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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1279/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

15 January 2018

Before:

MR ANDREW LENON QC
(Chairman)
PROFESSOR JOHN BEATH OBE
EAMONN DORAN
(Sitting as a Tribunal in England and Wales)

BETWEEN:

PING EUROPE LIMITED

Appellant

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

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Mr Robert Donoghue QC and Mr Tom Pascoe (instructed by K&L Gates) appeared on behalf of the Appellant.

Ms Marie Demetriou QC and Mr Rob Williams (instructed by CMA Legal Services) appeared on behalf of the Respondent.

CASE MANAGEMENT CONFERENCE

1 THE CHAIRMAN: Good morning.

2 MS DEMETRIOU: May it please the Tribunal, I appear with Mr Rob Williams for the
3 Competition and Markets Authority and Mr O'Donoghue appears with Mr Pascoe for Ping
4 Europe. The Tribunal will be aware that the CMA has an application to exclude certain
5 evidence pursuant to rule 21(2) of the Tribunal's rules. I apprehend that most, if not all, of
6 the other case management issues have disappeared, or at least don't arise for determination
7 today, and so, with the Tribunal's permission, I will proceed to make the application to
8 exclude the evidence.

9 THE CHAIRMAN: Yes, thank you.

10 THE CHAIRMAN: The evidence in question is identified in annex A to the CMA's application,
11 which I imagine the Tribunal will have read, and the Tribunal will have seen that all of it
12 relates to an issue referred to as 'Alternative Measures', and I will come on to explain how
13 that issue arises in due course. Before turning to the detail of my submissions, I would,
14 with the Tribunal's permission, like to make some introductory observations. The first is
15 that the issue raised by this application is an exceptionally important point of principle for
16 the Competition and Markets Authority, because it engages significant questions about the
17 enforcement of competition law in the UK and how it should work. The regime by which
18 the competition law prohibitions are in force is established, as the Tribunal knows, under
19 the Competition Act 1998, and there are two stages. The CMA is the primary fact finder
20 and decision maker, and is given various statutory powers to enable it to perform that role
21 during the administrative phase. There is then a right of appeal to this Tribunal on the
22 merits.

23 In my submission, this two stage model depends on the CMA being in a position to gather
24 and assess the evidence which is relevant to the infringement that it is considering. Severe
25 prejudice would be caused to the Authority's ability to carry out its function if it were open
26 to undertakings deliberately and without proper reason to withhold relevant evidence during
27 the course of the administrative procedure only to produce it at the appeal stage. If that
28 happens, the CMA simply can't do its job properly, and an appeal becomes more or less an
29 inevitability.

30 That is not the model established by Parliament, and it has a number of serious
31 disadvantages not least the waste of public resources. This prejudice to the CMA operates
32 at a practical level, in my submission. Whereas the CMA has wide ranging powers under
33 the Act during the administrative stage to gather evidence and to investigate the facts, the

1 same is not true at the appeal stage. Although the CMA can try to gather evidence to rebut
2 new evidence adduced by the appellant, it has no compulsory power to do so.

3 Further and importantly, the CMA is, at the appeal stage, defending the decision it has
4 taken. It is not open to it at the appeal to rewrite its decision or take a new decision. So
5 even where the CMA is able to adduce evidence to meet and to rebut new evidence on
6 appeal, there is unavoidable disruption and disorder in a process which is supposed to be an
7 appeal on defined grounds against the decision following a full investigation. That is why it
8 is critical to the success of the regime that primary fact finding is carried out during the
9 course of the investigation.

10 Parliament could have chosen - and indeed there were lots of stakeholders who urged
11 Parliament to do this - it could have chosen to adopt a prosecutorial model, such as pertains
12 in the United States, pursuant to which, of course, the court would be the primary fact
13 finder. The Tribunal in this country would have been the primary fact finder, but it hasn't
14 done so, and we say that on Ping's approach, Ping's approach seeks to marginalise the
15 investigation stage, such that everything is up for grabs again on appeal and the Tribunal
16 starts again. It was to counteract this very type of prejudice to the Competition Authority
17 that the rules were changed such as to constrain the ability of undertakings to adduce new
18 evidence on appeal.

19 Prejudice to the Authority is particularly severe, in our submission, where, as in this case,
20 the issue on which new evidence is filed is an issue on which the undertaking itself bears
21 the evidential burden. As we have said in our written application, this is not an arid legal
22 point on burden of proof, but an important practical point. The evidence that the CMA
23 seeks to exclude in this case goes to the question of whether there were less restrictive
24 alternatives that Ping could have introduced short of a ban on online sales, less restrictive
25 alternatives that could have achieved its objective of promoting custom fitting of golf clubs.
26 That is the question which is quintessentially, we say, within Ping's knowledge, and it's
27 very difficult to see how the CMA could properly investigate this without evidence from
28 Ping, without scrutinising its evidence.

29 So this is a clear case where the evidence was available to Ping during the administrative
30 stage, and where it deliberately chose not to provide it to the CMA. The reasons that it
31 gives for not providing the evidence to the CMA don't withstand scrutiny, and I'll come on
32 to say why. In other words, we say that this is a paradigm case envisaged by rule 21, and if
33 the power to exclude evidence conferred on the Tribunal under rule 21 doesn't apply in this
34 case it's difficult to see where it would apply.

1 Ping's main argument in response focuses on the prejudice to it that would result from
2 excluding the evidence, and we do, of course, acknowledge that there would be some
3 prejudice to Ping, albeit not as great as Ping makes out.

4 THE CHAIRMAN: Can I just stop you there. Rule 21, do you say it is an exclusionary rule?

5 MS DEMETRIOU: No, it's a power to admit or exclude evidence, but, as I'll come to show the
6 Tribunal, one of the reasons lying behind the rule change was to strengthen the powers of
7 the Tribunal to exclude evidence in these circumstances. So we say that that power, the
8 power to exclude - of course, you're right, sir, that it's a broader rule because it relates both
9 to the exclusion and admission of new evidence. The important power to exclude evidence
10 that could have been provided during the investigation, we say that this is the paradigm case
11 to which that applies, and if the Tribunal doesn't exclude the evidence then we say it's hard
12 to see in what circumstances it would, which would negate the reasoning behind
13 strengthening the rule, and I will come to take the Tribunal through the background to the
14 rule change, if I may.

15 In terms of prejudice, we say, first of all, and I'm going to come on to make this submission
16 in more detail, the prejudice to Ping is not as great as it makes out, but we say it's prejudice
17 of Ping's own making, it's a result of its own choice, and it would be unfair for the CMA to
18 be prejudiced, which it would be, as a result of Ping's deliberate choice. In any event, we
19 make the general point that there will always be some prejudice to an appellant if the
20 Tribunal exercises its power under rule 21(2) to exclude evidence. So that cannot be a
21 determinative factor, otherwise the power to exclude would be a dead letter.

22 So with those introductory remarks, I now propose to flesh out these points in the following
23 order. I was going, first of all, to take the Tribunal to the rule and guidance, and then
24 explain the legislative history behind the changes to the rule. Secondly, I was going to
25 explain how the legal issue of proportionality and less restrictive alternatives to which the
26 new evidence goes arises, and why the burden of proof, the evidential burden, is on Ping,
27 because we say that's an important point which colours the context. Thirdly, I was going to
28 take the Tribunal through the process that was followed by the Authority in this case, and
29 the circumstances in which Ping withheld the evidence. Finally, I was going to make my
30 submissions on rule 21(2), and address in turn the various factors set out in that rule,
31 notably under rule 21(2)(b), whether the evidence was available during the administrative
32 phase, the reasons - this is (c) - why it wasn't made available by Ping, (d) the question of
33 prejudice, and (e) whether the evidence is necessary for the Tribunal to give judgment.

1 So, starting with the rule, can I take the Tribunal to the authorities bundle. I hope that you
2 have two bundles, a hearing bundle and an authorities bundle. The rule is at tab 19 of the
3 authorities. Does the Tribunal have tab 19? You'll find the rule on p.16, and you will see
4 that rule 21(1) provides:

5 "The Tribunal may give directions as to—

6 (b) the issues on which it requires evidence, and the admission or exclusion
7 from the proceedings of particular evidence ..."

8 That is the power. Then under 21(2):

9 "In deciding whether to admit or exclude evidence, the Tribunal shall have regard
10 to whether it would be just and proportionate to admit or exclude the evidence,
11 including by reference to the following factors ..."

12 So those are factors which the Tribunal is required to take into account, but of course it is
13 not limited to those factors if there are other relevant factors. That's how the rule is
14 structured.

15 You will see that (a) is:

16 "... the statutory provision under which the appeal is brought and the applicable
17 standard of review ..."

18 Of course that's of relevance, but what this rule does, what the existence of this rule
19 demonstrates is the fact that this is an appeal on the merits and doesn't deprive the Tribunal
20 of its power to exclude. Then:

21 (b) whether or not the substance of the evidence was available to the
22 respondent before the disputed decision was taken;

23 (c) where [it was not] ... the reason why the party seeking to adduce the
24 evidence had not made it available to the respondent at that time;

25 (d) the prejudice that may be suffered by one or more parties if the evidence is
26 admitted or excluded;

27 (e) whether the evidence is necessary for the Tribunal to determine the case."

28 This is a new rule introduced in 2015, following an extensive review of the Tribunal's rules
29 carried out by Sir John Mummery. The rules relating to the treatment of new evidence were
30 a particular focus of that review. You will see behind the previous tab, tab 18, the
31 equivalent in the 2003 Rules, and if you turn to rule 22, which is about four pages in, the
32 rules then, 22(2) simply provided that the Tribunal may admit or exclude evidence whether
33 or not the evidence was available to the respondent when the disputed decision was taken.
34 So there was, even then, a power to exclude evidence, but you will see that the power to

1 exclude has been strengthened, and in particular focus has been made on the question of
2 whether it was available, and, if not, the reasons why it wasn't made available.

3 THE CHAIRMAN: Might it not be said that it's just filling out rule 22, the old rule, in a bit more
4 detail. It's giving some criteria, it doesn't seem to me on the face of it that it's putting the
5 burden one way or the other, it's just spelling out some criteria.

6 MS DEMETRIOU: That's correct. You're correct, sir, to say that there was an overall power to
7 admit or exclude, and then what the new rule does is set out criteria, but the critical feature,
8 in our submission, is that the criteria have a focus on this question of whether or not the
9 evidence was available during the investigative stage, and if it was available and was not
10 made available, why not, the reasons why not.

11 THE CHAIRMAN: That's one criterion.

12 MS DEMETRIOU: That's one criterion, and that's something which was very important in the
13 legislative history. That was a concern. One of the reasons behind reviewing this rule was
14 a concern that litigants may withhold evidence during the investigative stage, only to
15 produce it at the appeal stage, and that that is not a good thing given the system we have for
16 the reasons that I adumbrated in opening. We see a flavour of this in the documents which
17 preceded the adoption of the rule. Behind tab 21 is the report of Sir John Mummery dated
18 August 2014. If you turn to p.19 of that, you will see paras. 65 and 66. Paragraph 65, sir,
19 makes the point that you make, which is that no criteria are spelt out in the 2003 rule for
20 determining whether new evidence should be admitted on appeal. That was thought to be
21 one of the problems with the previous iteration of the rule. What Sir John Mummery is
22 saying is that:

23 "In the interests of more effective case management the CAT should be able to
24 exercise more control over the admission of new evidence on an appeal to enable it
25 to deal firmly with cases where, for example there are grounds for believing that an
26 appellant has deliberately held back evidence that could and should have been
27 produced to the regulator in the investigation ..."

28 Then what you see from 66 to 67 is that what Sir John was recommending at that stage was
29 a slightly more extreme version of the rule than was actually adopted under rule 21(2)
30 because what was being suggested was that the rule should apply in circumstances, or the
31 power to exclude, or there should be a focus on exclusion in circumstances where the
32 evidence could have been put to the authority during the investigation, and there wasn't at
33 that stage any focus on the reasons why it wasn't.

1 That comes later, and you see the consultation document, which is behind the next tab, and
2 if you turn to p.15 of the consultation document, para.6.36:

3 “Concerns have been expressed by some regulators that parties were deliberately
4 holding back evidence to ‘game’ the system, and they have suggested that parties
5 should not be permitted to introduce any new evidence at appeal. While
6 Government recognises that introducing statutory provisions constraining the
7 introduction of new evidence brings with it some risk, particularly in relation to
8 satellite litigation, there may be benefits in terms of reducing the cost and time of
9 cases for parties and the CAT.

10 Sir John was therefore asked to consider to what extent the rules should be
11 amended, and to set out the factors that the CAT should take into account when
12 deciding whether to admit new evidence - that is evidence which could previously
13 have been adduced at the investigation stage.

14 Sir John makes a distinction in his report between appeals from the ordinary courts
15 and appeals to the CAT.”

16 Of course, in the ordinary courts there has already been a decision by a judicial body,
17 whereas that’s not the case in relation to appeals before the CAT under the Competition
18 Act. This will be the first independent judicial consideration of the case.

19 “To address this gap Sir John has made the following recommendations to assist
20 the CAT to exercise more control over the admission of new evidence on appeal, to
21 enable it to deal firmly with cases where, for example, there are grounds for
22 believing that an appellant has deliberately held back evidence that could and
23 should have been produced to the regulator in the investigation leading to the
24 decision under appeal.”

25 Then you’ll see at paras.6.40 to 6.44 an explanation of Sir John’s recommendations. At
26 6.40 the recommendation is to require the notice of appeal to contain a statement identifying
27 any evidence which is new, and of course that’s been adopted.

28 Then he’s also recommended a new provision which will require the defence to the appeal
29 to set out in detail any objection to the admission of new evidence.

30 Then,

31 “Rather than prevent the introduction of any new evidence on appeal, the
32 recommended changes instead seek to strengthen the CAT’s powers to control the
33 admission of new evidence. The new procedure allows for new evidence to be

1 identified and dealt with at an early stage in the proceedings, and will stop time
2 wasting by appellants seeking to have evidence admitted late in the procedure.”

3 Then there’s a question on the consultation, and then admission of new evidence. At 6.44,
4 “Sir John recommends a new provision in rule 21(2) that lists the factors the CAT
5 will consider when determining whether it would be just and proportionate to admit or
6 exclude the evidence, including whether the evidence is necessary for it to determine
7 the case. This more focused early approach to new evidence will enable the CAT to
8 make an informed decision about the admission of the evidence, thereby avoiding
9 unnecessary time and costs....”

10 Then what you see behind tab 24 is the proposed rule at that stage. That’s at tab 24, p.23.
11 You’ll see under 21.2 on p.23, factors are set out. Those factors are at (b) and (c), the
12 relevant factors, whether or not the evidence was available; and then (c), whether or not the
13 evidence was capable of being made available to the respondent before the disputed
14 decision was taken.

15 You see there that the original proposed rule 21 was much more similar to the *Ladd v*
16 *Marshall* test that we have in civil litigation, because it focused on whether the evidence
17 could have been provided to the Authority, and there wasn’t at that stage a focus on the
18 reasons why it wasn’t provided. That came following the response to the Government
19 consultation. The response is behind tab 23, the previous tab. If you would turn, first of all,
20 to para.2.40, which is on p.16, you see respondents explaining in their responses justifiable
21 reasons as to why in some instances new evidence might be introduced at the appeal stage.
22 You see the kind of reasons that were being canvassed, and, sir, what was being said was
23 that if you don’t allow someone to try and explain why they haven’t adduced evidence that
24 was capable of being adduced at the investigation stage, then you may be missing out on a
25 whole host of justifiable reasons for not producing the evidence during the investigation.
26 Those include things like the short period given to respond to a statement of objections,
27 continuing to develop the case, responses to requests for information are typically given as
28 written answers rather than witness statements, so new evidence in the form of witness
29 statements is often necessary at the CAT stage.

30 To be clear about that, we are not seeking to exclude evidence here because it is in the form
31 of witness statements. All of the evidence that we seek to exclude is evidence which wasn’t
32 in any shape or form in substance put before the Authority. We’re not objecting to evidence
33 which was in some shape or form before the Authority but is now detailed in a witness

1 statement. That is not a basis for objecting to evidence that we take in this case, and nor
2 would you expect the Authority to object to evidence on that basis.

3 So you see a flavour of the reasons that were being put forward.

4 Then at 2.51 on p.18,

5 “The Government recognises the importance to appellants of being able to submit all
6 relevant evidence and notes there are a number of justifiable reasons why such
7 evidence may not have been submitted at the investigation stage. Consequently, it
8 agrees entirely that there should be sufficient flexibility for appellants to raise points
9 on appeal, particularly if the appellant was not reasonably able to realise the
10 importance of a piece of evidence earlier in the administrative process or if new
11 evidence emerges.”

12 Again, we note there the focus on the reasonableness of the appellant’s action. What
13 they’re getting at, what the Government is getting at, is a situation where an appellant has
14 acted reasonably in not adducing evidence during the investigation stage. So it seems to be
15 an objective test that they’re wanting to impose.

16 Then moving forward to para.2.62 on p.20 under the heading “Government response”,

17 “Whilst it is important for appellants to have a proper chance to put forward evidence
18 which supports their case, the CAT should be able to exclude evidence on appeals
19 when the party seeking to adduce that evidence could reasonably be expected to have
20 made it available to the regulator before the disputed decision was taken. Rather than
21 preventing the introduction of any new evidence on appeal, the new rules will give the
22 CAT powers to control the admission of new evidence, allowing it to consider, in
23 accordance with the criteria in Rule 21(2), whether the new evidence was available to
24 the regulator before the disputed decision was taken.”

25 Then it states at 2.63 that the criteria will be set out in the new rule, including whether the
26 evidence is necessary:

27 “The criterion shows that the party seeking to adduce the evidence will be expected
28 to explain why it was not made available to the decision maker.”

29 Then at 2.64,

30 “In response to the concerns raised by respondents, rule 21(2)(c), which previously
31 referred to the CAT considering whether evidence was capable of being made
32 available earlier, would be amended to provide for the CAT to take into account, in
33 cases where the substance of the evidence was not available to the respondent before

1 the disputed decision was taken, the reason why the party seeking to adduce the
2 evidence had not made it available to the respondent at the time.”

