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

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

Case Nos. 1251/1/12/16  
1252/1/12/16  
1253/1/12/16  
1254/1/12/16  
1255/1/12/16

17 November 2016

Before:

**THE HON. MR. JUSTICE ROTH**  
(President)  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

<b>GENERICS (UK) LIMITED</b>	<u>Appellant</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>
- AND -	
<b>GLAXOSMITHKLINE PLC</b>	<u>Appellant</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>
- AND -	
<b>(1) XELLIA PHARMACEUTICALS APS</b>	
<b>(2) ALPHARMA LLC</b>	<u>Appellants</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>
- AND -	
<b>ACTAVIS UK LIMITED</b>	<u>Appellant</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>
- AND -	
<b>MERCK KGaA</b>	<u>Appellant</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>

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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Stephen Kon and Mr. Christophe Humpe (Partners, of King & Wood Mallesons LLP) appeared on behalf of the Appellant (Generics (UK) Limited).

Mr. James Flynn QC, Mr. David Scannell and Ms. Charlotte Thomas (instructed by Nabarro LLP) appeared on behalf of the Appellant (GlaxoSmithKline PLC).

Mr. Robert O'Donoghue (instructed by Clifford Chance LLP) appeared on behalf of the Appellants (Xellia Pharmaceuticals APS and Alpharma LLC)

Ms. Sarah Ford (instructed by King & Wood Mallesons LLP) appeared on behalf of the Appellant (Actavis UK Limited)

Ms. Ronit Kreisberger (instructed by DLA Piper UK LLP) appeared on behalf of the Appellant (Merck KGaA).

Mr. Jon Turner QC and Mr. David Bailey (instructed by CMA Legal for the Competition and Markets Authority) appeared on behalf of the Respondent.

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1 THE PRESIDENT: Thank you all for your submissions. Can we deal with the non-  
2 controversial item first? I think, Mr. Flynn, you have applied for a redacted version of Mr.  
3 Horridge's witness statement, to remove his address I think, and also the names of some  
4 employees from an exhibit to Mr. Sellick's witness statement.

5 MR. FLYNN: That is right, and there is no objection as I understand it.

6 THE PRESIDENT: No one is objecting to that, so I shall make that order.

7 MR. FLYNN: Thank you.

8 THE PRESIDENT: Next, *Lundbeck* and the *Lundbeck* appeals, can I just ask for some factual  
9 information? A lot of people here are involved in them or know about them, or their clients  
10 are involved. I have been told that the *Merck* and *Xellia* judgments are being appealed as I  
11 understand it. Can anyone help me on the other judgments? Does anyone know, *Lundbeck*  
12 itself, is that being appealed – does somebody know? (After a pause) No one knows.  
13 *Ranbaxy* do you know, Mr. Bailey?

14 MR. BAILEY: We do not know.

15 THE PRESIDENT: And *Arrow Group*, Mr. Kon, do you know?

16 MR. KON: To the best of my knowledge there is an intention but I do not think it is quite time  
17 for the appeals.

18 THE PRESIDENT: It is next week or something?

19 MR. KON: Yes.

20 THE PRESIDENT: So they have presumably made up their mind.

21 MR. KON: I think they are advanced in their thinking on the intention to appeal.

22 THE PRESIDENT: Very possibly. Are there any others? I think that is it, there are six of them,  
23 are there not? Yes.

24 Mr. Turner, thank you for the CMA's submissions on the relevance you attach to the  
25 judgments which you say are relevant in four respects that you have set out. Are you  
26 intending to rely on those judgments in the General Court in the hearing of these appeals?

27 MR. TURNER: Yes, we say they set out the law as declared by the European Courts.

28 THE PRESIDENT: Yes, but set out the law in a way that is relevant and applicable here?

29 MR. TURNER: Yes.

30 THE PRESIDENT: Basically as set out in your----

31 MR. TURNER: Basically as set out in the submissions.

32 THE PRESIDENT: Mr. Flynn, in your note, and perhaps you can help me on that, I understand  
33 that you say and, indeed, all the appellants say that those cases are distinguishable –  
34 obviously, the facts are different – materially and significantly different, and therefore they

1 would not affect the outcome of this case. What I am slightly struggling with, I think you  
2 go further, and you say the General Court is wrong and this Tribunal was not bound to  
3 follow it and if, in our view, it is wrong, we should just disagree with it and take a different  
4 approach. Have I misunderstood you, because I struggled with that a bit.

5 MR. FLYNN: That would be my submission. The General Court has ruled on the validity or, at  
6 least, on the annulment actions brought by Lundbeck and others, and in so doing what it  
7 seeks to do is apply the rulings of the Court of Justice interpreting relevant provisions of the  
8 Treaty, Article 101 in this case. Our submission clearly to you, if you take the analogy of  
9 the *Cartes Bancaires* judgment, in the interim between the Court of First Instance's ruling  
10 in that case, the General Court, as it might have been, and the Court of Justice saying that it  
11 was wrong, we say you would not have been bound in the interim. You would have been  
12 perfectly able to say, as a matter of law, that is not the right approach to follow, that is not  
13 what the Court of Justice said in the relevant cases on object agreements, and that you  
14 would be free to take your own view on those matters, as we said, if necessary with the  
15 assistance of the Court of Justice. That is our submission and that may be a submission we  
16 will need to develop at the hearing if Mr. Turner's line is, where the Court of First Instance  
17 has made a proposition of law, that you have no choice but to follow it.

18 THE PRESIDENT: I have to say, it does seem to me that the point you put and the submission  
19 you made, I have great difficulty with in the light of s.60. It may not be for me alone to  
20 decide this. I do think at the moment, subject only to a question of reference that I will  
21 come back to, the law as stated, the principles of law stated by the General Court in those  
22 judgments, bind us in this Tribunal. The question of what to do about this case, I have to  
23 say, I approach on that finding. I really struggle to see how we can say, "We think the  
24 General Court have got it wrong, and therefore we are not going to follow them". How are  
25 we free to do that in the light of the statute?

26 MR. FLYNN: In my submission, s.60 does not super-add any authority to a General Court  
27 judgment that it does not have as a matter of European Union law. While of course it is a  
28 binding judgment in relation to the validity of the *Lundbeck* decision, it is not, in my  
29 submission, a binding judgment in relation to the European Union law on how to interpret  
30 Article 101 in respect of matters such as potential competition or object restriction that the  
31 CMA would seek to rely on; and likewise in relation to the penalty matters.

32 THE PRESIDENT: It is not in the authorities that have been produced, but at any time when the  
33 court - and that, of course, includes this Tribunal - determines a question arising with regard  
34 to Chapter I or Chapter II, then it must act with a view to securing there is no inconsistency

1 between the principles laid down by the Treaty and the European Court. That includes, of  
2 course, the General Court, and any relevant decision of that court. So if the decision is  
3 relevant, we are bound to ensure that there is no inconsistency.

4 MR. FLYNN: The decision of the General Court is one in relation to the validity of the *Lundbeck*  
5 decision. That is its relevance. The General Court has no authority, as a matter of  
6 European Union law, to lay down the general principles of law. Its job is to apply them.

7 THE PRESIDENT: What does it mean when it says the principles laid down by the Treaty and  
8 the European Court, which is defined to include the General Court?

9 MR. FLYNN: You are asking yourself, what are the principles laid down? In my submission, the  
10 principles are laid down by the Court of Justice and they are applied by the General Court.

11 THE PRESIDENT: It does not look as though the draftsman of s.60 had that distinction in mind.

12 Mr. Turner, can you tell me the CMA's view on this----

13 MR. FLYNN: Might I just add: as you say, this arises at a time when the court determines an  
14 issue. This is something on which you will be entitled to have, and will have, submissions  
15 on at the hearing.

16 THE PRESIDENT: But it does have a great effect on the decision I have to make now, which is  
17 whether we proceed or whether we wait.

18 MR. FLYNN: The analogy I have put to you, Sir, is would you feel bound by a Court of First  
19 Instance ruling in the *Cartes Bancaires* case, despite that being inconsistent, as was later  
20 shown, with existing rulings of the Court of Justice? Are you put in a box where you have  
21 to follow that which, after submission by the parties, you are persuaded is not right on a  
22 particular point?

23 THE PRESIDENT: My present feeling is that you would have to make a Reference - that is my  
24 thinking at the moment - or you would be entitled to make a reference saying you are  
25 troubled by this, but to say you can ignore it because this Tribunal thinks it is wrong.

26 MR. FLYNN: That is the course indeed that we set out in our submissions.

27 THE PRESIDENT: Yes, that I understand.

28 MR. FLYNN: That is something which should follow submissions, and not, in my respectful  
29 submission, precede them.

30 THE PRESIDENT: I just want to see within what framework I have to exercise the discretion -  
31 clearly I am not bound to adjourn this case, it is a question of discretion what the position is.

32 MR. TURNER: We had assumed until seeing GSK's skeleton that the domestic law was clear in  
33 s.60. We have listened to what Mr. Flynn says and we do not think that it is a reasonable  
34 interpretation given the Statute. Section 59 defines the European Court to include the

1 General Court and s.60 says in very clear terms that the court must act to secure known  
2 consistency between the principles laid down by, among others, the General Court, and any  
3 relevant decision of that court as applicable at that time in determining a corresponding  
4 question. Therefore, we do not see this as really open to doubt on the language of the  
5 Statute.

6 THE PRESIDENT: I do not want to prolong having submissions from everyone on this. It does  
7 seem to me there is no ideal solution to the situation we are in. The appeals that are being  
8 brought, and I imagine there will be more than two, are on substance as I understand it, they  
9 are not just against the penalty, and no one knows what may happen in the Court of Justice,  
10 but what we do know is that it will take a long time. One course would be to adjourn this  
11 appeal, re-fix it, but it seems to me realistically it could not be re-fixed before November  
12 2018 – I do not think it would be safe to make any earlier listing – and that is a very long  
13 time.

14 The alternative is to go ahead. That will mean that we will be able to find the facts. It will  
15 mean that a lot of time is no doubt spent trying to distinguish or not the *Lundbeck*  
16 judgments, all of which might be academic if they are then set aside; that is the unfortunate  
17 part. The scope of the debate will be, to some extent, influenced by the *Lundbeck*  
18 judgments, which again might be academic if they were even modified.

19 However, if and insofar as we felt we could not distinguish the facts and we will by then  
20 have the advantage of actually having the appeals in the *Lundbeck* cases and knowing  
21 exactly what are the points of appeal, if insofar as we feel we cannot distinguish, having  
22 heard argument, and it is a point that has been taken on appeal, to make a Reference. But a  
23 preliminary ruling proceeds to a quicker timetable than a direct action appeal, so there  
24 would be a reasonable chance, subject obviously to how the European Court manages these  
25 things, that any Reference from this Tribunal could catch up with the *Lundbeck* appeals,  
26 then they might decide to hear them with the same constitution of the Court of Justice, and  
27 that will produce a lot of clarity as to quite what applies to what.

28 On the other hand, we may be persuaded by all the appellants, insofar as *Lundbeck* is  
29 relevant, it is a very high level of generality and there are a lot of distinctions, and therefore  
30 we are not troubled by it, in which case no Reference and the matter is fully determined.

31 But, I think if we go ahead, there is a distinct possibility that we might have to make a  
32 Reference unless Mr. Flynn persuades the full Tribunal that we can ignore it if we think it is  
33 wrong. But, as I have indicated I struggle with that.

1 I think that is the situation as I see it, so that going ahead does give rise to a very real  
2 possibility – I put it no higher than that – that there might be a Reference of some issues, but  
3 other issues, no doubt, will be determined, and all the evidence will be heard, as opposed to  
4 putting it back for what is a very long time, and really unsatisfactory. Does anyone want to  
5 make any submissions in the light of those observations?

6 MR. TURNER: Sir, we are very grateful, and we do see the sense in that. We would make the  
7 following additional comments. So far as concerns the possibility of this Tribunal making a  
8 Reference, our preference, and it seems in common with that of the appellants, would be for  
9 the Tribunal not merely to find the facts but then to apply the law as it stands to the facts  
10 that it finds. If that course is taken, then there will be a clear, reasoned judgment from this  
11 Tribunal, and it is said by at least one of the appellants in their skeleton, and we agree, that  
12 it could then be taken on appeal.

13 THE PRESIDENT: I am not attracted by that, Mr. Turner. I do not think it is right to leave the  
14 Court of Appeal to sort out the mess if there is a different view of the law, and they may  
15 well send it back to us if there needs to be further examination of the facts or detailed  
16 argument; we are the specialist Competition Tribunal and I think it is for this Tribunal to  
17 produce a final judgment on the law, and then the Court of Appeal can say whether it is  
18 wrong and we should take into account the law as clarified. It is quite different, obviously,  
19 if a new case arises and there is a judgment from the European Court in the meantime, but  
20 one of the cases actually on appeal, which is being relied on, that is a very particular  
21 situation.

22 MR. TURNER: I am obliged. It will mean that the Tribunal is in the position, at the very least, to  
23 be quite precise about the area of uncertainty in making a Reference.

24 THE PRESIDENT: Yes, and we can indicate, and the European Court, I think can say, perhaps  
25 informally, or judges of that court, that they welcome a national court indicating its view on  
26 the question referred, so we can indicate what we think might be the right approach subject  
27 to their ruling.

28 MR. TURNER: Yes.

29 THE PRESIDENT: We can go quite far down the line, but they can say “no” we are wrong.

30 MR. TURNER: In relation to the procedure, we have had an initial look at that, thinking that this  
31 might have been, Sir, in your mind. There is the possibility of making an Article 267  
32 Reference, and it being heard on the same occasion in Luxembourg by the same  
33 composition of the court, with judgments delivered on the same day. We have found  
34 precedents for this happening before. It is not formally possible to join two cases of

1 different kinds under the court's rules, but that practical solution has been adopted before,  
2 and it may be the case here.

3 THE PRESIDENT: That would be a matter, obviously, for that court.

4 MR. TURNER: The final point is a remark, Sir, that you made about the advantage of having the  
5 *Lundbeck* appeals. We say that that is an important issue for us to address here. We have  
6 suggested to the appellants that it will be appropriate for them to produce their appeals to  
7 the Court of Justice so that this Tribunal and the CMA can see the way in which they put  
8 the case, how they say *Lundbeck* is wrong, what the factual issues are that give rise to the  
9 legal points there, and that way any question of overlap between the issues in these appeals  
10 and in *Lundbeck* will become clear. Therefore, we would suggest that the parties should be  
11 directed to produce copies of their written appeals when those are filed for the purpose of  
12 these proceedings.

13 THE PRESIDENT: I am not going to do that now. We will have, long before the hearing, the  
14 published notice summary – it is short, but it does indicate what are the points being  
15 challenged as published in the Official Journal or on the court's website for each appeal – if  
16 it felt important then to get more detail you can make an application if it is not provided  
17 voluntarily, but I really do not think we want what would be very substantial documents  
18 going into detailed facts of another case, we have enough paper to work through in this  
19 case. What I really want to know is just simply what are the issues of law, because an  
20 appeal to the Court of Justice is only on law, that are under challenge and what are not. I  
21 hope that is clarified by the summary, if it is not we can get clarification.

22 MR. TURNER: Sometimes their summaries are rather opaque.

23 THE PRESIDENT: I see that.

24 MR. TURNER: Prior to the time of the skeleton arguments at any rate we may need to be able----

25 THE PRESIDENT: I am not going to rule on it. First, you can ask, it might be provided  
26 voluntarily.

27 MR. TURNER: It may be.

28 THE PRESIDENT: And if it is not you can, if necessary, make an application here, but I am not  
29 going to deal with that now. I can say that my inclination, subject to any further  
30 submissions is that we should proceed with the possibility of a Reference, and not put it all  
31 back, which would mean we only start hearing evidence in November 2018, albeit that the  
32 shape of the argument might be clarified by an Advocate General's opinion and a judgment  
33 from the Court of Justice. That is my inclination, having looked at what you have all said,  
34 but I do not think you all took into account the possibility of a Reference.



1 Does someone, for any of the parties, wish to dissuade me from that course? You can take  
2 instructions, if you like.

3 MR. O'DONOGHUE: Sir, that was essentially our position as well.

4 THE PRESIDENT: Yes, I saw that.

5 MR. O'DONOGHUE: One further point which, Sir, you have suggested, it is no part of my  
6 client's appeal that *Lundbeck* is wrong. In fact, we rely on *Lundbeck*.

