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6 **IN THE COMPETITION**
7 **APPEAL**
8 **TRIBUNAL**
9

Case No. : 1380/1/12/21

10 Salisbury Square House
11 8 Salisbury Square
12 London EC4Y 8AP
13 (Remote Hearing)
14

Monday 19th July 2021

15
16 Before:
17 The Honourable Mr Justice Marcus Smith
18 Bridget Lucas QC
19 Professor David Ulph CBE
20 (Sitting as a Tribunal in England and Wales)
21

22
23 **BETWEEN:**
24

25
26 BGL (Holdings) Limited & Others
27

28 -v-
29

30 Competition and Markets Authority
31

32 **A P P E A R A N C E S**
33

34 Daniel Beard QC and Alison Berridge (On behalf of BGL)
35 Ben Lask and Michael Armitage (On behalf of Competition and Markets Authority)
36

37 Digital Transcription by Epiq Europe Ltd
38 Lower Ground 20 Furnival Street London EC4A 1JS
39 Tel No: 020 7404 1400 Fax No: 020 7404 1424
40 Email: ukclient@epiqglobal.co.uk
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1 **Monday, 19th July 2021**

2 **(10.30 am)**

3 **MR JUSTICE MARCUS SMITH:** Good morning, everybody. I must begin with
4 a customary warning. These proceedings are being live-streamed, but
5 although they are remote, they are otherwise as if in open court, and the usual
6 rules and courtesies apply. In particular, the proceedings, whilst being recorded
7 here at the Competition Appeal Tribunal, that is the only recording that should
8 be taking place and it would be very wrong for anyone to photograph, record or
9 transmit these proceedings. I know that won't happen, but it is a warning I give
10 before every hearing.

11 More helpfully, we have seen and read your very helpful written submissions and we
12 have before us on our screens the electronic case management bundle with
13 the agenda and the various other documents which we have gone through.

14 Inevitably, it will have been at a fairly brisk clip, but you can take it that we are very
15 familiar with the important documents in that bundle. I hope that assists by way
16 of an indication as to how Counsel can approach this.

17 It seems to us that we should deal with matters according to the agenda on an item by
18 item basis and what we will try to do is give a ruling to the extent it is necessary
19 after each agenda item, and then we will move on to the next. So it may be we
20 will have to go into the retiring room to discuss, but that's how, subject to
21 Counsel's views, we are minded to proceed.

22 **MR BEARD:** We are entirely content with that. I think the first item on the agenda
23 would be what's loosely referred to as the FCA market study material. I may
24 be able to deal with this relatively shortly, because, subject to anything the
25 Tribunal may say, this is not a matter where any directions are being sought.
26 In the light of the various statements and concessions made by the CMA about

1 the FCA material in their most recent letter, which for your notes is in B1,
2 pages 15 to 17 -- I am sure you will have seen this, but it is the further
3 responses to further questions asked by BGL of the CMA in relation to the FCA
4 material.

5 That means, in a way, this issue does not need to be pursued further, unless the
6 Tribunal wishes us to. I just want to make one or two remarks about this
7 material. It was obviously flagged in our Reply, and there's clearly no objection
8 from the CMA, quite rightly, from our relying on this material. That's obviously
9 the correct approach, since it wasn't available previously.

10 The fact that the CMA are seeking to suggest in this correspondence that none of this
11 really matters is something I just want to highlight now. We want to raise it
12 clearly, this issue, because it is a significant matter for trial.

13 Obviously, there will be an opportunity for submissions in due course, but in essence
14 what we have here is a situation where in the Decision the focus of the alleged
15 anti-competitive effects is on the so-called promotional deals.

16 Now, in the appeal, obviously, we have explained why there was not an appetite for
17 promotional deals and why the analysis of whether there might have been
18 expected to be more of them in the absence of wide MFNs is actually flawed.
19 So that is dealt with in the grounds. But this FCA material -- and this is the FCA
20 operating as a competition regulator in this context -- it shows something else.
21 It is showing that the CMA failed to consider whether promotional deals were,
22 in fact, a good thing in competition terms. Obviously, that is extraordinarily
23 important potentially, in circumstances where their whole case is there were
24 adverse effects on competition here, but the FCA material goes further than
25 that. The FCA material is actually saying that promotional deals are a bad
26 thing.

1 Now, when I say "promotional deals", I am talking about the promotional deals
2 identified in the Decision, because we recognise entirely that what the FCA is
3 not saying is that there is no scope for discounting. What the FCA is saying is
4 that if you discount in relation to new business, that must be replicated in
5 relation to renewals business. But the reason this is so significant for our case,
6 and the recognition, the concession by the CMA in their most recent letter is
7 important, is because they recognise that all of the promotional deals in our
8 case are new business only promotional deals.

9 It is also important to note that the FCA has been considering material across the
10 period of this alleged infringement in reaching these conclusions.

11 So what we are saying is we have set out our case to date why the CMA were wrong
12 in relation to promotional deals being actually in any way hampered by the
13 operation of wide MFNs, but the FCA analysis is saying more than that. Even
14 if they had theoretically been hampered, that is not a good thing in competition
15 terms, given the nature of these promotional deals.

16 As I say, this is a matter for submissions in due course. I can go through all the
17 relevant references and so on, but I am not sure that's necessary. We just want
18 to flag it, because what we do not want is a suggestion that we are bringing this
19 up somehow at the last minute in skeleton arguments and so on.

20 That's all I need to say in relation to it. Mr Lask and the CMA have said "not seeking
21 any directions". We are not seeking any directions. I hope that, in very brief
22 outline, sets out our position in relation to this. As I say, happy to deal with any
23 queries or issues the Tribunal may have in relation to it and take you to the
24 documents, if useful.

25 **MR JUSTICE MARCUS SMITH:** Well, thank you, Mr Beard. Mr Lask, obviously I will
26 want to hear from you, but it might assist if I set out how we view this, because,

1 like the parties, we see this as a matter not for today but for the hearing in
2 November.

3 It seems to us that the decision or the market study by the FCA is something which of
4 itself is clearly not for debate at the substantive hearing in November. What is
5 for debate is the question of whether the matters found in the FCA's market
6 study are of significance when considering the CMA's Decision which is under
7 review.

8 Now, it seems to us that this is a matter which is for either cross-examination or
9 submission and we will permit, subject to what you say, Mr Lask, the matter to
10 be explored as material that can be used by the Appellants to articulate their
11 case. In other words, we are very happy for the market study to be deployed
12 as a piece of evidence forensically in order to deal with the point or case that
13 the Appellants have advanced, and that I think is Mr Beard's point. He is putting
14 you on notice, and has done so in the Reply and correspondence, that this is
15 material that his clients regard as significant and which will form part of the
16 attack that is made on the Decision. That, I think, is the point under debate.
17 Our provisional indication is we are very happy for that attack to be made.
18 Whether it succeeds or not is not a matter for today, and provided I think the
19 CMA is happy for that to be clear, then we don't need to worry too much.

20 It goes without saying, of course, we are not accepting in any way, shape or form that
21 Mr Beard is right. This may be a matter that is either irrelevant or wrong or any
22 number of ways in which it may not matter, but that, as I say, seems to us not
23 to be a matter for today but for November.

24 So, Mr Lask, with that steer, obviously we need to hear from you.

25 **MR LASK:** Sir, thank you. I am grateful for those indications. I can respond very
26 briefly. Firstly, in relation to the correspondence we, of course, don't accept

1 that the CMA has made any concessions in that correspondence, but we don't
2 say that's a matter for today.

3 Mr Beard has not pursued the suggestion that the replies given by the CMA are in any
4 way inadequate. So I think that can be put to one side.

5 In principle, the CMA does not object to the FCA material being deployed at trial,
6 subject only to one issue that I will flag up now so that it is on everyone's radar,
7 and it is this.

8 It is not entirely clear to us, notwithstanding the Reply, how this argument fits into
9 BGL's case because the nub of the submissions made just now by Mr Beard
10 was that, according to the FCA, promotional deals are, in fact, adverse to
11 consumers and competition.

12 In my submission, that comes dangerously close to suggesting that if the wide MFNs
13 restricted competition by restricting the use of promotional deals, that was
14 a good thing, because they thereby protected consumers from the harm that
15 BGL says promotional deals can cause. Of course, that is an Article 101(3)
16 case. There is no Article 101(3) case pursued by BGL on this appeal. Indeed,
17 there was no evidence put forward in support of an exemption during the
18 investigation. So I simply flag that up in order to make clear that it is not entirely
19 clear to us how these matters fit into BGL's case. We don't object in principle
20 to BGL relying on the FCA documents at trial, but we do query their relevance.

21 **MR JUSTICE MARCUS SMITH:** Well, thank you, Mr Lask. That's very helpful.
22 Mr Beard, before you come back --

23 **MR BEARD:** Of course.

24 **MR JUSTICE MARCUS SMITH:** -- let me again throw in our provisional sense of
25 where this is going. It goes without saying that we have pleadings for a reason,
26 and it seems to us that what we are saying is that it is not quite open season,

1 but we see why you want to articulate these points at the hearing. But if Mr Lask
2 or Miss Demetriou, if she is there in November, if they say: "Look, this is a point
3 that you have not properly articulated in the pleadings, in other words, it is not
4 a point that's open for you to take", that's something we will probably deal with
5 at the end of the hearing, rather than the beginning. In other words, we will let
6 you make your points, cross-examine or by submission. If there is an argument
7 by the CMA that this is a point not open for you to take, it seems to us that we
8 would hear this material *de bene esse*, whether it is submission or evidence,
9 and we will either reach a view and express it at the end of the three weeks or
10 we will take it away and deal with it as part of our judgment at the end of the
11 day.

12 What I don't want to do is either close out any objections that the CMA may have at
13 this stage, nor indicate to you that your points are closed out. It seems to me
14 that the parties need to work out their differences before the hearing. If there
15 is something we can assist on, then obviously we will assist, but if it is simply
16 a debate that is best had in November, and for my part I feel that it is, then that's
17 what we will do, hear it *de bene esse* in November.

18 **MR BEARD:** I think, just taking matters in stages, in our Reply, which is part of the
19 pleaded case, we have relied on this material. If Mr Lask is saying that the
20 indications we gave in that Reply are not sufficiently clear, then we are willing
21 to consider his concerns in relation to that and respond to them, but we have
22 pleaded these matters in a formal sense, albeit that the issues raised go beyond
23 points inevitably that are raised in our appeal in relation to the specific grounds.

24 So we entirely accept that, that they go beyond the grounds as put forward, but we
25 have set them out in the Reply.

26 Now, if he is saying that he wants more detail in relation to that, then fine. He can ask

1 us. If his position is that he is concerned that this may stray into a 101(3) or
2 a section 9 positive case, I think one needs to be clear. What we are saying is
3 the CMA needs to make out its case that there were appreciable adverse
4 effects. If the FCA is saying the very conduct that the CMA has identified
5 actually does not give rise to adverse effects, or those adverse effects putatively
6 are minimal, because what is being supposedly stymied is not beneficial, that
7 is not a section 9 or 101(3) argument. It is an argument that the CMA have not
8 made out their case.

9 There is a further aspect to this, as I anticipated in those opening remarks, that the
10 failure of the CMA actually to consider these issues, because they have not
11 done, is also a further criticism of the CMA's position.

12 We have set that out. We think that's clear. If Mr Lask and the CMA are in any way
13 unclear, as I say, we are happy to respond to them.

14 We are also happy with the Tribunal's course of action in those circumstances, but we
15 say that that is transparently clear as to what we are saying in relation to these
16 issues. In other words, we don't need to go as far as saying it's a section 9 or
17 101(3) justification here. It is for the CMA to show that this supposed restriction
18 on the availability of promotional deals was, in fact, adverse.

19 **MR JUSTICE MARCUS SMITH:** Just to be clear, though, Mr Beard, if it is the position
20 that you want to go as far as justifying matters on a 101(3) basis, is that
21 something you want to do or are you, in a self-denying ordinance, not going so
22 far?

23 **MR BEARD:** At the moment we don't see the need for it, because we see that as
24 being the fifth wheel on the carriage. What you will be considering here is
25 whether or not the CMA have made out its case on adverse effects. We are
26 saying: "Even if you are right on everything else, which you are not, there is

1 not an adverse effect by this notional fall in promotional deals."

2 If you then say, well, then, the way to deal with this is to say there were adverse effects
3 by the restriction on promotional deals, but it must be justified, we say that's not
4 the right approach.

5 If Mr Lask is going to say: "Actually, all of this should be dealt with under the head of
6 101(3) or section 9", then we want to know that, because if that is his objection
7 to it, then yes, we would want to put in protective arguments in relation to it.

8 As I say, the primary way we deal with it is this is about adverse effects. What the
9 FCA are saying is that these things are massively confusing to people, and all
10 they are doing is adding a process operated by insurers who dominate this
11 market, which undermines benefits to consumers. That is not a good thing for
12 consumers or for competition.

13 **MR JUSTICE MARCUS SMITH:** Well, I understand. If I can be layman like about
14 this, what you are saying is the substance of the point that really goes to the
15 question of are there or are there not adverse effects, part of that point is that
16 promotional deals are potentially, in competitive terms, pernicious. I don't want
17 to say anything more than that, but that's your point.

18 **MR BEARD:** Yes.

19 **MR JUSTICE MARCUS SMITH:** You say it could be badged as either an attack on
20 the Decision, which, given this is an appeal, the Decision is your natural
21 classification, or if it was a different type of case, the badge 101(3) might well
22 apply, but you say it is not necessary.

23 **MR BEARD:** Yes.

24 **MR JUSTICE MARCUS SMITH:** That I understand. It seems to me that if the CMA
25 is happy with that approach, i.e. this is simply a question of nomenclature and
26 does not assist any further, then we can leave it be. If, on the other hand, the

1 CMA considers that there is a point to be taken about how far you can, without
2 asserting the 101(3) badge, take this point forward, then I do agree that needs
3 to be flushed out so that both sides know and the Tribunal knows how far there
4 is a dispute that will have to be resolved very early on in the hearing.

5 So, Mr Lask, I think over to you. I don't in any way, shape or form want to force the
6 CMA into taking a position now, because that wouldn't be fair, but I do think that
7 before the term ends it would be important to understand where the battle
8 lines are drawn on this, because if there is a genuine dispute about how far
9 Mr Beard can go in either making submissions or in cross-examining your
10 witnesses, and it is probably going to be both, then that's something which I
11 think at least we need to know as an issue this side of the summer.

12 **MR LASK:** That's helpful, Sir. If I could start by saying it is, of course, for BGL to
13 decide whether or not it wants to bring an Article 101(3) case at this late stage.
14 We can't indicate one way or the other whether it ought to do so.

15 **MR JUSTICE MARCUS SMITH:** No. Sorry. I think you misunderstand me. I am
16 not -- I think Mr Beard's position is he doesn't need it. He is saying this point
17 sits very comfortably in his general attack as simply an extra string to his bow,
18 if I can call it that, that he is perfectly able to make without asserting 101(3),
19 because the whole 101(3) question of justification goes into whether there is
20 an adverse effect or not. So Mr Beard's position is he doesn't need 101(3). It
21 is not a point. I think the real question is are you agreeing with Mr Beard's
22 classification of this, or are you saying that there is, in fact, a point in the
23 nomenclature that unless he amends to make the 101(3) point actually in his
24 Appeal Notice, he can't take certain points. That I think is the debate we are
25 having today.

26 **MR LASK:** Yes. Sir, thank you. If I can put it this way, we are not proposing to take

1 a formal objection to Mr Beard raising any of the arguments set out in his Reply
2 or indeed cross-examining on those, but we are reserving the right to argue that
3 those arguments are irrelevant to the case on adverse effects, and if they have
4 any relevance to Article 101 at all, it would be to Article 101(3). So no formal
5 objection, but we do reserve the right to say it is simply irrelevant to the case
6 they are actually running.

7 **MR BEARD:** Obviously I am not trying to keep Mr Lask or the CMA out of running
8 those points, but if they are going to maintain that these are matters that should
9 be dealt with under 101(3) or section 9 rather than under 101(1) or section 2,
10 then I think it is important that the CMA spell that out, because otherwise we
11 are going to end up with a situation where we get to skeletons. We submit
12 a skeleton, and the first time we understand what their supposed legal case on
13 101(3) is, is when they serve their skeleton and that will be too late.

14 So if they are going to say this is not relevant -- obviously on the factual matters, on
15 the role of the FCA, on the evidence, they can make any case about relevance
16 or wrongness or whatever else they want to do. That's obviously open to them,
17 but if they are going to take a legal point that says, "No, you have put this in the
18 wrong box", we want to know whether they are going to take that point, because
19 we need to anticipate that in our skeleton argument, otherwise we are just going
20 to get into a muddle in relation to this. We have set out our position as clearly
21 as we can. We have highlighted it at this CMC for these purposes.

22 If the CMA want a week or two to think about whether or not they are really taking this
23 point, fine. If they are going to, I would ask that the Tribunal push the CMA to
24 provide their response by the end of term that, Sir, as you were mooting,
25 because that way we will have an indication of both the argument and the
26 reasons for it that we can engage with.

1 **MR JUSTICE MARCUS SMITH:** We will finish, Mr Lask, on this, but I will give another
2 provisional indication to assist Mr Lask in the pushback.

3 It seems to me that there are two ways in which we can deal with this, and I am not
4 inclined to be prescriptive about how we do, but I think the consequences of
5 each route need to be clear now.

6 We can leave things as they are and the CMA stand with their position that you can
7 take the points you want and there will be an argument at the close that these
8 points actually are irrelevant. Now, to be clear, we would hear that argument,
9 but we would expect the CMA to take on board that if you have gone uphill and
10 down dale on certain points which you say fall within the non-101(3) part of your
11 case, we would be inclined to take that material into account, because we would
12 have heard the evidence and would only want to identify material that was to
13 be ignored if it very clearly fell outwith your case.

14 If, on the other hand, there is a clear point that is going to be taken, as it were, in
15 advance, it does seem to me that you are entitled, Mr Beard, to know what the
16 battle lines are. So, without in any way requiring the CMA to push back, it does
17 seem to me how we are going to take this material on board, how we are going
18 to treat it, is a matter that is going to be affected by the clarity of the objection
19 taken by the CMA in advance. So that way we will know whether there is
20 something we need to deal with either in November on the first day of the
21 hearing or whether we can, as is my inclination, leave it over to closing, where
22 you are really arguing about relevance rather than anything else.

23 Now that is putting the ball very firmly in the CMA's court. I am not saying that there
24 is not room for an objection in closing. I think there probably is, but it is going
25 to be a rather differently framed form of objection than if you make clear the
26 battle lines and we rule on them before the hearing.

1 **MR LASK:** Sir, thank you. Those points are well heard. May I suggest that the CMA
2 reflects on them over the next week or two and that, if we are going to adopt
3 the -- I think it was your second option, then we will make that clear in writing
4 before the end of term.

5 **MR JUSTICE MARCUS SMITH:** Well, Mr Beard, I don't think you can say fairer than
6 that.

7 **MR BEARD:** No. That's absolutely fine. If that is the CMA's position, I am grateful
8 for the indication by the Tribunal. I don't want to overplay this, because I think
9 it may be -- well, let's hope that this aspect, this issue is something of a storm
10 in a legal teacup.

11 **MR JUSTICE MARCUS SMITH:** No, that's my sense, that we are trying to
12 over-analyse something which actually I think is relatively straightforward, but
13 the last thing I want to do is to feel that any party is being closed out from taking
14 a procedurally good point. That's really what I want to avoid in terms of a car
15 crash.

16 **MR BEARD:** That's exactly what we want to avoid as well, given the ordering of
17 skeletons. So that's absolutely fine so far as we are concerned. I think that
18 concludes anything that needs to be dealt with in relation to the FCA documents
19 unless the Tribunal has any further questions, and we will leave those for
20 another day.

21 **MR JUSTICE MARCUS SMITH:** No. I should have said, because you can't tell -- you
22 probably can tell from the background -- Ms Lucas and I are present in the
23 same court room. So I can see whether she has questions. Professor Ulph is
24 not. He has much nicer pictures behind him than I have behind me, but it will
25 mean I have to ask him explicitly rather than looking at him across the
26 courtroom whether he has any points. So, Professor, do you have any points

1 before we move on?

2 **PROFESSOR ULPH:** No further points from me, no.

3 **MR JUSTICE MARCUS SMITH:** Thank you very much, in which case I think agenda
4 item 2 is the application on the CMA's part to adduce additional evidence.
5 Mr Lask, I think it is probably right for you to lead on that and for Mr Beard to
6 respond.

7 **MR LASK:** Thank you, Sir.

8 The CMA applies to file a short supplemental report from Professor Baker responding
9 to certain new analyses in what I will call Ralston 2, which is the second expert
10 report of Helen Ralston, dated 4th June 2021. The CMA's application is at
11 page 305 of the core bundle and it encloses Professor Baker's proposed
12 second report, which begins at page 320 of the bundle. As the Tribunal will
13 hopefully have seen, Baker 2, as I will call it, is short, carefully focused and
14 already in final form, should the Tribunal choose to admit it.

15 As set out in the CMA skeleton arguments to our application, what I propose to do,
16 subject to the Tribunal's views, is firstly elaborate briefly on each of those four
17 points and, secondly, if it would assist the Tribunal, walk through the relevant
18 parts of Ralston 2 and Baker 2 to show you the new analyses that
19 Professor Baker wishes to respond to and how he proposes to do it.

20 So beginning with --

21 **MR JUSTICE MARCUS SMITH:** Yes. Just to give an indication in terms of
22 an additional point that I think does matter, I mean, we obviously understand
23 the CMA's point that it is important to allow the experts to flesh out and deal
24 with points that arise before the hearing so that everyone can take that on
25 board, but I have to say the timing of this does trouble me slightly, because
26 what we have is 4th June 2021, as you say, Ralston 2 comes in. The experts

1 are meeting at this time, and the experts' meeting, as I understood it, took
2 place -- it may have been on several dates, but the experts met on 15th
3 June 2021. The joint memorandum on an extended date is signed off on
4 9th July. It is only on 6th July that this issue is first raised, page 336 of the
5 bundle. Then about a week later, on 15th July, Baker 2 is produced in the form
6 that we see it now.

7 My concern is that, whereas I would be much more open to Baker 2 coming in if this
8 point had been at least articulated in the first half of June so that it could be fed
9 into the process of experts' meetings and the joint memorandum, what we are
10 now faced with is a slightly unsatisfactory situation where the joint
11 memorandum is liable to be qualified and there is, entirely rightly,
12 an acceptance by the CMA that there may have to be a Ralston 3 to deal with
13 such points as arise out of Baker 2.

14 I suppose my concern -- I am putting it rather long-windedly -- is that really this game
15 should have stopped on 9th July. It seems to us quite disruptive for there to be
16 a further iteration in circumstances where the need for a rejoinder report really
17 ought to have been flagged in early June. That I think is a point that we would
18 require your assistance on, because I could not see really in the CMA's
19 application why it was the timing is this way rather than, as one might expect,
20 an issue being raised in the first fortnight of June.

21 **MR LASK:** Yes. I was proposing to deal with that in the course of my submissions.

22 **MR JUSTICE MARCUS SMITH:** I am grateful.

23 **MR LASK:** If it suits the Tribunal, I will come to it in the order --

24 **MR JUSTICE MARCUS SMITH:** Of course. I don't want to take you out of your order.

25 **MR LASK:** Thank you, Sir.

26 So dealing with the four limbs of the application, in very broad outline they are as

1 follows.

2 Number 1 is that Ralston 2 contains new analyses that Professor Baker had no
3 opportunity to respond to in Baker 1.

4 This is all set out in the skeleton. I think it is paragraph 4 of the skeleton.

5 Number 2 is that Professor Baker considers it important to respond to those new
6 analyses, and in my submission it is far better for him to do it in writing ahead
7 of trial.

8 Number 3 is that the joint expert statement was not and is not an appropriate vehicle
9 for his responses.

10 Number 4 is that permitting the application would cause no prejudice to BGL or indeed
11 the trial timetable. That is notwithstanding the points that you have just been
12 highlighting, Sir.

13 So I will elaborate on each of those four points. The first, as I say, is the new analyses
14 and the fact that Ralston 2 does contain a number of analyses that were not
15 contained in Ralston 1. I will show you some examples, but very broadly she
16 has, for example, introduced a new economic model based on academic
17 literature that was not cited previously. She has run new empirical tests in
18 an effort to demonstrate that her economic analyses are robust and she has
19 updated her existing analyses using entirely new data.

20 I will deal with those points in more detail when I walk you through the evidence, but it
21 is at least partly common ground that Ralston 2 contains new material. We
22 have highlighted that common ground in our application. It is right to say that
23 BGL describes it somewhat differently. BGL refers to it as "updated analyses"
24 or "refined analyses". In my submission it is not especially helpful to engage in
25 a semantic debate about how best to describe the material. The important point
26 is that in a number of places Ms Ralston goes beyond simply disagreeing with

1 Professor Baker, for example, on conceptual issues or how best to interpret
2 certain analyses, and introduces substantive analyses that were not contained
3 in Ralston 1, and which Professor Baker, therefore, didn't have an opportunity
4 to respond to in Baker 1.

5 Sir, if I may, I would like to illustrate that distinction for you. So if I could ask you,
6 please, to turn up Ralston 2, which is in the core bundle, and I would like to take
7 you to page 643. That's the beginning of the report.

8 **MR JUSTICE MARCUS SMITH:** Sorry. Which page?

9 **MR LASK:** It's 643 of the core bundle. That's the beginning of the report. What I want
10 to show you is an example of where Ms Ralston simply disagrees with
11 Professor Baker, which we would say is purely responsive and which
12 Professor Baker does not seek to respond to, and then contrast it with
13 an example of the new analysis.

14 I would emphasise, Sir, that it's not difficult to find material in Ralston 2 that
15 Professor Baker does not seek to respond to. Ralston 2 is 177 pages long
16 and extremely detailed, and Professor Baker has been restrained and selective
17 in his proposed report, responding only to analysis that is clearly new and which
18 he considers important to respond to by way of a supplemental report and he
19 has in my submission also responded as concisely as possible.

20 So, Sir, if I could ask you to go to section 5 of Ralston 2, which is at page 753, you will
21 see that this section concerns the econometric evidence.

22 **MR JUSTICE MARCUS SMITH:** Yes.

23 **MR LASK:** Then at 759 there is section 5.B. Mine has not gone -- sorry. Page 759.
24 Yes, section 5.B, "Spillover bias". By way of context in Professor Baker's view
25 spillover bias is a serious problem for Ms Ralston, because it fatally undermines
26 her econometric analyses. In short, he says it means that the non-covered

1 insurers, those who didn't have wide MFNs, cannot be used as a counterfactual
2 against which to test the impact of the removal of the wide MFNs on covered
3 insurers.

4 Because it is so important, spillover bias, in Ralston 1, and we see this from
5 section 5.B.2 of this report, Ralston 2, which is at page 770, you will see at
6 paragraph 5.48 Ms Ralston explains that in her first report she conducted
7 a number of empirical tests to verify whether her results were robust to spillover
8 effects. As you will also see from this section of her report, those tests were
9 criticised by Professor Baker in Baker 1.

10 So what she does here in section 5.B.2 is she deals with Professor Baker's criticisms
11 and to some extent she disagrees with them. So you will see, for example, at
12 paragraph 5.50 she responds to his criticism of her first test. It may be better if
13 I allow the Tribunal just to read paragraph 5.50.

14 **MR JUSTICE MARCUS SMITH:** Yes, of course. (Pause.)

15 **MR LASK:** Then similarly at 5.54 Ms Ralston disagrees with Professor Baker's
16 criticisms of her second test.

