IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1230/6/12/14

Victoria House,
Bloomsbury Place,
London WC1A 2EB

27 January 2015

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

Sitting as a Tribunal in England and Wales

BETWEEN:

FEDERATION OF INDEPENDENT PRACTITIONER ORGANISATIONS

Applicant

- and –

COMPETITION AND MARKETS AUTHORITY

Respondent

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HEARING DAY TWO

APPEARANCES

Mr. Brian Kennelly and Ms. Emily Neill (instructed by Watson Farley Williams) appeared for the Federation of Independent Practitioner Organisations.

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

THE CHAIRMAN: Yes, Mr. Kennelly.

MR. KENNELLY: Good morning. I should say before I begin, that I may run over my half hour slot this morning. I will try not to. I have discussed it with my learned friend Ms. Smith and I have said that if I do I will take that time out of the time allocated for my reply this afternoon, so she will not be prejudiced.

THE CHAIRMAN: That is fine.

MR. KENNELLY: First, regarding Ground 2, and whether FIPO is able to criticise factors relied on in the CMA's defence, which FIPO has not challenged directly in this notice of application - you will recall the discussion we had yesterday ----

THE CHAIRMAN: I think I would put it more as challenged paragraphs in the report which it has not challenged in its notice of application.

MR. KENNELLY: I respectfully agree. FIPO will not be applying for permission to amend its notice to raise a direct challenge to the finding in the report that there was no evidence, to quote 7.108, that consultant fees are being constrained to such a level that it is discouraging innovation.

THE CHAIRMAN: Thank you.

MR. KENNELLY: It should be noted for completeness that FIPO has also not directly challenged the finding that there was no evidence of adverse effect on the quality of consultants' work arising from the fee constraints, and this is also relied on in the CMA defence as a factor going to show what they say is no adverse effect on competition between consultants. My submission will be that these surviving factors are too slender a thread from which to hang the conclusion that there is no adverse effect on competition between consultants.

THE CHAIRMAN: Thank you.

MR. KENNELLY: I turn then to Ground 3, and the finding that competition would be possible below the fee cap. Chairman, Sir, you put to me the difficulty in assessing consultants' profitability, the point which the CMA make at para.7.98 as a potential justification for not conducting the exercise. My answer is this: first, far more than in *Skyscanner*, the question of whether consultants could or would compete below the fee caps was of critical importance. This is not merely a relevant consideration, it was a central consideration, because the fee constraints have been established by the CMA as a matter of fact, so any relevant competition between the consultants has to be below them. The number of consultants found to be pricing above the caps, and more significantly likely to price above the caps in the future, was found by the CMA to be minuscule, or likely to be minuscule.

As regards the fee information remedy, you saw that at 11.628 the CMA said that competition below the fee caps would make the remedy effective. The expression was "making the remedy effective".

THE CHAIRMAN: Sorry, can you give us the paragraph reference again?

MR. KENNELLY: Paragraph 11.628, the very last words of that paragraph. Therefore, we say that even if difficult, in an AEC analysis, in this AEC analysis, it was irrational not to conduct the exercise. Second, such exercise as was carried out ----

THE CHAIRMAN: Sorry, conduct which exercise - what exercise do you say they should have done?

MR. KENNELLY: To assess whether consultants could compete below the fee caps, which we accept would involve an assessment of the consultants' profitability. We accept that a factor going to whether or not consultants could compete below the fee caps could involve an assessment of their likely profitability.

Second, such exercise as was carried out was patently flawed. You have my submission that it was not reasonable to rely upon the Stanbridge data, because it predated the substance of the problem; and I say it could not be reasonably to outweigh the other factors which the CMA had found which demonstrated the downward pressure on the consultants' profitability and you have my point about the freeze fall in the investment rates, the stagnant PMI market and the growing numbers of available consultants and rising insurance and business costs.

Third and most importantly, if, as the CMA says, the analysis of consultants' profitability is too difficult to carry out it should not have concluded that competition between consultants would be possible below the fee caps. It could not rationally, I say, have reached that conclusion without carrying out the exercise, which it declined to do.

MR. GLYNN: Your point about the competition below the fee cap even if making a loss so the idea that the profitability analysis was necessary to get to that point is...

MR. KENNELLY: Forgive me; I am not saying it was necessary I am saying I accept that it could be part of the analysis. It would be a factor going to show whether or not the competition was likely. I entirely accept that it is not determinative of the issue at all and you have my primary point that they are constrained in practice to price at the cap, which is why I said that there was no competition on price between them.

THE CHAIRMAN: Can I ask my question then? Was the Stanbridge work referred to in the provisional findings?

MR. KENNELLY: Yes, it was.

THE CHAIRMAN: Can you tell me the reference to FIPO's comments on it at that stage?

MR. KENNELLY: My learned junior will find it for you.

THE CHAIRMAN: I will be happy just with the reference in due course.

MR. KENNELLY: Turning now to the procedural fairness point, the principles are very well known to the Tribunal so I will not take you to any authorities. The legal test is in Section 169(2) of the Act and it is that the CMA must give reasons for its proposed decision. The test in the case law is the Sedley test which appears in the *Coughlin* case and in *Moseley v Supreme Court*, which is in the authorities bundle volume 3, tab 49.

THE CHAIRMAN: Why would one not go to *South Bucks DC v Porter (No. 2)* [2004] UKHL 33 in the House of Lords on reasons?

MR. KENNELLY: No, this is about fairness. This is the point that the decision maker – and it is trite and I do not think this is in dispute – must inform the consultee what the proposal is and – and these are the words on which I rely – exactly why it is under positive consideration. Of course I say that they never said that the reason why they were proposing what they were was because consultants would be able to compete below the fee cap.

THE CHAIRMAN: I am so sorry, it is my fault, but which ground are we on?

MR. KENNELLY: You will recall, Sir, that my challenge to the finding of this competition below the fee cap raises a point of rationality and a point of procedural unfairness and that is in the notice of application.

I challenge on two bases. First of all, I say that the conclusion that there would be competition---

THE CHAIRMAN: Which ground are we on?

MR. KENNELLY: We are still on ground three.

THE CHAIRMAN: Procedural limb to ground three.

MR. KENNELLY: Yes and I ask you to turn to CMA's defence to see what their answer is to this.

THE CHAIRMAN: Can I see how the case is put in your notice of application?

MR. KENNELLY: It is at paragraph 41.

THE CHAIRMAN: So is this ground three?

MR. KENNELLY: Yes. Paragraph 43 is the procedural fairness aspect of this, which I am now addressing.

THE CHAIRMAN: They did not refer to this in the provisional findings.

MR. KENNELLY: No, there is no reference to competing below the fee cap. Just to be clear, Sir, we discussed Stanbridge a moment ago and Stanbridge disclosed profitability of

consultants and that was addressed in relation to the risk of consultants leaving private practice. It was in that context that we responded to it.

On this point, as I said earlier this finding, which is critical to both the PMI decision and the fee information remedy was not mentioned and that is really a straightforward point. We then turn to the defence to see what the CMA said, which is in volume 4.

THE CHAIRMAN: So if we come at some point to look at the provisional findings report and provisional decision on remedies is there a particular section we should look at in order to see that the omission is there? Can you help us with that?

MR. KENNELLY: One would have expected to see it but it is just not there.

Turning to the defence in my volume 4, paragraph 81 is where the CMA addresses this.

The CMA makes two points in paragraph 81:

> "It is denied that this finding in response to, in particular, FIPO's contentions, was in any way procedurally unfair. The CMA consulted on its provisional findings from which it was clear the CMA would not be making a finding that there was an AEC in respect of PMI buyer power."

We accept that that was certainly the proposal; that there would be no AEC in respect of PMI buyer power. This is the important point:

> "It was also clear from its provisional findings that an information AEC would be found. It is therefore clear that the CMA considered whether consultants could compete on price and quality. The CMA's entire analysis of consultant groups was predicated on the existed of competition on price; had the CMA considered that consultants could not compete on price, that would have been made clear in the provisional findings."

THE CHAIRMAN: It sounds as though they are saying that provisional findings make it clear no AEC. FIPO come back saying there jolly well is an AEC because consultants will not be able to compete, and then they make their finding in their Final Report in response to the FIPO contention; is that right?

MR. KENNELLY: No, with respect. What they are saying here is – and of course Ms. Smith will explain it better than me, it is her defence – that because they were saying in the provisional report "We are not going to find an AEC in respect of PMI buyer power we should have understood from that that they had decided that there should be competition below the fee caps."

THE CHAIRMAN: I was just focusing on the first sentence where it seems to be saying, "This finding was made in response to FIPO's contentions" and my question really is was the

chronological order of events provisional findings no AEC and FIPO then make representations; is that right?

MR. KENNELLY: Yes.

THE CHAIRMAN: Where do we have those? Give us a bundle reference.

MR. KENNELLY: I will. There are several places where FIPO said there would be no effective competition. What we said was it was uneconomical to expect us to compete at these levels, which are constrained.

THE CHAIRMAN: So it was, as is said here, FIPO come back saying, "We will not be able to compete and therefore AEC." I want to get the chronology right. Then the Final Report, the CMA deal with that contention by making the findings that they do. Is that the order in which things happened?

MR. KENNELLY: That is the chronological order, but it was not linked in the way that you say. That is the chronology, but at no stage ----

THE CHAIRMAN: If that is the chronology then it seems to me that there are difficulties with your submission because you did have an opportunity to make submissions about the difficulty of competition below, and it is those submissions that are dealt with in the final report.

MR. KENNELLY: We made submissions about it being uneconomical to compete generally because of the fee constraints, and the circumstances which I have taken you through. But at no point did the CMA say 'we have decided that competition will be below the fee cap', but the question was never crystallised by the CMA. We were making submissions generally about the difficulty of competing but they never said: 'FIPO, your concerns are misplaced because we predict that with the fee information remedy which is their current case, competition will be possible even below the fee caps, because the status of the fee caps was not clear. The degree of restriction was not clear until the final report. The provisional report accepts the fee caps and so forth you have seen, but that particular reason which is competition is possible, even below the fee caps, was not made clear at any stage. I say, because of the importance of the point it had to be said clearly. What the case law says is the 'exact reasons for the proposed decision' and it is a central point.

I have accepted that, in the abstract we were able to say competition was impossible because of the fee constraints, that was the very question in the consultation because what we were looking at was competition between consultants, but the particular question of whether competition is possible, even below the fee caps, was not put to us by the CMA.

THE CHAIRMAN: Yes, well it is obviously going to be important for us in due course to assess this submission to have the FIPO response, so if you could just give us the reference, please?

MR. KENNELLY: The point we make about the uneconomic levels of fees I can give you the reference now.

THE CHAIRMAN: Just give us the reference for the entire set of submissions, and then the particular reference as well.

MR. KENNELLY: The point we make about the uneconomic level of fees is in the FIPO reply, it is in my bundle 2. It is our application bundle 2, tab 9, para. B.37.

THE CHAIRMAN: So this is reply to statement of issues. Does this not come before the provisional findings?

MR. KENNELLY: Yes, it does.

THE CHAIRMAN: Right. It is helpful that we know the chronology, but I had, in fact, asked you for the FIPO response to the provisional findings.

MR. KENNELLY: Yes. We also, in the response to the provisional report made submissions about the difficulty of competing within the fee constraints, but to take it in order the uneconomic level of fees point is made in the reply to the statement of issues and, as I have said it is in the second volume, tab 9, para. B.37, B.51 and B.52.

THE CHAIRMAN: And then the references in the representations in the response to provisional findings? If you do not have those, if you could ask your junior to find them?

MR. KENNELLY: I have them written here in a table.

THE CHAIRMAN: If you could supply them to us before you sit down.

MR. KENNELLY: I certainly will. That is my point, the specificity of the point was never put to us and if it was such an important point it had to be put to us.

The second point in the defence, if you look at the CMA's defence, which I hope you should have open, para. 81: "There was nothing in the provisional findings to suggest it was not possible to compete on price irrespective of PMI strategies." So the CMA there argues that there is nothing to suggest that the CMA considered it was impossible to compete below the caps i.e. the opposite view is in mind. In my submission that is no answer to the argument that the central point was not put to us. The fact they did not positively put forward the opposite view is not an answer to my point about procedural affairs.

THE CHAIRMAN: Yes.

MR. KENNELLY: Turning to Grounds 4 and 5, which I shall take together. Much of this has been trailed in the earlier Grounds, and so I can be relatively brief.

In any event, in finding that the number of consultants had not fallen, I say the CMA failed to take into account relevant considerations and took into account irrelevant considerations. Critically, on the question of whether the numbers of consultants were likely to fall in the future there was no reasonable investigation at all.

As we discussed yesterday, rationality, albeit a difficult test, is a flexible standard, and the intensity of a decision makers' inquiries is informed by the importance of the issue.

Time and again in the final report, as you have seen, having set out the reasons why the PMIs actions could lead to an AEC, the CMA concluded that it was not the case and the first matter cited is the lack of evidence of a fall in consultant numbers.

THE CHAIRMAN: Which paragraph in the report is that?

MR. KENNELLY: It appears throughout the report, Sir.

THE CHAIRMAN: If you just give me two report paragraph numbers. It is unfortunate, the reports tend to be quite long, so when someone says: "It is in the report" we do not always find that the most helpful.

MR. KENNELLY: 7.122 is the one I recognise has a particular problem, the last sentence of that, and also 7.108, which deals with the fact that there is no evidence that consultant numbers in private practice are being reduced by the PMI practices. More clearly in the pleadings, as you have seen, and in the skeleton argument.

THE CHAIRMAN: I have a memory that there was something in Appendix 7.2 – para. 23? Yes, p.1050.

MR. KENNELLY: Yes, exactly, and in the Appendix.

THE CHAIRMAN: So they certainly addressed the point.

MR. KENNELLY: Yes, well I shall come back to 23.

THE CHAIRMAN: But is my comment a fair one that they addressed the point?

MR. KENNELLY: They address it in those six lines, but my point would be that if that is it, if that is the extent of their analysis of whether consultant numbers were likely to fall in the future as a result of these PMI practices that is not a reasonable basis on which to reach that very important conclusion. That is not, I would say, a reasonable inquiry, even in view of the generous margin of discretion which the CMA enjoys in conducting an investigation.

THE CHAIRMAN: So what should they have done do you say?

MR. KENNELLY: They should have properly engaged with the evidence which FIPO had adduced to the effect that consultants were likely to turn away from private practice in growing numbers, for a number of reasons. But, one of those reasons would be, we say, the

ever increasing restrictions on consultants' ability to price. I say that para. 23 in Appendix 7.2 is inadequate to the point of unreasonableness.

Skyscanner here, Sir, is directly on point, because this is a very important point. It has been put to the CMA FIPO is not in a position to address this question in detail; it is for the CMA to investigate it and they failed to do so.

THE CHAIRMAN: Well, they do investigate it but you say in an irrationally defective way.

MR. KENNELLY: Yes, and if you need references for why – I have skipped ahead to para.23, but 23 is ----

THE CHAIRMAN: Presumably it might be said that, unlike in *Skyscanner*, FIPO actually is in a position to provide information about this. I thought the point in *Skyscanner* was that *Skyscanner* was unable to assist by providing evidence and information.

MR. KENNELLY: Yes, FIPO is in a position to provide information about how consultants are currently behaving, and FIPO did so, and there is a FIPO survey, which I can take you to, which shows the reasons why consultants, according to FIPO, are reluctant to enter into private practice, and increasingly so, but ultimately the CMA is best placed to do the broad analysis of the effect of the NHS also. There are a number of factors which the CMA can analyse, and is better qualified to examine, than FIPO. Be under no illusions, FIPO is not an expert body by any means, it is a loose collection of people who have day jobs, and it is not reasonable to expect them to produce the evidence which the CMA is best qualified to produce.

THE CHAIRMAN: Notwithstanding that it is not reasonable to expect them to do it, they did. They provided evidence.

MR. KENNELLY: FIPO did provide evidence.

THE CHAIRMAN: The CMA assessed that evidence and you do not like the result of that assessment.

MR. KENNELLY: Characterised like that, that would suggest that I am ----

THE CHAIRMAN: It is going to be characterised like that against you, so I am interested to know how you respond to it.

MR. KENNELLY: As I have responded, that it was put to them that they had a duty to investigate - see *Skyscanner* - and what they give us is para.23 of appendix 7.2 which, for an issue of this importance, is inadequate to the point of unreasonableness. That is my answer. If you need references as to the lack of clarity on consultant numbers, you have already seen, and I showed you the references in the final report, that on the face of the report itself in relation to Bupa, how it appeared that between 2011 and 2012 and 2013 there was a drop

of 3,000 in the number of active recognised consultants. You will recall that I took you to those passages.

In any event, widely differing figures as to the numbers of consultants were before the CMA and it failed to reach a conclusion as to how many active recognised consultants there were in the relevant markets, and failed to analyse at all, save for 23 of the likely number there was going to be as a result of the PMIs' practices.

Then moving on to Ground 6, this is the question of whether it was reasonable for the CMA to assume that the savings earned by the PMIs in cutting consultants' fees would be passed through to policyholders. The reference in the final report is in 7.109:

> "There are clear benefits to policyholders, which should be passed on to consumers, resulting from insurers promoting lower-cost consultants "

7.110 is also relevant.

THE CHAIRMAN: They seem to be saying that there is active competition in the insurance market.

MR. KENNELLY: Yes, and they say in 7.110:

> "Moreover, corporate policyholders can relatively easily switch providers if this were to become an issue for their members."

"this" being a failure on the part of the PMIs to pass through savings earned from lower consultants' fees.

The CMA does acknowledge in that same paragraph, 7.110, that in relation to personal policyholders, this is the third line down:

> "… we note that at present open referral policies are not generally available. It can be extremely difficult for a personal policyholder to switch insurer and on taking out a policy or at renewal a personal policyholder may not be able readily to understand the implications in terms of consultant choice of an open referral policy or the likely impact of the insurers' consultant fee …"

THE CHAIRMAN: Presumably personal policyholders will understand very well the price. We are on your Ground 6 debating whether price savings would be passed on.