7 THE PRESIDENT: But that also might create difficulties if it is set aside.

8 MR. O'DONOGHUE: It may do. Incidentally, that is perhaps a reason why Mr. Turner's  
9 requests for full copies of the appeals is also not appropriate.

10 THE PRESIDENT: Does anyone else wish to add anything?

11 MR. KON: The only point I would make, which is, anyway, fairly academic, that there are, of  
12 course, other cases in the wings on this same subject before the General Court as well, so to  
13 tie us too closely to *Lundbeck* in any event may not be particularly sensible.

14 THE PRESIDENT: Obviously, we would not be waiting for all the cases. It is not unlike the  
15 situation where the High Court is going to have a long expensive trial with one party relying  
16 on a Court of Appeal judgment, which is on appeal to the Supreme Court. In that situation,  
17 I think most judges would adjourn the High Court trial until after the Supreme Court  
18 judgment, but the timing is rather different, and I think that weighs very heavily here, the  
19 timeframe and the extent of delay.

20 MR. FLYNN: Sir, I was only going to add Mr. Turner said he had not realised before reading the  
21 skeleton that was our position, it was in our submissions on *Lundbeck* as also is the position  
22 where we are not saying *Lundbeck* is all wrong by any means.

23 THE PRESIDENT: It was in your submissions; you are quite right.

24 MR. FLYNN: You will see at the end that there is plenty that we agree with. I just say that it is  
25 open to any party to say "This bit is right"----

26 THE PRESIDENT: Anyway, you are not seeking to dissuade me from that course.

27 MR. FLYNN: No, it does not sound as if anyone is.

28 THE PRESIDENT: Ms. Kreisberger?

29 MS. KREISBERGER: The concern that occurs to us by approaching these appeals on this basis is  
30 one of cost and timetabling, which is that one will, in effect, have to argue both that  
31 *Lundbeck* has been wrongly decided, and that question will go up to the Court of Justice,  
32 but on the secondary basis that if we are wrong about that, even applying *Lundbeck* it does  
33 not govern these settlements because of the distinctions and so we really want to reflect on  
34 the impact that might have on the timetable.

1 THE PRESIDENT: I do not think it would have an impact on a timetable. You are all arguing, I  
2 think, that *Lundbeck* is distinguishable in so far as it expresses views about a reverse  
3 payment settlement, or potential competition, and so on, and in other aspects you may need  
4 to rely on *Lundbeck*. So, one will have to decide whether it is distinguishable. If it is not,  
5 you just say it is wrong, and it is under appeal, and the appeal is there. You do not have to  
6 persuade us that it is wrong, because I do not think, unless Mr. Flynn makes headway in his  
7 submission, that we will reach a view that it is right or wrong. You do not have to argue  
8 that appeal.

9 MS. KREISBERGER: No, but the submissions will need to be approached on those two layers.  
10 We reserve our position to say, irrespective of the answer in *Lundbeck*, we think the  
11 answers that we have provided are the right ones, but these are the legal questions that go up  
12 to the Court of Justice.

13 THE PRESIDENT: Yes, I do not see that it would greatly complicate matters. There are costs  
14 aspects, because if there is a preliminary ruling and if an answer comes back that it is  
15 judged the way it is argued here, there may have to be further argument. In that respect,  
16 adjourning the whole case for two years is cheaper. As I say, if *Lundbeck* is set aside, then  
17 all this argument about distinguishing it, was a waste of time. If it is qualified or refined it  
18 shapes the argument. That may be, on one level, the cheaper course, but I am not sure it is  
19 the just course.

20 MS. KREISBERGER: Sir, I think we have nothing to add to that.

21 THE PRESIDENT: As I say, there is no ideal solution in this situation, and one must beware of  
22 just going ahead because everybody is geared up and keen to go. That is not, I think, in  
23 itself a good enough reason. I think the length of time this has been going on so far and the  
24 length of additional delay that might be invited if we were to wait, as I indicated, it would  
25 have to be November 2018 for this trial. The outside possibility that even getting a  
26 *Lundbeck* judgment might give rise to questions of to what extent this case, on the law,  
27 produces a different outcome, and so one cannot exclude altogether the possibility that there  
28 would still have to be a Reference, in which case it is far better, I think, to proceed, find the  
29 facts, deal with everything we can, possibly resolve the case and, in so far as we find we  
30 cannot resolve a part of the case, subject to Mr. Flynn's argument that we can ignore the  
31 General Court, to make a Reference, and I think that is the course I am going to take.  
32 So we will proceed with our appeals starting at the end of February.

1 Can we then turn to some of the detailed questions that arise? Further evidence:

2 Mr. Turner, what is the position? At the end of your skeleton, para.44, you raise the  
3 prospect of a further factual witness statement.

4 MR. TURNER: It will not be a further factual witness statement. What we will do in relation to  
5 Mr. Horridge, liaising with the Department of Health, is not straightforward because their  
6 computer systems have changed several times, people are not in post, and so forth. We  
7 think the simplest thing to do, particularly given the context in which we view that  
8 evidence, namely that it is not actually that important, is that, if we produce, and we are  
9 looking hard now, further documentary material that should be produced to the Tribunal so  
10 that the Tribunal is not misled on some point of fact concerning the context, we will do so  
11 as soon as possible, but we will not be producing a further witness of fact to deal with this.

12 THE PRESIDENT: Does this go to any of the material that you have produced that feeds into the  
13 expert analysis?

14 MR. TURNER: Not for Mr. Horridge. He is the man who addresses the expectations in 2001 and  
15 2002 about whether there would be a new discount inquiry feeding into the NHS  
16 remuneration of pharmacies. His evidence essentially is that the industry expectation at that  
17 time was that there would not be a further claw-back discount inquiry preceding that. We  
18 have had initial conversations with the Department of Health about that. We do not propose  
19 to put in further factual evidence on that.

20 There are other factual witnesses who GSK has put forward now too, Mr. Sellick and  
21 Mr. Heath. There again, those are industry witnesses. We are not proposing to put forward  
22 an additional witness on the CMA side.

23 However, in relation to Mr. Horridge, as we are on that point, there has been  
24 correspondence between the CMA and Glaxo's solicitors concerning the fact that although  
25 Mr. Horridge deals with events dating back to 2001/2002, sometimes very precisely, he  
26 exhibits no documents at all. He does not refer either to any particular sources of his  
27 information or belief. We have asked them if they would not mind producing documents  
28 that he has relied on, or referring specifically to the sources of his information or belief, and  
29 invited GSK to suggest a timeframe. They have not done so, but have suggested that we  
30 should raise it at this hearing, if appropriate, and I am raising it.

31 THE PRESIDENT: Can you tell me first, the additional documents that you are seeking and  
32 working with the Department of Health to provide, when will those be provided? You say  
33 as soon as possible? People need to know.

1 MR. TURNER: We have imposed as much pressure as it is possible to impose. We are going to  
2 say best endeavours within only two weeks. That is 30<sup>th</sup> November.

3 THE PRESIDENT: You have had Mr. Horridge's statement for some time; it came in with the  
4 replies.

5 MR. TURNER: It came on 12<sup>th</sup> October.

6 THE PRESIDENT: Yes, and if it needs correction----

7 MR. TURNER: There is a further point about Mr. Horridge, and you will have seen this from our  
8 skeleton, if, Sir, you are troubled by that, and that is that what Mr. Horridge refers to there  
9 is evidence which we say could have been produced, and should have been produced, with  
10 their notice of appeal. In so far as he is talking about the expectations and what was  
11 foreseeable at the time in 2001/2002, that was an issue covered in the decision explicitly in  
12 three places. It was in response to representations made by GSK during the administrative  
13 procedure. It is dealt with in paras.1.5 and 1.6 of Annex I to the decision, and it could have  
14 been produced then. We are not taking any point about that, and we are not seeking to  
15 exclude it. Our only point is that we do not want the Tribunal to be misled if something has  
16 come in now and it contains something inaccurate.

17 THE PRESIDENT: I am not stopping you from putting in documents correcting it, or seeking to  
18 clarify it. I am just concerned about when they come, so that everybody has proper time to  
19 consider them. You say 30<sup>th</sup> November. You say you are also wanting the documents that  
20 he has relied on for the basis of his views. Mr. Flynn, he is being called by your client, I  
21 think.

22 MR. FLYNN: Yes, he is.

23 THE PRESIDENT: It is obviously not satisfactory that he is asked in the witness box, "What  
24 document did you rely on?" and then he produces it.

25 MR. FLYNN: I can indeed help you. As you say, the CMA has had Mr. Horridge's statement for  
26 some time now. I think we received the day before yesterday at five o'clock from the CMA  
27 a letter saying, "Produce everything that Mr. Horridge relies on", and various other things,  
28 "and do so by four o'clock yesterday". The reply was that, actually that will not be  
29 possible, and let us talk about it after the CMC. The response to that was, "Tell us you are  
30 going to do it and when?" and we said, "Let us talk about it after the CMC". I think that  
31 will be relevant, because no doubt, Sir, you will give indications. So, it was not possible to  
32 deal with that request in the timeframe, and I have said that is entirely reasonable.

33 THE PRESIDENT: I understand that but, clearly, he should produce it so that everyone can  
34 consider it.

1 MR. FLYNN: Yes, and he will be available for cross-examination.

2 THE PRESIDENT: Yes, but that is not the time for him to start producing documents.

3 MR. FLYNN: No, Sir.

4 THE PRESIDENT: They should also be produced within a couple of weeks. That should be  
5 feasible, should it not?

6 MR. FLYNN: It should be, Sir. As we have pointed out, and as you are aware, Sir, Mr. Horridge  
7 is a retired gentleman. I do not know what he is up to, but assuming that he is in the  
8 country, two weeks should be possible to respond to a reasonable request from the CMA.  
9 We have not debated the terms of that request yet, but we will engage with them after the  
10 CMC as we said we would. It would be, in our submission, entirely appropriate for the  
11 CMA to produce any documents that they manage to dig up from the Department of Health  
12 that suggest that Mr. Horridge is going wrong.

13 THE PRESIDENT: Yes, I think they will produce them, it is just a question of when.

14 MR. FLYNN: Given where we are, 30<sup>th</sup> November is probably about right, Sir. It certainly  
15 should not be later than that.

16 THE PRESIDENT: Mr. Turner, I will not make an order, but if they are not produced by  
17 30<sup>th</sup> November then GSK can apply, or if you say they will not be produced on further  
18 discussion with the Department of Health, for an order, and I will then order that they be  
19 produced within about a week after that - in other words, by 8<sup>th</sup> or 9<sup>th</sup> December, if they  
20 have not been produced voluntarily. That may assist you with the Department of Health,  
21 unless you suggest that it would be better to have an order now.

22 MR. TURNER: No, that does assist. The indication is going to be sufficient. May I add two  
23 comments? The first was that, as well as documents, Mr. Horridge is referring to things  
24 where there may be other sources of his information or belief. He has had conversations  
25 with people, and obviously if he is relying on information provided by somebody else, it  
26 would be helpful if that could be made clear.

27 THE PRESIDENT: I think, although I have not got it at my fingertips, that in the CPR there may  
28 even be a provision that if you are relying on information and belief in a witness statement,  
29 you state the source of the information.

30 MR. TURNER: You should do that. The second point is this: if Mr. Horridge does produce  
31 documents and says, "This is what I was referring to, and this is why I say this", we will  
32 then, of course, need to show those to the Department.

33 THE PRESIDENT: Yes, that may be, and you may need to come back further, but that should not  
34 delay you in producing the documents you are seeking.

1 MR. TURNER: It will not, but I wanted to make that qualification clear.

2 THE PRESIDENT: Good. I think we will leave the factual side of things like that. I think I have  
3 given a sufficient indication to both the parties involved as to how I expect you to proceed.  
4 I will not make an order as to what you or the CMA have to do, but if there are problems  
5 then you can make applications in writing.

6 MR. FLYNN: That seems helpful, Sir, and obviously anything that comes from Mr. Horridge,  
7 Mr. Turner will be able to put to the Department of Health for the purposes of his cross-  
8 examination in the normal way.

9 THE PRESIDENT: Experts. Dr. Haydock: I think it is wholly unrealistic to expect someone  
10 who has just given birth to be cross-examined a week or two later, whether by video link, or  
11 in any other form, plus the whole process of a potential hot tub, and so on. I think there is a  
12 need to substitute another witness. The issue is, I think, Mr. Turner, Rachel Webster has  
13 now had a chance obviously to look through in some detail Dr. Haydock's report and the  
14 other material. To what extent is she going to adopt the opinions in that report, subject, of  
15 course, to the new information that is referred to by Dr. Stillman, the new database or  
16 source of daily pricing in 2001, which she did not have, so that is new material. But,  
17 leaving that aside---

18 MR. TURNER: And the new evidence of Dr. Majumdar, which I will address as well.

19 THE PRESIDENT: Clearly, if Dr. Haydock is not giving evidence that report goes out, unless it  
20 is adopted by the new expert, and clearly what I think is of concern is are we going to get a  
21 completely new expert report, which will have implications on the timetable for everything  
22 to do with the experts because they all refer to Dr. Haydock, or many of them refer to Dr.  
23 Haydock's report, and all that then has to be reconsidered.

24 MR. TURNER: That will not be a problem, I can give that assurance. We have had a very recent  
25 indication that Ms. Webster is likely to be able to adopt, insofar as it remains relevant and  
26 has not been superseded, the vast majority of what Dr. Haydock has deposed to. There may  
27 be one or two points which we will want to discuss with her, so I cannot promise that it is  
28 going to be absolutely everything, but any deviation is likely to be very limited. It should  
29 not, therefore, disrupt the timetable.

30 THE PRESIDENT: Yes, well, I do not think it is fair for people to comment in a thorough way  
31 until they have seen what she produces, because what may seem small to you may be  
32 regarded as more significant to others.

33 MR. TURNER: Yes.

34 THE PRESIDENT: You say 12<sup>th</sup> December is the time?

1 MR. TURNER: That is right, and this is not leisurely, this is pulling out the stops and really  
2 working as hard as possible for her to be able to do it.

3 THE PRESIDENT: Can that period be truncated at all?

4 MR. TURNER: We can use best endeavours to get it done beforehand. That was, without  
5 wishing to put in any form of marginal cushion, what we responsibly thought we could  
6 manage, and the time is put forward only on that basis. We would be content to say best  
7 endeavours to get it in as soon as possible prior to that, and we will do so.

8 THE PRESIDENT: That will presumably take account then, in particular, of Mr. Sellick – is it  
9 Mr. Sellick who produced the new 2001 data on prices?

10 MR. TURNER: That is right.

11 THE PRESIDENT: Which Dr. Stillman takes into account in his second report, which Dr.  
12 Haydock did not have, obviously Ms. Webster will take that into account.

13 MR. TURNER: Yes. She will do what Dr. Haydock would have had to do anyway, is our  
14 submission.

15 THE PRESIDENT: And it is that part that she is concerned with because I do not think on the  
16 more general issues, your conceptual issues and so on, your expert is Professor Shapiro and  
17 was not Dr. Haydock and will not be Ms. Webster, she is not going to stray into those  
18 areas?

19 MR. TURNER: That is right. She will only be the replacement for Dr. Haydock on the pricing  
20 issues.

21 THE PRESIDENT: Mr. Flynn, is there anything you want to say about that?

22 MR. FLYNN: Yes, Sir, I would just like to rewind a bit. First, we are only hearing now that this  
23 is a problem. Let me also say that GSK congratulates Dr. Haydock, and no one more so  
24 than Dr. Stillman with whom she used to work.

25 THE PRESIDENT: Yes, they know each other?

26 MR. FLYNN: They do. This is news which, according to the skeleton of the CMA, was  
27 available shortly before the time of the replies-----

28 THE PRESIDENT: Shortly before?

29 MR. FLYNN: The time of the replies, is the coy phrase that is used. So this is an issue that has  
30 been bubbling away for a while, of which no hint has been given to the parties until just  
31 before the CMC, and we are effectively being ambushed by a proposal that Dr. Haydock's  
32 evidence should either be substituted or, as I now understand, completely replaced.

33 THE PRESIDENT: I do not think it was completely replaced. What we are told is that it will be  
34 largely adopted.

1 MR. FLYNN: In circumstances where, according to the skeleton, Ms. Webster is not even  
2 instructed yet. She has papers and she is looking at them, but it is said that it is not clear  
3 that she has actually been instructed to prepare a report.