17 **MR JUSTICE MARCUS SMITH:** Yes.

18 **MR LASK:** So Professor Baker is not seeking to engage in a ping-pong with Ms
19 Ralston on those matters where she is disagreeing with his criticisms.

20 Then if the Tribunal scrolls down to page 772, it will see the subheading 5.B.3,
21 "Additional robustness test for spillover bias". This is where Ms Ralston does
22 something different.

23 **MR JUSTICE MARCUS SMITH:** Which page again?

24 **MR LASK:** Page 772. You will see the subheading 5.B.3 two-thirds of the way down
25 the page, "Additional robustness test". Here she does something different
26 because she introduces additional robustness tests for spillover bias that were

1 not contained in her first report. In 5.61 she explains there were actually two
2 additional tests.

3 I am going to come back to this during the walk-through, but I wanted to show it to you
4 now, because it is a distinction we draw between the original material and what
5 we are calling new analysis that Professor Baker should be allowed to respond
6 to.

7 **MR JUSTICE MARCUS SMITH:** Just to be clear, Mr Lask, because I wonder if there
8 is not a shortcut to this, your response to this so-called new material is simply
9 to say that it doesn't hold water. It is not to bring in a new point.

10 **MR LASK:** Professor Baker is not seeking to bring in new points. He is seeking to
11 respond to what we call the new analyses and set out how he thinks it impacts
12 on his views as set out in Baker 1.

13 **MR JUSTICE MARCUS SMITH:** I understand. I mean, in other words, if this was not
14 a matter of technical complexity, it would be simply a question that you would
15 be cross-examining on in due course in order to demonstrate that this reply
16 evidence was wrong. Would that be right?

17 **MR LASK:** There are certain matters that are raised for the first time in Ms Ralston's
18 second report on which we will seek to cross-examine. We have sought to be
19 very careful in identifying those matters on which we think we need to go
20 beyond that and on which Professor Baker needs to be able to set out his views
21 in writing. It is more a matter of if he didn't set it out in writing, he would have
22 to give oral evidence on it. Given the complexity, that would be less helpful we
23 would say to the Tribunal and the parties.

24 **MR JUSTICE MARCUS SMITH:** My point is this. No-one on the Tribunal wants to
25 close you, the CMA, out from cross-examining Ms Ralston and sometimes that
26 cross-examination requires you to be able to put some form of competing

1 analysis to in this case Ms Ralston in order to test the views she has advanced.

2 Now if that's the purpose of Baker 2, then I am wondering whether this is material you
3 articulate in advance, as you have done, purely and simply as a vehicle to put
4 to Ms Ralston in due course, which, if she accepts, becomes actually her own
5 evidence, and which, if she doesn't accept, we may need to hear
6 Professor Baker on in due course.

7 In other words, what I am anxious to do is to distinguish between material that is expert
8 evidence that is in at the moment and needs to be worked out versus proper
9 notice of points that are being taken in order to cross-examine effectively, which
10 in this sort of case requires actually a lot of work and a lot of notice in advance.
11 So what I am really wondering is how far this is not actually advance notice
12 produced by the CMA out of fairness to the Appellants in order to ensure
13 efficient cross-examination and isn't something that ought to be admitted as
14 evidence per se.

15 **MR LASK:** Well, Sir, it may be that's the sort of question that is easier to grapple with
16 when going through the material. It will be easier for the Tribunal to see what's
17 actually in Baker 2, but --

18 **MR JUSTICE MARCUS SMITH:** Fair enough. What I have in mind is when I did
19 *BritNed* over six weeks, there were multiple occasions on which I or the
20 advocates raised a question and both experts toddled off and ran the numbers
21 through their computers and came back with material which they adduced to
22 the Court and then were cross-examined on. It happened on a sort of iterative
23 basis. It would have been nice if it had happened well in advance, but in that
24 case it didn't. My sense is this may be that sort of material; in other words, it is
25 material that you need to put the Appellants on notice of, and you have done
26 so, but it would be perhaps too much to say it comes in at this stage as

1 a formally served expert report to which then the Appellants will feel obliged to
2 have to respond. We then get a process that drags out ad infinitum. If it is
3 a process of saying, "Ms Ralston, you are wrong and this is why", I am not sure
4 we need to admit this as a formal report now as opposed to making it clear this
5 is something on which she is going to be cross-examined and this is the basis
6 of the cross-examination. I put it out there as a way of shortening matters, but
7 obviously you must take your own course in terms of what it is the CMA is
8 asking for.

9 **MR LASK:** Indeed, Sir. We have, of course, been mindful of the balance between
10 written evidence and cross-examination in the course of preparing
11 Professor Baker's report and preparing our application. Our position is that we
12 ought to be allowed to put in the written report. We appreciate that in doing so
13 it will serve as advance notice of certain lines of cross-examination. In my
14 submission, so be it. Our strong preference is to have this in as part of our
15 evidence rather than merely as advance notice of cross-examination.

16 Indeed, the concern would be that there are parts of Baker 2 that might not be
17 considered appropriate to be put in cross-examination only, without them being
18 formally incorporated within Professor Baker's evidence.

19 **MR JUSTICE MARCUS SMITH:** I see.

20 **MR LASK:** It is a little difficult to answer it in abstract. It may be the position becomes
21 clearer to the Tribunal when I take you through Baker 2.

22 **MR JUSTICE MARCUS SMITH:** Yes. Okay.

23 **MR LASK:** Sir, I was dealing with the first limb of my application. I was about to say
24 this. BGL contends that the additional analysis in Ralston 2 should not be
25 considered new, because it is simply responding to Baker 1. There is a very
26 strong flavour of that in the document that was put in at 9.15 this morning.

1 In my submission, that misses the point. The analysis in Ralston 2 may well be
2 responsive to Baker 1, but that does not mean it is not new. As I have shown,
3 there is a difference between simply disagreeing with Professor Baker's
4 criticisms and responding to those criticisms by introducing new source
5 material, new data or new analysis that builds on the existing data. What Ms
6 Ralston is effectively saying in Ralston 2 is "You don't like that analysis, so try
7 this one for size".

8 BGL also contends that's all very appropriate for reply evidence. That's what reply
9 evidence is for. Again, I submit that's not the relevant question. The ultimate
10 question is whether it is reasonable and proportionate for Professor Baker to
11 have the opportunity to respond, and we say it is, because there is analysis and
12 source material which he wasn't able to address in Baker 1.

13 Sir, I would add this. Much of the new analysis in Ralston 2 is in substance as much
14 responsive to the Decision as it is to Baker 1, and in those circumstances there
15 is no reason why it couldn't have been included in Ralston 1. I would like to
16 show you an example of that, if I may, Sir.

17 **MR JUSTICE MARCUS SMITH:** Of course.

18 **MR LASK:** You ought still to have Ralston 2 open. If you go to page 706, you will see
19 the subheading, section 3C.2, "partial coverage" and it is common ground, as
20 Ms Ralston says, that market coverage is relevant to at least the magnitude of
21 any anti-competitive effects, but Ms Ralston goes further than that, and says
22 where the cover is only partial it means that any such effects would unravel
23 completely.

24 To support her position, she introduces at paragraph 3.24 a new economic model
25 derived from the literature on partial coverage in cartels.

26 At 3.25 she then applies that model to the present facts. But the dispute over

1 unravelling was firmly on the table at the time of the Decision. Just to illustrate
2 that very briefly, this is not the core bundle. This is bundle 2A, where the
3 Decision is contained.

4 **MR JUSTICE MARCUS SMITH:** Yes.

5 **MR LASK:** If the Tribunal goes to page 730 in this bundle, it will see Annex Q to the
6 Decision.

7 **MR JUSTICE MARCUS SMITH:** Yes.

8 **MR LASK:** Subheading "coverage".

9 **MR JUSTICE MARCUS SMITH:** Yes.

10 **MR LASK:** You will see there that the CMA notes BGL's submission that partial
11 coverage leads to unravelling, and goes on to reject that submission, referring
12 to some economic literature.

13 In my submission, there is no obvious reason why Ms Ralston's new partial coverage
14 model couldn't have been introduced in Ralston 1, and certainly no reason has
15 been given by BGL, as far as I am aware. Of course, if it had been,
16 Professor Baker could have responded in Baker 1.

17 Sir, there are other examples, but I am not proposing to take the Tribunal's time up
18 with them. That's my first limb.

19 My second limb is this. Professor Baker did not have an opportunity to respond to the
20 new analysis when he was producing Baker 1, because it did not yet exist. He
21 considers it important to do so now.

22 In my submission, it is much better for everyone if he does so in writing in advance of
23 trial. It means that Professor Baker is able to set out his views actually in a form
24 that is more appropriate for addressing complex concepts. It means Ms Ralston
25 and BGL have notice, not only of Professor Baker's outline position on the new
26 analyses, which one does see in the joint statement, but the detailed reasoning

1 that underpins it, and it means also that the Tribunal is better prepared for trial,
2 and able, for example, to formulate questions on Professor Baker's evidence in
3 advance.

4 Sir, in support of that, may I show you the ruling in *Generics*, which is in bundle 3 of
5 the hearing bundle. It is at tab 27. It begins on page 2 of this bundle:

6 "Ruling on expert evidence."

7 It is paragraph 5 that I rely on, where the President sets out three considerations.

8 Perhaps I can allow the Tribunal just to read paragraph 5.

9 **MR JUSTICE MARCUS SMITH:** I think we have it set out.

10 **MR LASK:** You are familiar with it. The President recognises the benefit of having
11 expert views set out in advance. I should say in relation to the ping-pong issue,
12 I submit that permitting Baker 2 would not generate an endless ping-pong. The
13 CMA is content, in principle, for Ms Ralston to respond, but unless she
14 introduces yet further new analysis, that ought to be the end of it. So there is
15 no concern, in my submission, in that regard.

16 Now, we don't understand BGL to disagree that it is better for everyone to have
17 Professor Baker's evidence set out in writing ahead of trial.

18 What they do say, however, is that: "Well, some of the new analyses in Ralston 2 is
19 responsive to material in Baker 1 that was not in the Decision."

20 The essential response to that is that is irrelevant. BGL has not objected to the
21 admissibility of anything in Baker 1, despite various markers laid down
22 by Mr Beard at the first CMC. Baker 1 was served in April, and BGL did not
23 even mention this point until early (inaudible).

24 For the avoidance of doubt, we don't accept there is anything objectionable in Baker
25 1. All Professor Baker does in that report is defend the Decision against the
26 attack in Ralston 1. But in any event, the important point is this. Ms Ralston

1 was able to respond to anything new in Baker 1 when she produced Ralston 2.
2 So there is no argument that she was put at any disadvantage or that BGL were
3 put at any disadvantage. We say Professor Baker and the CMA should be
4 afforded the same privilege. So, Sir, that was my second limb.

5 **MR JUSTICE MARCUS SMITH:** Yes.

6 **MR LASK:** My third limb is this. Once it is accepted that it is better to have
7 Professor Baker's responses set out in writing ahead of trial, it follows, in my
8 submission, that this ought to be done by way of a supplemental report.

9 Given the nature of Ms Ralston's new analyses, Professor Baker's proposed
10 responses are reasonably detailed. In my submission, it is not helpful to try to
11 shoehorn those responses into the joint statement.

12 We have made this point in our application and skeleton argument. The joint
13 statement should be a convenient and user-friendly snapshot of the experts'
14 position, not the primary repository of their evidence on complex matters,
15 because if it becomes that, it becomes unbalanced and unwieldy.

16 Sir, I would like to show you an example in support of this submission as well, please.

17 It requires us to go back to Ralston 2 and page 794. This is section 5D.2,
18 "Violation of the common trend assumption".

19 The debate between the experts here is whether the tests conducted by Ms Ralston
20 establish that the common trends assumption holds for her econometric
21 analyses. The common trends assumption is the assumption that covered and
22 non-covered insurers reacted in a comparable way to common external factors
23 before the wide MFNs were removed. It is common ground that the assumption
24 has to hold in order for her analysis to be reliable.

25 What one sees in this section, 5D.2 of Ralston 2, is that she presents new tests in
26 an effort to demonstrate that the assumption holds. You can see these new

1 tests described at paragraph 5.141 onwards. This is page 796.

2 **MR JUSTICE MARCUS SMITH:** Yes.

3 **MR LASK:** She describes the tests there, and the results are set out in figure 5.2,
4 which is on page 798.

5 **MR JUSTICE MARCUS SMITH:** Yes.

6 **MR LASK:** I should say it is common ground that this part of Ralston 2 contains new
7 analysis. It is common ground, according to BGL's letter of 9th July. My
8 understanding is that the table put in this morning simply expands on that,
9 rather than withdraws any concessions previously made.

10 Then, Sir, if I could ask you to turn up the joint experts' statement. The point here is
11 to show you the point Professor Baker wishes to give to this new analyses is
12 not suitable for the joint statement. The joint statement is at page 959 of the
13 core bundle.

14 **MR JUSTICE MARCUS SMITH:** Yes.

15 **MR LASK:** This is proposition I.3.

16 **MR JUSTICE MARCUS SMITH:** Yes.

17 **MR LASK:** What Professor Baker does here, you will see in the final column where
18 he disagrees with the proposition, and in the final column in the second
19 paragraph he outlines the view that the new tests arbitrarily truncate the
20 observations, but in any event still show significant leads.

21 **MR JUSTICE MARCUS SMITH:** Yes.

22 **MR LASK:** Where leads are significant, this indicates a violation of the common
23 trends assumption.

24 Then, Sir, if you can turn, please, to Baker 2, I will show you how he elaborates on
25 that position in his proposed second report. The relevant page in Baker 2 is
26 page 330.

1 **MR JUSTICE MARCUS SMITH:** Yes.

2 **MR LASK:** You will see section F, "Reply to new leads test". He elaborates on the
3 outline view in the joint statement. He elaborates on it quite considerably at
4 paragraphs 31-37. I don't know if the Tribunal wants to take a moment to scan
5 those paragraphs.

6 **MR JUSTICE MARCUS SMITH:** Yes, we had better. (Pause.)

7 **MR LASK:** I ought to say, and this is no criticism of BGL, BGL's solicitors have not
8 had the opportunity in the time available to indicate what is and is not
9 confidential within Baker 2, and what that does is it limit my ability to read
10 anything out, or indeed summarise it. If we need to go into closed session, we
11 will have to, but I am going to try to avoid that.

12 **MR JUSTICE MARCUS SMITH:** No. I think best if you give us things to read on
13 screen and make your submissions then on the basis of what we read.

14 **MR LASK:** Thank you, Sir. What I would say at this point is that paragraph 35 is
15 an example, in my submission, of the sort of evidence that does need to be set
16 out in a supplementary report from Professor Baker, rather than simply put to
17 Ms Ralston in cross-examination.

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MR LASK:** In my submission, this illustrates the point that it wouldn't be appropriate
20 or sensible to try to squeeze this level of detail and complexity into the joint
21 statement. I should say it is not altogether clear whether BGL seriously argue
22 otherwise. The point was raised in correspondence. I don't think it is repeated
23 in the skeleton, but we shall see what Mr Beard has to say. Sir, that was the
24 third limb.

25 The fourth limb is this. Granting CMA's application would not, in my submission, cause
26 any prejudice to BGL. Baker 2 is short. It is 14 pages long. It is carefully

1 focused. It is already in final form. As I have said, the CMA is content in
2 principle for Ms Ralston to submit a short response, if so advised. So BGL is
3 simply wrong to say in the skeleton argument that the CMA is seeking to have
4 the last word. We are not. We have proposed a timetable for any Ralston 3.
5 This is at the end of the application, and the timetable would be 24th August for
6 Ralston 3, which is five weeks away, and for any updates to the joint statement
7 to be three weeks thereafter on 14th September, which I believe is three weeks
8 prior to BGL's skeleton.

9 It appears from BGL's skeleton for this hearing that, subject to their objection to the
10 statement being admitted, they can live with that timetable, because they
11 suggest the same timetable in their skeleton. So in my submission there is no
12 risk of any material disruption to the timetable to trial.

13 Finally, Sir -- and this comes back to the point you made at the outset -- BGL has
14 made certain complaints about the way in which the CMA raised its intention to
15 seek permission for Baker 2. Sir, this goes to the process. Sir, we don't accept
16 that any of that criticism is justified. The essential complaint is that the CMA
17 did not raise the possibility of Baker 2 until the joint expert process was nearly
18 complete, but the position is this, Sir.

19 The CMA wrote to BGL promptly once a decision had been taken to seek permission
20 for a supplemental report. We didn't think it was appropriate to raise this as
21 a mere possibility before the decision had been taken, and I do submit that that
22 was reasonable.

23 In terms of the time taken, I would emphasise these points. Ralston 2 was received
24 on 4th June. It is, as I have pointed out, 177 pages long, and bear in mind it's
25 a reply to Baker 1, which is only 61 pages long. So that gives you an idea of
26 the level of detail and the level of complexity in Ralston 2. So what

1 Professor Baker had to do was digest a huge amount of complex material,
2 including several new analyses. He had to consider his responses and assess
3 whether it was appropriate for those to be set out in the joint statement or a
4 supplemental report, all the while at the same time going through the expert
5 process with Ms Ralston. Of course, he is not a CMA employee. He has
6 another job. So he is not able to work full-time on these matters. In those
7 circumstances I submit to have written on 6th July, about a month later, was
8 reasonable. I accept it is unfortunate that it coincided with the final stages of
9 the expert process, but that was in my submission a function of the reasonably
10 compressed timetable and it was difficult to avoid.

11 Sir, those were my four limbs and what I was proposing to do next was walk you
12 through the materials in a bit more detail. I have taken you to some of them
13 already, but I was proposing now to do it in a more systematic way by reference
14 to the search issues covered in Baker 2. I can see Mr Beard shaking his head,
15 which suggests he does not think that's necessary but I will be guided by the
16 Tribunal as to what it would like me to do.

17 **MR BEARD:** Would it not be sensible for me to deal with the propositions that have
18 been put by Mr Lask and the particular examples he has dealt with so far, rather
19 than extending this further, and we will see where we get to in relation to the
20 issues of principle and the particular ones he has highlighted thus far?

21 Then, if the Tribunal wants Mr Lask to go through all of the further detail, then we will
22 deal with it, but it might well curtail this process I think.

23 **MR JUSTICE MARCUS SMITH:** Well, Mr Lask, I have some sympathy with that.
24 I think, speaking for myself, I feel that you have set out the position very clearly,
25 in terms of the process and the points that you have put forward. I am not sure
26 that we are going to be assisted by, as it were, further examples of what you

1 have made very clearly, and I think there is much in what Mr Beard says, that
2 we see what his objections are and proceed from there and, if necessary, hear
3 from you further in relation to a specific walk through.

4 For myself, and I really don't want to cut you off, my sense is that we are able to deal
5 with matters at the level of generality that you have dealt with now, but I don't
6 want you to feel that we are cutting you off. It is really how I feel the merits of
7 the application are going.

8 **MR LASK:** Sir, I am entirely in the Tribunal's hands. I am prepared to walk you
9 through the material if it would assist the Tribunal, but I am certainly not
10 proposing to force it upon you.

11 **MR JUSTICE MARCUS SMITH:** Well, in that case, I think we will hear from Mr Beard
12 and see where we go from there.

13 **MR BEARD:** I am most grateful.

14 If I may, I will deal with matters under four heads and then pick up some residual points
15 towards the end.

16 Sir, the first point I want to deal with is the one Mr Lask came to last, which is just the
17 plain inappropriateness of the behaviour of the CMA in relation to this matter.
18 The Tribunal has our submissions outlined in our skeleton, paragraphs 21 to
19 31, and by reference to, Sir, the Chairman's introduction, it is clear that you are
20 well aware of the position.

21 If I might be just indulged for a moment, obviously there was an order given on 15th
22 March of this year, which just for your notes is in Bundle B1 at 975. That set
23 out a very clear structure for expert evidence to be provided. It set down
24 a structure for our expert evidence to be provided with our appeal, for the CMA
25 to have leave to submit further evidence in relation to their case with their
26 Defence, and for us to put in reply material. There was no provision for rejoinder

1 and the CMA did not seek one.

2 More particularly, it set out a clear timetable. Thereafter, Mr Lask has put it as
3 a compressed timetable. It was relatively tight for dealing with the joint
4 memorandum.

5 Now, as the Tribunal recognises, on 4th June Ralston 2 was provided. Yes, it is long.
6 It is well spaced out. It is easy to read and, of course, it covers market definition
7 as well as the matters covered by Professor Baker. So he is overstating the
8 matter to say that for Professor Baker this was an unmanageable exercise. It
9 is plain that Professor Baker could and should have reached a resolution as to
10 whether or not he thought supplemental materials were required by the middle
11 of June. Otherwise it is difficult to understand how he is engaging in the joint
12 memorandum exercise, apart from anything else. He must have reached
13 a concluded view on the position.

14 Even if he had any doubts about these matters, which we do not accept in these
15 circumstances, we think the conduct of the CMA in coming to us, having
16 delayed the process of the joint memorandum, indicating they would not hit the
17 5th July deadline, indicating, therefore, that there needed to be an extension,
18 an extension that was then applied for on 2nd July, to which we acceded, but
19 not to have mentioned then that they were intending putting in a supplemental
20 report is something that just frankly beggars belief, because whatever doubts
21 Professor Baker must have had, given that the deadline for completing the joint
22 memorandum was three days after that July 2nd date, he must have known the
23 position, as must the CMA, and not to have indicated at that stage, but to have
24 proceeded with the joint memorandum process and the application to extend is
25 simply not good behaviour in these circumstances.

26 Now, that was the wrong approach. It is not helped, and this takes me to my second

1 point, by the authority in *Generics*. Mr Lask took you to paragraph 5 of
2 *Generics*, which sets out perfectly unimpeachable propositions about how the
3 Tribunal should manage these matters. It should deal with expert evidence
4 effectively and efficiently, or ensuring that it can be dealt with effectively and
5 efficiently, and recognising the complexity of economic evidence.

6 It recognises the benefit of having matters in writing. We don't demur on either of
7 those propositions. Nor do we demur with the third, which is to avoid endless
8 ping-pong.

9 In all of this, however, the judge in *Generics*, or the Chairman -- I am sorry -- in
10 *Generics*, Mr Justice Roth, will of course have had in mind the importance of
11 matters being dealt with in a timely and fair manner.

12 We have provided you, in relation to *Generics*, with one or two materials in the third
13 bundle. I can just refer you to the relevant extracts, because the point we would
14 make is that in *Generics* the situation was very different from the situation here.

15 In *Generics*, at the first CMC, an order had been given for the conduct of the trial or
16 the conduct of the process up to trial that didn't deal with expert evidence at all.
17 It is not included in that material. I will provide you with the references in just
18 one second. I have lost my note.

19 **MR JUSTICE MARCUS SMITH:** I am not sure you need to take us to the specifics of
20 *Generics*, but whilst, as you accept, paragraph 5 states propositions of
21 generally accepted truth very clearly and nicely, at the end of the day each case
22 turns on its own facts.

23 **MR BEARD:** Absolutely. Of course.

24 **MR JUSTICE MARCUS SMITH:** I think, as probably was clear in my interjections, it
25 is the timing here that troubles us.

26 **MR BEARD:** That's precisely -- if I may make one submission in relation to *Generics*

1 and the context. I will provide you with the references. I will not take you to the
2 documents. It was recognised that at that first CMC in *Generics*, and this is just
3 for your notes, page 11, pages 26 to 28, the President of the Tribunal there
4 said:

5 "Look, at the next CMC we will be able to give directions about expert meetings, expert
6 joint statements, and look more precisely at the length of the hearing in terms
7 of numbers of days required in the five weeks we have set aside."

8 So that was anticipated at the first CMC. The point I want to make is that the CMA at
9 the second CMC turned up and said: "We want to put in this supplemental
10 report".

11 We have also just pointed the Tribunal to the second case management transcript at
12 page 28. The relevant lines are lines 7 to 9, where Mr Turner, who was acting
13 for the CMA, so pressing for Professor Shapiro's report to go in, said:

14 "It would be wrong to block the CMA from being able to deal with these issues in
15 writing, because if it is in writing, there will be a proper platform for the experts'
16 discussions."

17 So what was being considered in *Generics* was "should we let this in" knowing full well
18 there was plenty of time for it to be fed into the joint memorandum process.
19 What has occurred here is completely different. They have waited until the
20 last minute in that joint memorandum process, and said "Actually, we would like
21 to submit something, something new".

22 So the experts on behalf of BGL, the independent experts, are in good faith engaging
23 with the experts from the CMA to create this joint memorandum, not being told
24 that there might be some supplemental matters, some supplemental criticisms
25 that might come forward they have to deal with. They are engaging and trying
26 to identify what's going on, and then that system essentially gets gamed by the

1 CMA in relation to this process.

2 Mr Lask kept saying "there is no prejudice here". We don't know how experts would
3 engage if they had seen the material they have now seen in relation to these
4 matters. I can't speculate about those matters. To say there is no prejudice is
5 wrong. There is prejudice to the process as well as to potentially the position
6 of BGL in relation to it.

7 So *Generics* does not, in fact, assist Mr Lask. The broad propositions are sound but
8 actually the context tells you something different. The context tells you that
9 these joint explorations of issues should happen after all of the exchange of
10 information, which to our mind exacerbates the failings in terms of process that
11 the CMA have engaged in in relation to this matter.

12 **MR JUSTICE MARCUS SMITH:** Mr Beard, I will obviously want to hear from Mr Lask
13 in reply, but my initial take is that this is a case of the third proposition in
14 paragraph 5 of *Generics*, avoiding the endless ping-pong. Now, as the
15 President made clear, there is a tension between proposition 2 and proposition
16 3.

17 **MR BEARD:** Of course.

18 **MR JUSTICE MARCUS SMITH:** Proposition 2 has been dealt with in our Order for
19 Directions. It seems to me that we are pretty squarely in proposition 3 territory,
20 in that we have, by order, cut out the endless ping-pong of evidence by saying
21 "This is the timetable for evidence".

22 **MR BEARD:** Of course.

23 **MR JUSTICE MARCUS SMITH:** I know, of course, you would agree with this,
24 because it is exactly what you are saying, but I articulate it for Mr Lask's benefit.
25 The point on which I think I would be grateful for your assistance is the extent to which
26 you accept that there can be, in cross-examination of Ms Ralston, a pushing

1 back on the points that she has made in Ralston 2. Clearly, you can't accept
2 or expect the CMA to accept that everything that is said in a reply report is
3 accepted rather than disagreed with by the CMA. So what I am wondering is
4 how far the CMA has, in substance, behaved almost prematurely but very
5 helpfully in articulating where Ms Ralston can expect a degree of pushback.

6 It is really the point that I put to Mr Lask in his submissions. Without admitting Baker
7 2, it seems to me it would be perfectly proper to put to Ms Ralston, in advance
8 of her evidence: "Look, we have done these workings. Here are some
9 propositions which we are going to put to you in cross-examination. Look at it.
10 We would like you to come back on it so that you can be ready for questioning
11 in cross-examination, and you will respond to this material in the course of
12 cross-examination without it being evidence per se. It is simply material that is
13 deployed in the course of cross-examination."

14 It may be that when Professor Baker comes into the box he will have to say something
15 more, but the default position is that this is material that is simply for Ms Ralston
16 to address as part of the CMA's attack on her evidence.

17 **MR BEARD:** I would like to come back to Mr Lask's points both on this notion of what
18 a reply report is for, because he is just wrong to say it is only for disagreement.
19 That just is not the basis upon which a reply report proceeds, and the
20 substantial three issues that he picks up. I will come back to those.

21 Just dealing with your first point, the problem we have with thinking about this idea of
22 using Baker 2 as effectively notice on cross-examination, which plainly is not
23 what the CMA intended at all, is that it is making assertions as to evidential
24 analysis.