3 Then at 2.66 you see a reference to how this will be considered in more detail in the Guide.
4 Mr Williams quite rightly asks me to turn back to 2.60 on the previous page, because this
5 explains why respondents were concerned about the adoption of essentially a *Ladd v*
6 *Marshall* test. They were saying the draft which I took you to earlier, which was the draft
7 suggested by, or proposed by, Sir John Mummery, essentially amounted to the *Ladd v*
8 *Marshall* test, and that was mitigated in order to place focus on the reasons why evidence
9 was not made available, even if it was capable of being made available. So it is not the
10 *Ladd v Marshall* test, and this is a point which Ping makes in its response to our application.
11 They say that essentially we’re adopting a *Ladd v Marshall* approach. We are not. We
12 recognise that the *Ladd v Marshall* test wasn’t adopted, and we are asking the Tribunal to
13 apply the rule, as adopted, which is to ask whether the evidence was capable of being made
14 available at the time – we say it was – and what the reasons were why Ping didn’t make it
15 available – which we say don’t stack up, and I’ll come to make my submissions on that in
16 due course.

17 Finally, we have the Tribunal’s Guide to Proceedings, which is behind the final tab of this
18 authorities bundle, tab 25. We ask you to note para.7.71 on p.110:

19 “In appeals or applications for review of a decision taken by the CMA or a
20 Regulator, it is expected that much of the factual material relied on by the
21 appellant/applicant will have been before the Regulator at the administrative
22 stage.”

23 Then at 7.73:

24 “The Rules refer to ‘the substance’ to reflect the fact that matters are often put
25 forward at the administrative stage less formally ...”

26 And again, I reiterate we’re not taking any point, we’re not making any application in
27 respect of material which was put in substance to the CMA.

28 Then 7.76 over the page:

29 “It is in the interests of all parties and the efficient conduct of the proceedings that
30 objections ... are raised as early as practicable. Although the Tribunal may
31 exclude or limit evidence on the basis of relevance ... it will not normally [do so]
32 of its own motion.”

33 Then we see:

1 “... the Rules therefore require each pleaded case to include a statement
2 identifying new evidence.”

3 That’s not something that Ping complied with in this case, and the purpose of that is to
4 enable early objection to be made to evidence, to new evidence. That is the purpose of that
5 change in the rule.

6 Then at 7.78:

7 “Objections to the admission of evidence will normally be considered at a CMC ...
8 The Tribunal has a broad discretion over the admission of evidence according to
9 the justice of the case and proportionality. The Tribunal will consider all the
10 circumstances, including the criteria set out in Rule 21(2).”

11 Then you have under (a), the statutory provision under which the appeal is brought. We see
12 - and this is a point relied on by Ping, half way down there - reference to Article 6 of the
13 Convention, and:

14 “An appellant in such proceedings therefore is in general allowed to present a new
15 case supported by new evidence. The Regulator by contrast will generally be
16 expected to defend an infringement decision on the basis of the material before it
17 when the decision was made and not by elaboration or expense of its extension.”

18 This is the point I made at the outset, which is the prejudice caused to the CMA if
19 appellants are permitted, are to be permitted, deliberately to withhold evidence and adduce
20 it at the appeal stage, because the CMA has to defend the decision it has taken. It can’t shift
21 ground. Of course, it can seek to adduce evidence, although it doesn’t have compulsory
22 powers to gather that evidence, to rebut the evidence, it can’t change its decision, it can’t
23 rewrite its decision. That’s why there is very real prejudice to this regime if that practice is
24 allowed to go on, and that’s one of the key considerations underlying this change, this
25 fleshing out of the rules and a focus on whether or not the evidence is new, and the reasons
26 why it wasn’t adduced.

27 THE CHAIRMAN: Is that relevant here, would you say? Would it require rewriting of the
28 decision?

29 MS DEMETRIOU: Sir, that remains to be seen, in a sense, because it depends where the
30 evidence comes out. What is clear is that on an element which Ping itself says is the central
31 - the central - part of the case, which is the proportionality of its rule, it has not provided, it
32 has not made its case to the CMA. It didn’t make it at all in the investigation stage. The
33 CMA has done its best to explore that part of the case. If this evidence is admitted, the
34 CMA will do its best to rebut the evidence that is adduced by Ping. In a sense, whether or

1 not there is very real prejudice in this sense depends on the Tribunal’s findings on the
2 evidence, and whether or not its findings would require a rewriting of the decision, and we
3 can’t know that until the substantive hearing if the evidence is admitted. That is why, in
4 order to avoid that sort of difficulty, that’s why there has been this focus on evidence being
5 put before the Regulator during the investigation stage, precisely so that the Authority can
6 consider it and factor it into its decision and deal with it in its decision.

7 Then we have at (b) the question “whether or not the substance of the evidence was
8 available”, and you will see that the concept of availability means either that the respondent
9 had possession of the evidence, or it was aware of that evidence and could reasonably have
10 obtained it:

11 “The criterion refers to availability to the respondent: it will apply where an
12 appellant relies on evidence which it had not placed before the Regulator before
13 the disputed decision was taken; and where the Regulator relies on evidence in
14 resisting an appeal which it had not referred to in its disputed decision.”

15 So it’s going exactly to this type of prejudice.

16 Then (c) focuses on the reasons why the party seeking to adduce the evidence hadn’t made
17 it available, and the Guide says:

18 “The party seeking to put the evidence forward will be expected to explain why
19 that material was not put forward in the administrative stage. For example, the
20 evidence may concern events since the decision was taken; or it may address a
21 point which only emerged in the decision and was not apparent to the party seeking
22 to adduce the evidence during the administrative proceedings.”

23 Then again, this reiteration that the approach of the Tribunal does not correspond to the
24 principle in *Ladd v Marshall*.

25 “However, the Tribunal will wish to avoid any gaming of the system where a party
26 holds back material evidence during the administrative stage in order to deploy it
27 only on appeal.”

28 Then prejudice, (d):

29 “The degree of prejudice ... is always relevant but is not in itself determinative ...”
30 which is the point I was making at the outset.

31 “Where evidence was identified as ‘new’ in accordance with the Rules but is
32 objected to only very late ...”

33 That is not the case here, so I don’t need to go on and consider that.

34 Then (e), “whether the evidence is necessary for the Tribunal to determine the case”:

1 “This goes directly to the fundamental considerations of justice and
2 proportionality. The Tribunal is always more likely to exclude challenged
3 evidence if it is of only doubtful relevance or unlikely to make a material
4 difference.”

5 So those are the criteria.

6 As I’ve said, the legislative history makes clear the concern underlying the rule change.
7 I will address the question of prejudice in a little more detail at the end of my submissions,
8 but wish to make two broad points at this stage. The first is, as I adumbrated in my
9 introductory remarks, it is inherent in the framework laid down by the Competition Act that
10 all matters relevant to the CMA’s decision should, so far as possible, be addressed in the
11 decision, because it’s at the investigation stage that the Authority has compulsory powers to
12 gather the evidence. Representations are then invited from the suspected infringer, which
13 are then considered, and it is all then addressed in the decision - weighed up by the
14 Authority and addressed in the decision. Of course, the process of pursuing investigations
15 and gathering the evidence and preparing infringement decisions does involve a substantial
16 amount of time and expense, and the efficacy of the system is obviously undermined and
17 compromised if the CMA is not provided with relevant evidence at the investigative stage.
18 Secondly, an infringement decision reached by the Authority is subject to a right of appeal
19 on the merits to the Tribunal, but the proceedings before the Tribunal are an appeal on
20 specified grounds. They are not intended to be a primary inquiry into the facts, into facts
21 and matters which could and should have been addressed as part of the prior investigation,
22 and, as I said in opening, Parliament has deliberately not adopted a prosecutorial system in
23 which a party responds to the CMA’s case by way of a defence advanced in judicial
24 proceedings. That is not our system.

25 Having made those submissions about the rule and the background to the rule, the mischief
26 it was directed to, I now want to go on to consider the legal issues to which the new
27 evidence that the CMA seeks to persuade the Tribunal to exclude go. The new evidence, of
28 course, goes to the question of the proportionality of Ping’s online sales ban, and more
29 specifically to the question of whether there were less restrictive alternative measures which
30 could have achieved the same objective.

31 This is a question on which Ping bears the evidential burden of proof, and that’s an
32 important contextual point here. It’s unsurprising that it’s a point on which it bears the
33 evidential burden of proof, because it’s quintessentially a point within its own knowledge:

1 could it have organised its business in a way which was less restrictive of competition, but
2 which achieved the aim that it sought to achieve?

3 I would like to take the Tribunal first briefly to the Authority's decision which is under
4 appeal in this case, which is in the main bundle behind tab 33. I would ask you to turn up
5 p.76, para.4.44. There is then a heading, "Legal Assessment of the Online Sales ban as an
6 object infringement", and at para.4.44, this is the conclusion which is then explained in the
7 subsequent paragraphs:

8 "For the reasons set out below following an individual and specific examination of
9 the content and objective of the Online Sales Ban and the legal and economic
10 context of which it forms a part, the CMA finds that the Online Sales Ban reveals
11 by its nature a sufficient degree of harm to competition, and that accordingly it had
12 and continues to have as its object the prevention, restriction or distortion of
13 competition within the UK and between EU Member States."

14 So that is the conclusion, there is an infringement by object, that the online sales ban
15 constitutes an infringement by object of the Competition Rules, both the Chapter I
16 prohibition and Article 101.

17 Then if you go forward to p.90, you have another heading, "Objective Justification",
18 heading 3, and again you have the conclusion set out before the reasoning:

19 "Following its specific examination of the context of the Online Sales Ban and
20 having regard to the properties of the products at issue, the CMA finds that the
21 Online Sales Ban contained within the Agreements is not objectively justified."

22 Then you see at 4.84:

23 "In its Written Representations and at the Oral Hearing, Ping told the CMA that ...
24 its Online Sales Ban [is] objectively justified as a *'product of'* or *'corollary'* of
25 Ping's *'overall policy on customisation, and is therefore a fundamental part of the*
26 *goods that PING sells' ...*"

27 So there's a submission, a legal submission, made by Ping during the investigation that the
28 ban is objectively justified.

29 Then if you move forward to 4.93 on p.94 you see the heading "Assessment of Ping's
30 submissions on objective justification", and at 4.93 again the conclusion is set out in
31 advance of the reasons:

32 "For the reasons set out below the CMA finds that the Online Sales Ban contained
33 within the Agreements is not objectively justified in the context of its selective
34 distribution network."

1 Then at 4.94:

2 “The Court of Justice in *Pierre Fabre* ...”

3 and this is the key authority in this area -

4 “... held that the online sales ban in that case amounted to a restriction by object
5 unless it was objectively justified. However, the Court of Justice’s ‘*points of*
6 *interpretation*’ ... are set out in very brief terms, stating ... that the test was
7 whether the restrictions of competition resulting from the ban ‘*pursue legitimate*
8 *aims in a proportionate manner*’.”

9 I am going to go to *Pierre Fabre* and take the Tribunal to it briefly, because that’s an
10 important judgment.

11 The CMA is there saying that objective justification depends on whether the measure is
12 proportionate to a legitimate aim.

13 Then at 4.96 you see the clear proportionality framework applied by the CMA, so: (i) does
14 the online sales ban pursue a legitimate aim, (ii) is it suitable or appropriate to pursue any
15 such aim, and then, (iii) is it necessary to pursue that aim, in particular are there realistic
16 alternatives, and are they suitable or appropriate? Are those alternatives less restrictive than
17 the online sales ban? It is those points under (iii) to which the evidence goes, the evidence
18 which is the subject of this application, and then at (iv), is the online sales ban proportionate
19 *stricto sensu*, by which is meant whether the burden imposed by it is disproportionate to the
20 benefits secured.

21 That’s the framework applied by the CMA in the decision, and then turning forward to
22 p.101 you see at 4.114 and following, and I am not going to take you through all of these
23 paragraphs, but you will see from the structure of the decision that the CMA is there
24 considering whether the online sales ban is necessary to pursue the aim, which it has found
25 to be a legitimate aim, of promoting custom fitting, and asks, “*Are there realistic*
26 *alternatives, and if so, are they suitable or appropriate?*” You then see, if you just flick
27 through here, a number of less restrictive alternatives that the CMA has determined would
28 be capable - would be realistic and would be capable of achieving the same aim.

29 Then you see at 4.156, which is on p.114, the CMA’s conclusion on objective justification:

30 “In light of the foregoing, the CMA concludes that the Online Sales Ban is not
31 objectively justified and amounts to a restriction of competition by object ... The
32 separate question as to whether [it] is a more efficient way of achieving the aims of
33 promoting Custom Fitting or preventing free riding will be assessed under Article
34 101(3), below.”

1 Then para.4.157 just below that, Ping had also advanced an argument that the online sales
2 ban is an ancillary restraint. The CMA's view is that is another way of putting exactly the
3 same objective justification point, but for completeness it was dealt with as an ancillary
4 restraint. You see that the CMA reaches the same conclusion, and if you flick forward to
5 para.4.165 you see the conclusion, and you see that the conclusion is predicated on the
6 consideration of the same proportionality test, including the existence of less restrictive
7 alternatives.

8 The point that we make about the evidential burden is that Ping accepts on this point, on the
9 ancillary restraints argument, that it did bear the evidential burden. We say in the light of
10 that it can't possibly sustain an argument that it didn't bear the evidential burden on
11 objective justification, because it's precisely the same point under a different legal label.
12 That's the structure of the decision and how the question of less restrictive alternatives and
13 proportionality fits within the structure of the decision.

14 I would like to take the Tribunal now briefly to the *Pierre Fabre* judgment, so perhaps you
15 could turn back to the authorities bundle at tab 11. This judgment lays down the approach
16 taken by the European Court of Justice on the question of online sales bans, and whether
17 they are restrictions of Article 101 by object. I am going to show the Tribunal that this
18 judgment makes clear, first, that an online sales ban is an infringement of Article 101 unless
19 objectively justified; and secondly, that the judgment proceeds on the basis that the
20 evidential burden is on the undertaking. If you turn to para.31 to start with, which is at
21 p.9459 (the bottom right hand corner), you'll see the question referred by the Court of
22 Appeal of Paris:

23 "Does a general and absolute ban on selling contract goods to end users via the
24 internet, imposed on authorised distributors in the context of a selective
25 distribution network, in fact constitute a 'hardcore' restriction of competition by
26 object for the purposes of Article 101(1) ..."

27 So a very similar question to the question that the Tribunal will have to grapple with in due
28 course in this appeal.

29 Then para.39, p.9461:

30 "As regards agreements constituting a selective distribution system, the Court has
31 already stated that such agreements necessarily affect competition in the common
32 market ... Such agreements are to be considered, in the absence of objective
33 justification, as 'restrictions by object'."

1 So that is the very clear statement by the European Court that, unless objectively justified, a
2 selective distribution agreement, *a fortiori* one containing an online sales ban, is a
3 restriction by object.

4 Then you see at 40 that it has been recognised that selective distribution systems can be
5 objectively justified. Then at 41:

6 “In that regard, the Court has already pointed out that the organisation of such a
7 network ...”

8 in other words, a selective distribution network -

9 “... is not prohibited by Article 101(1), to the extent that resellers are chosen on
10 the basis of objective criteria of a qualitative nature, laid down uniformly for
11 potential resellers and not applied in a discriminatory fashion, that the
12 characteristics of the product in question necessitate such a network in order to
13 preserve its quality and ensure its proper use and, finally ...”

14 and this is the key point in this case -

15 “... that the criteria laid down do not go beyond what is necessary ...”

16 Then 42, it is primarily for the referring court to decide this, “but we’re going to provide the
17 relevant points of interpretation”. Then 43, it is undisputed that the criteria are objective
18 and are uniform, so they’re not discriminatory:

19 “However, it must still be determined whether the restrictions of competition
20 pursue legitimate aims in a proportionate manner ...”

21 That is the key point in the present case that the Tribunal will have to grapple with.

22 “In that regard, it should be noted that the Court, in the light of the freedoms of
23 movement, has not accepted arguments relating to the need to provide individual
24 advice to the customer and to ensure his protection against the incorrect use of
25 produces in the context of non-prescription medicines and contact lenses, to justify
26 a ban on internet sales ...”

27 Then we see at 47 the conclusion:

28 “In the light of the foregoing considerations ... Article 101 must be interpreted as
29 meaning that, in the context of a selective distribution system, a contractual clause
30 requiring sales of cosmetics and personal care products to be made in a physical
31 space where a qualified pharmacist must be present, resulting in a ban on the use of
32 the internet for those sales, amounts to a restriction by object ... where, following
33 an individual and specific examination of the content and objective of that
34 contractual clause and the legal and economic context of which it forms a part, it is

1 apparent that, having regard to the properties of the products at issue, that clause is
2 not objectively justified.”

3 You will see, just going back to para.44, that the court is noting there the kind of arguments
4 that are put forward by companies seeking to establish the objective justification of their
5 restrictions in their selective distribution systems. So what the court is saying is this is the
6 kind of argument normally advanced, and of course the critical feature for the present case
7 is that Ping never advanced those arguments to the CMA, and that’s the source of the
8 CMA’s concern underlying this application.

9 Now, in the authorities bundle at tab 3 is a dominance authority dealing - the entire
10 authority is very lengthy, so we have included only an excerpt, because we go to it just to
11 establish one point, which is this point about the evidential burden being on Ping. This is
12 the *Racecourse Association* point, and what the CAT was looking at there was a collective
13 sale by many race courses of media rights, of TV rights, to the races that they were holding.
14 You’ll see at para.9 reference to the OFT finding that the MRA - that was something called
15 the Media Rights Agreement, which was an agreement between the various racecourses,
16 infringed - effected a collective sale by the courses of the non-LBO bookmaking rights that
17 infringed s.2 of the Act and didn’t qualify for exemption. Then moving forward a couple of
18 pages, you’ll see the excerpt beginning on p.58 of the report and the heading “Burden of
19 proof”, and then at 131, subject to one qualification, there was no issue that the legal burden
20 of proof lay with the OFT.

21 Then at 132 over the page:

22 “The OFT submitted, however, that this position is qualified in cases in which the
23 decision-maker has to decide whether what appears to be a restriction of
24 competition is justified by the particular circumstances of the case. It submitted
25 that, in such cases, whilst the *legal* burden of proving the infringement of the
26 Chapter I prohibition remains with the decision-maker (here the OFT), the
27 *evidential* burden of demonstrating that the apparent restriction on competition is
28 justified falls upon the undertaking advance such assertion: he who asserts must
29 prove. The OFT submitted that, to the extent that the appellants defended the
30 *prima facie* anti-competitive effect of the MRA as being ‘necessary’ to achieve a
31 pro-competitive outcome, the evidential burden of showing it lay on them.
32 We accept this. It cannot be for the OFT to set up and disprove a case founded on
33 the ‘necessity’ argument. If, as the appellants claimed, any apparently anti-
34 competitive effect of the collective dealing between the Courses and ATR was

1 justified by the necessity of such dealing, it was for them to demonstrate it by
2 evidence. Once that evidence was before the OFT, the overall legal burden still
3 remained on the OFT to prove the infringement of the Chapter I prohibition that it
4 was asserting. But unless the appellants first made out a necessity case, no such
5 case would arise for consideration.”

