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IN THE COMPETITION
APPEAL TRIBUNAL

Case Nos. 1300/4/12/18

Victoria House,
Bloomsbury Place,
London WC1A 2EB

14 December 2018

Before:

THE HONOURABLE MR JUSTICE ROTH
(President)
TIM FRAZER
ANNA WALKER CB

(Sitting as a Tribunal in England and Wales)

BETWEEN:

(1) J SAINSBURY PLC
(2) ASDA GROUP LIMITED

Applicants

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

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HEARING

A P P E A R A N C E S

Mr Jon Turner QC, Mr Alistair Lindsay and Mr Nikolaus Grubeck (instructed by Linklaters / Gibson Dunn) appeared on behalf of the Applicants.

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

1 THE PRESIDENT: Good morning. Mr Turner, may I just say that we are conscious that some of
2 our papers are marked confidential and, in the usual way, if there is any need to refer to
3 them you can direct us, either counsel can direct us to the relevant passage without reading
4 it out. I do not think, as things appear at present, this is a hearing where we should need to
5 go *in camera* at any point, but if that does arise we can address it.

6 MR TURNER: Sir, we agree, and we will seek to achieve that. May it please the Tribunal,
7 I appear today with Mr Lindsay and Mr Grubeck for the Applicants, Asda and Sainsbury's.
8 For the respondent, the CMA, there is Ms Demetriou, Mr Williams and Mr Bailey.
9 May I begin by thanking the Tribunal for arranging to sit this quickly in response to this
10 urgent application. The Tribunal should have from our side three bundles, namely the main
11 bundle, the bundle to which the President has just referred containing confidential extracts
12 from these working papers, there to give the Tribunal a flavour of what this is about, then
13 there is an authorities bundle.

14 THE PRESIDENT: Yes.

15 MR TURNER: From the CMA side, you will have, or should have, the skeleton argument that
16 they served yesterday, plus two witness statements, including the exhibits to those
17 statements. They also have an authorities bundle.

18 THE PRESIDENT: Yes, we have that.

19 MR TURNER: Sir, you should have, finally, from us also an annotated version of the notice of
20 application which we sent across yesterday, which is fully referenced to the bundle for the
21 ease of the Tribunal. It was intended to replace the original version that was not fully
22 referenced. Overnight, finally, there was a letter that was sent from our side to the CMA
23 prompted by the Tribunal's question concerning this case in the Court of Appeal, *Floe*
24 *Telecom*. I do not know if the Tribunal has got a copy of that.

25 THE PRESIDENT: Yes. There was a letter also to the Registrar of the Tribunal which we have,
26 copied to the CMA of course, from Linklaters saying that you propose to amend the relief
27 sought in para.100, and we have got that.

28 MR TURNER: I am grateful.

29 THE PRESIDENT: You are very properly not seeking that the Tribunal, if you succeed in
30 quashing either decision, should direct a date or dates which we doubt we would have
31 power to do.

32 MR TURNER: That is so, and the letter to the Registrar tracks the letter that was sent to the
33 CMA.

1 THE PRESIDENT: What we have in mind, if I can say this now for the assistance of all Parties,
2 is this: if, when we have heard all the arguments, and obviously it is a big 'if', we consider
3 that the Applicants should succeed on either or both grounds, we will, given the urgency of
4 the matter, retire at the end of the arguments, consider whether we can give an immediate
5 decision with a reasoned judgment to follow, because clearly you want to know as soon as
6 possible on all sides where you stand.

7 MR TURNER: That would be welcome on both sides.

8 THE PRESIDENT: Given that, as you now recognise, it is not for the Tribunal to direct, if we do
9 quash the decision, what the new timetable should be, but if we are able to give any
10 indication, which would be elaborated on in our reasons, of what we think might be
11 reasonable and fair, without binding the CMA because we cannot, we should say so as well,
12 because clearly what I would have thought nobody wants is if we were to quash the decision
13 without saying more, then the CMA sets a new timetable, then you consider on your side
14 that is unfair and you are all back here next week. That would be highly undesirable and
15 unproductive.

16 So, subject to hearing in due course from Ms Demetriou as to whether the CMA would be
17 resistant to that course, we thought that if these proceedings develop that way that might be
18 helpful, making clear, as I have said, it would not bind, Ms Demetriou, your clients, because
19 we cannot.

20 MS DEMETRIOU: Sir, we would be happy with that course.

21 THE PRESIDENT: Thank you very much.

22 MR TURNER: Sir, I begin with our address. The issue before the Tribunal is essentially whether
23 certain procedural decisions by the CMA restricting the Applicants in an ability to respond
24 to material and to put their points across, are unrealistic and are unfair.

25 There are two aspects to the case. The first is this: the Parties have been asked to comment
26 on an extraordinary quantity of material and analysis, and it includes analysis which frames
27 the future direction of the inquiry. They have been asked to do this within a very short
28 period, when the Parties have, in my submission, convincingly explained and sincerely
29 explained that this is impossible. The CMA, for its part, in its responsive material has not
30 attempted to suggest that it is possible.

31 The second point is that the Parties have been told that their opportunity to take part in an
32 oral hearing, strictly two of them, to put their points across to the decision makers was a
33 one-off chance expiring today, although a hearing arranged in the last week would not have
34 given the Parties the chance effectively to put across their points, and it would have

1 impacted further on our ability to deal with what is an already impossible timetable for the
2 written comments.

3 These are matters of serious concern. The right approach for an administrative body setting
4 deadlines involves sizing up the task that has been given and then allowing a minimum
5 period of time which reflects the size of the particular task. If you do not proceed in that
6 way, the approach is apt to be oppressive. Perhaps of equal importance, it is a false
7 economy and it can be counter-productive. You push out to a later stage the possibility of
8 picking up fundamental systematic errors in your modelling or in your approach which
9 could mean that you have to redesign the approach, you need to gather more data, you need
10 to redo the analysis, and you need to re-consult. Calibrating the time which is allowed for a
11 task by thinking about the time which is actually going to be needed reflects the way that
12 the courts set deadlines in litigation. A court will always seek to impose a deadline that is
13 achievable in practice. It would not arrange a hearing for a party to make representations at
14 a time when this would be wholly or largely valueless to do it.

15 The CMA's approach to the two matters which are subject to challenge today does not
16 follow those principles.

17 THE PRESIDENT: There is, of course, the difference from a court in litigation of any kind that
18 the CMA has a statutory unmovable deadline by which it has to produce its decision, which
19 is not the position of a court, either as regards the trial - that can always be adjourned, put
20 off, re-fixed - or indeed the judgment. So they have a constraint which is somewhat
21 different from the analogy that you gave.

22 MR TURNER: That is true. Nonetheless, it remains necessary for the thinking of the
23 administrative body to take into account the size of the particular task as a necessary
24 component of deadlines which it sets. Where it appears that the point has not been
25 adequately, or perhaps even at all, taken into account, and that the reasoning has been
26 driven solely by reference to a top-down appreciation of the demands of the timetable
27 without thinking about those steps - if one likes, bottom up - then that is a flaw, because it
28 must be part of the thinking.

29 In this case there is not any indication that they have taken into account what the specific
30 task actually involves, and their approach in that sense is not evidence led. Rather it seems
31 that they have taken, both as their start and their finish point, three other matters which you
32 see developed in their skeleton and their witness evidence.

33 May I, in order to proceed efficiently, ask you at this point to take up their skeleton, if you
34 have that to hand, and go past the initial discussions to the hard-edged points, and turn to

1 p.13. Here you see at the top of the page a heading for something that really is one of the
2 crucial issues, “The extensions of time sought by the Applicants will prejudice the CMA’s
3 work”. If you go down to para.41(b) and look at the last sentence of 41(b), what you see
4 this boiling down to is the contention that giving the Applicants even a modest extension of
5 time for the written response between nine o’clock in the morning this coming Monday, the
6 17th, and instead the 21st of December, will set back the CMA’s work and progress by one
7 week. Then this additional one week produces as a knock-on effect apparently an
8 unacceptable risk of rendering the entire next part of this inquiry unachievable. This is
9 suggested to be the case even if eight additional weeks are now added on to the inquiry
10 timetable.

11 If you go up to para.41(a) immediately above you see in brackets in the fifth line the point
12 that was made clear in their skeleton: “we will assume the maximum 32-week inquiry
13 period.” At the moment, and subject to the extension, everybody has been working on the
14 basis of 24 weeks.

15 That is their first point, that there will be a setback of the one week, maximum one week,
16 and it will have this chain reaction.

17 The second point that they make, the gist of their case, you see in para.43 over the page, at
18 the top of p.14. They say this:

19 “The question for the Tribunal ...”

20 I am now on the hearing issue -

21 “... is whether, in principle, it is permissible for the CMA to list a main party
22 hearing in the week of the deadline for responding to working papers.”

23 So in other words, the draftsman of the skeleton has moved from seeking to defend this
24 particular decision to insist on all hearings during essentially this last week, the week
25 ending today, and frames it as a general proposition for the Tribunal that such an approach –
26 organising hearings when there is also work being done on the responses to working papers
27 – is a legally permissible approach generally.

28 The closest that this skeleton argument gets to defending the particular decision in this case
29 - that is demanding a hearing during the current week expiring today, you see if you go back
30 to p.5 and look at para.12(e):

31 “The CMA’s proposed hearing dates have been lawful, taking into account the
32 purpose of the hearing and its role in the CMA’s overall process taking into
33 account other opportunities for the Applicants to be heard.”

1 That last phrase seems to be saying, “We offered you even earlier dates, since you did not
2 take those up, a hearing in this last week expiring today is fairly to be regarded as your final
3 chance.” The skeleton does not argue that there would be insuperable difficulties if a single
4 day was given for the main party hearings at the beginning of January, but if you go to the
5 witness statement of the CMA’s official, Mr McIntosh, he does assert there that a hearing
6 on any day in January would cause - the witness says that a hearing on any day in January
7 would cause irretrievable delay to the CMA’s ability to finalise its provisional papers.

8 THE PRESIDENT: Yes. I am not sure it is right to call Mr McIntosh an “official” of the CMA.
9 He is the Group Chair.

10 MR TURNER: That is a point well taken, Sir. If we go in his statement in the bundle to p.30, the
11 point there which you do not find in the skeleton is at para.96. Reading what he says:

12 “If the hearing were not to be held until January (and we consider this would apply
13 to a hearing on any date in January) this would cause irretrievable delay to the
14 CMA’s ability to finalise its analysis, carefully consider the Applicants’
15 representations, and take the decisions necessary to enable it to advance the
16 drafting of the provisional findings document, let alone engage in the essential
17 quality assurance, fact verification and confidentiality processes associated with
18 production of this document. Such delay would clearly threaten the CMA’s ability
19 to deliver the post-provisional findings and remedies stages in a manner which is
20 consistent with its duties and could also prejudice the Applicants’ rights during that
21 stage of the investigation.”

22 That is then the third leg of the CMA’s argument. Those are his assertions, and we would
23 say there is no clear reasoning to support those assertions.

24 Sir, what I have therefore done is to try to lay out the gist of our case and the gist of what
25 we see as being the main points in response.

26 If I may then turn to some legal questions, the first of those is: what is your role? The
27 judicial Tribunal’s role is to consider what are the requirements of fairness to the Parties in
28 the circumstances of this particular case and then to ensure in your ruling and order that
29 those requirements are complied with by the administrative agency. In this regard the
30 following propositions apply: number one, you, the Tribunal, yourselves decide what
31 fairness requires in this case. Two, you do not defer to the CMA’s assertions. Number
32 three, you will critically examine the underlying basis for their claims to see if they are
33 well-founded or not. Number four, if the procedural decisions by the CMA are unfair to the

1 Parties, then the Tribunal will set them aside and order the agency to substitute fair
2 procedures in accordance with its judgment.

3 On that last point, what to do if there is perceived to be unfairness in these particular
4 decisions? Sir, you have indicated that the Tribunal would be assisted by our submissions
5 on the implications of *Floe Telecom*. I think we have now covered that and, subject to any
6 submissions on the CMA's side, you have seen the way that we propose to approach this,
7 which is to say that if you accept our submissions the course to adopt is, first, to quash or
8 set aside these decisions and secondly, to direct the Authority to make new decisions in
9 accordance with your judgment.

10 THE PRESIDENT: Yes. The issue raised by *Floe* was prompted by the previous framing of the
11 relief that the applicant sought.

12 MR TURNER: Yes.

13 THE PRESIDENT: So, I think that is now covered by the amended grounds, it seems to us - the
14 amended order that you are seeking.

15 MR TURNER: Yes. Sir, I turn to focus on the question of the extent to which this Tribunal must
16 accord deference to the Authority in the central decision that you have to make about what
17 is procedurally fair. In their skeleton, if you open that up again, and go in it, please, to
18 para.19, p.6, and para. 20, the CMA deals with aspects of the law on fairness. You will see
19 that at para.19 at the bottom of p.6 they emphasise that this Tribunal should be slow to
20 second-guess their assessments of fairness. The proposition comes from a statement by the
21 Tribunal in an earlier case, *BMI*, which is quoted at the foot of the page, and if you look at
22 that quotation you will see that that statement related to the protection of confidential
23 information, and the Tribunal said it "should be slow to second-guess decisions of the
24 Commission, in particular as to how confidential certain material is, and how best to protect
25 the confidentiality in that material."

26 The issue in our case is not quite the same, because here the essential question is whether it
27 is fair to make a party respond to certain fundamental material in writing and then put their
28 points on it across at a hearing before it is practically possible for them to do so. Moreover,
29 if the CMA has made its procedural decision without taking account of that factor,
30 practicality, adequately or perhaps even at all, then, in my submission, there is not a good
31 basis to accord them deference. They have simply failed to look at something sufficiently
32 which needed to be thought about.

33 There is an important Supreme Court case on procedural fairness in situations where
34 matters of great importance to Parties are at stake. We refer to that in our skeleton

1 argument. It is called *In re Reilly* and if I could ask the Tribunal briefly to take that up
2 I will show you two passages from it. You will find this in tab 11 of our authorities bundle.
3 What it is, is a seminal decision of our Supreme Court about the requirements of fairness in
4 our common law. It is at tab 11. It is a case which arose in the context of three decisions
5 which had been made by the Parole Board in respect of the release or transfer of prisoners.
6 It is relevant in this context too, which I will come on to. In each of the cases in *Re Reilly*,
7 what happened was that the Parole Board refused the Applicants' request for an oral hearing
8 where they wanted to put their point across because the Board did not think that it would be
9 necessary or useful to their decision making. In the course of his judgment, Lord Reed dealt
10 with the question of what counts as procedural fairness under common law principles
11 generally in settings where there is a great deal at stake for the party concerned.
12 If you go into the judgment to p.1148 of the report, you see that, beginning at F on the right-
13 hand side, two-thirds of the way down the page:

14 “*Procedural fairness at common law—three preliminary matters*

15 65 The first matter concerns the role of the court when considering whether a
16 fair procedure was followed by a decision-making body such as the board.”

17 The material proposition comes towards the end of that page, three lines up:

18 “The court must determine for itself whether a fair procedure was followed ...”

19 Reference to the *Gillies* case.

20 “Its function is not merely to review the reasonableness of the decision-maker’s
21 judgment of what fairness required.”

22 So, this clarifies that the role of the judicial body is not subsidiary or deferential, it is there
23 to ensure that the administrative body does not behave unfairly.

24 Lord Reed then went on to lay emphasis on the whole----

25 THE PRESIDENT: It is not just, to interrupt you, sorry, because Lord Reed says it is not correct,
26 reflecting the view of the court below, simply a *Wednesbury* review of the decision-maker -
27 is that right?

28 MR TURNER: That is right. That is actually an important point in the way that one needs to
29 think about this. Administrative bodies organise processes and make procedural decisions
30 as in that case, as in our case, but ultimately the purpose of the judicial review is that you
31 take the decision on what is fair. Yes, in an appropriate case, you take into account the
32 closeness of the authority to the issues it is dealing with, but you are in the right position to
33 consider the wider picture, and in particular if a body has left something out of account, or
34 not given it sufficient attention.

1 Lord Reed then goes on after that paragraph to lay emphasis on what is the purpose of
2 procedural fairness, and that reasoning too is relevant in our context. It is dealt with in the
3 following paragraphs. If you look at para.67:

4 “There is no doubt that one of the virtues of procedurally fair decision-making is
5 that it is liable to result in better decisions, by ensuring that the decision-maker
6 receives all relevant information and that it is properly tested.”

7 I pause there. The Applicants’ concern about the way they are being treated now is
8 precisely that the decision-maker is charting a course where it will not receive all relevant
9 information in time for it to be taken properly into account in its overall inquiry and the risk
10 is that it will not be properly tested.

11 Then at para.68, finally, Lord Reed says that an important value which is engaged, the last
12 sentence of 67, is what was described by Lord Hoffmann:

13 “... as the avoidance of the sense of injustice which the person who is the subject
14 of the decision will otherwise feel.”

15 This too is significant in the present context, and I do, therefore, refer to it. What happened
16 is that on our side, the Parties have put forward both a convincing case that the time limits
17 being imposed are not manageable, and we have offered an alternative which is based on
18 working quite literally as hard as is humanly possible, and which will cause - you have seen
19 the CMA skeleton - a maximum of a week’s delay. There is not a reasoned response given
20 by the CMA which grapples with the point that the limits are unmanageable, and I will
21 develop it, but there is not good reasoning to show why those days between the 17th, this
22 coming Monday, and 21st of December provoke the chain reaction putting at risk the whole
23 process. This is apt to foster a sense of real injustice in a case where there is a great deal at
24 stake and disillusionment.

25 THE PRESIDENT: You say the 17th and the 21st, but is it not the case that your clients have
26 also said as regards responses to a not insignificant number of the working papers, you need
27 until the 4th of January?

28 MR TURNER: That is correct.

29 THE PRESIDENT: So, it is not just to the 21st of December, we are not just all here at huge
30 expense for a matter of four or five days?

31 MR TURNER: That is correct. What we are saying is that we want to put in some of the material
32 on the 21st and the remainder on the 4th of January, but the point is that the offer that we
33 are making is intended to avoid holding up the CMA’s staff on the other side. So, what
34 I am referring to here is not the fact that all of it is coming on the 21st, but that what is

1 coming on the 21st prevents - the idea is to prevent a hold up in their process on the other
2 side. The idea is they will be getting a large chunk which they can then process.

3 THE PRESIDENT: Yes.

4 MR TURNER: So, in terms of holding them up, the effective delay is restricted to one week.

5 If you go back to their skeleton again, look at the way they also accept this point in 41(b),
6 which we went to at the beginning, the point crystallises in their last sentence of 41(b):

7 “It sets back the CMA’s work and progress by one week, which is a significant
8 amount of time when considering the work to be done between now and next
9 year.”

10 Sir, you are absolutely right, this is the reason why the point arises in this way. We are
11 trying to do something which will avoid the hold-up and they say that this will result in that
12 degree of delay.

13 In this connection there is a point of asymmetry which is worth flagging up too, in the
14 context of fairness, because the CMA’s case is that if they receive our responses to the
15 working papers, if they were to have received them on 11th of January, which was our first
16 position before – we said, “We will do everything, pull out all the stops to get it to you by
17 the 4th for the final deadline”, if it was 11th of January and if the CMA had to produce their
18 provisional findings in late January, say the very end of January, that is 20 calendar days,
19 they say in Mr McIntosh’s witness statement that would be an impossibly short period for
20 them.