MR. KENNELLY: Yes, but the point here is switching. That is something which informs whether or not PMIs will pass through the savings. If policyholders are very likely to switch then it is more likely that the PMIs will pass through the savings. If personal policyholders find it difficult to switch, it is less likely that a saving will be passed on to them.

THE CHAIRMAN: In terms of personal policyholders we have potential new recruits, new policyholders, for whom the difficulties of switching is not the issue, but price is likely to be, and then people who are already existing policyholders who may find it difficult to switch - is that right?

MR. KENNELLY: Yes, that is right, although I would say that there has been no proper investigation in relation either to corporate or personal policyholders, and I will come to that. Even in relation to personal policyholders, you will not find an examination of their price sensitivity and their willingness to switch.

This is, I say, a core part of the reasoning, which leads to the conclusion, and in para.71 of the skeleton argument you have seen that this is a factor relied upon by the CMA. I say there is no evidence at all to support this assumption of pass-on, still less any probative evidence. It is inherently implausible in the face of the facts found by the CMA that consultants' fees that were staggered since the 1990s and reduced since 2011, while PMIs' premiums increased, and you have seen the figures, by 60 per cent between 1995 and 2012. That is the reference at 3.78. I am not saying that proves anything, but I am saying that it suggests that there is no direct correlation between the falling reimbursement rates and premiums.

The CMA says that it is allowed to infer this assumption, this assumption that there will be pass-through, from a primary fact. The primary fact, it is, Sir, as you say, that competition is such as between the PMIs that consultants' savings - savings on consultants' fees - will be passed on to policyholders. There was no examination as to the degree of competition between the PMIs. CMA will say that is not in their terms of reference. That is a difficult question: to what extent do they compete with each other? That is not examined in the final report. That is also assumed. So the assumption of pass-on is also based on an assumption that there is competition in this respect as between the PMIs.

THE CHAIRMAN: It was not in the terms of references - is that because the OFT did not think there was a problem in respect of competition between the PMIs?

MR. KENNELLY: I do not know why the OFT did not refer that point, whether the OFT thought there was a problem or not. The CMA was not asked to investigate the degree of competition between the PMIs. I will be corrected if I am wrong, but that was not a question which the CMA had to examine.

I am saying that assumption that there be pass-on is based on an assumption that there is adequate competition on that point between ----

MR. GLYNN: Are you saying that they could have investigated ----

MR. KENNELLY: No, I say that on the face of the reference they could not. They could have asked the OFT to amend the reference, it is open to them to do that. We have raised that in our grounds but I am not pressing that point to the Tribunal today.

MS. POTTER: Mr. Kennelly, what about the points in 7.109, the corporate trust and the fact that the corporate sector is actually highly transparent and therefore pricing directly premiums in the following year?

MR. KENNELLY: Yes, and we accept, as I say - that is why I am citing the personal policyholders - that our case is stronger for them than it is for the corporate policyholders. That is why at the very beginning I emphasised that there were 1.5 million personal policyholders. Even in relation to the corporate policyholders, it is assumed that they would, in fact, respond. Remember, it is what they were responding to, whether savings in consultants' fees would be passed on. It is how responsive they would be to that issue. That is the relevant question, whether, if the PMIs did not pass on the savings in respect of falling consultants' fees, would that lead corporate policyholders to switch. There may be, and we do not challenge it so we are "stuck" with it, for want of a better word, the point made in 7.109, but I say that does not demonstrate a proper investigation of whether they will be responsive to a failure to pass on savings in consultant reimbursement rates.

THE CHAIRMAN: Is that not just basic economic theory of how competitive markets were?

MR. KENNELLY: Yes, it is an assumption based on an assumption that the markets are functioning really.

THE CHAIRMAN: They say, at least for the corporate market, it is.

MR. KENNELLY: Yes, and they say that even a monopolist would pass on a proportion of the reduction in the costs achieved, and that is economic theory. But the theory, in my submission, gives way to the facts. Where we have put to them that the market circumstances in this case are such that it is inherently implausible that pass-through operates as clearly as that, it was incumbent upon them to investigate the question. It was not rational to simply rely on this abstract theory, and we have put to them the fact that, as I say again, the umpteenth time, the consultants' fees had been fixed and were falling; there was a large body of them in a stagnant market and their competitive situation was very weak and the PMIs had very strong market power, and the facts speak the other way and they had to investigate it.

THE CHAIRMAN: Yes; thank you.

MR. KENNELLY: Of course we put to the CMA, as did the AAGBI that the PMIs were not passing on savings in consultants' fees. That was a live issue that was put to the CMA, so they were prompted, we say, to do the investigation which they failed to do.

THE CHAIRMAN: So these paragraphs seem to be even then dealing with that contention by FIPO.

MR. KENNELLY: Yes, but this is not an investigation Sir; this is economic theory and assumption – we have not actually examined the question.

In ground seven, this was a finding that it was in the PMIs' interests to maintain a number of and high quality consultants. The basic point is that there is no AEC on competition between consultants because PMIs can be trusted not to exercise their buyer power so as to lead to a reduction in high quality consultants. It is an important finding because the buyer power, the very significant buyer power was found as a matter of fact. The incentives on the PMIs holding this power are significant, in the CMA's decision, to decline to find an AEC. Again, I say, there is no probative evidence to support that finding because it is not, as we said in our submissions to the CMA, necessarily in the PMIs' interests to maintain very high quality, a sufficient number of consultants. The PMIs' interest is driven by cost. They obviously have an interest in ensuring a significant number of adequately qualified consultants but it is not necessarily the case, as the CMA has confirmed, that they can be trusted to ensure a sufficiently high number of properly qualified innovative consultants. The analogy is inapt but I will make it anyway. It is in the supermarkets' interests to have high quality milk; that does not stop them necessarily for pressing the farmers. This is about competition between consultants not only looking at whether the PMIs can ensure through their controls a sufficient number of good consultants; it is whether there is competition between the consultants.

A short point on this, the CMA relies on a survey in its defence and at paragraph 81 of its skeleton argument. It says survey commissioned by GFK---

THE CHAIRMAN: Where do they refer to that in the report?

MR. KENNELLY: It is referred to in a number of cases. In section 11 it is referred to at paragraph 11.629. The two places are Section 7.94:

> "Consultants are critical to the insurers' business. The key perceived benefits of privately-funded healthcare are treatment by a consultant of choice and treatment at a time and place convenient to the patient."

I ask the Tribunal to read that very carefully because I say that that is a misleading extract from the survey referred to.

THE CHAIRMAN: Is that your pleaded case, that they have misconstrued the survey?

MR. KENNELLY: No.

THE CHAIRMAN: So why are you making that point, not pleaded?

MR. KENNELLY: We did not challenge the survey in our notice of application.

THE CHAIRMAN: You did not challenge this assessment of the survey?

MR. KENNELLY: No. Let me take you through the point.

THE CHAIRMAN: I do want to know where we are going with this point because ultimately we are going to have to write a judgment and if you are making a criticism of the report, which is a permissible criticism I need to know when that is happening. On the other hand, if you are making a criticism of the report which is not a permissible criticism I need to know that for the purposes of a judgment; secondly, why are we wasting time on that?

MR. KENNELLY: I understand that. So in our notice of application we challenge the finding that the PMIs can be trusted to avoid restricting competition because they have an interest in maintaining high quality consultants. That is squarely in our pleaded case. In our notice of application we have referenced various reasons why that is the case. We have not included in the particulars of that challenge a specific challenge to the survey relied upon in 7.94. The survey is relied on particularly in the defence and in our reply we make a very short reference to the inadequacy of the evidence which is referred to in the defence, which includes the survey. I am not suggesting that the point I am about to make to you was made in these terms at any stage in our pleadings, but I do submit that it is within the four corners of the issue raised in the Pleadings which allows me to make the point.

THE CHAIRMAN: What, that the CMA misunderstood the survey?

MR. KENNELLY: No, that the survey is not an adequate evidential basis to support the findings they made. The point here is that they say the key perceived benefits of privately funded healthcare are treatment by a consultant of choice. That is the first point you make. If you look at footnote 667 they say: "76 per cent of respondents to our patient survey stated that the main reason for going private was..." You see the points that are made.

Even on the face of this document the number who choose a specific consultant is 39 per cent. That is not said by them to be the key perceived benefit of privately funded healthcare. The first is appointment times and the second is that. That is why I want to show you the survey itself. I have a short extract from it which was given to my learned friend this morning and is the survey relied upon by the CMA, so if I can hand it up.

THE CHAIRMAN: We do not have the survey in the bundles yet, but if you give it to us. (Same handed) If we can find where to put this.

MR. KENNELLY: You can put it at the back of the defence bundle. If we turn to paragraph 81 of the CMA skeleton at the same time – if you can keep that open and I will take you back to that. The point is a very short one, which is if you look at the survey first I draw your attention to the dates when the survey was undertaken.

THE CHAIRMAN: Where do we get those from?

MR. KENNELLY: The front page tells you what sort of survey it is and the second page tells you the method and you will see that the total period is 16 November to 16 December 2012. Again, I make my point that timing is critical in this because these restrictions are very recent; that that is not as up to date as it could have been. The key point is at the bottom, "sample size". You see that 1288 private hospital patients and 89 PPU patients were surveyed, that is 1,377 and there was only a 22 per cent response rate, which means that the total number of respondees to the survey was 303.

If you turn over the page to slide 25 you see the particular percentage relied upon. So this is "Reasons for choosing to go private". You see that about five lines down, as a reason for going private it is said: "Able to choose a specific private consultant", that is 39 per cent, which is the percentage referred to in the report – that is only 118 people. It is on 118 responses that the CMA is prepared to conclude that the PMIs are sufficiently interested in ensuring that competition between consultants is preserved, because that is what their policyholders care about. I will come back to the report very briefly on the next ground, so if you can conveniently put it to one side.

THE CHAIRMAN: So can we put the survey away, or do you want it left open?

MR. KENNELLY: I am not sure how much space you have.

THE CHAIRMAN: If you are coming back to it ----

MR. KENNELLY: I will come back to it. That is my point. The survey is relied upon and you see the extent of the reliance in the skeleton, which is at para. 82 of the CMA skeleton. They say the CMA's analysis of patient responses in its survey allowed it to observe that the key perceived benefits of privately funded healthcare are treatment by consultant of choice at a place convenient to the patient. That is not a rational conclusion based on that survey that the key perceived benefit is treatment by consultant of choice. The survey is too small and that is not, even on the face of that small survey, said to be the most important, or the first key perceived benefit.

If I may move on to Ground 1, which I shall take very briefly. As I said in opening, this Ground depends on me succeeding in my challenge to the PMI decision.

My basic point here is that the fee information remedy clearly depends upon the correctness of the PMI decision. In the time available to me it is not possible for me to take you through the parts of the report in section 11 which deal with the fee information remedy, but I will give you the cross references.

THE CHAIRMAN: Yes, please.

MR. KENNELLY: They are numerous. The first is para. 9.74, 9.79, 10.9. Then in section 11, 11.483, 11.587, 11.602, 11.618, 11.619, 11.628, 11.631, and 13.5. The points each of these make is that the effectiveness of the remedy is said to depend on its ability to stimulate competition between consultants.

Before I leave I wish to take you back to that survey and if you could, at the same time open the final report again, and go to para. 11.629, because the survey is relied upon in this part of the report also.

If we turn to 11.629, and the very bottom of that page of the final report, you see:

> "We recognize that many patients, particularly those with medical insurance, may choose not to 'shop around' even if given the information with which to do so."

And obviously I rely upon that.

> "However, we consider that for this remedy to be effective, it is only necessary for a relatively small but significant proportion of private patients to do so as switching on the part of these patients would provide consultants with an incentive to compete on fees. The survey undertaken by GfK for the CC indicated that 29 per cent of patients cited whether or not their PMI would cover a consultant's fees to be an important . . ."

Please turn back to the survey, and turn to slide 31. Remember the point being made in the report is what percentage of respondees consider whether or not their PMI would cover the consultant's fees to be important. In the survey, under the title: "What discussed about the consultant", you see "Whether PMI would cover fees (fully or partially)". The percentage given is not 29 per cent, it is 16 per cent, and remember that is 16 per cent of 303 respondees, an unreasonably inadequate basis to reach that conclusion. Then, the next sentence of para. 11.629 it said:

> "In addition, 10 per cent of patients surveyed indicated that they would be prepared to travel further for a lower-cost consultant . . ."

30 people.

THE CHAIRMAN: I am sorry, I am having difficulty marrying up these figures, with the page you have taken us to.

MR. KENNELLY: I have taken you to para. 11.629 of the report, and page ----

THE CHAIRMAN: It is the sentence that goes over the page.

MR. KENNELLY: And then at p.31 of the survey, headed: "What discussed about the consultant".

THE CHAIRMAN: Yes, so where do we get the 29 per cent.

MR. KENNELLY: You do not, Sir, that is the point. If you go down, the question which is asked in the report is: "how important is it that the PMI would cover the consultant's fees?" and that is the question which is asked half way down that column, on p.31 of the survey, whether the PMI would cover the consultant's fees fully or partially? The question you are asked is: "Did the healthcare professional discuss any of these things with you about the named private consultants you spoke about?"

THE CHAIRMAN: My difficulty at the moment is in seeing how the numbers in para. 11.629 correspond at all with what we have on the page in the survey you were showing us, and what it is leading me to wonder, but I do not know, is whether, in fact, the cross-reference is to another page in the survey.

MR. KENNELLY: Perhaps I will deal with it in reply then, because I genuinely do not understand how the percentage of 29 was arrived at.

MS. SMITH: I am not sure it is adequate to do it in reply, Sir. This is a point which has not been raised at all before, para. 11.629 has not been referred to.

THE CHAIRMAN: This is your case, Mr. Kennelly.

MS. SMITH: I am afraid that the case that is being made against me in this regard is wholly unclear.

THE CHAIRMAN: You have made your point.

MR. KENNELLY: I move on.

THE CHAIRMAN: So you are not pursuing this?

MR. KENNELLY: The point about the 16 and 29 per cent I am not pursuing, but I am pointing out to you, because I do rely on the size of the survey, and I say that 10 per cent is a very, very small number, it is 30 people, and that is the number of people who would be prepared to travel further for a lower cost consultant. That goes to the effectiveness of the remedy, and I do take that point and that is the end of my opening.

THE CHAIRMAN: Thank you very much.

MS. SMITH: Sir, would it be possible to have a five minute break before I start?

THE CHAIRMAN: Yes.

MS. SMITH: Thank you very much.

THE CHAIRMAN: We will rise for five minutes.

(Short break)

THE CHAIRMAN: Just before you begin, Ms. Smith, Mr. Kennelly, I think you were going to give us the reference to the FIPO response to the provisional findings?

MR. KENNELLY: Yes, in relation to ----

THE CHAIRMAN: Was it not a single document, "Provisional findings"?

MR. KENNELLY: Indeed, this is the ----

THE CHAIRMAN: I just wanted the reference to the document. That would satisfy me.

MR. KENNELLY: It is in bundle 3, tab 19.

THE CHAIRMAN: When you say bundle 3, is that the third of bundles?

MR. KENNELLY: The third bundle attached to ----

THE CHAIRMAN: Yes, thank you.

MR. KENNELLY: There is also the reply to the provisional decision on remedies, which is tab 24. We say we took the point earlier in our response to the issues statement.

THE CHAIRMAN: Yes, I have got that already.

MR. KENNELLY: Thank you.

THE CHAIRMAN: Yes, Ms. Smith.

MS. SMITH: Thank you, Sir, and thank you for the five minute break. I want to make a number of general points by way of introduction and then deal with each of the seven grounds in the order dealt with by Mr. Kennelly for FIPO. The crux of FIPO's challenge in this case, as has become clear, is the PMI decision, that is the failure by the CMA to find that the exercise by PMIs of buyer power led to an AEC, and that is directly the focus of their Grounds 2 to 7. It is also, in reality, the focus of their Ground 1. Under Ground 1, they say that the fees information remedy was not an effective remedy, essentially because it failed to remedy the PMIs' buyer power. Mr. Kennelly fairly accepted that yesterday, that if FIPO failed to persuade the Tribunal that the PMI decision is unlawful FIPO cannot succeed on its challenge to the fees' information remedy.

In the light of that, it is important, in my submission, to focus on the nature of the AEC, which FIPO says the CMA should have found, or in fact FIPO says the CMA acted irrationally in not finding.

That AEC was an AEC based on the buyer power of the PMIs, of the insurers. It is important in this regard to recall that, generally, buyer power is usually seen, rather than a potential source of competitive harm, as a countervailing factor which benefits competition, and which operates to the benefit of consumers.

To make that point good, can I take you to the CMA's guidance, CC3, which you have seen a number of times over the last few days. It is in the third authorities bundle at tab 47. Could I ask you, first, to turn to p.39. You will see the heading above para.173, "Countervailing factors". There is, first of all, on p.38 the "Potential sources of competitive harm" above para.170. Then there the countervailing factors and at para.173 it says:

> "In assessing the potential sources of harm, the CC considers aspects of the competitive situation that may, on the other hand, benefit competition and operate to the benefit of customers."

Then in para.174 we see reference to efficiencies. At 175 we see reference to the prospect of entry or expansion, and in para.176, we see countervailing buyer power, and it is said there:

> "Countervailing buyer power may also be taken into account in the CC's competitive assessment. In some markets prices are in effect determined by the relative bargaining power of sellers and buyers. The exercise of buyer power can sometimes be a feature harming competition …"

and I will take you back to those references:

> "However, in other circumstances 'countervailing buyer power' can have the positive effect of preventing the exercise of a supplier's market power in the bargaining process. The presence of large buyers relative to the size of the suppliers does not necessarily guarantee that the buyers can exert countervailing buyer power. The relative importance to each buyer and supplier of its business with the other party is a key factor."

It then goes on to make further points. Then at the end:

> "The CC will also assess the extent to which the benefits of any countervailing buyer power are passed on to customers in lower prices."

If you then go back to p.36, this is the cross-reference to para.157, under the heading "Structural features", and this is the structural features of the market which may cause an adverse effect on competition:

> "Structural features may include high levels of market concentration, high entry barriers, common ownership of competing facilities and buyer power."