6 We say that that is very clear, and that it applies precisely in the present case.

7 For completeness, at tab 15, we have the recent judgment of Mr. Justice Popplewell in one
8 of the interchange cases - again, it is an extract from a lengthy judgment. In this case he
9 considered the ancillary restraint doctrine which, as I have shown you in the decision, raises
10 precisely the same questions as objective justification under the *Pierre Fabre* rubric, and at
11 para.45, which is three pages into this extract:

12 “It was common ground that the burden of proof lies on MasterCard to bring itself
13 within the ancillary restraint doctrine. This is, however, an evidential burden
14 rather than a legal one; the burden is on the Claimants to establish a restriction of
15 competition which infringes Article 101 ...”

16 So there’s a legal burden. Again, that’s apiece with the *Racecourse* case that I just showed
17 you. There’s the legal burden to establish the infringement of Article 101 that rests on the
18 Authority, but where the position is that there’s a *prima facie* restriction of competition by
19 object, which is only displaced by objective justification, the evidential burden on that
20 question of objective justification lies on he who asserts it.

21 THE CHAIRMAN: Even where that element is, in a sense, a negative element?

22 MS DEMETRIOU: Even where that element is a negative element, because we say that it’s
23 quintessentially a matter which concerns the manner in which Ping runs its business. I’ll
24 take you to correspondence in which Ping, itself, says that clearly the CMA has absolutely
25 no expertise in relation to this matter, and the reason it’s saying that is because it’s
26 quintessentially a matter within its own knowledge. So it is for it to analyse whether or not
27 there was a less restrictive way it could have run its business and achieved the same aim.
28 We say that it’s a very serious matter, so where a company is in a position where an
29 authority is alleging that, *prima facie*, it has restricted competition by object, it’s simply not
30 good enough for it to sit back and say, “It’s for you, CMA, to investigate the types of less
31 restrictive measures that we could have taken and analyse whether or not they were
32 sufficient”, and that a responsible company who has been put on notice that they are
33 engaging in a practice which constitutes a *prima facie* restriction of competition, it’s

1 incumbent on a responsible company in that position to ask itself the question, “Is there
2 something less restrictive we could have done to avoid breaching the Competition Rules?”
3 Ping has done the opposite in this case. It has sat back and said nothing.

4 In a sense, even if one gets beyond the question of legal burden and evidential burden, the
5 point is a very fundamental and practical one: a company in Ping’s position needs to put its
6 case. It needs to put its case to the CMA, and this is a point which, on Ping’s admission, on
7 Ping’s case, is the central part of the case, it has simply never put its case.

8 In fact, we see that - I may just take you briefly to Ping’s response where we see that,
9 because I’ve now said that a couple of times, so just to make that good - at Ping’s response,
10 tab 10, para.4(b), p.2 of Ping’s response to this application:

11 “The CMA is seeking to exclude the entirety of Ping’s evidence on the most
12 important part of its decision.”

13 Then we see at 5(b):

14 “All the disputed evidence undermines the central edifice of the CMA’s decision.”

15 We are saying that, in other words, by saying that this is the most important part of the case,
16 Ping seems to be accepting, as it, in fact, does need to accept in line with *Pierre Fabre*, that
17 the online sales ban is a *prima facie* restriction of competition, and that the key question is
18 whether it is objectively justified. So it seems to be accepting that, otherwise it wouldn’t be
19 saying that objective justification is the most important part of the case. Of course, a critical
20 part of justification is the question of whether there were less restrictive alternatives.

21 Just moving forward in this response to para.37(c), Ping says, “Well, we did put the CMA
22 on notice of the fact that Ping didn’t consider that the proposed alternative measures would
23 be feasible or effective”, and then it sets out the manner in which it contends it put the CMA
24 on notice of that argument, and it refers to a letter, and it says:

25 “It bears emphasis that Ping Europe Limited has operated its business and the
26 custom fitting and internet policies for decades now. It genuinely does not see any
27 equally effective and proportionate alternative that would reconcile the various
28 objectives.”

29 : We say that it is wholly inadequate, wholly inadequate for a company that has been told, in
30 line with established European Court of Justice case law, “You are engaging in a practice
31 that is a *prima facie* restriction of competition”, simply inadequate not to explore whether it
32 could be, not to try and justify why it could not achieve that aim through less restrictive
33 means, and instead sit back and say, “This is our genuine belief”. That is simply, simply
34 not good enough.

1 We say that the position is even starker in circumstances where Ping has actually begun
2 work and gone a long way in developing that work on the question of less restrictive
3 alternatives and decided to withhold it from the CMA. It's even starker in those
4 circumstances.

5 I'll turn now to the procedure during the investigation. I think we can broadly take this
6 from our application, which is behind tab 4. It's really paras.36 onwards, and if I could take
7 you through those paragraphs whilst at the same time taking you to some of the key
8 contemporaneous documents, I think that would be the most efficient way of explaining it.
9 You'll see at para.36 that on 15th August 2016 the CMA issued Ping Europe with a
10 statement of objections, and at that stage Ping had not specifically contended that its online
11 sales ban was objectively justified, and so the issue was not addressed in the SO.

12 Then at para.37 in its written representations in response to the SO, Ping argued that the
13 online sales ban is intimately bound up in Ping's legitimate custom fitting policy. That's
14 the excerpt that was set out in the decision that I took you to a few moments ago. It made
15 essentially the same arguments on the basis of the ancillary restraints doctrine.

16 Then you see at para.38 that the issue was the subject of discussion at an oral hearing on
17 18th October, and as part of the issue the CMA raised the question of proportionality. So the
18 CMA asked Ping: are there not alternative less restrictive ways of encouraging, promoting,
19 securing and ensuring custom fitting in the way that Ping wishes to see, and asked similar
20 questions in discussing the exemption conditions. You'll see there Ping's reply:

21 "I think, if the question is, have we put down a list and ticked off things that could
22 not work, the answer is no. It is the message John Clark gave. We think the single
23 most effective way to give that message is through contractual measures and
24 similar indications on the website."

25 Then Ping wrote further to the CMA on this subject in a letter of 7th December 2016, so
26 almost two months after the hearing, and we see that letter behind tab 8.3, if I could just ask
27 the Tribunal to turn that up. The first main paragraph is not relevant, but then you see:

28 "We also wish to raise a further important matter. At the hearing on 18th October
29 the CMA asked Ping Europe whether alternatives to an outright ban would be
30 equally effective at achieving its goal of ensuring every customer receives a
31 custom fitting. However, Ping notes that no specific alternative measures have
32 been put to Ping."

33 You have my submission that that's the wrong way round. That's a misconceived point to
34 make.

1 “If the CMA wishes to make a case that Ping Europe Limited could achieve its
2 custom fitting objectives equally well by adopting alternative measures, Ping
3 considers it essential that such point is properly put to it. In particular, the
4 alternatives that the CMA suggest would be equally effective must be fully
5 particularised. The SO does not do this. Without a specific particularised case to
6 respond to, Ping would be forced to speculate about the allegations that are being
7 made, which is not consistent with its rights of defence. It bears emphasis that
8 Ping has operated its business and the internet policies for decades now.”

9 Then again, the point that I have just read to you.

10 “It is concerned that the CMA, with absolutely no market experience itself, should
11 not posit alleged alternatives in the abstract that have no basis in market reality,
12 and which do not rigorously compare their costs and benefit with the current
13 policies operated by Ping Europe.”

14 That is bizarre, in my respectful submission, because what Ping is saying in the same breath
15 is that it’s for the CMA to explain why less restrictive alternatives don’t work, but that the
16 CMA has absolutely no market experience and shouldn’t speculate, so it’s not in a position
17 to do it. The combined effect of those two points would be that the CMA is simply not able
18 to investigate this matter at all. As I’ve already explained, the true position is that the
19 evidential burden rested on Ping, and it hadn’t discharged it.

20 Going on:

21 “Please confirm whether the CMA is pursuing an argument that Ping Europe could
22 have achieved its objectives by different allegedly less restrictive measures, and, if
23 so, please confirm that the details of these alternative theories will be put to Ping
24 Europe in writing with the proper level of particularity as to the measures that it
25 could allegedly take to achieve that objective. Ping can then respond in writing
26 (and if necessary, at a further oral hearing).”

27 Then it says:

28 “We are copying this letter to the procedural officer.”

29 I just note that because it shows that Ping at that stage and throughout, has been well aware
30 of the procedural officer’s role, and it’s a point that I’ll come back to in due course.

31 So what did the CMA do next? Well, going back to our application behind tab 4, and
32 para.42, the CMA acted in a scrupulously fair way. It did not simply proceed to a decision
33 on the basis that Ping had not discharged its evidential burden of showing that the ban was
34 proportionate. Instead, it sought to engage further on this issue with Ping and give Ping

1 every opportunity to make its case. We see the CMA's letter behind tab 8.4, and if you
2 could again, please, just go to that tab and turn up the letter. On the second page you'll see
3 about two-thirds of the way down:

4 "The CMA considers that the evidential burden ... falls on the person advancing
5 such an assertion. It was therefore for your client to adduce evidence ... In
6 particular, the CMA would have expected to have received submissions from Ping
7 supported by evidence, explaining the basis on which it is said that there is no less
8 restrictive alternative measure.

9 Ping has not provided such submissions or evidence. However, given that Ping's
10 position is that its online sales ban is objectively justified, the Case Decision Group
11 considers that it is appropriate to explore further with Ping the basis on which Ping
12 contends there are no less restrictive alternatives."

13 Then the CMA says:

14 "Attached to this letter are the CDG's initial views on possible less restrictive
15 alternatives ... the CDG seeks Ping's representations [on these matters].

16 Please provide any written representations on the alternative measures set out in
17 this paper by 5 pm on 7 March 2017."

18 and then offers the opportunity of an oral hearing.

19 The paper itself, which I don't need to go through, is behind the next tab, and I just note
20 that, given that, in fact, no submissions were made on this paper, unsurprisingly, the
21 findings in the decision very much reflect what was being put to Ping in that paper at that
22 time.

23 One point that is made by Ping in its response is that this letter and the paper, it took the
24 CMA four months to produce this. In fact, it wasn't, it was two months, and this is
25 something dealt with in Ms Aspinall's second witness statement, and that included the
26 Christmas period, and in any event we say that the timings - so the point made by Ping is
27 that the CMA took this lengthy amount of time to produce this paper, and the time limit it
28 was giving it to respond was much more limited.

29 Now, two points to make: firstly, it didn't take the CMA a long period of time to produce
30 this paper. Essentially it was six working weeks, and that's dealt with in Ms Aspinall's
31 second statement. Secondly, one is not comparing like with like because, as I've said, these
32 are not matters within the CMA's expertise. It has to go out and seek evidence, whereas
33 these are matters within Ping's knowledge and expertise. Thirdly, although the time limit

1 originally set was three weeks, the CMA then extended that to set a six week time limit,
2 which we say in all the circumstances was reasonable.

3 There is then, following this letter, a series of exchanges about the deadline for Ping's
4 response. I'm going to take the Tribunal to the key parts of the correspondence. In my
5 submission, what comes out of this exchange is the high handed way in which Ping engaged
6 with the Authority, and the disregard it had for the Authority's procedures. In particular, it
7 made no real attempt to justify why it needed additional time, simply a statement as to what
8 it intended to do on a sort of 'take it or leave it' basis, and it failed to raise any issue as to
9 the fairness of the timetable with the procedural officer, as the CMA had indicated it could
10 do, and as the CMA's procedures envisage.

11 We see the first response behind tab 8.6, which is an email from Ping's solicitors:

12 Dear Ms Carr

13 ... your deadline of 7th March simply cannot be met.

14 The paper raises a variety of new and significant points. These are very important
15 points which must be addressed and 3 weeks to do so is insufficient.

16 Particularly relevant is the fact that our Counsel is in a 5 week trial with the CMA
17 from the end of February."

18 Counsel's availability is very rarely a good reason for not complying with deadlines, but we
19 say in this case even more so, because these are quintessentially factual matters of evidence.
20 Of course it would have been reasonable for Ping to seek their counsel's advice, but this
21 wasn't primarily a task for counsel. It was primarily a task for people within the business,
22 because it was a factual matter.

23 Then behind the next tab, 8.7, we see the CMA response, and that points out, the third
24 paragraph:

25 "... not clear to us how the availability of counsel is a sufficient justification for
26 such a significant and lengthy extension which will considerably delay the CMA's
27 assessment of this matter. We appreciate that Ping will wish to receive counsel's
28 advice, but we would expect the assessment to be primarily a matter for Ping.
29 Counsel frequently work across a number of cases, and we note that Ping has
30 engaged both senior and junior counsel.

31 To be in a position to assess whether Ping should be granted an extension, please
32 detail the factors that lead it to request an extension of nearly eight weeks ..."

33 that is on top of the three weeks.

34 "Please could you provide the following information ..."

1 and that includes specific reasons why an extension is required and why Ping believes it
2 wouldn't properly be able to respond before the current deadline.

3 Then we have behind the next tab an uncooperative response from Ping, which mistakenly
4 refers to a four month period of delay before the CMA produced its paper, and again simply
5 asserting that "the time period we have requested is entirely reasonable and one to which we
6 will stick". So no attempt at all to do what the CMA asked, which is, "Please give us
7 specific reasons why you need this period of time".

8 The CMA then wrote back in detail on 24th February, that's behind the next tab, offering an
9 extension of a further three weeks until 28th March, and the CMA's position is that six
10 weeks was wholly reasonable, given, first of all, that the burden was on Ping in the first
11 place to make its case on this point, and it should have done that already; and secondly, it's
12 not far short of the time allowed for a response to an entire statement of objections.

13 Then you will see at the end of the letter, "You may refer the above decision to the CMA's
14 procedural officer by 3 March", and then giving details of how to apply to the procedural
15 officer. I have already shown you that Ping was aware of the role of the procedural officer,
16 because it had referred to her role earlier itself in previous correspondence.

17 Then we have Ping's response behind the next tab, stating that the extension was welcome,
18 but fell short of the timescale required, and it anticipated it would not meet the revised
19 deadline. It did not appeal to the procedural officer.

20 Then behind tab 8.11, the CMA makes that point:

21 "I am not aware that you have sought to challenge this extension by way of
22 application to the procedural officer, and therefore the CMA expects to receive any
23 representations Ping may wish to make by the deadline granted."

24 Then, if it doesn't receive further representations it may decide to proceed with the case on
25 the basis of the evidence before them at that time, in particular it may issue a draft penalty
26 statement.

27 The CMA did not hear further from Ping, and on 31st March 2017 it issued Ping with a draft
28 penalty statement, and you see the letter enclosing that statement behind tab 12. At the
29 bottom of the second page:

30 "If Ping submits a response to the alternatives paper the CDG will consider at that
31 time the extent to which it is appropriate to take account of the evidence or views
32 in Ping's response before taking a final decision on whether it is appropriate to
33 reach an infringement decision and, if so, whether, and in what amount, to impose
34 a financial penalty."

1 So that makes clear that no decision had been taken at that stage.

2 Then you have behind the next tab the draft penalty statement, and then behind tab 8.14 you
3 have a letter from Ping's solicitors saying that it did wish to make oral representations on
4 matters referred to in the draft penalty statement, and explained what its preferred date was.
5 We say that this sits uneasily with its next letter, in which Ping's solicitors say that they've
6 reached the view that Ping can't receive a fair hearing from the CMA. So one asks
7 rhetorically: why are they engaging with the CMA and seeking to fix a hearing date if that
8 were the case?

9 Then behind the next tab you have Ping's response in relation to the issues of a less
10 restrictive alternative, and you see that Ping has taken, in my submission, an extreme stance.
11 It states that the CMA's decision to issue the draft penalty statement shows a clear
12 prejudgment of the issues that it's supposed to be considering with an open mind, and that
13 the CMA has apparently pre-determined the issue, and Ping no longer sees any purpose in
14 engaging with the CMA, and, "Being candid", and this is the final paragraph on the first
15 page, "Ping no longer feels it can receive a fair hearing before the CMA."

16 The position is, of course, and this is explained in our evidence, which I'll come to, that, as
17 anyone practising in the field knows, the CMA does progress different parts of the case in
18 parallel, at the same time, in order to meet its deadlines and in order to act promptly and
19 efficiently. That is addressed in Mr Polito's statement which is at tab 9 of this bundle.

20 Mr Polito is the chairman of the three member Case Decision Group. I am not going to read
21 it, but I will ask the Tribunal, if it hasn't read it already, to read these paragraphs, especially
22 paras.9 to 14. Mr Polito there is making the point that it's very common for the CMA to
23 progress different parts of the case in parallel, including questions relating to remedy, even
24 when it hasn't yet reached a decision on infringement, and it needs to do this in order to act
25 efficiently, and that's something which is within common knowledge.

26 Then you see Ms Aspinall's second witness statement----

27 MR DORAN: Excuse me, could I just ask a question: the references in Mr Polito's witness
28 statement at para.13 all refer to 'mergers', they don't refer to this sort of investigation.

29 MS DEMETRIOU: That's a fair point, and that's, I think, because Mr Polito's experience of this
30 particular issue of parallel working has been in mergers. We have in our application at
31 para.61 of our application given an example of a Competition Act case in which the CMA
32 has found no infringement, despite having previously issued a draft penalty statement.

33 MR DORAN: It's not in the rule. The question was about the rules here, this is a reference to the
34 rules and procedure.

1 MS DEMETRIOU: Yes, that's right. Mr Polito has explained it by - his examples are mergers'
2 cases, that's a fair point. That's his particular experience, and he's drawing from his own
3 experience.

4 The Tribunal also has Ms Aspinall's second statement, which is behind tab 13, and she says
5 at para.14:

6 "As is the normal practice, the CMA case team started work on the DPS (Draft
7 Penalty Statement) in advance of showing the proposal to the CDG for its
8 consideration. For example, Ping will be aware the Case Team requested the
9 necessary financial information from Ping to prepare the draft DPS at the same
10 time as working on other aspects of the investigation. This used a parallel but
11 separate workstream. This is a common and necessary feature of sequential CMA
12 processes so as not to add unnecessary delay in the event that the investigation
13 reaches subsequent stages."

14 That's what happened here, and she, of course, makes the important point that Ping was
15 aware that that was going on, because the CMA was, in parallel, asking for financial
16 information which could only go to its draft penalty statement. So Ping must have been
17 aware that this was happening in parallel. Of course, administrative proceedings are not
18 sequential in the same way that criminal trials are. This is an analogy that Ping seeks to
19 draw in its submissions. It says, it's as though half way through a criminal trial the judge
20 says what sentence he or she is minded to impose. There's no proper comparison with a
21 criminal trial, because one is dealing with an administrative procedure where it's very
22 common for different threads of the case to be advanced at the same time.