25 Now, with all due respect to Mr Lask and Miss Demetriou, whatever their skills, they
26 are not in the position to make assertions on the basis of expert evidence or

1 indeed factual evidence that is not otherwise contained in what the Americans
2 would call "the record". So I think the difficulty one has is that I don't see on
3 what basis it is legitimate to cross-examine Ms Ralston on the basis of factual
4 or expert assertions that are set out in Baker 2. You can cross-examine Ms
5 Ralston on the basis she has got stuff wrong. You can try, for instance, to pick
6 apart her spillover analysis. You can try and pick apart her unravelling analysis.
7 That's fine. But what you can't then do is rely on as assertions what the nature
8 of an expert appraisal of, for instance, partial unravelling would be or the
9 alternative spillover analysis would be, because that would not be evidence.

10 Therefore, we will get ourselves into a difficulty here, because the nature of Baker 2 is
11 not simply "We are putting you on notice that we will do these things". It is
12 an assertion of "This is what we say is the right approach" and that is not
13 a matter of cross-examination. So I see a real problem there.

14 There is also a parallel problem, which is I am left in a position where I do not know
15 what I am cross-examining Professor Baker on, in relation to these matters,
16 because if this is not admitted as evidence, how do I treat these assertions that
17 are being put forward? I don't know whether I am supposed to cross-examine
18 on them or not. I would say it shouldn't be admitted, therefore not. If it is to be
19 admitted, at least I know, and then Ms Ralston will have put in a substantive
20 response, which the Tribunal will see in writing, that can be used for the purpose
21 of that cross-examination exercise. In that cross-examination, I then won't be
22 criticised for putting forward questions on the basis of a lack of evidential basis.

23 I can see in practical terms there are real issues in just treating this as being
24 a cross-examination tool. If that's what the CMA want to do, they should
25 withdraw Baker 2, and put us on notice of what they want to cross-examine on
26 and what the basis is. Then we can look at it and say: "You either have the

1 expert or evidential basis for that or not", and we can criticise the questions as
2 they are put forward.

3 Unfortunately, I have a fear that, tempting though the Tribunal's sort of attempt to steer
4 a way through the Scylla and Charybdis of excluding everything from Baker 2
5 and avoiding a further round of ping-pong, I am not sure that in practical terms
6 we are going to end up with a satisfactory situation at trial. That is in part
7 because what Baker 2 does is says: "Oh, well, this material from Ralston 2 is
8 new", even though it was merely responsive, and then takes it all a further
9 stage.

10 **MR JUSTICE MARCUS SMITH:** I mean, to be clear, if we go down the route of this
11 being advance notice, I take your point that in form it doesn't look anything like
12 that, but that's a matter of form that can be rectified.

13 To be clear, the way I would see this working is that propositions, no doubt informed
14 by expert analysis, could be put by Counsel to Ms Ralston and she would
15 respond as an expert as she sees fit.

16 Now, if she accepts the proposition, it becomes evidence. It specifically becomes her
17 evidence. If she rejects it, it does not. Now part of that questioning may very
18 well involve putting together an analysis which is done by Professor Baker, and
19 is pushed under Ms Ralston's nose in advance, and she can comment as she
20 sees fit on that material, and again if she accepts it, then it becomes her
21 evidence. If she says: "No, I disagree with this analysis for the following
22 reasons", then that will be her evidence, but on a basis that the CMA may not
23 like, but that is as far as this would go.

24 There would be no basis of saying beyond what Ms Ralston is prepared to accede to,
25 of saying that there's any further material coming in. That's why I'm seeing the
26 interplay between *Generics* point two and *Generics* point three as so important.

1 Clearly, the CMA can't be stopped from saying: "You, Ms Ralston, are wrong". The
2 problem with expert evidence like this is that you very often get a question
3 which is so technical that you can't actually put it to the witness box and expect
4 the witness immediately to answer. What they will say is: "You may be right,
5 but show me the analysis". The point is the analysis needs to come in a few
6 days beforehand.

7 **MR BEARD:** (a), I can understand the Tribunal's practical concerns with dealing with
8 expert interrogations. In part, that's why we have these joint memorandum
9 processes, so that we identify early on what the points of agreement and
10 disagreement are, so people have the opportunity to say: "Yes, I don't agree
11 with that for the following reasons." It is why you have these tables that are not
12 merely yes/nos. That is the function of that, in many ways. That's why we are
13 so concerned that this has been done at the last minute, because that's
14 precisely what should have been done in the joint memorandum.

15 If what the Tribunal is saying is that they can put hypothetical issues on the basis of
16 technical advice from their expert in cross-examination, of course one cannot
17 stop that, but I think it is important that the Tribunal is alive to the consequence
18 of that. If Ms Ralston rejects that material, there is no evidential basis for it on
19 the record before the Tribunal, because that is merely being put in
20 cross-examination as a question. If that's the case, I would equally not have to
21 cross-examine Professor Baker on what is within Baker 2. Again, I can be clear
22 about that and my situation is clear.

23 That obviously is not problematic per se, but I was concerned with the Tribunal's
24 suggestion that it might permit the CMA to say: "We have put this stuff in
25 questioning and Professor Baker was the one that told us about this stuff for
26 the questioning, so we can rely on the content of what we put forward in the

1 questioning as evidence". That's where I would have profound cause for
2 concern in relation to this and, as I say, just as a practical matter, what I have
3 to cross-examine Professor Baker on, or whoever is doing it, but yes.

4 **MR JUSTICE MARCUS SMITH:** I entirely understand your concerns, and to be clear,
5 this is no more than the ordinary rule of cross-examination of evidence. Take
6 a trial where you have a letter which contains within it an assertion of fact which
7 is not the subject of a hearsay notice. It is just a letter which is helpful for the
8 party cross-examining. It is taken to the witness and you say: "Well, the letter
9 says there was a meeting between you and Bloggins on this day. Did that
10 happen or didn't it?". If the witness says "Yes, it did", then that is evidence.

11 **MR BEARD:** But the counter proposition, if the witness says no, is the party, if there
12 is no hearsay notice, cannot rely on that. If that is the course we are going
13 down, then I can understand that that can work. My concern was if you think
14 about actually the way that we deal with hearsay, for example, in the course of
15 these sorts of proceedings, (a) you don't need hearsay notices, but, in fact, it is
16 much more informal.

17 What I want to avoid is a suggestion that I am going to be facing in closing arguments
18 in Baker 2 which we do not accept, that Ms Ralston for the sake of
19 argument - I am not presuming which way she would answer - let's assume that
20 she does not accede to propositions that are put to her on the basis of
21 Professor Baker's priming of the CMA. That doesn't leave it open to the CMA
22 to say: "We have got an expert that says something different".

23 **MR JUSTICE MARCUS SMITH:** I think, just to be clear, if we go down the
24 cross-examination material route, that is how I for one see it as working.
25 Whether we go down that route, as I say, is another matter.

26 **MR BEARD:** I was not preceding the matter. I was trying to deal with your questions.

1 **MR JUSTICE MARCUS SMITH:** It is very important that Mr Lask knows what we are
2 proposing and as important as you know (inaudible).

3 **MR BEARD:** Because, as I say, for my part, one of the key issues is whether or not
4 I need to be cross-examining Professor Baker on any of this stuff.

5 **MR JUSTICE MARCUS SMITH:** Of course.

6 **MR BEARD:** I can take it that I don't, on the basis of this approach.

7 Is it worth me finishing by just touching on the three examples as --

8 **MR JUSTICE MARCUS SMITH:** Please do.

9 **MR BEARD:** Mr Lask did, because, as I say, his approach to the analysis of a reply
10 report is just, as I say, flawed. It is not some kind of bifurcation between
11 a straight disagreement, where you say "I don't agree with you" and
12 a reasonable response. A disagreement that just says "I disagree" is of no
13 value in this process. Indeed, if you think about Common Law pleadings
14 normally, you don't even have to put in a reply if you are just disagreeing,
15 because that's the default position, in pleading terms.

16 The purposes of a reply report is to say "I disagree for the following reasons". It is
17 obviously right that when you spell out those reasons, as an expert economist,
18 you are almost bound to be drawing on the data that has been put in issue in
19 the proceedings. It is almost inevitable you are going to be looking at the
20 criticisms of your analysis that are made by the other expert and saying: "Well,
21 you could do things differently to deal with your criticisms." That's pretty much
22 exactly what has gone on in relation to what Mr Lask has referred to as the
23 spillover bias issues, if I may.

24 I am sorry it was late and only came in this morning, but if you have the supplemental
25 observations table that we provided in relation to Baker 2. It is probably not in
26 any bundle, so I apologise for that. You may have it loose or in an e-mail. It is

1 headed "Observations on Proposed Baker 2 Supplemental".

2 **MR JUSTICE MARCUS SMITH:** I don't know if we have that. One moment. Do you
3 have a bundle reference, Mr Beard?

4 **MR BEARD:** Let me check.

5 **MR JUSTICE MARCUS SMITH:** You have sent an updated bundle and that may be
6 where we find it.

7 **MR BEARD:** Let me double check. I don't have it to hand. Those helping me may
8 be more efficient.

9 **MR JUSTICE MARCUS SMITH:** Tab 31. Oh, yes, I see. It is in an odd place.

10 **MR BEARD:** Tab 31. I am so sorry. I am grateful for that.

11 **MR JUSTICE MARCUS SMITH:** Not at all. Thank you very much.

12 **MR BEARD:** Could I just pause for a second so you can track it down?

13 **MR JUSTICE MARCUS SMITH:** I have it now. Ms Lucas, do you have it? Professor,
14 you have it as well?

15 **PROFESSOR ULPH:** Yes.

16 **MR JUSTICE MARCUS SMITH:** We are all with you. Thank you.

17 **MR BEARD:** What we tried to do, you will recall in our skeleton of Thursday we just
18 had not had time to digest this stuff properly. So we have gone away and with
19 the assistance of Ms Ralston and her team just come back and looked at the
20 various issues. This actually just amplifies a table that we sent to the CMA
21 previously, but one can see on the left-hand side -- on the left-hand column we
22 have set out the relevant paragraphs of the application dealing with the different
23 substantive matters.

24 The three that we are really dealing with that were the examples were 6(a), so that's
25 the potential unravelling issue, 6(c), which was to do with spillovers, and then
26 I think 6(f) on common trends. I am happy to take you through it any which

1 way. I was picking up on spillovers, but why don't I start just on 6(a) and work
2 through?

3 You will recall on 6(a) that the point that Mr Lask made was that Ms Ralston had
4 explained why, if you only have partial coverage of wide MFNs, then there can
5 be an unravelling of any putative effect that might exist. Professor Baker came
6 back in his report and said, "I don't agree with that and I am going to cite
7 a couple of pieces of literature in relation to it". In her reply report Ms Ralston
8 said, "Well, I see your literature, but actually it doesn't tell you what you are
9 asserting it says, and actually there is other literature particularly in relation to
10 partial cartel operation which is extremely helpful in considering these issues",
11 and she cites one article in relation to it.

12 You will see, therefore, on the right-hand side that we have set out that the relevant
13 paragraphs of Ralston 2 to which Mr Lask has referred are actually responsive
14 to particular paragraphs of Baker 1, in which Professor Baker explained his
15 view on partial coverage and introduced new literature -- I should say new
16 literature never referred to before by the CMA.

17 So it was clearly appropriate for Ms Ralston to indicate her opposition to this, but the
18 first thing to bear in mind, given Mr Lask's account of matters, is that those two
19 paragraphs of Ralston 2, 3.24 and 3.25, they actually re-state points about this
20 unravelling argument that were all in Ralston 1.

21 It is true that paragraph 3.24 of Ralston 2, as I say, does refer to a new academic
22 paper, but what this was doing was engaging in that debate and explaining why
23 the points put by Professor Baker were disagreed with and the reasons for it.

24 Now that is precisely the role of the reply report. It is obviously going to lead to ping-
25 pong if as soon as someone puts in a new piece of literature or any reasoning
26 of any sort, you can then open the matter up again. So when the CMA talks

1 about these being new insights or new material, they are just further building
2 on the material that has originally been put forward.

3 Now he then didn't take you to some further paragraphs in Ralston 2, 5.28 and 5.36,
4 which in 6(a) of his skeleton he said were all new, but you will see from the
5 notes in the final bullet point in particular that what was being done there was
6 dealing with a particular table that Professor Baker had put in, forming no part
7 of the CMA's Decision, and that it was dealing with those matters.

8 Now there is nothing wrong that. That's the paradigm role of a reply. So we say this
9 partial unravelling was set out clearly in Ralston 1. There was a response in
10 Baker 2 which did not rely on material that had been put forward in the Decision,
11 and she responded to it, including by citing another report. There is nothing
12 wrong with that, and giving an account of these matters is not in any way setting
13 out some kind of new model, as it was being suggested, in relation to these
14 matters. It is explaining why that literature is relevant to the particular context.
15 I have provided the references in that section.

16 If we then move on to 6(c), which is this bias from spillovers point, now here what we
17 have is a situation where Ms Ralston has said, "Well, you can test for spillover
18 effects". Professor Baker has come back with the slightly remarkable
19 proposition that you can't. Now we will deal with that at the hearing, but what
20 he then does is he criticises these spillover effect tests that Ms Ralston carries
21 out in Baker 1, and she responds in her Ralston 2 explaining why it is that these
22 matters are potentially flawed -- these approaches by Professor Baker are
23 potentially flawed.

24 It is just important -- if we go -- I don't know if you still have it open, but if we go back
25 to those paragraphs that I think Mr Lask took you to, if I read my notes correctly,
26 I think he took you to 5.48 in her report, which, as I recall, was at page 752

1 I think, if my notes are right. No. That's not right. It is page 770 in the bundle.

2 **MR JUSTICE MARCUS SMITH:** Thank you. Yes.

3 **MR BEARD:** Now I would just invite you to read 5.48 through to 5.51 for the moment,
4 which he took you to. You will see, although he says there are disagreements,
5 actually what is being done here is the spelling out of reasoning as to why
6 there's disagreement. That runs right through to 5.56.

7 **MR JUSTICE MARCUS SMITH:** Yes.

8 **MR BEARD:** The point I want to make is Professor Baker came up with a criticism
9 that said certain particular HIPs could be identified as particularly affected
10 and therefore you should take them out of the control group. That's what Ms
11 Ralston then does.

12 So for the CMA to suggest this is somehow a grand new piece of work is just not
13 sound, because what it was doing -- what Ms Ralston was doing in Ralston 2
14 here was taking a specific criticism that Professor Baker made and then running
15 in relation to the same data set the same methodology, but removing particular
16 individual HIPs that he had identified. Now that's not some kind of new
17 econometric analysis that warrants further submissions or expert evidence.
18 This is dealing with specific points that Professor Baker put forward. That's
19 what we set out in the bullet points in that section of the table.

20 **MR JUSTICE MARCUS SMITH:** Yes.

21 **MR BEARD:** So, yes, it is a variation on the test, but it is a variation prompted by
22 Professor Baker's criticism, using the same data and same methodology. We
23 say, you know, this is giving reasons why you disagree with his criticism.

24 Then the third one I want to deal with is in relation to 6(f), which is the common trends
25 material. If we could go back to the table in tab 31 in the bundle. I am sorry to
26 jump around a little bit.

1 **MR JUSTICE MARCUS SMITH:** Yes. No, not at all.

2 **MR BEARD:** Again we have tried to provide the relevant references, but what we are
3 seeing in this common trends section is yes, there is a dispute about common
4 trends. We understand that, but the section is responding to paragraphs 142
5 to 147 of Baker 1, and it is those criticisms that had also been raised in part in
6 the Decision, and what Ralston 2, figure 5.2, does is it does contain new
7 analysis not previously presented in Ralston 1, but it is a direct response to the
8 results of Professor Baker's own unweighted relative price analysis that wasn't
9 in the Decision and was set out in table 10 of his report.

10 So when the CMA comes along and says, "This is a wholly new leads test", as it is
11 technically known, it is not. It is using the same model as in table 10 of Baker
12 1, but it is using sub-samples of the existing data. To suggest that's wholly new
13 is just not right. It is responding to what Professor Baker had done in Baker 1
14 and table 10.

15 Actually if we then skip back, if we may, to page 796 in the bundle --

16 **MR JUSTICE MARCUS SMITH:** Yes.

17 **MR BEARD:** -- you will recall that Mr Lask took you to paragraph 5.141.

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MR BEARD:** Again what you will see is at 5.142, which he didn't then go on to, what
20 Ms Ralston explains is:

21 "Professor Baker claims that my interpretation of the leads and lags test is erroneous
22 as it doesn't account for the fact that four brands", so this is insurance brands,
23 "had their wide MFNs removed two months earlier."

24 So that's a specific criticism and then:

25 "He argues that the leads and lags test should be run on the two groups separately to
26 avoid disguising violations of the common trend hypothesis. I accept this is

1 a sensible approach and restrict the sample to the main treatment group when
2 considering this."

3 However, she then goes on and says:

4 "Even accepting Professor Baker's approach and narrowing the test ..."

5 She then goes on and finds that her analysis is sound. What she is doing is taking
6 what Professor Baker has said in Baker 1 and essentially re-running her
7 analysis using the same data and techniques in order to obtain a reasoned
8 response to Professor Baker's criticism.

9 In relation to that again there is nothing wrong with that. It is not outwith the scope of
10 a reply report and it should not give Professor Baker opportunity then to come
11 back with some further account and reply submissions in relation to these
12 matters.

13 I should note that the section F that Mr Lask asked to you read in Professor Baker's
14 report includes chunks of new argument that were not raised at all by him in his
15 first report, that plainly he could have done, and indeed are not concerned with
16 the new so-called tests, in other words, the tests that were carried out by Ms
17 Ralston having regard to what Professor Baker had said. They are entirely
18 new, things like the material in relation to paragraph 34. They are not to do with
19 Ralston 2 at all. They are just an opportunity to try to put new material forward.

20 So I have taken you through those three examples. We can deal with all the others.

21 We have set them out in the table. I don't want to do a walk-through for the
22 reasons that Mr Lask very sensibly didn't either, but we have set out these
23 points.

24 The main issue is Mr Lask starts from the wrong approach to analysing what is
25 appropriate for a reply report. It is not just a matter of disagreement. It is
26 a matter of engaging and giving reasons. That's precisely what Ms Ralston has

1 done. In those circumstances it compounds the issue in relation to
2 Professor Baker's supplemental report.

3 If I may just deal with one or two quick further wrap-up points. If on reflection the
4 Tribunal does want to admit Professor Baker's second report, we have
5 tried - and we have spoken to Ms Ralston, and she and her team have tried to
6 be accommodating, and if that is the approach - we will try to apply the
7 deadlines that the CMA suggested for a supplemental report and the joint
8 memorandum.

9 **MR JUSTICE MARCUS SMITH:** Just remind me of those again.

10 **MR BEARD:** It would be 24th August and then 14th September for a new joint
11 memorandum. So we have canvassed it with her. We are not being obstructive
12 in relation to these things. We say it should not go in. It is wrong for all the
13 reasons we have explained, but if that's the approach, we have not just been
14 obstructive. That should not change the way in which the Tribunal treats this
15 issue we say. The fact that we are trying to be cooperative in relation to those
16 matters is very much in the alternative.

17 **MR JUSTICE MARCUS SMITH:** No. We understand that.

18 **MR BEARD:** We have dealt I think with the cross-examination issues and I think,
19 understanding the Tribunal's proposal - I will confirm my instructions, but
20 I anticipate that the position will be as I have set out - that so long as it is not
21 being treated as evidence and I don't have to cross-examine on it, then we quite
22 understand the approach.

23 Then the final point. Mr Lask did at various points say we have not challenged the
24 admissibility of Professor Baker's first report. We have always said we are
25 challenging the Decision. If Professor Baker's report goes beyond the
26 reasoning in the Decision, it cannot be relied upon by the CMA to fortify its

1 Decision. On the other hand, getting into some kind of sterile pre-emptive
2 admissibility debate prior to a trial in relation to these matters we think is futile.
3 We have preserved the position in relation to this. We have said many times
4 that it is the Decision we are criticising, not some expansion of it. That I think
5 sets out our position and also explains why we have not engaged in some sort
6 of interlocutory or satellite litigation in relation to particular paragraphs, lines or
7 sections of Professor Baker's report, but I hope it is clear how we have reserved
8 our position on such matters for trial.

9 Unless I can assist -- if I may just check with those with me.

10 **MR JUSTICE MARCUS SMITH:** Please do.

11 **MR BEARD:** Unless I can assist the Tribunal further in relation to those matters, those
12 are our submissions.

13 **MR JUSTICE MARCUS SMITH:** Thank you, Mr Beard. I am very grateful.

14 Mr Lask, you will obviously have a variety of points, but I think the crucial point for our
15 purposes that we would like you to address is the extent to which you say that
16 the CMA would be prejudiced if we were to adopt, as it were, the
17 cross-examination route rather than the admission of evidence route, it being
18 clear that the cross-examination route has the very hard bright line limits that
19 I discussed with Mr Beard in our exchanges, but don't take that as a limiter.
20 You say what you would like in reply.

21 **MR LASK:** Thank you, Sir. I will endeavour to deal with the points in the same order
22 in which Mr Beard dealt with them and also cover what you have identified
23 there, Sir, as the crucial point.

24 Mr Beard's first submission was to return to the complaints made in his skeleton
25 argument about the process by which the CMA raised these matters, and I do
26 need to respond to that, given the way in which he put his points. He firstly

1 emphasised that there was no provision in the previous order for rejoinder
2 evidence, to which I say of course there was not. That's why we are making
3 this application. More importantly, I do say that his complaints are seriously
4 overblown, and in particular the suggestion that the CMA somehow gamed the
5 process is completely unfounded.

6 **MR JUSTICE MARCUS SMITH:** You don't need to say anything more about that.

7 **MR LASK:** Sir, I have explained how this came about and we do firmly reject that
8 suggestion.

9 But in any event I do say that the focus should be more on whether the admission of
10 Baker 2 can be accommodated in the timetable going forward rather than what
11 happened in the past. In my submission it can. We have set out the proposed
12 timetable. Mr Beard has confirmed that, although they resist the admission of
13 this evidence, they can handle it in accordance with that timetable. He suggests
14 there is prejudice to the process, but he doesn't suggest there is any prejudice
15 to BGL. So I do say that the process point really falls away.

16 Sir, you made the point in an exchange with Mr Beard that we were in proposition 3
17 territory from the *Generics* ruling. That's the ping-pong. In response to that
18 I would emphasise that this could only be Professor Baker's second report. So
19 I do say that it doesn't quite reach the ping-pong threshold. As I made clear in
20 my opening submissions, there is a clear end in sight to the process. If Ms
21 Ralston wants to put in Ralston 3, we don't object in principle. The prospect of
22 her introducing yet further new analyses we would say are very slim. So there
23 is a clear finish line.

24 Sir, dealing with the Tribunal's suggestion about using this material as essentially
25 a series of cross-examination propositions that would be put to Ms Ralston in
26 advance, Mr Beard makes clear, and I think the Tribunal accepted this, that

1 under those circumstances the CMA would be prevented from positively relying
2 on anything in this material that wasn't accepted by Ms Ralston. That in
3 essence is the answer to the question of "What prejudice is there?", because
4 the outcome would be the CMA would potentially be shut out from relying on
5 this evidence or this proposed evidence from Professor Baker altogether.

6 May I just illustrate that with a reference to Ralston 2 that I didn't take you to in my
7 walk-through?

8 **MR JUSTICE MARCUS SMITH:** Yes, of course.

9 **MR LASK:** It is my example of where it would be quite unfair for the CMA to be shut
10 out from putting in evidence in response. It is section 6(e) of our application.
11 It's concerned with Ms Ralston's new analysis of CTM's commissions.

12 If I can just give you some context, Sir, the issue here is whether some econometric
13 analysis that Ms Ralston has conducted on CTM's commissions, so CTM alone,
14 whether that's reliable. What happened during the investigation is Oxera put in
15 some analysis across all PCWs and the Decision found that in addition to the
16 fundamental flaws that the CMA had identified, so, for example, concerning
17 spillovers, there was a problem with this analysis, because it only included one
18 year of post-Relevant Period data. So it only included 2018 data, which the
19 CMA said didn't allow you to draw any reliable conclusions.

20 So, in response, in Ralston 1 Ms Ralston introduced two commissions analyses, one
21 for all PCWs, as Oxera had done, and one for CTM only. By way of response
22 to the CMA's criticisms she extended the time period for the CTM only analysis.
23 She now had some more data. She had the 2019 as well as the 2018, so she
24 used that data.

25 Now in response Professor Baker criticised her analysis, but mainly her all PCW
26 analysis, because he recognised that the CTM only analysis at least included

1 that extra year of data from 2019. So the one year only criticism did not apply.
2 With that context, Sir, may I ask you to go back to Ralston 2 and to page 789, where
3 she picks up on this issue?

4 **MR JUSTICE MARCUS SMITH:** Yes.

5 **MR LASK:** You will see section 5.D.1 headed "Commission data from 2018". She
6 introduces the issue. Then at 5.116 she comes on to the CTM specific analysis.
7 You will see at 5.116 she notes that Professor Baker acknowledges that his
8 critique doesn't apply to her CTM specific analysis. Then she goes on at 5.117
9 to say:

10 "Nevertheless for completeness I have extended this analysis further. In particular,
11 I have requested one additional year of commissions data from CTM such that
12 my data set now includes data on commissions from 2012 to 2020."

13 So the first point is that that's not in any way responsive to Professor Baker.
14 Professor Baker was not criticising the data period for the CTM only analysis,
15 but she nevertheless introduced further data. The second point is that this is
16 new data. It is data that has been obtained by Ms Ralston from CTM. It was
17 not previously available to the CMA or to Professor Baker, and in my
18 submission it is self-evident that Professor Baker and the CMA should be
19 afforded the opportunity to address it. It would be difficult for Professor Baker
20 to do so or for the CMA to do so by way of cross-examination lines, because
21 you will see the way he deals with it in Baker 2 at page 329, Sir, page 329 of
22 the core bundle.

23 **MR JUSTICE MARCUS SMITH:** Yes.

24 **MR LASK:** So he deals with this at paragraphs 28 to 30. I am not going to read
25 anything out, but you will see that he gives his views on the new data -- on the
26 analysis based on the new data at footnote 37, which in my submission is

1 material that couldn't sensibly be put to Ms Ralston in cross-examination, but
2 even if it could, insofar as she rejects what Professor Baker says about it, the
3 CMA ought not to be shut out from relying on that. They had never seen this
4 data before.

5 Sir, there is a further related point, which is this. We have the joint statement and the
6 joint statement contains Professor Baker's outline responses to the new
7 material in Ralston 2. Whilst Baker 2 elaborates on those responses, it is
8 entirely consistent with them. So it is not seeking to adduce any new -- it is not
9 seeking to introduce any new issues that are not already in the joint statement.
10 So refusing permission for us to rely on Baker 2 would mean you have
11 Professor Baker's headline positions as set out in the joint statement, but you
12 don't have his explanations. You don't have his reasoning behind those
13 headline positions. In my submission, to shut out those reasons - to shut out
14 those explanations - would be unfair to the CMA and would be less than helpful
15 to the Tribunal.

16 Sir, finally, I would like to pick up briefly on the points Mr Beard made on the three
17 examples, the first of which was all about partial coverage. That's 6(a).

18 **MR JUSTICE MARCUS SMITH:** Yes.

19 **MR LASK:** 6(a) of the application.

20 **MR JUSTICE MARCUS SMITH:** Yes.