Then the footnote 86 at the bottom simply defines buyer power as the ability of a firm to secure from its suppliers prices or other terms in its favour. Then at the end of that para.157, for example, buyer power was identified as a structural feature in the case of the supply of groceries investigation.

The point I make is simply this: contrary to what sometimes appeared to be suggested by FIPO in their submissions, effective competition does not mean suppliers being able to set whatever prices they want. In a well-functioning competitive market, prices are constrained primarily by competition between suppliers, but they also may be constrained by other factors, such as buyer power. So buyer power can have a positive role to play in a competitive market. It is generally seen as a good thing in that it can bring down prices, and generally lower prices are seen as a desirable outcome from the process of competition. Buyer power can become a bad thing where prices are pushed down so low that they are pushed down to uneconomic or uncompetitive levels. In that situation buyer power may have an adverse effect on competition - for example, where prices are pushed down so low that they start to reduce the quality of services offered, or they negatively impact on innovation, or prices are pushed down so low that suppliers are forced to exit the market and this reduces choice to consumers. Simply reducing prices is not necessarily an adverse effect on competition in itself.

With that background, can I turn to the ----

MR. GLYNN: (No microphone) Can I just ask, one of the important things here is the buyer of an intermediary in the market. The PMIs, if you like, are agents on behalf of the customers. When people are looking for a reduction in prices as a benefit from competition, if that is stayed at the intermediary level (inaudible) would that be, in your view, a benefit of competition in itself, or do you also need to see it going through to the final customer or consumer?

MS. SMITH: There are two points to make on that. The first and simple point is that the CMA did look at the possibility of pass through and that one of the grounds that is relied on. The second point is what is required under Section 134, which I think went in at the bottom of the authorities bundle. Section 134(1) and (2) obviously defines adverse effect on competition as features that prevent, restrict or distort competition. The remedies section of Section 134(4) and (5) talks about a detriment to customers – so it is not just consumers, it is customers. The CMA's reading of that is that would encompass not just the ultimate consumers, the end customers, but also the intermediate stage. So one has to consider not just detriment on consumers or adverse effect on competition insofar as it results to lower prices being passed through, but also the effect on the intermediate stage.

The main point is that the issue of pass through was considered by the CMA and that is one of the grounds I will come to address.

If I can turn to, against that general background, the CMA's approach in the present case to the question of whether the exercise of buyer power by PMIs gave rise to an AEC, can I ask you to turn to the final report at page 208? I am not going to take you through every paragraph but I think it is important to see exactly how the conclusions in this case were expressed in the final report because this was a difficult decision which was reached on balance by the CMA. If I can start at paragraph 7.48, here it sets out what the CMA is going to consider. It is line with the general points I have already made:

> "This section considers whether insurers have buyer power in relation to consultants which may be used to suppress consultant fees to a level below those which would prevail in a competitive market. If this were the case, this could lead to a shortage of consultants in private practice and/or a reduction in the quality of service provided by consultants to patients and incentives to innovate. Insurers could also distort competition between consultants if caps on the reimbursement of fees were applied to some consultants but not others."

So essentially the CMA is engaging in the process I have already identified. Is the exercise of buyer power pushing down these fees to such a level below those that will prevail in a competitive market which will have an adverse effect on competition?

MR. GLYNN: Forgive me, could I interrupt a second there. This concept of what would prevail in a competitive market is particularly difficult in this context, is it not? I take it that you are saying that the CMA was simply thinking that a change from where we were a year or so before is an indication of a move away from what would prevail in a competitive market. Is that unfair?

MS. SMITH: I think that is probably not correct. If I could take you to the points about whether there was a benchmark against which the CMA could measure the current level of prices. The CMA effectively came to the conclusion that because of the information and data available, in particular the way in which treatments had been coded – there had been a change to the coding of treatments in 2006, there was not a clear benchmark that could be found against which the level of fees could be compared. So there were also problems with carrying out a profitability analysis and I will come to that. So the CMA decided that the best available evidence to it – not exactly those terms but that is one way of characterising it – was to look at the impact of the reduction on fees and other measureable outcomes – the outcomes being quality, innovation, numbers of consultants, reduction in customer choice. So it was trying to look at, in assessing whether the fees had dropped to these uneconomic levels, uncompetitive levels, the outcomes of the reduction of fees, in light of submissions

from companies such as FIPO and other consultants' representatives that fees had dropped to an uneconomic level. If one looks then at paragraph 7.54, page 209:

> "In this section we focus on the ways in which insurers have sought to constrain consultant fees and whether this has an AEC in the provision of consultant services. Finally, we also describe other concerns raised by consultants and their trade associations in relation to the behaviour of insurers."

Then the CMA sets out the evidence which was before it, summarises the evidence. I will come back to those paragraphs in detail insofar as necessary in responding to those grounds, but in summary first of all the CMA sets out the evidence on insurer fee schedules – paragraphs 7.55 through to 7.67. Then the CMA summarises the evidence on consultant fee capping, paragraphs 7.68 to 7.81. Then it sets out the evidence on open referral policies, paragraphs 7.82 to 7.92. It then sets out its assessment, starting at paragraph 7.93. The purpose in 7.93 is important.

> "In light of the above, we focused our investigation on two key issues relating to consultants' fees: first insurer reimbursement rates..."

I interpose there, the level at which they had been set and the existence of those rates:

> "... and secondly insurer restrictions on top-up fees including the impact of open referral policies."

Effectively that is whether the consultants were free to price over the reimbursement rates.

> "In doing so, we make two general observations."

These are important:

> "First, in the context of consultant fees, the consultant is the supplier of a service and the insurer is the payer and can therefore be characterised as the buyer of services. Strong buyers can generally lead to increased competition and lower prices for consumers."
>
> At 7.94:
>
> "In the absence of the insurers constraining consultants' fees, it is unclear how such fees would be constrained for insured patients – given that the insurer is responsible for funding the treatment rather than the insured patient."

Then we go on to make a point about consultants being critical to the insurers' business.

> "The key perceived benefits of privately funded healthcare are treatment by a consultant of choice and treatment at a time and place convenient to the patient."

That finding is explicitly challenged and I will come back to that. But the point is good.

So how did the CMA assess whether those consultants' fees had been constrained to uneconomic levels or to a level below those which would prevent a competitive market, using the language at 7.48?

As I have said, the CMA looked at the evidence of outcomes, looked at what evidence was available. First of all the CMA looked at the level of PMI reimbursement rates and that is set out from paragraph 7.95 onwards. Paragraphs 7.95 to 7.97 the CMA summarises consultation responses. The CMA's assessment is carried out in paragraph 7.98 onwards. At paragraph 7.98 the CMA refers to Appendix 7.2 and its analysis of the evidence submitted by parties on consultants' fees which:

> "...did not suggest that consultants' fees were either increasing or decreasing significantly."

Then the CMA makes the point:

> "The extremely wide variation in the levels of consultant earnings and costs depending on specialty, locality and size of practice would have made any profitability analysis extremely difficult, resource intensive and likely to be inconclusive."

So that is the point I have made. One way of looking at whether these prices have been depressed to uneconomic levels would have been to carry out a profitability analysis. The CMA considered whether that was possible; the points made in that paragraph concluded that it would not have been helpful in this case. Not just that it would have been difficult and resource intensive but that the results would likely have been inconclusive because of the extremely wide variation in the various practices set out.

So the CMA then goes on to look at the analysis in Appendix 7.2 about net average incomes and makes the point that they appear to have been relatively stable over that period. Then it makes a point about a number of factors having impacted on consultant fee income in recent years independent of the insurers."

THE CHAIRMAN: What is net average income; is that after allowing for the consultants' business expenses?

MS. SMITH: If you see in footnote 670, income after accounting for practice costs including staff costs, consulting room hire, professional indemnity.

THE CHAIRMAN: Thank you.

MS. SMITH: Then the point is made at 7.99:

> "In addition, on the basis of the information we received, we are not able to ascertain whether the level of PMI reimbursement rates mean that consultants' charges are

being constrained by the insurers at a level which is more or less appropriate compared with the charges previously made."

It is slightly opaque but as I understand that what this means is that we were not able to consider whether or not the prices charged were appropriate, i.e. at a competitive level – not uneconomic – in comparison with charges previously made. We could not do that on the basis of the information we received; there were problems with benchmarking. The CMA goes on to say:

"It is evident that the insurers' strategies in relation to consultants' fees over the last few years are tending to constrain consultants' fees. This has combined with the insurers' increasing role in determining the choice of consultant for particular treatments..."

Et cetera. So they cannot, on the basis of the information they have received, carry out a comparison with charges previously made. There are references in particular in para. 7.56 to the change in clinical coding, which was introduced in 2006, and I understand that that change in clinical coding at the very least made it difficult to make a proper comparison with fees charged recently and previously.

So what does the CMA look at? The CMA focuses, as set out in para. 7.100 on the outcomes, the impact on the reimbursement rates on issues of quality innovation and customer choice, that is reduction in the numbers of consultants. Does that evidence, evidence that the CMA does have, suggest that rates have been pushed down to uneconomic levels?

In para. 7.100:

"However, we have not seen evidence to indicate that the insurers' reimbursement rates are leading to lower quality of services, to lower incentives to innovate or dissuading consultants from entering or remaining in private practice in sufficient numbers to affect consumer choice or cause long-term detriment."

MR. GLYNN: Excuse me, I think it is clear that this is a macro or general level, is it not? In other words, one is not here taking interest in the individual patient who might not be able to get to the consultant they want because the consultant is not on an approved list?

MS. SMITH: This is a general statement. It is broken down further in paras. 7.106 through to 7.111, which does address specifically the inter-relationship between the nature of policies available to policyholders, including open referral policies. The point being that, unless you are on an open referral policy you can choose your consultant, and so in theory you can pay top-up fees to pay that consultant even if the consultant will only be reimbursed by the

insurer at the reimbursement rates, and how that interacts with insurers actions to derecognise consultants if they charge top-up fees. The interaction between those two factors operating in the market is dealt with in more detail in paras. 7.106 through to 7.111, and I will come back to those.

But, insofar as saying: "We look at Mrs. S, could she get the consultant she wanted on this particular day, it is true, no, that analysis was not carried out. We say that is not unreasonable.

The level of reimbursement rates I have discussed, which is para. 7.95 to 7.100. Then the CMA focused on consultants' ability to charge top-up fees from 7.101 onwards. Representations responsive to consultation are considered first, and arguments are considered first, and then the assessment is carried out from 7.104 onwards. This is where it becomes clear that these are difficult issues that the CMA is considering, and these are difficult issues that require balancing, and the judgment reached at the end was finely balanced. This is quite clear, in my submission, from what is set out in these paragraphs. The CMA, to put it crudely, recognises there are potential problems, and comes to the conclusion, in effect, that they have not yet manifested themselves as an adverse effect on competition.

So, para. 7.104:

> "There is clear disparity in organizational size between an individual consultant (and indeed most consultant groups) and an insurer."

The insurer is a big buyer, the consultant is a small seller.

> "In addition, we find the argument that Bupa recognition and AXA PPP is critical to many consultants persuasive, given Bupa and AXA PPP’s share of private patients. Furthermore, a consultant who is not recognized by Bupa and/or AXA PPP or who loses a significant proportion Bupa referrals because they refuse to agree to be fee-capped could well find it uneconomic to run a private practice. See paragraph 7.75 above."

Paragraph 7.75 on p. 214 sets out the explanation of what are 'premier partners'. I should start at 7.74, which refers to Bupa's contract consultants. These are consultants who are newly recognised after June 2010 and they are only recognised by Bupa if they enter into a contract to charge at Bupa's reimbursement rates, those are contract consultants, so they have a contractual requirement to charge at Bupa's reimbursement rate.

7.75 refers to 'premier partners', who have chosen to enter into a contract in return for being given additional benefits. You see there in the fourth line from the bottom of the paragraph,

enhanced promotion, etc, and they are listed higher in search engines. They have also entered into a contractual relationship by which they agree to charge at the reimbursement rates. So the contract consultants and the premier partners are contractually obliged to charge at reimbursement rates.

We see in para. 7.76 that, as of December 2013, the number of consultants in the top line who are fee-capped under a contractual requirement, that is either contract consultants, para. 7.74, or premier partners, para.7.75. So that number of consultants have entered into a contract to charge at Bupa's reimbursement rate and you also see there, which is important, footnote 645:

> "36 per cent of consultants in our survey stated that they had agreements with Bupa to charge in line with Bupa’s fee schedule compared with only 13 per cent for AXA PPP."

So we have that number in the first line, out of 19,000 active Bupa consultants, para. 7.73. We also have a number of consultants who have entered into 'informal agreements' as they are described in 7.76, so they are not contractually obliged to charge the reimbursement rates, but they have entered into a voluntary or an informal agreement that they will bill within Bupa's Benefit Maxima, those are the consultant partners, and a number of recognised consultants who habitually bill within its Benefit Maxima. So no obligation but do generally bill at those levels, and you see the number in the last line of consultants who fall into those further two categories. So in theory those consultants can still charge top-up fees, they are under no contractual obligation.

So, we have those figures, it is also, I think, important to note, when we are looking at these numbers for Bupa, that Bupa, although they are obviously a large operator, cover 39.5 per cent of the PMI market. I can take you to that, but for your note that is Fig.3.15 on p.58 of the report. So, Bupa 39.5 per cent of the PMI market, and their consultants, a proportion are under a contractual agreement to charge the reimbursement rates, others do so habitually.

We were looking at para. 7.104. It is probably worthwhile looking at the position as regards AXA, while we are looking at the figures. That is set out on p.213, para. 7.70 onwards. The numbers here have been redacted. The numbers are unredacted in the version of the report annexed to the defence, so it may be worth, to have a full picture, having that open at the same time. It is in what is called, I think, the core hearing bundle.

THE CHAIRMAN: It is in the bundle with the red spine.

MS. SMITH: Yes, it is behind the defence at tab 1.

THE CHAIRMAN: I am sorry, which paragraph are you looking at ?

MS. SMITH: Paragraph 7.70. Paragraph 7.70 addresses those consultants who have entered into a contract with AXA to charge at the reimbursement rates. You will see the percentage figure, how many of the consultants of the 24,000 recognised consultants were subject to that contract. You will see that figure six lines from the bottom of para.7.70, so a proportion.

MR. GLYNN: An increasing proportion?

MS. SMITH: An increasing proportion. The point also made at the end of para.7.70 is that AXA:

> "… had not seen any change in the number of new consultants applying for recognition since the introduction of the new contract."

Then in para.7.71, similar to the distinction for Bupa, there are a percentage who are fee assured based on a "usual and customary" approach:

> "There is no contract in place between AXA PPP and these consultants but they have historically charged within reimbursement levels deemed acceptable by AXA PPP. However, if such a consultant were to routinely charge … higher fees than they previously had, AXA would review its charges and practice. If, after discussion with AXA PPP, this charging practice were to continue, the consultant would then be told that they were no longer on [the] list of fee assured consultants, and their fees would be capped … This meant that AXA PPP did not recommend … and when a policyholder sought pre-authorization to see a non-fee-assured consultant, AXA PPP informed the policyholder that they might be liable for additional fees. However, AXA PPP policyholders could use their benefits to see such consultants and were free to pay top-up fees."

So there is the possibility of paying top-up fees. If the consultants are routinely to charge above the reimbursement rates then this process would come into action

Then in 7.72:

> "… AXA PPP told us that it monitored the number of fee-capped and fee-assured consultants …"

Then you see the redacted text at the bottom of 7.72. I am not going to read it out in open court, but you see the numbers there referred to.

In appreciating these figures it is then also, I think, important to note that AXA, again a large operator in the PMI market, has 25.5 per cent of the PMI market by value. I think it is value, I will double-check, but it is figure 3.15 at p.58.

If we then go back to the report, and I can make these points now by reference to the version that we have been working from, the blue version of the report. You can put away

the defence, I may need to come back to it on certain grounds, but I think that is done with it at the moment. In the blue version of the final report, p.215, the position as regards Aviva is set out in para.7.80. Aviva, for your note, accounts for 13 per cent of the market, figure 3.15 at p.58, and the situation is that:

> "During 2013, Aviva made a number of changes to its specialist registration terms and conditions, including that new consultants seeking to obtain 'approved status' must agree to charge in accordance with its fee schedule and may not ask Aviva policy-holders to pay a top-up fee. However, the registration process allows new consultants to opt out of obtaining approved status. Such consultants remain recognized but Aviva advises its policyholders that a top-up fee may be payable."

So there is a possibility of top-up fees there, even for any new consultants coming on. The position with the smaller insurers in para.7.81, PruHealth, which accounts for 9 per cent of the market:

> "… is not proposing to introduce similar consultant fee-capping contracts. WPA and Simplyhealth told us that they did not cap the level of fees at which their consultants may charge."

So the position is not as simple as FIPO might have tried to present it. There are levels of constraint, there are different proportions of consultants for each insurer who is subject to constraints, different types of constraints, and there are different insurers who have different shares of the market.

MR. GLYNN: Overwhelmingly, the consultants are now constrained, in fact, by the fees of the life insurance company?

MS. SMITH: There is a difference, in my submission, between consultants being required to charge at these levels - that is the first point - and choosing to charge at these levels. That may have something to say about whether the levels are uneconomic.

MR. GLYNN: In practice, taking account of the informal pressures as well as the contractual ones.

MS. SMITH: There is a significant proportion. I would not say all, but there are, yes, significant proportions. The position is not as simple as FIPO would like you to think. The point is that this was complicated evidence that was considered by the CMA, and considered in some detail by the CMA, which then led it to the assessment which it carried out in paras.7.104 onwards. Perhaps I can go to those at p.221 of the report. I have taken you

already to para.7.104 where the cross-reference was to para.7.75 above, and a recognition by the CMA that:

> "… a consultant who is not recognised, or who loses a significant proportion of Bupa referrals because they refuse to agree to be fee-capped could well find it uneconomic to run a private practice."

Paragraph 7.105:

> "The two largest insurers have been able to agree standard fees without negotiation with a significant number of consultants (and in relation to all new consultants impose a standard fee in order to be recognized)."

So that recognises the point made, Mr. Glynn, by you just now.