23 One can't say that the Authority, by doing that, is not approaching the matter with an open
24 mind. If one did, it would be a ground for challenge in almost every case. This was
25 something which the CMA went to great lengths to emphasise to Ping, that it hadn't reached
26 a final decision on liability, and that the CDG would consider Ping's evidence with an open
27 mind. If you would go back to the exhibits to Ms Aspinall's first statement, and go to tab
28 8.17, you will see a note of a telephone conversation on 2nd May between Ms Aspinall and
29 Ping's lawyers. She sets out her explanation to him, to Mr Hardy, who you will be aware
30 has provided a witness statement in response to this application, and she says after the
31 particular bullets, which set out the course of events:

32 "I explained that this in no way ..."

33 I think that's missing a word -

1 "... indicated a final decision on liability as the CMA's letter had made this clear.
2 I explained that the CDG has taken no final decision and that should Ping submit a
3 response on Friday, as it indicated throughout that it would, it would be for CDG
4 to consider it. SH explained that Ping felt that the CMA had made up its mind and
5 that there was no point in submitting a response. I explained we are still expecting
6 a response, Ping had indicated from February it would do so, and the CDG retains
7 an open mind.

8 I queried why Ping would not wish the CMA to consider Ping's submissions on
9 justifying its online sales ban and why it would rather litigate these issues on
10 appeal." SH said he would take his client's instructions (paraphrased).

11 Then you have an email behind tab 8.18 reiterating those points:

12 As explained the CDG has taken no final decision, retains an open mind, the CDG
13 would consider it carefully. You said you will be taking your client's instructions,
14 please can you let me know (paraphrased).

15 Then at 8.19 we have Ping's response, where it confirms, on the second page, that it will not
16 change its mind and that it would not be submitting its evidence.

17 Then behind 8.20 the CMA wrote to Ping at greater length - this is a letter of 9th May -
18 seeking to address the range of criticisms made by Ping, and essentially the CMA
19 maintained it had acted reasonably, and the issuing of the draft penalty statement was not
20 indicative of any prejudgment.

21 Then you have Ping's lengthy response behind the next tab. In relation to the events
22 between February and May, the letter repeats Ping's assertions and makes a number of
23 further points. Could you please go to the second page, about two-thirds of the way down,
24 Ping stated that on February 14th it had immediately begun to diligently work on a
25 responsive exercise with its proposed 28th April deadline in mind.

26 Then it said on 31st March - sir, I'm going over the page to the first complete paragraph, so
27 six weeks later and four weeks before its proposed deadline it had immediately stopped
28 work on the responsive exercise, since the DPS showed that the CMA did not have an open
29 mind on the anterior issue of liability, but was proceeding to penalty.

30 This goes to the issue of whether or not the evidence was withheld. We say it plainly was,
31 because it's clear that Ping had substantially by this stage progressed its representations and
32 its evidence on the issue, and then decided that the CMA should not consider the fruits of
33 that work until appeal.

1 Then we have a final letter behind tab 22 from the CMA, where the CMA wrote to Ping
2 seeking to draw a line under matters. It repeated it still had an open mind, that it would
3 accept a response by 9th June, and then Ping subsequently confirmed that it would not
4 provide such a response.

5 Of course, the CMA's decision was then published on 24th August 2017 and, as I have said,
6 the analysis of the question of proportionality, in particular less restrictive alternatives,
7 substantially reflects the content of the alternative measures paper on which Ping had
8 refused to comment.

9 Ping's appeal now before the Tribunal provides for the first time evidence by way of
10 substantive response to that paper.

11 I was going to go on now to deal with my specific submissions, which I can do relatively
12 briefly, given that I've taken the Tribunal through all of that, but I wonder if a break is
13 required for the shorthand writer before I do that.

14 THE CHAIRMAN: There isn't a shorthand writer.

15 MS DEMETRIOU: Sorry, I thought there was one. Maybe there's not one, so we don't need a
16 break. I'll just plough on. Sorry, my confusion.

17 I want to start with rule 21(2)(b), whether the evidence was available to the CMA during the
18 administrative procedure, and I can take this very quickly. The Tribunal has seen Ping's
19 complete lack of engagement on the issue of proportionality and objective justification. It
20 was a matter for it to put its case on the evidence, and it failed to do so. Ping now says, and
21 this is in its response, para.37(c) through to (e), that the evidence Ping seeks to adduce in
22 the appeal was available to the CMA because it could have obtained it for itself. This is a
23 very bold submission, which we say is not at all credible. The CMA asked Ping for its case
24 on the alternative measures and Ping refused to provide it. It's now quite untenable for Ping
25 to say that in those circumstances the CMA could have simply gone out and discovered
26 what it is that Ping would have said by way of its case. By doing what, we ask rhetorically?
27 By interviewing Ping's employees and the retailers it has chosen to interrogate in order to
28 adduce its evidence for this appeal? We say that is a nonsensical submission.

29 On the technical definition of what's meant by 'available', which I have taken you to in the
30 Guide, the CMA was not aware of the evidence that is now adduced by Ping. The fact that
31 some in the industry would inevitably have had views about alternative measures doesn't
32 mean that the CMA was aware of the content of those views. It was not, or it would have
33 dealt with the points in its paper. We say that, indeed, if Ping was right about its definition
34 of what's meant by 'available', evidence would literally always be available to the CMA

1 because the CMA could always use its powers to carry out a roving inquiry across the
2 industry, and that would render the power in the rule to exclude new evidence, not to admit
3 it, a dead letter.

4 It is also not right to characterise the alternatives paper as a basis for consultation with the
5 industry, which is what Ping does. It was never that. We see in Ms Aspinall's second
6 statement, which perhaps it's just as well to go back to now, which is at tab 13, at paras.11
7 to 12, she makes that point. She says in Ping's response that Ping says that the CMA could
8 and should have obtained the disputed evidence during the investigation and
9 mischaracterises the purpose of the alternative paper, which was to elicit Ping's
10 representations on why the online sales ban was necessary and proportionate:

11 "This approach reflected the CMA's view that Ping bore the evidential burden of
12 establishing why a restrictive measure was necessary and a proportionate way of
13 achieving its objectives. The CMA might have conducted a market test of
14 potential alternatives had it received Ping's representations in the course of its
15 investigation. However, in the absence of a response from Ping, setting out why
16 its objectives could not be achieved with other measures, the CMA did not
17 consider it even necessary as a matter of law or productive to use its power to
18 market test a set of measures on which Ping had declined to comment."

19 That's common sense, in my submission, because if one has a point on which the evidential
20 burden rests on the suspected infringer, because, as in this case, it's a point which is
21 quintessentially within Ping's own knowledge, the question of whether it could have run its
22 business in a different way, then it's nonsensical to say that the undertaking concerned can
23 sit back and say nothing because evidence is always available to the CMA because it can go
24 out and interrogate people generally in the industry to speculate as to alternative means that
25 the undertaking could have employed to achieve the objective aim. We say that is not a
26 sensible approach to the legislation.

27 That's rule 21(2)(b).

28 Rule 21(2)(c), reasons why Ping didn't make the evidence available: the starting point is
29 that there is no question but that Ping deliberately withheld the relevant evidence from the
30 CMA during the investigation. That comes across very clearly from the correspondence,
31 including the final letter where it says that it had progressed the evidence and had decided
32 not to submit it because it had reached the view that the CMA had prejudged the question of
33 infringement. On its own case, it did six weeks of work and then deliberately downed tools,
34 and didn't provide anything to the CMA.

1 The question for the Tribunal is whether Ping had good reason for doing so. As the
2 Tribunal has already seen, the Government response following the consultation preceding
3 the new rule refers to whether there were justifiable reasons, and whether the party in
4 question could reasonably have been expected to provide the evidence. So we say the
5 question for the Tribunal is whether, objectively, the reasons given by Ping for withholding
6 are reasonable. The Tribunal will have seen Mr Hardy's witness statement. Can we briefly
7 turn that up. That's in the bundle at tab 11. Mr Hardy is the solicitor who had conduct of
8 the case. You will see between paras.6 and 12 - these paragraphs all concern the deadline
9 issue and the procedural dispute between the CMA and Ping. Then at 13 to 15, on
10 31st March Ping Europe received the draft penalty statement:

11 "In those circumstances Ping Europe reached the view that there was no purpose in
12 continuing with its preparations to respond to the alternative measures papers and
13 gathering the necessary supporting evidence.

14 Without waiving privilege I can confirm that the CMA's assertions in the
15 application that Ping Europe is guilty of gaming the system and that there can be
16 no serious question that Ping has held back the substance of its response to the
17 CMA's alternative measures papers in order to deploy those points only on appeal
18 are wholly untrue. The simple fact was that Ping Europe had reasonably, albeit
19 with regret, formed the view that the CMA no longer held an open mind."

20 Then to similar effect, going to para.24, again:

21 "Ping Europe's explanation for not submitting a response, i.e. that it genuinely
22 believed the CMA had prejudged the case – is supported by the contemporaneous
23 correspondence I have cited above. It is not an excuse that Ping Europe invented after
24 the facts and it is certainly not an attempt by Ping Europe to 'game' the system and
25 did not involve Ping Europe withholding evidence."

26 That's what he says. I am going to come back to that, but I would ask the Tribunal at this
27 stage to note two points. The first is that there is no evidence before the Tribunal from Ping
28 itself, and the second and important point is that Ping has chosen not to waive privilege in
29 the legal advice it received on these matters, and that's an important point in terms of what
30 the Tribunal can find. I'll come back to that.

31 The CMA's submission is that Ping did not have good reasons for deliberately withholding
32 its evidence, and we make the following points: first, the starting point is that it was for
33 Ping to make its case on proportionality to the CMA. Ping says in its response that

1 objective justification and proportionality is the most important part of the case, and, as I've
2 said, it was inadequate and unreasonable for it to sit back and not address this issue.

3 Second, the CMA did everything it could to engage with Ping on this point. Even though
4 the factual question of whether there were other ways that Ping could have achieved its
5 objective was a question for Ping, the CMA did not simply sit back and decide to exploit
6 Ping's initial refusal to engage. It did the opposite. It tried to fill the void that Ping had left
7 and it issued its alternatives papers containing its initial views in order to engage Ping on
8 the subject on which it bore the evidential burden.

9 Third, there was then a procedural disagreement between Ping and the CMA as to the
10 deadline for Ping's response to the Alternatives Paper. There is no question that it was no
11 more than that, simply a procedural disagreement, and it's one that should have been
12 capable of resolution. Ping did not engage properly with the CMA in relation to that matter.
13 It didn't make a reasoned request for an extension of time. It simply stated in a high-handed
14 way that it would respond on a particular date, without justifying that. That is not a basis on
15 which a responsible public authority can operate. The CMA's response was to set a
16 reasonable deadline of six weeks, and indicate to Ping that if it continued to disagree with
17 this, the proper course was to raise the matter before the procedural officer. Critically, Ping
18 chose not to appeal to the procedural officer, and there is no explanation whatsoever in
19 Mr Hardy's statement of why it didn't follow that proper procedure, and there is no
20 justification for its failure to do so.

21 Fourth, instead of appealing to the procedural officer, instead of attempting to resolve what
22 was a minor procedural disagreement, Ping chose instead to escalate the dispute with the
23 CMA, and it did so to the point where it made the very serious allegation that the CMA was
24 guilty of bias and had abdicated its responsibilities as a fair minded authority. There was no
25 proper basis for that exaggerated allegation. The CMA had acted reasonably, and Ping had
26 failed to engage. At worst, all the CMA had done was to adopt its common course of
27 proceeding different parts of the case in parallel. The CMA went out of its way to assure
28 Ping that it had not prejudged the issue and it was still willing to receive the evidence.
29 Really, the key question, in my submission, for the Tribunal is not whether Ping was
30 unhappy with the procedure. That's not a good enough reason to fail to provide its
31 evidence, to withhold its notice. That's the point addressed by Mr Hardy. Mr Hardy says
32 that Ping was unhappy with the procedure. The question the Tribunal has to confront is
33 whether the procedural difficulties that Ping was unhappy about constituted a proper
34 justifiable basis for withdrawing from the process and refusing to provide its evidence.

1 The fifth point I wish to make is that the CMA contends that the most reasonable inference
2 to make from the correspondence, from the contemporaneous documents that I've taken the
3 Tribunal to, is that Ping acted opportunistically and decided to withhold its evidence for
4 tactical reasons, namely that it would serve Ping better to adduce it on appeal than before
5 the CMA, because the CMA would not be able to consider it in advance of its decision, and
6 the CMA would not be able to avail itself of its statutory powers to test it.

7 Ping's excuse for not producing the evidence simply doesn't stack up, because if Ping were
8 concerned about time it could have appealed to the procedural officer. Even if Ping were
9 truly concerned about bias, there was nothing to prevent it from providing the evidence to
10 the CMA and then challenging the CMA's approach on appeal, including on bias grounds.
11 What did they have to lose by adducing the evidence? The answer can only be that the
12 CMA would have had the chance to consider the evidence in its decision and this reinforces
13 the conclusion that Ping's decision was tactical.

14 Finally, we say on that point that it's very telling that now in this appeal Ping has not
15 pleaded a ground based on bias, which it could have done. So it has referred to - in its
16 notice of appeal you will have seen that it makes an allegation about prejudgment but it
17 does not translate that into a bias ground, into a ground of procedural irregularity. Instead,
18 it only advances that complaint as a justification for adducing this new evidence at the
19 appeal stage. So it has taken the view, we say, that bias is not a pleadable point, and that
20 again reinforces the inference made from the CMA.

21 Sixth, Mr Hardy's statement: Ping invites you to conclude on the basis of the paragraphs -
22 essentially paras.14 and 24 - of Mr Hardy's witness statement that it was not gaming the
23 system, but that Ping Europe had reasonably formed the view that the CMA no longer held
24 an open mind in the case. As to this, the evidence advanced by Ping, Mr Hardy's witness
25 statement, is more notable for what it does not contain than what it does. There is no
26 evidence from Ping Europe itself. Mr Hardy, as I have said, does not explain why Ping did
27 not appeal to the procedural officer in order to resolve the procedural disagreement. This is
28 an important point because Ping now focuses on the draft penalty statement, but it's evident
29 before then that it sought to escalate the procedural dispute with the CMA about the
30 deadline for its response, rather than resolve it through the proper channels, and we say
31 that's evidence of its opportunistic decision to take a tactical stance.

32 Despite making very serious allegations of bias, Ping does not disclose the legal advice that
33 it would have obtained from its legal advisers on the question of bias, and in particular

1 whether the legal threshold for bias was met. So it has chosen to maintain privilege over
2 legal advice it received.

3 There is no evidence for the same reason, or disclosure of whether or not Ping or its legal
4 advisers considered the tactical pros and cons of providing the evidence to the CMA or
5 withholding it for appeal. Again, that's a matter on which it's very likely that Ping would
6 have asked its advisers' views. There is no disclosure at all of the advice that Ping received
7 from its very experienced competition counsel. Given the seriousness of the bias allegation
8 that Ping was raising, the issues of whether or not to appeal to the procedural officer,
9 whether or not the legal test for bias was made out, in particular in light of the CMA's
10 common course of progressing different parts of the case in parallel, whether the legal test
11 for bias was made out and whether this justified Ping withdrawing from the process, and the
12 tactical pros and cons of providing the CMA with Ping's evidence, these are all matters on
13 which a responsible company engaged in a legal procedure such as this would have sought
14 advice on from its competition counsel. Instead, Ping has not disclosed that, and has
15 expressly chosen not to waive privilege over the legal advice it was given on these issues.
16 In those circumstances and in light of the omissions I have just highlighted, it is not possible
17 for the CMA to test Mr Hardy's assertion in paras.15 and 24 in the light of the
18 contemporaneous evidence of the legal advice provided to Ping, because these are
19 quintessentially legal issues: is the bias test met? Does that justify withdrawing from the
20 process? And this is a very serious deficiency. Sir, if Mr Hardy's statement were the end of
21 the matter then it would be open to any undertaking not to provide evidence at the
22 investigation stage and then stand behind legal professional privilege to avoid proper
23 scrutiny of its reasons for doing so.

24 There is one additional authority that I would like to show the Tribunal. We gave it to my
25 friends this morning. This is the judgment of Mr Justice Morgan in the *Digicel* case. (Same
26 handed) The short point I derive from this authority is that where a company makes
27 representations about what it did or did not believe, but chooses not to waive privilege, then
28 a court is not in a position to make positive inferences about what that legal advice may
29 have contained in the company's favour.

30 Just to take you through the key parts of the judgment - it is really one paragraph, but I just
31 want to set the background a little bit - para.8, p.3:

32 "The rival case was pleaded in a re-amended defence ..."

33 I think this will be enough to give you a flavour of what was going on, and then further
34 down:

1 “Without prejudice to the burden of proof, insofar as the claimants do identify
2 particular individuals as having the relevant intention that can be attributed to
3 particular defendants, as they should, the defendants’ position is as follows:

4 (1) At least each of the following honestly believed, at all times material to the
5 issues in any particular jurisdiction, that threshold was no obligation upon the
6 relevant defendant in the particular jurisdiction to commence physical
7 interconnection ...”

8 Then you see more of that on the next page at sub-para.(4). So the plea was the belief of
9 particular individuals within the company.

10 Then there was an application, which you see at p.5 under the heading “The Application”:

11 “The claimants seek an order that the defendants shall give disclosure and
12 inspection of documents constituting or evidencing legal advice which was given
13 to or received by the individuals identified in the draft order attached regarding the
14 lawfulness [of the action].”

15 The basis for that application was that there had been a waiver of privilege. That’s not
16 something I’m contending in this case, but that sets the context. That is then dealt with by
17 Mr Justice Morgan, and if you go forward to para.25 at the bottom of p.16:

18 “Mr Rubin accepted that if the legal advice were not disclosed as a result of this
19 application, he would contend in closing submissions at the end of the trial that it
20 could not be inferred that the legal advice supported the alleged beliefs. I put to
21 Mr Rubin that if the defendants did not disclose the legal advice, they could hardly
22 ask the court to infer that the legal advice supported the alleged beliefs. That
23 would not be a case of drawing adverse inferences against the defendants by reason
24 of the claim to privilege; it would instead be a case of not drawing inferences in
25 their favour; the reason for not drawing inferences in their favour being that the
26 material was simply not before the court and could not be assessed.

27 In due course, Mr Patton, on behalf of the defendants, accepted in clear terms that
28 in the absence of disclosure of the legal advice the defendants could not contend
29 for such an inference in their favour.”