4 THE PRESIDENT: I imagine she had not been instructed to prepare a report because it needs the  
5 permission of this Tribunal today, but my clear understanding is that subject to permission  
6 being granted she is instructed. Is that right, Mr. Turner? She will be a witness----

7 MR. TURNER: She will be a witness.

8 THE PRESIDENT: --and she is going to act and there is not going to be a problem.

9 MR. TURNER: Yes, that is right. We did only learn about this a couple of weeks before the  
10 replies. We then had to see what the replies said, and we have acted----

11 THE PRESIDENT: You tried to find someone. So, Mr. Flynn, she will be instructed, or she is  
12 provisionally instructed, so that is not a problem and she has been working on it.

13 MR. FLYNN: The reason for it is that for eminently foreseeable reasons Dr. Haydock may not be  
14 in a position to give evidence at the trial but, in our submission, it would still be appropriate  
15 for Dr. Haydock to respond to Dr. Stillman's latest report. After all, what the Sellick table  
16 does, in Dr. Stillman's view, is to make irrelevant some of the disputes or the discussion  
17 that he----

18 THE PRESIDENT: You say she should respond, if she is no longer the expert she plays no  
19 further part in the case.

20 MR. FLYNN: But her original report, I take it, stands.

21 THE PRESIDENT: No, it only stands insofar as it becomes the new expert's. If it is not adopted  
22 it drops out.

23 MR. FLYNN: So the proposal is now that we will not actually know what the CMA's position is  
24 until 12<sup>th</sup> December, apparently.

25 THE PRESIDENT: We have been told that most of what Dr. Haydock said, save insofar as it has  
26 been rendered inaccurate because of the new data that was produced with your reply, with  
27 Mr. Sellick's 2001 material, is going to be adopted but, we are told, there may be some  
28 small points where it might be slightly different, and it depends, of course, how small they  
29 are, I understand that, but most of it is not going to change. Of course, it is not ideal, that is  
30 self-evident, but it is a fact of life, literally, and we have to work with it.

31 MR. FLYNN: Yes, I suppose there is no point in crying after spilt milk, this could have been  
32 much better and more appropriately handled in accordance with the duties of the parties to  
33 co-operate as we have pointed out. We are where we are, but it does seem to us that it is  
34 unfortunate that, despite this lapse of time we are only now hearing today for the first time



1 that it seems likely that Ms. Webster will be able to adopt everything, or much of what Dr.  
2 Haydock has said and, as you have implied, the points may not in the end be that small and  
3 this will be coming in on 12<sup>th</sup> December, which is hardly an ideal moment, if I may say so.

4 THE PRESIDENT: I can see that. I do not think, given when it was learned about and then the  
5 need to find another expert, and then to discover whether the other expert does indeed adopt  
6 Dr. Haydock's view, because if Ms. Webster said "No I take a rather different view, and I  
7 think it can be supported for different reasons", then there would be much more of a  
8 problem, and it clearly took her some time to digest what is not a straightforward case and  
9 see where she stands. You could have been told earlier that there was a problem, but I am  
10 not sure it would have helped in practical terms in what steps have to be taken.  
11 I think when you get that report, and this applies to everyone who has commented on Dr.  
12 Haydock's, if they think it significantly changes things such that their expert, who has  
13 commented on Dr. Haydock's report and wants to say something now on Ms. Webster, they  
14 will have to be given a chance to do so, but I would hope that would be very limited.

15 MR. FLYNN: I think we can only approach that on a contingency basis. I hear what you say on  
16 that.

17 THE PRESIDENT: The time is short, but it is not so short that it is unmanageable. All I can say  
18 is it will be of concern, Mr. Turner, if the areas of difference are seen to be significant  
19 because if their experts have commented on Dr. Haydock saying: "That has dropped out, so  
20 my comment on Dr. Haydock is irrelevant, but Ms. Webster said this, so I now want to  
21 comment on that." You can see the potential problem.

22 MR. TURNER: Yes. As I say, my understanding at the moment is that it will be limited. I shall  
23 not respond to what my friend has said about lack of co-operation other than to say that this  
24 is a fact of life, and we have dealt with it as responsibly as could be expected. So far as  
25 concerns the evidence that is to be given, would it be appropriate now for me to address the  
26 broad question of whether the CMA should be permitted to introduce further evidence at  
27 this stage?

28 THE PRESIDENT: The expert evidence?

29 MR. TURNER: The expert evidence. It will not solely be in relation to the Stillman material,  
30 building on the new spreadsheet, and I do, therefore, need to explain to you the parameters  
31 if you will permit me to do so.

32 THE PRESIDENT: This governs then Professor Shapiro as well----

33 MR. TURNER: Yes.

1 THE PRESIDENT: --to serve, essentially a rebuttal. I think Professor Shapiro is not affected by  
2 the new spreadsheet, is he?

3 MR. TURNER: He is not, that is correct.

4 THE PRESIDENT: Yes, tell me what you are seeking to do. On the point we have dealt with, I  
5 give you permission to call Ms. Webster in substitution for Dr. Haydock, the report to be  
6 produced by 12<sup>th</sup> December and best endeavours to produce it earlier, if possible, and that  
7 she should indicate expressly the parts of Dr. Haydock's report, so far as practical, that she  
8 agrees with or that she adopts, and then it becomes her evidence.

9 MR. TURNER: Yes, she will do that. I am grateful.

10 THE PRESIDENT: May I then turn to the disputed question of whether the CMA should be  
11 permitted to file further written expert evidence at all?

12 MR. TURNER: It will be necessary to take you, Sir, to some of the material to explain the  
13 position that has arisen, and to justify this request.

14 The first point, a preliminary observation, there is not a legal impediment to this. This  
15 general point arose in the very first major case in this jurisdiction, *Napp*. The Tribunal  
16 made clear that where an appellant makes the new allegation or produces new evidence, the  
17 authority has to be allowed to address it, and now----

18 THE PRESIDENT: You quote that, do you not?

19 MR. TURNER: Yes, I am not sure that we quote the *Napp* authority, but you are aware of that in  
20 any event. Now the Tribunal is going to be guided by the overarching principle in rule 4 of  
21 the Tribunal Rules, reflecting the overriding objective, to deal with this case justly. There  
22 are three main strands to that assessment.

23 The first question is whether acceding to the CMA's request is going to help the Tribunal to  
24 resolve the expert issues in dispute in what is a major public interest case.

25 The second element is whether it will be fair as between the parties, and the third is whether  
26 it would upset, or would promote, as the CMA says, the orderly conduct of these appeals.

27 Our first critical observation to make is that the factual and the expert material which was  
28 served on 12<sup>th</sup> October in the appellants' replies does contain significant new elements to  
29 which it is plainly necessary to allow the CMA to respond. It is helpful to divide the expert  
30 material into two components, as, Sir, you have indicated already. The first are the pricing  
31 issues, which is where the experts consider the available data on whether Glaxo's or  
32 industry prices more generally fell as a result of the agreements at issue or did not. That is  
33 the pricing dispute.

1 The second are the wider issues of economic theory, such as whether you can expect  
2 agreements with the particular features of those in this case structured in this way to be pro  
3 or anti-competitive.

4 If I may, having said that, turn to the pricing issues. We now have new pricing analyses in  
5 the reports with the replies from Dr. Majumdar for GUK, and from Dr. Stillman for GSK.  
6 Those are detailed, long and intricate. They each rely on a range of assumptions and  
7 reasoning which are contentious, and are not accepted, and we will show you that there has  
8 not been an opportunity for the CMA to address those properly at all. In the case of  
9 Dr. Majumdar, this is the original report. There was no prior economic opinion.

10 THE PRESIDENT: Can I look at it?

11 MR. TURNER: I am turning to that in a moment, but if you do turn that up that is attached to the  
12 reply from GUK. Just before I go there, you know that what came with GUK's notice of  
13 appeal was a sheet of RBB Economics calculations mentioned in the footnote and attached  
14 in an appendix. That was according to GUK, the picture.

15 Turning to Dr. Stillman, briefly, he, himself, freely accepts that there is new opinion  
16 evidence that he is giving, built on the pricing spreadsheet which has been unearthed by  
17 GSK, and built on further witness evidence which is also now forthcoming. That is not just  
18 from Mr. Sellick, but from a Mr. Richard Heath. The new evidence from both Majumdar  
19 and Stillman does supersede a significant amount of the expert debate which took place  
20 prior to it. That is why it is necessary for the CMA to be permitted to deal with it in a fresh  
21 written response. Unless we can do that, the process will be unbalanced. It will also  
22 forensically not help the Tribunal because the Tribunal will need to see something in  
23 writing from the CMA, concise, pithy, but in writing, so that the process can go forward in a  
24 just and fair manner. It cannot merely be dealt with orally at the trial.

25 Just before going then to Majumdar, I should say that the same is true for the new evidence  
26 that has been served from Dr. Majumdar, Dr. Stillman, and Dr. Helen Jenkins concerning  
27 the non-pricing issues.

28 THE PRESIDENT: That is your second, the wider issues of economic theory?

29 MR. TURNER: Yes, and to explain, those fall into two main areas. The first is the assessment  
30 for competitiveness of the supply agreements which were entered into: basically, do the  
31 features of these arrangements with their fixed volume caps and the profit guarantee, and so  
32 forth, that you have seen, do those features mean that no meaningful constraint on GSK's  
33 pricing behaviour was to be expected, which was the CMA's case and what it found in the

1 decision; and that these agreements were, in essence, a vehicle for transferring value to the  
2 generic entrants without disrupting GSK's prices.

3 Dr. Stillman's first report examined that issue.

4 THE PRESIDENT: Before going there, at what point are we going to go to the reports?

5 MR. TURNER: In just one moment. I will need to open them, but just to explain the picture,  
6 what Dr. Stillman has done, and I will show you, is that he examines this using what he  
7 called a 'dominant firm competitive fringe model'.

8 THE PRESIDENT: That is his first report?

9 MR. TURNER: That was his first report. Professor Shapiro engaged with that, took it as a useful  
10 starting point for analysing the effects of the agreement in his report for us, for the CMA.  
11 Now what has happened on this aspect is that you will see that Dr. Majumdar has attacked  
12 the suitability of the model completely in this new report that has come without any  
13 precedent from GUK. He departs, therefore, from both Stillman and Shapiro.  
14 Secondly, Dr. Stillman says that his model was crude, and he puts forward refinements to  
15 his approach. That is why I will show you that the CMA does need the chance to respond to  
16 those developments in writing concisely so that there is a proper platform for further  
17 economic discussions, and then the trial.

18 Before turning to the documents, the second general area was the basic question of whether  
19 it is right to presume that if an incumbent, an originator, in the pharmaceutical industry pays  
20 generic entrants to induce them to not continue independent efforts to enter the market, is  
21 that anti-competitive unless justified? That was the basic logic of the CMA's decision. It is  
22 also, if I may say so, the logic of the General Court in the *Lundbeck* judgments too. That  
23 basic question supports both the object restriction, something that has the object of  
24 restricting competition, and the conclusions of abuse in our case.

25 Here, on this second area, Dr. Jenkins for Merck makes an extensive attack on the basic  
26 economic logic of the decision in her report of 12<sup>th</sup> October. In some material respects,  
27 which I will now show you, she does not, and explicitly is not, responding to  
28 Professor Shapiro's report in the case. In fact, she complains that Professor Shapiro has not  
29 dealt with certain points which are of interest and then she develops those points herself  
30 extensively. We will say that could and should have come with the notice of appeal back in  
31 April. We are not seeking to exclude it, but Professor Shapiro has not dealt with that in his  
32 report in the course of these proceedings. That is why on that issue too we think he should  
33 be able to say something. This is not a question of unfair prejudice because it has come  
34 from the appellants' side, and it can be addressed in a timely fashion.

1 Now, may I turn to the evidence, and we will start with Majumdar? Sir, you have that. You  
2 will see it is a 47-page report, it is his first report. If you turn in it to para.30, you see the  
3 same in para.12, he outlines in a series of steps a mechanism by which he says these  
4 agreements would be expected, by him as an economist, to have given rise, to give rise, to  
5 pro-competitive effects, and he works it through.

6 Then if you go to para.31 and following, he says that this is the right approach to take, this  
7 perspective, not the dominant firm competitive fringe model. If you look in particular at  
8 para.62, he says there that the model on which both Dr. Stillman and Professor Shapiro have  
9 engaged is unrealistic, and you will see he says that it fails to capture a number of critical  
10 elements of the industry structure.

11 Then this section of his report----

12 THE PRESIDENT: Just a minute, you are taking me rather briskly through it. Obviously, this is  
13 a significant question, and it would have helped if the pre-reading had included relevant  
14 sections of the reports.

15 MR. TURNER: I understand, and I apologise for that.

16 THE PRESIDENT: One can pick it up quickly by paragraph references and understand what is in  
17 them. It is not like being referred to a judgment or something. He says he agrees with  
18 Dr. Stillman, although he says the model is unrealistic. I do not quite understand it. He  
19 says, "Dr. Stillman's model is unrealistic, in short I agree with him". I do not quite follow  
20 that.

21 MR. TURNER: The reason for that is that Dr. Stillman had used the model but had drawn that  
22 conclusion anyway. He is saying, "I, for different reasons, support that conclusion, but I do  
23 not accept the model".

24 THE PRESIDENT: The model is not required.

25 MR. TURNER: Yes. If you go to 65, that is made quite clear. It is a short paragraph, and the  
26 second sentence:

27 "I see no reason to place much weight on the theoretical model put forward by  
28 Dr. Stillman and critiqued by Professor Shapiro. For completeness, however, I  
29 explain a number of problems with the model."

30 The next part of this report is picking it apart.

31 Without going into the detail, what you can see is that he is adopting a different approach, a  
32 new approach, and we are seeking permission for Professor Shapiro, concisely, to address  
33 this point.

1 We may as well stay with the Majumdar report to look at the second part of it, which  
2 concerns the pricing issues. That is beginning on p.26, and is headed, “Comments on the  
3 expert report of Dr. Haydock”. Sir, I should begin by emphasising what this until the end of  
4 his report is not. It is not a response to Dr. Haydock’s critique of that expert spreadsheet  
5 that had accompanied GUK’s appeal, the short RBB Economics calculations. There is reply  
6 evidence on that in here, and if you go to p.39, there is a heading, “Comments on  
7 Dr. Haydock’s critique of GUK’s submission”, and there it is in that short section. That  
8 covers eight paragraphs.

9 If you go back to p.26, the analysis preceding this is a major new original piece of economic  
10 analysis. What it does is to begin, on p.28 at the top, para.93, with a sustained extensive  
11 argument covering 24 paragraphs, down to 117, about why it is necessary to concentrate on  
12 prices to wholesalers, and not just prices to the pharmacies. You will see in 93 he says:

13 “For the reasons outlined in s.341, it is a major omission not to have placed weight  
14 either on the price to wholesalers charged by the entrants, or on the development of  
15 volumes . . .”

16 And this is the volume share analysis he engaged in of the entrance of paroxetine over time,  
17 and he criticises Dr. Haydock for having done something else.

18 THE PRESIDENT: And then he produces his PTW analysis.

19 MR. TURNER: Then he goes into that.

20 THE PRESIDENT: Which Dr. Haydock did not do.

21 MR. TURNER: That is right, and so what he is doing is essentially launching on what she did not  
22 do and not what she did. From para. 119 he then goes on to look at the specific levels, it is  
23 headed: “5.4.1” on p.33 “The PTW charged by each Entrant”. What he does then is to go  
24 into the question of the levels of the prices that were charged.

25 THE PRESIDENT: I think I have that, thank you.

26 MR. TURNER: So that is it.

27 THE PRESIDENT: That section 5 is something Ms. Webster would address, is that right?

28 MR. TURNER: Yes. This is all on the pricing area of the case, and it is new, it was not dealt with  
29 by our expert before.

30 THE PRESIDENT: I understand.

31 MR. TURNER: The same is true, but perhaps I need not develop it in further detail, in paras. 126  
32 to 140, where you have a new independent analysis based on specific assumptions and  
33 calculations which we have not addressed. So that is Dr. Majumdar.