21 So, when it comes to thinking about the burden on them, quite rightly they size up the task
22 and they consider whether it is practicable for them to achieve it. They do not do the
23 reverse. They do not concern themselves with what is impossibly short for the Parties, and
24 if 20 calendar days is impossibly short for them to process our comments on the working
25 papers, it does indicate that 20 calendar days is harsh to impose on us, because we are
26 preparing our comments from a standing start in relation to fresh material, fresh analysis,
27 fresh modelling, fresh coding, which is liable to be at least as time consuming as reviewing
28 our comments against their established body of work.

29 THE PRESIDENT: That is part of the problem of this case, that you say this is just impossible to
30 achieve, that is not being reflected; the CMA says, well, if they give the sort of timetable
31 that your clients are asking for, for them it is impossible to achieve. It is very hard for the
32 Tribunal to know, in fact, what is really impossible within the constraints of the ultimate
33 deadline, allowing for the extension. Both sides in good faith are saying this is impossible.

1 MR TURNER: On our side, we have brought forward both succinct and cogent evidence of the
2 material that we are facing and what we need to do with it in order to bring to light
3 fundamental and underlying problems. On the other side, part of my address is going to be
4 to show you that when they refer to the knock-on effects on the CMA, the position is far
5 more nebulous and imprecise, and that it involves certain oddities.
6 I will show you that we had been working until yesterday to a 24-week timetable which
7 they said they were not prepared at this point to say it should be extended - they now have -
8 and that the deadlines, which they fed in to their timeline after consultation, and which were
9 published on their website, themselves make it difficult to see why what we suggest is going
10 to lead to these insuperable problems.

11 THE PRESIDENT: Yes.

12 MR TURNER: I add to that, as I said at the outset, the point that the hold up from what we are
13 proposing, the one week hold up, is said by them to lead to the chain reaction whereby even
14 adding the eight weeks on becomes now unachievable, and I will make submissions on that
15 too.

16 Sir, what I will say is that although you have two Parties, both of whom are saying the
17 position for us is intolerable, we have the better of the argument, and we have a clear and
18 hard-edged point that we are facing this difficulty now. Moreover, we are seeking to - we
19 have no interest in derailing this inquiry for obvious reasons. What we are seeking
20 desperately to do is to protect our interests and to avoid a situation where failure to give this
21 time now is even going to be counter-productive, a point which is also not recognised
22 anywhere in the CMA's case.

23 Finally, there is a further legal question which I should touch on briefly, but I believe it is
24 common ground, and that is: is there a duty of fairness at this point in the inquiry at all?
25 That point was established nine years ago to the very day, 14th of December 2009, in the
26 *Sports Direct* inquiry case. If we can look at that briefly, it is in tab 9 of our authorities
27 bundle. It is a short judgment. The issue was whether the Competition Commission, as it
28 then was, acted lawfully by making certain redactions to working papers which had been
29 sent to the company, Sports Direct, for its comments in an inquiry process. The contention
30 by the Competition Commission was the complaint was premature and that Sports Direct
31 should wait until the stage of provisional findings. The Tribunal decided that the complaint
32 was properly constituted because there was a real risk of injustice if it was not "nipped in
33 the bud" at that stage. The reasoning is concentrated in para.58 on p.18. Essentially,

1 having decided in para.56 that the Tribunal’s job is to look at whether there is injustice, in
2 58, six lines down, the Tribunal states:

3 “We were persuaded that Sports Direct was, at least potentially, adversely affected
4 by the suggested findings of fact and conclusions contained in the working papers
5 and that real injustice could have resulted from the CC’s decision to withhold
6 material information and/or analysis supporting those findings.”

7 So, there was a real risk of injustice if issues at the working papers stage were not
8 addressed.

9 That is the legal framework for today’s application. What are the facts in more detail? May
10 I ask the Tribunal to pick up Mr Pritchard’s witness statement in support of the Applicants’
11 application, which is at tab C in our main bundle. I am going to take this briskly. On p.2
12 half-way down you see section B, “The basic architecture of a CMA merger inquiry”.

13 I want to remind the Tribunal of the framework and the context, because it is important for
14 an appreciation of what procedural fairness requires here, with the two decisions which we
15 are focusing on. What I am going to show you with this is that this witness evidence
16 demonstrates in short that the Applicants were acutely conscious from the outset, from the
17 end of April, of the dangers of being squeezed in their ability to respond to the CMA’s
18 thinking about their approaches to the issues in the inquiry at an early stage. The
19 predicament which we are now bringing today to the Tribunal is accordingly not a late
20 contention, not an invention that has come out of nowhere, this is a long-standing worry
21 which is as genuine as it is severe.

22 Looking at this evidence, and, as I say, I will go briskly, para.6 makes the point that you
23 have two phases for a merger inquiry, and the first phase, phase one, normally is 40
24 working days. Over the page, para.14, the second phase, phase two, has a timeframe of 24
25 weeks, but the 24 weeks can be extended once by up to eight weeks if you have got special
26 reasons. Preceding both of those statutory phases is a period of what has become called
27 pre-notification. If you turn to p.4 of the statement, this is dealt with from para.23 onwards.
28 On p.5 please look at para.25, you will see from that that generally the pre-notification has
29 been around 16 to 18 weeks in recent cases, which have involved much less extensive and
30 complex issues than our inquiry.

31 Para.26 draws a comparison with what happens in Europe. You will see the Commission
32 uses longer pre-notification as a tool to manage the overall process in large cases of
33 comparable size to ours, often in the order of up to 25 or even 40 weeks.

1 There was a suggestion in the CMA's witness evidence that we were relying on the pre-
2 notification case somehow as a tool that should be used here and we must be careful not to
3 subvert the will of Parliament by having set timeframes for an inquiry, although I will be
4 clear, we are not saying that the CMA routinely should be using pre-notification in the same
5 way as you see in Brussels for large-scale mergers. All we are saying is that in this
6 particular case the use of the pre-notification period was crucial. It was crucial to allow the
7 inquiry to work properly within the confines of the statutory timetable once the gun was
8 fired.

9 Para.27 I draw to your attention briefly. There is a legal mechanism in the statute, s.39(4),
10 which we have in the authorities bundle, which allows the CMA to "stop the clock", as it is
11 often termed, if somebody fails to comply with a formal information request. That is
12 whether or not there is a reasonable excuse for doing it.

13 So that is the pre-notification period. The witness statement then goes on----

14 THE PRESIDENT: That would not arise here, stopping the clock, because it is only permitted, as
15 you have just explained it, if there is a failure to reply reasonably to an information request.

16 You cannot just do it as a backdoor way of getting a further extension.

17 MR TURNER: That is right, and that is why neither party is focusing on this as a primary
18 mechanism. It is a backstop, if I may use that expression.

19 Sir, the witness statement then explains the fast-track procedure. It begins at para.28 at the
20 bottom of p.5. This is something which applies in a setting where you are inevitably going
21 to proceed to phase 2. You are inevitably going to have to look at the competition
22 implications seriously of the merger. If you look at para.30 at the top of p.6, you will see
23 that the guidance says:

24 "... Given that fast track reference cases will by definition be those where the
25 Parties accept that the test for reference is met (and agree to waive their normal
26 procedural rights during Phase 1), the CMA will not be required ..."

27 to go through various steps which arise at the first stage. So, steps that would involve
28 receiving an issues letter, a hearing right there, those go by the board, because you are
29 focusing on trying to get the information together to concentrate on moving to what will be
30 required for phase 2.

31 At para.31, you see from the last sentence that there has been a small number of fast track
32 requests in the larger more complex cases so far. Those include Ladbrokes/Coral, BT/EE
33 and Tesco/Booker.

34 At 32, last sentence:

1 “[In] the fast track Ladbrokes/Coral case (2016, in which core adviser team
2 members were directly involved)...”

3 the pre-notification phase was almost five months.

4 THE PRESIDENT: This is all background, which we have read, as indeed is one of the CMA’s
5 witness statements. There is no challenge, there might have been complaints at the time and
6 concern, but there is no challenge to the length of the pre-notification.

7 MR TURNER: Not to the length of the pre-notification in itself.

8 THE PRESIDENT: In this case we have moved beyond that.

9 MR TURNER: We have moved beyond that. This is to explain the framework. I am now going
10 to show you in five minutes, and only five minutes, a small number of paragraphs to bear
11 out what I said at the outset, which is the relevance of this, which is that this danger that
12 there would be a compression, particularly affecting us at this stage, was something that was
13 known about and talked about from the outset and this is the manifestation. Sir, I will go
14 very quickly. If you look at p.7, under the heading D, “The CMA process and the
15 Applicants’ efforts to alleviate timetable ‘compression’”, I ask you to look at paras.40 and
16 41. Briefly, and I will summarise for speed, what you see there - in para.40 the reference is
17 to this case being a multiple of the available size of a UK phase 2 case by five times by way
18 of shorthand. The advisers were mindful of the need to avoid what they termed “timetable
19 compression”. That is at paras.40 and 41.

20 Then on p.9, paras.46 and 47, the point is this: that there was an initial meeting with the
21 announcement of the merger having happened on 30th of April 2018. Then there was a call
22 on 11th of May 2018 with the then project director, Mr Raftery. I direct your attention
23 about eight lines down in para.46 on p.9 to the sentence which begins, “However”, it is
24 about seven lines down, and it reads:

25 “However, he then went on to say that the Applicants’ suggestion that there could
26 be an extended pre-notification process was *‘unrealistic given the circumstances of*
27 *the case’*, and that *‘we should aim to get this on the clock by the middle of August’*
28 (i.e. three months away). He subsequently added that, while there was *‘no magic*
29 *to the dates’* the CMA had in mind that the Phase 1 review would begin on 15
30 August, with a fast track reference to Phase 2 on 5 September.

31 On the call members of the core advisory team immediately repeated our position
32 that the Applicants were very open to a longer pre-notification period.

33 Mr Raftery’s response was that *‘there is certain pressure to get moving on this*
34 *sooner rather than later’*. It has never been clear to me who or what exerted that

1 pressure, or why. Mr Raftery added that *‘to the extent that additional time might*
2 *be required, it would be a case of looking to see where the additional time can be*
3 *found in the Phase 2 proceedings rather than creating additional time in pre-*
4 *notification’.*”

5 Then at para.48 you have our concerns about the CMA’s anticipatory quantification of the
6 three months, “the CMA’s precise quantification of only three months’ pre-notification”,
7 which they then said would be the case, followed by firing the gun on phase 1. You see
8 from that that there is an unexplained concern to have created this situation, but that that
9 initial period was perceived to be important for doing things which now are needing to be
10 done under intense pressure.

11 Then in the course of May and June, the CMA asked the Parties formally to confirm, “You
12 are requesting a fast track reference and you are agreeing to waive your normal procedural
13 rights”, as they put it, under phase 1. The Parties’ advisers explained their concerns to
14 avoid timetable compression again. You see that in para.57. I will not read that entire
15 quotation, but that is the letter from the advisers to Ms da Silva on the 21st of June, where
16 they are saying, “We do not want to waive our procedural rights unless we are confident
17 that you are not going to start the clock prematurely and create these difficulties. We know
18 that there is public pressure to do this, but”, the last sentence, “you have got legal
19 obligations of fairness and due process towards us.”

20 Over the page at paras.58 and 59 you have the gist of the CMA’s response to that. They
21 referred to their statutory duty of expedition, and they do have a statutory duty generally of
22 expedition - that is so. Then we received a call to say that the clock is going to start on the
23 phase 1 review on the 23rd of August. That is mentioned in para.66. There was a telephone
24 call. You see that on p.13.

25 When that happened there were concerned exchanges of correspondence, and I direct your
26 attention to para.68 and what the CMA then said in the second italicised paragraph right at
27 the bottom of the page:

28 *“Consistent with the purpose of a fast-track proceeding, the CMA expects*
29 *information-gathering and substantive discussions to continue ...”*

30 and I emphasise -

31 *“... in the run-up to the opening of the Phase 2 investigation (although the*
32 *objective of the fast-track proceeding is, of course, for the weight of substantive*
33 *discussions to occur during Phase 2).”*

1 That indicates that the expectation was that information gathering would have largely or
2 wholly come to an end by the time that you begin this phase 2.

3 Over the page at paras.70 and 71, and I will not read all that again, there were the Parties'
4 concerns about that, and those concerns, what I would say, reflect what I am saying to you
5 now, that the----

6 THE PRESIDENT: You do not say it will be completed, you say it will continue in the run-up to
7 the opening of phase 2, which was only a couple of weeks, but under a fast-track they had a
8 - this was written on the 20th, so phase 1 starts on the 23rd and is accelerated with a rapid
9 move to phase 2.

10 MR TURNER: Yes.

11 THE PRESIDENT: So all they are saying is that it does not start with phase 2, it has been going
12 on and it is going to continue over the next few weeks as well.

13 MR TURNER: The way it is expressed is "continue in the run-up".

14 THE PRESIDENT: Yes, but not be completed by the start of phase 2?

15 MR TURNER: No. It, however, emphasises that that activity, as one would expect, is largely
16 going to be in the run-up.

17 What you then get in response to them having said that is, as I say, concerns expressed in
18 writing, paras.70 and 71, which foreshadow what I am saying today, the risk of falling into
19 error if short cuts are taken, essentially. I need not read that in detail.

20 The short phase 1 review period, Sir, as you say, took place between the 23rd of August and
21 then the 19th of September, when phase 2 started, and that is dealt with in this statement at
22 paras.79 to 82 under the heading, "Phase 1", p.16. There is one part of this that I do draw to
23 your attention in para.82, at page 17. You may have seen this quoted in the notice of
24 application. In para.82 there is a record of the new project director's statement, looking
25 three lines down from his quote:

26 *"Normally start of Phase II is a scramble, but we're not in that position here. Can*
27 *therefore stagger the Working Papers. Can progress them, and share them with*
28 *the Parties on a staggered basis, so you DON'T end up with 6 Working Papers*
29 *dumped on you 2 weeks before hearing, and we aren't rushed digesting your*
30 *responses. There will always be some papers that come out closer to the hearing*
31 *than others."*

32 The hard point is that that assurance has not been kept to, because, as I will come to, there
33 were working papers showered only shortly before a date fixed for a hearing, and more
34 material even after that.

1 Then you get phase 2. That is addressed from para.83 onwards under the heading, “Phase
2”. You see, to follow up, Sir, your point on this, at para.85, the CMA opens it by sending a
3 request for further information which was 165 questions and 411 sub-questions. They
4 impose deadlines on us then with responses allowed of only one and two weeks for it. So,
5 the pressure has ramped up enormously.

6 Then para.88 at the very foot of that page, there is an Issues Statement published on the
7 16th of October. This is a very important and daunting document. It identifies up to 18
8 theories of harm across a range of product areas. You will see from the last sentence that
9 they gave us a two-week deadline for responding to it, the 30th of October.

10 THE PRESIDENT: Yes, we have it at tab 23 - is that right?

11 MR TURNER: That is right, you do. Sir, finally, to cut to where we are now----

12 THE PRESIDENT: Just a moment.

13 MR TURNER: This is important because you can see the pace of the inquiry and what we are
14 now facing in context.

15 THE PRESIDENT: Yes.

16 MR TURNER: Sir, now we come to the working papers themselves, and please look at para.92
17 on page----

18 THE PRESIDENT: The response to the issues paper, it is not just you, it is anybody who wants
19 to respond?

20 MR TURNER: Yes.

21 THE PRESIDENT: This is a case where there are a number of other people with substantial
22 interests or concerns.

23 MR TURNER: That is so, we take nothing away from that, but when we come to the working
24 papers, these are documents which are supplied----

25 THE PRESIDENT: Those are confidential to you, we understand that.

26 MR TURNER: Yes, with indeed an Annotated Issues Statement as one of these documents.

27 THE PRESIDENT: Yes.

28 MR TURNER: Sir, we come to that now. It begins at para.92, and you will see from this that the
29 first substantive working papers come on the 14th of November, and there are lists of them
30 in those paras.92, 93, and at 94 the bulk of these working papers arrives during the
31 afternoon and evening and in the small hours of the 28th of November in the following
32 sequence, and they are laid out.

33 THE PRESIDENT: We have got in our bundle at the end of your application a helpful schedule
34 showing the date they are received.

1 MR TURNER: Yes. That is right. That is an important document, it is schedule 2.

2 THE PRESIDENT: It is just very helpful. One can take it all out of Mr Pritchard's witness
3 statement, but it sets it out in a convenient form.

4 MR TURNER: It does, and it shows the date when everything was received and the submission
5 dates that have occurred, and which are programmed. It is the last page, and I hope it is in
6 colour in tab A.

7 THE PRESIDENT: Just one moment. (After a pause) Yes, thank you.

8 MR TURNER: Sir, the detailed narrative to which that relates is back in this witness statement at
9 para.94. The bulk of these papers come in the afternoon and evening of the 27th and 28th
10 of November, ending at about one o'clock in the morning. In pure numerical terms that was
11 over 400 pages from a total of 850 or so. With those came a mass of underlying data and
12 new analysis referred to in para.95 on p.19. You ask yourself, what is the time that was
13 allowed for our responses to all of this? It was seven working days, with a uniform deadline
14 of the 7th of December. To add to that, the date for our oral hearing, which is in the
15 guidance the date for an occasion when we are to have an opportunity effectively to put
16 across our points, is the 4th of December, four working days from the time the bulk of this
17 material is sent.

18 Then if you look at para.100 at the foot of p.19, you will see that we are faced with this
19 predicament, and, apart from trying to work furiously under great pressure, we seek an
20 extension of time. Initially we did ask for time to respond to these working papers on a
21 rolling basis taking you up to the 11th of January, and we wanted re-scheduling of the oral
22 hearing to a date when we would be able, when the CMA would have been able to digest
23 our comments.

24 Finally, to complete the story without going through the batting across of the exchanges of
25 correspondence, in the interests of time I will just go straight to the final letters in the
26 sequence directly, because they will show you the rival positions neatly ahead of the
27 bringing of this application, and what the reasoning was that was then deployed. If you,
28 therefore, go forward in this same bundle to tab 34, you have there our letter beginning on
29 p.203. It is not a long letter. It comes in the wake of what had before been quite protracted
30 but compressed correspondence over a few days. After the first paragraph, in the interests
31 of time and the urgency of this matter, we said:

32 "We have considered your proposals with care and apply the test of what is the
33 minimum necessary to give the Parties a meaningful opportunity to explain their

1 position on key points in the CMA’s emerging thinking, in writing and orally (as
2 the process envisages, and needs).”

3 I pause there because that was genuinely the test that we applied. We realised that we were
4 up against the wall and we said, “All we want is the minimum necessary to be able to hit the
5 key points in the emerging thinking, which is intricate, interconnected and dense.”

6 Below that:

7 “We emphasise that the proposals below are at the limit of what is possible for the
8 Parties to deliver ...”