30 Sir, I make an analogous point here, which is that Mr Hardy has made assertions which are
31 essentially assertions about bias, the basis for Ping withholding its evidence from CMA. We
32 say that the questions for bias are, first of all, whether the legal threshold for bias was met,
33 for apparent bias was met; and secondly, whether it justified the course in this case. Those
34 are quintessentially questions on which legal advice would have been sought. They have

1 consciously not disclosed that legal advice. It's not open, in my respectful submission, for
2 the Tribunal to make the positive inference in Ping's favour that its legal advice supported
3 what Mr Hardy is saying.

4 We say that the way this principle applies here is that the Tribunal must be very careful
5 about what it takes from Mr Hardy's statement. Mr Hardy states at para.24 that Ping did
6 not 'game' the system and did not withhold evidence. This is all very subjective and
7 imprecise. Mr Hardy has obviously adopted a restrictive interpretation of what is meant by
8 'withheld', because we say that Ping plainly did withhold evidence on any natural meaning
9 of that word, because it had progressed its evidence and it chose not to provide it, and that
10 must mean it withheld it.

11 We equally don't know what restrictive definition Mr Hardy might be attributing to the
12 notion of 'gaming', where he says that Ping didn't 'game' the system. What we don't know
13 is whether Ping acted at least in part for tactical reasons, whether it thought it would be
14 better placed, keeping the evidence back and adducing it on appeal. We say that
15 Mr Hardy's statement quite plainly can't be dispositive of whether Ping had good reason,
16 because then the test would be an impossibly high one for the CMA to meet in any case.
17 In those circumstances, it would not be appropriate for the Tribunal to conclude on the basis
18 of Mr Hardy's statement that Ping acted solely for legitimate reasons.

19 What we invite the Tribunal to do instead is to consider the entirety of the evidence it does
20 have and ask whether, objectively, Ping had good reason for withholding its evidence. As
21 I've said, the CMA says that the proper inference to draw from the contemporaneous
22 evidence is that Ping did act for tactical reasons, it acted opportunistically. That's because
23 it could have tried to resolve the position on timing, but it didn't. It could have made its
24 representations late, but it was unwilling to do so. Even when the CMA had made genuine
25 efforts in good faith to resolve the position, Ping still refused to engage. Ping's case that it
26 has been shut out from giving evidence, leading to allegation of bias, doesn't stack up and it
27 isn't supported by what happened.

28 In any event, leaving those submissions aside, obviously Ping did not have good reason not
29 to provide the CMA with its evidence during the investigation.

30 The bottom line, in my submission, is that if the Tribunal accepts the CMA's submission
31 that Ping deliberately held back evidence without a proper reason for taking that course,
32 that's the very problem at which the rule changes were directed and a very powerful reason
33 to exclude the evidence now.

1 Those are my submissions on rule 21(2)(c). I turn now to (d) and prejudice. The CMA
2 would, for all the reasons I've already advanced, undoubtedly suffer prejudice because of
3 the nature of the enforcement regime. Ping's submissions don't recognise this. Could I just
4 ask you to turn up briefly Ping's submissions at para.37 (tab 10, p.16). Ping says there:

5 "The CMA's complaint is rather bizarre since it appears to be aggrieved that it be
6 forced to fight this appeal on a level playing field with Ping. Put another way, the
7 CMA considers it prejudicial that it should have the same evidential facilities as
8 Ping in this appeal."

9 We say that that shows very clearly - this reference to a level playing field and the same
10 evidential facilities as Ping - shows quite clearly how Ping is seeking to marginalise the
11 entire investigation stage. This is not a prosecutorial system where both sides are
12 approaching the evidence on the same basis, it's an appeal system with an administrative
13 procedure which provides the CMA with wide ranging compulsory powers which it doesn't
14 have at the appeal stage.

15 Ms Aspinall has explained in her statement what this means on a practical level in this case,
16 and if I could ask the Tribunal to turn to Ms Aspinall's first statement at tab 7, she deals
17 with this at paras.13 to 19. This sets out the steps - again I'm not going to read this out
18 because it's a lengthy passage, but I would ask the Tribunal to read it if it hasn't done so
19 already, because it sets out the steps that the CMA is likely to have taken had Ping acted in
20 the way it should have done and discharged its evidential burden on the question of
21 objective justification. It explains what the investigative steps are, and you see at para.15 a
22 series of steps that the case team would have taken with a view to putting the position to the
23 CDG, and then what the CDG would have done. It would have taken into account all of this
24 before reaching its decision. At 16, the CMA could have sought further documents and
25 information from Ping account holders. 17, interviews with golf retailers, and so on and so
26 forth.

27 I would ask the Tribunal to read that in detail because it gives practical meaning to why we
28 say the CMA suffers prejudice in a case such as this - so in this case and generally in a case
29 where, on an important point, an undertaking has deliberately not put in evidence at the
30 investigation stage.

31 In this case, of course, my submission is that the prejudice is particularly acute since it's a
32 point on which Ping bore the evidential burden, so it's particularly acute.

33 Then turning to prejudice to Ping - of course, this is the issue on which Ping leads in its
34 response to the application - Ping overstates its case on prejudice. Of course it's not the

1 case that the CMA will win by default if this evidence is excluded. Ping will be able to test
2 the CMA's case on proportionality and the accuracy and consistency of its reasoning in
3 evidence. In any event, we say that this prejudice is prejudice of Ping's own making,
4 because of my earlier submission that Ping did not have good reason for withholding the
5 evidence.

6 Finally, prejudice to Ping is not determinative of the application of this rule. There will be
7 some prejudice in any case in which evidence is excluded, yet the power to exclude
8 evidence has been strengthened and has been focused for the reasons I've explained, and if
9 prejudice to the undertaking concerned were a trump card, then those changes would have
10 been for nothing.

11 So the true position in this case is that, at most, prejudice is a neutral factor that works both
12 ways.

13 Finally, whether the evidence is necessary: it's not necessary for the Tribunal to have this
14 evidence in order to determine the case. The CMA decided the case without the evidence
15 and the Tribunal can do so as well.

16 THE CHAIRMAN: Well, surely that would be a reason for never admitting any evidence?

17 MS DEMETRIOU: Exactly, that's right. So we say that the way we put it in our application is to
18 say that the evidence may be necessary for Ping to pursue all the arguments it wishes to
19 pursue, but that's not the same as whether it's necessary for the Tribunal to decide the case,
20 because if Ping's argument were correct that the Tribunal may come to a wrong conclusion
21 if it doesn't have all the evidence, then, as you say, sir, the Tribunal would never exclude
22 evidence if that were the crunch factor. Of course, courts and tribunals frequently do
23 exclude evidence which is relevant to a particular issue. That doesn't mean to say that the
24 decisions they've taken are wrong, it's simply a product of the adversarial system.

25 So those are my submissions on the relevant factors in the rule.

26 In conclusion I can be very short. We respectfully invite the Tribunal to exclude the
27 evidence that we've set out in the appendix to the application on the application of rule 21.
28 This is a clear case in which the appellant has deliberately withheld evidence at the
29 investigation stage - there can be no question about that - and we say it has no good reason
30 for having done so. Indeed, the course of events indicates that Ping did act for tactical
31 reasons. Ping states in its response that this application is unprecedented. Equally
32 unprecedented is Ping's behaviour in deliberately withholding its entire case from the CMA
33 on an issue that it acknowledges to be the most important issue in the case and on which it
34 bears the evidential burden.

1 Quite aside from the prejudice to the CMA in this case which would result from the
2 evidence being admitted, the CMA is extremely concerned, as an institution, that if the
3 Tribunal does not exclude new evidence in a clear cut case such as this then other appellants
4 will perceive the power to exclude new evidence in the new rule as a dead letter, and the
5 reality we fear is that a judgment in Ping's favour will embolden other parties to decline to
6 provide evidence during the course of investigation, and any case of a procedural
7 disagreement now risks becoming a basis for withholding evidence.

8 Sir, the CMA does have a very serious concern that the problem which the Tribunal's new
9 rules were intended to guard against will become a serious issue going forward and that the
10 Tribunal's new rules risk having the opposite of their intended effect, and that is why we
11 see this as a test case, and we do ask the Tribunal, in giving its judgment, to recognise the
12 wider implications of any ruling that it makes when it gives consideration to the issues that
13 we have raised.

14 Unless I can assist any further, those are my submissions in opening the application.

15 THE CHAIRMAN: Thank you very much.

16 MR O'DONOGHUE: Sir, Ping is already concerned that on the substantive decision it is involved
17 in one test case, and it is doubly troubled by the suggestion that it is now involved in a
18 second test case on the procedural front, but be that as it may.

19 I want to focus on three issues. I want first to make some contextual remarks; second,
20 I want to make five legal submissions; and third, I want to address the Tribunal on the rule
21 criteria from Ping's perspective and to deal with some of the CMA's points.

22 On the context, at the risk of stating the obvious, this appeal is tremendously important to
23 Ping. We make the point in our written submissions that Ping is not actually a very large
24 undertaking. It technically, I think, qualifies as an SME. It is a family run company, and
25 has been from its inception.

26 We can pick this up from comments made by Mr Clark, the managing director, who is
27 behind me today at the hearing, because it really puts this in context for Ping. This is in the
28 main bundle, tab 8.2. Sir, this is the transcript of the oral hearing in October before the
29 CMA, and I want to turn to a few points made by Mr Clark at that hearing. Unfortunately,
30 the pages aren't numbered, it's five pages in. You will see a heading "(Mr Clark)", line 19.

31 THE CHAIRMAN: Saying, "Thank you, I am John Clark"?

32 MR O'DONOGHUE: Sir, yes. At the bottom of the page:

1 “I have found this process very baffling and frustrating. We have been accused by
2 the CMA of operating in a way that is detrimental to the very consumer that we
3 serve, and for Ping this really hurts.”

4 Can I invite the Tribunal to read this page and the next page, and I will then deal with a
5 couple of points on the page overleaf. (After a pause) Sir, starting at the bottom of the
6 second page you’ve just read:

7 “We’ve always believed that we take care of the quality of what we do and the
8 quantity will come anyway, but quality comes before quantity. We believe that the
9 benefits of custom fitting for the consumer are obvious, significant and undeniable.
10 This process has taken hundreds and hundreds of hours of my personal time, and
11 even more from employees to comply with the multitude of requests from the
12 CMA, giving very short deadlines to hit sometimes, and extension requests were
13 reluctantly ...”

14 there’s something missing -

15 “... but eventually granted, and we’ve been pressured to keep to a CMA imposed
16 deadline. Sir, this is has been a very, very tough 12 months. I have probably had
17 to spend more time on this than any other issue in the business, and I still have a
18 business to run ...”

19 and so on. So this investigation and this decision is of tremendous importance to Ping
20 Europe and has been a massive draw on its resources and the time of key personnel.

21 Sir, that is an important starting point.

22 The evidence that the CMA seeks to exclude goes to an issue, or a series of issues, that, in
23 my submission, are existential for Ping. You’ve seen from Mr Clark’s oral comments that
24 Ping invented custom fitting. That is its key competitive advantage and differentiator. The
25 alternative measures, if accepted, would, in Ping’s submission - this will be part of the
26 appeal in May - fundamentally and fatally undermine those unique and important
27 advantages. So the exclusion of the evidence is existential for Ping in the sense that its
28 model which has been in place for many, many decades, and which is unique, would be
29 fundamentally and fatally undermined by the CMA’s proposed interventions. We can pick
30 this up in Mr Clark’s evidence, this is in his statement in the main appeal. I don’t know if
31 the Tribunal has that to hand. We have extracts in annex A, but we don’t have the full
32 statement. We have copies if, for some reason, the Tribunal doesn’t have it.

33 THE CHAIRMAN: Do you know the tab reference in the appeal bundle?

1 MR O'DONOGHUE: It's Mr Clark's statement, tab 16. Can I start at para.30. I'm not going to
2 read this out in full. You'll see para.30, Ping has a unique product, it is the only brand on
3 the market that is delivering custom fitted products to its consumer, and so on. Can I ask
4 the Tribunal in its own time to read paras.31 to 33, and again 56 to 59. Of course, the CMA
5 doesn't seek to exclude these specific paragraphs, but the point I'm going to go on to make
6 is that the evidence in relation to the alternative measures goes hand in glove with the
7 evidence that I've shown you in brief form. For Ping to be able to retain its unique and
8 important advantages and competitive differentiators, it must challenge the alternative
9 measures by way of evidence. So it is fundamental to its appeal that it succeeds in relation
10 to the alternative measures. One sees this very clearly from the notice of appeal itself. The
11 alternative measures section covers almost 30 pages of the notice of appeal - that is paras.94
12 to 166.

13 The effective position on this application is that the CMA wants to exclude the entirety of
14 Ping's factual and expert evidence in relation to the alternative measures. Now, I should
15 make clear at the outset that the exclusion of the alternative measures evidence does not
16 simply bear on one of our grounds because, as Ms Demetriou has adverted to, the same
17 evidence is relevant to ancillary restraints, which is a separate ground, and also to the
18 question of exemption under 101(3). We have cross-referred in our notice of appeal to the
19 alternative measures evidence in the context of those two grounds as well.

20 So the effective position on the substance of the CMA's application, if successful, is that all
21 but one of our substantive grounds would, in a practical and meaningful and useful sense,
22 become unrunnable. We would not be able to advance the case that we would wish to
23 advance. The only substantive ground that would be left to run in an unfettered way is the
24 anterior legal question of as to whether this conduct is capable in law of being an object
25 infringement. So, if we lose on that question, the exclusion of our evidence would torpedo
26 the rest of our substantive grounds, and that is obviously something of significant concern.
27 If we can turn very briefly to the actual evidence itself, because Ms Demetriou hasn't shown
28 the Tribunal what they wish to exclude, and, as I said, it is the totality of the alternative
29 measures evidence on our side, both expert and factual, but just to give the Tribunal a
30 flavour of what that evidence says, I think it is important to see that in context.

31 Can we again go back to Mr Clark's witness statement in the main appeal, the exclusions
32 start at para.87. The Tribunal can obviously read that in its own time. Just to pick up on the
33 flavour of some points, for example, in 93(a), a very, very important factual point:

1 “If Ping Europe were to offer the same number of permutations and combinations
2 that are currently available for purchasers and its account holders, the online
3 retailers’ drop boxes would have to allow the online consumer to choose from
4 more than 3 billion possible iron combinations ...”

5 and so on. There’s a whole series of quite detailed granular evidence of a factual variety,
6 and all that would, on their case, be excluded.

7 Now, in our submission, one sees very clearly from Mr Clark’s evidence that these are
8 important factual points that mean that the alternative measures are wholly unworkable in -
9 the real world. Our fundamental criticism of these alternative measures is a fact-based
10 assessment that, in the real world, based on the evidence from the retailers themselves and
11 from Mr Clark, who would be responsible for implementing them on the other side of the
12 agreement, these are simply unworkable.

13 The retailers themselves pick up essentially on similar points from their perspective. I’m
14 going to take this very quickly. There’s a statement from Mr Hedges (tab 18, volume 2),
15 who is from Foremost Golf. For example, at para.24 of his statement he is talking about
16 building websites along the lines suggested by the alternative measures, and he says:

17 “Building adequate websites that allow sales of golf clubs is very resource
18 intensive. Many brick and mortar retailers simply cannot compete online because
19 they are too small and are unable to support the website by, for example,
20 employing dedicated full-time webchat operators.”

21 He goes on in the next sentence:

22 “The price for this would be prohibitively high for a large proportion of retailers.”

23 You will have seen from his evidence that Foremost Golf is essentially an aggregator,
24 para.1, which represents over 1,000 members in the industry. So, if the CMA is successful,
25 this fundamental factual point that seems to apply to a large number of a cross-section of
26 1,000 retailers simply could not be raised at the hearing.

27 Of course, the implication of para.24 is extremely serious, because if the CMA is correct
28 then, in a sense, if Ping imposes these measures on its retailers some of them may well go
29 out of business.

30 The implication of the exclusion that the CMA seeks is extremely serious for this industry,
31 and therefore for Ping. We have made the point in the NoA, which I’ll develop at trial, that
32 these alternative measures actually reduce competition. None of this evidence which is
33 directly from the affected stakeholders on their application can be brought to bear. We see

1 similar points, Mr Sims, tab 19, and the exclusion started, para.22. Sir, he makes the
2 general point:

3 “I do not believe the alternative measures suggested by the CMA will be an
4 appropriate and effective replacement for Ping’s internet sales ban for the purpose
5 of promoting custom fitting. None of the alternative measures will be as effective
6 ...”

7 and so on. Then, for example, at 24 he makes the point that this online chat facility that the
8 CMA has mentioned in the alternative measures would be practically difficult, if not
9 impossible, for smaller retailers.

10 So again, evidence from people at the coalface that these measures are at best ineffective
11 and at worst potentially disastrous.

12 A couple of final points, Mr Clark, tab 20: one of the exclusions, for example, starts at
13 para.21, which is the free rider problem. At para.22, for example, you have quite detailed
14 information on the specific charges being levied by this retailer, and the consequence of free
15 riding caused by these alternative measures. So this is obviously very troubling as a
16 development, or a potential development, if these measures are implemented to retailers of
17 this kind, and none of that evidence could be raised or even discussed or perhaps even
18 alluded to in the hearing if this application is successful.

19 A couple of final points, this is Mr Challis, who is a retailer with John Reay Golf Centre -
20 for example, at para.15 he makes the point that a website and online chat features are not a
21 responsible way to sell golf clubs.

22 “Thus custom fitting cannot happen online and these two aspects of a sale should
23 not be separated. Also I would think such a feature would need to be available
24 24/7, or at least most of the time, and I could not afford to staff this.”

25 So this is obviously critical evidence and the CMA has been very, very coy in terms of
26 taking the Tribunal to what it actually wishes to exclude, and its relevance both with this
27 appeal and, more importantly, for the stakeholders who would be directly affected by these
28 measures. In my submission, it is clear from a quick canter through the evidence which is
29 sought to be excluded that it is absolutely fundamental evidence, and if we are right, and
30 that will have to be tested in a trial, it is extremely concerning, because this is a decision
31 which, if implemented, will reduce the competition substantially and eliminate or
32 marginalise a key competitive advantage by Ping. It is Ping’s ultimate selling point and the
33 exclusion of this evidence would essentially be a shortcut to the dismissal of this appeal. In

1 my submission, as a starting point and as a matter of first impression, that is a very, very
2 difficult proposition to accept as being correct.