> "We note that the BMA's recent survey of consultants found that the number of consultants threatened with de-recognition by insurers has risen from 11 per cent in 2011 to 34 per cent in 2012. We also refer to para.7.77 above and the fact that since August 2011 Bupa has asked approximately 10 per cent of its active non-fee-capped consultants to lower their fees, failing which they will be derecognized, almost all of whom have agreed to lower their fees."

So all that evidence is fairly considered.

> "We consider, therefore that at the very least Bupa and AXA PPP have buyer power …"

So there is a positive finding there that at the very least Bupa and AXA do have buyer power in relation to consultants.

> "Consequently, Bupa and AXA PPP's actions in relation, in particular, to capping some consultant fees and the recognition of consultants has the potential to distort competition between consultants."

So there is a clear finding there. They have buyer power; the actions they take had the potential to distort competition. Let us go on to consider whether it actually does.

Paragraph 7.106 is actually a continuation of the same point:

> "If extensively and rigidly applied, fee-capping consultants could lead to distortions in competition between consultants and to reduced consumer choice. Fee-capping (and de-recognition of consultants..."

So the two working together:

> "...who do not agree to abide by the insurer's fee schedule) has the potential to increase the disincentives on consultants from setting fees to reflect their costs, experience, expertise and the local market conditions."

They recognise that potential:

> "This distortion may potentially be increased, the greater the number of insured patients on policies that require open referrals from GPs as policyholders are channelled to lower cost consultants. Moreover, assuming that Bupa continues with its policy of de-recognising consultants who charge prices which are higher than 90 per cent of their peers and not recognising new consultants unless they agree to be fee-capped, this is likely to lead to the majority of consultants being required to charge Bupa's standard national reimbursement fees and the ability of policyholders to pay top-up fees to have a greater choice of consultant significantly limited irrespective of the terms of their policy."

So a specific recognition there that even if under the terms of your policy as a policyholder in theory you can pay top-up fees the effect of the fact of the reimbursement rate schedules and de-recognition by Bupa here of consultants who do not charge at the recognised rate could constrain significantly the choice of consultants available to policyholders.

The point made here is that if Bupa continues with this policy this is likely to lead to the majority of consultants being required to charge the standard national reimbursement fees. "Required" there obviously equates to contractually obliged. At the moment you have seen the proportions that are required to charge reimbursement fees, as opposed to the proportion who choose to charge. So at the moment the majority are not required, although they may in fact charge it.

MR. GLYNN: I am not sure that the word "required" is being used in such a narrow sense there – contractually obliged – because the first part of the sentence is talking about Bupa continuing with its policy and de-recognising consultants' charges. It is a policy, not a contractual obligation.

MS. SMITH: Yes, I am sorry. You either are required because you have entered into a contract or you are required because you are de-recognised if you do not charge, but the numbers – and I should have taken you to this – who have been de-recognised because they do not charge the rate is set out in paragraph 7.78, as less than 0.2 per cent of consultants in private practice. The figures I think 27 consultants being de-recognised by Bupa.

MR. GLYNN: On the numbers alone it is not a very real constraint; it just means people fall into line.

MS. SMITH: Absolutely. All I am saying is that what is said here is simply restricted to the point about Bupa continuing with its policy of de-recognition and not recognising new consultants unless they agree to be fee-capped. It is a limited point that that is likely to lead

to a majority of consultants being required to charge the fees and the ability of policy-holders to pay top-up fees being significantly limited irrespective of the terms of their policy. It is a simple point but at the moment if you have a policy that is not an open referral policy you can pay top-up fees, in theory.

MR. GLYNN: Yes, just that the consultant might get it in the neck from Bupa later on.

MS. SMITH: It is a limited point being made here that at the moment the majority are not required but if the policies continue to be applied then in the future the majority may be required. It is a limited point.

Then the CMA goes on to look at the outcomes, the impact on consultant numbers.

Paragraph 7.107 talks about the number of new consultants being recognised and that not having reduced annually since the introduction of Bupa and AXA contracts.

The other point about majority of course is that we were there talking only about Bupa.

Paragraph 7.107 talks about numbers of new consultants being recognised despite Bupa and AXA keeping these contracts and those not reducing annually.

Paragraph 7.108 is the evidence that a number of consultants in private practice as a whole, there is no evidence that those are being adversely affected by the actions of insurers, or that this is adversely impacting on consumer choice or quality, discouraging innovation or otherwise causing long-term consumer detriment.

I will come back to this paragraph because it is one of the paragraphs that is exclusively challenged under the grounds.

Just to highlight the actual finding there, the number of consultants in private practice as a whole, there is no evidence that that is being adversely affected by the actions of insurers.

Then the last two lines: "the absolute number of consultants in private practice had not declined significantly". Not a finding that there has been no decline.

Then paragraph 7.109 – and again I will come back to this in detail because it is another of the paragraphs that is challenged – is about benefits and pass on and specifically responding to the FIPO consultation response. You will see about halfway down that paragraph that FIPO expressed concerns and there is a response to those concerns – and I will come to the detail – and the same issues of pass on are considered in 7.110.

Then 7.111 considers from a different perspective from the policyholder. I will come back again because this is another paragraph that is specifically challenged, but it is about what is the extent of choice available to policyholders and it considers the existence of open referral policies; the extent to which they have rolled out across the market; and the fact that if you

have a policy that is not open referral you can choose to see a particular consultant and pay a top-up fee.

> "The majority of policyholders and almost all personal policyholders are not required to obtain pre-authorisation... under the terms of their policies. It is only policyholders on open referral policies whose choice of consultant is more limited... However, as noted previously, such policyholders currently have access to over 90 per cent of recognised consultants."

FIPO's ground two is essentially about the interaction between the findings in that paragraph about policies that policyholders can have – the interaction between that matter and the de-recognition consultants who do not charge above the caps; and I will come to that point about the interaction between those findings under ground two.

Then the conclusion is then reached in 7.112:

> "We therefore do not find that insurer buyer power in relation to consultants has an adverse effect on the provision of consultant services in the UK. However, see our comments below in paragraph 7.135 with regard to the nature of information provided to policyholders and to consultants and the potential this may have to distort competition..."

The conclusions are summarised, if you go over to page 227, starting at paragraph 7.130:

"The two largest insurers at least, Bupa and AXA, have significant buyer power..."

That reflects that they have buyer power:

> "...but we have found insufficient evidence that currently it is being exercised in such a way as to harm competition by suppressing fees to uneconomic levels resulting in a shortage of consultants in private practice or to a reduction in innovation or quality of consultant services. Indeed, the incentive is on insurers to promote competition among consultants on price and quality and maintain innovation and quality to protect and indeed improve demand for PMI."

Then in 7.131 the findings in relation to fee capping specifically and we look at the number of consultants recognised and at the end of that paragraph:

> "... evidence regarding de-recognition of consult-ants more generally from the insurers does not suggest that quality or innovation is being adversely affected..."

7.132, clear benefits to policyholders which should be passed on. However, the concern is expressed:

> "...if fee-capping is rigidly and extensively applied, competition between consultants could be distorted as the fee levels adopted by Bupa and AXA PPP, whilst

maximum fees are in practice actual fee levels and are uniform fees and therefore do not take into account a consultant's degree of specialism, patient mix, experience or geographic location. There is also the risk that without transparent and fair review mechanisms and flexibility in application, uniform fees could lead to a distortion of competition between consultants and an adverse effect on quality and innovation."

So there are these risks that are highlighted.

"Whilst all policyholders are able to pay top-up fees under the terms of their policies and all insurers including Bupa and AXA PPP offer policies to both corporate and personal policyholders that do not require open referral, the ability to pay top-up fees and the choice this provides policyholders is dependent upon the insurers' consultant recognition policy."

I will come back to this point on Ground 2, but just to highlight the interaction between those two issues is explicitly recognised there by the CMA. So the suggestion that this was effectively ignored by the CMA is just wrong.

"Moreover, the more patients are directed to fee-capped consultants by the insurers irrespective of the terms of a policyholder's policy, this could impact on the viability of private practice for some consultants.

As noted above, it is not in the insurers' interests to exercise their buyer power in such a way as to harm competition in the provision of consultant services. Whilst we have not received persuasive evidence that the other issues raised by consultants and trade associations in relation to insurers indicate a current competition problem in the provision of consultant services, we consider that insurers, and in particular Bupa, as they increase their role in directing patients to consultants, need to ensure that their policyholders are provided with clear and accurate information about the terms of their policies. Similarly, they need to ensure that their interaction with consultants is fair and transparent . . ."

Then this is about the availability of information, the point is made in 7.135:

"The availability of information on consultant performance and fees is considered further in Section 9. As set out in Section 9, we consider that with greater availability of information on consultant performance and fees, this will increase competition between consultants and lead to patients being able to make more effective choices. This may address . . ."

- this was the information remedy that was then put in section 11.

"This may address some of the issues that have led to insurers adopting the type of strategies considered in this section and may ensure that these strategies are not rigidly and extensively applied with the consequent risks to, in particular, quality or innovation."

So, in summary, the CMA found that although Bupa and AXA have buyer power - Bupa and AXA, not the other insurers – which could potentially give rise to an adverse effect on competition, there is insufficient evidence to find that that buyer power is currently being exercised so as to harm competition by supressing fees to an uneconomic level. In reaching that conclusion the CMA looked at evidence of outcomes, whether there was a shortage of consultants in private practice or a reduction in levels of quality or innovation, and found that there was insufficient evidence to support that.

Also, weighed in the balance against that were clear benefits of lower prices to customers, that is the PMIs in the first instance which should, at least in part – and the finding goes no higher than that – at least in part be passed on to consumers, the policyholders.

That was a judgement reached by the CMA on the basis of all the evidence in front of it, taking into account a number of factors, and reaching a finely balanced conclusion. We say that this conclusion is a paradigm example of the exercise of judgement by an expert regulator that this Tribunal should be slow to second guess.

FIPO's challenges are either that the CMA's findings on the various material factors which it took into account in reaching this decision were irrational insofar as (a) they were based on no evidence, (b) they were contrary to the evidence on a number of the grounds; or (c) they were reached after insufficient investigation of the evidence. There is also one procedural fairness challenge under Ground 3.

Two points, in my submission, arise from this. First, the nature of FIPO's challenge, and the way it is split up into a number of grounds, each of which attacks the CMA's findings on one particular aspect of its decision and one particular factor that it took into account in reaching its decision. There are dangers in that approach of splitting up the challenge in this way, because the way in which the CMA reached its decision was it looked at all these various matters as a whole, and weighed them all up before reaching an overall decision.

THE CHAIRMAN: But if it placed weight on a particular factor and its findings on that were irrational, that would affect the lawfulness of the conclusion, would it not?

MS. SMITH: If the factor was material. But obviously our primary case is that it is unable to establish that any of the findings were irrational.

THE CHAIRMAN: I follow that but I do not understand you to have a separate submission that 'and in any event this particular factor was not material'.

MS. SMITH: No, we do not get that far.

THE CHAIRMAN: You do not get that far and you do not maintain such a position?

MS. SMITH: No, we do not. The second point to be made is that the challenges, of course, all boil down to irrationality challenges. The Tribunal is well aware of the case law on this, summarised at paras. 40 to 44 of our defence – I am not going to take you back to it. But the concept of irrationality has been bandied around in FIPO's submissions without, in my submission, recognition of what this actually entails, but it is a high standard of review, and it is a high intensity of review. The intensity of review, under a judicial review challenge in this Tribunal is the same as would be undertaken in the Administrative Court, and the Court of Appeal in *BskyB* made that absolutely clear.

The Tribunal must be careful not to blur the distinction between a judicial review challenge under s.179 and an appeal on the merits, particularly when dealing with the findings of fact and I am sure it will not, and particularly when dealing with the findings of an expert body such as the CMA in this case.

Insofar as it is making evaluative assessments in the judgement, as it quite clearly was in this part of its report, the CMA has, in my submission, a wide margin of appreciation. FIPO has to establish that no reasonable decision maker could have reached the decision that was reached.

The Tribunal is well aware of all those points but I make them because it is important to bear that in mind. In particular, FIPO relies on the recent Judgment of the Tribunal in *Skyscanner* and I think it is important that I do take you to that. It is in authorities bundle 3, tab 51. I say that the present case is nothing like the *Skyscanner* case. Before I take you to the relevant parts of the judgment it might be helpful just to explain in summary the background to the case. This was a case under which the OFT (as it then was) was investigating hotels and online travel agents (OTAs) for a breach of the Chapter I prohibition under the 1998 Competition Act. A completely different statutory background, but the point is the OFT had reached a provisional view which it set out in a Statement of Objections that it sent to the parties, that there was an anti-competitive arrangement between hotels and online travel agents, in that the online travel agents had agreed with the hotels not to discount their prices when they put them on their websites, so a clear agreement not to discount prices by the online travel agents with the hotels.

That was set out in a Statement of Objections that were sent to the parties as the provisional findings. In an effort to avoid a final decision being reached by the OFT the parties took advantage of s.31A of the Competition Act, which allows parties to offer commitments to the OFT, and if the OFT considers that those commitments address the competition issue it can accept those commitments instead of proceeding to a final decision that there had been a breach of the Chapter 1 prohibition.

So, the hotels and the OTAs offered commitments to the OFT, and the nature of those commitments was: we will set up an agreement structure whereby we, the OTAs - online travel agents - will offer discounts to customers on hotel prices but in limited circumstances. The customers will enter into, or become a member of what was called a closed group. They go on to the online travel agent's website, they sign up, they give personal information, they become a member of their closed group. It is only then that they get the advantage of a discount and they only get the advantage of a discount after having made one full price purchase. That was what was offered to the OFT, "We will commit to enter into these arrangements and that will go some way at least to addressing this competition problem, the arrangements not to offer discounts".

The problem with this, from the point of view of what were known as meta-search sites or aggregators, such as Skyscanner, they had particular problems with this. Skyscanner is a site, not an online travel agent, but a site that aggregates results from online travel agents. So if you are a consumer who says, "I want to find a hotel in Paris on this particular date", you can go on to each online travel agent, Booking.com, Expedia, and you can look at what they are offering for hotels in Paris, or you can go to somewhere like Skyscanner and get the results for the price for a hotel in Paris on that date from all the different online travel agents.

One of the aspects of the proposed commitments was that the discounts available to members of the closed group could only be known to those members of the closed group. They could not be publicised on meta-search sites. So if a consumer went on to Skyscanner or the meta-search site and tried to search for what prices were, they would only see the undiscounted prices, they could not see the prices that are available to them if they entered into a closed group.

Skyscanner's point was that the remedy or the commitment which the OFT proposed to accept may have addressed the original competition problem, the price fixing agreement, to some extent by introducing discounting, but it gave rise to a different competition problem over reduced price transparency. There were challenges on procedural fairness and

rationality grounds. In summary, the Tribunal held that the OFT, in accepting the commitments, had failed to consider properly or at all the representations made by Skyscanner on the impact that these commitments would have on price transparency, and therefore acted unlawfully, first, by failing to take into account a relevant consideration - this was the Ground 2; and secondly by acting irrationally - this was Ground 3.

It is important to note that the Tribunal applied standard judicial review principles, the standard case law, as regards relevant considerations and irrationality and reached conclusions on the particular facts of the case.

If you turn to paras.32 to 33 of the judgment, you can see there the judicial review principles set out in *BAA*, which the Tribunal applied in that case. So the standard principles and for judicial review in this Tribunal.

It was also relevant, however, that the case concerned commitments on which there was some European case law and you see that considered, because there are commitments that can be offered to the Commission under European law, which are similar to those offered to the OFT under UK competition law. Those are set out at paras.34 onwards. So that is the particular test.

Skyscanner, as I say, had raised concerns in the consultation process, in the second consultation process, about the impact of the proposed commitments on price transparency, and the heart of this case, the essence, was in effect the OFT had refused to take those representations into account because it said that Skyscanner had provided no evidence to support its concerns. That is the first aspect. There was, in effect, a refusal to consider, because the submissions were unevidenced.

The second point, the point that, Sir, you have already picked up, is that the Tribunal held that in those particular circumstances it was unfair to expect Skyscanner to provide such evidence. If you look at para.90, starting on p.37 of the judgment:

> "The CMA seems to be saying that, to be taken seriously, a submission in response to a consultation must be accompanied by some material to provide a veneer of substance … We disagree. If a consultation response raises an important and obvious point of principle, it is for the authority to examine it further. This is particularly so where the authority has not carried out an analysis of the economic effects of the practices which it proposes to address with its commitments decision and where that decision itself may generate its own economic effects within the market.

In any case, it is not clear what evidence Skyscanner could reasonably have produced in this case."

Then at the bottom of para.91:

"In these circumstances, it does not seem unreasonable for Skyscanner to say, in effect, 'we have the following plausible concerns about the likely effect of the proposed commitments, and this is something we think you, the authority, should consider before proceeding further'. No doubt Skyscanner could have provided some 'material' in these sense described by Ms Bacon [who was acting for the OFT], but in these particular circumstances this would have amounted to no more than descriptive padding to the Skyscanner response with no substantive content."

Then para.92:

"Without wishing to add to the CMA's burdens in cases of this kind, it is not acceptable for it to say that when an interested party, operating in the market under consideration, raises a point that puts in question an essential feature of proposed commitments, the authority will not act on it without supporting material provided by the party raising the point. Of course the objection cannot be fanciful or frivolous, but the OFT accepted Skyscanner's point as plausible. In this instance, Skyscanner was not in a position to provide 'hard' evidence based on its past experience and, in any event, the concern was about potential effects in a new and previously untried situation."

Then they go on to say that the OFT, if it had felt the need for additional material, that could have been easily obtained and verified.

The point is there that the OFT essentially said, "No, we are not going to consider this point, because you have not provided us with evidence, and in those particular circumstances, we say quite an extreme situation, the Tribunal held that that was procedurally improper but also irrational.

I should draw your attention to what is said at the end of para.96 on p.39, which deals with what actually went on:

"Nothing that was said in meetings or correspondence responded specifically to Skyscanner's point. All that it was told was that it should provide evidence to back up its objection, which we have already considered as an unfair position for the OFT to have adopted."

So that is the point.