34 Do you have Dr. Stillman’s second report to hand?

1 THE PRESIDENT: Yes.

2 MR. TURNER: This one is 40 pages. It also is not a reply report in which he explains why  
3 attacks on his original opinions were misplaced. It is the occasion for introducing  
4 significant new material, and if you go in it to p.8, which is where he picks it up, at para. 35,  
5 he says very clearly here:

6 “My analysis of the impact on pharmacy prices had two parts – theory and data.  
7 The theory part was based on the simple model . . .”

8 Which we talked about:

9 “. . . in which I assumed that there was a fixed supply of parallel imports and that  
10 authorised generic supplies initially only displaced parallel imports.”

11 That is on the firm competitive fringe model. He explains his approach that he took there in  
12 para. 35, and the data part of his analysis which he separately and helpfully distinguishes is  
13 the pricing part.

14 Professor Shapiro had engaged with the theory part in his response report. In the second  
15 report Dr. Stillman jettisons aspects of that model. So, for example, at para. 44:

16 “The model”, and this is the same model “that I presented in Appendix E was  
17 crude in certain respects. One of the crude features was the assumption authorised  
18 generic supplies would first displace parallel imports (and only parallel imports),  
19 and would then not reduce the demand faced by GSK for the UK-sourced 20mg  
20 Seroxat . . .”

21 Then he says, in the following section, that there is a different approach where you assume  
22 that pressure is placed on GSK right from the start.

23 THE PRESIDENT: Where is that?

24 MR. TURNER: This is in para. 44 five lines down: “A more sensible way to apply the model”,  
25 and he says, three lines from the bottom:

26 ““In this more general application of the . . . model, any volume of authorised  
27 generic supplies reduces (or causes a ‘shift to the left’ in) the residual demand  
28 faced by GSK and will put downward pressure on prices.”

29 So it is a materially different approach. He then develops it in the following paragraphs too,  
30 dealing with new assumptions in contrast to his original model, for example, at paras. 45 to  
31 51, dealing with the profit guarantee clause. You will see at para. 49 he introduces a new  
32 approach to examining that and suggests that the generic GUK may have wanted to sell the  
33 supplies as quickly as possible, and adopted a different strategy. These were things that

1 were not said before and, in terms of the factual assumptions, and reasoning deployed are  
2 contested.

3 Similarly, at paras. 52 and 53 he makes a new point concerning the inelastic demand for  
4 Paroxetine.

5 THE PRESIDENT: He is responding to Professor Shapiro's criticisms, is he not?

6 MR. TURNER: He does respond there to Professor Shapiro's criticism, but he develops it and  
7 says: "This is what I really mean on it".

8 THE PRESIDENT: That is a responsive report.

9 MR. TURNER: Yes, the reason why it needs to be viewed together is that all of this section is  
10 part of the change, if you go back to the title at 2.2.1. "The dominant firm/competitive  
11 fringe model". The major shift in it is effected from para. 44, where he says that that was  
12 crude, and this is the way to approach it, and these are other----

13 THE PRESIDENT: He made a change in the assumption.

14 MR. TURNER: Yes, which is a major change in the assumption, but then having done that, and  
15 you are right to say that these are of a different order but they all go to the same point which  
16 is that he re-approaches the question of what the circumstances are that should be  
17 addressed, and because it is integrated it is not really sensible to take it separately and only  
18 address that one part at the beginning.

19 That is the essential point about what has happened in relation to Dr. Stillman and Professor  
20 Shapiro.

21 When an appellant's expert shifts the argument in that way it is reasonable and, more  
22 importantly than it being reasonable it is in the interests of justice to permit Professor  
23 Shapiro to give a concise response in writing before the meeting of the experts.

24 THE PRESIDENT: The bit you want to respond to, to be clear, this is on the theory side, is para.  
25 40, although that summarises how they were, I think. It is really paras. 43 to what?

26 MR. TURNER: Down to the end of renewal incentives, so para. 55. It is the revisiting of that  
27 model that has taken place, and the new conclusions which are drawn about it. If it is of  
28 assistance, I should indicate that this is something that we have already spoken to Professor  
29 Shapiro about. That is why he anticipates that a reply to this can be produced by him in  
30 very short order indeed.

31 THE PRESIDENT: Yes. Knowing it is a timing point----

32 MR. TURNER: But it is not merely timing, it shows you he is not planning to produce some  
33 large new piece of work. He is producing something which we hope will be available  
34 within a matter of days. Unfortunately, it was not able to be produced today----



1 THE PRESIDENT: I am not sure why renewal incentives comes into that – I have just quickly  
2 read paras. 54 and 55, is that not a separate point?

3 MR. TURNER: It is all taken as part of the overall heading concerning the operation of that  
4 model.

5 THE PRESIDENT: No, it is not, the heading of “Economic Theory”. It is not under----

6 MR. TURNER: I apologise, yes, that is correct. It is a point on renewal incentives.

7 THE PRESIDENT: I think it is down to 53, is it not, not to 55?

8 MR. TURNER: Yes. We can take it there. Professor Shapiro had indicated that he would want  
9 to pick that point up.

10 THE PRESIDENT: I am sure he will. Obviously, he can reply; we will have views and  
11 responses to everything, but if you are going to get permission to respond----

12 MR. TURNER: Then it should be a response that will be limited.

13 THE PRESIDENT: --you must be very tightly constrained or this goes on for ever. Yes, so 43 to  
14 53 on the theory side, and then as regards the pricing in Dr. Stillman?

15 MR. TURNER: The pricing begins under the heading “Empirical evidence” beginning on p.13, at  
16 para. 57. You will see at para. 58 that he, himself, accepts that in addition to responding to  
17 what Dr. Haydock has done, that he is discussing this new evidence.

18 THE PRESIDENT: I did look at that and, as I say, you do not have to expand on it, I just want to  
19 identify the bits of the report. There is the new data from Mr. Sellick, he analyses it. He  
20 says that has changed the way he approaches it.

21 MR. TURNER: He takes this all the way through para. 73, if you turn to p.18, he deals with  
22 coverage. He refers there, at the top, to there being 173 pharmacy groups in this  
23 spreadsheet.

24 THE PRESIDENT: Yes, and then 75 because it has been discovered only recently.

25 MR. TURNER: You will see if you drop down to the footnote, if you are looking at p.20, and  
26 footnote 27, five lines down: “The witness statement of Richard Heath provides additional  
27 details on how the move to” different distribution approach direct to pharmacy supply by  
28 Glaxo.

29 THE PRESIDENT: It is contrary to his earlier assumption.

30 MR. TURNER: Yes, “it is contrary to what I have previously seen”.

31 THE PRESIDENT: So it goes up to para. 82?

32 MR. TURNER: It goes up to para. 82. The other issues raised by Dr. Haydock.

33 THE PRESIDENT: You need not expand on that. I will hear what Mr. Flynn has to say about  
34 that.

1 MR. TURNER: I should say that also after that point, if you look at para. 85, he attacks what she  
2 has done by reference to the new witness evidence which has come in again in para. 85.  
3 Before leaving that, it may be convenient if you have the additional bundle, the “CMC  
4 additional bundle” we are calling it, the little bundle of material for this hearing.

5 THE PRESIDENT: Yes.

6 MR. TURNER: Because you will gather, first, what the spreadsheet actually means, how to  
7 interpret it and, secondly, the use that has been made of it by Dr. Stillman, also not  
8 obviously self-evident. You will see at tab 3 that the CMA wrote to GSK’s solicitors saying  
9 that they need to understand the factual basis and sources of the dataset. There are some  
10 questions about it in an annex. If you turn to the annex on p.3 you will see “Dr. Stillman’s  
11 Second Report” is the heading, and they ask questions at paras. 8 and 9 concerning the use  
12 that was made, and at para. 10 they have said: “Are there other similar spreadsheets?”  
13 That went on 24<sup>th</sup> October. There were then some chasers, which are in the file but you do  
14 not need to read them. Eventually on 9<sup>th</sup> November at close of play Glaxo’s solicitors did  
15 respond and that is in the bundle at tab 10. It is a full response. You will see on p.5 that  
16 they respond, expanding on the use that Dr. Stillman did make of that spreadsheet here. At  
17 para. 10.2 on p.6 they say that Mr. Sellick has also now looked at his laptop in conjunction  
18 with a Nabarro lawyer and he refers to a range of further potentially relevant documents  
19 which are then listed in the annex on the facing page. There are 45 such documents  
20 altogether, as we indicated in our skeleton, these, which came a few days ago, together with  
21 this explanation are also being reviewed.

22 Sir, thinking of case management and the timescale, you just need to know what is  
23 happening in terms of the CMA trying to interpret and understand this.

24 The other aspect is that we wanted to ensure that the explanations given by Nabarro were  
25 explanations which the witnesses could speak to if necessary at the trial, and they have  
26 helpfully in further correspondence explained which part of those explanations can be  
27 assumed to have been made by Mr. Sellick subject to a statement of truth, and we are happy  
28 not to press that point, given their letter, and which parts of it are assumptions and further  
29 narrative from Dr. Stillman and his team. That has also recently been explained.

30 Sir, this is why, when you are thinking of the deadline imposed on the CMA, we are making  
31 best efforts, we will----

32 THE PRESIDENT: This will all be dealt with by Ms. Webster?

33 MR. TURNER: Ms. Webster, but you will see that there is some work to do behind the scenes, it  
34 is not automatic.

1 THE PRESIDENT: Yes, I understand.

2 MR. TURNER: That is Stillman. Mr. Bailey reminds me - perhaps before you put away Stillman  
3 - that there is further material. It is not that there is a cut-off point, because there is further  
4 material in the following paragraphs dealing with the new spreadsheet, and analysing it.

5 THE PRESIDENT: Yes, I think it is difficult to deal with that aspect by reference to paragraphs.

6 MR. TURNER: I am obliged. Can we then turn to Jenkins? Her second expert report was served  
7 with Merck's reply. This is also 20 or so pages. If you turn in it to p.17 you will see a title,  
8 section 4, "Responses to Professor Shapiro's specific comments on my analysis". So, that  
9 is essentially the province of a reply to his report. What had happened was that the first  
10 report from Dr. Jenkins had mainly considered the competitiveness of another form of  
11 settlement agreement, which the CMA says could have been stuck in the place of the ones  
12 to which it objected, a counterfactual, and it went to the effects case. In this second report,  
13 the section preceding that up to p.16 contains an extended attack on a basic feature of the  
14 CMA's object restriction case with a very detailed new analysis supported by a number of  
15 graphs and figures. If you go to para.1.11(b), you will see how she describes what she has  
16 done in the contested section, section 3 of this new report:

17 "Section 3 explains that the analytical framework underpinning Professor  
18 Shapiro's and the CMA's conclusion that so called 'reverse payment' settlement  
19 agreements can be presumed anti-competitive cannot be relied upon."

20 Then she says that it is over-simplistic, and she introduces what she goes on to show in the  
21 following pages down to the end of p.16, and says that when you factor these things in:

22 "... it supports the opposite conclusion and makes clear that some settlement  
23 agreements with value transfers above litigation costs are pro-competitive."

24 She refers in (c) to section 4 responding to the specific criticisms that Shapiro made of her  
25 first report separately.

26 So, that is what she sets out to do. If you then go to para.3.5----

27 THE PRESIDENT: Section 2: you are not quarrelling about section 2 as being a response?

28 MR. TURNER: This is not something where we need to put in further written material. It is the  
29 assessment that takes place in section 3. If you go to the top of p.8, 3.5, what she says is  
30 this:

31 "In published articles (but not in his expert report), Professor Shapiro has  
32 responded to economic critiques of his approach, arguing [as follows] ... I note  
33 that the CMA adopts a similar logic in the Decision, asserting that if reverse  
34 payments were permissible, parties would always have an incentive to select an

1 entry date that is a patent expiry. I explain below why this line of reasoning is  
2 incorrect and does not reflect real world considerations.”

3 What you see is that what she now embarks on doing is not attacking a proposition from his  
4 expert report, she attacks a particular part of the decision and she footnotes, second footnote  
5 down, para. D40, a proposition in the CMA’s decision, which was also----

6 THE PRESIDENT: They are aligned, as you might expect. Shapiro’s is supporting the reasoning  
7 in the decision.

8 MR. TURNER: But it was not in his report.

9 THE PRESIDENT: The attack is on the----

10 MR. TURNER: On his published articles and not on his report. The attack is on that proposition  
11 or finding in the decision. This has come with their reply.

12 THE PRESIDENT: I am just looking - you will appreciate that I am trying to take this in very  
13 quickly: 3.9:

14 “The framework relied on by Shapiro assumes that ...”

15 and so on. 3.10:

16 “The model that reflects this framework can be used to analyse the preferences ...”

17 She represents it and seems to define it. Is the framework in Shapiro’s report?

18 MR. TURNER: Yes, it is. What she says is, this is how he approached it in the report, but  
19 actually you then need to go on, and she then develops a different approach all the way  
20 through down to 3.42, in which what she is doing is explaining why, when you introduce a  
21 further series of factors, a particular proposition and finding in the decision, something  
22 which had not been addressed in Shapiro’s report, but had been contained in his published  
23 literature, leads to a different conclusion. It means, according to her, that in the real world it  
24 is not possible to presume, this supporting the legal presumption, that the sorts of  
25 agreements condemned by the CMA are harmful.

26 That first chunk in which she does that goes down to 3.28. If I may support that, if you look  
27 at what she says after 3.28, at section 3C - “Professor Shapiro’s ‘ray of delay’ argument in  
28 published literature” is the heading on p.13, and she says:

29 “The Shapiro Report does not address the issues that I explored above concerning  
30 information asymmetry and risk aversion or their impact on his framework and the  
31 validity of the pay for delay inference in those ‘real world’ scenarios.”

32 In other words, all of that is an amplification of her original evidence, and not a response to  
33 his report.

1 She goes on to discuss his earlier work, if you go to 3.31 over the page, not his expert  
2 report:

3 “In his earlier work, Professor Shapiro has sought to address this issue by arguing  
4 that these pro-competitive settlements are not stable because both parties would  
5 always have an incentive to continue to delay ...”

6 and so forth, known as the ‘ray of delay’.

7 “I note that the CMA, in its Decision, also relies on this idea ...”

8 So, she emphasises again there that she is directly attacking a particular finding in the  
9 CMA’s decision, which was not in Merck’s notice of appeal. At para.3.32 she introduces  
10 new evidence about other disputes over patent settlements. If you look at the last sentence  
11 she says:

12 “See, for example, the disputes in the USA relating to Lamictal and Provigil,  
13 which involved settlements that provided for entry ...”

14 That is there to support her attack on the CMA decision and on Shapiro’s published work,  
15 but not what he had said in his expert report. At 3.38 on p.15, she offers opinions as to what  
16 the CMA should have done, and this is fresh:

17 “The CMA should have given specific consideration to the questions of whether:  
18 (i) there was information asymmetry between GSK and GUK; and (ii) whether  
19 GSK was risk averse in terms of the losses that might arise ... The CMA’s failure  
20 to gather relevant data and factor these considerations into its assessment of the  
21 object and effects of the Settlement Agreement means that its approach is unsound  
22 as a matter of economic analysis..”

23 These are the sort of propositions that one would expect to find in an expert report  
24 accompanying a notice of appeal.

25 In short, and perhaps it is not necessary to emphasise too much how this is new, although  
26 you can plainly see it is, there is an element of analysis striking directly at a proposition or  
27 finding in the decision, not highlighted in Merck’s notice of appeal, not contained or  
28 developed to anything like this extent in the original report.

29 THE PRESIDENT: You say ‘notice of appeal’, you are not objecting to the argument being  
30 raised?

31 MR. TURNER: We do not do that.

32 THE PRESIDENT: Your point is that it was not in her first report, so it was not addressed by  
33 Shapiro?

1 MR. TURNER: It was not. What one sees is a development of something there from the first  
2 report in a very extensive way. So even if one leaves aside the question of newness, and  
3 you ask yourself what is the practical way to address this sort of material, all we are saying  
4 is that, as a pragmatic as well as a principled approach, it makes sense to allow Shapiro to  
5 be able to respond to these developments.

6 THE PRESIDENT: It is section 3?

7 MR. TURNER: It is section 3. It would be wrong to block the CMA from being able to deal with  
8 that in writing, because if it is in writing there will be a proper platform for the expert  
9 discussions.