9 We attached the schedule which reflects----

10 THE PRESIDENT: It is the same schedule, is it not?

11 MR TURNER: Yes, it is, in fact, the same. Yes, it is exactly the same, even the narrative is
12 exactly the same. That is what we then told them were our proposals. You will see from
13 that, if you have got that open or if you are looking at the document at the end of tab A, that
14 four responses were essentially submitted already, on the 7th of December, and the plan was
15 that wave would be submitted by the 21st, and then a final wave would be submitted by the
16 4th of January.

17 As we mentioned at the top of p.204, the second page of this letter, what it will mean, if it is
18 allowed, is working effectively straight through the Christmas holiday. On that page, p.204,
19 the issue is “Timing for issuance of Provisional Findings”, and that is dealt with under the
20 heading at number 2 in bold type, and you will see that we were working on the basis of a
21 24-week inquiry timetable, not the 32 weeks, and that was because in the correspondence
22 over the previous days the CMA had refused to agree that an extension of the timetable was
23 needed at that stage.

24 If you go back to the CMA’s letter on that point in tab 31, which is a letter of the 4th of
25 December, that point in this letter was on p.181, just above the heading “Engagement” in
26 the middle of the page. The writer, who I believe was Mr McIntosh, said:

27 “As noted in my previous correspondence, of the Phase 2 cases involving an
28 extension since the formation of the CMA, the vast majority of cases have been
29 extended on, or after, the publication of the CMA’s provisional findings. At this
30 point of the investigation, and mindful of the points set out above, the Group does
31 not consider it appropriate to extend the statutory timetable. However, the Group
32 will continue to keep this position under review.”

1 So, at that stage, it appeared to us they were working on the basis that there was a real
2 possibility of an extension, but the points they are making rejecting what we are asking for
3 are equally taking into account that this may end up still being a 24-week timetable.
4 Even on a 24-week timetable there was no apparent problem so far as we were concerned.
5 Up until yesterday the timings which the CMA indicated were its future steps in the inquiry
6 were all set out in their published administrative timetable on the website. I would ask you,
7 if you keep this open, also to have a look at that. That is exhibited to Mr McIntosh's first
8 witness statement at SM1, p.5, tab 3. This was the timetable then operative, and half-way
9 down you see "Early December", it is the sixth line down, "deadline for all Parties'
10 responses and submissions before provisional findings". So that was then listed as early
11 December at that time. Immediately above it, because we are moving up in time as you
12 rise, the notification of the provisional findings document was listed as "Early January."
13 So, the timetable then was envisaging, for the Tribunal's information, that you move from
14 the giving of our responses to them issuing the provisional findings within a month over the
15 Christmas period.

16 So even if, taking this as a guide, because you are considering fairness overall - even on this
17 basis, if our submissions come in late December or early January, or up to the 4th of
18 January, applying the logic of this timetable, you will shift the provisional findings from
19 them by a month to the end of January/early February. This is what we pointed out in our
20 letter, if you still have that open, on p.204, in that section, "Timing for issuance of
21 Provisional Findings".

22 Working on the basis of what they, themselves, had put out as being their sequence, this
23 would work.

24 Finally, at the foot of this letter, I will just point out that we referred to the hearings under
25 section 3, "Disclosure into the Confidentiality Ring", which you do not need to look at. We
26 said, four lines down:

27 "We think it is in the interests of both the CMA and the Parties for the main party
28 hearings to be rescheduled for a point in time at which the CMA will have had an
29 opportunity to receive and at least briefly consider the Parties' responses to a
30 number of the working papers."

31 In our submission, it was not just reasonable to list the hearings for a point when the CMA
32 would have had a chance to do that, it was appropriate for the hearings to serve their
33 intended purpose of allowing the Applicants - or one of the intended purposes - to put their
34 points across to the decision makers. So that was our letter.

1 THE PRESIDENT: Well, I struggle with that at the moment. The point made in the letter to
2 which you are responding, which is at tab 33, is that it is not necessary for the CMA to have
3 digested your responses to the working papers, it is perhaps important that the Parties
4 should have had an opportunity to understand the working papers and see the lines along
5 which the CMA is thinking, but indeed Mr McIntosh says that it is not at all unusual for a
6 main hearing to be held prior to receipt of the responses. Indeed, he therefore agrees, as you
7 have acknowledged, at the beginning of the paragraph you have just read to us from a
8 solicitors' letter that the hearing can be on the 12th of December, but that they do not need
9 to see your responses to the working papers as long as you have seen the working papers
10 and had a chance to read them, which, by the 12th of December, you would have.

11 MR TURNER: Yes, let me take that in two stages. I accept the point. The first point which is a
12 necessity is, Sir, as you say, that if we are going to effectively be able to put our points
13 across and if they are to hit home, we should have had a chance ourselves to understand and
14 digest what these working papers say and the fundamental points. That is a necessity.

15 THE PRESIDENT: Therefore, I can see why you said, "Well, we only got these late on the 27th,
16 or in the early hours of the 28th, the December is just unrealistic." You made that point
17 forcefully to the CMA and, though they may not have expressly accepted it, they
18 nonetheless agreed to reschedule to the 12th.

19 MR TURNER: Yes, as to which, looking at it from our point of view, there remain two
20 difficulties. The 12th, similarly, does not lead us to a point where we will have been able to
21 absorb, digest and understand this material. We need longer than that. The second related
22 point is that by the 12th we are still, bearing in mind that at this point they are saying you
23 can have until the 14th, today, to put in responses, flat out trying to get the written material
24 in. So, we are being divided.

25 THE PRESIDENT: I understand the second point, but I am a bit surprised that, with the
26 sophistication and numbers of the teams advising the two Parties, by the 12th, in two weeks,
27 you could not have digested the general gist of the working papers. The main hearing is not
28 an opportunity to make detailed submissions on the working papers at all. That is what you
29 do in your response, as explained by Mr McIntosh in his letter, and indeed there is other
30 material on the main hearings of a general kind. So, it is not an occasion when you are
31 going to go through the details of a GUPPI analysis, or what analysis should be in its place.
32 I do slightly struggle to see for myself why, by the 12th, you could not have got sufficient
33 understanding of the way the thinking was going, the working papers, to deal with the main
34 hearing.

1 Your second point is rather different.

2 MR TURNER: Yes. The answer to that is that, and I will need to give you more of a flavour of
3 what these contain, these are large numbers of documents which are (a) interlocking, and
4 (b) dependent on material which is difficult to penetrate because it involves complex
5 underlying analysis, which you need to dig into in order to find errors. This is not,
6 therefore, a case at all similar to some, perhaps many, court cases where you can either skim
7 or review things quite quickly and rapidly and try to get a general appreciation. The nature
8 of this task is such that you need to look at it intensively in order to be able to bring up
9 points which may be fundamental. That is why it is necessary in this case to do that.
10 An ancillary point is that---

11 THE PRESIDENT: Is that not true in most cases, that the working papers are going to be
12 detailed, based on a lot of data, complex analysis, and so on?

13 MR TURNER: In this case we had a large number of working papers, multiple of what you
14 would receive in other cases. I think the figure that has been given - this was together with
15 the annotated statement, that is 22 with the Annotated Issues Statement and the surveys and
16 the fuel price concentration analysis.

17 THE PRESIDENT: Yes.

18 MR TURNER: Two or three times more than you get usually, and some of those, if you go back
19 to the document at the end of tab A, where we said we were going to be dealing with things
20 holistically, being very clearly interlinked.

21 THE PRESIDENT: That is your schedule?

22 MR TURNER: That is the schedule and needing to be dealt with together.

23 THE PRESIDENT: Have we got, by the way, the Annotated Issues Statement in our confidential
24 bundle?

25 MR TURNER: I do not believe you have, we can provide that.

26 THE PRESIDENT: We obviously do not know, because we have not seen it, but it might be
27 helpful if at some point it could be supplied. We do not need all the working papers clearly.
28 We have seen the Issues Statement which is public, but it would give a sense of what is
29 being produced, and it would probably be easier to digest for us than detailed working
30 papers.

31 MR TURNER: Yes.

32 THE PRESIDENT: So, if that can be provided by one side or the other----

33 MR TURNER: We can provide that.

1 MS DEMETRIOU: Sir, I am sorry to interrupt. I just need to ask for some clarification about the
2 listing. We thought this was listed for half a day. I think you indicated at the outset that
3 you would be looking to give a decision, if possible, after lunch, but if that is not correct
4 and we are listed for longer then perhaps the Tribunal could indicate.

5 THE PRESIDENT: We have got the day, but we are hoping - I do not know about the actual
6 listing that was provided - our expectation was that we would be able to conclude mid-
7 afternoon to give us time to consider and come back after half an hour, an hour, with a
8 decision. I would hope, Mr Turner, you can work to that, because obviously Ms Demetriou
9 needs to have her time. We have, albeit we have not had very long with the papers, we have
10 read them. We have not read the working papers in the confidential bundle, but we have
11 read the correspondence and the witness statements.

12 MR TURNER: Yes.

13 THE PRESIDENT: We would also like to take a five minute break at this point as usual, if this is
14 a convenient moment, but perhaps you might think about when you expect to conclude, and
15 how much longer you have got.

16 MR TURNER: We should break now. I do not have that much more. I want to show you a few
17 more points in the witness statement. There is one that now does seem to be important
18 which is the discussion in the witness statement of what we are now talking about, these
19 working papers and what they involve, in order to illustrate the point that we are debating.

20 THE PRESIDENT: That would be helpful.

21 MR TURNER: That I need to show you. With that and looking at one or two other documents
22 very quickly, I was going to go to the submissions and make the points which I have
23 foreshadowed already right at the beginning quickly.

24 THE PRESIDENT: Yes. I think you need to finish not just before lunch, but to enable
25 Ms Demetriou to start her submissions before lunch. If you were able to finish by 12.30,
26 12.40, I think that would be appropriate.

27 MR TURNER: I will do that.

28 THE PRESIDENT: What we certainly cannot do is sit late tonight. Given the nature of the
29 dispute, that should not be necessary. We appreciate, of course, how important it is for
30 everyone, but nonetheless it is not over-complex.

31 We will return in five minutes.

32 (Short break)

33 THE PRESIDENT: Yes, Mr Turner?

1 MR TURNER: Sir, I am going to resume therefore and take this as briskly as possible to finish
2 within that timeframe. Essentially, there are four points in answer to the question that you
3 have raised, to draw the strands together. I have mentioned first the exceptional volume of
4 these working papers in this case, compared to the norm, and the extent to which they
5 interlock.

6 Secondly, I mentioned to you that the issue of complexity of the material in this case is also
7 something that means that one needs to look intensively into the material to bring to light
8 any flaws. It is not something that a general gist will bring to light by a once-over. I will
9 illustrate that if you have Mr Pritchard's statement open. If you go in it to p.21, you have
10 the section headed "The Working Papers comprise of detailed and lengthy analysis". I draw
11 your attention to the following parts in that section on p.21. Para.109, referring to the
12 content, the data involved, how dense it is. Para.110, the underlying data, to give you an
13 idea of its complexity, the sets of codes and the excel spreadsheets and their volume.
14 Then if you turn over to paras.117 and 118, we give an example from one of the working
15 papers which you have got.

16 THE PRESIDENT: The online on 110, I am just trying to cross-refer that to the schedule, there
17 are quite a lot of online working papers, four, I think.

18 MR TURNER: Yes.

19 THE PRESIDENT: This is a reference to - is this all of them or one of them?

20 MR TURNER: I am told it is the first of those.

21 THE PRESIDENT: The online survey?

22 MR TURNER: I am told it is the online survey. If that is wrong, I will be corrected as we go
23 through.

24 THE PRESIDENT: That one came on the 14th of November?

25 MR TURNER: I am sorry, a correction to what I was told initially, we think it is the online
26 competitive assessment as well as the online survey.

27 THE PRESIDENT: So, the two combined?

28 MR TURNER: Yes. As I say, we will check and ensure that that is accurate. I was just about to
29 show you in this - now is as convenient a time as any - under the heading "Novel analytical
30 approaches raised by the Working Papers", the first example deals with one of them, which
31 is the Fuel Working Paper. This is now confidential, it is in yellow highlighted type, so
32 I will not read it out, but I think I can say this: you see from para.118, please read that, that
33 they are putting forward alternative methodologies in place of a previous established
34 approach.

1 THE PRESIDENT: This is - again I am just trying to - yes, I see, sorry.

2 MR TURNER: Then para.119, it shows you how, for this methodology or for one of them which
3 is being put forward, dependence on regression analysis. There is no short cut in working
4 out whether there is a problem there. At para.120, again in yellow type, there is the creation
5 of another methodological tool, which is referred to there, something else which is designed
6 to support the analysis which needs to be looked into.
7 Then the implications of that in relation to this working paper are then discussed in
8 para.121. I can read that briefly:

9 “We cannot forecast the outcome of this work at the time in the statement, but if
10 we put forward good reasons why the CMA’s proposed new methodologies are
11 unsuitable for use in the present case, and if the CMA accepts those points, then it
12 will be necessary for the CMA to do these various things, possibly design a new
13 further approach. In any of those cases, it would be far better for them to
14 commence that work at this stage rather than only much later

15 Sir, that is an example in that one of how you need to look at something in great detail
16 before you can see the problem. An example of the same concern, which was the creation
17 of a new framework for analysis is in another of the working papers discussed in the
18 statement on what is called the “GUPPI” - that is 122 and following - the gross upward
19 pricing pressure index. That is discussed in 122 to 126, and I will ask you, in the interests
20 of speed, to read perhaps those paragraphs, particularly 122 and 124, which is in yellow
21 type, to yourselves, because you will see from 124 that there is a proposal to adopt a
22 different approach from a standard model. It is a challenging thing to look into and at 125,
23 which is not in yellow type, Mr Pritchard says:

24 “These are significant issues, not least as the GUPPI threshold will have a decisive
25 impact on the number of local substantial lessening of competition findings and in
26 part probable store disposals. These issues require very careful analysis by the
27 economists ...”

28 and that is the consulting firm. It is called CRA.

29 My second point was on the complexity, and I think that is sufficient to give you that
30 flavour.

31 The third point was that the CMA said to us, which may not have been apparent to you, that
32 they appreciated there need to be technical discussions between their staff and our advisers,
33 and it was said that that technical exchange, or the technical interaction, could be addressed
34 in part at this oral hearing itself. You see that if you go in our bundle to tab 28, where you

1 will find a letter from Linklaters and Gibson Dunn which is dated the 30th of November. In
2 that letter, and you have to go to p.168, there is a heading at the top, “5. Need for further
3 engagement”, and in the second paragraph they wrote:

4 “Our latest request for a technical meeting between our economists and the
5 economics team at the CMA was rejected this morning. The email refusing the
6 meeting suggests that ‘the most appropriate way for the Parties to address
7 “misunderstandings and analytical issues contained in some of the working papers
8 to date” is either orally at the hearings or in writing through the submission of
9 comments by the 7th of December’.”

10 There was a proposal that actually that is the sort of discussion that you might be getting at
11 those hearings, and that is our opportunity.

12 My fourth and final point----

13 THE PRESIDENT: Your clients say, or the solicitors say, well, that is not appropriate?

14 MR TURNER: Yes, that is right.

15 THE PRESIDENT: And it is really not the sort of thing to do at the hearing?

16 MR TURNER: No. The last point was a point that you will have on board, the fourth point, it is
17 the same people who need to be doing this work and at the hearing. That is referred to by
18 Mr Pritchard at para.133 of his statement in part, the second part of para.133. You are
19 dividing people up in a way that means that they are stretched, and it makes it even less
20 likely that they can do either task properly.

21 THE PRESIDENT: A lot of this detailed work is presumably done by the economic consultants,
22 is it not, the sort of thing that you directed us to in Mr Pritchard’s witness statement,
23 supported no doubt by teams from the two clients.

24 MR TURNER: The point about the oral hearing is that that is the opportunity, as the guidance
25 says, when we can have distilled our points, marshalled them and put them across to the
26 decision makers. They are the people in charge. This is the opportunity which has real
27 impact.

28 THE PRESIDENT: That is not your clients’ position. You say it is not appropriate for a
29 technical discussion at the oral hearing, and----

30 MR TURNER: Not for the technical discussion, but to be able to then marshal them----

31 THE PRESIDENT: So, the sort of technical work on these working papers, all right, you wanted
32 to take several people from CRA to the oral hearing. Whether you needed to take them all,
33 I do not know, but there would have been others continuing the work at the same time. The
34 oral hearing, it is less than a day.

1 MR TURNER: It is a day.

2 THE PRESIDENT: There was indeed some argument about how long it should be, but it is
3 within a day. Of course, it has to be prepared for. The large teams involved will continue
4 their work on responding to the working papers, and parts of them will be working no doubt
5 because they are not at the oral hearing.

6 MR TURNER: Sir, there may be something in that. The stronger point remains that you are
7 asking a team to attend an oral hearing to put across the nub of your points which are meant
8 to be the culmination of the work, where you have drawn out these key issues at the same
9 time as you are requiring people separately to be working on the papers.

10 Sir, in view of the time I am going to mention one document, the final letter from the CMA,
11 and then I am going to make my remaining submissions, to the extent they have not been
12 already covered, succinctly.

13 So, the CMA's response was the following day after our the 6th of December letter. It
14 came on the 7th, and that is tab 36. It is a relatively short letter. I will not take you through
15 it in detail, I will only say this: this is the final letter on their side.

16 THE PRESIDENT: Yes.

17 MR TURNER: The first point, the only concession on the timing of responses to the working
18 papers you will see at the top of p.212, and that was to give us one weekend, and say all
19 responses must come in by 9 am (in bold type) on the 17th.

20 THE PRESIDENT: Yes.

21 MR TURNER: Pausing there, you may have picked up that the CMA's counsel in their skeleton
22 have proceeded on the basis that the entirety of the Monday was being offered, and so all of
23 their numbers in the skeleton are out by one day.

24 Under the heading "Timing of issuance of Provisional Findings" in that letter, the CMA
25 now say, this is the 7th, that if the working paper responses come after the 14th of
26 December then they are going to amend the published timetable, and they have now,
27 yesterday I think, amended this to say that the provisional findings would arrive in January,
28 early February, or beginning of February. Essentially, therefore, that would envisage not
29 the four-week or month gap, but roughly a six-week gap.

30 Lastly, on the main party hearing, that is p.213, they said, well, a hearing does not
31 necessarily have to be on the 12th of December - that is Wednesday past - it could be on
32 another day in the same week.

33 So those were the final positions. Then the application was made. I will make the
34 following submissions, and we will need to show you one more document.

1 Time allowed for comments on these working papers: the guidance, their published
2 guidance, says that where working papers are disclosed the Parties will be given the ability
3 to comment. We refer to that in para.37 of our notice of application.

4 THE PRESIDENT: Sorry, can you just - I know you are short of time, but in the guidance?

5 MR TURNER: Sir, 7.3, it is Guidance CC7, I will just find the reference.

6 THE PRESIDENT: That is the old Competition Commission guidance, yes.

7 MR TURNER: We have quoted it, but essentially, they say where they are disclosed the Parties
8 will be given the ability to comment. It is tab 3.

9 The second point, and I do not need now to go over it, you have seen what they disclosed to
10 us for that purpose. You have seen the bulk, you have seen the timing and you have seen
11 the complexity, and it is high.