21 **MR LASK:** Neither Mr Beard nor myself in my opening submissions took you to
22 the -- I don't think Mr Beard took you to it -- later part of Ms Ralston's second
23 report, in which she relies again on this new economic model and then
24 introduces a further paper. Mr Beard said she relied on one new paper. It is
25 actually two. I don't know if you want me to take you there. It is where she
26 deals with umbrella effects. It is in section 5 of the report, Sir. Would it be

1 helpful to see that?

2 **MR JUSTICE MARCUS SMITH:** Yes. Let's have a look.

3 **MR LASK:** So at page 764 of the core bundle you will see at paragraph 5.28 she
4 compares the concept of spillovers to the concept of umbrella effects. Here
5 what she does in this section is applies the same model, the partial coverage
6 cartel model, to spillover effects, but then at paragraph 5.35 on page 766 she
7 introduces yet another new model from yet another piece of academic literature.
8 This is where she relies on a model that simulates the umbrella effects of cartels
9 based on their level of substitutability and uses it to argue that spillover effects
10 in this case would be limited.

11 That actually takes me on to the next example, which was 6(c), and is all about
12 spillover effects. Mr Beard submitted that all Ms Ralston is doing in this
13 section is spelling out the reasons for her disagreement with Professor Baker,
14 but, Sir, this is another example of an issue which was fully canvassed in the
15 Decision.

16 The CMA made quite clear in the Decision that one of the fundamental problems with
17 Ms Ralston's econometric analyses was the presence of spillover effects, or
18 contamination, as it is also referred to in the Decision. Ms Ralston introduced
19 several tests in Ralston 1 to show that it was not a problem. There is no reason
20 at all why the additional robustness tests she introduces in Ralston 2 could not
21 have been there from the outset, and if they had been, Professor Baker would
22 have been able to deal with them in Baker 1.

23 Finally, Sir, is issue 6(f) of the application, which is common trends, the new analysis
24 of common trends. This arises at paragraph 5.142 of Ralston 2. The
25 section begins at page 794 of the core bundle.

26 **MR JUSTICE MARCUS SMITH:** Yes.

1 **MR LASK:** Mr Beard took you to paras 5.141 onwards under the heading "Leads are
2 largely insignificant" and made the point, "Well, all she is doing here is
3 responding to a criticism or adopting a suggestion that Professor Baker made
4 in Baker 1". That's true so far as it goes, but Mr Beard did not go as far as
5 paragraph 5.145 where she does something new, something that was not
6 suggested in Baker 1. What she does is she moves from an all PCWs analysis
7 of common trends to a PCW specific analysis. You see that in figure 5.2 where
8 you have three tables set out. That wasn't a response to a suggestion in Baker
9 1. It is something new. It is something that Professor Baker considers it
10 important to respond to.

11 So, Sir, just to sum up --

12 **MR JUSTICE MARCUS SMITH:** Yes.

13 **MR LASK:** -- we do say that there is a substantial degree of substantive new analyses
14 in Ralston 2. We do say it is fair, reasonable and helpful to everyone for
15 Professor Baker to be able to respond in writing in advance, and we say, finally,
16 that it causes no prejudice and it is essentially common ground that it causes
17 no prejudice to BGL as opposed to the process, and would on the contrary be
18 helpful to BGL and to the Tribunal and would be fair to the CMA.

19 Sir, unless I can assist the Tribunal further, those are my submissions.

20 **MR JUSTICE MARCUS SMITH:** No. Thank you very much, Mr Lask.

21 Mr Beard, I see you have your hand up.

22 **MR BEARD:** Yes. There are just a couple of things that were not necessarily reply
23 material.

24 The first is, given Mr Lask's statement, we are very much content that the CMA was
25 not gaming the process. We can understand how people might see it that way.
26 That is fine. We understand the position and accept that. That does not alter

1 any part of the submissions that we have put forward.

2 The other point that was not a reply point -- this is no criticism of Mr Lask, because in
3 a way it would have been part of his walk-through -- he picked up 6(e) in his
4 skeleton and section E of Professor Baker's putative second report, and there
5 he said that there was new data.

6 I think, if you have our table in tab 31 in front of you, that is entirely accepted. There
7 is an updated analysis in relation to 2020. That was not previously included.
8 That has always been accepted by Oxera. Obviously we have said that in
9 relation to those sorts of matters a different approach might be adopted, but we
10 do note, as is included in that box at the bottom, that essentially the essence of
11 what is said by Professor Baker in the paragraphs to which Mr Lask took you is
12 actually set out in section H3, which is page 956, in the joint memorandum.
13 Therefore, we say, "Completely understand in relation to new data, but actually
14 you have dealt with this one, so that is not a further justification for the report".

15 Those were the issues I think that went beyond reply. The only other thing is I hope
16 I did not misspeak. I said that there was one additional piece of literature
17 referred to in paragraphs 3.24 and 3.25. It is completely right, Mr Lask's
18 arithmetic is absolutely correct in relation to the later paragraphs. There are
19 two reports, one building upon the other. So insofar as misspoke on that
20 I apologise and I accept his counting.

21 **MR LASK:** I am so sorry, Sir. I am grateful for Mr Beard's confirmation that my
22 arithmetic was correct.

23 **MR JUSTICE MARCUS SMITH:** One plus one does indeed equal two. I am very
24 grateful.

25 **MR LASK:** May I just draw your attention to one point under section 6(e)?

26 **MR JUSTICE MARCUS SMITH:** Of course.

1 **MR LASK:** Mr Beard makes the point that the paragraph in Baker 2 that he refers to
2 is already set out in the joint memo. I can't now recall whether I already pointed
3 you to footnote 37, but footnote 37, which is on page 330 of the bundle --

4 **MR JUSTICE MARCUS SMITH:** You did.

5 **MR LASK:** -- does set out the analysis of the new data, which is not in the joint
6 statement.

7 **MR JUSTICE MARCUS SMITH:** I understand. No. Thank you very much. Well,
8 thank you both very much. We will rise for five minutes just to debate our
9 response and I will make a short ruling then. I think the best course is for us
10 to leave the meeting. So I will invite my fellow Tribunal members to do that and
11 we will be back in five minutes. Thank you very much.

12 **MR BEARD:** I am grateful.

13 **(Short break)**

14
15 **Ruling (see separate Ruling)**

16
17 **Post-ruling discussion**

18 **MR BEARD:** I am most grateful to the Tribunal. Thank you.

19 Might I just raise one issue. If and insofar as the CMA does want to put forward
20 analysis that it would want to rely on in relation to cross-examination, it needs
21 to do so, since these would not just be documents as per patent procedure, but
22 analysis that would require engagement, that that needs to be done with
23 sufficient lead time to enable Ms Ralston to actually consider the modelling that
24 is being put forward, otherwise this exercise becomes futile.

25 **MR JUSTICE MARCUS SMITH:** Absolutely, Mr Beard. I don't want us to be setting
26 out too mechanically the process, and I don't think you are asking for that, but

1 it is clear that if one has got the tweaking of a model -- what usually happens in
2 these cases is that one economist puts forward a model and says it
3 demonstrates X. The rival economist says: "If you take this model and adjust
4 it in this way or that way, one gets the very opposite effects".

5 What we have in mind is that the data, in whatever electronic form it exists, is
6 submitted, and assuming the experts are using a common platform or software,
7 then Ms Ralston needs to have -- and to be clear this operates both
8 ways -- Mr Baker equally needs to have enough time to consider the revised
9 form of model and consider it. So that's what we envisage happening. How
10 long that is required, that's a matter I think the parties will know that they need
11 to give as much time as they reasonably can.

12 That's why, to be clear, we took the view that although Baker 2 was in form, we
13 thought, not well conceived, in substance the intentions that are there are ones
14 that we actually very much would endorse. It is not, as I say, the form that we
15 would like, but this is how these sorts of issues should be raised. It is not
16 a question of pulling rabbits out of hats. It is questions of enabling the experts,
17 who after all have duties to the court which are very clear and very important,
18 to have time to say: "Well, actually you are right. If we tweak the model in this
19 way, the point you make is a good one". That's the sort of debate that we are
20 anxious to encourage rather than discourage.

21 **MR BEARD:** That's all completely understood. I should be clear we are not looking
22 for timelines. We are not seeking to encourage the CMA to engage in this
23 exercise. That is a matter for them. I just put down, as we always
24 euphemistically put it, a marker in relation to these matters and I think possibly
25 we just move on.

26 **MR JUSTICE MARCUS SMITH:** No, indeed. The marker goes for both sides, and

1 I think both sides really need to just have more than half an eye on how these
2 things will work mechanically in court, because we as a Tribunal will take
3 a singularly dim view of the rabbit being pulled out by one advocate and the
4 expert saying: "This is all very interesting. I am going to need three hours to
5 consider whether you are right". That's an inefficient use of time of what is
6 an important process. So sometimes it is inevitable, but that's what we want to
7 avoid happening.

8 **MR BEARD:** Completely understood. I am sure Mr Lask is in the same position.
9 I don't want to prolong this exchange, because I think we are probably all in the
10 same place.

11 **MR JUSTICE MARCUS SMITH:** That's very helpful. Mr Lask, I will not invite you to
12 respond unless you want to violently object, and I don't assume you will. Thank
13 you very much.

14 Just before we rise, because I see the time, the next points are really to do with the
15 order of witnesses, the framing of the hearing and so on. That I think is roughly
16 what's left. Have I missed something out?

17 **MR BEARD:** No, I think that's right. I think there is probably a very large measure of
18 agreement in relation to these issues. There is a limited difference that we think
19 there should be slightly longer openings. I think both Mr Lask and I, or CMA
20 and I, think in relation to time for witnesses we need to give ourselves leeway
21 at this point, even though it may be that we are overestimating the time that's
22 required, and then I think there is an agreement that there's a pause, and
23 written closings and oral closings. In relation to experts, I think there is broad
24 agreement that it can be dealt with by broad issue on market definition and
25 economic effects. But if this Tribunal were minded to say it would like to have
26 some concurrent hearing of evidence, then we are amenable to that, and we

1 will facilitate the Tribunal doing it by providing suggestions on questions and so
2 on. But actually I am not sure that there's a vast amount of disagreement
3 between us in relation to any of these matters. Mr Lask, unless I can
4 misrepresenting the position --

5 **MR LASK:** Well, only to say I think the timetable is now actually agreed.

6 **MR BEARD:** It is even better than that.

7 **MR LASK:** It is even better. The one that appears at page 5 of the core bundle which
8 does allow for a day and a half of opening is one we have agreed to.

9 **MR BEARD:** I am so sorry, Mr Lask. That one had passed me by. I am grateful.

10 **MR JUSTICE MARCUS SMITH:** Let me just see that I have that. Right. Yes. We
11 will want to have a discussion just to make sure that we all know where we are
12 at, but to be clear, we were entirely happy with the separation out of markets
13 definition as, as it were, a front-runner with other issues to follow on. We would
14 be I think ill-advised to push back on what is clearly something that both parties
15 think is sensible and seems to us to be sensible also.

16 It follows from that that any question of purdah, as regards the witnesses, is something
17 that we would lift, because it would be wrong to have a witness put out of action.

18 We are for our part encouraged by the openness of the parties to the idea of concurrent
19 or hot-tubbing evidence, not I think in whole at all. It seems to us that it is far
20 better to budget on the basis that there will be cross-examination in the usual
21 way, but it is possible that when the issues have been thrashed out in opening
22 submissions, and we have heard some evidence, that we may suggest that
23 both experts come back for a short hot-tub on a particular point that may
24 emerge as one of importance. I say that really by way of wriggle room for the
25 Tribunal more than anything else. I have no idea what those issues might be,
26 but my experience in these cases is that sometimes a point just emerges, which

1 everyone says "Why on earth didn't we think this was as important as it was
2 before?" The fact is that's the way these things happen. It may well be that on
3 that issue a hot-tub would be better than further cross-examination. So that
4 sort of flexibility is something we would want the parties to be aware that we
5 would encourage.

6 **MR BEARD:** I am grateful for that indication. It may be the parties can think
7 themselves about whether or not there are any particular issues -- they may not
8 agree on these matters -- that would be potentially suitable for hot-tubbing,
9 because I think it is genuinely helpful for the experts to have forewarning of the
10 process they are facing in relation to these issues. It is also, in practical terms,
11 quite helpful for organising the process of the trial.

12 Whilst, of course, the Tribunal can undoubtedly decide to do things at the last minute
13 or after openings and so on, it might be sensible if we give it a little bit of thought
14 in advance, but again not something we need to lay down any timetabling or
15 anything else. The indication from the Tribunal is sufficient for today.

16 **MR JUSTICE MARCUS SMITH:** Mr Lask.

17 **MR LASK:** Thank you, Sir. I would endorse Mr Beard's comments. This is not
18 intended in any way as a form of resistance to what the Tribunal has said. It
19 sounds perfectly sensible. One practical difficulty that concerns me in relation
20 to Professor Baker is his physical whereabouts. This ties in with whether the
21 main hearing is going to be remote or in person. He is based in the United
22 States. If it is in person, we will have to ensure that he is available for
23 a sufficient period to accommodate any recall for hot-tubbing.

24 **MR JUSTICE MARCUS SMITH:** Thank you, Mr Lask. I am very grateful that you
25 have raised that, because one of the points that I had -- I see the time but I think
26 it is worth giving you our views at the moment. Clearly, even though today is

1 Freedom Day, I think we can't expect COVID-19 to necessarily abide by that
2 injunction, that we are all free of its malign implications. So what I say is very
3 much not set in stone, but it seems to us that we ought to aim to have a hearing
4 in court with minimal teams and witnesses present, and as many people as
5 possible participating by way of either watching the live stream or on Teams.
6 For our part, it is marginally helpful for us to have all three members of the
7 Tribunal present, the advocates present and the witnesses present. I say it in
8 that order. Having done a few of these before, it is incredibly helpful for the
9 Tribunal to be in one room, but I know Professor Ulph has his own entirely
10 proper concerns about attending in person if COVID goes one way or the other.
11 So you may very well end up with a two person Tribunal in London and
12 Professor Ulph dealing with matters from St Andrews. That is something which
13 will work, just not quite as well as, I think, the Tribunal being in one room
14 together.

15 Equally, my experience is that it is very important to have the advocates in the same
16 room as the Tribunal when one has submissions. The whole interplay between
17 an advocate recognising that the Tribunal wants to make a point is so much
18 easier in court, where you get the body language, whereas my experience on
19 remote hearings is that when you intervene, it is usually a car crash, because
20 it comes out of nowhere, rather than being sort of signalled in body language.
21 So provisionally we would like everyone to be in the same room.

22 So far as witnesses are concerned, my sense is it is much more marginal. Oddly
23 enough, because it is so formalised with question, answer, question, answer,
24 witnesses manage very well remotely or in person.

25 To deal with your last point, Mr Lask, whilst marginally I would rather have the experts
26 in court, I don't see it as any kind of problem to have either both experts remote

1 or one present in court and one remote. That works very well in my experience.
2 I have done it in a number of patent trials where the American witness has not
3 flown over but the UK witness has been present in court. I think you should
4 recognise that the Tribunal will be flexible about this, but I think the default, and
5 it is subject to future developments, is that I would like the core people in court
6 on 1st November, but who the core people are is something up for debate. If
7 your expert, Mr Lask, for reasons that are entirely understood, given this is
8 a three week trial, finds it easier to give his evidence and can be more flexible
9 giving his evidence from America, then I can't see that as a problem.

10 **MR LASK:** I am very grateful, sir. That's extremely helpful. Thank you.

11 **MR BEARD:** We will take those matters away and discuss them.

12 **MR JUSTICE MARCUS SMITH:** Indeed. I mean, the fact is if in the course of late
13 August we get a massive spike and there's a problem, we will just have to go
14 back to the drawing board. So this is very much an aspiration rather than a kind
15 of direction, and we will be very interested to hear anything the parties have to
16 say on that front.

17 With that in mind, I think we have a few more points to briefly discuss, but I think we
18 can start the teach in by 2.30. If we come back at 2 o'clock, we can knock on
19 the head any further points regarding the advocacy part and then proceed to
20 the teach in.

21 **MR BEARD:** Thank you very much.

22 **MR JUSTICE MARCUS SMITH:** Excellent. Until 2 o'clock.

23 **(1.13 pm)**

24 **(Lunch break)**

25 **(2.00 pm)**

26 **MR JUSTICE MARCUS SMITH:** Can I just check we have communications. I can

1 see the Tribunal members but I can't see anyone else.

2 **MR BEARD:** We can see you, Sir, and members of the Panel, or certainly I can.

3 **MR JUSTICE MARCUS SMITH:** Good. I can hear you, Mr Beard, and hopefully --

4 **MR BEARD:** Excellent.

5 **MR JUSTICE MARCUS SMITH:** Hopefully the image will come up in a moment.

6 **MR BEARD:** Occasionally with the live stream feed with CAT there can be a delay.

7 I think we have had that on previous hearings. I don't know if Mr Lask can see
8 and hear as well.

9 **MR LASK:** I can see and hear everyone.

10 **MS LUCAS:** I can certainly see you both, Mr Beard and Mr Lask.

11 **PROFESSOR ULPH:** So can I.

12 **MR JUSTICE MARCUS SMITH:** Bear with me for a moment while we see what's

13 going on here. Bear with me. I seem to be the only one suffering from this.

14 I can only see Professor Ulph and Ms Lucas. That's slightly cramping my style.

15 So I am going to hold.

16 **MR BEARD:** Sir, just to note you are not muted.

17 **MR JUSTICE MARCUS SMITH:** Right. Excellent. Thank you very much to IT. I can

18 now see everyone concerned. So thank you for bearing with me.

19 We were just exploring the format for the hearing and there was one further point,

20 subject to anything the parties themselves want to say, that we wanted to raise.

21 It links in a little bit with the teach in that we are going to begin. We have looked

22 at the slides that have been produced by the Appellant and we are very grateful

23 for the work that has gone into it. We are bound to say that we are likely to

24 have questions on the teach in that go quite well beyond what is there in the

25 slides and we will see how we go in doing that, but there are certain questions

26 which may or may not be relevant to the hearing that we are at least

1 provisionally interested in hearing the answers to.

2 If I can give you one example of the question I think Professor Ulph and I have both
3 thought is something we would like to know and it is this. When one as
4 a proposed insured goes to the platform, the Compare the Market platform, and
5 enters various details and gets a quote and says "That's fine. I would like to be
6 transferred to the insurer", how far there is an absolutely precise dovetailing
7 between the provisional quote that is given by the website translated into the
8 final accepted proposal from whichever insurer that is coming up there, and it
9 seems to us at least at the moment, and we recognise that we are talking at
10 a very low order of knowledge on our part, that the extent to which there is
11 a potential for change between one stage and the other might be significant.
12 That was one of the questions which I have on my list for this afternoon.

13 Obviously if that question cannot be answered or appropriately answered, the parties
14 will let us know, but it did lead us into a point of potential concern regarding the
15 trial, because substantially, subject only to Ms Glasgow's appearance, we have
16 only got expert evidence in November, and on a number of occasions this
17 Tribunal has indicated its concern about over-reliance on expert economists in
18 situations where they are opining on a market about which they are not expert,
19 albeit in an expert fashion.

20 Now, it is fair to say those cases were all not regulatory appeals. They were I think in
21 all cases instances where it was private parties litigating against each other,
22 where the Tribunal made the point that economic evidence ought to be founded
23 on a factual understanding of the market.

24 Now, it may be that that is different in the context of a regulatory appeal, where one
25 has a decision which is based upon certain facts which are then challenged,
26 but, speaking for myself, I was a little concerned at our dependence on

1 an economic analysis based upon statements by economists as to how the
2 market is, in fact, operating. The questions I have just articulated and one that
3 I would be minded to ask is perhaps an indication of where what actually
4 happens on the ground could inform what the economists are saying in their
5 reports.

6 So, without wanting to restrict the parties in any way in saying what they have by way
7 of response, I just wanted to put on the table the sort of concern that we
8 perhaps ought to have, in November, someone available who can actually tell
9 us how things are working in the market so that we don't have, if a question
10 comes up, economists scratching their head saying: "Well, we don't know but
11 we have the answer".

12 The trouble is the evidence is locked down, as we have indicated this morning, and it
13 may be that this is something which the parties have thought about and
14 considered not appropriate, but I thought it was appropriate at least to raise the
15 concern, because, speaking for myself, I am usually enlightened by economic
16 evidence after I have got my teeth into exactly how these things work. It may
17 be that the relatively low level at which the teach in has been pitched reflects
18 the fact that actually both parties are of the view that the precise detail of
19 operation of the price comparison websites matters rather less than the
20 economic analysis of them.

21 I don't know in which order you wish to address me on that. It may be actually,
22 Mr Lask, better if you go first, as the regulator, rather than Mr Beard, as the
23 Appellant, but I am very easy about that.

24 **MR LASK:** Thank you, Sir. It is very helpful to have had that indication. I must
25 confess I find it difficult to respond immediately without having sort of taken it
26 away and thought about it with the CMA. I mean, it may be that the team can

1 have a think about it during the course of the teach in and we can formulate
2 some thoughts for later on in the hearing. It is food for thought. I hesitate before
3 trying to respond on the hoof without really having thought it through properly.

4 **MR JUSTICE MARCUS SMITH:** I entirely understand, and, of course, there is in this
5 case a particular asymmetry, in that you are not a participant in the market. You
6 are the regulator. It is fair to say in the other cases there was also an
7 asymmetry. For instance, in *Mastercard*, it is Mastercard that knows far more
8 about its operation of systems than, say, Sainsbury's or the supermarkets.
9 They are outsiders. So there is an asymmetry. But here there is a completely
10 legitimate appreciation that you make the decision and you then defend it.
11 I entirely understand your hesitancy in raising it. As I say, it may not be a real
12 concern, but given where we are at in the process, I felt that since we have
13 articulated the concern ourselves, it is worth putting on the table.

14 Mr Beard, of course, it's a slightly more pointed question for you, because you are in
15 the market and you could provide us evidence, but you are obviously
16 responding and attacking a decision of the CMA.

17 **MR BEARD:** Yes, absolutely. Just to state the utterly obvious, it is for the CMA to
18 discharge its burden of proof in relation to these issues, and it will be part of the
19 submissions to be made in due course that they have failed to do so and failed
20 to proffer sufficient evidence to enable them to do so.

21 During the course of the administrative procedure, submissions were made by
22 individuals who were then at Compare the Market, and so material was
23 provided to the CMA in relation to these matters during the course of the
24 administrative procedure, which we will refer to in due course.

25 One of the criticisms will be that the CMA's findings are not congruent with that and
26 yet they lack an evidential basis for disagreement. That doesn't require us to

1 put in further evidence in relation to these matters.

2 As you will have seen from the thrust of various strands of our appeal, what we are
3 saying is "Not only did you not have adequate evidence; you drew poor
4 inferences from the material you had and you did not carry out the sort of expert
5 exercises you would expect to carry out in circumstances where you didn't have
6 that factual evidence."

7 Yes, of course we have people who have knowledge of the market, albeit one of the
8 lead people that provided evidence in the course of the administrative process
9 moved on, for entirely separate career reasons, to another company who were
10 quite jealous of his involvement, and therefore he has not been involved in
11 proceedings since, but the material he provided was entirely sound.

12 As I say, this will be a matter of submission in due course, because it's a key strand of
13 our appeal, that they have not hit their straps in relation to burden or standard
14 of proof in relation to facts, inferences or expert material.

15 So yes, it is important. Yes, of course, we have people that know about the market,
16 but that's a slightly different issue when, as you say, you are dealing with the
17 target of a decision. What we are looking at is the assertions made by the CMA
18 and are they made out?

19 **MR JUSTICE MARCUS SMITH:** Mr Lask, I don't want to take words out of your
20 mouth, but your answer I suspect is going to be the precise converse, which is
21 the CMA have set out the factual basis for the Decision. That is all in all
22 sufficient. Mr Beard is raising a number of objections that don't hold water. But
23 whatever the outcome of that Decision is, additional evidence of fact can't help
24 either which way. You can't adduce additional evidence of fact, because that
25 would be changing the goalposts of your Decision, and it was for Mr Beard to
26 decide what he adduced by way of response, and we have what we have.

1 Whilst, of course, I would be grateful for the parties' additional thoughts on this point
2 I can see why we are where we are. It is just I have a sense of unease, as
3 a member of the Tribunal has to decide these issues, that there may be
4 questions that we raise in the course of November which we think at least, when
5 we ask the questions, are intended to assist us in deciding the issues before
6 us, but which no-one in the room can actually answer, because they are not
7 sufficiently up to how this market works on a day-to-day and granular basis.

8 **MR BEARD:** I think, as Mr Lask has said, we understand the position the Tribunal is
9 adopting. Of course, there may be circumstances where questions the Tribunal
10 raises and are interested in we may be able to assist by way of simply taking
11 instructions in relation to matters. Of course, we will try to assist the Tribunal
12 in relation to such matters. Whether or not that requires someone to be sort of
13 on standby as an information hotline is perhaps less clear at this stage. It might
14 be better to leave that open. But we recognise the point that is being made by
15 the Tribunal and we will seek to assist as best we can in relation to it.

16 **MR LASK:** Sir, if I may just add, respectfully I would endorse your characterisation of
17 my likely position, which is to say that we have set out a series of factual
18 findings in the Decision. The Appellant has, in certain respects, taken issue
19 with the CMA's understanding of how the market operates. They have not
20 adduced factual evidence, but, as Mr Beard says, there is factual material that
21 was before the CMA at the administrative stage, which it will be open to both
22 parties to refer to.

23 There is, of course, also the question of Ms Glasgow. I don't now recall where she is
24 at the moment, but during the Relevant Period or at least some of it she was
25 working for one of Compare the Market's rivals. So at least to some extent you
26 will have a witness before the Tribunal with knowledge of how the market

1 operated at the relevant time.

2 **MR JUSTICE MARCUS SMITH:** That is entirely fair, as a point. I think that, having
3 raised the point, it would be pointless and probably ill-advised to take it further.
4 It may be that it is simply a reflection of the very steep learning curve we have
5 to undertake in relation to this case, more than anything else. Having that in
6 mind, we thought it was appropriate to at least flag something so the parties
7 were aware of what we were thinking. We will not invite anything more there.

8 In terms of the trial timetable, the parties have what we said before the short
9 adjournment, and no doubt the trial timetable can be further evolved as matters
10 go on. The only thing I would say in terms of the three weeks that we have is
11 obviously reading is over and above that. That is entirely understood, but, if
12 I may be slightly critical of the Tribunal's own practice, there is a tendency to try
13 to shoehorn too much into too short a hearing, which results in great pressure
14 on both the advocates and the Tribunal in trying to get through things.
15 I personally am quite pleased that we have a number of days which are, as it
16 were, labelled a break, which could constitute a means of using additional time,
17 should it efficiently be necessary. So I am quite pleased that we have more
18 time rather than less for everyone's benefit.

19 Subject to that, I will hand over, Mr Beard, first to you and then to you, Mr Lask, to see
20 whether you have anything more to say about the modus operandi in
21 November.

22 **MR BEARD:** No. I don't think I do at the moment. I think the agreement in relation
23 to timetable which, as I understand it, the Tribunal has far from any objection
24 to, is one that we will inevitably revisit as we get closer to the time to see
25 whether or not there can be compressions, reorganisations and what have you.

26 In terms of other logistics, the only other matter that is outstanding is in relation to

1 resolution of how to deal with confidential material. I think that that is a matter
2 which is being constructively discussed between the two sides. We are not
3 seeking any direction in relation to that at the moment. We think that there is
4 going to be a means of providing a non-confidential version of material so that
5 it can be used and referred to openly.