10 THE PRESIDENT: Professor Shapiro, you say, can produce the further report by?

11 MR. TURNER: We have said 30<sup>th</sup> November, with best endeavours to serve it within a matter of  
12 days from now on 23<sup>rd</sup> November. Again, this is mainly to give comfort, first, that there  
13 will be time to deal with it and, secondly, that it is not big.  
14 Sir, therefore it is for those reasons, and I do apologise that this was not set out in greater  
15 detail beforehand, but I have taken you through it, I think fairly----

16 THE PRESIDENT: Fairly but swiftly, and it is not always easy to digest. It would have been  
17 helpful if the parties had agreed these things when preparing for this hearing.

18 MR. TURNER: Yes. In short, what we are looking to do is something that is confined, it is  
19 limited and it will be responsibly done.

20 THE PRESIDENT: Right. I think that affects, therefore, GSK, Merck and GUK, I think.

21 MR. FLYNN: GUK, yes.

22 THE PRESIDENT: Mr. Flynn, do you want to go first? They are two quite separate points----

23 MR. FLYNN: Indeed.

24 THE PRESIDENT: --the new pricing analysis that Dr. Stillman relied on, which obviously Dr.  
25 Haydock could not take account of because the material has come since.

26 MR. FLYNN: There is no contestation or resistance there, Sir. We fully accepted, or fully  
27 expected, that the CMA might wish to put in further evidence. Obviously, we hoped it  
28 would be from Dr. Haydock, and that would, as Dr. Stillman says, actually this new data  
29 puts an end to a controversy and a difficulty they had been having because of the old data,  
30 so we envisaged----

31 THE PRESIDENT: Assumptions, yes. So you are content for Ms. Webster – I know you would  
32 prefer if it were Dr. Haydock----

33 MR. FLYNN: That is too late, I should not have said that.

34 THE PRESIDENT: --to deal with that on the pricing analysis.

1 MR. FLYNN: We will be delighted to hear from Ms. Webster.

2 THE PRESIDENT: Clearly that should be done in writing.

3 MR. FLYNN: That has to be done and as soon as possible. I think I should just say it may or  
4 may not be of interest to you that the CMA's further questions and the suggestion that a  
5 large amount of further information is provided is somewhat dramatic. We were asked some  
6 broad questions about what else was on Mr. Sellick's laptop, and some stray pieces are  
7 there that, as far as we can see, are not going to be of a great interest to anyone in this case,  
8 but no doubt we will hear further. The essential position is that set out in Mr. Sellick's  
9 witness statement and the conclusions that Dr. Stillman draws from that, and we would  
10 expect a short response on that and that will be normal.

11 THE PRESIDENT: Yes, Ms. Webster's report.

12 MR. FLYNN: In every other respect, and I am not attempting to speak for my friends here, but in  
13 every other respect Mr. Turner seems to be arguing for a full opportunity for rejoinder  
14 evidence, which was, of course, not provided in the order from the first CMC, and I do not  
15 think the timetable would have been set on the basis that it has been if rejoinder evidence  
16 were envisaged.

17 Insofar as it falls to me to address this question in relation to Dr. Stillman's report,  
18 indications from you, Sir, as you were being taken at a clip through this material, and it  
19 would have helped us if we had had some notice of this as well, but it is pretty obvious, I  
20 would submit, that Dr. Stillman was responding to points that Professor Shapiro made, and  
21 where he thought appropriate, accepting comments that Professor Shapiro made.

22 THE PRESIDENT: Yes, what is said in his report, paras. 43 to 53.

23 MR. FLYNN: 43 to 53 were the ones you particularly alighted on.

24 THE PRESIDENT: He revised his model. His response to Professor Shapiro's criticism, but he  
25 has revised it, and therefore it is now materially different.

26 MR. FLYNN: He explains what he is doing in the paragraphs immediately before para. 43, and  
27 how he is going to address the remarks that Professor Shapiro makes. In my submission, all  
28 of this here is entirely what you would expect to find in a reply report, and it may raise  
29 issues that the experts will wish to discuss in due course. But, to call it revising models – it  
30 is not as if some fantastic new Excel thing has been put in front of the CMA which it needs  
31 to deconstruct and digest. In simple prose, Dr. Stillman explains a response to the points  
32 that have been put to him and, in my submission, that is entirely normal reply evidence  
33 stuff, and there is no call for a further report from Professor Shapiro on this. The issues  
34 between them have been identified.

1 THE PRESIDENT: I do not think there can be any criticism of what Dr. Stillman has done. It is  
2 legitimate for him to do it in a second report, because he is taking on board the criticism,  
3 and applying it to revise his model. It is a small area of his report. The question really is  
4 would it not be helpful for everyone, including, indeed, Dr. Stillman, and you, if you had it  
5 set out in writing rather than in the witness box, what Professor Shapiro says about the  
6 amendment that has been made to the model. It is not a big part----

7 MR. FLYNN: Two points in response for your consideration, Sir. One is no doubt there will be  
8 experts' meetings and this is a point they can discuss, and the other I have just completely  
9 forgotten! (Laughter).

10 THE PRESIDENT: It cannot be so important!

11 MR. FLYNN: The other point was the infinite regress point, which I think you also said exactly  
12 the same point could be made.

13 THE PRESIDENT: I see that and one is very alert to that point, of course. It just may be, given  
14 what we have is the model being revised, that it may be helpful for everyone if one had, and  
15 I imagine it is just a couple of pages just explaining in writing rather than in a statement of  
16 experts, which we will come on to. This does not necessarily preclude a different approach  
17 to the other points which Professor Shapiro wants to cover, which other counsel will  
18 address me on.

19 MR. FLYNN: Precisely.

20 THE PRESIDENT: But on this particular point, I do not think this infinite ping-pong of reports  
21 really arises, it is a focused point on which it might be helpful, as things developed, to get in  
22 writing.

23 MR. FLYNN: Professor Shapiro may make another point that Dr. Stillman says: "Yes, that is  
24 true, but . . ." In my submission, it is the infinite regress point, and it could go on for ever,  
25 but one thing one can certainly say is that if there is to be a response on this it would be  
26 extremely short, and I probably cannot assist you further on the point.

27 THE PRESIDENT: Thank you very much. Now, Dr. Majumdar – Mr. Kon. This is a new  
28 report, of course.

29 MR. KON: It is a new report, Sir, but it equally is a report which is responding very clearly to the  
30 evidence, which has been put forward by Professor Shapiro and Dr. Haydock, by the CMA.  
31 The CMA put forward no economic testimony as part of its decision. It, for the first time  
32 introduced that testimony in its defence. All that Dr. Majumdar is doing is responding to  
33 that evidence.



1 Perhaps I could take you, Sir, back to Dr. Majumdar’s report and, in particular to the  
2 instructions which we say he faithfully follows – p.4, para. 3 of his report. He says:

3 “I have been instructed . . . to produce an independent expert report to assess the  
4 following:

5 The conclusions of the expert report of Professor Shapiro (27 July 2016)”  
6 which, of course, was produced for the first time in the defence:

7 "on which the CMA relies as part of its Defence, and in particular Professor  
8 Shapiro’s assessment.”

9 He goes on to describe what that was. Secondly:

10 "The conclusions of the expert report of Dr. Haydock on which the CMA also  
11 relies as part of its Defence. Specifically, I have been asked to assess the  
12 conclusions reached by Dr. Haydock concerning the actual impact of the GUK  
13 Settlement on competition.”

14 There is clearly an active dispute and there has been since the notices of appeal on whether  
15 wholesaler or pharmacy prices are the relevant prices to take into account, and whether the  
16 CMA has actually faithfully constructed pharmacy prices.

17 If I could take you to our notice of appeal, Sir, it is a point that we raised very clearly in our  
18 notice of appeal, para. 6.11, and this is entirely consistent with what we submitted to the  
19 CMA:

20 “The relevant question which the CMA should instead have considered is the  
21 impact of the Settlement on prices charged by GUK to wholesalers.”

22 That is the issue and the fundamental issue is whether the prices that GUK offer to  
23 wholesalers was a lower price and was a competitive price compared to Seroxat obviously,  
24 which was sold to wholesalers prior to 2002 and to parallel imports which was a  
25 fundamental part of the CMA’s case which is that this did not introduce any new price  
26 competition *qua* the prices that were charged by parallel imports.

27 Sir, may I move on in the notice of appeal?

28 THE PRESIDENT: Yes.

29 MR. KON: Paragraph 6.14:

30 “The CMA argues that the price of GUK’s paroxetine *charged by wholesalers to*  
31 *pharmacies* was not materially different to the price of PI *charged by wholesalers*  
32 *to pharmacies*. The CMA reached this position by assuming that wholesalers  
33 marked-up GUK’s paroxetine by substantially more than the amount they marked-  
34 up PI. It follows that the CMA necessarily proceeds on the basis that wholesalers

1                   paid a substantially lower price for paroxetine supplied by GUK than they paid for  
2                   PI.”

3                   A similar point is made again at para. 6.17 and certain data is given in that paragraph on that  
4                   question. That is the point that Dr. Haydock and, to some extent, Professor Shapiro are  
5                   dealing with in their evidence, and what Dr. Majumdar is doing is essentially responding to  
6                   that evidence on that particular question.

7                   I think Mr. Turner’s fundamental point on this, the way he put it was there was “a  
8                   fundamental shifting of arguments, which entitles him to serve rejoinder evidence”, that is  
9                   the way he put it a moment ago.

10                  All of this evidence is responsive. It is entirely responsive to the evidence put in by  
11                  Haydock and on the other question by Professor Shapiro. He goes no further than  
12                  responding to that and, indeed, in para. 62 of Dr. Majumdar, which you were taken to by  
13                  Mr. Turner, you will recall that Dr. Majumdar says at the end of that paragraph: “I do not  
14                  need to produce any new models, I do not need to respond to the models because”, he says  
15                  “I consider this point can be explained intuitively; a formal model is not required.”

16                  THE PRESIDENT: That is on a different point.

17                  MR. KON: That is the second point.

18                  THE PRESIDENT: On the point that you are talking about now, about prices, looking at 5.4  
19                  onwards that is a whole analysis that supports the point in your notice of appeal, but he is  
20                  advancing a new price analysis.

21                  MR. KON: All based on CMA data.

22                  THE PRESIDENT: It may be based on CMA data, but it is supporting a point in your appeal, but  
23                  he says Dr. Haydock has ignored this and should have done it. That is more than just  
24                  responsive. It is putting forward detailed analysis which has not been considered yet.

25                  MR. KON: It is putting forward an analysis which is explaining the omissions in Dr. Haydock’s  
26                  evidence.

27                  THE PRESIDENT: It is saying what is the result of filling the omissions. You could have put  
28                  this with your notice of appeal.

29                  MR. KON: We had nothing in the CMA’s decision which required us to do so. They put forward  
30                  no economic evidence until their defence. There was nothing in the decision that required  
31                  us to do this.

32                  THE PRESIDENT: I am not saying it is excluded, but the point you took in the notice of appeal  
33                  is that one should look at wholesaler evidence, and now Dr. Majumdar is saying, “I have  
34                  looked at it, and this is the result”.

1 MR. KON: Yes, but this is no shifting of arguments.

2 THE PRESIDENT: It is not a shifting of argument, but it is a new data analysis, which has not  
3 been considered by the CMA's experts. To have a response to this by way of oral evidence  
4 going into the detail of how the analysis was conducted and whether the computations may  
5 need adjustment, it surely is more satisfactory if that is done in writing. There may be  
6 different issues on the theoretical side, but when it comes to pricing analysis one has to  
7 think about the practicalities, how this evidence is going to be taken and challenged. One  
8 could leave it as it is and then Ms. Webster can speak for 45 minutes explaining why it is  
9 problematic, and how it should be adjusted, and how, if it is adjusted, she can produce in the  
10 witness box a different figure and a different chart. We cannot deal with a case that way.  
11 I do think, when it is conducting a data analysis----

12 MR. KON: Data that was available----

13 THE PRESIDENT: -- what your expert has done, and I am not criticising him for doing it, but to  
14 not have a response in writing and leave it to witness evidence is just unsatisfactory. I think  
15 it is unsatisfactory for you as well, because you then would have to question her, and the  
16 Tribunal would have to question Ms. Webster on these matters hearing her position for the  
17 first time when she is giving evidence.

18 MR. KON: Our position is quite straightforward, that this is all evidence that was available to the  
19 CMA, which they could, and Dr. Haydock could have included in her original report. She  
20 failed to do so. All Dr. Majumdar is doing is pointing out to her the areas where she has  
21 failed to take evidence into account, and the fact that she failed to take this evidence into  
22 account is a material omission, and that material omission is explained in Dr. Majumdar's  
23 evidence. The fact that they failed to do so, rejoinder evidence should not be used as an  
24 opportunity to restate a case.

25 THE PRESIDENT: I am sorry to interrupt you, but it then leads one on to the question, if it is  
26 simply that they failed to take it into account, they should have, therefore the appeal should  
27 be allowed. That is one thing. That cannot follow. One has to go to the next stage, failed  
28 to take it into account, should have taken into account, and when you do take it into account  
29 this is what it shows, and it produces this result.

30 MR. KON: Which is exactly what Dr. Majumdar is saying, I acknowledge that.

31 THE PRESIDENT: If it is going to be said, "Well, actually, when you do take it into account, it  
32 does not produce this result because it has to be analysed in a different way and it points to  
33 a different conclusion", that is something that, it seems to me, should be canvassed in  
34 writing prior to the hearing and not at the hearing.

1 MR. KON: Our point is a very simple point, that this is purely responsive to Dr. Haydock, and  
2 there is the point.

3 THE PRESIDENT: The other part is the bit earlier on which I stopped you referring to.

4 MR. KON: Yes, which I was referring to. Essentially, as Dr. Majumdar says, it is a question of  
5 his intuition, as he says in para.62, and if you go back to exactly how he has approached it  
6 at para.30 and onwards, what he puts forward are a number of simple propositions, a  
7 number of clear statements of principle, nothing more, nothing less. There is no new  
8 evidence involved in there, it is a question of Dr. Majumdar's logic and, as he puts it,  
9 intuition, which leads to a particular result. It does not seem to us that that requires any  
10 particular response from Professor Shapiro.

11 THE PRESIDENT: I think it was only 30 to 31, and 63 to 65, those he ought to respond to. Is  
12 that right?

13 MR. TURNER: I should just remind you, Sir, if we are looking at the particular paragraphs, that  
14 in our skeleton at para.29, what we did was, for each of the appellants' expert witnesses we  
15 did identify where the new evidence was primarily to be found in terms, starting with  
16 Dr. Majumdar, then Jenkins, then Stillman. The point about the new mechanism you are  
17 focusing on, para.30, it referred to para.12 to 16 here. That is because, as I mentioned, it is  
18 the same----

19 THE PRESIDENT: Sorry, 12 to 16 where?

20 MR. TURNER: In Majumdar.

21 THE PRESIDENT: Paragraph 30, and then you go back to 12?

22 MR. TURNER: Yes, that is because that is the summary of his opinions. That is all it is, just so  
23 that you can see that it is there, but he repeats it. It is the same thing.

24 THE PRESIDENT: Yes, it is the same point, one is the summary and one is the detail, yes. Yes,  
25 I understand your point on that, Mr. Kon. I think that is a rather different character from the  
26 other point.

27 MR. KON: It is certainly a different point.

28 THE PRESIDENT: Thank you. Ms. Kreisberger, I think you look after Dr. Jenkins.

29 MS. KREISBERGER: Thank you, Sir. I would like to make two points in response to

30 Mr. Turner, and the first point is about the way this application has been made, and the  
31 second point is dealing with the substance of the attack on which the application to put in  
32 rejoinder evidence is based. I was going to say, Sir, on my first point, that we simply  
33 cannot respond to this application because we do not know what its substance is. Sir, you

1 have already commented, you have already observed, that this morning we have discovered  
2 what the substance of that application is. I am afraid that puts us in a very difficult position.

3 THE PRESIDENT: I did sort of understand what the nature of the application was from the  
4 skeleton. I understood what was going to be advanced, it is just the detail of what one has  
5 to read.