3 That is all I wish to say by way of introduction.

4 On the law I have five points to make. First, an obvious point but an important one: this
5 Tribunal deals with cases and evidence somewhat differently to the ordinary civil courts.
6 The Competition Appeal Tribunal in its inception was deliberately modelled on a different
7 type of judicial model more closely aligned to the Court of First Instance in Luxembourg, as
8 it then was, and it was deliberately set up to avoid detailed technical rules of evidence and
9 what I would call 'White Bookery'. One sees this very clearly in the rules, and in particular
10 one rule which the Chairman, I think, has adverted to, which is rule 21(b) and (c). The
11 Tribunal has very unusual powers in that it can direct under its rules the evidence that it
12 considers necessary or useful for the determination of its proceedings. In the *Ofcom v*
13 *British Telecom* case - I won't turn it up, it is in authorities, tab 12, para.21 - Lord
14 Justice Toulson highlighted the fact that "this was a very unusual", those were his words,
15 "power". So one sees in rules 4 and 21 in particular that the Tribunal is more guided by
16 questions and considerations of overall fairness and justness and proportionality than strict
17 and technical rules of evidence. That is an important starting point.

18 The second point I wish to make, and again the CMA has been rather coy in accepting this,
19 is that the CMA is obviously up against it because the general position is that an appellant
20 in an appeal like this is entitled in general to advance new evidence. So, for the CMA to
21 succeed, it must avail itself of an exception to a general rule or a presumption. I will come
22 on to develop the point that the presumption, at least in a case involving *quasi* criminal
23 sanctions, such as the present case, is an overwhelming one. But the general position is that
24 we can advance new evidence, and that must not be forgotten.

25 Just to pick this up in a couple of authorities and in the Guide itself, can we start with the
26 Guide at para.7.78 - authorities, tab 25, at the bottom of internal p.111. We have seen this
27 briefly already. Essentially, what the Tribunal does at 111 and the top of 112 is it codifies a
28 series of cases in which the question of new evidence has been considered by the Tribunal.
29 The synthesis is that, as I have indicated, in general an appellant is allowed to present a new
30 case supported by new evidence. Of course, critically, the Tribunal refers to Article 6 in
31 this context.

32 Again, this is a point rather skirted over by Ms Demetriou, but there is a clear blue wall of
33 distinction between Competition Act 1998 cases on the one hand and merger appeals and
34 Communication Act appeals on the other, and one sees this distinction very, very clearly

1 from pp.111 and 112. The reason for this is obvious, where there is a *quasi* criminal
2 sanction in the form of a fine, that engages a set of rights and obligations and protections
3 that are simply not engaged in the context of, say, a merger assessment. Just to give you an
4 example: for example, application for review under s.20, so Mr Doran's example of a
5 merger, in that context the guidance makes clear, if the applicant wishes to rely on expert
6 evidence that was not before the regulator, it must apply to the Tribunal for permission. So
7 a very different set of circumstances. You have judicial review principles. If you wish to
8 adduce, certainly expert evidence, you must formally apply for permission. So within the
9 scheme of the rules, it is clear that rule 21 makes a fundamental distinction between those
10 appeals such as the present, which engage Article 6 rights, and other appeals where, in a
11 sense, the presumption may start from the opposite point of departure, which is that you
12 have to apply for permission to adduce, say, expert evidence.

13 Can we briefly turn to one or two of the authorities which elaborate on this, and can we start
14 with the first *Napp* case, which is in tab 1. We have set this out in our skeleton, so I can
15 take it very quickly:

16 "… the appellant is not limited to placing before this Tribunal the evidence he has
17 placed before the Director but may expand, enlarge upon or indeed abandon that
18 evidence and present a new case. Since there is no right to test the evidence of
19 witnesses before the Director, it is at this judicial stage of the proceedings that the
20 applicant may apply to test by cross-examination the evidence of all relevant
21 witnesses against him."

22 THE CHAIRMAN: Sorry, which paragraph are you reading from?

23 MR O'DONOGHUE: Forgive me, it's 76, tab 1 of the authorities, para.76. Then at 77 a short
24 point:

25 "We doubt, however, whether exactly the same liberal approach to the submission
26 of new evidence can be applied to the Director."

27 So the Tribunal makes two points. First, in general, you can advance a new case as an
28 applicant; second, as a respondent competition authority, you may be constrained to some
29 extent in respect of the submission of new evidence. So there is an asymmetric standard
30 that distinguishes to some extent between applicants and the defendant competition
31 authority.

32 The second tab, this is the more detailed consideration of the same case, *Napp*, and this time
33 it's para.117. The Tribunal makes a point:

1 “If and when a matter moves to the judicial stage before this Tribunal, what was
2 previously an administrative procedure, in which the Director combines the roles
3 of ‘prosecutor’ and ‘decision maker’, becomes a judicial proceeding. There is, at
4 that stage, no inhibition on the applicant attacking the Decision on any ground he
5 chooses, including new evidence, whether or not that ground or evidence was put
6 before the Director.”

7 One sees, therefore, quite clearly why there is a distinction in the Guide in the case law
8 between Competition Act cases 1998, the Article 6 cases, and the Communication Act cases
9 from the 2003 Act and s.120 appeals. Take, for example, communication cases involving a
10 price control, that is effectively an appeal on an appeal, because before the Competition
11 Commission there will effectively have been a further appeal from the underlying decision,
12 and the hearing before the Tribunal is effectively an appeal on that further *quasi* judicial
13 consideration. One can see very, very clearly why, in a case such as the present, where the
14 first judicial consideration of the case is before the Tribunal, there is a distinction compared
15 to, for example, some Communication Act appeals.

16 Then, finally, the *Tesco* case, which is at tab 6. It is para.124. Effectively, what we have
17 here is a synthesis of some of the case I have taken you to, and others - we have that out in
18 our written submissions, but that is a convenient summary.

19 The third point is one I have touched on, which is what the CMA has not appreciated is that
20 rule 21 applies to all appeals that are conducted before the Tribunal. As I have indicated,
21 although the rule does not distinguish between the different types of appeals, the Guide, in
22 explaining rule 21, as amended, very clearly distinguishes between appeals involving *quasi*
23 criminal sanctions and other appeals, and in particular in respect of new evidence the Guide
24 articulates a fundamental distinction between the general presumption that new evidence
25 can be advanced in the case of the former appeals, but not in relation to the latter. That is a
26 very clear distinction as to the articulation of the rule within the Guide, and it is of
27 fundamental importance in the present case.

28 The fourth point, again not mentioned by the CMA, is this is an appeal on the merits. It is
29 not a judicial review, it is not some truncated form of an appeal, it is an appeal on the
30 merits. If we can go back to the second *Napp* judgment in tab 2, it explains some of the
31 consequences of an appeal on the merits. Again, it is para.117. This is the bit I didn’t read
32 out. The third sentence:

33 “The Tribunal, for its part, is not limited to the traditional role of judicial review
34 but is required by paragraph 3(1) of Schedule 8 of the Act to decide the case ‘on

1 the merits' and may, if necessary and appropriate, 'make any other decision which
2 the Director could have made': paragraph 3(2)(e). If confirming a decision, the
3 Tribunal may nonetheless set aside a finding of fact by the Director. Unlike the
4 normal practice in judicial review proceedings, the Act and the Tribunal Rules
5 envisage that the Tribunal may order the production of documents, hear witnesses
6 and appoint experts and may do so even if the evidence was not available to the
7 Director when he took the decision: see Rule 20(2) of the Tribunal's Rules."

8 So the fact that this is an appeal on the merits, it has important consequences, including for
9 the consideration of evidence.

10 The CMA to some extent, I suspect, would accept many of those points as far as they go.
11 The critical point that they have fastened upon is they say, well, the amendments of the
12 rules on 1st October 2015 have materially changed the lie of the land. In my submission,
13 that is grossly exaggerated. In fact, if one looks at the changes to the text of the relevant
14 rule, now rule 21, they are quite limited. The Tribunal always had the power to exclude
15 evidence. That hasn't changed. So the power of the Tribunal in terms of a procedural
16 power is as it was. In my submission, the changes are essentially twofold, and relatively
17 minor: first, as the Chairman has adverted to, what rule 21(2) essentially does is amplify the
18 criteria according to which the Tribunal may decide whether or not to exclude evidence.
19 One of the criticisms - and we will see this shortly - in Sir John Mummery's report was,
20 there is a basic power to exclude, but it is unclear how the discretion is to be exercised.
21 What one sees in 21(2) is an articulation of criteria, all of which, frankly, are common sense
22 and which were being applied anyway by the Tribunal, as we have seen, in its case law.
23 So what we have is a codification of certain criteria. That is not a fundamental change, it is
24 essentially a codification of existing factors.

25 THE CHAIRMAN: Would it be fair to say that those cases don't refer to the question of the
26 reason why evidence was withheld? I don't remember seeing that as being something that
27 was in the cases you referred to.

28 MR O'DONOGHUE: Well, sir, it obviously wasn't a criterion in the rules. In any application of
29 this kind it would always be relevant to understand the context, and of course there would
30 always be submissions on why something was or was not provided at this point of time. In
31 any normal application, or any contest to evidence, it would be relevant to understand the
32 context and why something was or was not provided. You are quite right, sir, that there is
33 now an express criterion in rule 21(2), which means the Tribunal will need to grapple with
34 that. In my submission, it was already certainly implicit in the pre-existing practice.

1 The second thing, in my submission, that the changes do is they essentially ensure that the
2 process of assessing and investigating is front-loaded. The way that is achieved is through
3 the notice of appeal. There is now a brief requirement to state where evidence is new and
4 what that evidence is, and that essentially ensures that the process of identification is front-
5 loaded. So there is a procedural efficiency in that being front-loaded.

6 So, in my submission, there are two changes, neither of which is substantive: one, a
7 codification of existing criteria; and second, an attempt to front-load consideration of these
8 issues for reasons of procedural efficiencies.

9 One critical point which the CMA has overlooked is that nothing in effecting those changes
10 was ever intended to, and did not, alter in any way the distinction between Competition Act
11 1998 cases and other cases. We can see this very clearly from Sir John Mummery's review.
12 It is in the authorities bundle, tab 21. and it is para.35. Sir John says:

13 "There is an important distinction between appeals from the ordinary courts and
14 appeals to the CAT. In the ordinary courts appeals are usually brought from
15 decisions made after adversarial arguments at a public hearing before a judicial
16 body which has heard the evidence tested by cross examination and has heard rival
17 submissions on the case. In the case of the CAT the appeals, which are determined
18 on the merits by reference to the grounds of appeal set out in the notice of appeal,
19 are the first independent judicial consideration of the case, including the factual
20 matters in dispute. A regulator's decision, which can be appealed on the merits,
21 has been reached following a procedure which is more of an administrative than of
22 a judicial character."

23 So again, one sees that reflected in the guide post amendment to the rules, and they
24 essentially say that where one is dealing with the first proper judicial consideration it is not
25 an appeal within an appeal. Then the general presumption in favour of being able to submit
26 new evidence remains strong.

27 A couple of final points before I move on - I see the time, I can finish this, I think, in two
28 minutes and then I'll move on to my submissions on rule 21(2).

29 It is also important, in my submission, to understand that the basis for the change, the
30 alleged concern, was a pretty limited one. We can see this in the Government's response to
31 consultation (tab 23 of the authorities bundle). For example, at para.2.49, internal p.17:

32 "The Government acknowledges that no evidence has emerged to date that
33 suggests parties deliberately hold back evidence to 'game' the system."

1 The CMA has made a series of exaggerated policy argument that the sky will fall if this
2 application is refused, and so on, but the genesis of the change is that there was no evidence
3 of anyone deliberately holding back evidence to game the system. Now, Ms Demetriou has
4 referred briefly to some of the reasons why, on appeal, things are sometimes different. This
5 is para.2.40. This is from respondents. They explained justifiable reasons as to why in
6 some instances new evidence might be introduced at the appeal stage, so a short period for
7 response, and then:

8 “Where parties expect an infringement decision, they will typically continue to
9 develop their case after the formal response to the statement of objections ... in
10 anticipation of an appeal. Inevitably new evidence emerges which is helpful to
11 their case and which is therefore used in the appeal.

12 Responses to requests for information at the investigation stage are typically given
13 as written answers, rather than witness statements. By contrast, evidence before
14 the CAT is given by named individuals in the form of witness statements and
15 possible cross examination to test their evidence. Accordingly, new evidence in
16 the form of witness statements is often necessary at the CAT stage.”

17 Now, it is obvious. One can think of a number of good reasons - for example, the old
18 lawyers may get sacked if there is an appeal. The company may be very unhappy with
19 having been at the receiving end of a large fine and they may engage new lawyers. Of
20 course, everyone will have different ideas as to how the case is run, and that may include
21 evidence. But what para.2.40 highlights is an important point, which is that it is atypical in
22 the context of CMA investigations for the defendant to put forward witness, and certainly
23 expert evidence in the form of that put forward by Professor Brady.

24 The process before the CMA is typically in the form of a narrative and/or legal response -
25 so, for example, a response to a statement of objections. The reason for that is obvious.
26 Because there is no process for cross-examination before the CMA, the value of witness
27 evidence during the administrative phase is necessarily limited. I will show you after lunch
28 case law suggesting that, essentially, evidence in the form of witness evidence before the
29 CMA, which has not been subject to cross-examination, is of very, very limited value
30 indeed.

31 So there is essentially a fallacy at the core of what the CMA is putting forward, which is,
32 but for the CMA’s precipitous conduct Ping would have submitted each and every aspect of
33 the witness evidence it is now putting in. That is simply untrue. It is untrue as a general
34 matter because companies in administrative proceedings of this kind do not put in expert

1 evidence such as that of Professor Brady or in the nature of the retailer statements. In this
2 particular case, we never suggested at any stage that there were witness statements of the
3 kind we have now submitted in the appeal that we were preparing at that stage. We made
4 very, very clear that we were engaged in a responsive exercise, and we never said at any
5 stage that that included retailer evidence or evidence such as that put forward by
6 Professor Brady. So there is essentially a fallacy at the heart of this application, which is
7 that the evidence, as has emerged on appeal, is necessarily different, and in my submission
8 that is unsurprising, from the evidence which is before the CMA at the administrative stage.
9 It is a different kind of process with different constraints.

10 Sir, I will leave it there, and pick this up after lunch, if I may.

11 THE CHAIRMAN: Thank you.

12 (Adjourned for a short time)

13 MR O'DONOGHUE: Sir, I'm moving on now to the final of my three topics, the rule 21 criteria
14 on Ping's submissions, and how they should be applied in this case. As a preliminary
15 matter, in our submission, what is an eloquent silence in this case is that the CMA has been
16 unable to furnish the Tribunal with a single decision under the Competition Act 1998 where
17 new evidence has been excluded, either under the old rules or the new rules. We have
18 searched on this topic, and the only thing which is in any way related is the order in the
19 *Socrates* case, which we refer to in our written submissions. Perhaps I could hand up the
20 order in that case. (Same handed)

21 Sir, the first thing to note is that it is an order of the President, and therefore carries perhaps
22 even more weight than usual. You will see from the first recital that it was an application to
23 adduce expert evidence, economic expert evidence, on the issues of foreclosure effects and
24 whether any objective justification is sufficient to offset any foreclosure effect, and so on.
25 Then over the page we have the reasons. The first paragraph, it is a fast-track case, so it
26 was not an appeal against an administrative decision, it was an *inter partes* litigation. The
27 new evidence in this case was refused. This is the only example we can find. The
28 circumstances, in my submission, are striking. In para.2:

29 "The limited scope of expert evidence was discussed with the parties at the CMC
30 on 16 May 2016 and there was no suggestion from Counsel for the Defendant that
31 it might seek to serve expert evidence of broader scope."

32 So this had been discussed at length, and there was essentially a change of heart on the part
33 of the defendants. Then 3:

1 “To allow expert opinion evidence on these issues now would significantly
2 prejudice the Claimant. These are potentially broad issues on which it appears that
3 the Defendant’s expert has been working for some time whereas, given the terms
4 of the Order of 16 May 2016, the Claimant’s expert has not. The trial commences
5 in the week beginning 7 November 2016 ...”

6 so if one sees the date of the order, this was one month before trial -

7 “... and it would be unfair to the Claimant to expect its expert now to start analysis
8 of these issues with a view to production of a further expert’s report in a very short
9 time.”

10 So this is the only example we can find of new evidence of any description being refused by
11 the Tribunal in a Competition Act 1998 case. It is a striking and, in my submission, pretty
12 extreme set of circumstances one month before trial, where someone essentially had a
13 change of heart, and where the opposing party would simply have been unable to respond in
14 any meaningful way.

15 In this case, of course, the one submission you haven’t heard from the CMA is that when
16 they submit their defence and evidence at the end of this month they will be unable to
17 respond in any meaningful way. The assumption before the Tribunal today must be that if
18 the evidence is admitted, the Tribunal will receive the defence and a responsive position at
19 the end of the month.

20 Before I move to the rule 21(2) criteria, there is an anterior point which I had adverted to
21 before lunch, which is that, under rules 21(1)(b) and (c), the Tribunal has its own power and
22 its own facility, which the Court of Appeal described as ‘unusual’, to essentially dictate the
23 requirements of the evidence that it needs to determine the appeal. In my submission, that
24 is a sufficient basis for the Tribunal in the context of this application, having seen the
25 decision and having seen the notice of appeal, to render a ruling saying that the Tribunal
26 considers under 21(1)(b) and (c) that it needs the evidence in question to decide the appeal
27 on the merits. This is an appeal on the merits and you have my point that in the context of
28 such an appeal you were not strictly speaking limited to the four walls of the decision. You
29 can take any decision that the CMA could, itself, take. That is an important point that the
30 CMA has not dealt with, despite the fact it is raised in our written submissions.

31 Turning to rule 21(2), I am going to take the criteria slightly out of sync. In my submission,
32 what is important to bear in mind is that the criteria and the weight of individual criteria
33 may vary from case to case. It may be in a given case that one criterion is of particular
34 importance, and that other criteria are of somewhat peripheral importance.

1 In my submission, under 21(2)(a), the critical starting point is the statutory provisions under
2 which the appeal is being brought and the applicable standard of review being applied by
3 the Tribunal. I have taken you before lunch to the very clear division in the Guide, which is
4 fleshing out rule 21(2), that, because of the fundamental rights engaged by the CA 1998
5 appeals, there is a general and, in my submission, overwhelming presumption in favour of
6 new evidence being admissible on appeal. In my submission, the present case, if anything,
7 is *a fortiori*, because it isn't just that Article 6 and Article 49 of the Charter are engaged, we
8 have also in our notice of appeal relied on other fundamental rights under Article 16 and
9 Article 17 of the Charter, which is the freedom to conduct a business and property rights.
10 So a whole series of fundamental rights are engaged in this appeal, not limited to Article 6.
11 The *quasi* criminal sanction really is of fundamental importance, because the significance
12 and stigma associated with that finding, coupled with the other impacts on fundamental
13 rights in terms of my client's organisation of its business, they add particular weight and
14 ballast to the force of the general presumption in a case of this kind. That is to be heavily
15 contrasted with what I would call an appeal within an appeal where there has already been a
16 *quasi* judicial stage and the Tribunal's appeal is, in substance, a second appeal. That is a
17 fundamental and clear distinction under the rules.