Then irrationality is on p.57. This was effectively the flip side of the procedural unfairness. At para.156:

> "We have already concluded that the OFT failed properly to consider Skyscanner's objection to the proposed commitments. The CMA has argued that Skyscanner's complaints under Grounds 2 and 3 [the procedural impropriety and irrationality] are essentially the same and all arise from whether the OFT acted reasonably or not. To an extent we agree with this view, but we disagree that Skyscanner has no case under irrationality. To the contrary, we find that the OFT acted unreasonably not only in failing properly to consider the objection (Ground 2) but also in coming to a decision that effectively ignored the point Skyscanner and others had raised …"

Then in para.157 the point is made:

> "Whilst the authority enjoys a substantial margin of appreciation in exercising its judgement, where it makes a decision that raises obvious competition concerns that have on its own admission not been fully assessed …"

So again, on the OFT's own admission it has not assessed these issues -

> "… the Tribunal can and should intervene."

Then it sets out the various further issues it took into account in para.158, and comes to the conclusion in 159 that the procedural impropriety under Ground 2 finds its reflection in the irrationality of the Decision itself under Ground 3.

So all I say is that that was a very unusual case, quite different from the situation in the present case.

Then, Sir, turning to each of FIPO's grounds, and I am going to address them in the same way that they were addressed by Mr. Kennelly, Grounds 2 to 7 first, and then Ground 1.

Ground 2 is characterised in the notice of application as a challenge to a finding that top-up fees enabled consumer choice.

THE CHAIRMAN: Can you give us the notice of application paragraph numbers?

MS. SMITH: Yes, this is p.24, para.38, under the heading, "The finding that top-up fees enabled consumer choice". I am not going to quibble about how it is put in the paragraph, but what is in the heading. What is important is what is actually challenged, and that is the finding in para.7.111 of the final report at p.223. So could I ask you to look at that, p.223 of the blue version of the report. It is para.7.111, the first sentence that is challenged as irrational. That is the statement of the CMA:

"We also recognise that whilst the insurers encourage policyholders to see fee-capped or fee-assured consultants, policyholders – with the exception of those that hold open referral policies – can pay top-up fees under the terms of their policies if they wish to see any recognised consultant."

Then the CMA goes on to consider the extent of those policies.

As I understand it Mr. Kennelly said fairly as a matter of fact that is correct in his oral submissions yesterday, and as a matter of fact it is correct. Policyholders with the exception of those that hold open referral policies can pay top-up fees under the terms of their policies if they wish to see any recognised consultants. What he said, as I understand it, is that although that is correct as a matter of fact, the CMA's position is irrational because if consultants charge top-up fees they will be de-recognised so policyholders cannot get access to them and this statement is, in effect, unreal.

My point in response is that the CMA clearly did take into account the interaction between what a policyholder can do under the terms of their policy and the fact they can pay top-up fees, and the interaction between that factual matter and the fact that consultants who charge top-up fees may be de-recognised, and that interaction is explicitly recognised on page 228 of the Final Report, at paragraph 7.133. If you look at 7.133

"Whilst all policyholders are able to pay top-up fees under the terms of their policies and all insurers... offer policies to both corporate and personal policyholders that do not require open referral, the ability to pay top-up fees and the choice this provides policyholders is dependent upon the insurers' consultant recognition policy."

So that interaction that FIPO says we have ignored is explicitly recognised.

MR. GLYNN: Can I ask, is there any evidence anywhere about how frequently people do pay top-up fees?

MS. SMITH: I cannot off the top of my head think of that. I see we are close to lunch – perhaps I could check that.

The point is that if the challenge that this is irrational because we have failed to take into account the impact that is clearly not right. If the challenge is, on the basis of the evidence before you, you came to an irrational result, again that is difficult to see how FIPO gets anywhere on an irrationality challenge there. The CMA was clearly aware of the interaction of these issues, the nature of the policies, who policyholders can see under their policies and the fact that this may be constrained and limited by de-recognition, and those issues are all set out in paragraph 7.106 onwards, particularly the point at 7.106 in the middle of that paragraph on page 221. Sir, I will start at the beginning.

> "Fee-capping consultants could lead to distortions in competition between consultants and to reduced consumer choice. Fee-capping (and de-recognition...) has the potential to increase the disincentives on consultants from setting fees to reflect..."

That would include top-up fees because the fees reflect their quality et cetera, and they would be at the level and would get the level that they feel is necessary, which may be above the reimbursement rate:

> "This distortion may potentially be increased, the greater the number of insured patients on policies that require open referrals from GPs as policyholders are channelled to lower cost consultants."

The more people who have gone to open referrals the less choice there is.

> "Moreover, assuming that Bupa continues with its policy of de-recognizing consultants... and not recognizing new consultants unless they agree to be fee-capped, this is likely to lead to the majority of consultants being required to charge Bupa's standard national reimbursement fees and the ability of policyholders to pay top-up fees to have a greater choice of consultant significantly limited irrespective of the terms of their policy."

So the point is that even those who have a policy which is not an open referral policy but allows them in principle to pay top-up fees and to see whoever they want, the more that Bupa , in this instance, de-recognises consultants and imposes upon its new consultants not to charge above the reimbursement rates, not charge top-up fees the more this choice will be limited, even if in principle they have a choice. So that issue was clearly considered by the CMA and it considered it with reference to the numbers of consultants who are signed up, the nature of the sign-up to the reimbursement rates that they have entered into, the numbers of consultants being signed up by each of the different insurers with the different market shares; the fact that Bupa may encourage policyholders to see certain consultants, all of that evidence was considered by the CMA. So a challenge to its statement in 7.111 by saying that this is over simplistic or does not take into account all these other issues and interaction and therefore is irrational is, in our submission, bound to fail.

Moving on to ground three, in the Notice of Appeal this is characterised as a challenge to a finding that consultants could compete below the fee caps. That is paragraph 41 onwards of the Notice of Appeal, page 26 of tab 1 of the hearing bundle.

The first important point is that one needs to see this in context. What is challenged (see paragraph 41 of the Notice of Appeal) is paragraph 11.628, the finding in paragraph 11.628. If we can look at that on page 421 of the blue version of the Final Report. The first point to

be made is that you need to see this finding in context. It is a finding which does not appear in chapter 7, which is the consideration of whether or not there is an AEC, but it appears in chapter 11 of remedies, and it appears specifically in the CMA's consideration of whether the information remedy will be effective. So the consideration about whether the imposition of a remedy, as to what information should be provided by consultants in the future, whether that remedy will be effective.

THE CHAIRMAN: Where can we get a statement of the remedy?

MS. SMITH: The statement of the remedy is actually set out in some detail in paragraph 11 – in some exhaustive detail. Perhaps I can ask someone to find me a paragraph that summarises that because as is often the way in these decisions---

THE CHAIRMAN: Do they not produce an order that says what it is?

MS. SMITH: That came subsequent to the report, it is not in the report.

THE CHAIRMAN: If someone can provide me with a reference.

MR. KENNELLY: Sir, if I may, in bundle 4 at tab 7 is the order that contains the information...

MR. KENNELLY: Sir, if I may, in bundle 4, tab 7 is the order that contains the information remedy, that is probably the most accurate reflection of the remedy itself, so it is behind tab 7 in bundle 4, the core bundle, tab 7, and the fee information remedy is at para. 22.

MS. SMITH: Sir, the information the consultants have to provide is set out in 22.1. There is also information that the operator of the private healthcare facility has to require from the consultant. It is quite a detailed remedy, as you can see, as you go over the page.

THE CHAIRMAN: Yes, thank you, that is helpful.

MS. SMITH: Effectively, it is about a consultant providing information on their fees and a qualitative survey of their performance actually, not quality of performance.

If you look at the point 11.628, this addresses this paragraph. Representations made by FIPO in the provisional findings as to the effectiveness of this remedy, and it is FIPO's argument at para. 11.628:

> ""Without the ability of consultants to set their fees without interference from the insurers, and for patients to freely choose a consultant there could not be effective competition on price among consultants."

Effectively, they are saying: "Even if you require them to give lots of information there cannot be effective competition because of this buyer power by the PMIs. The CMA responds to that – we did not agree with this argument on a number of bases.

"We did not agree with this argument. We did not find that the price caps imposed by the insurers were forcing consultants out of private practice at the aggregate level . . ."

And there is a cross-reference to s.7.

". . . which would have reduced the choices available to patients, nor did we see any reason that insurers should not sell restricted policies provided it was made clear to patients what they were purchasing."

And I think Mr. Kennelly said yesterday we do not argue that insurers should be restricted in the nature of the policies that they can sell.

"Patients who preferred to have a free choice of consultants could choose a different insurer or different policy to give themselves this option. For those patients who had chosen restricted policies . . ."

- so even for them; it is a very limited point:

". . . we thought that even in a context where insurers set an upper limit to the fees charged to their policyholders, consultants could still compete below this level on price, making the remedy effective."

So this is one very small point about whether the remedy is rendered ineffective by the existence of these restricted policies.

THE CHAIRMAN: So restricted policies are only part of the picture, but even there they think that there can be competition.

MS. SMITH: The restricted policies, yes, and those are basically restricted policies which do not allow patients to charge top-up fees because they are open referral, because the insurer will choose the consultant.

THE CHAIRMAN: Yes.

MS. SMITH: The question really was, even for those policyholders, would it be worthwhile for them to give information on consultants' prices and performance which, in these limited circumstances are necessarily at or below the PMI's approved rates. The CMA held, and no more than this that it would be worthwhile because there may even be limited competition between those consultants.

FIPO's arguments are that the consultants' rates are being forced so low by the PMI's fee schedules and de-recognition policies that competition below the rates was impossible; you just could not reduce your rates any further if you are a consultant, and therefore this finding was irrational. I think it is put in a slightly different alternative way that this finding is irrational even in this context because the CMA should have carried out an analysis of the

ability of consultants to compete below the reimbursement rates before reaching this conclusion.

You have seen in para. 7.98, p.219 of the final report that the CMA held that carrying out a profitability analysis - which would have been essentially what could have shown this inability to compete below these levels - would have been difficult, resource intensive and likely to be inconclusive. The evidence which the CMA did have in front of it as to consultants' fees and incomes was that they were basically remaining stable.

In light of the first of that evidence ----

THE CHAIRMAN: I think Mr. Kennelly says that is on a survey between, I think 2006 and 2010, and the picture was changing.

MS. SMITH: Yes, it is, the position is changing. One has to record that this reference was made to the CMA in 2012, so the investigation period was from 2012 to early 2014. The report was issued in April 2014, the reference was made in April 2012. So the data that was available from Stanbridge Associates was, we say, not that long ago. The point about whether the CMA should have kept the position under review, we say it did, and also took into account the future position. On that particular point I will come back to you, if I may, after the lunch break, with references to make good that point, and I will also then deal with the procedural fairness aspect of Ground 3 before going on to the third ground.

THE CHAIRMAN: Yes, very well, we will rise until 2 o'clock.

(Adjourned for a short time)

THE CHAIRMAN: Yes, Ms. Smith.

MS. SMITH: Sir, before I continue with my submissions on Ground 3, there were two points that were raised with me by the Tribunal that I said I would come back to after lunch. The first was the question from Mr. Glynn as to how many patients pay top-up fees, and what information is available in that regard in the report. What I can take you to in the report is paras.7.68 and 7.69 on p.212 of the report. In 7.69 we have the figures by the insurers for shortfalls as defined in the previous paragraph where the insurers were aware that consultants' fees were higher than the reimbursement rates because the issue had been raised with them by the consultant. Of course, what we do not have are figures on where there was a top-up as defined in para.7.68, because, where the patient was aware of and agreed to pay the difference in advance, we do not, I am afraid have information on that. Obviously it is additional, because the contract was between the consultant and the patient, so arrangements may have been made between the consultant and the patient which never

got to the insurer. I am afraid we do not have figures on that. We do have the figures on the shortfall.

Can I draw your attention to 7.69 and also the footnote ----

THE CHAIRMAN: In fact, the shortfall is a sort of top-up.

MS. SMITH: It is a variation of, yes.

THE CHAIRMAN: In 7.68 the distinction is drawn between the two, but it is an additional payment that the patient is contractually obliged to pay the consultant.

MS. SMITH: Yes, but they have brought it to the insurer, saying, "I am now being asked to pay this much", or the consultant has billed the insurer ----

THE CHAIRMAN: Perhaps, not surprisingly, people are not desperately happy about that.

MS. SMITH: The explanations are given in the footnotes. Footnote 635 talks about reasons why the consultant had not made the patient aware of the potential difference in advance of treatment. Paragraph 6.37 addresses the point about the policyholder not necessarily paying the difference.

That is the information that I am able to draw attention to. Of course that does not tell us anything about the level of top-ups or the number of top-ups, the extent of top-ups being paid, the extent of shortfalls. It does not tell us anything about, in my submission, whether the level of the reimbursement rates is uneconomic. The fact that someone may not have had to pay a top-up fee may be for any number of reasons.

THE CHAIRMAN: Looking at the body of 7.69, the point being made is not confined to shortfalls as specifically defined in the previous paragraphs. The figures there seem to be just look baldly at the circumstances in which more was paid to the consultant than was covered by the reinvestment by the insurer.

MS. SMITH: More was paid by the insurer, yes. What that does not ----

THE CHAIRMAN: By the policyholder?

MS. SMITH: No. It does not cover that.

THE CHAIRMAN: The consultants' fees were higher than Bupa's Benefit Maxima. Am I reading this incorrectly?

MS. SMITH: I had better check that.

THE CHAIRMAN: What that seems to be talking about is the difference between what is actually paid to the consultant and the proportion of the cost which is reimbursed by the insurer, but do tell me if I have misread that.

MS. SMITH: I am sorry, the point is simply this: this may not give the full picture, because if you look at footnote 637, the second sentence:

"Bupa and AXA PPP similarly told us that they could not confirm final consultant charges as they did not generally know unless their policyholder raised the matter with them whether the consultant invoiced the patient directly or for how much."

So where the consultant had invoiced a patient directly and the patient just simply paid that top-up fee, that transaction may completely bypass the insurer, and so the insurer is able to give a certain amount of information but not all of it.

MS. POTTER: So in 7.69 we are talking about situations in which the insurer has been invoiced by the consultant, from the looks of the text - is that right - and the insurer will then say, "This exceeds our recoverable amount, so we are not going to pay it all"?

MS. SMITH: Yes, it is when it is invoiced to the insurer, the insurer may refuse to pay it. The insurer may pay it - the top of p.213, it talks about Aviva not reimbursing in full, but:

"Several insurers explained they frequently consultants' fees in full over and above their fee schedules, in particular where the patient was not aware of the likelihood of a differential."

THE CHAIRMAN: In essence, as I understand it, that is the insurers trying to preserve their goodwill with their policyholder?

MS. SMITH: Yes, exactly.

THE CHAIRMAN: Even though they are not necessarily ----

MS. SMITH: For any reason, in particular where the patient was not aware. So there may be other reasons.

THE CHAIRMAN: Thank you.

MS. SMITH: The second issue that I said I would come back to you on was the information on consultants' income and revenue and the date of that information. The first point is that the information that the CMA had and relied upon as regards consultants' income and revenue was not just the Stanbridge report, but there were other sources of information that are set out more fully in appoints 7.2, if I can just quickly take you to that. It is the second volume of the final report, the blue volume, starting at p.1042. This is appendix 7.2, which sets out the data and the information which the CMA had on consultant remuneration. In para.1 the CMA explains that they carried out their own analysis of the change in revenues for each speciality between 2006 and 2011, and you can see that in the graph in figure 1. The data goes up to 2011, and the data is taken from the insurers, as you see from footnotes 1 and 2. Various conclusions are drawn from that data in para.2. Then they look at further figures in para.3, the percentage of fees paid to the top 20 per cent of the highest billing consultants by

speciality between 2006 and 2011. That is figure 2. That is the analysis of the CMA's own data obtained from the insurers.

At para.5 they then look at an analysis carried out by Laing and Buisson, which you can see from the source under figure 3 is a 2012 report; it is a report produced by Laing and Buisson in 2012, bottom of figure 3, which is about consultants' fee income.

THE CHAIRMAN: It is only covered up to 2010.

MS. SMITH: Yes, that is right. Then there are figures considered in paragraph 6, a data series for England, the number of consultants up to 2012; for Scotland up to late 2011; for Wales up to 2011. The consultant numbers over the page, figure 4, up to 2012. Then in figure 5 we have the Stanbridge Associates data. Then again another study, paragraph 10, page 1047, with the caveat that although this is based on data around ten years old there is a study of consultants' earnings in the *Journal of the Royal Society of Medicine*, in 2008 – another potential comparator. Then in paragraph 12 evidence submitted by third parties, including a fee pay service of its members' earnings up to 2011. A BMA survey of consultant income in paragraph 13 and then we go on to the numbers in the next section of the report.

The points I want to make on this are simply these, that effectively what we have here in a number of different data sources – and there is an analysis of data up to and including 2011. Some of the data sources only cover up to 2010; other data sources cover up to 2011.

THE CHAIRMAN: Some of them go up to 2012.

MS. SMITH: Some of them. We have to bear in mind that the investigation was referred to the CMA in April 2012. Work was carried out and the results and data we say is not up to date; the data up to the end of 2011 and 2012 in the situation of an investigation that starts in April 2012 and ends in April 2014 is not out of date data. It was not irrational, given the results that showed the position had remained relatively stable, not to have gathered further detail. In any event, the best that the CMA could have done is to have gathered, in my submission, data perhaps up to the end of 2012 because the data has to be gathered after the end of a year; it then has to be analysed and so given a statutory publication date of April 2014 they certainly would not have had time to look at data up to the end of 2013. So the best they could have done is data up to the end of 2012; but in the circumstances it was wholly reasonable to have looked at the data that they looked at, including evidence submitted by parties actually operating in the market.

If I can then go back to ground three and the second limb of FIPO's ground three, which is procedural fairness. The point in essence made here, I think, is that before making the statement in paragraph 11.628 to the effect that for those patients who had chosen restrictive

policies consultants could still compete below this level on price the CMA should have consulted FIPO specifically on that point.

My submissions in this regard are as follows. In the provisional findings which are – I will give you the references – in appeal bundle 1, tab 6, the CMA made it clear first that they were going to introduce the fees information remedy – that is at paragraphs 9.63 and 10.5.