6 I think there are inevitably going to be periods during both submission and expert
7 evidence where we will be straying into closed session, private session. That
8 is unavoidable, given some of the data and sources of material, but we are
9 obviously, both sides I think, doing our best to ensure that as much as possible
10 can be dealt with openly, both in the interests of justice but also in the interests
11 of convenience, quite frankly, because jumping in and out of private session
12 I think frustrates all concerned, including the Tribunal. That is the current
13 project that is underway, but I am not sure we are asking you to do anything
14 about it at the moment.

15 I perhaps should defer also to Mr Lask, because I recognise this is a cooperative
16 enterprise that is being undertaken at the moment, and obviously some of the
17 confidentiality is something that is within the gift of the CMA to deal with, not
18 really within the gift of BGL when we are talking about third parties, but my
19 understanding is the CMA are taking steps to try to deal with those issues as
20 best they can.

21 **MR JUSTICE MARCUS SMITH:** That's very helpful. Mr Lask, I will obviously hear
22 from you, but just on the mechanics of operating a confidentiality ring, in what
23 is going to be at least in part a hybrid hearing, even if we have all the key players
24 in court, and that may not be the case, there will be multiple interested parties
25 entitled to hear confidential material not in court.

26 We probably ought to try to have a dry run of this, because I am wondering whether

1 one ought to have two sets of hearings configured, one which is open to all,
2 and anyone who has an invitation gets one and others can participate in live
3 stream. The other confined to people in the ring so that one can move, as it
4 were, from one Teams meeting to another, without having to check who is
5 present remotely, and make sure they leave the court room every time, because
6 when I have done it in the past, that takes quite a lot of time, working out who
7 is properly there and whose initials or e-mail address denotes someone who
8 shouldn't be there. Usually people are very good about leaving, but it is
9 a problem.

10 **MR BEARD:** Completely understood. Given the indications that we are going to need
11 to do some of this at least involving some people virtually, I think that's
12 an eminently sensible suggestion.

13 I should say I think this is distinctly manageable. Over the last two or three weeks the
14 CMA itself, in its different capacity, dealing with energy matters, has been
15 running a series of Appellant sessions, where there are various confidentiality
16 rings and exclusions that are required. I am sure we can liaise to ensure that
17 the CAT Registry have the best way of dealing with these things. It may be that
18 the CAT Registry already has, particularly through Sir Charles Dhanowa in
19 relation to these matters, these matters underway, but I think there are ways
20 and means of doing that.

21 I am not sure whether you will need to have a full dry run session in order to operate
22 that. I think what you end up doing is effectively having discrete invitation lists
23 that are at the behest of the Registry, effectively. Essentially, they can fulfil
24 what is no doubt a very satisfactory bouncer function from time to time during
25 the course of the hearing.

26 Again, I think this is probably better if we take it away, discuss it between the parties,

1 liaise with the Registry, and I think we will have the technical wherewithal to
2 deal with this.

3 **MR JUSTICE MARCUS SMITH:** I was just being educated as to how the Tribunal
4 does do things. I think, Mr Beard, you are right. This is something which with
5 a bit of communication with the Registry will work pretty smoothly. It may not
6 be quite the way I articulated it, but I think with the input of the parties this will
7 work pretty smoothly.

8 **MR BEARD:** Yes. The very fact that you live stream means that, whereas with other
9 court proceedings, where they have to take steps to effectively take people's
10 e-mails, to log them on to the system if they want to watch as the public, through
11 public access, you don't have that issue in the CAT. So you solve a bunch of
12 generalised access problems already. As I say, this I think is entirely
13 manageable. We can take it under advisement and deal with it.

14 **MR JUSTICE MARCUS SMITH:** Thank you, Mr Beard.

15 Mr Lask, probably I should have asked you first on this, since the CMA I think bears
16 the greater burden on confidence, but do please add your submissions.

17 **MR LASK:** Thank you, Sir. Mr Beard is right about engaging with third parties on
18 confidentiality. We anticipate being able to update BGL on that in due course.
19 We can no doubt come to a sensible arrangement for how that material is dealt
20 with at the hearing.

21 I agree with everything Mr Beard has said about the manageability of, for example,
22 having two separate Microsoft Teams meetings in process. It sounds
23 eminently sensible and sounds eminently achievable.

24 Sir, the only additional issue I wanted to flag was in relation to the hearing bundle, on
25 which we provided an update at paragraph 11 of our skeleton argument, where
26 we described the proposal that the CMA has been exploring with BGL, namely

1 one in which there is a main bundle containing all of the documents referenced
2 in the pleadings, the evidence and the Decision. It is one that is found in
3 electronic format only. Then there is a hard copy core bundle containing the
4 key documents that are likely to be referred to at trial.

5 My understanding is the parties are still discussing that, but that's where the proposal
6 stands at present. Of course, if the Tribunal has any immediate reactions to
7 that, that would be very helpful.

8 **MR JUSTICE MARCUS SMITH:** I am going to chance my arm and give an immediate
9 reaction, and be shot down by the other members if I have misspoken, but for
10 my part, whilst a core bundle in paper is very useful, it probably ought to be
11 produced at the very last minute, if at all, and we should principally rely upon
12 electronic bundles to be used, partly because that is more tree-friendly and
13 partly because it is actually more efficient in terms of getting really quite hefty
14 documents to parties who don't necessarily work in the same place all the time.
15 So for our part we would endorse, provided they are, as I am sure they would
16 be, clearly navigable, electronic documents, that would be our preference. It
17 may be that we supplement it with a single lever arch file of core materials, but
18 that may not even be necessary. What I suggest is that the parties proceed on
19 the basis of electronic bundles, and we will make it clear later on if
20 a supplementation by way of a paper bundle would assist. It may very well not.

21 **MR LASK:** That's very helpful, Sir. I anticipate there may be members within the legal
22 teams that find it helpful to have core bundles in hard copy, and certainly, if that
23 is the case, and if there is a separate core bundle, then that can be replicated,
24 I would have thought, as an electronic bundle, so that the Tribunal is clear as
25 to what the parties have in their hard copy core bundle, and can access it
26 separately from the much larger main hearing bundle that will also be available

1 electronically.

2 **MR JUSTICE MARCUS SMITH:** I understand.

3 **MR BEARD:** These are matters of discussion. We want to focus on electronic. We
4 will arrange for stuff to be printed out as necessary, if that's of use to the
5 Tribunal. I think there is a question of whether or not you have two versions of
6 documents electronically, one in a core bundle and one in a general bundle.
7 Let's look at the navigability. It slightly depends on how good these systems
8 are that we are using for packaging stuff up and accessing them and navigating
9 them. If they are less than ideal, then having a core index, as Mr Lask suggests,
10 may be sensible. Whether or not the Tribunal even wants all of that copied off
11 in hard copy, given volumes, I think we can debate a bit further down the line.

12 I think the critical thing is we try and sort something out so people can start relatively
13 far in advance (a) having access to things and (b) being able to mark them up.
14 At the moment, on the timetable, I think the bundles are only intended to be
15 finalised quite close to the date of the hearing. 22nd October is the date for
16 actual lodgement of the bundles, including in electronic form. We will carry on
17 with the discussion. It may be we can make progress well in advance on that.

18 **MR JUSTICE MARCUS SMITH:** Yes. Speaking as someone who recalls the
19 pleasures of preparing a case as counsel, I think you would want your
20 electronic bundles or the bundles you are going to work from as soon as you
21 possibly can, just to enable preparation. For our part, we would encourage the
22 parties to move in a direction which produces these things sooner rather than
23 later, but that's more for the parties' convenience and Counsel's in particular
24 than ours.

25 **MR BEARD:** Yes. I think we are all working on the basis this may take more than
26 eight days' preparation, this trial. We are conscious that we will want the

1 referencing before then, and obviously for skeleton arguments it is jolly handy
2 to be able to put in bundle references.

3 **MR JUSTICE MARCUS SMITH:** It is.

4 **MR BEARD:** So people can navigate their way round. We have those matters in
5 mind, notwithstanding the specific timetable that's in place. Again, not one for
6 directions at this stage. I think this is one of those happy circumstances where
7 we all have the same communal interest to make this navigable and workable.
8 So we will do our absolute best to ensure that.

9 **MR JUSTICE MARCUS SMITH:** Thank you very much. Unless there is anything
10 more, we should move over to the teach in. I saw Miss Gibbs flash up on screen
11 and then disappear. Perhaps we can move on to that.

12 **MR BEARD:** Yes. I will not make any comment. I have not, in fact, seen the slides
13 she is going to present to you. So I will leave all of this to Miss Gibbs. I know
14 there have been exchanges of correspondence in relation to these matters.
15 Miss Gibbs is aware of the parameters of the teach in. There has been
16 a discussion about the slides I understand with the CMA, and Miss Gibbs well
17 understands that the Tribunal may have questions along the way in relation to
18 these issues. So with that I perhaps just leave matters to you, Sir, and to Miss
19 Gibbs.

20 **MR JUSTICE MARCUS SMITH:** Thank you very much.

21 **MR BEARD:** Mr Lask had his hand up. I apologise.

22 **MR LASK:** Thank you. May I just say my proposal, subject to the Tribunal's views,
23 was to leave any questions or points that I wanted to make on the presentation
24 until the end rather than seeking to interrupt the presentation.

25 **MR JUSTICE MARCUS SMITH:** That's very helpful, Mr Lask. Thank you. Miss
26 Gibbs, welcome to the Competition Appeal Tribunal. Thank you for giving up

1 your time to go through this presentation. I am not going to swear you. You
2 are not giving evidence here. This is simply a process to enable the Tribunal
3 to shortcut the learning process in November so that we can cut to the
4 controversial points more quickly. It is simply intended to assist us to get a grip
5 on matters.

6 We will let you just go through the matter. If we have any questions in the course of
7 it, we will ask them, but we will save any big questions for the end, but we will
8 intervene or try to intervene, as helpfully as possible, in the course of your
9 presentation. Thank you and over to you.

10 **MISS GIBBS:** Great. Thank you very much. So I am Ursula Gibbs. I am currently
11 the Commercial Director in Compare the Market. I have worked in the
12 insurance industry in various guises for about the last two decades. My current
13 role really consists of managing Compare the Market's external third parties,
14 who provide products and services to our customers. That consists of broadly
15 about 200 panel members and partners, and those products range from home
16 insurance, which we are clearly going to cover in some level of detail today, to
17 travel insurance, mortgages, money and everything in between.

18 There may be some areas, as I go through the content, that I might touch on if it is
19 relevant and helpful as a comparative, but clearly the primary objective of this
20 afternoon's meeting is really to just support the content around the home teach
21 in.

22 Our role, as a commercial team, is really to ensure that our partners are delivering
23 both good prices, services and ultimately great outcomes for our customers,
24 and also ensuring CTM get the most advantageous commercial terms from
25 those relationships.

26 Prior to joining CTM, just over a year ago, I held a role in our broker division, and I will

1 come on in a moment to just explain the broker function and what that means.
2 That role was hopefully helpful in the context of discussions today, because
3 I was responsible for quite a broad suite of external relationships. That
4 encapsulated anything from our insurer partnerships to our price comparison
5 relationships and also our affinity partnerships. So hopefully that will give us
6 some additional framing as we go through the deck.

7 Really my objectives for today are to give you a broad introduction to how price
8 comparison sites work, in the context of home insurance. I am going to be
9 covering various facets of that. That will be the businesses that operate within
10 the home insurance value chain, the interactions between each of those, how
11 price comparison sites look to attract customers and bring them on to their
12 websites, search engines and the role they play in attracting customers and
13 presenting shop windows for customers.

14 We will run through, at a very high level, the customer journey and distinctions that
15 exist across providers.

16 Lastly, I will take you through some key components around price comparison sites,
17 their provider and panel relationship and key contractual and operational terms.

18 I will probably start with a slight confession. Because of the breadth of the agenda
19 today, I am not an expert in all of the areas that we will cover, but I am hoping
20 I will be able to give you some broad context. If we do get any questions that I
21 am unable to answer, clearly I can take those back to the team and come back
22 to you as quickly as possible with answers on that.

23 The other thing I am very conscious of is the insurance industry is very well renowned
24 for jargon, so I will try not to use jargon. Unfortunately, it does seem to come
25 a bit second nature after 20 years. I will try to avoid that wherever possible. If
26 I do slip up, feel free to put your hand up and I will stop and clarify at any time.

1 Before I start, any questions at all?

2 **MR JUSTICE MARCUS SMITH:** Not from me. Thank you very much.

3 **MISS GIBBS:** Great. Okay then. So we will start kind of at the very beginning, which
4 is what is home insurance? Home insurance consists of three key products.
5 Broadly, as you think of those products, they are buildings insurance, contents
6 insurance or combined insurance, which is a policy that covers both buildings
7 and contents. If you think of buildings insurance, essentially, if you were able
8 to turn your house upside down, anything that dropped out of it would
9 essentially form contents insurance. Anything that remains in the property is
10 buildings insurance.

11 There are about 28 million households in the UK. Of those, 18 million have some form
12 of household insurance, be it a combined policy or buildings or contents as
13 a standalone provision. Anywhere between 25% and a third of the UK
14 population don't have any personal insurance policies. That's driven by two
15 key reasons. The first is, in the main, insurance is not mandatory. So in the
16 car insurance sector there is a mandatory and legal requirement for you to have
17 insurance for a vehicle that is on the road. There are some areas, for example,
18 mortgage providers may insist on a customer having a buildings insurance
19 policy. But predominantly it is not mandatory, which is why you have a lot lower
20 number of customers who then opt for it. So that's driven by two things. Usually
21 people who don't own their own property, younger demographics, and also
22 people who potentially are in social housing.

23 The purpose of insurance is really to cover you against a number of perils, so damage
24 or loss caused to your property or the contents of your property. That ranges
25 from anything from fire to earthquake, which clearly doesn't happen too
26 frequently in the UK, to theft or attempted theft or falling trees or branches. So

1 it is really there to protect consumers in the event that an unfortunate incident
2 happens, to cover the damage or losses caused by them.

3 This is probably, in terms of the slides we are going to go through this afternoon, one
4 of the most complex in terms of the narrative and level of detail that I will get
5 into. I think it is a really good context in terms of understanding how price
6 comparison websites sit within the broader value chain. I am hoping the chart
7 on the right will help frame those conversations and I will start to walk through
8 that now.

9 Fundamentally, whatever type of insurance policy you purchase, that will have in some
10 way, shape or form an underwriter on an insurer sitting behind it, who is
11 regulated by the FCA and the PRA to distribute home insurance. The role of
12 those insurers are ultimately to determine an appropriate price for the individual
13 risk that a customer is posing when they are looking to take out a home
14 insurance policy. Risk to an insurer really means the likelihood of that customer
15 making a claim and them having to pay out for it.

16 So when they are looking at individual customers, they will have a whole suite of
17 models that really look to determine the potential profit from each of those
18 customers that they will then use to derive a price.

19 They will also look at the likelihood of a customer staying with that insurer over
20 an extended period of time, because that will then essentially drive a longer
21 term value from those policies. The longer a customer stays with that insurer,
22 the better in terms of them recouping their investment.

23 In the most straightforward of scenarios, a direct insurer can choose to distribute their
24 product directly to consumers. They will use direct marketing activities, which
25 will look very similar to the ones we adopt as a PCW to attract customers to
26 their websites. They will use above the line marketing investments, TV

1 campaigns, search engines, etcetera.

2 There are also a number of direct providers that won't appear on PCWs. So they will
3 choose not to present themselves on PCWs. There are a couple of examples
4 here. There are various reasons why insurers may choose to do that. Hiscox
5 is actually an insurer who tend to deal with much more high net worth
6 policyholders. So in those instances it is a much more one to one interaction.
7 It tends to be a more offline customer service with portfolios of properties,
8 boats, cars. So that's why they don't tend to operate in the PCW space.

9 We then have NFU who have never operated in the PCW space, and are very overt
10 in terms of the messages they use, around not playing in PCWs. Then you
11 have UK General Insurance Group, more commonly known as Direct
12 Line Group. Their key brand within that UKG Direct Line Group portfolio is
13 Direct Line. Similarly, they explicitly state that they do not work with PCWs and
14 will only operate in that direct channel. They will use strong foundations in their
15 brands and marketing to try to attract customers into their direct propositions.

16 **PROFESSOR ULPH:** Could I just ask a question at this point? You talked about
17 Hiscox. I can understand that if you are an insurance provider and you really
18 wanted to specialise in a particular niche of the market, you would not
19 necessarily want to go through a price comparison website. It wouldn't be the
20 kind of thing you would do. But I just want to understand to what extent might
21 other insurance providers who do use price comparison websites also have
22 some degree of specialisation in terms of the range of products or the range of
23 properties that they would consider providing a quote for?

24 **MISS GIBBS:** Yes.

25 **PROFESSOR ULPH:** Is it possible that some insurers might just say: "Look, we are
26 not interested in London. We don't like the risks. It's too high there. We will

1 only insure people who are coming from rural areas". Is there any such
2 specialisation going on there?

3 **MISS GIBBS:** Insurers will operate multi-brand portfolios, and those brands and
4 propositions can look distinctly different. I think it is fair to say that typically,
5 where you would see key points of differentiation is in question sets. Price
6 comparison websites, and we will come on to this later on, essentially try to
7 cater for the masses in terms of the providers they work with. So they will have
8 a broad question set, but it will be consistent.

9 In that example that you just outlined there, if you were trying to distinguish whether
10 you would write policies in a certain location in the UK, you could simply do that
11 by not returning a quote via price comparison websites if you wanted, because
12 we provide that information as part of the quote journey.

13 If, as an example, you were really looking at the types of property and construction of
14 a property, and you wanted to ask a very finite level of detail around
15 construction of property, that would be quite difficult for you to do via a price
16 comparison website, because the price comparison site works in conjunction
17 with a panel of providers to provide prices, but it also has to be very conscious
18 of the customer, and not essentially looking to add additional questions that
19 may distract, for the majority of customers, in getting to the end of that process,
20 which is ultimately to try to get a price and compare prices.

21 I hope that answers the question, which is there are potentially component parts that
22 we can facilitate just by the information we capture. When it becomes more
23 niche and nuanced, it would essentially have to be a direct proposition, because
24 we would not cater for that in some instances.

25 **PROFESSOR ULPH:** Okay. That's really helpful.

26 **MISS GIBBS:** Okay. So we talked to that simple distribution strategy, which is "I am

1 an insurer and I go direct to customers to secure their business".

2 Most insurers offer what we would call multi-channel distribution strategy. So as well
3 as operating in that direct segment, they will also use a variety of distribution
4 techniques to get their brand and policies out to market.

5 We have got some examples here. So Aviva, Covéa and Ageas all offer direct
6 propositions to their customers, but they will also operate in a number of other
7 alternative distribution sectors and factors. If we move to own insurer brands,
8 we have got Churchill and QuoteMeHappy there. That is essentially where an
9 insurer is taking their underwriting and pricing capability but they are using a
10 separate and distinct brand to then take that out to market. Again, those can
11 be positioned and marketed directly, but they can also be taken in other kind of
12 areas of distribution. Churchill is actually part of the UK General Insurance
13 Group, or Direct Line Group and QuoteMeHappy is an arm of Aviva.

14 If we look at the biggest brand we work with which is Admiral, they adopt a very similar
15 philosophy. So Admiral is one of the biggest personal lines insurers out there
16 in the market. Admiral is probably the most well renowned of their portfolio, but
17 they also operate brands Bell, Gladiator and Diamond that run alongside that,
18 and that is really about giving diversification of portfolio and product options
19 around distribution. So that's how potentially you can have an insurer that then
20 has a multi-faceted brand portfolio.

21 I said in my introduction I would cover brokers. It is something I am fairly familiar with,
22 given the context of my previous role. So brokers --

23 **PROFESSOR ULPH:** Sorry. Can I ask another question?

24 **MISS GIBBS:** Yes.

25 **PROFESSOR ULPH:** Is there any potential then for confusion, because if some
26 providers are operating through a number of different channels and different

1 brands they are going under, might a customer think they are getting a quote
2 from a completely separate company, but in fact they are getting it just from the
3 same company?

4 **MISS GIBBS:** Yes, they are definitively -- I have taken my time over the broker. We
5 will come on to the complexities of broker and the value chain and how that sits
6 together in a moment. But if you look at affinity partnerships, so Marks &
7 Spencer's home insurance is an example, isn't managed or operated by Marks
8 and Spencer. It is actually operated by a number of third parties who support
9 Marks and Spencer in getting their brand out to the market and distributing
10 home insurance. So as an insurance provider, a broker or an affinity, you have
11 to be really kind of clear and try to in your customer communication establish
12 your role and the role of those you are working with, in terms of distribution.
13 But, as you can imagine with any kind of small print, it is often missed and can
14 lead to customer confusion.

15 **MR JUSTICE MARCUS SMITH:** Just to add to that, so you are using intermediators
16 in a very particular way to represent those entities that carry forward, as it were,
17 M&S's brand of insurance.

18 **MISS GIBBS:** Yes.

19 **MR JUSTICE MARCUS SMITH:** Okay. So you don't have in this picture any labelling
20 for the traditional insurance broker, where I go, not to a price comparison
21 website, nor to an intermediary provider, nor directly, but I have a broker who
22 may access multiple of those channels. Is that because you simply see them
23 as within the home insurance customers label and not necessarily needing to
24 be differentiated, or is there some other reason why they are not specifically
25 labelled on your diagram?

26 **MISS GIBBS:** It may be my poor labelling. So apologies. All of those three kind of

1 distribution routes kind of I would encapsulate as intermediated. It may just
2 appear because my arrow is immediately under affinity. Sorry about that.

3 **MR JUSTICE MARCUS SMITH:** I am with you.

4 **MISS GIBBS:** So a broker, really good example of a broker who interacts in exactly
5 that way and who doesn't distribute on price comparison sites is a provider
6 called A Plan. A Plan operate a retail network and don't distribute on price
7 comparison websites. So when I talk to "intermediated", what I am really saying
8 is the ability for either an insurer, an affinity partnership or a broker relationship,
9 anything that's not essentially a very vanilla insurance brand going direct to
10 a consumer, the offering that exists there that could end up with a home
11 insurance customer having a direct interaction with any three of those facets.

12 **MR JUSTICE MARCUS SMITH:** Okay. I take it it doesn't matter, for the purposes of
13 your description of the market, whose agent the broker is, because one can, of
14 course, have a broker who is acting as the insurer's agent or a broker who is
15 acting as the insured's agent, and there's a difference in terms of the duties
16 they owe and the responsibilities they have. Can I take it that under your label
17 of intermediated you are only talking about brokers who are acting as the
18 insurer's agent and that brokers who are for the proposed insured are in your
19 yellow box at the bottom.

20 **MISS GIBBS:** That is correct.

21 **MR JUSTICE MARCUS SMITH:** Thank you.

22 **MISS GIBBS:** No worries. So the distinction in the broker categorisation here is that
23 a broker will create their own brand and they will typically use a panel of
24 insurers to then drive the best prices for their customer base.

25 Brokers will typically take on a large degree of the end-to-end customer journey,
26 including on-boarding customer services, potentially even elements of claims

1 management, and they will also potentially have an influence over price.

2 So the panel will provide a price and then, although the broker will pay the insurer or
3 underwriter for that risk, they then may have an influence over the ultimate
4 street price or the price that is presented to the customer. So the advantages
5 for insurers in that broker's circumstance are clearly there is no cost of
6 acquisition, because the broker is paying for that, and then also reduced
7 operating costs, as those brokers take in a number of activities that in a direct
8 scenario would have to be managed through their own operations.

9 The last of the three potential routes --

10 **PROFESSOR ULPH:** Sorry. Can I just ask a question there?

11 **MISS GIBBS:** Yes.

12 **PROFESSOR ULPH:** You talked about managing the risk, but there are actually
13 multiple risks here, because there is question of -- basically, an insurance
14 contract shares risk between the company offering the insurance and the
15 customer. So, for example, you have lots of issues to do with excess clauses.
16 So they may only pay out above a certain amount of money for certain types of
17 events. Also, precisely when they pay out is written into lots of terms and
18 conditions which the customer may or may not fully understand.

19 So basically you are sharing risk between the customer and the insurer. So part of
20 the matters of what determines price is how much of that risk lies ultimately with
21 the insurance company and how much lies with the customer.

22 So when you are talking about some of these brokers, what role do they play in
23 determining precisely which risk is borne by the customer and which risk is
24 borne by the insurer?

25 **MISS GIBBS:** So they would not -- we will come on to this later on, in terms of excess
26 application and what that means from a pricing perspective. So they would

1 typically not have an influence over the insurer's pricing or the excess that's
2 applicable to that price.

3 Where they would be viewing risk is more so on the basis of the potential of that
4 customer cancelling a policy midway through or falling into debt, and the tenure
5 of that relationship with that consumer. So it looks very different from what you
6 would call a traditional risk profile that an insurer or underwriter would be
7 considering.

8 **PROFESSOR ULPH:** There is a follow-up question I have. You talk about the risk to
9 the customer that they would not necessarily pay, but there are other risks
10 attached to customers as well. I am thinking of home contents insurance.
11 People might claim to have been robbed when they had not been robbed. They
12 might be making fraudulent claims. So how much information do all these
13 different people gather about the customer who is potentially going to take out
14 an insurance policy?

15 **MISS GIBBS:** Is it okay, because I think I will answer that as I go through, in terms of
16 the questions we pose and also how data is utilised. Fundamentally, yes, when
17 they are trying to determine the risk that's presented by an individual customer,
18 they will be screening and utilising external data sources and their own
19 underwriting criteria to look at the trustworthiness of that customer and their
20 potential to exaggerate a claim.

21 **MR JUSTICE MARCUS SMITH:** I am sure you will be coming to it in due course, but
22 I could not quite see in your handout where you will be coming to it. If I can
23 articulate my question without expecting an answer now, that might assist you
24 in expanding your presentation when you get to this point, but what I am, for
25 better or worse, interested in is the extent to which there is a degree of binding-
26 ness on the underwriter if and when there is a price comparison offered, let us

1 say, on comparethemarket.com.

2 Let's suppose I end up on the price comparison website platform, and I put in certain
3 details that are asked by the site, which you will be coming to, and up come
4 three, however many different proposals, for want of a better word, of insurance
5 meeting my criteria. I see one is at £350 and one at £400 and the other at
6 £550. I obviously go for the lowest one and spin through there.

7 What I am quite interested in is the extent to which you, as a PCW, tie down the insurer
8 from changing the goalposts or saying "no", because it seems to me that there
9 might be a whole series of questions that an underwriter might have regarding
10 the attractiveness of the particular proposal which are not flushed out by the
11 website, by the PCW, because you want as quick a process and as uncluttered
12 a process as possible before you get to the quotations themselves.

13 So one of the questions I am interested in is how far there is an ability to say: "We are
14 now going to ask you the following 14 additional questions by the underwriter,
15 and when we have worked out precisely what your risk profile is we will say no,
16 get lost, because we don't like the cut of your jib". That's one of the areas I am
17 interested in.

18 The other thing is the other way to control risk is to say "We will have you but on
19 particular terms". I anticipate that the terms of insurance will be different across
20 the board. So what you will find is that you will be dealing with different forms
21 of offering between underwriters through the same platform, and again I would
22 be interested in knowing how far there is a degree of control over the
23 divergence in terms that exist or, to put the same point the other way, whether
24 there is an ability to control the product once you have passed through the PCW
25 on to the interface with the underwriter themselves. For instance, adding
26 additional products, like travel insurance, to your home insurance is something

1 which is often done.

2 What I am really trying to get at is the way in which the price comparison website is no
3 more than a puff, if I can put it like that, in terms of what is actually entered into
4 as an agreement between the insured and the insurer. Sorry, that was a very
5 long non-question.

