. But, and this is important: "The use of the term does not imply any prejudgment of an AEC in a given market." Then para. 164:

> "Focusing the competitive assessment on the testing of theories of harm helps the CC to understand the market and to evaluate evidence so as to be able to decide the statutory question of whether or not there is a prevention, restriction or distortion competition and, if so, identify what features are causing it. The use of theories of

harm also helps the parties by identifying the issues that will be addressed and indicating the information that will be gathered."

So you identify your theories of harm on the basis of what you might expect, and then you go on to investigate. It provides a focus for your investigation, correctly. But then you go on to investigate. That theory of harm cannot be given any special weight, it is obviously in carrying out your assessment of whether, at the end of the day after you have carried out your investigation, there is an AEC, you bring your judgment to bear on the evidence that is in front of you, as the CMA, as the expert regulator. That judgment is not just a judgment as to how the figures work, but it is a judgment as to how markets work, and you know, because you are an expert regulator, that there are certain aspects of markets that might give rise to problems. You know that collective price setting might give rise to a problem. You know that large market shares might give rise to a problem, and all those feed into your judgment and your assessment of the evidence in front of you, so that is all taken into account in your assessment of the evidence in front of you. But, just because you have identified a starting point and a theory of harm, you have identified certain features that you then go on to assess, it is a question for you as to how, in your expert judgment you weigh up those various factors. There is nothing in the legal structure that demands that you put more weight on some factors than others. It is a question about you assessing the weight of the evidence given your experience as an expert regulator, given the evidence in front of you, and the evidence is the factual evidence that you get from your analyses. The evidence is also your understanding of how economics works, your understanding of how markets work. That is all that is brought to bear on the evidence in front of you, but there is nothing in the legal system that says, or the legal structure of the Statute that just because there are certain features that provide your theory of harm, and provide your starting point, you give them any sort of special legal weight.

THE CHAIRMAN: Yes, thank you.

MS. SMITH: If I can perhaps try to go back to where I was, which I think is to address the point made in the Skeleton Argument by AXA that we confused the question of whether there is an AEC with the question of whether there is consumer detriment.

Consumer detriment is relevant to remedies under s.134(4) of the Act, and, Sir, moving on to that point if I could take you to that, which is at tab 29, p.179.

THE CHAIRMAN: Yes.

MS. SMITH: Section 134(4), having decided that there is an AEC you then decide the following additional questions. The CMA decides whether action should be taken by it under section 138, which is the power to order remedies:

> "for the purpose of remedying, mitigating or preventing the adverse effect on competition concerned or any detrimental effect on customers so far as it has resulted from ----"

THE CHAIRMAN: Is your point on this that there is nothing in s.134(1) to (3) that excludes you having regard to the impact of features of the market in assessing whether there is an AEC?

MS. SMITH: My point on this is that pricing, the nature of pricing, in a market is evidence that goes to market outcomes that are relevant to the assessment of an AEC.

THE CHAIRMAN: Yes.

MS. SMITH: But it is also evidence that may be relevant to the second and subsequent issue of whether there is customer detriment for the purposes of the remedy.

THE CHAIRMAN: I think that is what I was putting to you, and that is your point on that?

MS. SMITH: That is my point simply on that. And that is borne out, actually, by para. 103 of CC3, the guidance, I think it says: "and prices may also be relevant to the question of remedies."

THE CHAIRMAN: Yes.

MS. SMITH: So it is evidence of these two different things. So, by looking and saying we were looking at market outcomes, and our starting point for looking at market outcomes was to look at the evidence produced by the pricing analysis, we were not saying 'in order to establish an AEC you have got to establish consumer detriment under s.134(4), we were looking at market outcomes and the evidence of market outcomes.

THE CHAIRMAN: Yes.

MS. SMITH: So if I could just very quickly go through what we actually did, and I have done a bit of that already, I think - with the very helpful discussion I think I have covered quite a lot of the points I was going to cover, so I am just going to go through and see where I have got to. (After a pause) I think, although not in the order I anticipated but as a result of our discussions, I have actually covered the points I wanted to make on Ground 3.

THE CHAIRMAN: Very well.

MS. SMITH: Unless you or your colleagues have any further questions.

MR. GLYNN: Could I ask one question, which is similar to the one ----

MS. SMITH: Yes.