12 A third point, the material has been disclosed to us for a good reason. It is genuinely
13 important for us to be able to input at this juncture, and if I may say so, Mr McIntosh
14 himself has very fairly underlined the genuine importance of giving us an opportunity now,
15 and you see that in his witness statement on p.23, para.79. You will see he begins that by
16 saying:

17 "Acknowledging however that the working papers represented a significant body
18 of material, and that receiving the Parties' considered responses to those working
19 papers was an important step towards reaching a robust and well-evidenced
20 outcome to the investigation ..."

21 So, this is common ground, there is a good reason. To repeat what I said before, it is far
22 easier to change direction now, if necessary, than later. We have fleshed this out with some
23 illustrations, and I have taken you to those, and I will not go back to it.

24 Sir, we say there should not be a dispute that we should be given sufficient time to do what
25 Mr McIntosh acknowledges we should be given the chance to do.

26 THE PRESIDENT: Yes.

27 MR TURNER: To use an analogy, if there is to be any chance of turning around an oil tanker to
28 face a different port, that needs to be done early. I would emphasise that the very anxiety
29 which the CMA exudes about not having enough time at the back end of the inquiry
30 process, that itself in a sense provides an additional reason for allowing us now the extra
31 time that we want. Conspicuously, they do not appear in their thinking to have built in any
32 form of cushion in case later they do need to redo their analysis, alter their thinking or re-
33 consult.

1 The next point is that in the CMA's skeleton, the way that they present our point is a
2 mischaracterisation. If you have their skeleton and turn in it to p.9, you have para.26(a),
3 and the sentiment here is repeated at further paragraphs too, but you will see that what they
4 say, in flamboyant terms, is:

5 "The Applicants contend that this is their one and only chance to respond to the
6 issues raised by the working papers. If they do not raise every point of fact,
7 methodology or analysis there is to make now, the CMA's analysis will
8 irretrievably head in the wrong direction in the provisional findings: Application,
9 paras.71 and 95."

10 They quote our application on that. That is not what our application says and it is not how
11 we have put our case. If you open our application and you look at that para.71 on p.21,
12 what we have said is common sense:

13 "The Applicants ought to have the chance to put the CMA back on track on any
14 perceived fundamental or systemic issues in the Working Papers ..."

15 not every point of fact -

16 "... before those issues are followed through into the Provisional Findings. At that
17 stage, it will be much harder for the CMA to abandon fundamental lines of
18 reasoning and approach on the basis that other approaches should be substituted
19 instead. There will inevitably be pressure to hold fast to the existing lines of
20 reasoning and approach ..."

21 and so forth.

22 We are not saying, therefore, we have to deal with everything, however trivial. We do not
23 see commenting at this stage as a substitute for addressing the provisional findings when
24 those come, and we are focusing our work on fundamental and systemic issues which are
25 difficult to unpick later. That is their first point.

26 The second point they make, if you have their skeleton, is in paras.36 to 39. This one is
27 headed "The Applicants should provide (and should have provided) staggered responses".

28 This is a new objection, you do not find this in the correspondence, and it is not terribly
29 coherent. At para.37, if you read that, you will see the draftsman says that "[t]he CMA does
30 not object to the Parties providing holistic and joined-up responses." We are grateful for
31 that. But they do object to us taking the last of the dates for working papers that are
32 connected with other working papers as the starting point for our consolidated response.

33 Then you go back to the schedule, Sir, that you picked out at the back of tab A in the bundle
34 to see how that works, p.31. Take, for example, the fuel working paper and the PFS survey,

1 which stands for petrol filling station survey, which is in the middle, and you can see there
2 the dates when these documents were received. You have the 27th of November and the
3 14th of November for the survey. The early documents like that survey, like the price
4 concentration analysis, have to be read in conjunction with how the CMA uses them in the
5 reasoning in the working paper. They are not meaningful until you know how they are
6 going to be interpreted and deployed.

7 I am afraid I have to say this, I was told after this arrived: in the case of these surveys we
8 did have responses but they had to be rewritten when the main responses came out.

9 THE PRESIDENT: The main working papers?

10 MR TURNER: The main working papers, I am sorry, and we saw how the CMA was using them.

11 It was not sensible to try and respond to a survey in the abstract.

12 Their remaining point on this issue in the CMA's skeleton is the contention that, if we have
13 until the 21st of December and then the 4th of January, rather than the hard stop on the 17th
14 of December, there will be irreparable prejudice to their overall process. That is the point
15 which they make in paras.40 and 41 of skeleton, paragraphs that I referred to at the outset.
16 The core of their claim is that if they do not get the work product for the beginning of the
17 week of the 17th, this coming Monday, they will be under-employed for a week -
18 para.41(b), the final sentence. That, according to them, prompts the delay of many weeks
19 which even a statutory extension to the overall timetable cannot cure. Our point is that how
20 they make that leap remains opaque. What we do see is that there is an internal timetable
21 attached to Mr McIntosh's witness statement. I ask you to take that up. It is on p.13 of his
22 exhibit, SM1. I am sorry, I do not have your tabulation.

23 THE PRESIDENT: It is at tab 5.

24 MR TURNER: I am told it is tab 5.

25 THE PRESIDENT: Pages 14 to----

26 MR TURNER: Yes, it is under cover of an email at p.13, which was prepared by Mr Bamford on
27 the 7th of December, and from p.14 onwards you see a table which has two columns
28 compared. On the left-hand side is what they call the current extension to the response they
29 apply, everything due by Friday - today, the 14th; and on the right-hand side is the Parties'
30 proposal with the 21st and the 4th . If you turn over the page you see them tracking through
31 these steps. If you turn to p.15 and look at the top box on the left-hand side, the 7th of
32 January, you see there, "First full working week after Christmas", "update the Group on the
33 further analysis and, full team review, WP responses, drafting background elements." You
34 will see, if you look over to the right-hand column that there is the one week difference,

1 there is a shift. You will see the same content on the right-hand side, but one cell down, one
2 week down. That is the one-week difference.

3 Then look at the next week for the left-hand column, the one below it: “review working
4 paper responses conduct further analysis, update the Group on the further analysis, drafting
5 background elements of PFs.” Apart from the formatting difficulty, which you will see in
6 the cell above, “full team review, conducting further analysis” leads into “drafting
7 background elements” – essentially what you have is a repetition. They are pretty well
8 identical.

9 THE PRESIDENT: It is probably my mistake, I have lost you.

10 MR TURNER: No, it is my fault, you have not lost me. 14th of January - you see for the 7th of
11 January it goes down by a week, then look at the 14th of January, “Full team review of
12 working paper responses... Drafting PFs, rolling quality assurance, drafting remedies
13 notice, put back process for quantity of material”, that is the one you see.

14 THE PRESIDENT: That has been moved down two weeks.

15 MR TURNER: Moved down two weeks, and the provisional decision meeting, which was on the
16 14th of January there, the first one, has gone two weeks to there. It has slipped two weeks
17 down on the right-hand side. The slot for the one-week delay, the one above, is occupied by
18 what appears to be a repeat of the contents of the week before.

19 It is not clear to us, because we are not in a position to interrogate this in any detail, and
20 indeed this has been superseded, but why the CMA needs to hold, for example, two Group
21 meetings in successive weeks, as you see there on the right-hand side, to update the Group
22 on further analysis and working responses - two of those, but only one in the left-hand
23 column. Sir, you see that this is not, therefore, a fully worked out document, but there are
24 areas of slippage that are somewhat unexplained.

25 To appreciate a second point on this, if you return to the timings on the CMA’s published
26 timetable, as it stood until yesterday, that was on p.5 of this same tab, or it may be tab 4 in
27 your----

28 THE PRESIDENT: For us it is tab 3.

29 MR TURNER: P.5 in the exhibit. You see there it proceeds on the basis of the report being
30 published by the 5th of March, that is the 24-week timeframe. If you extend it by eight
31 weeks, it would move to the 30th of April, and you see from the administrative timetable
32 that the time allowed for producing the provisional findings after the responses to the
33 working papers, as I said before, was one month. Then if you compare that with the internal
34 timetable that we were just looking at, which was back on p.16 in whichever tab you have

1 it, you see that the first entry in the left-hand column at the top of p.16 in bold type refers to
2 provisional findings in the week of the 11th of February. That is on the basis, because it is
3 the left-hand side, that the working paper responses are coming on the 14th of December.
4 So, by this point this is almost two months, which is double the length of time referred to in
5 the published timetable, which was one month. Again, there is no obvious reason for
6 doubling the estimate.

7 At all events, and it may not be fruitful or possible to drill into this with precision, when you
8 turn from that document back to their skeleton argument yesterday and go in it to 41(a),
9 they are talking again about the end of January for preparing the provisional findings - that
10 is four lines down.

11 Our point from all of this, is that there is, as you can see, imprecision in forecasting the
12 steps ahead. So, the real question for the Tribunal, in my submission, remains: is it
13 sensible, is it right, to refuse the Applicants' request for their additional work from the 17th
14 to the 21st of December, when the position is that you have been shown it is essential to
15 allow a properly informed response on fundamental and systemic issues. The extra week, in
16 our submission, will make all the difference to the quality of what is submitted. It will
17 mean that if there are fundamental problems of approach or method which should be
18 corrected, we stand a much better chance of that being achieved.

19 As against that, you do not have a strong or convincing case that we must be prevented from
20 being able to do that to protect the whole timetable, which has not yet even been given the
21 eight-week extension.

22 Sir, I am very conscious I am now in penalty time, so in one minute I will deal with the
23 issue of the main party hearings.

24 THE PRESIDENT: Yes.

25 MR TURNER: The points which are made on that in the CMA's skeleton are at paras.43 to 46
26 essentially, paras.42 to 46. They are extraordinarily weak, almost lukewarm. This step,
27 which is a single day for the hearings as soon as possible at the beginning of January, will
28 not materially hold up the CMA to render it impossible to manage the later stages of the
29 process. On the other hand, it is an important protection for us under the guidance. We can
30 explain our position on key issues orally to the decision makers.

31 THE PRESIDENT: That is not quite the question, is it, whether it could reasonably be in early
32 January, it is whether it was unfair to do it on the date that was set, as extended. I said to
33 you that I can understand why it might be said it was unfair to seek to adhere to the 4th
34 of December when you only got the working papers, or a significant number of working

1 papers, late on the 27th of November. Then it moved to the 12th. We have got to say is that
2 unfair, not whether it might work or might be reasonable to do it in January. The question
3 is unfairness, is it not?

4 MR TURNER: Yes, it is. I think the answer to that is that when you are asking yourself whether
5 it is unfair for it to be held, let us say, on the 12th, or in this week, that an aspect of
6 answering the question is whether it really it would be a problem if it were to be held later,
7 as I suggest. That helps you understand whether, holding it or insisting on it in this week
8 now past was unfair.

9 THE PRESIDENT: Yes, that I see. While we are on that, what is slightly surprising to me is that
10 on the 30th of November, I think it was, when the Parties' solicitors wrote a long letter
11 setting out all their concerns about the time to respond to the working papers and how that
12 is just not possible for all the reasons you have explained, at that point the deadline was
13 until the 7th of December, but there is no suggestion in that letter that the main hearing has
14 got to be postponed. Indeed, the only concern is whether it should be longer than two and a
15 half hours for each party.

16 MR TURNER: Yes, that is so. We were at that point doing our best to get ready for that hearing.
17 As, Sir, you will appreciate, when you are faced with this form of pressure, with this form
18 of process, it is a matter of last resort to say, at the end, "we cannot do it". It is a question
19 of judgment as to when you raise that point. At this stage, we were trying hard, and yes,
20 you are right, it may have been the case that had we thought about that more closely we
21 should have said, even at that point, "this will not be possible".

22 THE PRESIDENT: It causes huge disruption, given what is involved in arranging these hearings
23 with members of the Group who are not full-time employees of the CMA, some of them
24 have to travel from far away to attend it, if it is only in the afternoon before that you say,
25 actually it cannot take place, with no prior warning.

26 MR TURNER: Yes, it was raised - I think it is the following tab - in our letter on the 3rd
27 of December. It is probably sensible for you to have that in front of you. It is tab 29. It
28 was fast moving events. Sir, I take nothing away from what you have just said, but you will
29 see three paragraphs in:

30 "Since our letter on Friday, we have reflected further on whether there is utility in
31 pressing ahead with the main party hearings ..."

32 and so forth.

33 THE PRESIDENT: That was sent, it seems, at 4.38 in the afternoon, looking at the email which
34 attached it on p.174. I assume that is the letter?

1 MR TURNER: Yes. All I would say additionally to that is that if you put yourself in the position
2 of the Parties at this stage, it is an agonising decision to have to make, because there is this
3 feeling that we are not in a position to avoid this. We may be giving up something
4 important, but we do, however, have to make our point. It is a dilemma because if we take
5 that risk, it is a real one, but if we do not take that risk then we will be going ahead into a
6 hearing which, it was becoming rapidly, increasingly clear, was going to be largely
7 valueless, and at a certain point when you are faced with that dilemma you have to decide,
8 and that was the point at which it happened.

9 THE PRESIDENT: Yes, thank you.

10 MR TURNER: Sir, those are our submissions.

11 THE PRESIDENT: Yes, thank you. Ms Demetriou, we will ensure that you have proper time to
12 make your submissions.

13 MS DEMETRIOU: I am grateful. May it please the Tribunal, I propose to make my submissions
14 in the following order. I am going to, first of all, make some short submissions about the
15 nature of the legal test; and second, explain the basis on which the CMA's decisions are not
16 unlawful as being procedurally unfair, as the Parties claim.

17 As to that, the question of what procedural fairness requires at this stage has, in our
18 submission, to be determined in the light of two very important contextual factors. The first
19 is the mandatory statutory timeframe within which CMA is obliged to complete the entire
20 process; and the second is the fact that this is not the Parties' only opportunity to put their
21 case, or indeed their main opportunity to put their case, because they will have an
22 opportunity once the provisional findings have been published.

23 By way of observation on Mr Turner's introduction, he said, and he repeatedly said, that the
24 CMA has failed, in taking its decision, to size up the task that the Parties face, and to
25 consider what is actually going to be needed. We say that that is entirely wrong. The CMA
26 has sized up the task and has given very careful consideration to the deadline that it has
27 imposed and considers that this gives the Parties an adequate opportunity to make
28 representations on the working papers. The difficulty from the Parties' point of view is that
29 what they would like to do at this stage, which is to respond very comprehensively to what
30 is in the working papers, is more than what fairness requires. The fact that they would like
31 to do something which cannot be accommodated does not render the deadline imposed by
32 the CMA, which makes it difficult for them to do that, something which is unlawful or
33 procedurally unfair.

1 Moreover, we say that the Parties' case here, and this is evident through their evidence in
2 their submissions and through the correspondence, is driven solely by their side of the
3 equation - what would they like to be able to do at this stage? Of course, the Authority has
4 to have regard not only to the rights of the Parties, but also to the process as a whole, and
5 has to take a view in the round as to how that process can best be managed, not only to
6 accommodate the very substantial work that the CMA and the Group must carry out, but
7 also to accommodate the opportunities afforded to the Parties, and indeed to third Parties,
8 including further down the line in the process.

9 So, with those introductory remarks, I turn first to the legal test. There is much common
10 ground, so I think I can take this quite lightly. I would like to take you to two authorities
11 very briefly. The first is *Eurotunnel (No 1)* which is in our authorities bundle at tab 5.
12 Could I ask you to turn to p.61, and it is paras.167 and 168 that I want to draw the
13 Tribunal's attention to. Para.167, if the Tribunal has that, helpfully sets out some
14 propositions which are distilled by the Tribunal in that case from various authorities,
15 including *Sports Direct*, that Mr Turner referred the Tribunal to. The Tribunal will see at
16 (b) that what is fair is something, of course, which is very much context sensitive, and at (d)
17 that, as with all aspects of natural justice, the right to make representations is coloured by
18 many factors, and you see there at (d)(i), "The statutory framework within which the
19 tribunal operates."

20 Then, over the page at para.168, "There remains the question of how issues of procedural
21 fairness are to be determined", and you see there the Tribunal saying, first of all:

22 "What constitutes a fair process is one for the court (or, here, the Tribunal) as a
23 matter of law."

24 We agree with that. We are not making the submission that was rejected by the Supreme
25 Court in *Reilly*, which is that it is for the Authority to take the decision, subject to a
26 *Wednesbury* challenge. That is no part of our case at all.

27 The Tribunal then goes on to say:

28 "That said, the process taken by the administrative tribunal is entitled to great
29 weight. It is the administrative decision-maker, and not the reviewing court, that
30 stands in the front line when assessing what is procedurally fair, and (to descend to
31 the specific) the Tribunal should be slow to second-guess decisions of the
32 Commission in terms of what needs to be shown to an affected party, how
33 confidential certain material is, and how best to protect the confidentiality in that
34 material."

1 Of course, the issue there was an issue relating to confidentiality protection.

2 Then the Tribunal concludes, having cited Lord Justice Lloyd in *ex parte Guinness*:

3 “... whilst it is for the Tribunal to decide what is and what is not fair, the
4 Commission’s approach should be given ‘great weight’. We consider this is
5 reflected in the case law, which repeatedly emphasises that, when considering what
6 is procedurally fair, one size does not fit all.”

7 We see the same approach, the same principles, being set out in the *BMI* judgment behind
8 tab 6, and at para.39(6), which you will find on p.19. Sir, again a recognition that what
9 fairness requires is a context specific one, and that the Commission’s approach in that case,
10 is entitled to great weight.

11 We say that these principles apply particularly strongly in the present context, because the
12 CMA does have to operate within a compulsory statutory deadline, and it has significant
13 expertise and experience in handling merger investigations within that statutory deadline
14 and is best placed to determine the knock-on effects for the process as a whole of additional
15 time being taken up at this stage.

16 So essentially the question raised by this challenge is one of time management, and we say
17 quintessentially that is a question on which the experience of the CMA should be accorded
18 very great weight, and the views of the CMA should be given very great weight.

19 In relation to two cases relied on by Mr Turner, *Reilly*, I have already made the point that
20 we are not seeking to persuade the Tribunal that it is applying a *Wednesbury* review
21 standard. That is not our case.

22 Mr Turner also cited *Reilly* in support - I do not think it is necessary to turn it up - of the
23 proposition that procedural fairness serves an important purpose. Of course, we agree with
24 that, so we are not disputing that as a matter of principle, but here we say that there is no
25 question that that purpose will not be achieved because this is not the Parties’ only
26 opportunity to engage with the CMA’s thinking. The facts are, of course, in this case
27 extremely, radically different to the facts in *Reilly*. In all of the cases considered by the
28 Supreme Court in *Reilly*, what was at stake was the liberty of prisoners whose continued
29 imprisonment was being considered by the Parole Board, and they were denied a hearing
30 before the Parole Board. So, the upshot of them not having an opportunity to put their case
31 to the Parole Board orally was that they continued to remain in prison and we are a very,
32 very long way from those types of facts. Really, the key question, the key issue here is that
33 this is not their only crack of the whip.