6 **MISS GIBBS:** I think I have got the gist of it. I don't think that is covered elsewhere.
7 So you are right to pose it now. In terms of question sets and customers
8 essentially being asked for further information at a later stage, once they have
9 clicked out of the Compare the Market journey, we spend quite a lot of time
10 really analysing and understanding customer outcomes once a customer has
11 left CTM's website. That consists of a number of metrics. Anything from how
12 many customers ultimately end up buying a policy from that provider, the
13 movement in price that they presented on our website and the price that they
14 then purchased at, complaints, and a whole raft of things in between.

15 The reason we do that is because of exactly that point. We want to make sure that
16 a customer has confidence when they are leaving our website what they are
17 purchasing, and therefore when they ultimately land with a provider they are
18 not being tasked with a number of other questions that are significantly moving
19 the goalposts. So that's part of our operating framework and how we manage
20 our partners.

21 The second question, in terms of the complexities and divergence in terms of terms
22 and conditions that those individual partners provide was something that the
23 FCA recognised a few years back, and introduced a piece of regulation called
24 the Insurance Distribution Directive. That's really about making sure that there
25 are explicit disclosures which are contained both on our journey and also the
26 provider's journey around key inclusions and exclusions related to that policy.

1 When we go through the customer journey, I will not show it in full, but I will touch upon
2 where that would be evident to the customer.

3 **MR JUSTICE MARCUS SMITH:** Thank you.

4 **MISS GIBBS:** No worries.

5 The last route, and these are just headline routes. There are small facets and models
6 sitting around these, but just for the benefit of today and trying to get through
7 as much as we can, the last key and primary route is the affinity space. So they
8 are relationships which essentially take a well renowned, trusted UK brand and
9 formulate partnerships around that with experts in the insurance market to
10 distribute a range of products, including home insurance. They can be
11 operated on either what we call a solus basis. So the affinity partner partners
12 directly with an insurer or, alternatively, they can be structured via a broker. So
13 John Lewis and M&S here are solus partners and RAC is brokered. John Lewis
14 is underwritten by Covéa, M&S by Aviva and then RAC distributed by BGL
15 Group. That's really, from an insurance perspective, quite a powerful dynamic,
16 in terms of those affinity partnerships and what they bring to the table, for two
17 reasons.

18 The first is that well renowned brands attract and have better marketing capabilities.
19 From a price comparison website, they engage the customer and can convert
20 from lower down on the page, from a price perspective, but they also offer quite
21 unique and distinct data opportunities.

22 So insurers are all about understanding as much as they can about a customer in
23 order to make sure they are pushing the right price out of the door.

24 So if you think about M&S as an example, if you have a product through their banking
25 arm and you are a home insurance customer, and you live next to your
26 neighbour. You are both purchasing home insurance at the same time, same

1 postcode, broadly the same kind of contents cover that you are looking for, as
2 an M&S banking customer, M&S will know that potentially one of these
3 neighbours spends a frequent amount of time at the airport and using their
4 credit card overseas. Now the next-door-neighbour may not do that. That
5 would potentially give the insurer a really good risk that the home is going to
6 have a higher inoccupancy rate, and therefore the likelihood of a larger claim
7 occurring via either an escape of water that's not detected for some time or theft
8 could happen. So affinity partners often come with really great basis of data
9 which is really attractive to insurers.

10 **PROFESSOR ULPH:** So they are not competing on price. They are competing more
11 on both their reputation as brands. So that's what is attractive from the point of
12 view of customers. But it is also their information which attracts them to the
13 insurers. So the insurers know that these people have a huge database, that
14 they can do all kinds of calculations of all these other risks that these customers
15 might pose to them, and that's what makes them very attractive. But they are
16 not part of the price comparison network, are they, or aren't they?

17 **MISS GIBBS:** No. We will come on to how we actually fit into this puzzle very shortly.
18 They would be brands that potentially would appear on a price comparison
19 website once a customer has undertaken a home quotation through a PCW.

20 That brings me lastly on to price comparison websites and where they fit into this. I did
21 say this one was complicated.

22 Essentially, price comparison websites act as a distribution mechanism for all of those
23 various manufacturers. There are about 18 million households who have home
24 insurance, and 6.7 million of those will every year come to a price comparison
25 site to undertake a quote. So about 35% of customers who have a home
26 insurance product will come to a price comparison site. Actually, only 15% of

1 them, and we will come on to why -- that is kind of towards the back end of the
2 deck -- will actually result in a sale.

3 Our key role in this broader distribution of value chain is to make sure that we are
4 stimulating as many of those 18 million households away from their incumbent
5 insurer at renewal or from our competitors in the broader either direct or price
6 comparison site space to ensure that our proposition and brand is standing out,
7 as compelling as possible, and when they do make a decision to search and
8 potentially switch their home insurance, we are the brand and provider they
9 come to.

10 Just to really recap, insurers are fundamentally behind every single variant of product
11 distributed in the UK. There are four primary channels: so direct, brokers, own
12 brand insurance distribution and affinities.

13 Insurers can strategically determine which of those avenues they use to source
14 customers and they may use a multitude of those routes to attract and access
15 additional customers.

16 Like I said, I think that's the most complex of all the slides we will go through today.

17 So I will just take a pause to see if there's any questions before I move on?

18 **MR JUSTICE MARCUS SMITH:** None from me.

19 **PROFESSOR ULPH:** Could I go back and ask a question about the price comparison
20 websites? It relates to in some sense the questions we were asking you before
21 about some of the information that's collected from the potential insured
22 customer and passed through to the insurers. So would all the price
23 comparison websites ask the same range of questions to customers?

24 **MISS GIBBS:** No. We will definitely cover that. Actually, in the market, it can look
25 very distinctly different, depending on where you go and how you shop.

26 **PROFESSOR ULPH:** Okay.

1 **MR JUSTICE MARCUS SMITH:** I suppose it follows on from your answer to my last
2 question. The contract between the PCW and the insurer is, I infer, quite open
3 textured, in terms of stipulating the sort of product that the underwriter offers, in
4 the sense that your control is through take-up rates and absence of complaints,
5 rather than saying: "You must offer a product which has this level of excess
6 and this term in terms of notification", and so on. You leave that to the
7 underwriters and you really control the process to say: "Well, if you don't have
8 a take-up rate that exceeds" whatever the percentage might be, "we will have
9 questions for your offering".

10 In other words, if you find that no-one is actually concluding an agreement for
11 insurance, you would really not want to have that underwriter appearing as
12 a quote of your three.

13 On the other hand, if someone is converting enquiries into solid business, then you
14 are not too bothered about the terms on which they are offering it, because
15 customers are buying the product and happy.

16 **MISS GIBBS:** Yes, with one subtlety, which is we would still, regardless of how many
17 policies are ultimately being taken up, we would still inherently manage and
18 monitor the customer outcome. So for us it is a balance between great prices
19 and great products and services. But yes, we can't dictate to our providers what
20 distinct excesses or terms and conditions they apply. We can only broadly set
21 out contractually what our understanding of that product is at a headline level
22 that they are offering to our consumers.

23 **MR JUSTICE MARCUS SMITH:** Yes. I mean, you obviously wouldn't want a home
24 insurance PCW to take you through to car insurers. That would be
25 fundamentally pointless. Basically, you are saying that your controls, in terms
26 of the products that are offered, and I don't mean controls to seem in any way

1 sinister, but your controls for your service are take-up and absence of complaint
2 by the customers after the event, and you would look at those two parameters
3 principally in order to work out whether the system is working from your point
4 of view or not.

5 **MISS GIBBS:** There are two fundamental principles. We do call them controls. We
6 have a broad set of controls that we utilise. So we have a team who on
7 a monthly basis undertake manual quotes and go through the customer
8 experience to see what happens post click-through. They establish any
9 potential incidents issues that may be arising for customers. Again, that's just
10 another control that we operate in order to understand and influence customer
11 outcomes.

12 **PROFESSOR ULPH:** Could I ask a follow-up question? If you don't control the term
13 about the excess that people have to pay, when a price comparison website
14 presents a customer with two different prices, how does a customer know
15 whether or not they are getting the same degree of insurance, or whether one
16 of them might look quite low because, in fact, they were being saddled with
17 quite a lot of the risk themselves.

18 **MISS GIBBS:** When we go through the customer journey, you will see excess and
19 key terms that are included and excluded are part of the price presentation
20 process. So, in the first instance, we are presenting the price, but then also
21 fundamentally the excess, both the voluntary and a compulsory excess. So
22 that's all there. So the customer can make a really educated and informed
23 decision when they are comparing.

24 **PROFESSOR ULPH:** Okay. Thank you.

25 **MISS GIBBS:** No worries. Okay. So this page covers really three really simple
26 questions around the whys. So the first one is why do UK consumers use

1 comparison sites? It is a really simple way for customers to get access to
2 a broad range of prices and providers across the UK home insurance market.
3 Whilst it does not encapsulate all of the insurance brands that are available, it
4 does give the customer one question set that they can work through, and they
5 will get a multitude of products and propositions, which will save them
6 considerable time. A customer who has never visited Compare the Market will
7 spend just over ten minutes completing their quote. If they have been to
8 Compare the Market before, it is a matter of two minutes in order to save over
9 £100 at the moment, in terms of switching.

10 So it's a really simple, efficient and effective route for the customer to try to get access
11 to a wide variety of services and providers in the market.

12 I have covered previously some of the reasons why insurers would then use price
13 comparison websites, but there are specific benefits for insurers. We talked
14 about potentially multi-channel strategies. Price comparison websites offer
15 really simple fixed cost means of acquiring customers. It is as simple as you
16 can switch that channel off on a day-to-day basis. Clearly, we wouldn't be
17 particularly happy about that, but it is that flexible, in terms of the variability.

18 An insurer ultimately knows the cost of acquisition for each sale being made, whereas
19 direct strategies actually require significant investment. They can be quite
20 volatile. They depend on customer engagement with that marketing strategy,
21 the behaviour of your competitors as and when you are executing against that.
22 When we get on to online search, there is quite a few competitive dynamics to
23 consider there.

24 So it is that degree of flexibility where insurers are considering both direct and then
25 PCW as an avenue, and PCW is a really low risk fixed cost route.

26 The third question here is how do we make money? The great thing about working at

1 a price comparison site is if the customer is making savings, the higher
2 likelihood they have of actually purchasing a product with us, and in turn we get
3 paid when a customer purchases a product.

4 Broadly, our role is to attract as many customers as we can to the website, give them
5 a great experience, make them feel valued in terms of time and effort that they
6 have exhausted on completing that journey, then deliver competitive pricing
7 alongside a really compelling rewards proposition, in order for them to then feel
8 confident that they can purchase a home insurance product from us, and in the
9 basis that they then come from the price comparison website into the product
10 provider's website and complete a sale, we are then paid a CPA at that point in
11 time.

12 Essentially, we are only paid where a customer actually takes up a policy. The
13 conversion rate that we currently see running throughout journeys is for
14 buildings and contents about 35% of customers ultimately go on to purchase,
15 and it is about 30% for contents.

16 Really, for us, that's the crux of how we make money. The better our brand, the better
17 our proposition, the more savings we can drive, the better our customer
18 experience and the higher likelihood of them purchasing the product.

19 There is also then quite an important distinction on renewals. Renewals are
20 essentially the majority of the market. We talked at the outset about 80% of
21 customers don't come out and switch and shop, and they stay with either their
22 broker, their affinity or their insurer provider at renewal. For the majority of
23 customers, they are not actively engaging with price comparison websites.

24 So again our role is to try and stimulate as many of those to come back out, to search
25 and save money for their households. What that means is if a customer were
26 to purchase a policy through a price comparison website and then, at the next

1 renewal or the renewal after that or the renewal after that, we are not then paid
2 any further income from a cost per acquisition perspective. I should say I will
3 refer to cost per acquisition, and this is where we may start talking jargon, as
4 CPAs. That is kind of the crux of how a price comparison site would make
5 money.

6 **PROFESSOR ULPH:** The cost per acquisition, that's a price paid by the insurer, the
7 insurance company. So you are not charging the customer directly for using
8 this.

9 **MISS GIBBS:** No. The customer is never charged for -- and we will come on to it.
10 The majority of customers actually don't purchase the product, and regardless
11 of whether you do or do not, it is a free service that we offer. It is only when the
12 customer actually goes on to purchase a product that the provider of that
13 product, and that could be an insurer, broker, or an affinity partner, is then due
14 to pay CTM or an alternative price comparison website a CPA.

15 **PROFESSOR ULPH:** But you could think of the possibilities that customers could
16 pay, because since, as you say in point one, they are saving a lot of time and
17 effort by using a price comparison website, it is not implausible that in some
18 context customers might be willing to pay. So, for example, if I use Sky Scanner
19 to book a flight, I might pay more than if I go directly to the airline to book
20 a flight, but I am willing to do that because I value my time highly and I don't
21 want to spend a lot of time booking flights. So is it inevitable that you never
22 charge customers or is that just the way the market has evolved?

23 **MISS GIBBS:** It is certainly not within our strategy at the moment to charge
24 customers. For us, the brand is there to make financial decision-making as
25 simple and straightforward as possible. However, who knows? I might take
26 that one back to our broader strategy group for a discussion on, but not at the

1 moment.

2 **PROFESSOR ULPH:** Okay.

3 **MR JUSTICE MARCUS SMITH:** Okay. This is more a question of choice of offering
4 rather than any technical reason why you couldn't go down that route?

5 **MISS GIBBS:** Exactly. It is just the commercial mechanic we choose to operate with
6 our providers.

7 **MR JUSTICE MARCUS SMITH:** I quite understand. It follows then that as a business
8 proposition you are, as an entity in the market, pretty unkeen on automatic
9 renewals. You are much keener on people going back through the price
10 comparison website when their policy is due to expire, with a view to seeing
11 what the best deal is, rather than doing what I am afraid I do, which is just roll
12 it over and avoid even the two minutes, and no doubt they are very expensive
13 two minutes that I am avoiding, but that's something which is a driver for your
14 business. You want more people to think about renewal rather than do it
15 automatically.

16 **MISS GIBBS:** Yes. Like I say, the great thing about working as part of a price
17 comparison site is we know fundamentally customers can save money. I think
18 it is £107 at the moment on average for a home customer, if they switch at
19 renewal. It is actually kind of nearly £250 for your car insurance. So really our
20 job is to try -- we will come on to brand in a minute, and marketing -- it is really
21 trying to stimulate as many of those customers to understand that for £100
22 ten minutes of your time is a pretty good outcome for most of the UK. So that's
23 our role, to educate as many people as possible.

24 **MR JUSTICE MARCUS SMITH:** Thank you.

25 **MISS GIBBS:** Okay. I am going to move on to slide five now. This is where we are
26 going to start to talk through actually what we do in terms of how we try to attract

1 customers to our price comparison site. Easily quite a lot of these kinds of
2 headline mechanics could be applied to any market outside of home insurance,
3 but we will make it specific to home insurance and the price comparison
4 website.

5 So really where you are starting is with a brand. So, what you want to do is you want
6 to create a brand that appeals to consumers, that is recognised, trusted,
7 potentially provides a unique value proposition, and really engages
8 an audience. You can do that in a multitude of ways. Strap lines is an example.
9 You are building that brand engagement in 'front of mind'. For us that's the
10 strap line "Simples".

11 Trying to make financial services exciting, as you can imagine, is quite difficult for
12 consumers. Certainly in the market people have had a really good go at that.
13 So whether it is using furry meerkats, whether it is using a Welsh opera singer
14 or an A list celebrity, it is really about building that engagement, so people
15 recognise and establish a relationship with your brand. The way we then utilise
16 that brand is through various strategies of marketing.

17 So these by no way, shape or means are all the ways of marketing a brand, but they
18 are certainly the ones we talk about most frequently as a price comparison
19 website.

20 TV is probably the most expensive form of advertising out there. TV advertising is
21 either through buying spots and adverts or sponsorship. If you think about
22 adverts, as you can imagine, buying a spot in the middle of ITV's Euro Final is
23 going to be super expensive versus buying a spot on maybe a subprime Sky
24 channel at 11.00 pm at night. But if you are really kind of looking to attract big
25 audiences, clearly the bigger the audience, the more expensive that is.

26 There are also then sponsorship opportunities. Until last year CTM sponsored

1 Coronation Street. More Than, who are a big home provider, also previously
2 sponsored Drama on ITV. You can either sponsor categories of programme or
3 sponsor a specific programme. Those opportunities typically feature very short
4 ad slots at the start of or in between and after the programme. That's TV. I am
5 sure we have all experienced TV advertising hopefully in some way, shape or
6 form.

7 Then we come on to display. Display is essentially placing adverts on third party
8 websites. So they are kinds of banners that will appear at the top of the page,
9 images down the side of a page, potentially texts.

10 There are three ways of doing that. You can either choose a website to display your
11 ad on. You can do what's called contextual advertising. So in the home
12 insurance space that might be advertising on Zoopla, because clearly Zoopla
13 is a website where customers would be proactively considering their home and
14 potentially home insurance. The third category is re-marketing. So
15 re-marketing, and I am sure you will all have seen this, where you go on to
16 a website. Let's take Sky Scanner as an example we talked to earlier on.
17 Wherever you go online, Sky Scanner is following you around. That's because
18 as a brand you know that a customer has engaged with your website. You are
19 trying to entice them and re-market them back on to your website to essentially
20 complete whatever transaction they came in originally to look at.

21 Then we look at outdoor. Outdoor is really simple. That's purchasing outdoor space,
22 billboards and in a growing number of cases digital billboards to place adverts
23 on. The most famous billboard, and I am sure we have all seen it, is the
24 Piccadilly Circus billboard. Most commonly, certainly from a PCW's
25 perspective, I would not expect to see us in Piccadilly Circus. Where we
26 advertise are billboards with high footfall across city centres, around train

1 stations, to really reinforce that brand, try to get as many eyeballs as possible
2 on that advertisement.

3 There is then 'social'. Social is really using the likes of Twitter, Instagram and
4 Facebook. It is quite a different basis of engagement. That's really about
5 having a much more frequent, regular, even daily social media presence to
6 build and inform/engage communities. So, this is not about trying to sell
7 something. It is about actually building the brand engagement to give
8 customers content that they can use and find helpful.

9 As an example, some of the social content we have used recently are things like how
10 to ask for a pay rise. We did some content around furlough last year. So it is
11 actually building a relationship with a customer outside of potentially the
12 products and services you are offering.

13 Cinema. Really important strand for us, just because of the relevance of our rewards
14 proposition. A component part of that is movies. If you are confident enough
15 to have headed back into the cinema and made enough time to purchase
16 popcorn and drinks, prior to the cinema and film adverts there are essentially
17 advertising slots available to purchase prior to the movie starting. So really
18 captive audiences. No distractions of children, laptops, iPhones and, in
19 a similar way to TV, you can buy advertising slots in cinema.

20 Then, lastly, 'rewards'. I am sure you may be familiar with the rewards that are utilised
21 in the PCW space. They are also rewards that are used fairly commonly also
22 by insurers in their direct propositions. All of the price comparison websites,
23 the big four price comparison websites, use rewards in some way, shape or
24 form to really stimulate and engage customers to feel positively rewarded by
25 not only saving money but also giving them a broader value proposition that
26 may engage them and draw them into the site. For us that's our Meals and

1 Movies proposition, enabling customers to get two for one offers when they are
2 going out with friends and loved ones either to restaurants or to a movie.

3 Go Compare give a free excess cover policy. That's kind of a distinct proposition. If
4 you were then to make a claim, you pay your excess and that can be
5 reimbursed for you.

6 Confused offer a choice of four rewards. That's everything from I think it is 12 free car
7 washes to a £20 Halfords voucher.

8 MoneySuperMarket don't offer anything directly for home insurance at the moment but
9 they have just offered a rewards proposition on car, where you can get
10 vouchers up to £150 towards the maintenance of your vehicle.

11 In the direct space a couple of things going on at the moment. M&S have a really
12 great offer out there, which is if you purchase a buildings and contents policy
13 through them direct you can either get an Amazon Echo Dot or a £40 National
14 Garden Centre gift card. Rewards are really about stimulating customers
15 coming to a brand because there are broader advantages for a customer to
16 secure, outside of either switching, searching your product.

17 Those are all the headline facets of how you bring a brand to life and how you then
18 market it.

19 Once you have done that, then what you are trying to do is get customers to come to
20 your website. There are five key areas of traffic.

21 Despite what is fairly substantial multi million pound campaigns by both price
22 comparison sites and insurers to try to stimulate customers essentially to come
23 directly to their websites, or their apps, a very small proportion of customers
24 actually end up coming to you directly. Direct means they would type in
25 'comparethemarket.com', they would download our app or they would respond
26 directly to e-mail activity that we have sent out.

1 So less than a quarter of our traffic actually comes from 'direct', despite all the fantastic
2 work that our marketing colleagues do to try to attract those customers in. The
3 predominant number of customers actually start their home insurance journeys
4 on a search engine. So typically Google, but there are Bing and Yahoo and
5 others. Thinking about the term "home insurance", so just home insurance
6 alone. There are 1.4 million searches a month undertaken on that. So it is
7 a big, big competitive market search when it comes to home insurance and also
8 other insurances as well.

9 Those search functions are really split out into two areas. The first is search engine
10 optimisation, which is SEO. We also refer to it -- apologies. I was reviewing
11 the deck and I have used "organic" elsewhere in the deck, but SEO and organic
12 search are one and the same. They refer to the same basis of search and
13 display. So when I refer to search engines, I will probably use Google, because
14 it is the predominant search engine that most UK consumers use.

15 Google has a complex set of algorithms that it uses every time a customer searches,
16 in order to determine what the best possible set of results and ordering of results
17 are for that customer. They make thousands of updates to those algorithms
18 per annum. Usually they are small adjustments. Sometimes they will be much
19 more significant large-scale changes, and they can be fairly disruptive to
20 brands. That distribution strategy if you perform really well, from an SEO
21 perspective, can be fairly volatile when those big changes happen. Thankfully,
22 they don't happen too often, but SEO is about essentially utilisation of search
23 engines to drive your website content up to the highest position on the page.
24 The great thing is if a customer finds you through search engine optimisation
25 activity; there is no payment that you then make to the search engine for that
26 customer landing on your website.

1 The other search engine traffic channel is pay per click. It is exactly what it says on
2 the tin. Pay per click is essentially if you advertise, and you are listed on Google
3 as an advertisement, and a customer clicks on your advertisement, you then
4 are due to pay Google for that click. So they are really based around specific
5 search terms. A brand can decide how they bid in order to drive traffic to their
6 websites.

7 I don't know how familiar everyone is with pay per click activity, but they are
8 advertisements. They are at the very top of the page. You have to scroll
9 through a page and a half of content before you actually get to the organic
10 search engine optimisation listings. Really, PPC is essentially the higher the
11 bid, the stronger the prospect of a customer seeing your brand.

12 It's a very, very fine balancing act between attracting the right customers and bidding
13 on the right terms at the right price in order to then optimise the profit, because
14 what you really want to do is target those customers who are going to purchase
15 something from you and engage with your journey. Clearly, if they don't, you
16 are then on the hook for the cost of that customer landing on your site. PPC is
17 super tactical, it is very agile. Bidding strategies change by time of day, day of
18 week. For larger organisations it is a really complex and analytical set of
19 individuals with much bigger brains than I, who monitor and are constantly
20 reviewing the performance of those channels, and tweaking the bids in order to
21 optimise the returns coming from those.

22 The last traffic channel is two distinct functions. I have categorised them in one here.
23 It is partnerships. It's kind of similar to the affinity relationships we talked to on
24 insurers and brokers. Really, what a price comparison website would be
25 looking to do is find partners that really complement the suite of products that
26 they are looking to provide.

1 For us, CTM, we have two large scale partnerships. One is with Auto Trader for car
2 insurance. As you can imagine, when you are looking to purchase a new car,
3 clearly you will be thinking about the costs of insuring that vehicle. And then
4 Right Move for home insurance. Those are looking at how do you build
5 relationships to drive incremental traffic into your price comparison website to
6 potentially attract a new and broader audience.

7 Affiliates cover a broad range of smaller channels and websites that PCWs could
8 choose to work with and also direct players. The most common one is
9 cashback websites. Cashback websites essentially could come on to either
10 a direct or a PCW journey, and you could either get your Amazon Echo Dot or
11 Meals and Movies for a year, depending on where you decided to purchase
12 your home insurance.

13 In addition to that, you can also then use a cashback website. They will pay you cash
14 for using them to visit the price comparison website or direct provider. The
15 biggest one of those is a site called Top Cashback. They list for home
16 insurance 77 home distributors. They offer anywhere from -- I think when
17 I looked yesterday afternoon AXA were offering up to £105 cashback. Quote
18 Zone was the smallest cashback offer at £5. You had all the PCWs in there
19 competing from anywhere between £20, £30, £31. So clearly a multitude of
20 different avenues to bring customers to the website.

21 As I said, our role is really to try to stimulate the brand and the marketing activity to
22 make sure as large a proportion as possible is coming through direct, or when
23 the customer is utilising, in the main, a search engine to try to identify
24 a provider, that we are front of mind and they recognise and engage and trust
25 our brand to click on to us and then come to our website.

26 **PROFESSOR ULPH:** Could I just ask you about the search engine route, which

1 I think is the second and third channels there? How much does it vary between
2 the different price comparison websites, as to where they end up in the ranking
3 of adverts at the top of the page? Are you bouncing around quite a lot or do
4 some price comparison websites consistently do better than others there?

5 **MISS GIBBS:** We will come on to it in a minute. There is a really good example.
6 I have some screenshots of pay per click activity. I was a bit disappointed on
7 one of the terms to see that Compare the Market were not listed in the top three
8 when I did the screenshot. When I went to check it yesterday afternoon, we
9 were there in position one. It is really dynamic. Like I said, people can be
10 changing their bidding strategies not only by day, but by hour. That's because
11 each of the price comparison websites will understand potentially different
12 customer behaviours, the likelihood of actually purchasing a policy. It might
13 change by day of the week.

14 Going back to how we track and understand whether customers have visited our
15 website, we may be willing to bid more on a certain cohort of customers who
16 we think they have already engaged with CTM, as an example. So it does
17 change fairly frequently, although we do monitor it on a daily, weekly and
18 monthly basis to establish our performance in sector.

19 We monitor both our performance against price comparison websites but also against
20 brokers and insurers, because, as you will come on to see in a moment, the
21 search engine route is actually kind of a much broader sub-set of providers
22 outside the price comparison websites.

23 **PROFESSOR ULPH:** How much do price comparison websites understand about the
24 underlying demographics of who is using which method of finding out about the
25 brands, and then using which way of coming through to you on the traffic?
26 I personally tend not to use price comparison websites a lot for these things. Is

1 that typically younger people who would be doing that?

2 **MISS GIBBS:** Actually it is really interesting. We are clearly super interested in
3 determining which customers like to engage with us through each channel and
4 then adapting our marketing strategy and engagement with each of those
5 segments of customers to try to appeal to them in a way that's going to be super
6 engaging for them.

7 We actually have quite a large cohort of over 50 customers who we call super-savvy
8 shoppers. So not only do they use price comparison websites. They will go on
9 all of the price comparison websites. They will then go on the direct sites, where
10 we don't have access to those prices, and they will make sure they are getting
11 the best offer that's available in the market.

12 I think kind of the more we examine that, actually we see some very varying trends in
13 terms of consumer behaviours that you might not expect. It is really interesting
14 at the moment. Sorry. I digress. But I get a bit excited about customer
15 segmentation. At the moment we are seeing a big drop off in the under 30
16 population, because they are all, rightly, being distracted by the prospect of
17 going out to night clubs and pubs with their friends rather than, unfortunately
18 for us, comparing financial services.