18 So the first sub-criterion (a), in my submission, carries significant and perhaps decisive
19 weight.

20 The next criterion I wish to turn to is (d), the prejudice that may be suffered by one or more
21 parties if the evidence is admitted or excluded. Ms Demetriou went as far as to suggest that
22 this issue was sort of a score draw, and in my submission that is an untenable position. The
23 contrast is clear: for my client, all of its substantive grounds but for the first ground could
24 not be effectively pursued before this Tribunal if this evidence is rendered inadmissible. It
25 would, for all practical substantive purposes gut this appeal of any real effect. It is difficult
26 to think of a prejudice more significant and more compelling and fatal than a prejudice of
27 that kind. It is the fundamental inability to prosecute the appeal on the merits against a
28 *quasi* criminal sanction.

29 On the CMA side by contrast, the relative prejudice, in my submission, is pretty small beer.
30 Again, they have had many, many weeks, far more than is usual, to put in their defence and
31 their evidence at the end of this month. The CMA has been rather coy in terms of
32 informing the Tribunal what exactly the evidence by way of response it would bring to bear.
33 They certainly have not suggested and sought to compare the evidence that we have
34 submitted against what they will submit at the end of the month, and indicating in any

1 material sense how they would be hampered. The fact is they have had weeks and weeks
2 and weeks to gather responsive evidence, and that is a facility which is open to them in this
3 appeal, and by contrast we would be shut out if they succeed from prosecuting the vast
4 majority of our appeal.

5 I reiterate the point I made at the outset, which is that in material respects this appeal is
6 existential for Ping, a small family company, and if its business is to be turned on its head
7 after many, many decades, and in a manner that materially and adversely affects
8 competition in this market, including at the retail level, that is a significant and profound
9 concern that would require the most compelling justification possible for such evidence to
10 be excluded.

11 The third criterion is sub-criterion (e), whether the evidence is necessary for the Tribunal to
12 determine the case. In my submission, it is unanswerable that the evidence is necessary.
13 I took the Tribunal before lunch to a smattering of the points that the retailers, Mr Clark and
14 Professor Brady would touch upon, and it is clear that each and every one of those goes to
15 fundamental factual mistakes and other errors of analysis in the alternative measures set out
16 in the decision. It would be an extraordinary vista if upon preliminary sight of that
17 information calling into serious question the fundamental underpinnings of this decision,
18 this decision, on this evidence, is radically wrong - it would be extraordinary if the Tribunal
19 were to proceed to decide this case shutting all of that evidence out of its mind. The
20 entirety of the factual and expert evidence in relation to alternative measures would, on this
21 application, be excluded. It would be an assessment made in a vacuum, it would be context
22 free, and it runs a significant risk, in my submission, of a materially wrong conclusion being
23 reached in fact.

24 So the evidence is plainly necessary and is plainly central to those issues. It is very difficult
25 to imagine what sort of trial would take place in the absence of evidence from the
26 stakeholders in question. It does bear emphasis that the alternative measures to a good
27 extent, if not a large extent, will directly bear upon and impact the retailers. They will also,
28 of course, impact Ping, but it is the retailers who will be required to make these significant
29 changes to their offerings, their websites, their personnel, and to incur these significant and,
30 in some cases, ruinous costs to comply with these measures.

31 Again, it is obvious why that evidence going in the other direction is necessary for the
32 prosecution of this appeal.

1 I can state my case in very simple terms. It would be fundamentally unjust within the
2 meaning of rule 4 and within the considerations in rule 21(2) for that evidence to be
3 excluded in this case.

4 Of course, on proportionality, again common to rule 4 and rule 21, the evidence in terms of
5 the application is being raised at a very early stage in these proceedings, and it is not being
6 suggested for a second that the conduct of this appeal or the trial would in any way be
7 affected by the timing of this evidential issue.

8 The upshot of the CMA's position, it is not that it would be unable to respond in this appeal
9 by way of evidence and submissions, it is a different point, and it is the point made at
10 paras.84 and 85 of their application, that, as a party to litigation, the CMA does not have the
11 same ability to gather evidence from across the industry to assess whether the views
12 submitted are robust and representative. We deal with this in detail in our written
13 submissions, and I am going to take you to that very briefly, but what the CMA has glossed
14 over is that our evidence primarily comes from third parties. We have no right to insist on
15 evidence from the retailers who have given evidence, and our expert is obviously a third
16 party that we can instruct, but he is not Ping, as such.

17 It was entirely open to the CMA at any stage whether by voluntary interview or mandatory
18 interview, to make contact with the affected stakeholders and in particular retailers. One of
19 the complainants after all is a retailer. The CMA relies on evidence from another retailer,
20 [X], and, in my submission, it is extraordinary that in a series of measures which will
21 impact on well over 1,000 retail stakeholders, the CMA, with the exception of the two I've
22 mentioned, failed at any stage to have any engagement with any of these stakeholders.

23 The only explanation we have had is in Ms Aspinall's second statement at para.12, and she
24 says that they didn't test these measures in the market place because it would not have been
25 productive. In my submission, a very quick glance at our retail evidence shows that it
26 would have been highly productive and absolutely necessary. Again, for the CMA to turn
27 this market on its head after many, many decades without road testing this in any shape or
28 form with any stakeholder is an extraordinary dereliction of duty. It is a decision which is
29 pie in the sky.

30 The CMA could have issued information requests to the retailers. All of these retailers are
31 parties to what is said to be the infringing agreement. In my submission, they could, if
32 necessary, have compelled certainly some of the retailers to interview. They could have
33 compelled Mr Clark to interview, as they had done on at least one previous occasion. They
34 could have compelled anyone else from Ping, or connected with the investigation, in for a

1 formal interview. They could have had informal interviews with any or all of these people,
2 and none of this was done. We have simply had no explanation.

3 The only point which has been said against us is, well, this is all within Ping's sphere. That
4 is simply incorrect. As I said, these retailers for our purposes are third parties. We cannot
5 compel them to give evidence on our behalf, and it is not difficult for the CMA to find an
6 expert such as Professor Brady if they want to. So the only gap, if I can even call it that,
7 was Mr Clark. He is obviously someone within Ping's sphere and, as I've indicated, they
8 could have interviewed him. They did interview him on past occasions. So it simply
9 doesn't hold up that the CMA was in any way hindered from ascertaining information the
10 affected stakeholders in any way that it wanted.

11 The failure of the CMA to do so is something we will be relying on very heavily when it
12 comes to the main trial. Something I said at the first CMC is this is a context free decision.
13 Not one person affected in this market by these measures has ever been canvassed by the
14 CMA. It's absolutely extraordinary.

15 If I can talk very, very quickly to the reasons we gave in writing - I'm sure the Tribunal has
16 these in mind, so I can take them very quickly - these are in our written response at paras.37
17 to 40, tab 10. I've touched on some of these. We say that the CMA will always suffer the
18 alleged prejudice whenever new evidence is admitted in an appeal. That is what the rules
19 envisage, at least as a general matter. We make the following points. The final sentence, of
20 37(a) is important: the remedy for any such prejudice as envisaged in *Tesco* was that the
21 CMA may produce responsive evidence to deal with any new points in the appellant's
22 evidence.

23 Second, the CMA makes a rather bizarre point, that it would be forced to fight this appeal
24 on a level playing field. We make the point over the page, that is an extremely weak form
25 of prejudice, if it is a prejudice at all.

26 Third, Ping stands by the submission that we did say on at least three separate occasions
27 that the only measures which would be proportionate were the actual measures in place by
28 Ping. We made the point that alternative measures would not be sufficient. That was in our
29 letter of 7th December in our response to the draft penalty statement and in response to a
30 letter of fact.

31 In a sense, what is striking is, having now seen our appeal, it is not as if the CMA has come
32 along saying, "Well, gee, now we see, we understand the point and we think these
33 alternative measures are disproportionate". They are sticking to their guns, we are sticking
34 to our guns, and essentially the position as we articulated on 7th December is exactly the

1 position we maintain in this appeal. The measures which are proportionate are the measures
2 which are in place. We have never wavered from that.

3 Then (d), this is a point I have already made about the CMA had a range of powers
4 available to it, if it chooses to deploy them. Ping's response or non-response had nothing to
5 do with those.

6 Then at (e), we make the point they could have interviewed Mr Clark. The CMA was
7 evidently aware that retailers could provide relevant information about a proposal for
8 alternative measures, and it could reasonably have taken steps to obtain that information.

9 Then at (f), they're saying they did, in fact, approach a whole series of retailers to obtain
10 evidence in support of the decision. We mention the complainant, [X] and [X]. Why
11 were these retailers not asked for any views on any of the alternative measures? It's
12 staggering. These were people in the CMA's investigation in a very active sense.

13 Then (g), a legal point, which is not unimportant: in any event, whatever evidence had been
14 placed before the CMA at the administrative stage, it would not have been sufficient,
15 certainly for Ping, to sit on its hands and say, "That is the totality of evidence we would
16 wish to bring in this appeal". At the judicial stage there is the crucial feature of cross-
17 examination, and we would, in any event, have been compelled, if we wished to advance
18 this evidence, to produce the witnesses before the Tribunal for cross-examination. You see
19 there reference to the *Tesco*, para.139, which notes the importance of cross-examination.
20 At para.40, a final point on the written document, which is the burden of proof. We have a
21 substantive ground of appeal which is that the CMA is simply wrong in relation to the
22 burden of proof as a matter of law. That is not something we need to decide today, that is
23 something for a later stage. We do make the point at the middle of para.40 that it would be
24 absurd to require Ping to prove a negative by identifying, then disproving, the entire
25 universe of possible alternative measures to achieve its aim. The common sense position is
26 that the CMA should identify and prove any specific alternative measures that it contends
27 could have been achieved, could have achieved Ping's aim, as effectively as the internet
28 policy. In any event, the question of whether new evidence should be admitted under rule
29 21(2) does not depend on who bears the burden of proving the matters set out in the
30 disputed evidence. So, in our submission, the Tribunal is not really assisted at this stage by
31 burden of proof points. That is something for another day, and something which we will
32 have to deal with in May.

33 In a sense, the CMA, certainly by its actions, has agreed with our position because there
34 have been a certain what market historians called 'revisions' on the CMA's part. The

1 chronology, and this is important, is that it was Ping who was forced to go to the CMA and
2 ask the CMA if it was bringing an alternative measures case and, if so, what alternative
3 measures it had in mind. What happened was that the issue was mentioned in passing at the
4 oral hearing. We then wrote to the CMA in December and said, “Are you seriously making
5 this case that you mentioned at the oral hearing?” Then, some weeks later, we received the
6 alternative measures paper. So certainly by their conduct the CMA did feel it was
7 incumbent on them to set out the alternative measures that they say would be a
8 proportionate alternative to the actual measures in place. It is unreal, in my submission, to
9 suggest that it was up to Ping, with no alternative measures having been suggested at any
10 stage, to pre-empt each and every conceivable alternative measure that could have been put
11 in place. That is an unreal submission.

12 The next point is (c), where the evidence was not available to the respondent before the
13 disputed decision was taken, the reason why the party seeking to adduce the evidence had
14 not made it available to the respondent at that time. I don’t really wish to say a great deal
15 on this, except the following. My first submission is that this is one of a number of criteria
16 under rule 21(2). It is entirely open to the Tribunal, independently under rule 21(1) and
17 under the other criteria in 21(2), to decide that this evidence should be admitted on the basis
18 of those considerations. This is a criterion, it is not a necessary one, or even a dispositive
19 one, so I do make the point that if the Tribunal, in the exercise of its judgment, forms the
20 discretionary conclusion that the evidence should be admitted for other reasons, this reason
21 would not be a sufficient counterweight to that conclusion. There is a series of criteria
22 which may come to bear, and it may be that, for example, the question of prejudice and
23 necessity and the utility of the evidence to the Tribunal’s appeal on the merits, in this
24 particular case carry decisive weight before one even gets to this criterion. So that is
25 essentially a legal point.

26 On the criterion itself, I mentioned this before lunch, it effectively involves Ms Demetriou
27 giving evidence to suggest or imply that by the time we downed tools at the end of March
28 we had on the stocks these retailer statements, Professor Brady’s report, or evidence along
29 those lines from Mr Clark. That is simply untrue. I made the point before the lunch that it
30 is atypical at the administrative stage to put in sworn testimony of this kind. That would not
31 be the usual course, and it certainly was not the course here.

32 One sees this very clearly from a series of documents. First of all, in relation to Professor
33 Brady, it is clear from his report that he was instructed in September 2017. It is simply
34 wrong and, in my submission, improper to suggest that we were treating with

1 Professor Brady or some other professor on that evidence back in March or April. That is
2 an impossible submission based on his instructions.

3 In relation to the retailers, again there are significant clues and evidence that the CMA is
4 simply wrong to imply that these third parties were people who were on our radar at this
5 stage. If one looks at Ping's costs schedule in tab 24 of the main hearing bundle, three
6 pages in you have our costs schedule, and you will see under "Witness statements" that
7 £126,000 has been spent on witness statements. Again, if the Tribunal is being asked to
8 infer or imply or find as a fact that the retailer evidence was good to go at the end of March,
9 it is difficult to understand how £126,000 was spent signing those statements or dotting the
10 I's and crossing the T's. So I would invite the Tribunal to reject as a matter of fact any
11 suggestion that the evidence which is now being challenged was something which was
12 either complete or substantially complete at the time Ping downed tools in March 2017.

13 THE CHAIRMAN: I didn't really feel that was being suggested. There was some material there
14 that could have been produced but Ping decided not to produce it.

15 MR O'DONOGHUE: Sir, we do not accept that. Perhaps I should show you the letter. We made
16 it very clear to the CMA that we were engaged in a responsive exercise. At no stage,
17 because it was completely untrue, did we ever suggest that we were preparing witness
18 testimony from retailers or someone of the ilk or Professor Brady, or anything of that kind.
19 That is a hare which has been set running while Ms Demetriou has been on her feet. In my
20 submission, it is quite improper for the CMA at this stage to seek through counsel
21 effectively to give evidence of that kind. You, sir, will remember before the last CMC -
22 let's turn this up, because this is quite important, it is tab 2... This is actually a letter from
23 Ping but we quote the CMA's letter which isn't in the bundle, and it's at para.3. At that
24 stage the CMA said:

25 "We understand Ping's position on why this new evidence was not submitted to
26 the CMA during the administrative phase."

27 In their written application, there was further backtracking. They said that they would ask
28 the Tribunal to infer that part of Ping's motivation was tactical, and now on her feet this
29 morning Ms Demetriou time and time again has made a very, very serious allegation that
30 Ping has quite deliberately withheld the evidence that it is now presenting in its notice of
31 appeal, and we refute that in the strongest possible terms. There is no evidential basis for
32 that allegation whatsoever. You have a signed sworn statement from Stephen Hardy, who is
33 an English solicitor. It makes more than tolerably clear that the suggestion that the evidence
34 which is now challenged was being withheld is entirely baseless. There is a desperate point

1 from the CMA, “Oh, well, we haven’t waived privilege and legal advice”. He’s not
2 referring to legal advice, he is responding to a factual allegation that the six statements that
3 they now seek to exclude were something which was complete or substantially complete by
4 the end of March. That is simply untrue. There is no basis before this Tribunal for the
5 CMA to seek to go behind that statement. It is clearly responding to an allegation they have
6 made and is responding in the strongest possible and clearest terms. It is nothing to do with
7 legal advice, it is saying that, in fact, this evidence was not available to Ping at the
8 administrative phase. It really is quite a serious allegation to suggest that we on this side of
9 the room have deliberately withheld the evidence and sprung it now on the CMA.

10 I do emphasise that these are third parties who are not available to us. They don’t have to
11 give evidence. It is not straightforward for Ping to get them to give evidence. That whole
12 exercise, as you can see from the costs schedules and the instructions, was something
13 which commenced after the decision, and it is quite wrong for the CMA to imply otherwise.
14 It would effectively involve an implicit but clear suggestion that Mr Hardy’s statement is
15 untrue. In my submission, it is improper to make that allegation, never mind to invite the
16 Tribunal to find on that basis. It should be withdrawn, in my submission, it is entirely
17 wrong.

18 The CMA’s desperation in one sense is illustrated by a small but not unimportant point.
19 One piece of evidence they seek to exclude is a statement by one of their own senior
20 personnel made in public in 2012. It’s the statement by Lord Currie. It’s a document from
21 many, many years ago from one of their own senior officials alerting the CMA to the idea
22 that measures of the kind set out in the alternative measures paper were wholly unworkable.
23 They want to exclude that in our appeal, and it’s absolutely astonishing.

24 In terms of the ins and outs of what happened in March and April, I’m not going to bore the
25 Tribunal with yet another running commentary. We’ve set out our position very, very
26 clearly, and I’ve explained Ping’s position on my feet. The CMA, in my submission, is
27 trying to elide a distinction between two very important things. It is one thing to say that in
28 the context of a merger inquiry, where, as the Tribunal well knows, there are extremely
29 short and aggressive statutory deadlines and the CMA for reasons of procedural necessity
30 may be obliged to publish provisional measures and in parallel engage in consultation.
31 In my submission, that is something fundamentally different to a *quasi* criminal sanction
32 where, before the CMA has had sight of any response from the defendant on the central
33 substantive issue in the case, it issues a draft penalty statement. In my submission, they are

1 apples and pears, and it is a hopeless argument to suggest that a minor practice in respect of
2 something different like mergers offers any support for what was done in this case.

3 We have never seen, and the CMA hasn't given a single example of any case in which it has
4 issued a draft penalty statement before the substantive inquiry had finished. It was an
5 extraordinary step by the CMA, it was unprecedented, and it was extremely prejudicial,
6 both in appearance and in substance.

7 The Tribunal, in my submission, doesn't need to get into any of this. The key point for the
8 Tribunal is that Ping had contemporaneously and genuinely formed a view that the CMA's
9 precipitous issuing of the draft penalty statement gave the appearance of a body which had
10 its mind made up. That emerges very clearly from the notes of the conversations between
11 the CMA and Mr Hardy, and perhaps I can just show you one of these. It's in the exhibits
12 to Ms Aspinall's first statement. This is a note of a conversation between Mr Hardy and
13 Ms Aspinall. It is 8.17. This is a contemporaneous record of a discussion. About two
14 thirds of the way down, "SH", Mr Hardy, "explained that Ping felt that the CMA had made
15 its mind up and that there was no point in submitting a response". So there you have a
16 contemporaneous record of exactly what we have been saying from the very outset.