THE CHAIRMAN: That is the provisional findings. Give us the bundle reference please.

Volume 1,tab 6, provisional findings report, 28 August 2013?

MS. SMITH: Yes, it is.

THE CHAIRMAN: There is also I think a provisional decision on remedies.

MS. SMITH: Yes, there are usually two documents.

THE CHAIRMAN: I just want to make sure we have the right references. Am I right in thinking that the provisional findings are bundle 1 tab 6.

MS. SMITH: Yes; it says provisional findings report notified 28 August 2013.

THE CHAIRMAN: Within that which are the paragraphs?

MS. SMITH: The provisional conclusions will be fee information remedy, 9.63 onwards, on page 826; and the summary at 10.65 on page 830 is the summary of the finding – information on consultants.

THE CHAIRMAN: Where in this provisional report is the finding no AEC?

MS. SMITH: That, I hope, is at 7.60 to 7.74, page 756 under the heading of "Analysis fee potential concerns regarding PMI buyer power". That goes through to 7.74 and the conclusion is summarised on page 766, paragraphs 7.84 and 7.85.

THE CHAIRMAN: Scanning these pages, that looks like the forerunner of Section 7.

MS. SMITH: Yes, that is exactly it. Just scanning them myself, the same issues are essentially raised there. So it was clear to FIPO what was being proposed; it was clear that we were proposing to introduce the fees information remedy, to increase information on price, to enable consumers to exercise more informed choices. It was also clear that the CMA was proposing to find no AEC as regards buyer power PMIs. So FIPO had, at the very least, the gist of what was proposed by the CMA to enable it to make representations on those proposals, particularly as regards the fee information remedy and the interaction between what became the PMI decision and what became the fees information remedy and it did make the representations. It made the representations at 11.628, which are summarised at 11.628---

THE CHAIRMAN: When you say 11.628?

MS. SMITH: Of the Final Report. Paragraph 11.628, which is what is challenged here.

THE CHAIRMAN: Just help me with the chronology. Provisional findings you have shown us.
MS. SMITH: Yes.
THE CHAIRMAN: FIPO's response, we were given a reference by Mr. Kennelly.
MS. SMITH: It is AB3, tab 19 I think.
THE CHAIRMAN: I am sorry, do we have the provisional recommendations on remedy.
MS. SMITH: I am not sure that we do actually. We have FIPO's response to the provisional decision on remedies at tab 24, but I will immediately see if we have the provisional decision on remedies.
THE CHAIRMAN: If that could be sent through to us at some point.
MS. SMITH: Yes, we can get hold of that for you.
THE CHAIRMAN: In fact, the procedural challenge is to the remedies is part of the final report, so I think we had better see the provisional decision on that.
MS. SMITH: Of course. The representations that FIPO made in response to the provisional findings, I hope, is at tab 19 of AB3, and the particular submissions on the proposal not to find an AEC resulting from buyer power is essentially set out from pp.1611 through to 1615, and then various case studies.
THE CHAIRMAN: Is that right, the heading says: "Are the PMIs actions somehow justified?" That seems to be a different topic – I mean we have not read this. Do you say that is the relevant part?
MS. SMITH: I think it is. Perhaps I could ask that we have a quick look through and see if there is anything else. I will ask my junior to see if there is anything else that explicitly refers to that point.
THE CHAIRMAN: I was just looking at para. A3.12 on p.1605, it is just my eye alighted on that, and that seems to be talking about contracts on price restrictions.
MS. SMITH: I am sorry, I did not hear the ----
THE CHAIRMAN: Page 1605 under a heading: "Anti-competitive agreement".
MS. SMITH: Yes, this is a slightly different argument, I think, about whether that agreement ----
THE CHAIRMAN: All right, let us move on, but if there are other passages we should be looking at please give us the reference before you sit down.
MS. SMITH: Yes, my point is really this, which can be taken from para. 11.6 ----
THE CHAIRMAN: Before we get to that, forgive me, there is the FIPO response on provisional decision on remedies, which is at tab 24?
MS. SMITH: Yes.

THE CHAIRMAN: Any bits in that which we should be ----

MS. SMITH: Not that I am aware. I will see if I can get some other references that we would ask you to look at in that. I am sorry, I do not have those at the moment.

THE CHAIRMAN: All right, well, if you could give us any references from that before you sit down.

MS. SMITH: Thank you, I will. My point is really this: that it is clear from the report, 11.628, what argument FIPO made, because it is summarised at the beginning of that paragraph 11.628 on p.421 of the report FIPO argued:

> ". . . without the ability of consultants to set their fees without interference from the insurers and for patients to freely choose a consultants, there could not be effective competition on price among consultants."

And it was clear that that submission was made in the context of the fees information remedy, the effectiveness of that remedy, because that is where the CMA consider it.

THE CHAIRMAN: That is why I rather thought there might be something relevant in the provisional decision on remedies, but you say not.

MS. SMITH: I will see if we can find you that reference, Sir.

THE CHAIRMAN: All right.

MS. SMITH: The CMA addresses that argument by making a number of points, including the point that there can still be competition below the fee caps on price. That was a factor that was raised in response to representations made in the context of a full consultation process.

THE CHAIRMAN: Representations which you have not yet showed us, unless it is in ----

MS. SMITH: Well, I will try to find them, I am sorry, there is no cross-reference there in para. 11.628, but I will try to find the reference for you.

In effect, it appears that what FIPO are saying is that they should have been re-consulted on this particular point about competition below the fee caps by the CMA before it reached the final report stage. It is not a case about consultation but actually really one that we drilled down into it, a case about re-consultation. We say first of all there is no material change in position which could have required re-consultation. This was simply a response to a consultation representation made by FIPO, which was wholly open to the CMA to make. In any event, FIPO claims in its notice of appeal, para. 45.1, that there is various evidence it would have submitted had it been aware of this finding and I can take you to notice of appeal 45.1, 45.2 and 45.3. In summary these points are caps have been forced down and they are at a very low level ----

THE CHAIRMAN: Sorry, we are just identifying, the NoA is in vol. 1 ----

MS. SMITH: Vol. 1, tab 1, p.28, para. 45. This is the information about this issue, caps are at a very low level, the costs of running a practice are rising, consultants' incomes are suffering. All these are factors, points, evidence, and the points that were made by FIPO in its various responses to the consultation in any event.

THE CHAIRMAN: In passages you have not shown us, but you say ----

MS. SMITH: In passages that are cross-referred to in para. 45.1 and 45.2 and 45.3 – FIPO's response to the annotated issue statement, and various other paragraphs.

THE CHAIRMAN: Was the witness statement of ----

MS. SMITH: No, that is a document that was put in with the notice of application. My point is simply this that these sort of issues were already before the CMA, considered in the final report at para. 7.95 onwards. There is no suggestion that there is any new and different points that could have been made had FIPO been re-consulted on this issue.

THE CHAIRMAN: It is a bit difficult for us to assess that submission because most of the points here are made by reference to Glazer, it was not before.

MS. SMITH: Sorry. Perhaps I could say it is a submission which is really at the high level. These are at the high level, the points that were considered by the CMA clearly in its report, the level of the caps, the fact that they are reducing, costs of running a practice, and consultants' income, and they are all addressed by the CMA in para. 7.95 onwards in the report, and also the final reference that I wanted to take you to is Appendix 7.2, particularly paras. 12 to 14.

You have seen this it is in appendix 7.2, p.1047. Paragraph 12 – "FIPO had conducted a survey of its members' earnings". The BMA put in a survey of consultant income, and all these issues about whether it would have been possible to compete below the fee levels or whether the levels of the fee caps are so low that you could not compete at all on price below those levels. Those issues were fully in front of the CMA and taken into account by it.

The final point is a point that was raised by Mr. Glynn, that even if you are pushed below your costs, there is still the possibility of competing on price below the fee levels.

THE CHAIRMAN: That is not going to last very long though.

MS. SMITH: No. The question is whether we should have gone back and engaged in re-consultation, and we say that there was no irrationality in our decision not to do so. I do not think there was a decision, but there was no irrationality in our not having done so.

THE CHAIRMAN: I am not sure that this point is put as a rationality point. It is put, as I understand it, as a fairness point.

MS. SMITH: If it is a procedural impropriety fairness point then we say this is essentially re-consultation, and you will be aware, Sir, of the case law on re-consultation, which is that consultation is not meant to go on and on and on, there must be a point at which it stops - the *Greenpeace* case, etc.

THE CHAIRMAN: Sorry, which case?

MS. SMITH: *Greenpeace* - it is not actually cited in this regard in our defence, but is the *Greenpeace* case, which is cited in our defence at tab 1 of the core bundle at para.91, the judgment of Mr. Justice Sullivan in *Greenpeace*. It is not this particular reference, I am afraid, that is given here, but the point is that in a case where re-consultation is argued for, which I now understand effectively is the case, having heard the oral submissions, there has to have been a material change or material difference between what was originally consulted on and what was effectively found in the decision.

THE CHAIRMAN: Can I just check, do we have the *Greenpeace* authority in the authorities bundles?

MS. SMITH: I am sure we do.

THE CHAIRMAN: I will find it for myself, do not worry.

MS. SMITH: If it is simply a challenge based on, "You should have carried out further investigation before you reached this decision or this point in 11.628 that competition on price could exist below fee caps", then that is a rationality issue. That is the adequacy of the investigation.

Can I then move on to Ground 4, which is presented in the notice of application as a challenge - p.29 of the notice of application, appeal bundle 1, tab 1, above para.46 - to a finding that the number of consultants had not fallen. In fact, you will see in para.46 that the challenge is to the finding, or the finding that is criticised, contained in para.7.108 of the final report, p.222. Can we have a look at what that actual finding said. You will see the finding there:

> "We also do not have evidence that the number of consultants in private practice as a whole is being adversely affected by the actions of the insurers."

There is then a reference to FIPO submitting concerns based on the NAO report as to the number of consultants undertaking private practice being reduced by a third..

> "However, the NAO report indicates that in 2003, the NHS introduced a new contract …"

THE CHAIRMAN: One of the important parts of the sentence is the words, "By the actions of the insurers" - is that right?

MS. SMITH: Absolutely.

THE CHAIRMAN: The numbers have been affected.

MS. SMITH: Yes, that is the first point, that is by the actions of the insurers, but it is also that the only conclusion drawn by the CMA from the NAO report, the absolute number of consultants in private practice had not declined significantly from 16,349 in 2000 to 15,754 in 2012.

FIPO's arguments in the notice of application and subsequently in its skeleton are twofold: first, it says that our finding is in some way inconsistent with NAO report, which reports that numbers dropped from 16,349 in 2000 to 15,754 in 2012. That is para.47.1, the PMI decision was premised on a material error of fact, because there was a decline in numbers. That clearly is a misunderstanding of the finding in para.7.108 which clearly explicitly had reference to that report and those numbers, and drew the perfectly reasonable conclusion that the absolute number of consultants private practice had not declined significantly from those numbers.

MR. GLYNN: Forgive me if this question is not a very good one, but the first comparison is from 2006 to 2012 - that is in the middle of the paragraph?

MS. SMITH: Yes.

MR. GLYNN: We have got a fall of a third there, which is a lot. Then in the last paragraph we have got 2000 to 2012 with a rather smaller fall. Are those figures all comparable - in other words, was there a rise between 2002 and 2006 and then a substantial fall?

MS. SMITH: I think that first statement may be about the proportion of consultants undertaking private work.

THE CHAIRMAN: There are two different points being made. One is NHS consultants undertaking private work ----

MR. GLYNN: It does say "number" and it does say "number of consultants", and the 2012 seems to be the same. On the face of it, there could have been a substantial rise to 2006 and then a substantial fall. I say "may be", I have not done the numbers properly.

MS. SMITH: It is the point made at 7.51 of the report, p.209. It is actually cross-referred in the paragraph:

> ""FIPO referred to an NAO report, which reported that there were, in 2012, 15,574 consultants in private practice, equating to 39 per cent of the total consultant population … It submitted that as the NAO indicated in 2006 that the number of consultants undertaking private practice was 55 per cent, then the

number of consultants undertaking private practice work in 2011/12 had reduced by one-third."

So those are the figures. There are figures for 2000, 2006 and 2012.

MR. GLYNN: So between 2006 and 2012 the numbers of consultants in private practice had gone down by a third?

MS. SMITH: The percentages had reduced. The percentage of consultants undertaking private practice out of a total consultant population had gone from 39 per cent to 55 per cent. That appears to be about one-third. Sorry, the other way round.

MR. GLYNN: The total consultant population would probably have been roughly stable, would it not?

MS. SMITH: It was, I think, as I understand it, yes.

MR. GLYNN: The numbers went down substantially between 2006 and 2012?

MS. SMITH: It looks like it, yes, from those figures. It went down from 55 per cent of the consultation population to 39 per cent of the consultant population undertaking private work.

MR. GLYNN: When the CMA relied at the end of 7.108 on the comparison between 2000 to 2012, was that a mistake?

MS. SMITH: That is the absolute numbers rather than the percentage.

MR. GLYNN: You get the same impression if you put it all into absolute numbers, would you not, by which I mean that if we did the sums, going from percentages to numbers, and looked at the 2006 to 2012 comparison ----

MS. SMITH: I am sorry, I am misunderstanding. If you look at 7.108, the findings, 7.108 says:

"Although the proportion of NHS consultants undertaking private work had declined from around two-thirds in 2000 to 39 per cent in 2013, the NAO observed that the absolute number of consultants in private practice had not declined..."

So that must mean that the number of NHS consultants had increased because the percentage had declined but absolute numbers had not declined.

THE CHAIRMAN: Do we have the document that is footnoted there, the Department of Health, Managing NHS Consultants?

MS. SMITH: The NAO report?

THE CHAIRMAN: Yes.

MS. SMITH: It will have been on the website; I am not sure we have it in the bundles. What we do have, which I think I should take you to, is the analysis carried out by the CMA on the

number of consultants in private practice, which is in the second part of Appendix 7.2, which is in the second bundle at page 1048.

THE CHAIRMAN: Yes, in fact I am looking at page 1044 paragraph 6 – the total number of consultants in England grew from 27,000 in 2002 to 40,000 in 2012.

MS. SMITH: Thank you.

THE CHAIRMAN: I think that the answer to Mr Glynn's question is that although the proportion has fallen the number of consultants has increased and the absolute numbers remain, say the CMA, more or less the same.

MS. SMITH: The absolute numbers in private practice remain the same, although the numbers of consultants overall had increased; so the proportion has dropped.

MR. GLYNN: The thing that interested me when I first saw this was that if you go between 2000 and 2006 and then to 2012 you do not have a peak and then a fall.

MS. SMITH: I can investigate that for you but I have not done so for the purposes of this challenge. All I can say is that the NAO report is in the bundles.

THE CHAIRMAN: The answer to that question I think is at page 1045 where we have a graph of consultant numbers and it is more or less a straight line.

MS. SMITH: It is a straight line. Then the availability of consultants in private practice is considered at 10.48 and onwards. So the challenge is that our finding was premised on a material error of fact, and then reference is made to the NAO report. But there is no material error of fact; the NAO report is clearly referenced in paragraph 7.108 and those figures support the conclusions drawn in that paragraph. It is also developed in Appendix 7.2 and I have given you the references for that. So it was not irrational, in my submission, to reach the conclusions reached in 7.108.

Going on to ground five, which is the related point that the CMA failed to consider a future fall in consultant numbers; that is put in the Notice of Application 48 – I will not take you to it – for your note – that the CMA had failed to take into account a material relevant consideration or irrationally failed to conduct any investigation at all into that issue about future consultant numbers. There is a short answer to that, which is the CMA clearly did consider the issue and that is in Appendix 7.2, page 1050. Paragraph 21 considers why there may have been a reduction in the proportion of consultants overall who are undertaking private work, and that responds to FIPO's submission that this must obviously have been as a result of the conduct of the PMIs in setting reimbursement rates, et cetera. The CMA properly, we say, says in paragraph 21 there may be other reasons why the

percentage of consultants in the NHS and also in private practice has declined in recent years.

> "Higher NHS starting salaries, more progressive pay structures and a longer working week introduced in 2006 with the aim of limiting private practice work by NHS consultants..."

The rising costs of professional indemnity insurance and the decline in demand for private work, at least outside London and the southeast; and an increased number of consultants competing for work.

> "Most of the PMIs commented that they had not seen a decrease in the number of new consultants seeking recognition."

So in light of those findings as to the current situation the CMA then goes on to explicitly consider the future situation in paragraph 23:

> "These factors might signal that the pool of NHS consultants available to the private sector might shrink in the future. However, drivers in the other direction include the fact that basic pay in the NHS has been frozen for the past two years and, as indicated by responses to our survey of consultants, even with a longer working week, 47 per cent of consultants who responded said that they had time available and would like to undertake more private work."

That was clearly considered. In his oral submissions Mr Kennelly moved this challenge essentially to not a failure to consider but a failure to consider adequately. He said paragraph 23 is very thin; we cannot support the conclusions drawn there. I say that it is perfectly rational; it is based on the evidence; it is based on the survey of consultants carried out by the CMA; it is based on the CMA's appreciation of the market and how it is working; its appreciation of what is going on in the NHS. All work undertaken and evidence relied upon by the CMA clearly is more than sufficient to support the statements made in that paragraph.

THE CHAIRMAN: Yes.

MS. SMITH: Ground six is presented as a challenge to a finding that fee caps result in lower premiums – that starts at paragraph 50 of the Notice of Application. The finding that is challenged in paragraph 50 is in the final report, paragraph 7.109, which is on page 222. This is the finding about pass on. Again, the finding is much more nuanced that FIPO would have us understand. If you look at paragraph 7.109 it simply says by way of introduction:

> "There are clear benefits to policyholders, which should be passed on to consumers, resulting from insurers promoting lower-cost consultants. Moreover, we would anticipate that competition in the insurance market would ensure that the insurers' strategies to contain costs in particular by Bupa and AXA PPP are passed though to policy-holders in the form of lower premiums and do not lead to a reduction in innovation or quality."