19 **MR BEARD:** It is only a very mundane point. It is to the shorthand writers. I am
20 conscious of time. I wondered whether, since Miss Gibbs has reached the end
21 of this slide and I presume she is moving on to stuff that's related, but
22 I wondered if five minutes now for the shorthand writers might be a good idea.
23 That is the only thing I was going to raise.

24 **MR JUSTICE MARCUS SMITH:** I think that's a very timely suggestion. What we will
25 do is rise until 15.45.

26 Miss Gibbs, I don't want to rush you, because this is very interesting and helpful, but

1 we will try -- it all depends on the questions but we will try to finish today. I know
2 we have got tomorrow, but I think it would be an excessive call on your time if
3 we ran into tomorrow. We can run until 4.30, or even a bit longer, because I for
4 one am finding this very helpful. But we will rise until 3.45 and come back then.

5 **MISS GIBBS:** Okay. Thank you.

6 **PROFESSOR ULPH:** Thank you.

7 **MISS GIBBS:** Thanks.

8 **(Short break)**

9 **MR JUSTICE MARCUS SMITH:** Mr Lask, I see you have your hand up.

10 **MR LASK:** Just one point. I had suggested at the outset of this session I would save
11 my questions for the end. I am still very happy to. It occurs to me that may be
12 less helpful for everyone else, if I have a question on an early slide that I don't
13 ask until we have reached the end of the pack. I do have a brief question on
14 slide 3 which I would be happy to raise now.

15 **MR JUSTICE MARCUS SMITH:** Then I think you should raise it, Mr Lask. Whatever
16 is most helpful for the process.

17 **MR LASK:** It would probably be best for me to raise it now.

18 **MR JUSTICE MARCUS SMITH:** Wait there. Ms Lucas is having a problem staying
19 in the call. I don't think it is her fault. I think it is her computer throwing her out.
20 Just one moment.

21 **MR LASK:** Right.

22 **MR JUSTICE MARCUS SMITH:** We are good to go. Your question?

23 **MR LASK:** Good afternoon, Miss Gibbs. On slide 3, Professor Ulph asked a question
24 about affinity partners and in particular about the parameters on which they
25 compete. The CMA's understanding is that price is an important parameter of
26 competition for affinity partners, just as it is for other types of provider. Would

1 you disagree with that?

2 **MR BEARD:** I am sorry. Just one second. That is not a question about the text of
3 the slide. That's a half-baked cross-examination question, and I thought that
4 was precisely what we were not engaged in today. You know, it is not about
5 do you agree or disagree with the CMA. It is not about whether you agree or
6 disagree with the case that's being put by BGL today. I don't think that's
7 appropriate. If Mr Lask or CMA has an enquiry that Miss Gibbs can clarify,
8 that's fine. Any question that is "do you agree with the CMA", Mr Lask should
9 put a pencil through today.

10 **MR LASK:** It certainly was not intended in that way. I am sorry if that is the way it
11 has come over. It was picking up on a question that Professor Ulph asked. My
12 recollection is the way Professor Ulph put it was to say, along the lines of is
13 price not a parameter of competition for affinity partners. Our understanding is
14 that it is. If that's not a question that Miss Gibbs is able to answer -- I don't
15 intend to cross-examine anyone.

16 **MR JUSTICE MARCUS SMITH:** Let's leave it at this. I am going to let, if she wishes
17 to and can, Miss Gibbs answer that question, but, Mr Beard, neither you nor
18 Mr Lask should be under any illusions that -- I know this is being transcribed as
19 a hearing, but I am not expecting the answers today to feature in submissions.
20 With all due respect to Miss Gibbs, I will be attaching very little weight to such
21 quotation, because I think that would be an abuse rather than a use of this
22 process. The whole point is to enable everyone, Counsel included, to confirm
23 their understanding, to the extent they have one, of how this market operates.

24 **MR BEARD:** Absolutely.

25 **MR JUSTICE MARCUS SMITH:** I can see why your hackles rose at that question,
26 but equally I think it is worth Mr Lask testing whether his understanding of the

1 market is right or wrong, because he may want to do some burrowing if he gets
2 an answer that is different to what he expects.

3 **MR BEARD:** Perfectly content.

4 **MR JUSTICE MARCUS SMITH:** Thank you. Miss Gibbs.

5 **MISS GIBBS:** I think price is definitely a factor in consideration when home customers
6 are looking at where they would like to purchase their product. I think the
7 key -- and this is not just for affinity schemes - I should be really clear -- and this
8 is across the total quotation market we see on prices - really clear: Only less
9 than 50% of customers purchase a policy from the top price position. So less
10 than 50% of customers will select the cheapest price. More than 25% of
11 customers will select a price that is third or lower. I think that kind of points to
12 a customer's considerations, and we will come on to actually some factors
13 distinctly around home insurance, but because premiums are so much lower
14 when a customer is considering home insurance, they take into account
15 a multitude of factors alongside price before making a decision on purchasing.

16 **MR JUSTICE MARCUS SMITH:** Thank you very much.

17 **MISS GIBBS:** Is that helpful, Mr Lask?

18 **MR LASK:** Thank you.

19 **MISS GIBBS:** Okay. Great. So I think we were at page 6. Hopefully, for the benefit
20 of time, the next seven slides are hopefully much quicker and neater in terms
21 of they cover a similar format and basis. It is just really around establishing the
22 various distinctions between online traffic.

23 So online search we have covered is a predominant tool used by customers to
24 potentially arrive at a price comparison website, and despite those investments
25 we talked to around brand, Google is really the key place of choice for
26 customers to start their search enquiries.

1 When we split that down, 50% of traffic to CTM, and I would imagine other price
2 comparison websites in the market, utilise a search engine to start their search.
3 In the next six slides we are going to be looking at the three key strands of
4 search in more detail and what they mean. Those three strands are -- we have
5 covered PPC, but PPC or pay per click is split into two distinct functions. One
6 is generic pay per click activity, one is branded PPC activity, and the second is
7 then organic or SEO traffic.

8 If we just come on to the next page, so we have covered pay per click. So pay per
9 click is for every customer who clicks on your link, regardless of whether they
10 choose to purchase, you then pay for that click.

11 Generic PPC of home insurance is really related to general non-branded terms that
12 a customer may choose to search in order to help them purchase home
13 insurance. Across the market, parties will bid for advertising space in order to
14 hopefully secure a position at the top of that page, following the customer's
15 search. Those are clearly identified by the prefix "ad", and generic terms are
16 the most expensive of the two terms you can search for.

17 As you get more nuanced in those terms, so we have short-tail terms. Short-tail means
18 it is a short search term, home insurance, buildings insurance. They become
19 less expensive as you get a longer tail. "Home insurance, East of England
20 thatched house", as an example, that would become a lot less expensive
21 because there is a much more finite and distinct audience.

22 Generic PPC in the home insurance category, so calendar year to date for us, broadly,
23 for every click, looked at around £7.50 per click. The highest bid is almost five
24 times as much as that. So, it is a really broad range of costs. That's going back
25 to some of the earlier conversations we had which are around being really clear
26 on your bidding strategy, understanding your audiences and adapting your

1 bidding strategy as you go through certain times and days of the week.

2 On the right-hand side, you just have some examples there of what generic terms
3 would look like. So you have contents insurance to new home insurance to
4 really obvious terms like home insurance.

5 If we just click on, let's assume a customer types into Google, if we just move on to
6 the next page, "contents insurance". So you will see in the top bar there the
7 customer has chosen to search via Google for contents insurance. On this slide
8 they have a significant number, so clearly 8 million results from an organic
9 perspective, so an SEO perspective. But they will not see any of that
10 whatsoever, because what you see in the first instance on every page will be
11 these paid for advertisements. Identified, and I have circled by the prefix "ad".
12 So these will be for the day at the time I searched, the providers who not only
13 were bidding the highest amount to show that advert on this position, but also
14 Google identified it as having the highest quality, in terms of the content of their
15 page and the likely appeal of that page to consumers.

16 So what we have is quite a mixed bag actually here in terms of search results. This is
17 the one where I said unfortunately Compare the Market didn't appear, but you
18 have Direct Line Group there, who only offer that product and proposition
19 directly to consumers. You have got Money Supermarket, who clearly appear
20 in the PCW space to Compare the Market. Lastly, a fairly new start-up called
21 Urban Jungle, which is really trying to tackle the young renters' market, and
22 they are an 'insuretech' who are supported by one solus insurer.

23 As you can see there, a really diverse range of search results, but generic PPC, that
24 headline is big broad terms that could be applicable to anyone who is potentially
25 looking to attract customers to their websites.

26 **PROFESSOR ULPH:** Can I just ask a question here? You said there were two factors

1 that determine where you appear in the list. One is how much you are prepared
2 to pay. The other is Google's assessment of your quality as a potential site.

3 **MISS GIBBS:** Yes.

4 **PROFESSOR ULPH:** How much do people understand about factors that drive
5 Google's assessment?

6 **MISS GIBBS:** Google don't disclose their algorithm or quality scores. That's very
7 much tried and tested kind of ongoing evolution of how you then position your
8 brand. On SEO there are more well renowned elements that a search engine
9 would look for. So that's everything from the number of visits you get to the
10 site, which is an indicator of how useful the information contained within your
11 site is, how regularly the content of that website is updated, how well the site is
12 optimised, so how you are structuring pages, very technical, and I definitely am
13 not going to be able to give any more insight into that, other than how you
14 structure your pages and how that shows up. Then the length of time it has
15 been live, how long a customer might spend. So there are a multitude of factors
16 that essentially influence Google's view on the quality of a provider alongside
17 the amount they are willing to bid.

18 **PROFESSOR ULPH:** Okay. Thank you. Mr Lask, I see your hand is up also.

19 **MR LASK:** Thank you, Sir. Miss Gibbs, is it right to say that the screenshot that you
20 have on this slide is just the top part of page 1 and that one can still scroll down
21 through page 1 without having to click over to page 2 of the search results
22 page?

23 **MISS GIBBS:** So when I was doing my searches, so searches are typically paid per
24 click advertisements. There are usually three or four that feature. When I was
25 doing my searches you had to scroll past page 1 in all instances in order to get
26 to the organic listings. That was true on both mobile device and on desktop.

1 So this was the full page 1 results.

2 **MR LASK:** Including both the paid for results and the organic results?

3 **MISS GIBBS:** Yes. So this is everything, if I was a customer, I would have seen on
4 page 1.

5 **MR LASK:** Thank you.

6 **MR JUSTICE MARCUS SMITH:** I suspect it must depend on how your device is
7 configured, amongst other things. I have just literally now done a contents
8 insurance search on my iPad and it is absolutely right that one only sees the
9 advertised listings, but if one scrolls down actually you can see far more. So
10 my device is -- I mean, I don't know if anything turns on that, but that's how
11 I would see it.

12 **MISS GIBBS:** Yes. So if you have a wide screen, larger screen attached to your
13 desktop, as I do today, you may see a slightly extended version, but certainly
14 from the basis of an iPad, an iPhone and a desktop search on my laptop, this
15 is what a customer would see.

16 **MR JUSTICE MARCUS SMITH:** Indeed. Thank you.

17 **MISS GIBBS:** Okay. So if we could just click down, then we get on to branded PPC.
18 So branded PPC is the same concept. As a business, you pay the search
19 engine for every potential customer who clicks on the link. This is where brand
20 and brand engagement and marketing is super powerful. The average cost per
21 click for a brand related term is 20 per cent of the cost of a generic term.
22 However, it doesn't stop other people bidding on your brand specific terms, and
23 we will see that in a moment, but it is much more effective and it is much more
24 cost efficient for you as a business if you can get customers to search on
25 a named provider's terms or variations of that. Similarly, again, you will see
26 that those are all prefixed by "ad". Like I said, they tend to be much more cost

1 effective.

2 So for us that would be things like "Compare the Market", "Compare the Meerkat",
3 "Meerkat Movies", which is our rewards proposition, "Meerkat Meals".

4 If you were Go Compare, it would be "Go Compare", "Go Compare Home Insurance",
5 et cetera.

6 So it is terms that specifically resonate with customers who are looking for your distinct
7 brand.

8 If we move on to page 10, here you will see in this example a customer has searched
9 for the term "Compare the Market Home Insurance". So just a little bit of a
10 distinction here, in terms of what you can see. So they are still all prefixed by
11 "ad". What you can see then is some extra content on the Compare the Market
12 ad. They are called Google ad site links. Google, at their discretion, will provide
13 up to three or four extra links on that page, depending again on the quality that
14 they believe that provider is providing to the business that is bidding on that
15 PPC activity.

16 They are really helpful, because clearly I think, as Mr Lask called out, clearly these
17 adverts take up quite a lot of space on the page. So what you really want to do
18 is make the most of that opportunity, before a customer scrolls down and
19 potentially sees a whole host of other competitors.

20 So although you don't have influence on Google's decision, what you can do is really
21 optimise your website to build those quality scores to try and take up as much
22 space on that page as possible in the advertisements.

23 What you have on this page as well is clearly you will see we have two other
24 competitors listed alongside us, the first being Direct Line, who were also shown
25 on the generic term search, but also then NFU Mutual, if we go all the way back
26 to the start of the content, who are also another provider, and you will see, in

1 terms of their copy text, really clear that they are not on comparison sites and
2 trying to entice customers away from comparison, or at least entice customers
3 to potentially undertake multiple quotes to ensure they are getting the most
4 attractive deal and value from that search.

5 We broadly covered this earlier, but the reason why PPC activity is so costly and is
6 really important to all brands who are essentially seeing a large proportion of
7 customers using search engines to identify providers is what we have seen
8 through most recent search insight from our data and customer insights team
9 is only 6% of customers search past ads, pay per click ads, on mobile, and only
10 15% go on to page 2 on desktop.

11 So clearly, if a customer does scroll past these results, it is great for us, because that's
12 what we want. We want to get those customers coming directly into our website
13 without having to pay for that privilege. But PPC activity is super important and
14 something we spend a lot of time investing in at this end.

15 **PROFESSOR ULPH:** Could I just ask a follow-up to the previous question, which is
16 how variable is the position that you would be on these pages? Could this
17 bounce around a lot from one day to the next?

18 **MISS GIBBS:** One hour to the next. Super variable. People run programmes.
19 Google offer a suite of programmes that you can utilise that will adapt your
20 bidding throughout the day and how much you are willing to bid. Other
21 businesses will operate those functionalities internally, but it is something,
22 particularly in large organisations, that you have whole teams based around
23 looking to optimise and drive performance from.

24 **PROFESSOR ULPH:** If I understood you correctly, you were saying for branded PPC,
25 the fact that was more important was the quality of the website, as assessed by
26 Google, if I understood you correctly?

1 **MISS GIBBS:** Yes.

2 **PROFESSOR ULPH:** How would you adjust that? How would a company adjust that.

3 **MISS GIBBS:** Going back up the page, the four bits under the main context and text.

4 When you talk to Google and their algorithms, it's kind of the same story in
5 various guises, which will be: Are customers utilising the information that they
6 are seeing? Are they spending time on the page in order to essentially
7 determine if the content of that page is of a high enough quality to enhance that
8 user's experience once they leave Google's domain?

9 As I said, what we will be doing is continuously optimising our website and the content
10 of that website, either through what we are saying, how we are saying it, the
11 use of pictures, icons, et cetera, to try to optimise both the user experience and
12 in turn the quality score that Google assign to us in order to hopefully get more
13 space on the page.

14 **PROFESSOR ULPH:** How rapidly will you change that?

15 **MISS GIBBS:** Our SEO team will be making changes on a daily basis.

16 **PROFESSOR ULPH:** So that's daily as well. Thank you.

17 **MISS GIBBS:** Okay. The last piece of the search puzzle, which is organic or search
18 engine optimisation. In contrast to paid search results, which are automated
19 by this auction system, organic search results are based on essentially an
20 algorithm that determines the relevance to the user's search query, and then
21 the links, domain authority and other organic rating factors, determined by the
22 individual search engine, and most importantly for us, clearly, if the customer
23 uses one of these links, they are free, in terms of the traffic that's delivered from
24 those.

25 Organic search is a mixture of branded and generic terms related to home insurance.

26 It could be Compare the Market. It could be Meerkat Meals. It could be home

1 insurance. It could be buildings insurance. A business really similar to the
2 activity we just talked about a moment ago, the business is really then
3 concentrating its efforts on optimising each of its pages and its content to drive
4 its listing as high up the page as possible.

5 We covered this, but this is everything from having relevant content but also links to
6 and from external and other websites, how many visits a page and site is
7 getting, how long are customers spending on your page, et cetera, et cetera.

8 This is a much slower and intrinsic task than PPC activity. We talked to PPC activity,
9 which is kind of monitored on a minute by minute, hour by hour basis and
10 adapted in terms of bidding strategies.

11 SEO, although we are doing optimisations of the website on a daily basis, has a lot
12 longer tail, in terms of the impact and how quickly you can move up those
13 listings. If you remember in the very first example, over 8 million listings I think
14 it was, it takes a long time and lots of focus and effort in order to orientate
15 yourself up that page.

16 Similarly, although it is a much smaller proportion of our traffic, so if we look at kind of
17 what that means from a traffic split perspective, it is around kind of 20% of our
18 traffic comes from SEO. It is still a fairly significant number. So we really have
19 to concentrate on that and making sure that where we do see customers
20 scrolling past those paid advertisements, and coming on to the organic search
21 listings, that they are doing so and we are featuring as high up that listing as
22 possible.

23 If we just come on to the next page, in this example the customer has scrolled past
24 those ads, which usually cover the first page and a half of content, and they
25 have made their way down to the organic listings. You can see here the ad
26 prefix has dropped off and what you have is a whole host of the kind of providers

1 in the market looking to offer customers solutions for home insurance.

2 I am really pleased to say in this instance we were number one and then we were
3 shortly followed by MoneySuperMarket, who are another price comparison site,
4 LV, under their direct home insurance proposition and then Aviva.

5 The other thing that looks slightly different here to call out is star ratings. Star ratings
6 are collected by Google and they use them to help inform customers of the
7 potential quality of service being offered by the providers. As you can see there,
8 everyone has broadly got pretty good star ratings of 4 and a half of above. That
9 probably wouldn't have a massive impact, but it is certainly something we would
10 manage and look to react to, if we did see anything happening that might cause
11 customers concern if they were to click through.

12 Three key variations on search engines and how we can utilise them to attract
13 customers into the price comparison world. So generic search, branded search
14 and lastly organic or SEO.

15 I think if we move down now. So we are going to start to now talk about -- we have
16 an awesome brand. We have marketed it. The customer has made their way
17 on to a search engine and found us or, ideally, come to us direct. Then
18 hopefully they will land on our home question set.

19 This example that we are going to run through here, this is a customer who has not
20 visited CTM before. If they had, as we covered earlier in the session, they
21 would have a much shorter consolidated question set, with a high degree of
22 pre-population.

23 Just to go back to a question that was posed at the start of the session, when it comes
24 to home question sets, it is really important to, I suppose, distinguish that while
25 I am going to talk through CTM's journey, headline question sets both in the
26 price comparison space and in direct insurer and broker and affinity journeys

1 look distinctly different. The differentiation between those providers and how
2 they approach it will be formulated around the number of questions they ask,
3 how they then use pre-population from data like the Land Registry Office,
4 property listings like Right Move or Zoopla, and then also where they make key
5 assumptions about a customer, so things like the construction of their property,
6 whether they have had any claims, to try to condense and make the customer
7 journey as seamless as possible.

8 For a PCW, it is slightly different. For us it is about finding the right balance between
9 the number of questions we ask to make sure that our panel are giving us the
10 most competitive prices as possible, but also balancing out that customer
11 experience so customers are not becoming agitated by the number of questions
12 we ask them.

13 Currently, and I don't think we are particularly proud of it, we have the longest question
14 set in comparison to our price comparison peers, but we do have a high degree
15 of pre-population and assumptions that means that although we have the longer
16 question set, our customers can make their way through the journey fairly
17 quickly.

18 The shortest question set as far as I know in the market is held by Aviva. They
19 ask -- and to put this into context, this is in comparison to broadly 90 questions
20 on our website, they ask 15 questions. Eight of those are actually in relation to
21 the customer and nothing to do with their property, and seven questions then
22 around the property and contents.

23 So clearly, as a direct player, you have a lot more agility in terms of your influence.
24 You are the sole insurer and underwriter. So you can be a bit more innovative
25 and dynamic in terms of how you structure your question sets, but, as I say,
26 today we are going to be looking at the CTM question set, and I will take you

1 through how a customer experiences that.

2 **MR JUSTICE MARCUS SMITH:** Just thinking about questions, presumably, if you
3 were to ask so few questions that your offering to insurers was next to useless,
4 because it was so generic, you will get push back the other way. You are
5 obviously monitoring how products are taken up by insurers, but insurers are
6 equally monitoring what you deliver in terms of prospective proposals for
7 insurers.

8 If you simply had a whole range of people who were attractive to insurers of the home
9 type, without any more detail, you might find that your underwriters would be
10 saying "you need to add a few more questions on there or re-focus your
11 questions because we are getting the wrong type of people?"

12 **MISS GIBBS:** Yes. So there is a common hypothesis that the more information we
13 give our insurers, the better prices we will get, which is I think, in reality,
14 something that we have never proven out, which is why we have ended up with
15 the longest question set in the market. But there is also a basis which is
16 essentially the more comfort you can give an insurer, in terms of their
17 underwriting assessment, the potentially broader panel and number of prices
18 you are going to get back, and as we said at the outset, our role is to make sure
19 that customers are getting access not only to best prices but the total value
20 proposition that Compare the Market and other price comparison websites
21 offer, but pricing is a factor in that. So it is about finding the right balance.

22 **MR JUSTICE MARCUS SMITH:** Mr Lask, I see you have a question.

23 **MR LASK:** Thank you, Sir. Just a point of clarification. Apologies, Miss Gibbs, if this
24 is an obvious question. I think you said that CTM has 19 questions. Is it
25 therefore fair to describe these slides as a simplified presentation of the
26 questions that a customer needs to answer in order to get a quote?

1 **MISS GIBBS:** It is actually 90. I would like it if it was 19. Exactly that. So this is just
2 a very consolidated view. As I go through, I will talk under each of the key
3 headings, the types of questions that would actually turn up to the customer as
4 they made their way through the journey.

5 **MR LASK:** Thank you.

6 **MISS GIBBS:** In the first box here you have personal details and cover. So what we
7 are looking at here is some very initial details, so just kind of the name of the
8 customer. Then what we are starting to build up here is a view on what type of
9 product a customer is looking for. So we will capture information about their
10 property address, their ownership, and ownership is a really key factor in
11 determining whether a customer may need buildings, buildings and contents or
12 contents insurance. Some of our customers are not aware that if they don't
13 own their property they don't have any legal kind of say over the building and
14 therefore we have to educate them around their requirements in respect of
15 insurance.

16 Then we will also look at when they want that policy to commence. So some really
17 headline information before we start to get into the specifics and nitty-gritty
18 around the specific cover they might be looking for.

19 In this example, we are going to assume the customer owns their own property and
20 they are looking for combined insurance, so a building and contents policy.

21 When we start to look at buildings information, we are really looking at the type of
22 property the customer is seeking to insure. That will look at everything from the
23 number of bedrooms, number of living rooms, number of bathrooms, when the
24 property was built, how it is constructed, whether it is near any water courses,
25 large trees, and then specific issues in terms of flood areas or subsidence.

26 We will then ask them some questions about any previous buildings claims they may

1 have experienced and lastly really look at the security of the home, so locks,
2 keys and alarms. That's broadly, although I have just covered that in a minute,
3 clearly there is a number of questions that sit under that. That's broadly the
4 themes we would look to cover to establish a customer's need from a buildings
5 cover perspective.

6 **PROFESSOR ULPH:** Could I just ask some follow up questions. One key factor there
7 would be the location of the building. If you are interested in things like
8 subsidence or risk of flooding, where the building is located. So presumably
9 the postcode would be a crucial variable. Just to kind of follow up on that, would
10 every price comparison website identify the postcode? Would you all then have
11 a lot of information about proximity to rivers, proximity to mining or past mining
12 activity from just that postcode information.

13 **MISS GIBBS:** We definitely capture the postcode and the house number as well or
14 flat number. The actual risk assessment, in terms of flood or subsidence, is
15 held within the insurer's underwriting criteria. So exactly that. They all have
16 detailed and extensive information relating to minutiae level detail within
17 hundreds of metres in terms of how close a customer might be to a river, to
18 your point, any previous issues specifically around the use of that land. So yes.
19 That is not held on the price comparison website but is fundamentally a risk
20 factor considered by the underwriters and insurers.

21 **PROFESSOR ULPH:** The follow-up question to that, would different underwriters and
22 insurers take a different view of that same information? I might say this
23 property is quite close to some previous mining, but from my experience as
24 an insurer that's actually not too big a risk. Other insurance companies might
25 take a different view and say: "Well, I think a property that close to previous
26 mining activity, there is quite a high risk of subsidence". Would they take

1 different views, and in some sense be quoting different prices just because they
2 are taking a different view of the risk.

3 **MISS GIBBS:** Exactly that. Exactly that. So every insurer will have their own
4 underwriting and pricing team, all using separate kinds of methodologies and
5 analytical tools in order to determine risk. That's why you then get a range of
6 prices coming back when the customer undertakes a quote.

7 **PROFESSOR ULPH:** Okay. To what extent would customers understand that to be
8 a factor that might be driving these differences in prices? Presumably not very
9 much.

10 **MISS GIBBS:** No. I suppose inherently, as a customer, you are answering these
11 questions for a reason. So I am assuming if you know a property has
12 subsidence, you are expecting that to have an influence on your price.
13 Understanding the nuances and how the individual insurers take that into
14 account, in terms of risk and pricing, I would imagine is not something -- to be
15 fair, I inherently wouldn't know exactly how each of -- say if I had 30 providers
16 coming back, I wouldn't be able to articulate how each of those have
17 determined a risk. I wouldn't imagine a consumer would have the benefit of
18 being able to do that either.

19 Then we get on to contents insurance. The key question here is the value of the
20 contents the consumer is looking to cover. If you think about it, that is quite a
21 difficult question to answer. If someone were to remove every bit of contents
22 out of your property, how much would you need, in terms of monetary value, to
23 replace those? We use a tool that enables customers to go around their house
24 in each room to collate a list of things to help guide them through it.

25 Then we look at non-specified items, so items below £1,500. Then we also ask
26 customers to specify items above £1,500. That could be anything from

1 jewellery to art to antiques that the customer may have. That's a specific and
2 fairly generic requirement of the market, in terms of insurers wanting to
3 understand what those high risk items are, and they will specifically price for
4 those as part of their consideration.

5 The other element we then ask the customer to specifically disclose is any bikes. So
6 for anyone who is a cyclist or keen cyclist, if your bike is above £350, typically
7 a number of insurers would exclude that. So we ask the customer to disclose
8 any bikes above £350, which are most, if you are not just someone who goes
9 out when it is sunny outside are. So that's another key facet of contents
10 insurance.

11 Once we have the headline personal information, detail around the property, detail
12 around what the customer is looking to cover, really we are on to then the
13 specifics around the customer's additional cover, so items in addition to the core
14 buildings and contents insurer and also excesses, which we touched on slightly
15 earlier.

16 In terms of additional cover items, the key additional item we see customers requesting
17 is accidental damage. This are the circumstances where if you have
18 grandchildren, they throw a toy across the living room and smash the wide
19 screen TV. It is where you are carrying a bucket of paint through the living room
20 and you end up spilling it on the carpet. There are also other optional extras,
21 home emergency cover, legal assistance, replacement lock and keys cover,
22 freezer cover, and personal possessions, which is essentially covering items if
23 they are lost or damaged whilst away from the home.