6 MS. KREISBERGER: It is the detail that is critical. Mr. Turner's skeleton refers to a number of  
7 paragraphs in Dr. Jenkins' report, and we are to derive from that, or we were to derive from  
8 that, prior to his submissions what the point was that was being made. Actually, what we  
9 should have seen in writing is, we would like to deal with the point about information  
10 asymmetry, for instance. You will not see that in the CMA's skeleton, and as a  
11 consequence we are dealing with that on the hoof. That must be understood in the context  
12 of this being an exceptional application to put in rejoinder evidence. Sir, we were put in a  
13 position of really engaging in a guessing game before this morning as to what Mr. Turner  
14 was going to say, and we have now heard it. I will respond to the substance, but I would  
15 just like to lay down a marker that this has caused some prejudice to us. We do regard this  
16 as an important procedural point.

17 Moving on to the substance in so far as we can respond, it is our contention that there is no  
18 justification for the CMA to have a further bite of the cherry on the basic economic theory,  
19 as Mr. Turner put it. We really make three points, which I will make briefly.

20 The first is that we think it is appropriate at this juncture to lay down a marker as to what we  
21 say is the significance of Professor Shapiro's report. In essence, we will be advancing the  
22 proposition that actually limited weight should be placed on that report, and we will develop  
23 that in our skeleton, but we flag it now to be absolutely clear. The reason for that  
24 contention is that there is no economic framework in the decision. It is a fiction to pretend  
25 otherwise. If I may, Sir, just take you to the relevant parts of the decision, which  
26 Mr. Turner has already referred you to.

27 THE PRESIDENT: The CMA's decision?

28 MS. KREISBERGER: The CMA's decision.

29 THE PRESIDENT: I have not been taken to the decision at all.

30 MS. KREISBERGER: Sorry, I think it was referred to, and I will come back to the specific  
31 paragraphs, Sir, if I may. It is p.240 of the decision, section 6, "Overview", and this is  
32 really the entirety of the theory on which the restrictions, the object part of the decision, is  
33 based. If I could just very briefly take you through it.

34 THE PRESIDENT: Do you need to do all this now?

1 MS. KREISBERGER: If I could perhaps make the point, Sir, and then we can decide whether it  
2 is worth going to the paragraphs. There is no economic framework put forward. Perhaps I  
3 can put it briefly in these terms: what one finds in paras.6.4 to 6.9 is the proposition –  
4 perhaps, Sir, if I could simply boil it down to this, and if there is any debate we can go to  
5 the paragraphs – the proposition in 6.7 that both competitors can be better off because the  
6 profits the generic supplier would make would be lower than that which the originator  
7 would be likely to lose. It is essentially an argument that the anti-competitive essence of  
8 these arrangements is that both parties do better under this financial arrangement. That is  
9 all we have, Sir.

10 What you will not see in these paragraphs, or indeed anywhere in the decision, is a  
11 reference to a pay for delay inference, to Professor Shapiro's writings, which we know from  
12 his report are well documented, widely published, because some of the articles are annexed.  
13 That is simply not there in the decision. They advance the theory in that way.

14 Professor Shapiro says something different and really quite specific, and I would preface  
15 that remark with the observation that that must be right, otherwise why would they bother?  
16 The CMA are now relying on a specific economic theory in support of their decision. His  
17 core proposition, and I will, Sir, take you very briefly back to Professor Shapiro's report, is  
18 that the expected date of independent generic entry will be earlier than it would be under the  
19 so-called 'paid for' settlement. In other words, without payment the parties will always  
20 agree on a later entry date. What he is really saying is it is a trade-off between money and  
21 time. The originator pays money to delay entry, to buy time. That is his proposition which  
22 we do not accept. If I might just take you, Sir, to the paragraphs that make that very clear. I  
23 should say this is not a proposition that any economist familiar with this area would find  
24 surprising. It is well-known and well ventilated, certainly in the US literature.

25 If we just go to Professor Shapiro's report. (After a pause) Sir, if I could ask you to turn up  
26 p.36 of Professor Shapiro's report. One finds this in a section dealing with market  
27 definition, and I am not going to take you to the substance of that but this is actually a very  
28 helpful illustration. This illustration illustrates the principle that permeates the entire report,  
29 which is the one I have set out that payment shifts the curve to the right. One has an  
30 expected generic entry date in the absence of settlement with payment, and payment results,  
31 one sees, on the horizontal line "delayed generic entry date". It could not be clearer than  
32 that.

33 For completeness, I will just take you to----

34 THE PRESIDENT: Is that the basis, you point out it is in the section on market definition.

1 MS. KREISBERGER: It is in the section dealing with market definition.

2 THE PRESIDENT: It is not about justifying the economic effect.

3 MS. KREISBERGER: It is not, but it just happens to be the neatest visual illustration so it is a  
4 useful guide, and I do not think anyone at the CMA would dispute that that is really the  
5 underpinning, that is the premise.

6 THE PRESIDENT: Of?

7 MS. KREISBERGER: Of the pay for delay inference. So, to be clear, this is a self-standing  
8 economic theory. As I said, it is well documented in the literature. The CMA could have  
9 relied on it, it is well-known. They could have relied on it in relation to Professor Shapiro's  
10 writings on the Actavis inference, he has now recast that for the purposes of this case as the  
11 pay for delay inference, and if we just go to that----

12 THE PRESIDENT: And others have written to that effect as well.

13 MS. KREISBERGER: They have, and, of course, there are well-known critiques of it, certainly  
14 not accepted theory. So, if one goes back to p.12, para. 57, Professor Shapiro says, towards  
15 the end of that paragraph, penultimate sentence:  
16 "This points to the conclusion that the payment was made in exchange for delayed  
17 generic entry or some other anti-competitive restriction that weakens the ability of  
18 the generic firm to compete. I call this the 'pay for delay inference'."  
19 He then has footnote 10, and if we go to that, he expressly refers to his writings on the  
20 Actavis interference, and this is the term he uses here: "The sole underlying economic logic  
21 applies in the UK as in the United States."  
22 One might have expected section 6 of the decision, which I took you to very briefly, to have  
23 begun with the proposition that settlement leads to independent entry later than expected  
24 under continued litigation. That is the p.36 illustration. One does not find it, it is not there  
25 in the decision. They have decided to rely on this theory at a later stage.  
26 This is all directly relevant to how we say the Tribunal should approach this application.

27 THE PRESIDENT: What does he say about Dr. Jenkins?

28 MS. KREISBERGER: If I may just take you to that in a moment?

29 THE PRESIDENT: Yes.

30 MS. KREISBERGER: I would like to make two points based on what you have just seen, Sir, in  
31 those passages.  
32 The first is we have not formally objected to the admissibility of Professor Shapiro's  
33 evidence on the pay for delay inference. We do not formally object, but we do say it has  
34 limited weight in the assessment of the correctness of the decision. Mr. Turner, in his

1 skeleton, took you to the *JJB* case, which refers to evidence which is not within the broad  
2 framework.

3 THE PRESIDENT: Yes, I understand you make that point, yes.

4 MS. KREISBERGER: This is where we lay down our marker now for the Tribunal's assistance,  
5 which is that our expert has engaged with the evidence as a secondary line of argument, it is  
6 not our principal position. Our principal position is this does not assist at all.

7 THE PRESIDENT: Before going into that, does Professor Shapiro address Dr. Jenkins' first  
8 report?

9 MS. KREISBERGER: Professor Shapiro does address the question of less restrictive settlement,  
10 he makes specific comments on that, it is at p.24, s.7.

11 THE PRESIDENT: Yes, in relation to Dr. Jenkins, yes.

12 MS. KREISBERGER: Yes, that is a separate issue, although I am coming to the end of my  
13 submissions I will return to that briefly.

14 THE PRESIDENT: That is s.7?

15 MS. KREISBERGER: Yes. We have engaged with the theory but that is very much a secondary  
16 line of argument. That is relevant because we say this would be both an unfair and costly  
17 distraction as well as causing real prejudice, if the CMA takes us down this road of  
18 theoretical economic debate, because we do not think it is directly relevant, it is not the  
19 basis on which they should be defending their decision. So, we think that colours the  
20 premise of this exceptional application.

21 With that in mind I then want to move to the specific points that Mr. Turner has addressed.  
22 The foundations of the proposition he advances which is that essentially Dr. Jenkins'  
23 evidence could have been put in with the notice of appeal. Those foundations do not  
24 survive scrutiny, they are more than shaky.

25 THE PRESIDENT: That is not really a ground of opposition. What I am just trying to  
26 understand is this: in Dr. Jenkins' second report is she responding to Part 7 of Professor  
27 Shapiro, or is she responding to the earlier parts of Professor Shapiro?

28 MS. KREISBERGER: Dr. Jenkins does both.

29 THE PRESIDENT: So, in s.4 of her report she responds to Professor Shapiro on her analysis,  
30 yes?

31 MS. KREISBERGER: She does.

32 THE PRESIDENT: That is s.4?

33 MS. KREISBERGER: That is s.4, so everything prior to that – yes.

34 THE PRESIDENT: So we are not concerned with s.4. Section 3 is?



1 MS. KREISBERGER: Section 3 is the contentious one.

2 THE PRESIDENT: Yes.

3 MS. KREISBERGER: I think we do need to address you on the fact that this is not evidence that  
4 could have been put in at an earlier stage.

5 THE PRESIDENT: I do not think you do, because it is not being objected to what is said is s.3 is  
6 not dealing with Professor Shapiro's criticism of her report, to which he responds. Section 3  
7 is a new area for her, she is engaging with grounds put forward by Professor Shapiro which  
8 you, yourself, criticise for being new, and this is, therefore, new evidence, a new area for  
9 Dr. Jenkins. If you are right that it should be disregarded, because it is not part of the  
10 decision, of course, all of this is academic. But, insofar as it is paid regard to, she has  
11 engaged with it, and what is thought is that Professor Shapiro can therefore comment on  
12 that because that is not something, obviously, he commented on when addressing her first  
13 report.

14 MS. KREISBERGER: Let me address that point directly.

15 THE PRESIDENT: You may be right that the CMA should not be entitled to advance that  
16 argument at all, that is something you will say at the hearing, in which case it really does  
17 not matter whether Shapiro responds or not.

18 MS. KREISBERGER: As I say, that is our primary position.

19 THE PRESIDENT: I see that, but then there is nothing lost by letting him do so.

20 MS. KREISBERGER: We think there would be something lost, in fact it would be quite  
21 prejudicial, not least because we have to remember this is exceptional. It is said against us  
22 that what Dr. Jenkins is doing is attacking the CMA's approach in the defence, and that is  
23 why they ought to be given a right to respond at this late stage.  
24 The basis for that submission was Dr. Jenkins' report para. 3.39.

25 THE PRESIDENT: I think it started at 3.5.

26 MS. KREISBERGER: Sorry, let me start that again. 3.5 and 3.31, which have the same reference,  
27 which is a reference to D.40 of the decision. We really take objection to this because D.40  
28 of the decision is not a part of the decision in which the CMA advances its economic theory.  
29 D.40, if one turns it up in the decision, one sees at p.606 the heading: "GSK's Annex 4", and  
30 D.40 is simply the CMA's response to evidence put in by GSK, which is precisely why one  
31 finds it in an annex.

32 THE PRESIDENT: Sorry D.40?

33 MS. KREISBERGER: Page 606.

34 THE PRESIDENT: 606 "GSK's Annex 4."

1 MS. KREISBERGER: Then D.40, the CMA makes some observations on GSK's submission.

2 All Dr. Jenkins is doing at para. 3.5 is observing that now that the CMA have advanced an  
3 economic framework, which they say justifies the approach they took in the decision, she  
4 says: 'Ah, now I see that reasoning. If I dig around in the annexes I find it'. But it cannot be  
5 the case that we were supposed to put on our hard hats and go digging around for nuggets  
6 on which to develop an economic theory. It simply was not in there.

7 What Dr. Jenkins is doing in this report is responding only to Professor Shapiro, subject to  
8 some observations: 'I see that there is some consistency here'. We will develop at the  
9 hearing inconsistencies as well, but that is all she is doing.

10 If one then comes back to Dr. Jenkins' report, it was also said against us that this is all new  
11 and this is why the CMA should be given this exceptional commission at this stage. The  
12 "newness" that you were taken to, with the reference to the impact of asymmetric  
13 information, actually that is not new either. That is in Jenkins' 1. I do not know if you  
14 would like to turn it up or simply have the reference, but at s.4(b)---

15 THE PRESIDENT: I think I----

16 MS. KREISBERGER: --Jenkins 1, annex to our notice of appeal.

17 THE PRESIDENT: I would like to deal with this today, if possible, so Jenkins 1, which bundle?

18 MS. KREISBERGER: It is the Merck notice of appeal, tab 16. Unfortunately, Sir, the point will  
19 leap out at you from the heading.

20 THE PRESIDENT: It is an annex to the notice of appeal.

21 MS. KREISBERGER: Yes, tab 16. If you could go to p.797.

22 THE PRESIDENT: Yes.

23 MS. KREISBERGER: You will see there the heading: "4B Impact of Asymmetric Information  
24 Between the Parties."

25 THE PRESIDENT: Yes.

26 MS. KREISBERGER: This is a plank of Dr. Jenkins' evidence in relation to less restrictive  
27 settlement. It is nothing new. It is also, again, something of a fiction to say that the CMA  
28 have been taken by surprise. Professor Shapiro will be well aware that information  
29 asymmetry is one of the classic objections made in the economic literature to his  
30 framework. This is nothing new. The CMA could have dealt with this all in Professor  
31 Shapiro's evidence, and they have not come up with any reason why they should have  
32 another go at the economic theory.

33 Our final point on this is that Dr. Jenkins' evidence is also criticised on the basis that she  
34 deals with the ray of delay argument in published literature, and this was not in the notice of

1 appeal. That objection is without basis. This may be putting it a little strong, but it could be  
2 said of Dr. Jenkins that it would be intellectually dishonest to address the theory, what we  
3 say is the partial theory, advanced in the evidence in Professor Shapiro's report, when it is  
4 well known that the objections which we make to that in Dr. Jenkins' evidence, based on, in  
5 particular, information asymmetry and inefficient bargaining, have been responded to by  
6 Professor Shapiro in his writings. It would be said against us, if we had not addressed that  
7 point, that we must have known it was in Dr. Jenkins' mind, it was perfectly appropriate for  
8 her to deal with that. The ray of delay phrase comes from Professor Shapiro's writings. It  
9 was within the CMA's gift to include that aspect of the theory. They chose not to. They are  
10 now saying that because Dr. Jenkins raises it, quite correctly, in her evidence, to ensure that  
11 she gives a complete answer, it is now being said: "Sorry, we did not cover that, we would  
12 like another go". These are not points made by us for the first time, they are points based on  
13 what Professor Shapiro says.

14 We also think procedurally this can all be perfectly well dealt with in the joint statement.

15 THE PRESIDENT: If there was a response to s.3 in a short report, and Mr. Turner emphasised  
16 several times "short" – s.3 itself is not very long – why would you be prejudiced.

17 MS. KREISBERGER: Simply, we do not know what that will say and we will not have an  
18 opportunity to respond, and it is----

19 THE PRESIDENT: He will say what he will say in his evidence if he is sitting here and you have  
20 to stand up and question him.

21 MS. KREISBERGER: In the same way as one might say why should we not then have an  
22 opportunity to respond. There is a reason why the rules provide a structure to provide an  
23 end.

24 THE PRESIDENT: Except the point, which is of some intricacy, which is made here by Dr.  
25 Jenkins, is not one that has been made in the reports otherwise, so it appears. She develops  
26 the framework applying the aspects that she says should be applied, including, I think, the  
27 asymmetry and the risk aversion, showing how they then produce a different outcome, if I  
28 have understood it.

29 MS. KREISBERGER: Information asymmetry has been addressed, actually in some level of  
30 detail in Jenkins 1, so we do not think that is a hook for the CMA.

31 THE PRESIDENT: Where does it refer to the level of detail?

32 MS. KREISBERGER: Page 797.

33 THE PRESIDENT: That is fairly short. There is a reference to the particular article.

1 MS. KREISBERGER: Those four paragraphs actually deal with information asymmetry and  
2 willingness to settle. These are not new points, and they are so well established.  
3 I think it is important to step back and say the principle that the CMA should be entitled to  
4 say everything they want to say at any point should not override the approach that we would  
5 invite the Tribunal to take, which is to step back and say that this is not an efficient means  
6 of proceeding. It is not a cost-effective means of proceedings. We have a very real concern  
7 that it does not place the parties on an equal footing, and it will thereby cause prejudice to  
8 Merck. We have not raised any point that Professor Shapiro could not have raised himself,  
9 because all of those points are drawn from Professor Shapiro's own writings. There must  
10 have been a reason they did not run with it and they want to know. I do not think that is  
11 appropriate. That is simply not the way we litigate. If they choose not to cover an aspect of  
12 his well-publicised theory then they need to live by that choice.