There is no statement there that they will be fully passed through and that point is then made clear in response to the FIPO concern. FIPO expressed concerns that it should not be presumed that if insurers have buyer power any gains would be passed on to consumers. So it is a response to a FIPO submission. You cannot assume that anything will be passed on. The response to that is, effectively, there is likely to be at least some pass on for the following reasons. One, although the PMI sector is highly concentrated – that is recognised, paragraph 3.80 – we note first that patients insured under corporate trust arrangements benefit directly from reduced consultant costs achieved by the insurers. Corporate trust arrangements are where an employer pays for the claims directly – that is the hospital's charges and the consultant's actual charges. The insurer manages the process and negotiates the price which the employer then pays, but the employer pays the price negotiated by the insurer. So the lower prices in that situation are directly passed on.

The second point:

> "Similarly, the large corporate sector is highly transparent, and competitive with pricing based on costing incurred by insurers in the previous period which will result in a significant proportion of reduced fees being passed through to such customers."

In the large corporate sector contracts are brokered, contracts go out to tender every few years, employers' claim profiles are known and insurers bid for the policy on that basis. So that particular part of the sector is highly transparent and competitive with pricing based on costs incurred by insurers in a previous period. So, in the light of that, that part of the market is likely to benefit from lower prices as well in that when the insurers are bidding for the corporate work they will reflect in their bids the lower prices they have obtained from consultants.

The final point: ". . . even a monopolist will pass on a proportion of a reduction in costs", and that is based on the theory that even if a monopolist manages to reduce its costs it will pass on some of those costs savings to its customer because the slightly lower pricing it is passing on to its customers may result in increased volumes, which will make up for the

slightly reduced profit margin. So that is our understanding of the economic theory that even a monopolist will pass on some of a reduction in costs.

So the findings are more nuanced, as I have said. All the findings are is that at least some of the benefits of lower consultant costs would be passed on through to consumers and policyholders.

Further points are made in 7.110 about the difference between corporate policyholders who can easily switch, and personal policyholders who cannot switch so easily. The findings of that paragraph were not challenged by FIPO but, in my submission, are further support for the conclusions that there may be some pass on.

That finding in para. 7.109 in our submission is clearly not irrational. It is based on evidence, it is based on the CMA's investigation, its understanding of the market it is investigating, and its understanding of economic theory.

MR. GLYNN: I think on this point it was put to you that over the same period the consultant fees ----

MS. SMITH: I was about to address that point, which is the argument that this conclusion is contrary to the findings elsewhere in the report and specific cross-references were given, I think, in FIPO's skeleton or reply. The finding on the one hand that the costs of medical cover are rising, and they referred to para. 3.79 in the report in that regard, and, on the other hand, reimbursement rates are decreasing. Again, that is over simplistic. Consultants' costs particularly are not the only costs that PMI's have to cover. A much more significant part of their costs are what they pay to hospitals. I can make that point good by taking you to p.19 of the final report, para. 2.20, under the heading: "Expenditure on privately-funded healthcare services".

> "Roughly two-thirds of expenditure on privately-funded healthcare services is on private hospitals. The next largest category of expenditure is specialists' fees and the third largest is the NHS (money spent treating private patients at NHS facilities such as PPUs). The breakdown of expenditure by segment is shown in Figure 2.2."

This is a general breakdown, but it reflects the proportion of costs of private healthcare and the main point is that it is not just specialist fees, which is the red segment in fig.2.2, but also the hospital costs, that is the cost of the bed, the cost of the drugs, the cost of the nurses, the cost of the employed healthcare workers in a hospital, as well as the costs of the specialists, the self-employed consultant, which is paid separately from the costs of the hospital.

The other point, and it is quite important in this regard, so when we are thinking about what the PMIs pay out, they do not just pay specialist fees. You can also see that in fig.2.4. The rise in the cost of private hospitals versus the rise in specialist fees. So the hospital costs have risen much faster than the costs of specialists.

If you also look at para. 3.99 on p.61, just to give you a flavour of the greater complexity of this issue, although the figures in the table 3.11 are redacted, some are, the rest are confidential, the point in para. 3.99 holds good. "Bupa was significantly affected by a combination of declining numbers of policyholders and continued growth in claims costs." So although the fees consultants are charging may be going down, the claims costs generally are going up.

THE CHAIRMAN: Yes.

MS. SMITH: So the conclusions at para. 7.109 cannot be said to be irrational.

Ground 7 is a challenge to the finding that insurers were interested in maintaining consultants in private practice, and for your note at para. 52 of the notice of appeal, challenge is made to the finding in para. 7.100 of the final report. If I could ask you to look at what that actually says, it is on p.220. It is the finding in the second part of the paragraph:

> "Further, it is in the insurers' own commercial interests to balance carefully their desire to constrain consultant fees (the benefits of which can be passed on to their policyholders in the form of lower premiums) and their need to ensure that their policyholders have access to high-quality, appropriately located and available consultants - such access is fundamental to their business as insurers. Thus, it would not be in the insurers' own interest to drive consultant charges so low that quality and innovation is negatively affected - and insurers are, therefore, unlikely to do so."

That is the finding. The challenge is that this is made on the basis of no evidence. That is clearly not so. If you look at footnote 674, which appears in the middle of that finding. 674 sets out the evidence on which this finding is based – the AXA response to issues statements and, in fact, responses from most of the PMIs commenting on the importance of consultants to their businesses.

These are statements which, in the exercise of its judgment, the CMA is entitled to take into account, and it took those into account. They are entitled to put some weight at least on those statements.

Further, in footnote 674 cross reference is made to the footnote in para. 7.94 above on the results of the CC patient survey and the reasons for choosing privately-funded healthcare. That footnote appears on p.218. Footnote 667 on p.218 is a footnote to para. 7.94, which makes the same point: consultants are critical to the insurers' business.

> "The key perceived benefits of privately-funded healthcare are treatment by a consultant of choice and treatment at a time and place convenient to the patient."

The statement in 7.94 was criticised by Mr. Kennelly this morning as not reflecting what is in the footnote at 667, and I say that is clearly wrong. "The key perceived benefits of privately-funded healthcare are treatment by a consultant of choice and treatment at a time and place convenient to the patient." Then the footnote:

> "76 per cent of respondents to our patient survey stated that the main reason for going private was reduced waiting times."

That is clearly about treatment at a time convenient to the patient. "52 per cent availability of appointment times", again at a time convenient to the patient. "39 per cent ability to choose a specific consultant", that goes to treatment by a consultant of choice. Then, the rest: "38 per cent better quality of care, 25 per cent better after care, 25 per cent better clinical care", all those are issues relating to the consultant care, and the quality of care, or at least in part to the consultant.

Again, this is evidence upon which the CMA entitled to rely on and which it did rely on in reaching the conclusions set out in para.7.100. FIPO says it is not clear why it would be in the PMIs' commercial interests to maintain a cohort of quality consultants, but that was a judgment that the CMA made. The reasons why the CMA reached that judgment are set out in para.7.94 to 7.100, and are clearly explains in those paragraphs. If you look at 7.100:

> "… it is in the insurers' own commercial interests to balance carefully their desire to constraint consultant fees and their need to ensure that policyholders have access to high-quality, appropriately located and available consultants - such access is fundamental to the business as insurers."

They do not say that is all they are concerned about. They say they balance it against reducing cost. As I understand it, FIPO are saying, "No, no, no, they are not interested in the quality of consultants, all they are interested in is driving down costs". We say, no, there is a balance there and insurers carry out that balance, and it is not in their interests to, as we say there, drive consultant charges so low that quality and innovation is negatively affected. We say that was a wholly rational conclusion that it was open to the CMA to reach, exercising its judgement on the basis of the investigation it carried out, the evidence

it refers to there, and its expert judgement as an economic regulator. It has taken reasonable steps to acquaint itself with the information required for it to answer the statutory questions. There is no irrationality.

Then, finally, we have Ground 1. That is characterised in the notice of application as failure to grant an effectively remedy (para.31 onwards, for your note, of the notice of application). FIPO's primary case, as set out in its pleadings, was that the CMA failed to comply with its statutory duty under section 138 because the fees information remedy was not effective. It is said the fees information remedy cannot be effective unless the buyer power of insurers is remedied, because otherwise there can be no effective competition between consultants on fees, even if you give everyone information.

Could I first ask you to look at the statutory duty in s.138, which is authorities bundle 3, tab 53 (at the very back). Section 138 is set out at the bottom of p.184. Over the page, the duty to remedy the AEC is in s.138(2), and the duty there is:

> "The Commission shall, in relation to each adverse effect on competition, take such action under section 159 or 161 as it considers to be reasonable and practicable—
>
> (a) to remedy, mitigate or prevent the adverse effect on competition concerned; and

I underline the word "concerned". So the CMA is under a duty to remedy the AEC which it found. I think this must be why Mr. Kennelly fairly says that if he fails in his challenge to the PMI decision he has to fail in his challenge to the fee information remedy, because the CMA clearly held there was no AEC resulting from the buyer power of PMIs for the reasons. For the reasons I have already said, that decision cannot be impugned. In those circumstances, we say the CMA clearly fulfilled its duty to put in place a remedy that is effective in addressing the AEC identified.

THE CHAIRMAN: So what AEC is identified?

MS. SMITH: I will take you to it. It is in para.10.9 of the final report, which is at p.279 Section 10 sets out the findings of AECs and, of course, because we had no finding of an AEC buyer power, there are no buyer power issues here. 10.9:

> "We found that the lack of independent publicly available performance and fee information on consultants was a conduct feature in the provision of privately funded healthcare services by consultants. This feature gives rise to an AEC in the provision of consultant services across the UK due to the distortion of

competition between consultants by preventing patients from exercising effective choice in selecting consultants by whom to be diagnosed and treated."

So that is the AEC which was being addressed.

Reduced competition between consultants arising from a lack of information leading to a weak customer response. There is no argument, as I understand it, by FIPO that the fee information remedy is not effective to remedy that AEC. In any event ----

THE CHAIRMAN: My understanding is that they do say that it is effective because the basis for finding the AEC is the last sentence:

"This reduces competition between consultant on the basis of quality and price."

MS. SMITH: Yes, and that is the point I want to address now, which is that, in any event, taking the analysis one step down, which is it cannot be effective because, in order for this to be effective, you have got to deal with PMI buyer power. That submission was made by FIPO in response to this proposal to put in place this remedy, and was addressed by the CMA at para.11.628 of the report, which takes us back to para.11.628 at p.421 of the report, that this remedy cannot be effective unless you address the PMIs' buyer power. We did not agree with this argument. We say why we did not agree with this argument. We have discussed why under Ground 3, why that conclusion by the CMA was not irrational. So this argument has been addressed by the CMA, reasonably and rationally addressed, and Ground 1 adds nothing.

THE CHAIRMAN: Yes, and you were going to give us the references to any passages in the provisional decision on remedies which you say was where FIPO raised the argument, any passages additional to the ones you have already indicated in the provisional findings.

MS. SMITH: I have those references which I can give you now, or if you would prefer to give me a minute, I can double-check because they have just been passed to me now. If you could rise for a minute I can double-check them and give them to you.

THE CHAIRMAN: I think give them to us now, and if you find there is a problem later you can let us know.

MS. SMITH: The references which I have been handed up are references to FIPO's reply to the provisional findings report, which is dated September 2013, and its reply to the provisional decision on remedies, are to be found in volume 3, tab 19, and the particular references are p.155, paras.1.3 to 1.4, pp.1567 to 1575, paras.4.1 to 4.29.

THE CHAIRMAN: Those are additional to the pages you gave us of 1611 to 1615, are they?

MS. SMITH: Yes. The second document is FIPO's reply to the provisional decision on remedies, a further document dated February 2014, which is in volume 3, tab 24, the first pages 1778 to 1785, paragraphs 2.1 to 2.22; pages 1792 to 1793, paragraphs 2.47 to 2.52; page 1808, paragraph 7.6.

I am also told that we are in the process of getting hold of a copy of the provisional decision on remedies, which we will send to the Tribunal and to the other parties.

Sir, unless you have any questions or your colleagues have any questions?

MR. GLYNN: I have just one comment, which is paragraph 11.621, which has not been mentioned.

MS. SMITH: There are a few that have not been.

MR. GLYNN: I note with interest that the information remedy is not actual prices.

MS. SMITH: It is aggregated prices. The consultants are asked to submit their pricing information to an information body and that information body then anonymises and aggregates the information. It certainly aggregates it but it also anonymises to overcome that potential issue in paragraph 11.621.

MR. GLYNN: Thank you very much.

THE CHAIRMAN: Mr. Kennelly.

MR. KENNELLY: It is important to bear in mind the basic question which the CMA was required to answer in its case: whether the PMIs' actions distorted competition in the markets for the provision of consultant services.

The FIPO challenge focused on the distortion in price competition and prompted by a question put by Mr. Glynn earlier today, the issue could be put like this: are the PMIs likely to restrict the ability of consultants to set their fees at a competitive level? What informs the competitive level?

The CMA in paragraph 7.106 refer – and if I may ask you to turn back to it – to an important factor, in my submission, in ensuring that the fees are at a competitive level. It is in the middle of that paragraph where the CMA says:

> "Fee-capping and de-recognition of consultants... has the potential to increase the disincentives on consultants from setting fees to reflect their costs, experience, expertise and the local market conditions."

Those factors inform the price and ensure that it is set at a competitive level, and where this has not happened, where it is restricted or discouraged, that is acknowledged to be a distortion because the CMA says then:

"This distortion may potentially be increased, the greater the number of insured patients on policies..."

Et cetera. I accept that the competitive price is also informed by competition between consultants – efficiencies can be generated by that kind of competition – but I say that competition on price between consultants is also severely restricted by the fee constraints imposed by the PMIs. And I accept that the competitive price is also informed by buyer power and there is nothing harmful *per se* with buyer power. In my submission, however, the buyer power of the PMIs is so overwhelming as to preclude the other drivers which lead to a competitive price.

The key evidence in my submission that price competition between consultants is restricted adversely, in the sense of the section, is the bar on top-up fees. To be clear, even when a policyholder wants to pay, is happy to pay to get access to a particular consultant or a consultant with particular expertise, to have that choice, and there is full transparency as to the fee and there was no direct extra cost to the PMI, as I sought to show in this case, the ability to charge such a fee is effectively banned for this vast majority in this market.

To be clear, the consultants have no objection to a fee information remedy, for transparency in relation to their fees and top-up fees. What they seek is to be permitted sufficient flexibility in setting their own prices and that is why they have sought, on the part of the CMA, to establish an AEC and therefore a remedy – the remedy being to prevent the PMIs from prohibiting them from charging top-up fees, which they accept should be transparent and properly explained to patients willing to pay.

That is my overall case.

In reply to the submissions made by Ms. Smith, a very surprising submission made at the beginning of her opening, in relation to a question put to her by Mr. Glynn she was asked about pass on; did she accept that in relation to evidence of effective competition was it necessary for the surplus, for the savings to be passed through to the policyholders? She said that it was sufficient but these cost savings remain with the PMIs. Obviously the CMA has found that they should also be passed through to policyholders but she said it was not necessary for them to be passed through; it was also evidence of competition if the PMIs retain those savings. That has never been mentioned in the final report.

THE CHAIRMAN: I think in fairness to Ms. Smith, in response to the question she made it clear that her primary answer was that findings were made; that they would be passed through to the ultimate consumers, but she felt that for clarity and avoidance of doubt she should make a technical point on Section 134, I think it was, about the representative customers. I did

not understand her to be saying that that actually featured in the CMA reasoning for this report.

MR. KENNELLY: That is an important clarification because it should not because it has never been said before. What Ms. Smith did say was that the CMA started to look at outcomes in order to establish whether or not competition was being distorted or restricted as between consultants, and she did refer again to the Stanbridge report in relation to profitability. Remember, there is a distinction between the materials she took you to, which showed changes in revenues and cost reimbursements and the profitability analysis, which is very important when one looks at questions of competition. The profitability analysis is standard and that is limited up to 2010.

Then she made the point that---

THE CHAIRMAN: I do not think you should shy away from the fact that there is a whole Appendix 7.2 directly addressing the question of consultants' remuneration and drawing on a lot of different sources of evidence.

MR. KENNELLY: Yes and I invite the Tribunal to look very closely, as I am sure you will, at the quality of that evidence, some of which is referenced to 2012; but it is important to focus on the particular evidence on which reliance has placed. As the Tribunal has noticed, much of it, even when it is in a later report or journal, is still related to data from a period which precedes the substance of our concern. I do not shy away from the existence of the Appendix, but the fact that it is there, as you, Sir, in particular know very well, a very large appendix or a large report does not indicate necessarily probative evidence, it is important to examine closely what is actually said and relied upon by the CMA.

THE CHAIRMAN: Yes.

MR. KENNELLY: The point was also made in relation to deciding what was a competitive level, whether a benchmark could be used in relation to past fee levels, and Ms. Smith said that they decided not to do that because of the difficulties with the difference in changes in coding. This has never, ever been mentioned in the final report, or in the pleadings, this reference to difficulties in establishing a competitive benchmark because of changes in coding has never been mentioned as far as I am aware.

She referred to 7.56 of the final report, which does not make the point and no other passage is referred to in the final report.

THE CHAIRMAN: There was a reference to the difficulties that they believed there would be in conducting a profitability analysis. I am just looking for the reference.

MR. KENNELLY: 7.56 was the passage referred to by Ms. Smith.

MS. SMITH: 7.98.

THE CHAIRMAN: Yes, I think she went first of all to 7.98 and then it may be not in the report, but she gave us by way of background that part of the difficulty at least was the change in the coding and then she referred us to 7.56.

MR. KENNELLY: Yes, I see that, and I understand what she said, but I make the point, in fairness to my own clients, that we read the report as closely as we can, we see 7.98 and 7.56 but the point she made about the reason why they did not establish a benchmark by reference to charges previously made was a reference to changes in coding. That was never put to anyone in the consultation and does not appear on the face of the report.

In fact, at 7.99 it suggests the opposite. It says:

> "In addition, on the basis of the information we received, we are not able to ascertain whether the level of PMI reimbursement rates mean that consultants' charges are being constrained by the insurers at a level which is more or less appropriate compared with the charges previously made."

which suggests that they would have liked to have made that comparison, but the information was insufficient to do so, which I think informed the question which Mr. Glynn put to Ms. Smith.