MR. GLYNN: The extent to which you are concerned about price effects within a group as opposed to the price effects on the average charges of anaesthetists when compared with the rest of the market. Is that part of your thinking as far as you know?

MS. SMITH: The fact that the group is a partnership rather than a collection of individuals is relevant to the question of whether there is an anti-competitive agreement for the purposes of the Chapter 1 prohibition; it is not relevant to the question of whether there is an AEC, and we still just look to whether there is an AEC or not, and the legal structure and form of the group is really neither here nor there for the purposes of s.134. So it is relevant that within the group not all anaesthetists set prices at the same level or set prices in line with the recommendations.

The fact they are a partnership does not matter if we had found clear evidence of difference in pricing between anaesthetist groups and independent anaesthetists.

MR. GLYNN: Perhaps I could put the question like this: supposing that you had found, after looking closely at one group, that the formation of the group, which included setting prices, had not altered at all the average price of the group, but had altered the prices of the individual anaesthetists within the group. Is that something that the Competition Commission or the CMA concerned itself with?

MS. SMITH: I am not sure we carried out that sort of analysis. It could have been relevant depending on what data we had available, but whether it was something at we looked at - what we looked at were the prices, I think, before and after the formation of the group.

MR. GLYNN: So the average group price before and afterwards?

MS. SMITH: Yes. I do not think it was, and I will have to double check this point perhaps overnight, a question of the limitation of the data, but we did not go right down to the next granular level, I do not think, but I will have to double check that.

MR. GLYNN: Thank you.

THE CHAIRMAN: Well, check it overnight rather than taking time now, thank you.

MS. SMITH: Unless there are any further questions, I will go on to Ground 4.

THE CHAIRMAN: Thank you.

MS. SMITH: Ground 4 and Ground 5 feed into each other, but there are two levels of criticism, as I understand it, of the CMA's case. The first is a more focused criticism, both are rationality criticisms, but the first criticism is that the conclusions that the CMA drew from the price analysis were irrational, that is the first challenge, which is slightly and subtly different from the second challenge, which is that given the pricing results, and the evidence in front of the CMA, it was irrational for it to make the decision it made in 7.47 to conclude

that there was no AEC, and that is what I say the decision is, on the basis of the evidence before it because it should have carried out further investigations as a second rationality challenge.

THE CHAIRMAN: Are you saying these are both within Ground 4, or just one ----

MS. SMITH: I think one is Ground 4 and one is Ground 5, but the way in which they presented in the Skeleton is they tend to overlap and segue into each other and, actually, in the Skeleton Grounds 4 and 5 were presented together. But, it seems to me that the two challenges are the focus on the 'you irrationally interpreted the results of the pricing analysis'; and the second rationality challenge: 'you took an irrational decision to stop where you stopped and make the decision contained in 7.47 that there was no AEC'.

THE CHAIRMAN: Yes.

MS. SMITH: So the first one I will address, which is that the conclusions that the CMA's analysis of the conclusions it drew from the pricing analysis were flawed. AXA accepts that this is an irrationality challenge, and that it has to establish that the CMA's approach to the evidence was irrational, and it accepts that this is a high hurdle. It also accepts the weight is a matter for the CMA subject to review only on irrationality grounds. It accepts that the CMA is an expert body and must be given a margin of appreciation.

We say that AXA does not get close to establishing irrationality. Its challenge under Ground 4 is simply an attempt to re-argue the merits. In fact, these are arguments that had already been ventilated in front of the CMA on consultation, and considered by the CMA.

If you look, Sir, at p. 206 of the Final Report, para. 7.36 there are summarised AXA's submissions during the course of the consultation.

> "AXA PPP submitted that the CC had incorrectly summarized the results of its pricing analysis, stating that it demonstrated an upward effect on prices from the presence of groups."

- the three case studies all yielded results that supported an AEC, etc.

> ". . .no significance that the precise measure of price effects was difficult and uncertain; it was the directional indication of price which was quite clear on the preponderance of the evidence."

That effectively is what they are now saying to you. So they have got to establish that there is irrationality; even where these arguments have already been made, the CMA has considered them, and come to its conclusions.

So, AXA tries to make out its case of irrationality on the basis of three arguments (para.87 of its Notice of Application) first, that interpretation of the results of the pricing analysis

was irrational. Secondly, there was other evidence which we failed to take into account, specifically (a) evidence on market shares, (b) BUPA's evidence on shortfalls, (c) evidence on barriers to entry and expansion; and (d) evidence on the countervailing buyer power of insurers.