1 The other case relied on by Mr Turner was *Sports Direct* and again I do not think that I need
2 to turn it up. Perhaps it might be easier, on reflection, if we do. That is in the Parties'
3 authorities and it is at tab 9. Mr Turner took you to para.58 on p.18. The short points to
4 make here are, first of all, that the CMA is not, in response to the Parties' challenge today,
5 taking a prematurity point. So, it is not saying this challenge, this judicial review is
6 premature and should not be heard by the Tribunal, which was the point at stake in *Sports*
7 *Direct*.

8 The second short point is that you can see from para.58 itself that the question was the
9 Competition Commission's decision to withhold material information. That is not the issue
10 here.

11 Then, thirdly, I ask the Tribunal to note para.59, where the Tribunal was very careful to say
12 at the end:

13 "We are deciding the present case on its own facts. We are not deciding any other
14 case ... For the avoidance of doubt, our Judgment should not be taken to imply
15 that the substantive content of working papers, for example, would ordinarily be
16 subject to review."

17 So, in short, it is a different point that the Tribunal was looking at, and the Tribunal was
18 also careful to say that it was not purporting to decide the point more generally.

19 THE PRESIDENT: I think you accept that having - and indeed your guidance states that if you
20 do put out working papers for comment, you do not have to, but if, as here, for good reason
21 you did, then the Parties must be given a fair opportunity to make those comments.

22 MS DEMETRIOU: Sir, we do accept that, but then the Tribunal has to decide, obviously, what is
23 fair and what is unfair in the circumstances. We say that what the Parties seem to be
24 contemplating here is a comprehensive response at this stage, and we say that fairness does
25 not require that. It does not require that. The point that we seek to make is that the
26 requirements of procedural fairness at this stage - Sir, you are quite right to say that if we do
27 decide to make working papers available, then there are procedural rights that are engaged.
28 The scope of those rights has to be determined in context and I am going to come on to the
29 context. Essentially, the Tribunal has our key points which are that they have to be
30 determined in light both of the mandatory statutory deadline and the fact that this is very far
31 from the only opportunity to comment on this thinking.

32 Sir, is that a convenient moment?

33 THE PRESIDENT: Just one moment. (After a pause) I think, because you started a bit late, we
34 will resume at a quarter to two so we have a bit more time.

1 (Adjourned for a short time)

2 MR TURNER: Sir, this is just to say that you should have - I hope all three of you have - a copy
3 of the Annotated Issues Statement with "Confidential" marked at the top.

4 THE PRESIDENT: No, but I think it is about to come up.

5 MR TURNER: Copies are heading towards you. (Same handed) I will say nothing about it, other
6 than that it is confidential.

7 THE PRESIDENT: It is confidential, yes. This is confidential. Shall we put it in the confidential
8 bundle?

9 MR TURNER: Yes, in bundle 2, either at the front or at the back.

10 THE PRESIDENT: Yes, we will put it at the front of bundle 2. (Same handed)

11 Yes, Ms Demetriou?

12 MS DEMETRIOU: Sir, members of the Tribunal, I had made some short submissions about the
13 nature of the legal tests, and I was proposing now to turn to why we say that the principles
14 of natural justice have not been breached by the CMA in reaching its two decisions that are
15 under challenge. The starting point, in my submission, for determining what the
16 requirements of natural justice are in the present case is the legislation itself. You will have
17 in our bundle of authorities at tab 1, s.104 of the Enterprise Act. It is the last page behind
18 tab 1. In my version it is very tiny, so I hope you can read it.

19 THE PRESIDENT: It is microscopic! We might look at it in the Purple Book.

20 MS DEMETRIOU: That may well be easier. It is p.188 in the Purple Book, s.104 of the
21 Enterprise Act. The Tribunal will see that this is entitled "Certain duties of relevant
22 authorities to consult", and the first point I wish to make is that----

23 THE PRESIDENT: Just a second. (After a pause) Yes.

24 MS DEMETRIOU: You will see from 104(1) that:

25 "Subsection (2) applies where the relevant authority is proposing to make a
26 relevant decision in a way which the relevant authority considers is likely to be
27 adverse to the interests of a relevant party."

28 Subsection (2) then applies in those circumstances and states:

29 "The relevant authority shall, so far as practicable, consult that party about what is
30 proposed before making that decision.

31 (3) In consulting the party concerned, the relevant authority shall, so far as
32 practicable, give the reasons of the relevant authority for the proposed decision.

33 (4) In considering what is practicable for the purposes of this section the
34 relevant authority shall, in particular, have regard to ..."

1 and it is (a) that is important here -

2 “any restrictions imposed by any timetable for making the decision.”

3 I make the following points in relation to the section, that the only statutory requirement of
4 consultation is to consult before making a decision which is likely to be adverse to the
5 interests of a relevant party. That requirement is implemented or fulfilled by the CMA by
6 publishing its provisional findings and giving the Parties an opportunity to make
7 representations in response.

8 The second submission on the section is that even that requirement is qualified because it is
9 a requirement to consult so far as practicable, and in relation to that I have just pointed to
10 s.104(4)(a), which expressly imposes an obligation - not just a discretion, but an obligation -
11 on the authority to have regard to the strictures imposed by the timetable when determining
12 what is practicable in terms of consultation. There is no other statutory obligation to consult
13 the Parties. So that is the important context, and we say that that is material when
14 determining what fairness requires in the present context.

15 Turning to CMA rules of procedure behind the next tab, tab 2, this is CMA17 - you will see
16 that at the bottom of the first page. I would ask you, first of all, to look at para.11, which is
17 on p.10. Para.11 is concerned with the provisional findings. As I have said, the publication
18 of the provisional findings and the opportunity for the Parties and others to make
19 representations in response is how the CMA fulfils, in the present context, its statutory
20 obligation under s.104. You should note at para.11.5 the obligation to invite the main party
21 to make written representations and the minimum period of 21 days that must be set for
22 those representations.

23 Then also I would ask the Tribunal to note para.11.6, which states that if any main party
24 fails to provide reasons in writing by the date specified, then the Group shall not be obliged
25 to take them into account. This, I submit, recognises the overall deadline within which the
26 CMA must operate, and the “so far as practicable” test in s.104 and so recognises that the
27 overall timetable must not be threatened by Parties not complying with their deadlines. So,
28 weight is given to the importance of deadlines.

29 Turning to the----

30 THE PRESIDENT: That approach is reflected a bit in para.10.3 about what happens if they do
31 not respond.

32 MS DEMETRIOU: Precisely, Sir, that is the same point. One can see where that comes from in
33 terms of the Act, because the Act requires the Authority expressly to take into account its
34 statutory deadline when determining what is required by procedural fairness. It is a point

1 which means that the authorities I took the Tribunal to before lunch, which indicate that
2 very great weight must be given to the Authority's considered view as to how to manage its
3 time to best protect on the one hand procedural rights, and on the other hand the statutory
4 deadline, that is something which is reflected in the legislation and the rules.

5 THE PRESIDENT: Yes.

6 MR FRAZER: Can I just ask a question here about what you say about 11.6, when you say "[i]f
7 any main party fails to provide reasons by the date specified the Group shall not be obliged
8 to take them into account": does that mean that the Group does not have to take them into
9 account in the context of the provisional findings or at all at any stage?

10 MS DEMETRIOU: At all. If, for example, 21 days is set as the deadline for a response to the
11 provisional findings, and that deadline is not met, then there is no obligation to take into
12 account representations received after that date. Of course, there is always a discretion to
13 do it, but what this provides is there is no obligation. So, it would be, in principle, legally
14 permissible for the Group to reach a decision without considering those representations at
15 all.

16 MR FRAZER: Okay, thank you.

17 MS WALKER: If I may ask a question: as I understood 11, it referred to provisional findings.

18 MS DEMETRIOU: Yes.

19 MS WALKER: As I understand the discussion, we have not been talking about provisional
20 findings up until now, so it is a different process?

21 MS DEMETRIOU: Yes, but we say that it is highly relevant to what the Tribunal has to
22 determine now. The point I am seeking to make is that the Parties have got a statutory right
23 to make representations in response to the provisional findings. That necessarily colours the
24 ambit of the procedural rights they have at this earlier stage.

25 MS WALKER: I see.

26 MS DEMETRIOU: I really make two points, just to be clear: the first point is if this right further
27 down the line did not exist, then one can quite see why it might be said that they need a lot
28 of opportunity now to respond to the emerging thinking of the CMA, but that is not the
29 case.

30 MS WALKER: I understand.

31 MS DEMETRIOU: The second point that I wish to make is that even where the statute states that
32 there has to be an opportunity to be heard, that is a qualified right that the Parties have. So,
33 we say, *a fortiori* it is a stronger position that where the statute does not mandate a right to

1 be heard, which is the case here, then there cannot be a greater right conferred on the Parties
2 than the right that they have to respond to provisional findings.

3 The Tribunal will bear in mind that the date given, the minimum timeframe that is laid
4 down is 21 days. You will have seen that, for the vast majority of these working papers, the
5 CMA's proposal gives the Parties longer than 21 days to respond to the working papers.

6 THE PRESIDENT: Well, it did not for a lot of them.

7 MS DEMETRIOU: Sir, it may not have done, but it does now, and the----

8 THE PRESIDENT: It does now, but there were sent out, nine working papers, on the 27th of
9 November in the afternoon, and one of them in the early hours of the 28th, with a request
10 for a response by the 7th. Is that defensible?

11 MS DEMETRIOU: Sir, I am not having to defend it today because of course----

12 THE PRESIDENT: I appreciate that it has been extended, but on your own skeleton argument
13 that was manifestly unfair, was it not?

14 MS DEMETRIOU: Sir, in most cases that is the timeframe that is accorded to Parties to respond
15 to working papers.

16 THE PRESIDENT: What is the timeframe?

17 MS DEMETRIOU: In lots of cases they are given a week to respond to working papers. That is
18 the normal position. I do not accept that it is manifestly unfair, no.

19 THE PRESIDENT: I am looking at paragraph 22 of your skeleton where it is said, no doubt on
20 instructions, “[h]aving regard to the nature of the working papers ...” - that means these
21 working papers, not other cases which we are not concerned with – “... “the statutory time
22 limits, the time needed for other stages of the investigation, and the Parties’ resources ...”
23 which are here considerable. Fairness to them “... required them to be given a period of at
24 least 20 days ...” - at least 20 days.”

25 MS DEMETRIOU: Sir, I read that. You will have noticed, because I was not available yesterday
26 - I was in Luxembourg doing another hearing - I am not an author of the skeleton argument.

27 THE PRESIDENT: No, but I am sure it is put in - it is not about the authors, it was put in, I am
28 sure, with the authority and approval of the CMA.

29 MS DEMETRIOU: Sir, I read this, not saying that fairness requires 28 days to be given.

30 THE PRESIDENT: Twenty.

31 MS DEMETRIOU: Sorry, 20 days to be given, but that that complies with the principles of
32 fairness. I do not see that as a concession, I will be told if I am wrong, that the earlier
33 position - I am told that I am right - so if there is some infelicity in drafting----

1 THE PRESIDENT: What does it mean when it says: “fairness to the merger Parties required
2 them to be given a period of at least 20 days”?

3 MS DEMETRIOU: I think what is meant is that the principles of fairness were met by giving
4 them 20 days.

5 THE PRESIDENT: Were they met by giving them, in this case here, the 7th of December?

6 MS DEMETRIOU: Sir, I do not have to defend the 7th of December, because that has now gone
7 by the by, because things have moved on and----

8 THE PRESIDENT: But have they been given 20 days?

9 MS DEMETRIOU: Yes.

10 THE PRESIDENT: If we look at the table which we have. We know that they came on the
11 afternoon of the 27th, did they not?

12 MS DEMETRIOU: Some of them, yes.

13 THE PRESIDENT: Those are the ones that have caused the big problem, some eight or nine of
14 them, or some in the morning of the 28th. We cannot count the 27th if it comes late in the
15 afternoon.

16 MS DEMETRIOU: No.

17 THE PRESIDENT: So the 28th, 29th, 30th of November, three days. If you have got to respond
18 by 9 am on the 17th, you cannot count the 17th.

19 MS DEMETRIOU: I accept that, Mr Turner makes a fair point, so it is 19 days, yes.

20 THE PRESIDENT: So, they have not been given at least 20 days - they have not been given 20,
21 let alone at least 20.

22 MS DEMETRIOU: Sir, the position is that this paragraph of the skeleton is certainly not intended
23 to be a concession that natural justice requires 20 days to be given. I think all that is meant
24 here is that giving 20 days, or we say giving 19 days, amply satisfies the requirements of
25 natural justice. We say that because when one compares it to the 21 days, which is what is
26 required when it comes to responses to the provisional findings, which is where the statute
27 says that procedural rights are engaged----

28 THE PRESIDENT: It does not say 21 days, it says “at least”, does it not?

29 MS DEMETRIOU: It says at least 21 days.

30 THE PRESIDENT: Yes, and will the period not depend on the complexity of the case?

31 MS DEMETRIOU: It might depend----

32 THE PRESIDENT: Some might be 21, some might be 24, some might be 28, these cases are very
33 varied, are they not, in terms of complexity?

34 MS DEMETRIOU: Sir, of course, all within the strictures of the overall timetable.

1 THE PRESIDENT: Oh, yes.

2 MS DEMETRIOU: The opportunity for the CMA or for the Group to extend that significantly is
3 just not there.

4 Sir, I was going to move on to look at two other guidance documents, if I may, and they are
5 to be found in the Applicants' authorities. The first is behind tab 2, and CMA2, guidance
6 on the CMA's jurisdiction and procedure in mergers. I wanted to take the Tribunal first to
7 paragraph - it is really section 12, which starts on p.112. We only have excerpts here, but it
8 is section 12, which is 112 at the bottom.

9 THE PRESIDENT: Sorry, this is CMA2 at p.112. Yes.

10 MS DEMETRIOU: This particular section is entitled "Developing the Phase 2 assessment", and
11 then you have a sub-heading "Working papers". 12.1 and 12.2 set out the purpose of
12 working papers, and you can see that they are described as:

13 "... internal CMA papers, which are used to facilitate internal debate on the
14 substantive and procedural issues that arise during the Phase 2 inquiry. As the
15 CMA's analysis develops through the course of the Phase 2 inquiry, working
16 papers will be prepared by the case team covering the factual background,
17 evidence and analysis relevant to the statutory questions and the theories of harm
18 that have been identified."

19 Then at 12.2:

20 "[They] contain the CMA's approach and developing thinking on issues at a point
21 in time. They are not definitive, nor do they represent the CMA's final views,
22 either in relation to the scope of the inquiry or the merits of any particular
23 argument."

24 So, we see here again, this is another important piece of contextual information against
25 which the requirements of natural justice have to be measured, which is that they are
26 primarily internal documents. Yes, the CMA can and does sometimes choose to disclose
27 them, but they do not represent final views, or even provisional views, of course, because
28 provisional views are contained in the provisional findings.

29 Then you see further on at 12.16 - before we get there, may I just draw your attention to
30 12.11 because this concerns hearings which I will have to come on to, and that says:

31 "Unlike a court hearing, CMA main party hearings are an inquisitorial and not an
32 adversarial process. The primary purpose of this hearing is to enable the CMA to
33 test the evidence and explore key issues with the Parties. The hearings therefore
34 take place at a stage in the investigation at which Inquiry Group members have

1 absorbed sufficient evidence to produce an Annotated Issues Statement and to
2 frame challenging questions from it. It also provides an opportunity for the Parties
3 to explain their position on these issues orally, directly to the Phase 2 decision
4 makers.”

5 Just pausing there, and to foreshadow the submission I am going to make about hearings,
6 we say that Mr Turner’s submission that the hearing can only fairly be held at a point in
7 time when the CMA has received all the responses to the working papers just simply does
8 not get off the ground, because that is just not what is intended as being the primary purpose
9 of the hearing.

10 THE PRESIDENT: It says in 12.12, “Prior to the hearings the CMA will provide the Parties with
11 an agenda ...” Have we got that somewhere, the agenda? Is it exhibited?

12 MS DEMETRIOU: One was provided. I am just trying to see where it is.

13 THE PRESIDENT: I assume it was provided, because it says that is what your client does. Have
14 we got it?

15 MS DEMETRIOU: I have asked those behind me just to double-check. Of course, what you do
16 now have is the Annotated Issues Statement.

17 THE PRESIDENT: Yes.

18 MS DEMETRIOU: The key point that we make in relation to that, if you could perhaps turn it up
19 for a moment----

20 THE PRESIDENT: Yes, that is in our confidential bundle.

21 MS DEMETRIOU: The Issues Statement was published on the 16th of October, and the
22 Annotated Issues Statement was sent to the Parties on the 27th of November. Of course,
23 this is a document that just the Parties get, not everybody else.

24 THE PRESIDENT: The annotations are the red.

25 MS DEMETRIOU: Are in red. That is right, the annotations are in red. The point that we make
26 here is that what the annotations do, and the Tribunal will be able to see this, is set out in a
27 pithy and accessible way the CMA’s updated thinking, taking account of the work it has
28 done in the context of producing the working papers. So, we say the idea is that both the
29 management of the company and its legal advisers can see very readily what the key issues
30 are in the CMA’s mind at this point in time and this provides a very sound basis for them to
31 prepare for the hearing.

32 THE PRESIDENT: In that case - I see that - it refers extensively to the working papers, for
33 example, on p.17 under para.52.

34 MS DEMETRIOU: Yes.

1 THE PRESIDENT: Where the issue is supplied retail fuel in relation to prices, and so on, and
2 then one sees what is said confidentially. It is basically saying the Parties can see what the
3 CMA is now thinking by reference to two working papers.

4 MS DEMETRIOU: Yes, and then you have a pithy summary of the available evidence. Of
5 course, we accept that the Parties are going to need to be able to read the working papers
6 before the hearing, because, as you say, Sir, there is cross-reference to those working
7 papers. The hearing does not normally take place at the point in time when the responses to
8 working papers have been received and digested.

9 THE PRESIDENT: Do you accept - you made clear you do not accept that the hearing has to take
10 place after the responses have been put in, and indeed you say that does not normally
11 happen.

12 MS DEMETRIOU: Yes.

13 THE PRESIDENT: Do you accept that it is right that the Parties should have had a chance to
14 digest the working papers before the hearing?

15 MS DEMETRIOU: Yes, we accept that, and at least to identify the broad or the main points in
16 those working papers, but they do not have to have been in a position to have formulated in
17 detail their responses because, as was canvassed earlier, the hearings are really not apt for
18 very detailed technical discussions.

19 Sir, you asked about the agenda. It is in the bundle. It is in the CMA bundle at tab 4.

20 THE PRESIDENT: Thank you.

21 MS DEMETRIOU: It is on p.10. Sir, you can see there are a number of high level agenda items.
22 So really the capacity to go into each of these issues in great depth is simply not there,
23 because that is not the purpose for the hearing. Really, the purpose of the hearing is, first,
24 for the CMA, for the Group to explore and ask questions and advance its thinking, and
25 secondly, it gives the Parties an opportunity to convey their main points, or some of their
26 main points.

27 Sir, finally, in terms of the guidance, I was going to turn next to tab 3, so the immediately
28 following tab, and look briefly at CC7, para.7.1, p.12.