13 THE PRESIDENT: Very well, thank you.

14 MS. KREISBERGER: Thank you, Sir.

15 THE PRESIDENT: I will hear a brief response now, and then I will consider over lunch what to  
16 do. I will allow Ms. Webster to respond to the pricing analysis, that is not resisted by Mr.  
17 Flynn, very realistically, but I will also allow it as regards Dr. Majumdar, that part of Dr.  
18 Majumdar's report, that is to say the s.5 part dealing with prices to wholesalers; that is quite  
19 distinct from those earlier paragraphs, so that is for Ms. Webster in other words.

20 MR. TURNER: I am grateful, Sir.

21 THE PRESIDENT: That is quite separate from whether Professor Shapiro should be able to  
22 address the other bit of Dr. Majumdar and, indeed, Dr. Stillman and Dr. Jenkins, so you  
23 need not deal with the pricing bit concerning Ms. Webster, the real issue is Professor  
24 Shapiro.

25 MR. TURNER: I can be short. The relevant parts, as I say, were set out in our skeleton and the  
26 basis for the objection was there. So far as Stillman is concerned, the overarching point is  
27 something that, Sir, you, yourself, referred to, which is a practical issue as well as a matter  
28 of principle.

29 We are going into a trial beginning next February, which should not be one-sided on this  
30 aspect, therefore where it is the case that the appellants put forward detailed new evidence,  
31 now I am referring only to the material which Professor Shapiro will need to address. If  
32 there is something there on which it will actually make sense for him to set out his position  
33 in writing, for the orderly conduct of these appeals, that should be done. The only respects  
34 in which we wish to put in a response from Professor Shapiro addresses those areas where

1 new material has come or a change in approach and not material which is the true response  
2 given to what he said in his first report.

3 So far as Dr. Stillman's material is concerned, there the major aspect is that he has changed  
4 the basis of his attack in the model. It is done explicitly. He is not, therefore, defending his  
5 original conclusions or approach in the first report. He is saying instead you must make this  
6 adjustment and then "Here is my opinion". That is why it is necessary on that for Professor  
7 Shapiro to put in something short explaining what his opinion is in relation to that. It is  
8 needed for good order and expert meetings are not the same as him producing something  
9 that will assist all parties and the Tribunal to deal with it. That relates to the dominant firm  
10 competitive fringe report issue; that is all there.

11 So far as Dr. Majumdar is concerned, again, here we have something that is not responsive  
12 to anything that was said by Shapiro, certainly not in relation to anything that came from  
13 Majumdar, because there was nothing beforehand. It is very explicitly not that. On the  
14 contrary, he now puts forward a different mechanism supported by a model or not is  
15 irrelevant, the wholesaler mechanism, which he says causes him as an economist to say that  
16 these agreements should be regarded as pro-competitive, that is paras. 12 and 30 and  
17 following of his first report. We have not dealt with that at all. You do not have the CMA's  
18 side of the argument on that point.

19 Similarly, he comes in and attacks the dominant firm competitive fringe model.

20 THE PRESIDENT: It was a point put in the notice of appeal, was it not?

21 MR. TURNER: What?

22 THE PRESIDENT: The wholesalers, should consider the wholesalers?

23 MR. TURNER: Yes, that is slightly different. That was about how you should look at prices to  
24 wholesalers, therefore that relates more to the Webster side of matters. What he is dealing  
25 with here is saying: "Here is a reason why one would expect these agreements to have  
26 produced pro-competitive outcomes". He then explains that the wholesalers would have  
27 had greater availability, or lower prices, that they would have passed those benefits on to  
28 the pharmacies, and that even with fixed volumes he, in his intuitive approach without the  
29 need for a model, says that this would have led to a pro-competitive outcome. That is an  
30 argument from an economist which we have not had before and which we must be allowed  
31 to deal with, because it is a fundamental aspect of their case, one which perhaps they should  
32 have put with their notice of appeal, and we are not now complaining about that. All we are  
33 saying is that when something new has come in of that nature the other side of the story in  
34 terms of the respondent's evidence needs to be addressed.

1 The other subject matter aspect of Dr. Majumdar is the attack on the dominant firm  
2 competitive fringe model where he weighs in and attacks the model put forward originally  
3 by Dr. Stillman, and engaged in by Professor Shapiro. Again, he makes points about that,  
4 and if Professor Shapiro is to be able to deal with it, it should be done in writing now.

5 THE PRESIDENT: 63 to 65, is it?

6 MR. TURNER: Those were relevant paragraphs on that, yes. He then goes on to give original  
7 evidence. It is s.4.4 of his report, beginning on p.20: "Inferences from Dr. Stillman's  
8 Dominant Firm Fringe Model". Then, you will see that what he does is run through in that  
9 section and say why those are wrong. This is important to the appeal; I should say this is  
10 not peripheral or we would not be raising it. The reason is because the CMA's decision says  
11 that an agreement with certain features observed here cannot be expected to have pro-  
12 competitive outcomes. That is an important aspect of dispute, and if a new expert comes in  
13 and makes points attacking a model previously engaged in by the other experts at the time  
14 of a reply it is both reasonable and orderly for the CMA to be able to deal with that shortly.

15 THE PRESIDENT: The model was put forward by Dr. Stillman.

16 MR. TURNER: The model was put forward by Dr. Stillman.

17 THE PRESIDENT: Yes, who is attacking it?

18 MR. TURNER: It was picked up by Professor Shapiro and engaged with on that basis. We now  
19 have a new economist who comes in and says: "Forget all of that, here is the right way to  
20 look at the case."

21 THE PRESIDENT: That is the wholesaler point?

22 MR. TURNER: It is, but it goes with the negative attack on the dominant firm competitive fringe  
23 model. There is the positive side and his attack on the model.

24 THE PRESIDENT: And Dr. Jenkins?

25 MR. TURNER: Yes, in relation to Dr. Jenkins, if you have that report open, I should first just  
26 remind the Tribunal that we did, at the top of p.13 of our skeleton, very specifically say  
27 which were the paragraphs containing the mischief that we objected to. If you have her  
28 second report open there you will see----

29 THE PRESIDENT: Just a moment, I have a lot of reports open.

30 MR. TURNER: This is Dr. Jenkins' second report attached to Merck's reply. The essential point  
31 is that, despite the eloquent submissions that you heard this is not about excluding Professor  
32 Shapiro's evidence on the basis that he is putting some kind of gloss on the decision which  
33 we contest in any event. What this is about is whether there is new material in the second

1 Jenkins' report which, in fairness and as a matter of the Tribunal's procedure, it makes sense  
2 to allow Professor Shapiro to traverse.

3 At 3.5, beginning in this s.3, the relevant s. is s.3, what she does there is to attack a  
4 proposition which she then does footnote part of the decision for, which was not, explicitly  
5 not in that report, and to develop it if you go forward to 3.7----

6 THE PRESIDENT: When you say "not in that report" you mean in her first report.

7 MR. TURNER: It was not something you will see – the opening words of 3.5 – in published  
8 articles but not in his first report. She then opens up a subject matter, and says at 3.7: "On  
9 this basis I take the view the CMA was wrong to rely on the presumption of anti-  
10 competitive effects which is rightly the way in which the decision reads, to patents  
11 settlements involving a reverse payment based on Professor Shapiro's framework.

12 THE PRESIDENT: She says they did rely on that approach as embodied in his framework.

13 MR. TURNER: That is absolutely right.

14 THE PRESIDENT: Then Ms. Kreisberger was telling me that was not an approach the CMA  
15 took at all.

16 MR. TURNER: That is incorrect. I think she may have misspoken, because what the CMA does,  
17 and what Dr. Jenkins does say here is precisely that there was an approach taken in the  
18 decision which formed part of the findings.

19 Go forward to 3.31, p.14, also referred to by us previously, and you will see there: "In his  
20 earlier work Professor Shapiro sought to address this issue", and then five lines down:

21  
22 "I note that the CMA in its decision also relies on this idea, suggesting that the  
23 possibility for the originator to make value transfers would give parties an  
24 incentive to . . ."

25 and so forth. What is going on is that you see an attack in this second report not responding  
26 to anything said by Professor Shapiro in his first report, but which deals with an element of  
27 the decision and that is the gist of s.3. She concludes, if you go to 3.38, which we also  
28 referred to previously, where she puts forward something that would fit well with a notice  
29 of appeal, three lines down: "The CMA should have given specific consideration to these  
30 various questions. The CMA's failure to gather relevant data and factor these in" says Dr.  
31 Jenkins "means that the approach is unsound as a matter of economic analysis."

32 Ms. Kreisberger also referred to a short section in the first report of Jenkins, where there is a  
33 reference to information asymmetry. You may already have seen this----

34 THE PRESIDENT: Yes.

1 MR. TURNER: --that was in a section explicitly dealing with the alternative settlements, and part  
2 of the effects case. It was not in the context of this argument at all. You will see at the top  
3 of p.797 the heading was: "The CMA has not shown that GSK and GUK could have  
4 reached agreement on the early entry settlement", and it arose in that separate context.  
5 What you have here, in other words, is not something which is responsive to previous report  
6 evidence from Professor Shapiro, but something that strikes at part of the root of the  
7 decision, which is significant, and on which there is currently no expert response from the  
8 CMA's side.

9 Sir, those are our submissions.

10 THE PRESIDENT: Yes, thank you.

11 MR. FLYNN: Sir, I apologise, but may I make a point that will take 10 seconds or so?

12 THE PRESIDENT: Yes.

13 MR. FLYNN: The Dr. Majumdar apparent attack on Dr. Stillman's model, my first submission  
14 would be the way to deal with that is through the expert meeting, but if you are minded to  
15 order or to permit further evidence from Professor Shapiro on that point it would seem only  
16 sensible also that the Tribunal would be assisted by any views that Dr. Stillman might have  
17 on it. Thank you.

18 THE PRESIDENT: That point had crossed my mind, Mr. Flynn.

19 MR. FLYNN: I am obliged.

20 THE PRESIDENT: We will say 2.15.

21 (Adjourned for a short time)

22 (For ruling, see separate transcript)

23 THE PRESIDENT: I think that takes care of that. 30<sup>th</sup> November, I think is the date you said,  
24 Mr. Turner, that you can do it?

25 MR. TURNER: Yes, I am grateful, Sir. We have also heard and taken on board what you said  
26 about preparation of the application.

27 THE PRESIDENT: So let us then move on. I think the next thing that logically comes from that  
28 is the experts' meetings, and joint statement. In your skeleton, Mr. Turner, you have very  
29 helpfully set out in para.31 some common areas which the different experts address. It is  
30 not always the same combination, as it were. I think you identify five, though it may be that  
31 the second and third can be taken together. The real question is whether we need different  
32 combinations of experts meeting, because I think that is what is envisaged, certainly as  
33 regards market definition and dominance. That does not, I think, involve Dr. Majumdar or  
34 Dr. Jenkins.



1 MR. TURNER: That is right.

2 THE PRESIDENT: So it is only those two experts who need meet to consider that. The others, I  
3 do not know if anyone has any particular comments on that, or whether indeed we need to  
4 precisely formulate that now. I think there will need to be separate meetings and separate  
5 statements.

6 Secondly, as regards the form of meeting and statements, they can resolve these meetings in  
7 a huge long list, in a schedule which ends up not being very helpful to anyone. I want to  
8 direct a rather more involved framework that I hope will produce better results so that the  
9 experts, not just of like discipline but on common themes should meet, and they should  
10 meet without the parties or their lawyers, they should produce a statement which will cover,  
11 first, the points on which they are agreed, secondly, identify the areas in dispute between  
12 them, and whether each of those areas is material to the outcome of the case. It may be that  
13 they can agree and they should try and do so.

14 MR. TURNER: Yes.

15 THE PRESIDENT: Then in relation to each area which is material, but only as regards those  
16 areas which they consider material, they should explain - either together or, if necessary, if  
17 they have different views - the extent to which it is material and why; secondly, their  
18 opinion on what the Tribunal has to decide in order to resolve that area of dispute, and how  
19 they think that can best be achieved, any assumptions underpinning each expert's views;  
20 and finally, a summary of each expert's criticism of the other experts' opinion. That should  
21 be done clearly and concisely as we have the full reports. I hope that framework, which has  
22 been attempted elsewhere, but not so far, I believe, in this Tribunal, will assist in getting a  
23 more useful document. It requires the experts to do a bit more work in their meeting, but it  
24 can be of benefit to everyone, because usually there are certain points in dispute that really  
25 are not very material. If they can agree on a common approach, even though they do not  
26 agree on the answers that can be helpful.

27 MR. TURNER: Sir, in relation to the first point you made about the division and the need to  
28 work out the combination and permutations of who meets when, I should say that the  
29 categories in para.31 were put to the other parties before this skeleton. I am not aware that  
30 there is vigorous disagreement with this categorisation, but we will no doubt hear from  
31 others. We would commend it as a reasonably workable approach to this.

32 In relation to the mechanics of the preparation of a joint statement, there is perhaps one  
33 point worth raising, which is sometimes an issue, which is the extent to which the parties  
34 and their lawyers can get involved in this process, or should stay completely out. The Civil

1 Procedure Rules do envisage that the parties can be involved with the experts, at least in the  
2 preparation of the initial agenda for their meeting, which would seem to make sense,  
3 because there is a distinction between things that are material to the conclusions of the  
4 experts, on which they, themselves, are the pre-eminent authorities, and the issues they  
5 address that are material to the issues in the case, on which the parties can assist. It would  
6 be our submission that on that latter point and at the initial setting up of this process that is  
7 where the parties and their lawyers can assist, partly for the reasons----

8 THE PRESIDENT: No, you are pushing at an open door. I do not see there is any problem with  
9 parties and their lawyers assisting in the preparation of the meetings, but I think the  
10 meetings, themselves, should be without the parties or their lawyers, and the production of  
11 the statements should be by experts alone.

12 MR. TURNER: Yes.

13 THE PRESIDENT: They are all experienced experts, they know how to do things.

14 MR. TURNER: Yes.

15 THE PRESIDENT: Mr. Flynn, the next thing obviously will be some timetable for this, but  
16 before that is there something you want to add?

17 MR. FLYNN: Yes, to get a timetable on the go, as it were, one would need agreement on the  
18 categories. There is some bewilderment, at least at this end of the table, at the suggestion - I  
19 may have missed something, but nobody around me seems to think that we have been  
20 shown or asked to agree this set of categories----

21 THE PRESIDENT: I think it is really the point that there are some experts - one does not have to  
22 agree the wording of the categories----

23 MR. FLYNN: No.

24 THE PRESIDENT: -- but there are certain areas, the obvious one is market definition and  
25 dominance, I would have thought that was self-evident.

26 MR. FLYNN: We fully agree.

27 THE PRESIDENT: There are some things, clearly the penultimate one, about the actual effect,  
28 which is something that Ms. Webster will deal with and Professor Shapiro does not. I do  
29 not know if Dr. Jenkins does. If she does, obviously she comes into that meeting, but that  
30 may be a separate meeting involving Ms. Webster, who is not concerned with anything else.  
31 So that is the broad point.

32 MR. FLYNN: That indeed, but actually you describe and how you cut up some of the issues----

33 THE PRESIDENT: That is the kind of thing that the lawyers can assist on.

1 MR. FLYNN: That is something on which we are going to have to, I think, respond and discuss  
2 with the CMA afterwards. I should just say, we are not content with that categorisation at  
3 the moment, but nor have we discussed it with other appellants.

4 THE PRESIDENT: Think about it. There is no order that I am making that it will be that  
5 categorisation, or will not be, it is just that there should be some categorisation, which I  
6 would hope you can all agree. It is almost who goes to which meeting, and there might be  
7 three different meetings basically, but it does take us to timing because there may be  
8 different aspects. Ms. Webster's report comes quite late. I think Dr. Jenkins is not  
9 available in the first half of January. It is really a question of when that can be done. I  
10 think we need to get the final outcome, if one works back, by 27<sup>th</sup> January, when we go on  
11 later to look at other things that have to happen. To achieve that, it is a question of when  
12 things can be done.