In para. 87 of the Notice of Application they also say that the third point is that the CMA overstated the amount of further work that was necessary in order to reach a proper conclusion on whether or not there was an AEC. I think that goes to the second argument.

THE CHAIRMAN: But on point (b), I do not think Ms. Bacon developed, for example, the BUPA shortfalls ----

MS. SMITH: No, well, there is clear consideration of that, and I will give you the references in due course, but it is clear we considered those.

In the time I have got available let us get straight to that first issue, whether our conclusion that the results of price analysis was mixed but irrational. Let us look at exactly what we found, if we may? Can I ask you to have open the Final Report? Rather than some presentation of the evidence in a different form in a table, it is important, in my submission, to actually look at what was found, so if I can ask you to have open the Final Report at p.202, and also have open Appendix 7.1, which is in the second volume of the Report, starting on p.1027. Sir, could I ask you to have those open next to each other, they should be read together, and I want to show you the way in which the CMA's analysis developed.

We start with the Final Report on p. 202, para. 7.23 under the heading: "Anaesthetist groups - price analysis" which says:

> "Appendix 7.1 sets out full details of our price analysis to which we refer throughout this section."

7.24 shows the formation of anaesthetist groups. We are told that there was a questionnaire to which 45 anaesthetist groups responded. That is on p.1028 of Appendix 7.1, footnote 10. The questionnaire was sent to over 100 parties identified from information provided by the AAGBI, the main hospital operators, the PMIs and from the internet of potential anaesthetist groups. We had 45 responses.

Then we say in para. 7.25 of the Final Report:

> "We did not have enough information on the anaesthetist groups' presence and membership across UK hospitals to test systematically their possible impact on average fees charged by anaesthetists. Therefore, our analysis covered those local geographic areas, and anaesthetist groups active in these areas . . ."

- although, in fact, we will go on to see there was some national analysis, but the focus was on these local groups.

It explains then in 7.26:

> "A key aspect of the analysis of each local area and anaesthetist group was to find an appropriate control group."

So the focus was on comparing what happened without the features and with the features. So we have to find a control group where there is no anaesthetists group engaged in price setting with high market shares, and we look, and we compare.

Then we say we recognise the limitations, towards the end of that paragraph:

> "As our control groups will not in general capture all other factors, there is some uncertainty associated with the results from our analysis. We controlled for the mix effect of different treatments performed in the different local areas by looking at six of the ten most common treatments in the UK under general anaesthesia (see Appendix 7.1 paragraph 11)."

Then if I could just go back to Appendix 7.1, on p.1028, under the heading "Data", we describe the data that was gathered, and there are two different data bases.

> "The first database is anaesthetists' data for insured patients at the treatment level for the period 2006 to 2012. The source was the invoice-level data provided by all insurers in response to our data questionnaire. It contained information on each treatment . . ."

- those are the six treatments.

> " the invoiced price, the hospital in which the treatment was administered and the GMC number of the anaesthetist who administered the treatment."

So, as I understand it, this is across the UK for those six years, for the six treatments, the price of each of those treatments, the hospital in which the treatment was administered, and the GMC number of the anaesthetist who administered the treatment. That information was obtained from the insurers. That is the first database.

MR. GLYNN: All insurers, so that is a complete data set, is it?

MS. SMITH: I am not entirely sure it was every insurer. If you look at footnote 7: "The composition of the clean insurer database, after removing outliers, was: 49.4 per cent BUPA" - I hope these numbers are not confidential, they are not marked as such - AXA PPP, Aviva, PruHealth, WPA and Simplyhealth."

THE CHAIRMAN So, it does look like a set of significant insurers.

MS. SMITH: Yes, but it is for the six treatments for the six years each time they are invoiced, the hospital in which it is invoiced and the anaesthetist who administered the treatment. That is the first database.

The second database is trying to find out essentially whether the anaesthetists who administered those treatments were members of anaesthetist groups or not. Again, we recognise that this data is limited because we only had 45 responses to the questionnaire, even though we tried to identify as many groups as we could, but we got the questionnaire responses and half way down para. 9:

> "We used this information to identify the anaesthetists in the first database that were in these groups."