29 THE PRESIDENT: Although this is a CC Chairman's Guidance, that is still treated as----

30 MS DEMETRIOU: Yes, it is adopted by the CMA, and in fact it is cross-referred to in the
31 document I just showed you. If you go back to that document behind tab 2, I took you to
32 para.12.2, and do you see the last sentence:

33 "The CMA's approach to disclosure of such papers ..."

34 that is working papers -

1 “... is set out in its published guidance on disclosure of information.”
2 You can see then the footnote.
3 THE PRESIDENT: The footnote refers to CC7.
4 MS DEMETRIOU: Exactly. So, turning to that document, and 7.1, in the middle of that
5 paragraph:
6 “The disclosure of provisional findings and a provisional decision on remedies is
7 the main means by which the CC ensures due process and fulfils its duty to consult
8 [under s.104] ...”
9 I have made that point in my submissions, but you see it there in the guidance.
10 THE PRESIDENT: Yes.
11 MS DEMETRIOU: Then at 7.3, internal papers, and the key point here is that there is no
12 obligation on the CMA to disclose its internal working papers, and what the guidance says
13 at 7.3, if you see the end of that paragraph:
14 “Whether it is appropriate or practical to do so ...”
15 i.e. to disclose them -
16 “... may depend upon timing considerations; for example, it would not be sensible
17 to do so when the CC is soon to disclose that thinking in an Annotated Issues
18 Statement or provisional findings. However, Parties will have the ability to
19 comment following disclosure.”
20 THE PRESIDENT: And the next sentence:
21 “In merger inquiries it is generally more appropriate to disclose working papers (or
22 extracts) to main Parties ...”
23 MS DEMETRIOU: Yes, I had missed that, I was not leaving it out deliberately. I saw that----
24 THE PRESIDENT: No, I am sure you were not. It is, as at least one member of the Tribunal
25 knows well, the general practice now, even though there is no statutory obligation. I think
26 you accepted that if they are disclosed then the party to whom they are disclosed with a
27 request to comment must have a fair opportunity.
28 MS DEMETRIOU: Yes, we do accept that. The submission I make is that in determining what
29 fairness requires - so we accept that they must have a fair opportunity, but fair opportunity,
30 what constitutes a fair opportunity has to be determined contextually, and we say that this is
31 another indicator that fairness does not require an ability to respond comprehensively and in
32 great detail at this stage.
33 THE PRESIDENT: Are you leaving that document?
34 MS DEMETRIOU: I am leaving that document.

1 THE PRESIDENT: Before you do, is 5.2 relevant?

2 MS DEMETRIOU: 5.2.

3 THE PRESIDENT: 5.2(b):

4 “[The Groups should have regard to] the desirability of avoiding unnecessary
5 burdens on business, the need to conduct investigations effectively and efficiently,
6 the need to reach properly reasoned decisions within statutory and administrative
7 timescales ...”

8 And that says at the bottom:

9 “These considerations may inform the Group as to whether particular information
10 should be disclosed, to whom and the manner of disclosure.”

11 Then at 5.3:

12 “For the most part these factors will not be in conflict with the CC’s transparency
13 aims and its statutory functions. However, when decisions are finely balanced,
14 Groups should pay particular attention to the need to achieve due process.”

15 MS DEMETRIOU: Yes, so what we say about that is, first of all, is that 5.2(b) and the reference
16 there to the statutory and administrative timescales, particularly the statutory timescale,
17 reflects what you have already seen in s.104, which is the obligation to have regard to that
18 when determining what fairness requires in any circumstances.

19 What 5.3 is saying is where there are finely balanced decisions then there is a particular
20 need to pay attention to the need to achieve due process. The way that might translate in
21 practice is, if we were at the stage of responses to the provisional findings, which is the
22 statutory right to make representations, and we were being faced with an argument that
23 more time was needed and there was a finely balanced question as to whether or not that
24 would be desirable, then of course the CMA would look very carefully at due process, the
25 need to achieve due process, as it has in this case.

26 It has in this case also examined carefully the argument made by the Parties, but in the
27 present, we say essentially in a nutshell that due process is achieved when one bears in mind
28 what the requirements are of due process at that stage. That is, in a nutshell, our
29 submission.

30 Unless the Tribunal has anything further on this document----

31 THE PRESIDENT: Can you just help me on 3.4. You say this has been adopted. The third
32 sentence:

1 “If a Group encounters a situation not covered in this Guidance, or if it considers
2 that it wishes to depart from the Guidance, the Chairman of the Group should
3 normally consult the CC Chairman.”

4 Of course, there is not a CC chairman.

5 MS DEMETRIOU: No.

6 THE PRESIDENT: How is that to be read now? This is a statutory guidance, is it not, this
7 document, as I understand it?

8 MS DEMETRIOU: Yes. Sir, I am told that on points of policy there would be a consultation of
9 the Case and Policy Committee.

10 THE PRESIDENT: Yes. Who is on that?

11 MS DEMETRIOU: Representatives of the panel, chairs and senior members of the CMA.

12 THE PRESIDENT: I see, but they were not consulted in this case, were they?

13 MS DEMETRIOU: They were not consulted in this case because there was no question of
14 departure from the guidance.

15 THE PRESIDENT: Yes. Then there is 2.2(a)

16 “... it is a means of achieving due process and of ensuring that by having a better
17 understanding of the CC’s ...”

18 We now say CMA -

19 “... analysis affecting them, the main Parties in inquiries are treated fairly.”

20 MS DEMETRIOU: Yes, and, Sir, the important point not to lose sight of here, in my submission,
21 is that, of course, publishing the working papers assists the Parties - materially assists them
22 - when it comes to responding to the provisional findings.

23 THE PRESIDENT: By “publishing”, you mean disclosing. They are not published.

24 MS DEMETRIOU: Disclosing the working papers does do this, so we agree entirely with what is
25 said at 2.2(a), because it is a means of achieving due process and ensuring a better
26 understanding of the analysis, because, rather than being faced with provisional findings,
27 which include large swathes of analysis for the first time, the working papers, which reflect
28 the emerging thinking of the CMA, have been disclosed in this case in advance of that.
29 That obviously will be of assistance to the Parties when they are responding to the
30 provisional findings. It does not follow that fairness requires them to respond in very great
31 detail at this stage. That is something which the Parties, in my submission, have lost sight
32 of. This part of the process, so the working papers and the response to the working papers,
33 is not a hermetically sealed process, it is to be viewed in the context of the process as a
34 whole.

1 Then Mr Bailey points me also to para.3.3, which places into context some of the
2 provisions, Sir, that you have just pointed me to, which states that a flexible approach may
3 be called for; and you will see (d), practical and timing considerations are referred to.

4 Sir, if we have finished with this----

5 MS WALKER: If I may, there is one area I would like to pursue with you, if I may. I certainly
6 understand the points that you are making on the timetabling constraints on the CMA, and
7 on the approach to fairness, but I want to explore one or two points that have been made and
8 understand what your answer is to those. As I understand it, the Applicants are saying that
9 some of the changes that have emerged in the working papers are really quite significant in
10 terms of methodology - I would not pretend to understand the details of those - but their
11 issue then is that they have had insufficient time to work through those changes in
12 methodology to know what the impact of that is.

13 If I have also understood them right, they then go on to say: if those changes in
14 methodology do lead to some significant issues, and those issues do not emerge until later,
15 until the provisional findings stage, it is much more difficult then, at a point at which you
16 are looking both at the underlying methodology and at the findings, to tease out clearly the
17 set of issues around that.

18 MS DEMETRIOU: Those are, if I may say so, very good questions, and I will give you my
19 answers to them now, if I may.

20 MS WALKER: Thank you.

21 MS DEMETRIOU: In relation to the question, we say two things: we say, first of all, that the
22 assertion by the Parties that thinking has changed and this is all incredibly complicated and
23 cannot be dealt with now, is vastly overstated. I do not think that this is a question that the
24 Tribunal is going to be able to determine in the course of this hearing, but to give you an
25 example, Mr Pritchard refers, as one of his two examples of how difficult this all is, to the
26 fuel analysis. The background to that is that the Parties' economists have already had two
27 meetings with CMA's economists about precisely this analysis. The second of the meetings
28 happened at the beginning of phase 2 and they asked many substantive questions about the
29 CMA's analysis. The position is not that they have suddenly been taken by surprise by all
30 of this when they got the working papers. It is an iterative process and they have been
31 involved, and we simply do not accept that they are not able to grapple with this. That is
32 the first point.

33 The second point to make in relation to that is that if it were the case that there are aspects
34 of the analysis that the Parties cannot deal with in detail at this stage, that is not the end of

1 the story, because their main chance to grapple with it comes after the provisional findings,
2 which really leads on to your second question, which is the point they make, which is,
3 “Well, the CMA’s thinking will have ossified at that stage, and it will be very hard to
4 change track.” We vehemently disagree with that submission, because what that implies is
5 that the Group will not consider the Parties’ responses to the provisional findings in a fair
6 and objective manner. There is absolutely no evidence before this Tribunal to suggest that.
7 The position is that the Group will consider the Parties’ responses to the provisional
8 findings. As it has a statutory obligation to do, it will consider them carefully and fairly and
9 impartially, and in detail. It is in everybody’s interests that that takes place, and that is what
10 fairness requires. If it concludes in the light of those submissions that it has gone wrong or
11 that it should take a different approach, then it will take a different approach in its decision.

12 THE PRESIDENT: I can see that, but if the provisional findings are built on an analysis that was
13 in a working paper which was sent to the Parties with a request for any comment by this
14 cut-off date, and if that comment cannot be provided by that cut-off date then they are faced
15 with provisional findings that are built on that, can the Parties then really say, “Well, the
16 problem is in the working paper”----

17 MS DEMETRIOU: Yes, they absolutely can.

18 THE PRESIDENT: -- “and that is where it went wrong, and here are our comments on the
19 working paper”? If they can say that then the deadline to comment on the working paper
20 becomes a slightly empty deadline.

21 MS DEMETRIOU: Sir, absolutely, yes, they can. If the provisional findings are built on an
22 edifice which the Parties show to be wrong in their submissions, in their responses to the
23 provisional findings, then they can make that point and it will be considered impartially and
24 fairly. That is why - Sir, you characterise it as an empty deadline - we say there is nothing
25 in their natural justice point. Yes, we have acted transparently, and we have disclosed the
26 working papers now. Yes, since we have disclosed them, they should have an opportunity
27 to be heard. But the very key point is that, first of all, we say that they have had ample
28 time, with the revised deadline of the 17th of December, to give their principal comments
29 and responses - ample time; but secondly, insofar as they do not have ample time to do that,
30 they can do it in response to the provisional findings and it will be considered then. There
31 is absolutely no material to form the basis for any suggestion that the CMA, that the
32 Group’s thinking will have been so ossified by that stage that it would be unwilling, in the
33 face of compelling submissions, to change direction. There is nothing to suggest that at all
34 and it would not happen.

1 MR FRAZER: Can I just ascertain the purpose of setting a deadline for responses on the working
2 papers, if it is not, as it were, a deadline beyond which no further comments can be made, as
3 you have just said, that purpose is what: is it to do with the main party hearings?

4 MS DEMETRIOU: It is a very good question, sir, can I take it from Mr McIntosh's statement,
5 because he explains it, and he explains it better than I am going to be able to do. That is in
6 our bundle at tab C, and it is really paras.25 to 27, so starting on p.8. At para.25, I think that
7 Mr McIntosh there directly addresses your question, sir. He says that the purpose of sharing
8 the working papers is two-fold, first "[t]o enable the Applicants to submit representations on
9 that emerging thinking that the Group could take into account ahead of producing its
10 Provisional Findings"; and secondly, "[t]o enable the Applicants to understand the
11 overarching points in the Group's emerging thinking, so as to respond to the questions in
12 the main party hearing. Then you see at para.26:

13 "The purpose of sharing the working papers...is not to get their 'final view' on the
14 emerging thinking set out in those working papers and it is far from their only
15 opportunity to submit their views. Nor are the working papers shared with the
16 merger parties to invite them to embark on a wholly new or different approach to
17 the CMA's initial analysis. Nor do the comments require a line-by-line assessment
18 of the CMA's analytical work or an in-depth review of all the data on which that
19 work is based. Rather, the purpose of sharing the working papers is [to] invite the
20 merger parties to comment on early parts of the CMA's analysis that may
21 eventually form some of the building blocks of the provisional findings, so that this
22 can be taken into account by the Group in its continuing work."

23 It goes on at para.27 to say that there is no prescribed format for responding:

24 "In some cases, merger parties mark up the working papers. In other cases, they
25 provide a commentary and seek to identify key points of disagreement as well as
26 highlighting material errors. The content, and length of responses varies according
27 to their nature. Given the purpose of sharing working papers and the stage of the
28 inquiry at which they are produced, the merger parties must necessarily prioritise
29 their responses to cover what they consider to be the key areas of concern. For this
30 reason they are usually less formal and comprehensive than responses to the
31 provisional findings. It gives them an early insight into the CMA's emerging
32 thinking and they can flag areas of disagreement within the time available. This
33 early insight can and should also [in]form the merger parties' responses to
34 provisional findings in due course."

1 So, what you can see is that this is a very far from hermetically sealed stage of the process.
2 The whole process is an iterative process and the transparency achieved by disclosure at this
3 stage moves things on, but it is far from the only opportunity that the Parties have to grapple
4 with this analysis, because there is an opportunity later at the provisional findings stage.

5 MR FRAZER: I understand the reason for sharing the working papers. The purpose of the
6 deadline in responses to the working papers, I believe, from your answer, is contained in
7 25(a) and (b), which is (a) so they can be taken account of in the production of the
8 provisional findings; and (b) so that they can be part of the main party hearings - is that
9 correct?

10 MS DEMETRIOU: That is correct.

11 MR FRAZER: I see, so they do have some relevance to both of those parts of the process?

12 MS DEMETRIOU: They absolutely do, yes, indeed.

13 MR FRAZER: I see, so the question is whether the deadline given provides sufficient opportunity
14 for those particular purposes outlined in 25(a) and 25(b)?

15 MS DEMETRIOU: That is correct, but then when one is looking at what is required, particularly
16 here for 25(a), a very important consideration is that this is not the only bite at the cherry.
17 The main opportunity really comes further down the line.
18 So it is not the case - in answer to the question that the President just put to me a few
19 moments go - that if in response to the provisional findings the Parties say, "Your analysis
20 here, which is reflected in the working papers, is wrong, because of a particular reason", of
21 course the Group is not going to say, "The deadline for telling us that has passed", of course
22 it is not going to do that. It will take account of that at that stage.

23 MR FRAZER: I see.

24 MS DEMETRIOU: What the Parties seem to want to do here - I will come to this - they have
25 asked for many days to respond to some of the papers, and they have got very large and
26 well-resourced teams, and they seem to be wanting to respond comprehensively to all of the
27 analysis, and we say that fairness does not - it might be desirable from their perspective,
28 I am sure it is, but it is not what natural justice requires.

29 Then for completeness, since we are on Mr McIntosh's statement, the point that the
30 Tribunal has just put to me is also dealt with at paras.70 to 73, which was under the
31 heading, "The approach to setting deadlines for the Parties' comments", p.20. You will see
32 the type of thinking that goes into this. So, para.70 relates back to 25(b), and para.71 refers
33 back to 25(a). You can see at 71 the balance that needs to be struck by the CMA between

1 the need for the Parties to be given adequate time to respond with the process - you see this
2 at para.72 - as a whole.

3 To be clear, Mr McIntosh's witness statement and the decisions taken by the CMA, are all
4 predicated on the extension of the statutory deadline. We see that from para.73.

5 Mr Turner took you - and this is an important document that I want to take the Tribunal to
6 also at tab 5 - to the administrative timetable, the two versions of it, that the CMA has
7 carefully worked through.

8 THE PRESIDENT: This is the internal document?

9 MS DEMETRIOU: Yes, it is tab 5 in this bundle, and you have seen the covering email already.

10 I would just ask you to note the date of that email. What you can see is that this is not some
11 kind of *ex post facto* analysis in response to the application, but this was the consideration
12 that took place when the CMA received the Parties' letter. So, far from doing what
13 Mr Turner alleges, which is not considering, completely ignoring, the Parties' requirements,
14 they did not do that, both the team and the Group very carefully considered the letter and
15 went through and produced a very carefully considered internal administrative timetable for
16 the remainder of the investigation on both bases. I would just like to take you through that
17 briefly. First of all, I would make one point: Mr Turner repeatedly said in his submissions
18 that the Parties' proposal for an extension of time - so what the Parties would like in terms
19 of timetabling - only results in one week's slippage. That is completely wrong, and it is
20 wrong for two reasons: first of all, it does not take into account that the Parties' proposal is
21 not just to deliver responses on the 21st of December, but also a substantial number of
22 responses on the 4th of January. So, his references to a week's slippage completely ignore
23 the 4th of January responses.

24 THE PRESIDENT: I think it was not a submission made on the difference between the 14th and
25 the 21st, it was based on what is said in the skeleton argument----

26 MS DEMETRIOU: Sir, can I come back to the skeleton argument.

27 THE PRESIDENT: -- at para.41, as I understand it. It is a response to the Applicants' favoured
28 timetable, which was some by the 21st of December and some by the 4th of January.

29 MS DEMETRIOU: Yes, and this is just dealing with the 17th of December. This part of the
30 skeleton argument is just dealing with the 17th of December.

31 THE PRESIDENT: It is the Applicants' favoured timetable, which was the 21st and the 4th, as
32 we know, "... deprives the CMA of the opportunity next week to review..." and so on, "[i]t
33 sets back the progress by one week ..."

1 MS DEMETRIOU: Sir, that has to be read in context, and the context is that - it could only set it
2 back by one week. It is talking about the papers that would be received on the 21st of
3 December.

4 THE PRESIDENT: It is not the whole of the timetable, it is just that bit of it, is it?

5 MS DEMETRIOU: Just that bit of it.

6 THE PRESIDENT: It is not what it seems to say.

7 MS DEMETRIOU: Sir, may I make a procedural point about the----

8 THE PRESIDENT: I appreciate it may have been written in a hurry.

9 MS DEMETRIOU: Yes, Sir, not only was it written in a hurry, but this litigation was
10 foreshadowed by the other side last Friday. They took until Wednesday lunchtime to put in
11 their application. Of course, we are very grateful to the Tribunal listing it today, but the
12 upshot was that the CMA had one working day to put together its evidence and its skeleton
13 argument. So, Sir, I would really appreciate a little latitude in terms of parsing the precise
14 paragraphs of the skeleton argument which I did not have an opportunity, myself, to review
15 before it was submitted.

16 THE PRESIDENT: Yes.

17 MS DEMETRIOU: Sir, we do stand by our evidence and timetable, and if you will just bear with
18 me I will make my submissions on the timetable.

19 THE PRESIDENT: Yes, please. That is where the one-week point came from. I appreciate what
20 you say, and one should not be too strict in the way one reads it, but that is where it was
21 derived from.