13 Am I right in thinking, Ms. Kreisberger, that Dr. Jenkins is not going to be engaged with the  
14 evidence coming from Ms. Webster that replaces the evidence that we have got?

15 MS. KREISBERGER: That is correct, yes.

16 THE PRESIDENT: So that meeting can take place in the first part of January. I do not think it  
17 can realistically take place any earlier, because the reports only come in on 12<sup>th</sup> December.  
18 I think that may have to be later, but the others, on the basis that Professor Shapiro's is  
19 coming by 30<sup>th</sup> November and is short, could, I hope, take place in December. Would it be  
20 appropriate to set a deadline now? It probably is, is it not, otherwise things tend to drift.  
21 Professor Shapiro is in America, is he not?

22 MR. TURNER: Professor Shapiro is in California. He will therefore, have to attend this meeting  
23 - we are not flying him over for this - by video link, or something of that kind, which should  
24 be workable. I do not anticipate any difficulty with him attending such a meeting in  
25 December, but I am not sure we have checked that. Yes, he should be able to make  
26 December.

27 THE PRESIDENT: I will not specify a date for it. It is a time by which it must take place. If one  
28 says, save for the meeting involving Ms. Webster, it will be by 21<sup>st</sup> December?

29 MR. TURNER: Yes.

30 THE PRESIDENT: Again, save for the one involving Ms. Webster, if we say the joint statements  
31 will be by 20<sup>th</sup> January, that should give time enough, I think. Is that all right,  
32 Ms. Kreisberger, is Dr. Jenkins back that week?

33 MS. KREISBERGER: That timing should work very well for us, thank you.

1 THE PRESIDENT: Then for the discussion involving Ms. Webster, can we say they should meet  
2 by 13<sup>th</sup> January. That gives slightly less time, but the statement by 27<sup>th</sup> January?

3 MR. TURNER: We had proposed for that one, p.19 of our skeleton, it is going to be for both,  
4 without prejudice meeting of experts, we can say the 13<sup>th</sup>, we had set down the 11<sup>th</sup>, but a  
5 joint statement to be produced still by 20<sup>th</sup>, because we had in mind, working backwards, if  
6 there is to be a PTR, and we think there should be, that should be in the week commencing  
7 30<sup>th</sup> January. It would be good to have available for the PTR the fruits of the experts'  
8 meeting.

9 THE PRESIDENT: Yes, I agree. I have in mind that the PTR, and I think everyone sees the  
10 sense of a PTR, would be on either 2<sup>nd</sup> or 3<sup>rd</sup> February. So I think 27<sup>th</sup> January should work.  
11 I will leave it flexible whether it is the 2<sup>nd</sup> or the 3<sup>rd</sup> for discussion afterwards, but one of  
12 those two dates, a full day. We will need confirmation, because it may be that that will be  
13 with a full Tribunal.

14 The question of whether the evidence should be heard concurrently, or colloquially, in a  
15 'hot tub', I think we save for the PTR. I do not want to deal with that now.

16 MR. TURNER: If that is your firm view, then we accept it.

17 THE PRESIDENT: It is. I think it is a question, first of all, for the whole Tribunal, not just for  
18 me, and it will also depend on the outcome of these meetings as to where we are on  
19 discussion. There are great benefits in concurrent evidence, but it does not always work.  
20 We will consider it then.

21 MR. FLYNN: Sir, just on the timetable, could I make two points? One, Mr. Turner earlier  
22 offered best endeavours to get Professor Shapiro's report by 23<sup>rd</sup> November. If that could  
23 be recorded, I would be most grateful, because this timetable, of course, puts a great deal of  
24 pressure on our witness, Dr. Stillman, who is covering both sides of the fence, as it were,  
25 and I am afraid we do not know what his current plans are.

26 THE PRESIDENT: He is also in America, is he not?

27 MR. FLYNN: He is based in Chicago, though regularly in London.

28 THE PRESIDENT: You did say "best endeavours".

29 MR. TURNER: We will use best endeavours, yes.

30 THE PRESIDENT: So that can be in the order.

31 MR. FLYNN: That is good to hear. Perhaps, and one hopes not, there could be a liberty to apply  
32 in relation to the dates if they really cause problems.

33 THE PRESIDENT: There is a general liberty to apply on all aspects.

34 MR. FLYNN: Then I need say no more.

1 THE PRESIDENT: Turning to the trial and skeletons, I know you all want complete liberty to  
2 say as much as you like, but you are not going to have it. I would like you to share out who  
3 will lead on the common issues in the skeletons. It may be that it will be GSK, who has  
4 obviously suffered the heaviest fine. By 'common issues', I mean there is object and  
5 potential competition, effect, vertical agreements exemption order and penalties. It does not  
6 assist the Tribunal to get four or five different extensive pieces of paper quoting large  
7 passages from *Cartes Bancaires* again, again and again, and setting out the principles just  
8 framed in slightly different words. I would like you to get together and decide who will set  
9 out the main principles on each of those heads. Then the other skeletons can either adopt  
10 what is being said or disagree, and of course supplement, but supplement not repeat. That  
11 applies not simply to the oral submissions in the openings, which you all recognise, but it  
12 does apply to the skeletons as well. That means that you will need to agree between the  
13 appellants and then no doubt provide, whoever is doing the lead part, a draft of it to the  
14 others. You do not have to have a common draft. One person can set out the general  
15 principles, and the others simply say the principles are set out in the skeleton argument for,  
16 for example, GSK, this appellant wants to make the following supplementary observations,  
17 or additional observations. That can work perfectly easily.

18 I will not necessarily require that on rights of defence. It may be that you have particular  
19 issues there that you want to deal with separately, but on those areas that are clearly  
20 common issues. The same will apply to the oral hearings.

21 On that basis, it has been suggested, I think by everyone, that bundles should be prepared by  
22 27<sup>th</sup> January, the appellants' skeletons by 10<sup>th</sup> February, and the CMA's skeleton in  
23 response by 17<sup>th</sup> February.

24 As regards bundles, this will be set out in an order that we will prepare, so you do not have  
25 to fully take this down, but we do not need to be provided by the parties with the CMA  
26 decision. We have got that and we will keep that in a separate bundle. As regards the other  
27 hearing bundles, each bundle, please, separately paginated, either continuously as a bundle,  
28 or within each tab, I do not mind, but not pagination running right through all the bundles.  
29 We have already had, I think, ten copies of the papers lodged, so if, in preparing bundles,  
30 you would like to take back some of the documents and use them again, those preparing the  
31 bundles should just liaise with the Registry. It may save yet further copying of long  
32 documents. Subject to those considerations, please can they be prepared as follows: bundle  
33 A will contain all the notices of appeal without exhibits, and then bundle A1, A2, A3, etc,  
34 will be any exhibits that are not witness statements or exhibits to witness statements, so any

1 free-standing exhibits. Bundle B will be the CMA defence, again without exhibits, and also  
2 your note on *Lundbeck*. Then again, B1, B2, B3, whatever, any exhibits that are not witness  
3 statements or exhibits thereto. Bundle C will be all replies without exhibits. Bundle D, I  
4 think it would be useful to have the English court *Paroxetine* judgments in one bundle.  
5 Bundle E will be the appellants' factual witness statements, and the exhibits to the witness  
6 statements to be in bundle E1, E2, E3, etc. Bundle F, the CMA's factual - I think just one  
7 factual witness, is that right, Mr. Turner, or are there two?

8 MR. TURNER: Just one factual witness.

9 THE PRESIDENT: So probably you can put the exhibits in the same bundle. Bundle G, all the  
10 appellants' economists' reports without exhibits done by economist, so it is Stillman 1,  
11 Stillman 2, Jenkins 1, Jenkins 2, Majumdar, and so on. G1, G2, etc, exhibits to the  
12 economists' reports. Bundle H will be the CMA's economists' reports, and H1, H2, etc, the  
13 exhibits. You get the drift, we want the exhibits in a separate bundle from the main  
14 statement or main report, so that they can be opened alongside each other. Bundle I will be  
15 the economists' joint statements, bundle J, a slim bundle, Professor Young's report, and any  
16 exhibits it has. That just leaves, I think, bundle K as a miscellaneous bundle for whatever  
17 else it is thought we ought to have. We do not need a bundle of all solicitors'  
18 correspondence which, in my experience, is referred to only to produce two or three letters.  
19 They can be handed up if there are two or three letters anybody wants to refer to, but it is a  
20 complete waste of space to have a full bundle.

21 Then there will be, of course, separately the authorities. It would be good to have all six  
22 *Lundbeck* judgments in one bundle, together with the summary of the appeals as in the  
23 Official Journal.

24 Is that clear? Yes, good.

25 MR. O'DONOGHUE: Sir, if I may, the notice of appeal contained very extensive references to  
26 the CMA's case file, and, to my knowledge, the documents themselves have not been  
27 exhibited. So, we will need some facility to access those documents for the hearing.

28 THE PRESIDENT: Let me just understand this: they are documents that you relying on, which  
29 were relied on by the CMA for the decision or - is that right?

30 MR. O'DONOGHUE: Both, Sir. This is the CMA's case file. Take, for example, my client's  
31 appeal, we have a large number of references to contemporaneous documents. Rather than  
32 exhibit each and every one at that stage, it was understood that there would be some facility  
33 to make available the case files at the hearing.

1 THE PRESIDENT: The full CMA case files at the hearing? You have seen these documents  
2 obviously, because you refer to them?

3 MR. O'DONOGHUE: Yes, we have referred to them.

4 THE PRESIDENT: But you have not exhibited them?

5 MR. O'DONOGHUE: There were simply too many.

6 THE PRESIDENT: How many are you going to want to refer to, because it is probably a huge  
7 case file, is it not? It may be 25 bundles, for all I know.

8 MR. O'DONOGHUE: Sir, at a minimum, the documents referred to in the pleadings will have to  
9 be available.

10 THE PRESIDENT: Yes, if you want to refer to them. In that case, treat them as if they were  
11 exhibited, which they could have been, and put them in A1, A2, A3 bundles.  
12 I think there has been discussion about electronic bundles, which we would find of  
13 assistance. We will have paper bundles in court, but if we could have an electronic bundle  
14 that would be helpful. Is that going to be done by each party separately?

15 MR. TURNER: We have already said to the appellants that we will liaise with them about that.  
16 We do favour that approach.

17 THE PRESIDENT: I will leave it to you, I will just direct that there be prepared an electronic  
18 bundle, and leave the parties to work out the details.  
19 I think the only remaining point that comes to my attention is then to think about the trial  
20 itself. Some of the detail of that clearly could sensibly be held over for the PTR. I think it  
21 is useful to address a few points now. I think it will be helpful to have fairly full openings.  
22 I do not think we need four days, as was suggested, but I think three days would be sensible  
23 with two days for all the appellants and a day for the CMA. I think that should work.

24 MR. TURNER: Sir, on that we are a little bit concerned, because there will be no duplication, we  
25 will be covering the same issues, and yet we are to be given half the time of the appellants  
26 on their case. It could be quite harsh. We would suggest that a greater balance is----

27 THE PRESIDENT: I will leave it over for the PTR - and I will just say that there will be three  
28 days for openings - as to how it is divided. I think it would be helpful, as GSK suggested,  
29 to have separate short openings of the Chapter II case when we get to that week, so that the  
30 first openings needs not concern the law on Chapter II and dominance and market definition  
31 in the same way. That can be held over to week three. On that basis, that there are three  
32 days of openings, it seems to me that the factual and expert evidence can be comfortably  
33 completed by the Friday of the second week. Then the third week, I am in difficulties on  
34 Friday, 17<sup>th</sup> March, and I would like not to sit on the 17<sup>th</sup>, but I think we should be able,

1 without any problems, to conclude the Chapter II case by lunchtime on the 15<sup>th</sup>, with short  
2 openings. There is Professor Young - do you want to cross-examine him, it is not referred  
3 to in your note?

4 MR. TURNER: We have said that we do not.

5 THE PRESIDENT: You do not, so it is just those two experts, and there is a factual witness?

6 MR. TURNER: Possibly a factual witness.

7 THE PRESIDENT: So I think two and a half days is comfortable. As regards penalty, it is a  
8 slightly odd situation, because penalty involves no witness evidence, no expert evidence, it  
9 is really oral argument. We then have written closings, we then have oral closings. We do  
10 not need oral argument on penalty twice, as it were, but it may be that one can build in on  
11 Wednesday afternoon and Thursday of the third week some submissions on penalty.

12 MR. TURNER: We would oppose that. We think it is a waste of time to have----

13 THE PRESIDENT: It may be a waste of time, I can see that. I am not going to make these rules  
14 now, I am just suggesting how I am currently looking at it. What I will say is that we will  
15 not sit on Friday, 17<sup>th</sup> March, so we will finish on Thursday, 16<sup>th</sup> at the latest. You will  
16 therefore have the 17<sup>th</sup> March, the Friday, and then the Monday and Tuesday, plus the  
17 weekend of course if you want it, for written closings, but we would like them by the end of  
18 the 21<sup>st</sup>, because I think in a case of this kind we will need a significant time to read them.  
19 We will finish the main part of the trial on Thursday, 16<sup>th</sup> March, and we will resume then  
20 on Monday, 27<sup>th</sup> March, and we have then got, if necessary, all that week, or part of it, for  
21 oral closings. It seems to me that should work quite comfortably.

22 As I say, I am not going to make any order today regarding the detail of the trial because  
23 that is for the PTR, other than to say that we will not sit between the 17<sup>th</sup> and 24<sup>th</sup> March,  
24 and oral closings to start on 27<sup>th</sup>, and I have indicated that we would expect to receive them  
25 by the end of 21<sup>st</sup> March. How the time for witnesses is shared out and a detailed timetable  
26 is for the PTR.

27 MR. FLYNN: Sir, yes, just on a point of detail, we heard for the first time just then from  
28 Mr. Turner that they do not intend to cross-examine Professor Young. I had not heard that  
29 before. If he is able to indicate in respect of any other of our witnesses that he is not going  
30 to cross-examine them, then, of course, it would be helpful so that we can stand them down.  
31 I do not know if he is able to enlighten us.

32 MR. TURNER: I am sorry, that is wrong, our skeleton was quite clear as to who we wish to  
33 cross-examine. We set it out.



1 THE PRESIDENT: That is why I asked you about that. I think you just indicated that you were  
2 not sure about another of the witnesses, so as soon as you know they can be told.

3 Is there anything else that remains to be dealt with today?

4 MR. TURNER: Nothing from us, Sir. (After a pause) I have just been asked to gain  
5 confirmation from the appellants' side, we assume that Mr. Collier, our only factual  
6 witness, is going to be called for cross-examination, but perhaps that can be confirmed?

7 THE PRESIDENT: You can confirm that out of court, if necessary, you do not have to do it right  
8 now, but each side should let the other side know who they want to cross-examine and who  
9 they do not as soon as possible. If you are able to say now, all well and good, there are a lot  
10 of you.

11 MR. FLYNN: It may be that there is some reference by omission. There was no reference to  
12 Professor Young, or it certainly had not been communicated to us. As I understand it, we  
13 have to proceed on the basis at the moment that Mr. Turner is intending to cross-examine all  
14 our witnesses.

15 THE PRESIDENT: I think the reason I assumed they were not cross-examining Professor Young  
16 is that somewhere in the skeleton there is reference to a trial timetable. Inevitably, the final  
17 decision on such matters has not always been taken yet, but as soon as it is please  
18 communicate it to each other.

19 MR. FLYNN: That has been heard. We have six witnesses, including, say, Ms. West, to whom  
20 the CMA have made no reference in its defence whatsoever, and the same with Professor  
21 Young.

22 THE PRESIDENT: This is Vivien West, yes.

23 MR. FLYNN: She is also now not working at GSK. I hear what you say, Sir, and I urge  
24 Mr. Turner and his team to let us know as soon as possible what their intentions are.

25 THE PRESIDENT: What he says at the moment is that they will cross-examine Dr. Reilly, and  
26 they may cross-examine the others, so that is something to be confirmed.

27 MR. FLYNN: We would hope to hear something firmer.

28 THE PRESIDENT: As soon as you know, please communicate.

29 We will draw up the order, we will let you know about the date for the PTR. Please keep  
30 both dates available. It may depend on the other members of the Tribunal, and they have  
31 not yet been appointed.

32 Thank you.

33 \_\_\_\_\_