So we overlay that second database on the first database. Then there was some more qualitative information obtained in that questionnaire as well as the information about who was in a group. We note the database did not cover all the anaesthetist groups in the UK, we recognise the limitations of that data.

Then we go on to the methodology in para. 10, and it is about identifying, as I have already said, an appropriate control group.

Then, in para.11 we control for the mix effect of different treatments performed in different areas by just focusing on six of the most common, and Ms. Bacon made the point that we had input during consultation from AAGBI as to whether two of those were appropriate or not so we changed which of the six treatments that we identified.

Then, in para.12, we say what analyses you carried out on the basis of the data that we had. So, first of all, we have a national analysis to give an overview. For your note we are here explaining the nature of the various analyses. At para. 12 we have the national level analysis, and overview. In para. 12(a) it is average fees in the UK, and in footnote 16 we say:

> "This comparison is not conducted on an annual basis; for each treatment we compare two average prices calculated for anaesthetist services provided between 2006 and 2011."

We compare the average price for those in anaesthetist groups with the average price of those who do not belong to groups but, of course, those who do not belong to groups, the latter group includes those who really do not belong to groups and those who we could not identify as belonging to groups.

Then we have two types of regional analyses, 10 out of the 11 groups we examined are located in one of two regions, so we conducted analysis of each of two regions. First,

average fees in each region for each year, so this is an annual average charged by those whom we knew were in groups, and those whom we thought were not in groups, or we could not identify as belonging to a group. Then average fees charged by each group in the region with the regional average. Then footnote 19, this is "similar to the national analysis, this comparison is not conducted on an annual basis."

Then we have the individual case studies and the four types of individual case studies, again depending on the information available. First, under C(i):"We compared annual price levels of anaesthetist groups with a regional average." (ii) price change, what we call 'pre and post event', so:

> "the price change of anaesthetist groups pre and post formation of the groups or changing their legal status with the price change of a regional average over the same period."

(iii) We compared annual price levels of anaesthetist groups with independent anaesthetists in the same hospital. (iv) then comparing prices in hospitals where the anaesthetist groups presence is significant with those in nearby hospitals where the groups are not present or not present to the same extent.

So that compares basically the sort of results for hospitals where there is an argument that there is dominance with the results for hospitals where there is not a large market share, not dominance.

Then we say in para. 13 that we observed there is substantial price variation in anaesthetist fees across the UK, a geographical price variation, so the national and regional analysis could be explained by factors other than the presence of the group.

At para. 14: "The individual case studies provide more detailed analyses" and we do then say which is more useful and which is less useful, but we take them all into account. It is a question of judgment, weighting, assessment. The pre and post event analysis is the most useful. The second best is independents working in the same hospitals. The pre and post event analysis is the most useful but we do not have as many of them.

The second best comparator is independents in the same hospital but they may follow the price of groups. The third best comparator is comparisons with nearby hospitals, but we have a lack of data on that. So it is all about assessment, judgment, qualitative weighing.

Then we come to the results, and those are in para. 15 onwards of Appendix 7.1 and para. 7.30 onwards of the Report. Paragraphs 7.28 and 7.29 of the Report summarise the different analyses that were set out in more detail in the previous paragraphs of Appendix 7.1.

For the national analysis if we look at the Final Report, paras. 7.28 and 7.30, and the Appendix 7.1 para. 16. In summary, the national results show that average fees for anaesthetists who are members of a group appear to be higher than those charged by "non-members" (non-members probably needs to be in quotation marks), and the weighted average price difference is about 7 per cent. (para.16, Appendix 7.1).

The national analysis suggests that anaesthetist groups may charge higher prices than independent anaesthetists, but it does not control for geographical differences, so its value is limited.

Two regional analyses summarised in 17 and 18 of Appendix 7.1, and in para.7.30 of the Final Report. Paragraph 7.30 of the Final Report draws the conclusion that the regional analysis generally suggests that anaesthetist groups may charge higher prices, but again suffers from the same problem of not controlling for geographical differences.

If you look at the detail in Appendix 7.1, it is not an across the board charging of higher prices, para. 17: shows that average annual fees charged by group members in Region 1 appear to be higher than those charged by non-members for the full six treatments.

Region 2 - average annual fees appear to be higher for five out of the six treatments. Those are average fees across the region.