17 Ping's position has been entirely clear. We have always said we needed until 28th April to
18 respond to the alternative measures paper. We have the point that the CMA's response by
19 way of defence was of a similar order of magnitude in terms of time.

20 I do make the point that, in substance, the alternative measures was a brand new case,
21 because the CMA had effectively admitted that what it had set out in the statement of
22 objections, that the Ping policy did not have a legitimate objective and was not genuine, was
23 completely wrong. So it was a *volte face* on the part of the CMA. They had for all practical
24 purposes binned the key part of the statement of objections and the alternative measures
25 paper, that really is their case. Their case now turns on proportionality. In the ordinary
26 course of events we would have had eight, ten, 12 weeks to respond to a statement of
27 objections. The fact that this is labelled an "alternative measures paper" should not detract
28 from our rights. So we have taken the position consistently and from the outset that that
29 was what we needed to prepare a response, that was the time we needed to prepare our
30 appeal, and that was the time they need to prepare a responsive position by way of defence.
31 So we were absolutely spot on in terms of that timeline. There has been some criticism, we
32 didn't justify why we needed that long. We did, and it's obvious. This was effectively a
33 new case and we should have been afforded the normal time to respond to that new case,
34 and not three weeks and not six weeks.

1 So this is not an excuse invented after the fact. There is clear and unambiguous
2 contemporaneous evidence that this was always our position. I think, for the Tribunal's
3 perspective, there has been a lot of heat on the CMA side in terms of deliberate withholding
4 and a bit of heat on my side. I think from your perspective, the fairest way of looking at this
5 is that, rightly or wrongly, there was a genuine breakdown in trust between the CMA and
6 Ping. That is not to criticise anyone on either side. They've made their points, "Oh, well,
7 you could have responded", and we've made our points, "Well, we thought there was no
8 point in responding, you've made up your mind", they say, "We hadn't made up our mind",
9 and we say, "Well, we thought you had", and so on.

10 In my submission, that is a rather sterile debate for the purposes of the Tribunal's
11 assessment. I would encourage the Tribunal to approach this on the basis that there had
12 been a genuine misunderstanding, or at least a lack of trust, and rightly or wrongly, Ping felt
13 genuinely and contemporaneously that the CMA had stopped listening. In my submission,
14 that is more than ample to deal with that. The allegations made against us that there was
15 deliberate withholding, they are extremely serious, and it would be quite wrong in the
16 absence of any testing of evidence, no cross-examination of anyone, to reach a finding to
17 that effect. You have an ample record showing that we had a genuine concern that we were
18 not being heard and they had stopped listening. In my submission, certainly on a human
19 level, that is perfectly understandable.

20 A small point is made about the procedural officer. We did copy the procedural officer on a
21 number of these letters, and it wasn't as if anything was forthcoming. The procedural
22 officer was kept in the loop. We made the point in our written submissions that Ping had
23 lost confidence in the CMA as an institution and we didn't feel that anyone there was
24 listening.

25 It may be, as it turns out, that people there remained open-minded. We certainly did not
26 have that impression, and it would be hard, in my submission, to criticise Ping for certainly
27 forming the appearance of prejudgment because of the unprecedented step of issuing the
28 draft penalty statement. This has never been done before, and it has not been done before
29 for a very good reason, because it is very, very difficult to think of anything more
30 prejudicial than someone telling you your sentence before you've had a chance to respond
31 on the substance. It is about as prejudicial as one can think. Ms Demetriou made the point,
32 "Well, sometimes we ask for financial information". There is a world of difference between
33 asking for financial information and actually issuing the draft penalty statement at a time
34 when they knew Ping was responding.

1 The draft penalty statement was issued on 31st March. We had sought consistently a further
2 four weeks to submit our response, and they should have waited. That was the correct thing
3 to do, it was the just thing to do, and in an investigation lasting many years, and a judicial
4 process which will last a little longer, it is completely unreasonable for the CMA not to wait
5 a little bit longer and see the response that they knew was forthcoming, but instead to hit us
6 with a draft penalty statement containing a *quasi* criminal fine. In my submission, that is
7 quite wrong, and Ping was entirely and understandably of the view that these people had
8 stopped listening.

9 As I said, I would discourage the Tribunal from getting into these issues which, in my
10 submission, have a bit more heat----

11 THE CHAIRMAN: It does seem strange, reading the correspondence, that the invitation to refer
12 to the CMA's procedural officer was not taken up.

13 MR O'DONOGHUE: Well, sir, we certainly had copied the procedural officer in on two, if not
14 three, of our letters. It rather depends what you mean by 'apply'. We felt that, by keeping
15 the procedural officer in the loop in terms of what was going on, we had made her aware.
16 As I understand the CMA's position, they seem to be of the view that we should make a
17 separate formal application to the procedural officer, and we say, well, in substance, we had
18 made her aware that we thought this was extremely unjust. In any event, I do come back to
19 the point that we, rightly or wrongly, had lost confidence in the institution. At that stage, by
20 the stage the draft penalty statement had been issued, it wasn't about getting an extra week
21 or two, it was that we had felt more fundamentally there had been a prejudgment of the
22 substance of the case. So at that stage it really ceased to be a procedural issue, it was rather
23 that the institution had, by its conduct, apparently made up its mind. This has never
24 happened before. I do emphasise that. In the scheme of things, they should have waited.
25 Sir, those are our submissions, unless I can assist further.

26 MS DEMETRIOU: May it please the Tribunal; by way of reply I will deal with the points raised
27 by Mr O'Donoghue in the order in which he raised them, but I would like to make two
28 points at the outset. The first is that the difficulty with most of Mr O'Donoghue's
29 submissions is that they prove too much, and that applies to his submissions which focus on
30 the nature of the appeal and the *Napp* case and Article 6, because if he's right about that
31 then, taken to their logical conclusion, his submissions would mean that the Tribunal never
32 has power to exclude new evidence that hasn't been produced in the investigative phase in
33 Competition Act appeals. We know that that is wrong, and we know it (a) because the rules
34 apply to both appeals and reviews and judicial reviews, and it would have been open to the

1 legislature to have adopted a different, more restrictive rule for appeals if the Tribunal had
2 never had power to exclude evidence on appeal. That's not the case.

3 We see it also from the legislative history behind the rule, which identified a particular issue
4 in appeals, which is the prejudice caused if parties were deliberately holding back evidence
5 only to produce it on appeal, from the administrative phase.

6 So we know that it's not the case that the Tribunal doesn't have power to exclude evidence,
7 yet that would be the logical consequence of Mr O'Donoghue's submission.

8 The same applies to his submissions on prejudice. He started with the prejudice to Ping, but
9 again, if that were a knock-out point, it would exclude any power on the part of the Tribunal
10 to exclude evidence adduced by appellants on appeal.

11 Exactly the same flaw applies in relation to limb (e) of the rule, which is necessity of the
12 evidence.

13 The second overarching point I wish to make is that it was striking, in my submission, that
14 Mr O'Donoghue ran away from the central point in our application, which was the reasons
15 for withholding the evidence. That featured at the end of his submissions, and indeed he
16 was at pains to say to the Tribunal before dealing with reasons that the Tribunal does not
17 have to consider that consideration at all, or doesn't have to place much weight on it at all in
18 this case. We say it's of very central importance, and that the purpose of the rule change
19 was to specifically require the Tribunal to focus on why evidence which could have been
20 produced in the investigation was not, the reasons why it was not.

21 So with those two overarching points in mind, I want to make a few submissions, first of all,
22 about Mr O'Donoghue's first point in relation to the rule. He sought to characterise the rule
23 change as effectively not amounting to a change at all. That's incorrect, in our submission.

24 There was a process of change which we have taken you through. The legislature rejected
25 the *Ladd v Marshall* approach, which was what Sir John Mummery had advocated, and
26 instead invited a specific focus on the reasons for not producing evidence during the
27 investigation, and that is a substantive change, albeit that the chairman is correct to say that
28 the overarching power to exclude evidence was there at the outset, but the change was to
29 introduce a focus on the reasons for not adducing evidence during the investigation.

30 In relation to *Napp*, I just want to make one short point, which is that in relation to the first
31 *Napp* judgment, which Mr O'Donoghue took you, and that is at authorities, tab 1, I would
32 ask you also to read - he took you to paras.75 and 76 - para.72, p.28, where the Tribunal
33 made clear that it starts from first principles:

1 “... but we do so only in a provisional way because the matter has not been fully
2 argued and we have not been taken to any authorities.”

3 I just ask you to note that caveat, which precedes the passage that Mr O'Donoghue relied on.
4 In any event, when reformulating the rule, we have seen that both Sir John Mummery and
5 the Government took full account of the nature of the appeal process and the fact that this is
6 a *quasi* criminal context, but nonetheless sought to strengthen the powers of the Tribunal, or
7 refocus the powers of the Tribunal to exclude new evidence that had not been produced
8 during the investigative phase. So that had been taken account of before the rule was
9 changed.

10 The CMA has, in any event, been very clear to acknowledge, and it is set out very clearly in
11 our written application, that the Tribunal's approach to new evidence of course differs in the
12 context of an appeal and a mergers review, we are not seeking to shy away from that, as
13 Mr O'Donoghue sought to characterise us as doing. We have said it plainly in our
14 application. We accept that the general position in appeals, in Competition Act appeals, is
15 that new evidence is admissible. It's not the case that it's always admissible, and in
16 particular we say it's not admissible, or the Tribunal should not admit evidence that could
17 have been produced in the investigative stage, if it was deliberately not produced for no
18 good reason. That is an extreme case, and we say it is the case here, and that's the basis on
19 which we invite you to exclude this evidence.

20 Turning to prejudice, Mr O'Donoghue started his submissions - he referred several times to
21 the evidence that the CMA seeks to exclude as being existential. Why, we ask rhetorically,
22 if it's so existential did Ping not produce it, particularly since it's the central issue in the
23 case, as Ping says, and the evidential burden was on it to do so?

24 Mr O'Donoghue sought to minimise prejudice to the CMA. The first point that he made is
25 that he criticised the CMA for not seeking more evidence from retailers during the course of
26 the investigation. Of course, that submission is predicated, we say, on a flawed assessment
27 of burden of proof, of evidential burden. Mr O'Donoghue did not engage substantively with
28 my submissions on burden of proof in his oral presentation. He said that that's a matter for
29 the main application. With respect, it's not. We do invite the Tribunal to make a finding on
30 that. It's a short point of law. We've taken the Tribunal to the authorities. No authority
31 against that, has been put up by the other side. The authorities support our contention that
32 the evidential burden on this point rested on Ping. That colours the context in which all of
33 this took place. Even if Ping were correct that the burden was on the CMA, what happened,
34 in fact, of course, was that the CMA produced its paper, yet Ping did not respond to it.

1 Ping says that the CMA should have road tested the less restrictive alternative measures that
2 it countenanced in its paper with retailers. Of course, the key point that we make is that the
3 CMA sought to road test that paper with Ping, and it refused to engage with it. That's the
4 central difficulty faced by the CMA.

5 There is a more nuanced point to make, which is that the CMA's case is not that Ping
6 should require all retailers to sell online. That's not the CMA's case. The CMA's case is
7 that Ping should not prohibit them from doing so. It's the fact of the ban that is the
8 infringement of competition, restriction on competition. Some retailers, of course, may
9 have a commercial incentive to sell online and others may not. So if the ban were lifted
10 because it's anti-competitive then some retailers may choose to sell online, and others may
11 choose to simply sell in the bricks and mortar store. So it's not an efficient way of going
12 about road testing, whether or not there are less restrictive alternatives, to start asking
13 retailers who may have very different commercial incentives in relation to the ban.

14 Essentially, the bottom line is that the less restrictive measures that the CMA put forward
15 were less restrictive measures that Ping could have taken in operating its business. The
16 question is whether Ping could have done something less restrictive, not whether all the
17 retailers could have done so. So it is a very unsatisfactory and indirect means of arriving at
18 an assessment of the evidential picture for Ping to say, "It was all right not to respond to
19 what you were saying our business could have done, instead you could have gone around
20 and asked all these retailers what they thought about it." That, we say, is just unsatisfactory
21 and not the test, because it was for Ping to make its case.

22 Essentially, I think I've made my point in opening, but we say that the fundamental
23 difficulty with Ping's case on prejudice is that it can't be a determinative factor, because if
24 it were then no application to exclude new evidence would ever succeed because there will
25 always be prejudice to the party seeking to adduce it. That can't be a determinative factor.
26 The key issue here is that the prejudice is of Ping's own making. Without proper
27 justification it refused to adduce evidence during the administrative phase that it could have
28 adduced, and instead it's reserved it for appeal.

29 Turning to limb (c) of the rule and reasons, Mr O'Donoghue fundamentally
30 mischaracterised the CMA's case in making his submissions, and I hope I was clear in
31 opening: it is not the CMA's case that Ping had witness statements on the stocks in March.
32 That is not what I submitted. Of course I did not purport to give evidence to that effect.
33 The CMA's application does not focus on form. The CMA recognises that it would be
34 unusual, it may be unusual for undertakings to produce witness evidence during the course

1 of the investigation. The CMA's point is whether the substance of these points could have
2 been put to the CMA. It's that about which we complain, not whether or not the substance
3 could have been put in a witness statement. For example, to take Mr O'Donoghue's point,
4 sir, he showed you some of the witness evidence at the outset, and you will recall that one
5 paragraph of a particular statement said that it wouldn't be practicable for retailers to sell all
6 of the different permutations online, because there are so many millions of permutations.
7 So that's a substantive point which is contained in a witness statement. That's a point
8 which could have been put to the CMA in substance. It wouldn't have mattered whether it
9 was in the form of a witness statement or who said it. All that needed to be said was, this is
10 not practicable, because there are too many permutations. So that's a practical problem
11 with one of these less restrictive alternatives. That's the way the CMA puts its case.
12 My submission was based on the contemporaneous evidence of Ping's position at the time,
13 and you'll recall I took you to the letter where Ping stated in terms that from 14th February it
14 had diligently started preparing its response, and yet it downed tools on its response six
15 weeks later at the end of March. So we're not saying of course that at the end of March it
16 had all of these witness statements that it now seeks to adduce, but we do say that plainly,
17 had it submitted the evidence at that stage that it was intending to submit, then it could have
18 made many, if not all, of these substantive points at that time. So it's not a criticism about
19 form, it's a criticism about substance.

20 Mr Hardy's statement: again, Mr O'Donoghue's submission is that the CMA's complaint is
21 about witness statements being available at the time. That suffused his submissions in
22 relation to Mr Hardy's statement, because he says that's what Mr Hardy was responding to,
23 but that wasn't our submission.

24 The key point to make about Mr Hardy's statement is that he simply does not say that
25 tactical considerations did not enter into the picture. He says that Ping did not withhold
26 evidence. We say that on natural meaning of the word 'withhold', plainly it did. It
27 progressed its evidence and it did not produce it. If that's not withholding it, we fail to see
28 what the word 'withhold' can mean.

29 Secondly, he said they did not 'game' the system. It's not clear what he means by that.
30 Despite Mr O'Donoghue characterising my submission repeatedly as 'desperate', there is a
31 very real and serious point about not waiving legal professional privilege which is that if
32 one is seeking to persuade the Tribunal that the reasons, which are essentially legal reasons,
33 for opting out of the process - legal reasons because they centre on whether there was
34 properly bias, they had properly identified bias, and whether that justified withdrawing from

1 the process - if that is the reason that is going to be put forward then we say that it is
2 incumbent on the appellant to show what legal advice it had obtained at the time, and it is
3 not open, we say with respect to the Tribunal, to read Mr Hardy's statement very broadly so
4 as to exclude the possibility that Ping was acting for tactical reasons. First of all, he doesn't
5 go far as to say that himself, and secondly, on this quintessentially legal issue we don't
6 know what the legal advice was that was being given to Ping, and that's an omission.
7 Also, importantly, it's an objective test. This goes really to Mr O'Donoghue's last point.
8 He said, rightly or wrongly, whatever happened, there was a breakdown of trust. Again, we
9 say it's not good enough to say "rightly or wrongly", because our point is that wrongly, they
10 wrongly took the view there was a breakdown of trust, and we say that the task for the
11 Tribunal is to determine objectively - objectively - whether or not Ping was justified in
12 opting out of the proper procedure, and we say it wasn't for all the reasons that I gave in
13 opening.

14 In relation to the draft penalty statement, Mr O'Donoghue said that the CMA hasn't given
15 an example of another case where the DPS was issued before all the evidence going to
16 infringement was received. That's true, but this is an exceptional case, and the reason it's
17 an exceptional case is that Ping had been set a deadline. It does not appeal that deadline to
18 the procedural officer, and we say that Mr O'Donoghue's submissions that they copied in
19 the procedural officer, and so on, simply don't withstand any scrutiny. The CMA made it
20 crystal clear in its correspondence that there was a proper process whereby an application
21 had to be made to the procedural officer. That was spelt out in the correspondence. Ping
22 did not do that, and in those circumstances, where there is no appeal to the procedural
23 officer and a deadline has not been complied with, then one asks, what is the CMA
24 supposed to do? Is it supposed to sit on its hands and do nothing and not progress the case?
25 No. What it did was it progressed the case, but then it made clear that it had not reached a
26 concluded view in relation to infringement, and that it would address any evidence it then
27 received with an open mind. That was made clear repeatedly in the communications with
28 Ping.

29 So for all those reasons we say that, objectively, Ping has not demonstrated that it had good
30 reason to opt out of these procedures which are there for a reason, that in deciding to
31 withhold evidence which it had spent six weeks producing, that meant that nothing was put
32 to the CMA on the less restrictive alternatives, an issue on which Ping bore the evidential
33 burden. So the CMA was left trying to decide these points in a vacuum without the benefit
34 of Ping's case. This is a paradigm of a case in which there is prejudice caused both in terms

1 of the regime and on a very practical level to the CMA, and for those reason we respectfully
2 invite the Tribunal to exclude this evidence.

3 We say, as I said at the outset, it's an important point for cases generally and for the
4 operation of the regime in general.

5 Those are my submissions in reply unless there is any question from the Tribunal.

6 THE CHAIRMAN: Thank you. We are now going to rise for ten minutes to consider our
7 decision.

8 (Short break)

9 THE CHAIRMAN: The Tribunal's decision is that Ping's evidence to which the CMA objects
10 should be admitted. The Tribunal will give its reasons for this decision in a written
11 judgment.

12 The Tribunal would invite the parties to make submissions in writing in relation to the costs
13 of this application after the judgment has been issued.

14 Is there anything else that needs to be dealt with?

15 MS DEMETRIOU: My understanding is no.

16 THE CHAIRMAN: Thank you very much for your submissions.
17 _____