24 The customer will be asked questions around whether they need any of those things.
25 Then we will have a conversation with them as to voluntary excess. Voluntary
26 excess is a payment made in addition to an insurer's compulsory excess in the

1 event of a claim.

2 Excesses can vary in nature anyway. Let's go back to the example of if an insurer
3 thinks you are in a high area of risk of subsidence, you may have a higher
4 subsidence excess on your policy. Typically, what happens is the higher the
5 voluntary excess a customer is willing to place on their policy, the lower their
6 premium. So the point and the conversation we were having earlier on, the
7 lower likelihood there is of an insurer having to pay out for a claim, as and when
8 it arises.

9 By that point, essentially we have collected all the information that we need to go out
10 and request quotes from our panel of providers.

11 If we just go on to the next page, at this point we are looking to make sure the customer
12 has access to their quote. After they have been provided with the list of
13 information available and prices, we will collect an e-mail address. We will also
14 ask them if they want to be contacted by telephone from any of the providers in
15 respect of their quotes.

16 The insurer will then at that point in time, or broker or affinity partner, they will take all
17 of the information we have collected. They will run that through their internal
18 software houses or pricing structures. They will also undertake some kind of
19 validation checks relating to that customer. This is when we go back to again
20 the potential of the customer having falsely declared information and their
21 likelihood of potentially making exaggerated claims. So they will look at the
22 information the customer has inputted. They will do soft credit checks in terms
23 of establishing the customer's creditworthiness and their likelihood of falling into
24 debt, and then also check that if the customer has disclosed claims or has not
25 disclosed claims, whether the database that is shared across the insurance
26 industry reflects the position that has been disclosed.

1 Once we have done that we will then ask the customer to just validate all of that
2 information and then they'll get to the point where we are able to provide them
3 with quotes.

4 We have 70 brands on the panel. Last month, on average, we had roughly for
5 buildings and contents insurers about 43 providers returning a quote. For
6 buildings, just under 40, and contents similarly I think that was about 37.

7 So, as you can see, as we go back to why customers use a price comparison website,
8 although it is a ten minute journey potentially, you are then getting access to
9 a whole multitude of propositions and prices.

10 If we look at page 7, this goes back to some of the conversations we had earlier. What
11 you can see here is at the top you have the annual price and monthly price that
12 a customer could pay. Some customers choose from an affordability
13 perspective, although it is more expensive to pay through monthly instalments.
14 Some will just pay outright. Hence why we choose both. As you can see here,
15 you have some key kinds of provisions. You have what the cover amount is for
16 buildings and contents, whether it includes accidental damage and then you
17 break down your excesses, so both voluntary and compulsory. Every provider
18 that's listed on the price presentation page will show this information.

19 So, as I said, then the customer will potentially establish, as I said, 25% of customers
20 actually purchase outside of kind of top three providers. So some may scroll
21 down to a multitude of positions. Some may only engage with a couple. The
22 more details page, when a customer has established a product that's right and
23 suitable for them, will then enable them to go on to page 8, which then
24 provides -- it is not shown here -- page 8 is prior to the customer clicking out to
25 potentially purchase, but that will show key features, additional benefits,
26 inclusions and exclusions, a short summary on the company, before then

1 asking the customer if they would actually like to proceed to a provider.

2 If they click on that green button on that call-out on step 8, they will then exit the CTM
3 website. They will move on to the provider's website, where they will be
4 provided further information.

5 As you can see here, Admiral are looking to potentially upsell the customer to another
6 range of products. They will establish what those additional benefits and
7 features are.

8 As I said earlier, ultimately at this stage only 30% to 35% of customers who start
9 a quote will ultimately then go on to purchase a product from us.

10 That is a very swift overview, in terms of the customer experience and journey that
11 they go from in terms of landing on the site to potentially ending up with
12 a provider and purchasing a policy.

13 **PROFESSOR ULPH:** That was really helpful. Could I just ask a couple of follow-up
14 questions. You say that different insurers and different companies collect
15 different information from customers. Would all the insurance companies on
16 your panel utilise all the information you collect, the answers to all these 90
17 questions you have, and is that why they are on your panel, or will some of
18 them just say: "We don't need this information, so we will ignore it".

19 **MISS GIBBS:** Yes. So whatever information we collect from customers we have to
20 be able to substantiate that that's required from a data protection perspective.
21 So we would ensure that the majority of the panel were utilising that information
22 in some way, shape or form, but there may be elements of the question set that
23 certain insurers don't use within their risk rating and pricing factors, and there
24 will be others that everyone uses continuously like postcode to come up with
25 a price for each individual customer.

26 **PROFESSOR ULPH:** Just a follow-up. If a particular insurer just thought "this person

1 or this property looks too risky for me", presumably they have the option of
2 either not returning a quote or just returning a quote which they just think is
3 going to be too high --

4 **MISS GIBBS:** Is monumental. That's why when I said earlier we have 70 brands on
5 the home insurance panel, but typically we see around 40 providers return
6 prices. As you make your way through that list of providers, there will on
7 occasion be some very obscure results towards the back end of that which you
8 would imagine customers would never go near. We talk to our partners about
9 that, in terms of quotability and the balance between getting quotes out into the
10 market but making sure they actually are appealing and attractive to customers
11 as well, because that's not great for our customers to see prices that look fairly
12 odd, but yes, they can price themselves out.

13 **PROFESSOR ULPH:** Okay. One more question. Going back to the other slide where
14 we had stuff about excess, you were also talking here about the conditions
15 under which the insurance company would actually pay out for certain types of
16 accidents. So you give some illustrations about putting your foot through the
17 ceiling, but the range of circumstances under which people might have an
18 accident is so vast that you can never properly assess what all those
19 circumstances will be and quote for all of those circumstances. So how well
20 would a customer understand the circumstances under which an insurer may
21 or may not pay out for some of these things arising?

22 **MISS GIBBS:** I think it is a real challenging dynamic in home insurance. In my
23 previous time at a broker, clearly you are looking at your panel and what you
24 are looking to observe is something called repudiation rates. So the percentage
25 of claims that are actually being declined when the customer is coming to make
26 a claim, and because of those nuances it is significantly higher than in car

1 insurance, where clearly I think everyone is broadly aware if you crash a car
2 and you have car insurance and it is comprehensive, it is going to get fixed,
3 unless you do something that you shouldn't be doing in terms of something
4 illegal. You are right to call it out. I think our job is to try to call-out the most
5 common and practical advice we can in terms of terms and conditions and
6 inclusions and exclusions, but given the repudiation rates that the market sees,
7 it is an ongoing issue and one that I don't think the market has solved yet.

8 **PROFESSOR ULPH:** And these repudiation rates would vary across insurer?

9 **MISS GIBBS:** Yes. Certainly from my time it was one of the ongoing and consistent
10 conversations we would have with insurers. I remember one insurer had closed
11 their book to new business and the business was in run off. We actually saw
12 a big spike in their repudiation rates, which clearly - from a customer outcome
13 perspective - they are looking to try to monetise the back book as much as
14 possible. So you have to really, as a broker, clearly your role is to deliver, from
15 an FCA perspective, appropriate protections and outcomes for your customers.
16 Things like that, you have would have to be all over, in terms of making sure
17 what's happening and appropriately challenging and championing your
18 customer outcomes.

19 **PROFESSOR ULPH:** Okay. Thank you.

20 **MISS GIBBS:** Okay. This slide really just looks to pull everything broadly we have
21 talked about in some shape or form together.

22 **MR JUSTICE MARCUS SMITH:** I think Ms Lucas has a question.

23 **MS LUCAS:** Could I ask a question about number 9 on the previous slide, provider
24 website. I think you mentioned in this instance it is Admiral upselling or
25 potentially upselling. When you get to that point, the provider website, do the
26 providers ever ask for any further information or do you just get: "You have had

1 your price, clicked through and we are offering these extra things." Do they
2 ever ask for further information at that stage?

3 **MISS GIBBS:** They do in some instances, yes, unfortunately. Going back to our
4 earlier conversation, that's where we have to monitor the experience the
5 customers are having, so how much prices are moving. We try and enrich our
6 data as much as possible to avoid customers having to re-enter information,
7 but particularly on add-ons, there quite often are circumstances where the
8 customer needs to re-select them, because the partner does not carry those
9 across. So yes, unfortunately so.

10 **MS LUCAS:** Would they ask further information that might lead to a difference in the
11 price quoted?

12 **MISS GIBBS:** In some instances, yes.

13 **PROFESSOR ULPH:** On a kind of related point, supposing they got that quote from
14 Admiral, £196, they chose not to go to the provider through your website, but
15 went directly to the provider, would they get potentially a different price?

16 **MISS GIBBS:** It depends on the individual insurer. They could get different prices in
17 that circumstance. We have something called first touch attribution, which is
18 essentially whoever the introducer of that customer is to that insurer, broker,
19 affinity relationship, if they had already been to Admiral in this circumstance,
20 then we wouldn't be due a CPA. If they left our website and went directly to
21 Admiral and took out a policy directly, the CPA would still be due.

22 **PROFESSOR ULPH:** Okay, thanks.

23 **MISS GIBBS:** No worries. Okay. So, as I said, this is really just about drawing
24 together. So a customer journey is clearly a very key factor that price
25 comparison websites need to concentrate on in order to make sure we optimise
26 a customer's overall perception of our experience, and hopefully encouraging

1 them to complete a purchase, and fingers crossed save some money as well,
2 but there are various component parts alongside that that need to come
3 together to give customers confidence to purchase and take up a home
4 insurance policy from a price comparison website.

5 We have talked about brand, and the essence of CTM's brand is to create
6 a recognised and trusted brand that hopefully stands out from our competitors,
7 in terms of being fun, furry and simple. Rewards are used as a key tool to try
8 to make that mundane task of household financial administration a little bit more
9 appealing.

10 Panel and diversity of panel, the last slides cover in a bit more detail panel, but trying
11 to get the broadest range of panel members as possible, because each
12 household in the UK is unique and therefore, even if you cater for 80% of the
13 population, there will still be 20% who may not come and have the same risk
14 needs as the majority of your customer base, but you really want to establish a
15 broad as possible panel, so every single customer who is coming to your
16 website is going to get a good experience and potentially a good price.

17 We talked about price and just some of the dynamics that exist there in terms of price
18 is a really important factor and customers feeling confidence in the fact that they
19 have gained great value from their experience with a price comparison website,
20 but it is actually quite a different factor if we look at a comparative to car. Car
21 insurance, average premiums are close to £500. So customers are spending
22 a significantly higher amount. Home premiums are a third of that, so closer to
23 £150. So the total value of an experience and rewards in particular is
24 something that customers really take into consideration when they are making
25 a decision on who they are going to purchase from.

26 This actually really came to light as we went into lockdown last year. Our rewards

1 proposition is clearly based around the fact that you can leave your house, you
2 can sit down with friends and family and you can go for meals and to the
3 cinema. Actually what we saw is one of the biggest downturns in performance
4 from a home perspective when we came into lockdown, and other peers in the
5 market had rewards propositions that actually enabled customers to still use
6 them.

7 Confused is a prime example, who really won at that point in time, because they had
8 tangible rewards that a customer could still utilise despite the fact that they
9 couldn't leave their house; Halfords gift vouchers and Dominos Pizzas. We
10 quickly reacted to that. Maybe you will have seen we did a Take That concert.
11 We did a Little Mix concert. Both virtual. We also launched our delivery option
12 through Meals, so customers can now get the benefit of takeaway as well,
13 which means in the event that we are going to go into another lockdown, our
14 customers can still benefit from our rewards.

15 That comes on to confidence. Confidence, in terms of -- actually, it is really interesting
16 from the work that we have done. If you take the Aviva example of 15
17 questions. When we have tested that, customers get really nervous with short
18 question sets, which is how can you possibly give me a policy that's going to
19 protect everything I own in the world, and you have only asked me eight
20 questions? So confidence is really important and that's both from pricing and
21 a product perspective and ensuring that the customers believe that product is
22 going to meet their needs.

23 Experience, we have talked about. That's both on site and also navigating their way
24 on to a partner site. Then all of that comes together in terms of a total value
25 proposition.

26 The total value proposition for a customer needs to ultimately mean that the time they

1 are investing in completing our price comparison journey provides great
2 outcomes that the customer feels invested in to then switch, and that's kind of
3 how all of those components parts come together as a price comparison site,
4 in terms of optimising your customer experience.

5 I have talked a couple of times in terms of how many customers actually go on to
6 purchase, which is just over a third.

7 Clearly, the primary aim when a customer visits a price comparison site is to get
8 a really broad view of the market, specific to their household, but actually once
9 a customer has been through that process, the majority of them don't go on to
10 purchase. That's for a number of reasons and this is just five primary reasons.

11 The first is clearly there are a portion that do purchase. So they will start a home quote
12 journey. They will go on to a provider website and purchase.

13 Secondly, they may be looking to benchmark their renewal price, and they may
14 determine, either because there is not a distinct variation in price, that going
15 through the effort of cancelling their insurance and taking it out with another
16 provider is not worth the time and effort. So they will maintain their renewal
17 price once they have done that benchmarking exercise. They may use the
18 insight to barter with their incumbent provider. So they will go back to their
19 provider and try to negotiate a more competitive price. Quite a lot of insurers
20 and brokers have models where they can then flex and adjust their renewals
21 pricing to accommodate that dialogue with customers.

22 It may be that customers are using what we call multi-channel search, and a lot of
23 customers do this. They won't only visit one aggregator. They may visit
24 a number. They may visit providers who are only looking to service their
25 products directly, or they may go via a cashback site and ultimately come back
26 through to us.

1 Lastly, window shoppers. This might be if you are looking to purchase a property.
2 You have not purchased it yet but you really want to get an assessment of that
3 lovely stream at the back of your garden and how much that might cost you
4 when it comes to insuring your next property.

5 So there are various reasons why a customer might not purchase from us, but the key
6 one is that regardless of how a customer uses a price comparison site, although
7 I will feed the feedback into our working strategy group on whether we should
8 charge them, is that customers are not charged for that service, however they
9 choose to then use that information.

10 Okay. I have just got two more slides.

11 **PROFESSOR ULPH:** One other category, going back to your window shop efforts, is
12 there might be people who have purchased a house but they might be really
13 quite conscious of how expensive insurance might be. They don't have a lot of
14 income. As you say, it is not mandatory to have housing insurance. So they
15 are just checking out how expensive it really is, and they are making a decision:
16 "Actually, even at these very low prices, we are just not interested. We can't
17 afford it".

18 **MISS GIBBS:** Yes. That was definitely something we saw as we went into COVID
19 and with more people being furloughed. People cancelling insurance because
20 it was an expense they could not afford.

21 Last two slides. I am very conscious we are over time.

22 We spend a significant amount of time and effort really working with our partners,
23 whether they are insurers, brokers or various means of intermediary service to
24 make sure we are delivering what we call the triple win, which are great
25 outcomes for our customers, the partners we work with and for CTM. If we are
26 doing our job right, we have done all of that. How we do that is in a number of

1 ways. For context, all of our insurance products are managed within one team,
2 our core insurance products. That's because quite often providers we work with
3 have multi-product capabilities. Just from an efficiency and dialogue
4 perspective, it is better to manage both a provider who provides car, bike and
5 home insurance through one direct relationship. So direct contractual
6 relationships with those end providers.

7 We have talked through this panel dynamic quite a lot, but it is really important. To
8 the right-hand side of this chart hopefully it just articulates in a bit more detail
9 why that's so important.

10 We have a mixture of what we call large scale volume players. These are going to be
11 household names that I am sure potentially the majority of people in the session
12 today will recognise. They are about covering and catering to the broad
13 population of the UK.

14 What's almost as important is below that dotted line, the niche players segment. That's
15 about catering to those areas with lower quotability but with specific audiences
16 and segments.

17 Just to provide a bit of colour here, Urban Jungle who we referenced early, fairly new
18 in the market, but really going after that low premium, content only segment.

19 You then have One Home. One Home are a contingent part of Brightside Group, who
20 are a fairly big player, but their product is -- if we go back to some of the
21 questions we have had around question sets, predominantly their offline sales,
22 due to the nicheness and the potential additional questions they need to ask;
23 questions to meet those specific needs.

24 Saga only quote for over 50s. Again, another specific segment of the market. Fresh,
25 the last provider there, are one of only three partners that quote for thatched
26 properties. So you are looking at sales of less than 100, but clearly less than 100

1 sales is still a proportion of price comparison site customers that we want to make sure
2 we have a proposition for.

3 So it is really important to have a broad mixture of panel members because, like I said,
4 price alone is not the key factor when customers are looking to select
5 a provider, and we have talked to the percentage of customers who choose on
6 price. What we want to make sure is they have a mixture of brands that they
7 potentially recognise and also newer challenger brands to really give them the
8 confidence that they are getting the best offers out there in the market.

9 If we look at the bottom segment, we are continually looking to bring new partners on
10 board. We have got 20 home partners on our build backlog at the moment, and
11 I am sure more joining as we work our way through 2021, and that's really borne
12 out of three things for us.

13 Going back to this triple win, how do we deliver unique insights, unique distribution,
14 manage this ability for insurers, brokers and affinity partnerships to distribute
15 with low risk fixed cost basis, and how do they benefit from the great brand and
16 marketing entity that sits around all of those functionalities from a CTM
17 perspective.

18 Last page I think. Okay. So this is just covering some key contractual terms in terms
19 of how we then work with those partners. I will also try to give a bit of a flavour
20 as to how those items then show up in day-to-day relationship management
21 frameworks.

22 So we have talked quite a lot as we have gone through around governance and
23 customer outcomes. Our contracts will have clear obligations on both parties
24 to ensure adherence to all regulatory requirements, which is fundamentally
25 delivering good customer outcomes. But then we will also monitor and operate
26 controls to ensure we are confident of that, so complaints, net promoter scores,

1 are some of the activities that we saw and discussed earlier on in the session.
2 We are really reactive to that. Last summer we saw a significant rise in
3 customer complaints from a partner, due to lack of communication. We
4 engaged with that partner. They had actually had quite a big cohort of their
5 team in isolation, and brought quite a lot of new staff in. So we identified what
6 that was and worked with them on an action plan around training and tried to
7 address some of those challenges there.

8 Audit terms are annual audit rights in place for CTM to examine essentially how sales
9 are being allocated. If you go all the way back up to the outset of the
10 presentation, it is complex, and customers may choose to go down a number
11 of channels when they are purchasing insurance.

12 The audit really looks to explore how those customers who potentially had a quote on
13 CTM have then established themselves in terms of purchasing of insurance,
14 and historically that audit process has been really important for us to manage
15 and monitor and improve the reporting between the two businesses, due to how
16 we accredit and had previously assigned for rewards following a purchase, so
17 two historical kind of multi-faceted bases of audit.

18 Data. Key contractual commitments that we set out with our partners on the reporting
19 we will give them. That's really about them understanding their performance
20 on site. Top of screen, which is of the prices you are presenting the percentage
21 of occasions you have the most competitive price and also quotability. So of
22 the percentage of quotes we are sending to you, how many you are then
23 quoting back for.

24 CTM then use that, alongside some external benchmarkers from consumer
25 intelligence and E benchmarkers that we pay for to try to establish the strength
26 of our panel performance, and that's both from a breadth and pricing

1 perspective. We use that on an ongoing basis to try to deliver improvements in
2 our capabilities for home insurance.

3 As an example, how we have used that previously and continue to use that on
4 a monthly basis actually to monitor panel performance is where we have seen
5 top of screen, so the percentage of occasions that a panel member is appearing
6 at the top of our journey, versus our aggregators or peer group journey. We
7 established last quarter there was a new provider, Get Safe, who we covered
8 a minute ago, that had gone live on a number of other price comparison
9 websites, and were still within our backlog for delivery. So because we
10 understood the dynamics that was delivering, in terms of competitiveness of
11 panel, we speeded up that delivery and brought that forward.

12 Also top of screen and quotability reporting is quite significant in terms of identifying
13 errors. So partners will continually be updating their schemes through releases.
14 If we see significant drop-offs, particularly either in comparison to our peer
15 group or even within our own data, that could essentially mean that there is
16 an incident and an error with the latest update from that partner. So data is
17 really important to us, in terms of establishing the efficiency of our panel.

18 CPAs, we have broadly talked about. They are negotiated annually. That process is
19 set out in the contract.

20 Change and builds. So all parties are obliged to make sure that we are meeting the
21 regulatory expectations, and in the event of incidents they are rectified as
22 quickly as possible.

23 Sales files and invoicing. That is just the process of making sure we are reporting
24 sales and therefore invoicing the partners appropriately.

25 Lastly, marketing rights. Once a customer has essentially purchased a policy from the
26 third party that we are working with, their ability to market and engage with

1 those customers, both in respect of the existing product and potentially broader
2 products that they may develop within their portfolio.

3 So those are the key contractual terms. It is fair to say that alongside the annual
4 negotiation of CPAs, a number of these factors may then become part of the
5 leverage a partner will make with us around how we are adjusting the CPA. So
6 change of builds is quite a frequent one.

7 Typically, CPAs are increased on an inflationary basis every year. We look to try to
8 establish the value we are offering to that partner, but a partner may ask for
9 a prioritisation as a build in exchange for an increase in the CPA.

10 So that hopefully brings together everything from broader market, all the parties
11 involved, how we build a brand, how we market, how a customer might
12 establish themselves to land on the website, the broader considerations we
13 need to make in terms of customer experience, and then ultimately how we
14 work with the panel to try and kind of optimise pricing and panel diversity.

15 **MR JUSTICE MARCUS SMITH:** Thank you. I see, Mr Lask, you have a question.

16 **MR LASK:** Thank you, Sir. One type of clause that receives a fair amount of attention
17 in this case already is what's referred to as narrow MFNs. I just wonder whether
18 those clauses would fall within any of these key contractual term headings and,
19 if so, which one?

20 **MISS GIBBS:** Narrow MFNs would fall under CPA terms.

21 **MR LASK:** Thank you.

22 **MR JUSTICE MARCUS SMITH:** Sticking with terms, you obviously have standard
23 terms that you would want to have agreed, but you obviously have some pretty
24 economically strong counterparties in the business who will no doubt also have
25 their own standard terms which they would want to have. So I suppose my
26 question is how far and to what degree is there a deviation from the standard

1 terms? I mean, would you be surprised if you found the majority of your
2 counterparties actually on the same terms or would you be surprised if they
3 were all different?

4 **MISS GIBBS:** I think I would be more surprised if they were all different, but I think
5 the fundamental point is right. The larger a business that we are operating with,
6 the more strategically important they equally are to us and our customers,
7 because the more scale they can bring, the likelihood is the more competitive
8 their prices are, and therefore we would be really keen to establish
9 a partnership that means that our customers get access to their products.

10 What tends to happen is if we get into nitty-gritty debates on contractual clauses,
11 although they may be escalated through the business in terms of seniority and
12 oversight, we will often -- and I think this is the case for our partners as
13 well -- but essentially our predominant objective is to have as broad and diverse
14 a panel as possible, and the broad rationale around that is for every partner
15 that we have on board, we assume broadly that 30% of the traffic and sales
16 that they write are incremental. So not having a partner on board, 70% of those
17 sales you would expect potentially to go to another member of the panel, but
18 there is always this incrementality point.

19 So yes, I would be fairly surprised if there were huge nuances across key contractual
20 terms, but there is always room for negotiation, particularly if you are a larger
21 partner who we are really keen to ensure that our customers have access to
22 your products.

23 **MR JUSTICE MARCUS SMITH:** Thank you.

24 **PROFESSOR ULPH:** I have another question to ask, which is you made reference to
25 your peer group. So how much do you understand about the circumstances
26 and performance of your peers? So you are one price comparison website.

1 How much do you understand about how well other price comparison websites
2 are performing, what their panel is, how well certain insurers are getting
3 successful quotes through that price comparison website, compared to yours,
4 what terms and conditions they are using?

5 **MISS GIBBS:** Yes. So we wouldn't have access to establish contractual terms and
6 conditions. What we do use is two external companies, Consumer Intelligence
7 and Ebenchmarkers. Those processes and protocols have been in place for
8 a significant period of time to really establish how competitive and broad our
9 panel is.

10 I touched on two examples of how we used that kind of earlier on this slide, which is
11 really establishing if there are any opportunities that we might be missing, in
12 terms of breadth and provision of partners, but then also establishing pricing
13 competitiveness from those reports and, where possible, acting on that.

14 What we don't understand, and if we go back to some of the statistics we talked around
15 earlier, and I would really love to understand, but so far no-one from an external
16 basis has been able to collate this, is a realtime view of the 80% of customers
17 that maintain a relationship with their insurer and (inaudible) the prices that are
18 going out the door there. What we tend to see is some fluctuations in the
19 demand in search in particular, when we see a hardening market. A hardening
20 market means that insurers are increasing their prices, which often means that
21 a renewal price may see a steeper increase in price, and that helps stimulate
22 customers to come back into the market.

23 At the moment we only get that view on a quarterly basis from the ABI. Yes. So that's
24 the missing piece of the puzzle really for me.

25 **PROFESSOR ULPH:** How much understanding do you think customers have of
26 changing risks through, for example, global warming driving higher risks of

1 flooding, for example? How well has that been picked up by the insurance
2 industry and reflected in the kind of --

3 **MISS GIBBS:** I would say at headline level not very well understood and not very well
4 publicised. I think it just goes back to insurance as a sector. I think it is not
5 something that customers typically want to spend their free time engaging in,
6 which is why we have to spend quite a lot of our time looking at really creative
7 ways to stimulate customers back into the market, because, like I said, 80% of
8 customers, once they have purchased a policy, and clearly a couple of us today
9 have talked to our own experiences, are more than happy to stay with
10 an insurer. Then, when it gets to the nuances of specific and changing risk
11 dynamics, and how that might individually impact your own insurance pricing
12 and products available to you, it is just yes, a very difficult nut to crack.

13 **PROFESSOR ULPH:** Thank you.

14 **MR JUSTICE MARCUS SMITH:** I will check with Mr Lask and Mr Beard, and I am
15 looking at Ms Lucas, but I think that is the end of this afternoon.

16 Can I express my appreciation for your time and very interesting presentation. We are
17 really very grateful. Thank you very much, but that concludes the teach in.

18 I suggest we have two minutes with the advocates just to ensure there is not anything
19 that we ought to cover off in light of that, but otherwise we will bring this hearing
20 to a close. So thank you very much, Miss Gibbs.

21 Mr Beard, I will hand over to you just to see if there's anything more, followed by
22 Mr Lask.

23 **MR BEARD:** No, apart from me expressing my thanks to Miss Gibbs for her
24 assistance to the Tribunal today. I don't have anything else on my list of things
25 to raise with the Tribunal. So I am very grateful.

26 **MR JUSTICE MARCUS SMITH:** Mr Lask?

1 **MR LASK:** Thank you, Sir. We also express our thanks to Miss Gibbs. I don't have
2 any points to raise at this stage. You will have seen that we made the point in
3 the skeleton argument that we would, of course, reflect on the presentation, but
4 we are conscious of the indication the Tribunal gave in correspondence. We
5 will exercise all due restraint and only raise any concerns if we really feel
6 absolutely necessary.

7 **MR JUSTICE MARCUS SMITH:** Well, thank you. With that then, and with the repeat
8 of my thanks to Miss Gibbs, I will end the hearing now. I wonder if Ms Lucas
9 and Professor Ulph could join us in our virtual retiring room in a moment. Thank
10 you all very much. I am really very much obliged to you all for a very helpful
11 day for us, and we look forward to seeing you hopefully in person in November.
12 Thank you all very much.

13 **MR BEARD:** Thank you.

14 **PROFESSOR ULPH:** Thank you.

15 **MR LASK:** Thank you.

16 **(5.01 pm)**

17 **(Hearing concluded)**

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