It is very important that the parameters of the findings are properly understood, in the same way that my own challenge must be properly confined.

Turning then to the question of top up. There is an important point which, Sir, you have drawn attention to and I wish to draw your attention to two things. First, in relation to the question which was put to my friend: "What is the extent of the top up fees?" there is evidence which was put to the CMA in FIPO's response to the annotated issues statement, which sets out figures, some of which referred to 2011, and you will see a change. Could you please turn up that document, it is in bundle 3, behind tab 13. This is important to understand the extent of this question of top up fees, so you can appreciate the extent of the alleged problem which the PMI say exists.

This is FIPO's reply to the Annotated Issues Statement, April 2013. Please turn to p.1296, para. 4.2. FIPO put to the CMA what it understood the shortfall rates had been.

THE CHAIRMAN: Which reference?

MR. KENNELLY: This is para. 4.2 on p.1296, and I am referring in particular to the bottom of that paragraph, the sentence beginning:

> "Alternatively, this merely suggests that the vast majority of consultants have traditionally charged at, or close to, the PMI reimbursement rates, which is

confirmed by the fact that the shortfall rate (i.e. the need for top up fees) has been very low in the past."

Then in brackets there is confidential information where FIPO refers to evidence it obtained as to the percentage of occasions when these extra payments are required. You can see that the figures are given, and the footnotes explain where FIPO got the information. For AXA it is from November 2011, and they were referring to publicly available statements, and answers which the insurance companies gave to FIPO, but Bupa refused to provide the relevant information, but the other insurance companies did, and I just ask you to read to yourselves the relevant percentages beside the names of the insurance companies. My point is that the percentages are very small.

Could you turn then to the final report, where more up to date figures are given – para. 7.69. The first sentence is:

"According to the insurers, shortfalls are identified by policyholders as a key concern."

Sir, you made the point, well, it is not surprising that policyholders should be concerned by this, but again, it is important to bear in mind that FIPO does make a distinction between shortfalls which are of concern to policyholders, and top up fees which are agreed with policyholders, which they are happy to pay in order to obtain choice and access to expert consultants.

THE CHAIRMAN: What is the evidence that they are happy to pay it? They agree to pay it, they may not be happy because they may feel strongly that: "I have paid my insurance premium why is the insurance company not paying for it? Here I come along, I want to use a consultant, that chap looks good – oh, he is telling me I have to pay another £1,000. I will pay it because I want him, but I feel pretty aggrieved about it".

MR. KENNELLY: Where is the evidence, Sir?

THE CHAIRMAN: Well, you are the one that said they are happy to pay it. I am just questioning that. Where is the evidence that that ----

MR. KENNELLY: First, I say it is obvious, and secondly, it is 7.102.

THE CHAIRMAN: Well, it is not obvious to me, I can tell you that.

MR. KENNELLY: I understand that, but it is a question of obtaining access. A policyholder may well be 'happy' – and I use that word – to pay the fee in order to get a particular consultant at a particular time in a particular way – and evidence was put to the CMA at 7.102. I apologise for the use of the word "happy", I do not need to go that far.

THE CHAIRMAN: Right.

MR. KENNELLY: This is about competition, it is not about happiness, it is about whether they wish to pay, or are willing to pay, perhaps the two are never ----

THE CHAIRMAN: I think when they find themselves in that situation, they are willing to pay, happy or otherwise.

MR. KENNELLY: Indeed, and so (d) is the evidence:

> "A policyholder might wish to pay a top-up fee in order to secure the services of a consultant with particular expertise, which enhanced patient choice and transparency. This would provide an incentive on consultants to develop expertise …"

to be better in order to be able to attract those kinds of patients who are willing to pay those fees. Remember, the CMA has found that even where a policyholder wishes to pay a top up fee it is barred from doing so in the circumstance which I have described, where consultants are subject to fee caps.

Turning back then to the percentages, the specific point I wish to make in 7.69 is, the percentages that you read there on the face of that paragraph refer to the instances when the consultants' fees were higher than the fee schedule of the PMI. As, indeed, you pointed out to Ms. Smith there is nothing to suggest here that these instances are all situations where a policyholder was surprised by the extra fee. It must encompass, on the face of that paragraph, the situations where policyholders wished to pay a fee in order to obtain access in the circumstances described in the later paragraph. The language is broad enough to cover both situations.

In any event, the vast majority, on the face of these figures, still comply and adhere to the fee schedules, the Benefit Maxima, and remember the Bupa Benefit Maxima you know is the industry standard and the lowest level of reimbursement rate.

If I may say so, the reason I submit to you why the rates went up between 2011 and 2013, of course, is because we know the reimbursement rates came down dramatically in 2012. You will recall I took you to the figures showing that Bupa in particular radically reduced its reimbursement rates in 2012.

THE CHAIRMAN: Just remind me of the reference?

MR. KENNELLY: That was 7.63.

THE CHAIRMAN: Thank you.

MR. KENNELLY: Then Ms. Smith addresses this question of the extent of the constraint, and she described the various types of consultant constrained by the fees, and she made a distinction between the Bupa consultants which have a contract which bars them from

charging top-up fees, and those which have entered into informal agreements who were not subject to any legal obligation.

In my submission, as a matter of reality and as a matter of assessing competition, there is no real distinction. The question is, as a matter of substance not of form, are the consultants constrained? The threat of de-recognition hangs over those who are subject to contracts and those who are subject to informal agreements. So long as that threat hangs over them it matters not whether they are subject to a contract or an informal agreement, they are banned by these fee constraints. It is unreal to suggest that there is a difference of substance between the two situations.

Turning to the question of flexibility, Ms. Smith had to acknowledge in 7.72 in the redacted bit, you still have a flexibility, AXA show when consultants want their fee caps raised.

She said in relation to the two situations that there is a difference between the consultants being required to adhere to their fees, and those who choose to adhere to the fees. Again, turning back to the point which you made to me about the difference between shortfall and top-up, contracts are voluntary in every sense, and they choose to be required by entering into the contracts. They choose to be bound in the informal agreement. As a matter of substance, there is no difference. In both situations they are *de facto* banned.

Turning then to the question of the extent, the CMA is quibbling about the degree of the restriction. In my submission, when one combines the informal agreements with the formal ones, it is plain that it covers the vast majority of consultants.

The CMA says that assuming that Bupa construes with this practice, it is likely that the majority of consultants will be bound, but there is no basis in the report for suggesting that Bupa would not continue. All the evidence points that way.

This is the finding in 7.106, this is the one beginning, "Moreover, assuming that Bupa continues …" Ms. Smith, unsurprisingly, tried to downplay this and say it was a limited point. I say, no, this is a central factual finding and, more importantly, forward looking, and describes precisely what is likely and expected to happen. It is not just Bupa, because we know that AXA set its fee schedules to quote the CMA along the same lines. That is at 7.61.

THE CHAIRMAN: I think the point Ms. Smith makes is that in 7.106, and again I think at 7.133, the CMA looked squarely in the face the very point that you are making and they take that into account, but they weigh it against a series of other factors as well - in particular, 7.107, 108, 109, 110, so that apart from 7.133.

MR. KENNELLY: Yes, except it is not a question of weighing it. They have asked themselves the question, if extensively and rigidly applied, 7.106, and you have my submission that on their own findings the fee constraints are applied extensively and rigidly.

THE CHAIRMAN: They clearly did not think that was the case but we have your submission.

MR. KENNELLY: Based on their own findings. Sir, this is, as I have been reminded, a judicial review. I am bound by the facts as found by the CMA, and I rely upon them in showing that, in fact, on their findings the fee constraints were applied extensively and rigidly.

THE CHAIRMAN: I think we understand the constraints you are operating under.

MR. KENNELLY: In relation to *Skyscanner*, the differences in fact and the differences in the statutory regime make no difference. The issue of principle is precisely the same except for two matters. The first is that, of course, in this case I say that the failure properly to investigate the matters is worse because it is not, as I said, a merely relevant consideration, this question of whether consultants could compete below the fee cap and whether they were likely to be driven out of the market, and whether the savings were to be passed on to policyholders were matters of central importance and not properly investigated.

The second distinction is the one put to me by the Chairman which is that it was suggested in *Skyscanner*, and found in *Skyscanner*, that the extra work would not have been very difficult for the OFT. In my submission, that is not central to the finding in *Skyscanner*.

The ratio in *Skyscanner*, as we can see from the judgment, relates to the duty of the CMA properly to investigate a matter which is put to it and which is of importance. The question is not that it is irrational to say to the consultee, "You must find the evidence", the rationality error was that they failed properly to investigate the matter. I take that from the second part of para.90 of *Skyscanner*.

Then to the grounds. Ground 2: Ms. Smith bases her defence of Ground 2 - this is my challenge to the first sentence in 7.111 - that, as a matter of law, it is correct that the policyholder, under its contract with the PMI, it can pay the top-up fee. I do maintain my submission that that is unreal, because the consultant cannot receive the top-up fee. This is not, as I say, just for Bupa, it covers AXA also.

Turning then to Ground 3, she relies on the fact that the relevant part appears in section 11, but one must read the final report as a whole. That cuts both ways. It is relied upon by the CMA in cases, and I rely upon it in this case. Paragraph 11.628 is all about the PMI decision. It is where, although in the context of the effectiveness of the remedy, the CMA addresses FIPO's argument in relation to the PMI decision. It is in that context that it says at the end that consultants could still compete below the level on price. In case there is any

doubt about its relevance also to the effectiveness of the remedy, it says "making the remedy effective". That I say is irrational because it has never been examined.

On the point of procedural fairness, I do invite you to read the documents and the references you have been given, because you will find ----

THE CHAIRMAN: You are content, those are relevant references?

MR. KENNELLY: I am, and I, in fact ----

THE CHAIRMAN: Right.

MR. KENNELLY: The provisional findings report says in para.7.85 ----

THE CHAIRMAN: The provisional findings report, just tell us where it is?

MR. KENNELLY: This is in tab 6, bundle 1. This is relied upon as the indication to FIPO that the CMA believes that it is possible for them to compete below the fee cap. It says:

> "In relation to fee-capping specifically, we consider that, on balance, the evidence we have received does not demonstrate that, at present, Bupa- or indeed any other PMI - is distorting competition between consultants through fee-capping of some consultants."

This ambiguity, when you come to read all of those references which you have been asked to look at, you will see that this reference to fee capping of some consultants demonstrates that the CMA did not accept that fee capping covered the majority of consultants in this market. So the question of whether or not ----

THE CHAIRMAN: I am sorry, how do you get that?

MR. KENNELLY: It says "some consultants".

THE CHAIRMAN: That just leaves open what proportion?

MR. KENNELLY: Exactly, but the point is that if either they had acknowledged that fee capping was almost universal and/or said, "And we find that it is possible to compete below the fee cap", and I am repeating the point that I made in opening, we would have addressed that specifically. That is an important point which was not made expressly. It is not fair, I say in the sense of procedural fairness, to expect us to infer that they have decided that it is possible for consultants to compete below the fee cap. That could be read to mean that, notwithstanding the fee cap, it might still be possible for consultants to compete above it.

THE CHAIRMAN: If you look at 7.84 they make the point that:

> "... Bupa and AXA have buyer power but we have found no evidence to suggest that it is being exercised in such a way as to harm competition, for example, by leading to a shortage of consultants in private practice or to a reduction in innovation or quality of consultant services. Indeed, the incentive is on PMIs to promote competition among

consultants and maintain innovation and quality to protect and indeed to improve demand for PMI."

MR. KENNELLY: That is entirely consistent with a finding that they be able to compete above the fee cap. I am not saying that we accept there is a strict fee cap which constrains you and any competition must be below that.

THE CHAIRMAN: They say that at 7.85.

MR. KENNELLY: They do not say that sufficiently clearly – through fee capping of some consultants is not sufficiently clear for such an important finding.

Grounds four and five really turn on what they did to examine the likely fall in consultants in the future and my friend relies ultimately on paragraph 23 of Appendix 7.2 and you have my submissions about the inadequacy of that paragraph.

Ground six, the evidence of pass on. There is no evidence. My friend referred you to the relevant paragraph of the report but there are no references in that paragraph to any evidence. It is all assumptions and it is a question of assumptions made in the face of evidence pointing the other way because, as we have seen, based on the figures we took you to at figure 2.2 of the report, consultants' costs, for paid consultants amounted to 25 per cent of the ultimate bill paid by PMIs – it is not an insignificant number. Yet it is accepted that remuneration rates have gone down and it is accepted that PMIs' prices, the charges for policies have gone up. The CMA never asked itself in those circumstances how are the PMIs passing through to policyholders now the cost savings they have earned from consultants. They never undertook that analysis; they simply assumed, based on the economic theory, which you have heard, that it would happen.

In ground seven, the references to which my friend took you to were in part the PMIs' own submissions which, in my respectful submission, are obviously self-serving. They would say that, would they not, the importance to them of consultants? More telling is the survey and my friend had no answer to the point that although relied on heavily by the CMA it still is based on a statistically inadequate sample of consultees – 118 people responded to that. That is far too thin for the purpose of such an important issue.

On ground one I also rely on the paragraph 10.9 that my friend took you to because in it you can see the clear distinction between the feature which they found causing the AEC and the AEC itself.

At 10.9 it refers to the lack of independent publicly available performance and fee information and it says: "...the lack of information was a conduct feature in the provision of privately funded healthcare services by consultants. Then:

"This feature gives rise to an AEC... in the provision of consultant services across the UK due to the distortion of competition between consultants by preventing patients from exercising effective choice in selecting the consultants by whom to be diagnosed and treated. This reduces competition between consultants on the basis of quality and price."

Those last two sentences tell you what the adverse effect on competition is. My point is that that is the same adverse effect on competition which arises from the feature which I have been submitting to you. If I am right that they should have found that the feature which I have referred to, distortion of competition, in the same market, the remedy which they have produced, which deals with the feature which they think is the sole feature causing this AEC will not be effective, the same AEC will remain because of the buyer power of the PMIs. That is why the fee information remedy will be ineffective; it is trying to address a problem that cannot be properly addressed unless the buyer power of the PMIs is addressed also. The rest of the paragraph reference I gave you in my opening demonstrates a very clear link between the PMI decision and the information remedy.

MR. GLYNN: The information remedy seems to cover a lot more than fees, does it not?

MR. KENNELLY: Yes.

MR. GLYNN: Meaning that a lot of patients would know more about which doctors were likely to give them good treatment or bad treatment.

MR. KENNELLY: Yes.

MR. GLYNN: Irrespective of the fees. There would still be a more effective element of competition between consultants on the basis of the quality of their work.

MR. KENNELLY: I am constrained by the discussion of yesterday. I cannot challenge directly the finding – we know that there was no current evidence on impact on innovation or quality. I do base my submission on the question of competition on price. I also say, as I pleaded, that this AEC will ultimately drive consultants out of the market, which will ultimately have knock-on effects in respects other than price, which is encompassed by the submission I made about consultant numbers. You are quite right I am basing this on price competition mainly.

For the avoidance of doubt do please take time to read the order itself and you will see that a great part of it refers to fee information. It is plainly an important part of the remedy and it is that part that I say will be ineffective in particular.

Unless I can be of any further assistance, those are my submissions.

THE CHAIRMAN: Just on one point, the procedural aspect of ground three, I have been doing my best to look at the provisional findings report, core bundle, tab 6, and it is on this question of whether there is sufficient advertence in the provisional findings as to the significance of the point on top-up fees.

MR. KENNELLY: Yes.

THE CHAIRMAN: At page 759 in the bundle we have in the provisional report a whole section on top-up fees, in particular 7.68 setting out that:

> "Consultants and their trade associations have argued that:
>
> (a) Bupa and AXA represent a significant proportion of the market for consultants and through requiring consultants only to charge up to their reimbursement rates are determining the maximum fees a consultant may charge.
>
> (b) Consultants can no longer set their fees."

And so on. Then at (c):

> "AXA and Bupa's reimbursement rates do not take into account differentials between consultants in terms of experience, expertise or location in the country.
>
> (d) The codes are relatively rigid and do not take into account the level of variation..."

And so on. Then in provisional assessment at 7.69 and following of those matters, which really looks similar to the assessment of that case of FIPO and others in the final report. So was it not abundantly clear from the provisional findings that the issue of top-up fees was indeed significant and that there was an indication that the CMA was not persuaded by the points which had been made specifically in 7.68 by FIPO and others about the significance of the top-up fees?

MR. KENNELLY: There is no substitute for an extensive reading of this document because it is not crystal clear on the basis of this that the CMA had accepted that the fee capping, formal and informal, was as extensive as I have put to you; and the reference to fee capping of some consultants in 7.85 suggests that it might be possible in the mind of the CMA that the fee capping was not as extensive as I put to you.

THE CHAIRMAN: 7.68, just reading that without going back to the underlying material, suggests very much the points you have been making to us were being made to the CMA not only on their provisional findings, but the previous document that they put forward.

MR. KENNELLY: That is correct. We have been submitting consistently that the fee caps are highly restrictive. What is not clear is that the CMA accepted that they were as restrictive as they were ultimately found to be based on their findings.

THE CHAIRMAN: Insofar as there is a procedural complaint it is that you did not have a fair chance to make the argument and what I am putting to you is that you seem to have made it repeatedly.

MR. KENNELLY: Yes, on the extent of the fee capping restriction, but what was not put to us squarely was that competition would be possible on low fees. Mr. Glynn said to me competition is not just about profitability. The question whether competition is possible with the fee caps is a complex matter, and it was never addressed until it appeared in the final report, and it is there in black and white for the first time in section 11 that competition is possible – will be possible below the fee caps. It is not fair in the legal sense to expect us to divine it from these passages which, undoubtedly, we saw, and which we submitted to and it appeared in the final report. That is why I do not challenge under the procedural fairness head these parts of section 7, I address para. 11.628, because I say there the CMA reveals a part of its reasoning which had never formerly been revealed to us.

THE CHAIRMAN: Yes, thank you very much.

MR. KENNELLY: Thank you.

THE CHAIRMAN: We are grateful to all counsel for their assistance in this matter. We will obviously reserve our judgment to be produced at a later time in the usual way. We will rise now. Thank you very much.

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