The second piece of regional analysis is more nuanced, you see it set out in Tables 2 and 3 of p.1032 of appendix 7.1, and you see there a number of instances where the regions are broken down by group, and you have under the various column headings for Region 1, "No. of treatments for groups where prices are higher than regional average", the number of treatments where they are lower, and the weighted average price difference and, to some extent, those groups within the regions are also in the individual case studies.

Region 2 - a number of different groups some of which are in the case studies and some of which are not: the number of treatments where group prices are higher, the number of treatments where group prices are lower, the number of treatments where group prices are close to regional average, and that is defined you will see from the asterisk "includes a price difference of less than or equal to 2 per cent."

It is quite important to outline that because, in our judgment, having carried out this analysis, we have come to the conclusion that effectively the prices are the same where there is a difference of less than or equal to 2 per cent. It is a question of judgment, very close price difference, if they are less than or equal to 2 per cent we effectively have said they are pretty much the same.

So then you go to the individual case studies. The summary of that is in 7.31 of the Report:

"In relation to the individual case studies, the results can be summarized as follows:

(a) We did not have enough observations to conduct individual case studies for five out of the 11 anaesthetist groups.

(b) The evidence on half of the individual case studies undertaken (three out of six) does not suggest that the presence of the anaesthetist groups, and especially their collective price-setting, leads to higher prices."

- those are case studies D to F.

"However, for these case studies we were unable to carry out what we regard as the strongest piece of analysis — the pre- and post- event price analysis."

Then:

"(c) For the other three case studies, where we could conduct the pre- and post-event price analysis, the evidence that the presence of the anaesthetist groups, and especially their collective price-setting, may have led to higher prices was, to some extent, mixed for two of the case studies."

The summary results are set out in Appendix 7.1, and then they are summarised.

An initial point that I have to make, and it is incredibly important in assessing these results, is that we were not just looking at whether there were price differences, we had to look at what caused those price differences. So were the price differences caused by the existence of anaesthetist groups which set prices and which had high market shares?

The hypothesis that we were testing, that had been put to us by insurers such as AXA and BUPA, was that it was the combination of collective price-setting by anaesthetist groups with high market shares which led to the price differences. So it was not enough just to identify price differences, we had to see whether the evidence went towards establishing that causal link.

Looking at the detail on each of the case studies, case studies D, E and F are set out in Appendix 7.1 p.1034 through to p.1035. We have case study D, a high market share of 80 per cent, average fees for the anaesthetist groups are broadly lower than the regional average fee for the four treatments for which you have data, despite the 80 per cent market share. Average fees for the anaesthetist group for two treatments in one hospital are similar to those in another hospital in a nearby area.

Case study E, 70 per cent market share. The findings for case study E are average fees are higher for four treatments, for the other two treatments fees were higher only in the initial part of the treatment before dropping to levels close to or below the national regional

average - so that is the average comparison. The level of fees for the anaesthetist group was higher than independent anaesthetists in the same hospital for two treatments, however, the gap was decreasing over time to reach similar levels. For the third treatment independents appeared to charge higher fees, so the anaesthetist group charges lower fees.

Then, average fees for the anaesthetist group for two treatments in one hospital were higher for part of the period than those in another hospital in a nearby area. This result demonstrates that prices can differ in these comparisons for reasons other than the size of the anaesthetist group.

Case study F - high market share of 70 per cent. Findings - average fees for the anaesthetist group are higher for three treatments, higher for the whole period; higher for one treatment towards the end of the period, and lower for one treatment for the whole period. The level of fees the anaesthetist group was close to the independent anaesthetist groups for one treatment, for the second treatment it was lower, then exceeded.

So there is a picture of movement from below to above. There is a picture of higher for some treatments, lower for others. There is a picture for the price difference changing over time.

There is really a lot of data here which cannot be reduced to a red triangle or a green triangle.

These were the case studies where we said the most helpful pre- and post- event analysis could not be carried out but other analyses were carried out and some weight was given to them.

The evidence for case studies A, B and C ----

THE CHAIRMAN: That sounds like a new chapter - I wonder if that is a convenient point.

MS. SMITH: Yes, I am sorry, I did not see the time, it probably is.

THE CHAIRMAN: All right. We will stop there, and we will resume at 10.30 on Monday.

Thank you very much.

(Adjourned until 10.30 am on Monday, 26th January 2015)