22 MS DEMETRIOU: Sir, yes, and of course Mr Turner seizes on that because it is in his interests
23 forensically to say, "Well, the CMA said it is just one week and why does that matter?"
24 I just want to show the Tribunal now why it is not one week by reference to the evidence of
25 Mr McIntosh. So, the key point is that the responses, the substantial responses, which the
26 Parties envisaged submitting on the 4th of January, matter a great deal, because what that
27 means is that because the responses are split the CMA cannot do what it would otherwise
28 do, which is have different teams working on different parts and progress the work in
29 parallel. So, the work has necessarily to be sequential work. That is why, in answer to the
30 query raised by Mr Turner, when you look at the second column, there are two Group
31 meetings rather than one Group meeting, because the work has to be divided on this
32 scenario because the responses are being received at different times. In order to progress
33 the first batch, so in order to gain any savings from the fact that, on the Parties' proposal,

1 we would be receiving some documents on the 21st, that has to be progressed first. The
2 responses on the 4th of January have to be progressed sequentially behind.

3 THE PRESIDENT: You mean they cannot be done in parallel?

4 MS DEMETRIOU: They cannot be done in parallel. That is why you need two meetings because
5 if you are to gain any saving from the fact that they are offering to produce some on the 21st
6 of December, and not all of them in January, then you need this parallel track, and that
7 results in two Group meetings. That is the simple answer to that query raised by Mr Turner.
8 Also, I should respond to another point that Mr Turner made, which relates to the published
9 timetables. Mr Turner drew a comparison between this very detailed internal working
10 document and the published timetable that was published in September. There are two
11 points to make about that. The published timetable was premised on the 24-week statutory
12 deadline without any extension. As Mr McIntosh makes clear in his evidence, we have now
13 moved on from that and accept that an extension will be necessary.

14 Secondly, yes, the timetable was published in September, but things move on and this is the
15 up-to-date carefully considered, very detailed plan that the CMA is now working towards.
16 The second reason why it is not just one week is that, even if all the documents - and of
17 course this is not the Parties' proposal - even if all the responses were received by the CMA
18 on the 21st of December, rather than the morning of the 17th, even that would not result in
19 just one week's slippage. The reason for that is because of the timing. Essentially, the 21st
20 of December is the Friday before Christmas Eve. The reason why the morning of the 17th
21 of December, as Mr McIntosh says in his statement, is very important for the CMA is
22 because that is a full working week. So, the investigation can be progressed in that full
23 working week, and he explains in his statement how that would happen. If the papers, the
24 responses, were received on the 21st, the week of the 17th could not just be replicated the
25 following week because that is Christmas week and there are (a) fewer working days that
26 week, and (b) fewer people around to do the work.

27 Turning back to Mr McIntosh's statement behind tab C, you see at para.83, starting on p.24,
28 a detailed consideration of that. He says he carefully considered the Parties' proposal with
29 the CMA team and assessed the implications to the timetable and, assuming we would take
30 the eight-week extension, and that is the timetable that you have just been looking at:

31 "... this demonstrated that even on the current deadline the CMA is only likely to
32 be in a position to publish its Provisional Findings in early February. This would
33 permit two full working weeks, plus two partial weeks over the Christmas period
34 (when those staff team and Group members who are available would continue to

1 work) to fully review and digest the responses; conduct any further analysis arising
2 from the responses; weigh the responses against all other evidence and then reach a
3 provisional decision.”

4 This is the key point. He says:

5 “The CMA has a full staff team available during the week commencing
6 17 December and needs to review the Applicants’ responses during that week in
7 order to provide initial thoughts on the consequences for the CMA’s emerging
8 thinking to the Group. The Group and senior staff team need to use this time, and
9 then the subsequent Christmas week (or, at least, the three working days of that
10 week) to review the Applicants’ responses and the staff team’s initial thoughts ...”

11 So, the difficulty is that if the papers were all received on the 21st, that next week cannot be
12 used in the way that the CMA is currently envisaging, which is the full staff team knuckling
13 down and crunching through all of these responses and producing their thoughts for the
14 Group to consider. Of course, the position is even worse because they are not even
15 suggesting sending all of their responses on the 21st, but a substantial number on the 4th of
16 January.

17 Going back to the timetable behind tab 5, the Tribunal will see that it is already incredibly
18 tight. The CMA and the Group will also have to consider the responses to the provisional
19 findings made by third Parties and hold third party hearings as well as the other main
20 hearing post provisional findings.

21 Critically, time needs to be built in in relation to remedies. In this case, if remedies are
22 required, and of course not even a provisional view has been formed in relation to that, they
23 are likely to be complicated because of the nature of the inquiry and the nature of the
24 different markets that are affected.

25 Then, of course, and this is a point that Mr Turner made, there needs to be time built into
26 the procedure to cater for other events which may be unexpected - not necessarily
27 unexpected but not standard. For example, let us say that a provisional decision is made
28 that the Parties are happy with, and third Parties make submissions which cause the CMA to
29 change its mind, there would then need to be a period for re-consultation, and that is all
30 within the mandatory time limit.

31 There obviously needs to be sufficient time for the Group to assimilate and consider all the
32 representations it receives.

33 THE PRESIDENT: Just one moment.

1 MR FRAZER: If I could just take you back to the table, in the right-hand column on the 14th
2 of January and the 21st of January, where the text seems to be replicated, albeit having a
3 different formatting, is----

4 MS DEMETRIOU: Sir, I am sorry, I cannot quite hear.

5 MR FRAZER: I am sorry. On the right-hand column for the weeks of the 14th and the 21st
6 of January, we have got text which is similar, almost identical in fact, but with just a
7 different formatting. What is that a reflection of?

8 MS DEMETRIOU: Sorry, it is the same?

9 MR FRAZER: It is the same activities in two sequential weeks.

10 MS DEMETRIOU: Ah yes, this reflects the point that I was seeking to make earlier about the
11 sequential nature of the consideration of the responses. What would happen on this basis -
12 this is on the basis of the Parties' proposals which are splitting the responses between the
13 21st of December and the 4th of January. I think you are referring, sir, to the fact that there
14 are two Group meetings, for example.

15 MR FRAZER: I thought that was the 24th and the 31st of December weeks. Perhaps I am
16 incorrect.

17 THE PRESIDENT: It may be the other way around, that the week of the 24th of December on
18 the right-hand side, and the 31st of December on the right-hand column, seem to be much
19 the same.

20 MR FRAZER: In other words, we have got two Groups of similar cells. The 24th and 31st are
21 similar, and the 14th and 21st of January are similar.

22 MS DEMETRIOU: Sir, yes, this reflects the fact that the knock-on effect is greater than a week
23 on the Parties' proposals, and that is for two reasons: first, because of the sequential nature
24 of the way that the process would have to be conducted. Just going back to look at the
25 CMA's proposal, if everything were received in the morning of the 17th of December, then
26 what you would have that week would be a full team working in parallel to analyse the
27 responses, all of the responses, and send points to the Group, which could then, over the
28 Christmas period, consider both the responses and the points made by the case team. Then,
29 going to the right-hand column, the reason that there is repetition is two-fold: first, because
30 that exercise would not have been able to have been conducted in the week of the 17th
31 where the full time is available to the team. So, it would have to be conducted at a slower
32 pace because there are fewer people working on the documents, and fewer working days
33 available over the Christmas period.

1 MR FRAZER: I see, so in the weeks of the 24th and 31st of December there is replication on
2 both sides of the table, both the left-hand column and the right-hand column?

3 MS DEMETRIOU: Yes.

4 MR FRAZER: And the weeks of the 14th and 21st of January, that is not the case on the left-
5 hand column, but it is in the case on the right-hand column.

6 MS DEMETRIOU: That is right, because by that stage we would have got the responses on the
7 4th of January, the next batch of responses, and so there would have to be sequential work
8 on that, which is why you have got another week, a replication, so you have the 14th of
9 January and the 21st of January. It looks like the same thing, but it is not really the same
10 thing because it relates to different batches of responses.

11 MR FRAZER: I see.

12 THE PRESIDENT: You have had all the responses in by the 4th of January.

13 MS DEMETRIOU: Yes.

14 THE PRESIDENT: So, it can be done in parallel.

15 MS DEMETRIOU: No, it cannot be done in parallel. What would normally happen is, if you get
16 all the responses at the same time the team would divide up. If we are correct that fairness
17 does not demand any more than the 17th of December, then the full working week which
18 we have next week, the team will divide up and consider in parallel all of these responses
19 and send their views to the Group. The team available over the Christmas period will carry
20 on working and the Group will be reading the responses and looking at the analysis that the
21 team has produced after that working week. If that week is not available, which it is not on
22 the Parties' proposal, because they are saying that everything is sent on the 21st, which is
23 the working day just before Christmas Eve, we do not have the full team available the
24 following week. So, the first week, the first full working week where the full team is
25 available, is the 7th of January, so that is when the full team starts to work on - there is
26 some analysis over Christmas that is done.

27 It would have been open - if I can put it this way, it might have been open to the CMA to
28 say that is totally hopeless because, even giving some papers on the 21st is completely
29 hopeless, you might as well have just said January, because Christmas does not allow the
30 full team to work. What it is trying to do is to be fair to the Parties and say, "Look, we are
31 going to factor in as much work as we can over the Christmas period on your hypothesis
32 even though we do not have the full team available." They have worked through it very
33 carefully, and their view is that, of course it leads to much more than one week's delay.

1 THE PRESIDENT: In their published timetable which we have at tab 3 of this bundle, they have
2 said that their plan was all Parties' responses, i.e. to any disclosed working papers, early
3 December, provisional findings early January. So, the expectation was that it needs a
4 month from receiving the responses to producing the provisional findings.

5 MS DEMETRIOU: Yes, Sir, and that was much too optimistic. That is what was published in
6 September.

7 THE PRESIDENT: Yes, because that was, of course, with a 5th of March non-extended deadline.

8 MS DEMETRIOU: Exactly. That was much too optimistic. Of course, what has happened since
9 then, amongst other things, is that the Parties asked for and received extensions of time to
10 reply to requests for further information. You see that again in Mr McIntosh's statement.
11 So, what was said in September does not at all reflect the reality now, and you will have
12 seen that things have moved on significantly, not least because of additional time granted to
13 the Parties.

14 THE PRESIDENT: No, I see that. So, the early December gets pushed back, but it is still
15 envisaged that the CMA, for its internal purposes, would need a month, including
16 Christmas, and short weeks, to produce its provisional findings after receipt of all the
17 Parties' submissions. I can see the early December is put back, but that month period is
18 also being extended, as I understand it.

19 MS DEMETRIOU: Sir, yes, that is far too optimistic, we see that now.

20 THE PRESIDENT: Because it is much more complex - is that right?

21 MS DEMETRIOU: Because it is more complicated and because----

22 THE PRESIDENT: And you say the 17th of December morning, effectively the 16th to produce -
23 so mid-December to produce provisional findings at the beginning of February?

24 MS DEMETRIOU: Yes.

25 THE PRESIDENT: But because it is more complex for the CMA, much more is involved than
26 envisaged.

27 MS DEMETRIOU: Sir, for two reasons: first, because it is more complex, and secondly, because
28 the procedure has moved. For example, as I said, the Parties sought and received extensions
29 of time to respond to requests for information. Those are not reflected here. So, there have
30 been delays in the timetable.

31 THE PRESIDENT: As I say, I understand why early December had to be pushed back, but by the
32 17th of December, if your timetable was adhered to, you would have everything, and some
33 of it you received a while back. You are saying to leave a month is clearly not adequate.

34 MS DEMETRIOU: No.

1 THE PRESIDENT: Because of, I take it, the complexity that is involved?

2 MS DEMETRIOU: Sir, I think really the key point to make is that this is an indicative timetable
3 that assumes no extension to the statutory timetable.

4 THE PRESIDENT: Yes.

5 MS DEMETRIOU: That has been looked at very carefully and considered very carefully, as you
6 have seen, and that is unrealistic. It was too optimistic at the time. You see in detail now
7 what the position is, and it is not as though - of course, we understand why the Parties
8 invoke complexity, because they say, "Well, this is very, very complicated, you have given
9 us X pages of working papers, and we need time to respond." That is a double-edged point,
10 because it is the CMA, it is the Group that has to reach the decision, that has to draft and
11 agree and determine and conduct all of the analysis. Not only does it have to conduct its
12 own analysis and take into account carefully the analysis and representations of the Parties,
13 but also of third Parties. So, complexity cuts both ways, and we say ultimately there is a
14 very difficult balancing exercise to be conducted by the CMA and by the Group in
15 formulating the timetable to make sure, first of all, that the mandatory deadline is complied
16 with and that the CMA can do its job properly whilst at the same time protecting procedural
17 rights. That is a delicate exercise.

18 The CMA is best placed to make that judgment, and it has looked at it very, very carefully,
19 and really the critical factor here is that this is not the Parties' only opportunity to grapple
20 with these points. Really that is the critical factor. It is simply not good enough to say,
21 "Well, we need a bit more time and you need to just bear the consequences when it comes
22 to the rest of the timetable, we need a bit more time because that is what fairness requires."
23 Actually, fairness does not require it because they will have time further down the line once
24 the provisional findings have been published.

25 THE PRESIDENT: Yes.

26 MS DEMETRIOU: Sir, I guess, in response to your question about complexity, of course it is
27 complex. We accept it is complex. There have been other complex mergers that have also
28 had to have been conducted within the statutory deadline, as they all are, *BT/EE* for one,
29 and *Sky/Fox News* for another. So, this is not the only complex merger. It is a complicated
30 merger, but that is not a point that really advances the Parties' argument, because
31 complexity is, of course, critical in terms of the timetable and how all of that is to be
32 accomplished.

33 THE PRESIDENT: I think we can all understand why the Group has concluded, albeit I do not
34 know if it is announced yet, that it is going to need the eight-week extension over the

1 timetable at tab 3, which was published on the 27th of September. We can appreciate that
2 fully. The question then is, given that extra eight weeks, whether allocating some part of
3 that eight weeks, and at the moment it seems to be about two weeks that has been offered to
4 the Parties for this stage, that if they had another week or two that really creates such
5 problems, given that there are eight weeks added on the end now.

6 MS DEMETRIOU: Sir, in response to that, of course that is broadly the question that the
7 Tribunal has to answer, but it is not the case that there is now a spare eight weeks because
8 the reason why the Group now thinks that it is inevitable that the statutory deadline has to
9 be extended is that it has to be extended regardless of this dispute now before the Tribunal.
10 So, a lot of that is going to be eaten up with other stages of the process. It is not that the
11 timetable in September was realistic and we think that we can now comply with it and we
12 now have the luxury of eight weeks, some of which can be allocated to the Parties. We are
13 just not in that position.

14 I just want to move on to look at what opportunity the Parties have actually had to respond
15 to the working papers. Our position is that they have had a reasonable opportunity to
16 respond to the working papers and that the deadline set by the CMA does not breach the
17 principles of natural justice. I just ask the Tribunal, please, to turn to the table appended to
18 our skeleton argument. I would like to make a few short points in relation to this table. The
19 first point is that with the exception of the paper on general merchandising to which the
20 Parties have already responded, they will have at least 19 days to respond to all of the
21 papers. I have already made the point that when one compares that to the 21 days - you are
22 right, Sir, that it is a minimum, but generally speaking not much more than 21 days is given,
23 given the strictures of the timetable. We say that that is an illuminating factor.

24 Secondly, the Tribunal will see from the colour highlighting that the Parties propose to
25 group their responses along particular themes. Obviously, that is a matter for them, but the
26 submission that I make is that natural justice does not require that they be permitted to do
27 this. What their approach has led to here is a position where they are seeking a very large
28 amount of time to respond to particular papers. Take, for example, the online survey which
29 is four rows down, that was received on the 14th and 16th of November, and it is suggested
30 that that is responded to on the 4th of January because it is being grouped together with
31 other things, which results in 51 days, a 51-day period to respond.

32 Sir, the short point is that their application for more time is driven to a material degree by
33 their own preference for grouping responses together, but this choice is not a choice that the
34 rules of natural justice require the CMA to give them.

1 THE PRESIDENT: Suppose one looked at the 27th of November working paper where, as you
2 accept, it is 19 days, not 20, and said the other ones that were received earlier should not be
3 allowed to the 4th of January, they tend to be surveys, I think, but in any event. Then you
4 are left with rather shorter periods.

5 MS DEMETRIOU: Sir, some of the documents received on the 27th of November, they are not
6 claiming they need until the 4th of January for - you see that?

7 THE PRESIDENT: Yes.

8 MS DEMETRIOU: -- in relation to GUPPI, and so on. You have my first submission which is
9 that 19 days to respond to working papers is sufficient----

10 THE PRESIDENT: No, we have got that point.

11 MS DEMETRIOU: -- given that they are going to have a response later to pick up anything they
12 had not managed to deal with in response to the provisional findings.

13 Mr Williams points out that if you take those papers, if you look at the bottom few rows
14 which are all dated the 27th of November, a substantial number of those result in a 38 day
15 response time. Sir, I am looking at the days requested - the last column is the days
16 requested.

17 THE PRESIDENT: What we have got to decide, as a matter of decision, is whether the 17th of
18 December was fair?

19 MS DEMETRIOU: Yes, that is correct.

20 THE PRESIDENT: We may not - as we said at the outset, we will try and indicate. If we think it
21 is not what might be fair, it does not mean we will necessarily say by way of indication that
22 the 4th of January is. What we have to focus on is the 17th of December.

23 MS DEMETRIOU: Yes, I agree, that is the question for the Tribunal. You are quite right, Sir,
24 that what they are seeking is not strictly relevant to that question.

25 THE PRESIDENT: It is of some relevance because that is what they say they can do, but we
26 might indicate that we are not sure that is right.

27 MS DEMETRIOU: Sir, I was going to turn to the hearing, but might it be helpful for me to
28 summarise in a nutshell what my submissions have been so far in terms of the very key
29 points?

30 THE PRESIDENT: Yes.

31 MS DEMETRIOU: Sir, we say in relation to the very key point, which is: is the 17th of
32 December unlawful? Plainly not. The requirements of natural justice at this stage are
33 context specific, as they are in each case. We accept that the Parties have to be given a fair
34 opportunity at this stage, but a very important factor is that this is not their only opportunity

1 to respond to these matters. Indeed, it is not their main opportunity that is required by
2 statute. Even when one looks at the statutorily protected opportunity to make
3 representations in response to the provisional findings, that is a qualified, attenuated right,
4 the content of which has to be determined by the CMA in light of its statutory deadline, and
5 that is an obligation on the CMA. Hereto, in determining how much time is fair, the CMA
6 must have regard to its mandatory deadline for concluding the inquiry and the steps that are
7 going to take place further down the line that have to take place. Essentially, you have to
8 balance what the Parties desire at this stage with the effect on the overall timetable, bearing
9 in mind that the Parties will have an opportunity in response to the provisional findings to
10 make any points that they do not feel able to make within the time set now. That is a
11 critical point.

12 That fine question of judgment in terms of balancing these different interests and managing
13 the timetable is something in which the CMA and the Group have a large amount of
14 experience and expertise, and we respectfully submit that the Tribunal should accord its
15 views very great weight. This is not a case in which the CMA has refused to engage with
16 what the Parties have asked, quite the opposite. You have seen the response in the timetable
17 and the covering email, where what the Parties requested has been taken very seriously, and
18 the possibility of giving them what they are seeking has been assessed carefully in the light
19 of the timetable going forward, and the CMA has reached the conclusion that it is not
20 possible to give them what they are seeking at this stage, and that fairness does not require
21 the CMA to give them any more time than they have already been given.

22 The time allocated - so the deadline of the 17th of December - is ample time to make the
23 key points in response to the working papers, and that is all they need to be able to do at this
24 stage. That is all that fairness requires.

25 Moving on to the question of the hearing, it is important to bear in mind that the primary
26 purpose of the hearing at this stage of the procedure, and I have taken the Tribunal to the
27 guidance explaining what the primary purpose is at CMA2, para.12.11. You have seen that
28 already. It may be that I need at this juncture to go back to Mr McIntosh's statement in the
29 CMA's bundle to see what he says about that. That is at tab C, and it is para.93 and
30 following. It is paras.93, 94 and 96. You see at para.94 the purpose of the main party
31 hearing is set out:

32 "… for the main Parties to have the opportunity to address the Group directly and
33 discuss key points at issue prior to the issuance of provisional findings."

1 You have seen the Annotated Issues Statement which sets out the key points in an easily
2 accessible form to help steer the debate during the hearing. The primary purpose of the
3 hearing of course is to enable the CMA to test the evidence and explore key issues with the
4 Parties. We see that from the guidance.

5 At para.96:

6 “If the hearing were not to be held until January, this would cause irretrievable
7 delay to the CMA’s ability to finalise its analysis, carefully consider the
8 Applicants’ representations, and take the decisions necessary to enable it to
9 advance the drafting of the provisional findings document ...”

10 So that is the expert assessment that has been made by the Group in relation to timing.
11 Essentially, Mr Turner had two points in relation to the hearing. His first point was that it is
12 necessary to have the hearing after receipt of the responses to the working papers, but we
13 say that that point does not really get off the ground because it is inconsistent with how the
14 hearing is supposed to operate and how it normally does operate, and you see that from the
15 guidance. So generally, the hearings are held before receipt of the responses to the working
16 papers.

17 Indeed, going back to Mr McIntosh’s statement at para.87, you see that after the exchange
18 of correspondence and late on the 7th of December, Mr McIntosh was informed by Andrea
19 Coscelli, Chief Executive of the CMA, that Mike Coupe had contacted Alex Chisholm, who
20 of course used to be the Chief Executive of the CMA and is now Permanent Secretary of
21 BEIS, to complain about the CMA’s conduct, and that then gave rise to a telephone
22 discussion between Mr McIntosh and Mr Coupe on 10th of December. You see further
23 down in that paragraph:

24 “[Mr Coupe] ... said that, were the CMA able to accept the timetable for
25 submissions proposed by the Applicants they, the Applicants, would be willing to
26 make themselves available for a hearing that week.”

27 i.e. this week. So that rather contradicts the point made. This is on the hypothesis that the
28 Parties would make their written submissions on the 21st and the 4th, and what they are
29 saying there on the telephone is that if they are allowed to do that then they are happy to
30 have the hearing this week. That rather contradicts Mr Turner’s submission that fairness
31 requires that the hearing is held after the responses to the working papers are submitted.
32 Mr Turner’s second argument was that it is onerous for the Parties to attend a hearing and
33 produce responses at the same time. The Tribunal has already explored that with him
34 during the course of his submissions. The short point is that many of the people working -

1 they have very large teams, they have two firms of solicitors and expert economist advisers,
2 they are very well resourced, and not everybody who is working on the responses to the
3 working papers would need to attend the hearing, because the hearings are not suitable to go
4 into depth on technical issues. That is not their purpose.

5 So, in conclusion, the Parties plainly have not been sitting on their hands while this
6 challenge has been mounted and is being heard. They are well resourced, and their advisers
7 will have progressed their responses to the working papers, and we apprehend will at least
8 be in a position to formulate their main points of response to the working papers. We say
9 they should provide those on Monday, as we have requested. To the extent that they are
10 unable to deal with everything in the working papers they will have a further opportunity
11 once the provisional findings have been published. Ultimately, as I have said, and as the
12 cases recognise, it is the CMA and the Group which is on the front line and has to balance
13 the competing constraints and its views should be accorded very great weight.

14 Sir, unless there are any further questions from the Tribunal, those are my submissions.

15 THE PRESIDENT: Just a moment. (After a pause) Thank you. Yes, Mr Turner?

16 MR TURNER: Sir, I will give a short reply. Ms Demetriou began by saying that she had two
17 headline points, and her first, which became a refrain of her submissions, was that this is not
18 the Parties' only opportunity to put their case, nor is it even the main opportunity. It is, in
19 itself, in this case, however, a significant opportunity. This is not like a case where, if you
20 are waiting for a bus and you miss the bus, there will be another one in due course. This is
21 not the case where, if you miss biting this cherry, there will be a later cherry. This is the
22 best chance to get some points across by their nature.

23 The point that was discussed with Mr Frazer, if I may say so, from Mr McIntosh's witness
24 statement was quite an important one in this regard. If we go back to Mr McIntosh, there
25 was a discussion with counsel about para.25. You will recall the discussion in particular
26 about para.25(a) and the question was about the need for these deadlines. Well, the point is
27 that you are setting these deadlines because your task at this stage is to try to get enough
28 over to the decision maker ahead of producing its provisional findings so that it can be taken
29 into account. The whole purpose of this stage in this case is that there are some matters
30 where there is a need to be able to affect what goes into the provisional findings. So this
31 refrain that we can wait until the provisional findings does not work.

32 Similarly, it was said in this connection, you can give high level responses - "high level"
33 was the term used - and achieve what is needed at this stage. I ask, what is a "high level"
34 response in this instance? How do you give a high level response to this sort of material? It

1 is not that sort of case. You have to look into the detail where these materials are so inter-
2 related and so complex. That is the first of her two main headline points, and that is the
3 answer to it.

4 Her second was to say that we had said that the CMA has failed to size up the task that we
5 have to do, that we are quite wrong about that, they did do that. There is nothing in the
6 quite lengthy evidence on their side about it. There is not actually even a sentence, and yet
7 it did form quite a significant chunk of Mr Pritchard's witness evidence. So, I took you to
8 his explanation of what was involved, but there is not a sentence in response to that. So, the
9 assertion that is simply repeated orally, that we took it into account, cannot be given weight.
10 So far as the legal test is concerned, Ms Demetriou took you to the *Eurotunnel* authority,
11 and the point there was that you have to accord great weight to what the decision maker, the
12 administrative agency, decides. Our point remains that the weight you give to the decision
13 maker's view is much less where it appears that the authority, the decision maker, actually
14 has not looked carefully at a factor which is undoubtedly important, and sizing up the task is
15 not the only factor, but it is an extremely important factor and there is not the evidence that
16 this was looked at with sufficient adequacy. That is different from the *Eurotunnel* kind of
17 case where the decision maker does look at a factor, so it has taken it into account, and then
18 the weight that it accords to it, having looked at it, is a matter for it. I can quite understand
19 that that is a different sort of instance, but that is not the problem facing the Tribunal today.
20 When dealing with our authority of *Reilly*, it was suggested again that there is another
21 opportunity to affect the CMA's thinking in due course, and similarly the references that
22 you were shown to the guidance of the CMA were all along the lines that the primary duty,
23 where you have to be especially careful on behalf of Applicants, arises later on. If that
24 arises only later on, there must be a more nebulous or shadowy or lesser duty now. That is
25 not a correct analysis. There are some matters where it is important now to take things
26 carefully into account and to give the Parties an adequate opportunity. It is not being said
27 on the CMA side, rightly, that there is no duty now, nor is it being said that the statute
28 envisages not giving central weight to what is fair and just to the applicant. What was
29 drawn attention to was that that factor was not explicitly mentioned in s.104 of the Act.
30 That is because it is central and hardly needs to be stated, that you must do what is fair to
31 the applicant and gives them a minimum time to put their case.

32 So far as the CMA guidance is concerned, there was a reference to the nature of working
33 papers, and what was said about those is that these are, by their nature, internal papers and
34 not even provisional views. It is necessary to recognise what, in practice, you are faced

1 with these working papers. You have some examples in bundle 2. These are very detailed
2 documents. They are, subject to the changes that will be made to them before the
3 provisional findings, the basis, the text, that will be adapted to become provisional findings,
4 and in due course a basis to become, potentially, a final report. These are not internal
5 scrappy documents at all.

6 The way to read these documents is also something which needs to be brought out. If you
7 could pick up bundle 2 and turn to any of these, because it is the same introduction for each
8 of them - I am looking at the GUPPI document in tab 1 - you will see that the text under the
9 date says, second sentence, "This paper should be read alongside the ..."----

10 THE PRESIDENT: Just before you read it, this entire document contains confidential material,
11 but I take it that rubric is not confidential in itself - I assume that is the case, is that right?

12 MS DEMETRIOU: Yes.

13 MR TURNER: I am sorry, and I am grateful for you pointing that out. The second sentence:

14 "This paper should be read alongside the Annotated Issues Statement and the other
15 working papers which accompany it. They are integrated in themselves and they
16 need to be read together."

17 The Annotated Issues Statement, Sir, as you have pointed out in the course of argument,
18 throughout adopts the practice of simply referring to the working papers and stating that that
19 is where important issues are discussed. It is not a self-standing document at all. It is
20 something that applies throughout it, but if you turn, for example, to p.6, para.20, and you
21 read the red text, that is the nature of the annotation and it shows the Tribunal why it is that
22 you have to look at these working papers as well, and understand them, and have digested
23 them, in order to be able to exercise your own rights.

24 Ms Demetriou said in answer to a question by Ms Walker that had two parts that, again, the
25 main opportunity to deal with all of this material will be after the delivery of the provisional
26 findings documents, and she said that the suggestion was being made on our side that
27 somehow the CMA will not be impartial or act fairly. Sir, your response in part picked that
28 up, but I need to emphasise, that is not right. We are making no allegation of either
29 potential future bias or of bad faith whatsoever. This is an objective, practical question of
30 common sense about what is possible in this statutory timeframe. The implications of the
31 statutory timeframe are many, but one of them is that, insofar as there is a constraint or
32 pressure later on down the line, that is a matter which points to why it is important to try to
33 get things right now. It is a matter of, therefore, practicality.

1 Ms Demetriou then turned to the internal timetable document exhibited to Mr McIntosh's
2 witness statement. The point being made there was that this is far more complex a question
3 than there simply being the need to deal with the one-week slippage. She made the point
4 orally - it is not in the evidence - that the CMA cannot progress work in parallel. She
5 developed a line of argument, not in the evidence, as to the difficulties that would thereby
6 be produced. It is not possible for me in response to deal with those assertions, other than to
7 say that those are simply oral submissions by counsel, but also to point out that it is not
8 merely the Group hearings or meetings that were duplicated in one cell below, other
9 elements of work were also duplicated.

10 The internal timetable did represent a doubling overnight of the timetable in the published
11 version that was posted on the website. On the new basis, the CMA needs until the end of
12 January to produce the provisional findings, and they say that this is precisely because of
13 the complexity that is involved. Again, that is a point which has something in it for us. It is
14 precisely because of the complexity involved that it shows why we, the Parties, need the
15 time too. They are the ones who have actually produced the working papers, supported by
16 the regression analyses and the new work. We are dealing with this fresh. If they need 20
17 working days or more to deal with it, we too, in order to process it, are going to need the
18 time.

19 Ms Demetriou in this connection did not deal and continues not to deal with the key point in
20 Mr Pritchard's statement at para.137, which I alluded to in opening. Essentially, what is the
21 point in forcing us to produce half-baked material and for them to crunch through it for the
22 purpose of the provisional findings? The overriding need is for us to be able to deal with
23 this material in the time that it takes, working furiously hard, in order to be able to give
24 responses on basic and fundamental matters. That is why we say we are asking for this
25 time, and what we have sought to demonstrate is that this is responsibly the minimum that
26 we can afford. That is never dealt with, and nor does she deal with the problems that are apt
27 to arise on the CMA side at the provisional findings stage if it turns out to be the case that
28 the documents which are then produced – at para.25(a) of Mr McIntosh's statement - are not
29 properly informed. There are problems being stored up by that, and again that point was
30 never addressed.

31 Third, to return to what I said earlier, nor does she address at any stage where it is shown
32 that we have been given enough time as a result of them sizing up the task that we face. It
33 is always put only on the basis of assertion.

1 Finally, before turning to the hearing, Ms Demetriou said, “Well, they are getting a longer
2 time to respond to some of these papers or surveys, such as the online survey.” I made the
3 point in opening that if you look at the survey in isolation from how it is used, that is of
4 little value.

5 Ms Demetriou said also that we were wrong to have referred to the difficulties with one of
6 these working papers, the fuel working paper, and confidential section talking about what
7 that gives rise to. She said that that had been discussed in two working meetings with the
8 economists. It would have been better had again that been a part of her evidence in
9 response, given that it was part of ours, but we have over the time of her submissions taken
10 instructions, and we reject what is said. Of the two methodologies which are discussed in
11 those paragraphs by Mr Pritchard, which are at 117 to 121, one was not mentioned at all -
12 that is the one in para.118(a) - and one was mentioned as being a potential methodology in
13 118(b). As to the second of those, it was not possible for our economists to do much with
14 that information about the type of work. It was necessary to have the information which is
15 in the second redaction in para.120. High level comment on this sort of work is simply not
16 something that we can provide.

17 Finally, I turn to the hearing. In relation to the hearing, if I may, Sir, you asked me before
18 I finished my opening address about the fact that on the 30th of November we had written
19 to the CMA, but we had not mentioned at that time that we could not attend the hearing.
20 May I invite the Tribunal, please, to pick up again the letter that I took you to of the 3rd of
21 December, because it was pointed out to me at the short adjournment that I had missed
22 something which ought to have been drawn to your attention. It is the letter dated the 3rd of
23 December, p.171, tab 29. You will see that, under the paragraph that I referred you to,
24 another important development is mentioned. What had happened, essentially immediately
25 before this letter was sent, you can read four lines down:

26 “In addition, the CMA has published this afternoon ...”

27 that is, therefore, just before the hearing -

28 “... the hearing summaries of two key complainants on which its working papers
29 rely heavily, Tesco and Morrisons (as well as three unnamed suppliers), plus the
30 transcript of hearings with the Consumer Council, the Food and Drink Federation,
31 the NFU, and so forth. It is abundantly clear that the Parties will not have had a
32 sufficient review and preparatory time to be in a position to discuss the issues
33 arising out of any of those in detail at the hearing tomorrow.”

1 What was drawn to my attention quite rightly is that this was essentially the straw that broke
2 the camel's back, we were being presented with this stuff less than 24 hours before the date
3 for the hearing as well.

4 The final matter is again to amplify something that I said earlier in opening, and if I can
5 perhaps ask just for this to be passed around. (Same handed) I did not have this to hand
6 before, so I took you to something indirect in a letter of the 30th of November. The point is
7 that between the Parties what was being said, as you see from this email, which has been
8 handed, I think, to my friends, in the second paragraph was that the CMA was, itself, saying
9 that the most appropriate way for the Parties to address misunderstandings and analytical
10 issues contained in some of the working papers to date is either orally at the hearings or in
11 writing through submission by the 7th of December. I show you that only to bring to your
12 attention that the CMA itself was not seeing these hearings as an opportunity for general or
13 high level points, but as an occasion on their side when analytical issues were also going to
14 be canvassed.

15 The hearing is the opportunity for the Parties to put across their case directly to the phase 2
16 decision makers. It does not require that to be fully in depth, but what it does require, Sir,
17 as you canvassed with me in my opening, is that there has been a sufficient time for us to
18 digest at least the working papers to make it useful and worthwhile so that we can put our
19 points across. We did not have that opportunity before.

20 One possibility that has been floated with me is this: because of the emphasis that is placed
21 on the next week by the CMA, there is a possibility, unless they are setting their face
22 against that completely, that if there is engagement on the purpose and focus of the hearing,
23 then next week could be a time when it is fruitful for that to be arranged, if possible, but the
24 indispensable necessity for us for all of the reasons I have given is that we do need to do the
25 analysis on the documents in the responses to these working papers, and that we have in
26 good faith put forward what is the bare minimum that we can do it by, and that is at the
27 fulcrum of what fairness requires.

28 Sir, unless we can assist further, those are our submissions.

29 MS DEMETRIOU: Sir, can I just give you some references, because Mr Turner repeatedly said
30 that we do not have any evidence sizing up the task. Can I just refer you to paras.51 and 79
31 of Mr McIntosh's statement. I am not going to take you to them, but it is wrong to say that
32 the CMA have not had regard to the nature of the task.

33 THE PRESIDENT: 59 and----

34 MS DEMETRIOU: 51 and 79.

1 THE PRESIDENT: 51 and 79, thank you very much. Well, as we said at the outset, we shall
2 now rise to consider if we can give a ruling today. We will certainly need half an hour. We
3 will let you know if we need any longer, and then you will be called back into the Tribunal.

4 (Short break)

5 THE PRESIDENT: Though it concerns a narrow issue, we have not found this an easy case to
6 decide, and we would like to pay tribute to the advocates on both sides for the very clear
7 and persuasive submissions that they have formulated and presented to us prepared at very
8 short notice.

9 The case is very fact specific, and certainly should not be regarded as in any way a
10 precedent for any future case. We have concluded, for reasons that we will set out in a full
11 judgment, that given the size and complexity of this merger and the corresponding number,
12 complexity and inter-relationship of the CMA working papers and the role that the
13 responses to the working papers plays in influencing the provisional findings, the process by
14 which the Applicants were ultimately given only until 9 am on the 17th of December to
15 submit responses to the working papers was unfair, and that the decision to that effect
16 should be quashed.

17 It is not for us to direct an alternative timetable. We have been effectively invited to give
18 some guidance. We can say that we may have come to a different view if the time allowed
19 was to close of business on the 21st of December, and we are certainly not able to say that
20 fairness necessarily requires that the Applicants be given in part to the 4th of January, as
21 they would wish.

22 As regards the main hearing, we do not accept that it is unfair just because a main hearing is
23 scheduled on a date before responses to the working papers are to be provided, or can be
24 provided, but in this case the decision to hold the main hearing in the week of the 10th of
25 December at the same time as what we have found to be an unfair requirement to produce
26 responses to working papers by 9 am on the 17th of December was, in our judgment, for
27 that reason unfair.

28 We note the suggestion in the final submission by counsel for the applicant, that the
29 Applicants would be prepared to attend a main hearing next week. We do not know, of
30 course, if that is suitable for the Group concerned with the merger, but we have said, in any
31 event, even without that suggestion from the Applicants' Counsel, that we can see no
32 unfairness in the holding of a main hearing next week.

1 Finally, we hope that now that this matter is determined, the Parties can put it behind them
2 and proceed to have a constructive engagement on the substantive issues raised by the
3 proposed merger, which is a case of great public interest.

4 Yes, Mr Turner?

5 MR TURNER: I am very grateful to the Tribunal, and repeat what I said at the outset of the
6 gratitude I believe on behalf of all Parties for you sitting so quickly and indeed so late.
7 I should clarify that we, in view of the Tribunal's ruling, will not be asking for costs. We
8 wish to pursue a constructive relationship. This is an important ongoing matter and we will
9 take to heart what you said at the end of your remarks.

10 THE PRESIDENT: Thank you.

11 _____