IN THE COMPETITION APPEAL TRIBUNAL

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

Victoria House,
Bloomsbury Place,
London WC1A 2EB

7 February 2017

Before:

THE HON. MR. JUSTICE ROTH
(President)
MR. HODGE MALEK QC
PROFESSOR JOHN BEATH OBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

GENERICS (UK) LIMITED
GLAXOSMITHKLINE PLC
(1) XELLIA PHARMACEUTICALS ApS
(2) ALPHARMA LLC
ACTAVIS UK LIMITED
MERCK KGaA

Appellants

- and -

COMPETITION AND MARKETS AUTHORITY

Respondent

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PRE-TRIAL REVIEW

A P P E A R AN C E S

Mr. Stephen Kon and Mr. Christophe Humpe (Senior Consultant and Partner, of Macfarlanes LLP) appeared on behalf of the Appellant Generics (UK) Limited.

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

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

Mrs. Sarah Ford (instructed by Macfarlanes LLP) appeared on behalf of the Appellant Actavis UK Limited.

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

Ms. Marie Demetriou QC, Mr. Tom Sebastian, Mr. Ravi Mehta and Ms. Elizabeth Kelsey (instructed by CMA Legal for the Competition and Markets Authority) appeared on behalf of the Respondent.

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THE PRESIDENT: Mr. Flynn, I think we will follow the course of the agenda that you have had, if that seems sensible. We are grateful for the written submissions, the skeleton arguments that we have had, and the measure of agreement that has been achieved. The first question, therefore, is the admissibility of Mr. Sellick's para.10.

MR. FLYNN: Exactly. It is tab 7 in your clip of documents.

THE PRESIDENT: Can you just help me on one thing. We have all read this part of Mr. Sellick's witness statement. He explains in paras.6 and 7 how the negotiation process took place. He says in 7, "The mathematical part of the process was the assessment of the 'match price'", which, as I understand it, has three elements: the Seroxat purchasing share, which he explains, second, the mainline wholesaler discount, and thirdly, the PI price, and then he says it is generally a floor price used to assist the negotiations:

> "The sales representative would try to negotiate a price higher than the match price …"

and so on. Then he goes into more detail in 8 and 9, and in 9 he says:

> "The approach was not formulaic. There was also a discussion around the inputs used to reach the match price in the first place."

That is the inputs I have just referred to in para.7, I think.

MR. FLYNN: Yes.

THE PRESIDENT: And he explains the Seroxat purchasing share, which is the first one. Then he says, the penultimate line on the page - he does not talk about the second element, the mainline wholesaler discount. He goes to the third one, which is the PI price, and he said:

> "[It] would be based on factors such as intelligence from the pharmacy (including based on shop visits), sight of purchasing invoices, sight of price lists and a general awareness of current PI prices across the UK. PI prices change regularly and the pharmacy would have had an incentive to emphasise the lower end of prices paid or available."

Have I understood that correctly, the PI price that goes into the match price as one of these ingredients was not necessarily the actual PI price, it would have been the assessment made by GSK's sales representative of what he, or perhaps sometimes she, thought and understood the PI price was?

MR. FLYNN: It is a discussion with the pharmacy that they are negotiating with.

THE PRESIDENT: But they will not actually have sight of the PI price because that would be confidential to the pharmacy.

MR. FLYNN: That would be confidential to the pharmacy, and this is why we say that paras.9 and 10 are indivisible because 10 contains----

THE PRESIDENT: When para.10 says the "PI price agreed upon", and you have to think about those words, it does not mean the PI price which the pharmacy paid, it means the PI price agreed between the rep and the pharmacy----

MR. FLYNN: As an element in the match price.

THE PRESIDENT: Which the GSK sales rep accepted should be used as the PI price, whether it actually was the PI price. This is not talking about actual PI prices, it is the PI price element in the negotiation?

MR. FLYNN: That is right, and I think you could fairly say he uses PI prices in 9 in those two senses, because he says the PI price would be used, "based on factors such as", and by that he means the discussed one. Then he says the PI price is changed regularly, and that means, I think, what the pharmacy actually was paying for the PI. I can see that.

THE PRESIDENT: Then he makes certain statements in para.10. That is the way we understood it, I think.

MR. FLYNN: Then 10 explains that in a bit more detail.

THE PRESIDENT: Ms. Demetriou, if we can ask about this: para.10, with that explanation, there are two pieces of factual evidence in para.10, it seems to me. One is that the sales representative would be selling around 12 to 15 products to a pharmacy, whereas paroxetine would have been one of hundreds of medicines it was buying. That, I would have thought, would be common knowledge. That is the first bit of fact. The other bit of fact is that a sales representative's performance would include how the deal price was above the match price and the overall sales value of all deals, and that is how its performance was measured. That is a factual statement which otherwise one might not know, but it is the sort of question the Tribunal might indeed ask Mr. Sellick if it was not explained.

Everything else in that paragraph is inference or opinion. We are slightly puzzled why this is being objected to. It is not giving evidence of the actual PI prices.

MS. DEMETRIOU: Sir, if that is the position, then it may be that we can let it go in. The issue is that Dr. Stillman in his further expert report, in dealing the with the parallel import price issue, makes certain points about the prices in Mr. Sellick's spreadsheet. He is making those points in order to counter the points made by Miss Webster in her own expert report. You will recall that Miss Webster says that PI prices in the CMA's Decision are overstated, and if that is correct that would tend to overstate any reduction in price caused by these agreements. That is essentially the overall point.

Dr. Stillman in his further expert report seeks to rely on the Sellick spreadsheet and the parallel import prices in the Sellick spreadsheet in order to counter Miss Webster's point. Sir, what is being said here is that the prices in the Sellick spreadsheet would tend to understate the actual PI prices. That is why it seems to be relevant to the points made by Dr. Stillman.

THE PRESIDENT: I can see why it has some relevance though he does not refer to this paragraph, perhaps because it had not been admitted at that point, and he might want to elaborate. As I say, it is just explaining how the negotiations of the deal price would be conducted, but I do not think it is referring to the actual PI prices.

MS. DEMETRIOU: No, but if GSK's position is that the Sellick spreadsheet does not refer to actual PI prices then that may be the answer to all of this debate. It seemed to us that what Dr. Stillman was saying in his further report, he was seeking to rely on the PI prices in the Sellick spreadsheet.

THE PRESIDENT: Yes, the spreadsheet is referred to by Mr. Sellick not in para.10, but I think just above, is it not? It is in para.7.

MS. DEMETRIOU: Yes, but I am talking about Dr. Stillman's further expert report.

THE PRESIDENT: So the spreadsheet is in evidence, and the spreadsheet, which I have not looked at - should we look at the spreadsheet - would that be helpful?

PROFESSOR BEATH: The relevant column in the spreadsheet, which is referred to as column S, that is labelled 'PI or Generic Price'. A question I would have had was this: is that price the actual price of the PI and generic, or is it used in the construction of this match price which underlies the profit that the salesman can make from selling? That is the thing that is used to calculate the margin, as far as I can understand.

MS. DEMETRIOU: We understand it to be the latter, but it seems to us that Dr. Stillman in his further expert report, in order to attempt to counter the point made by Miss Webster about the PI prices being overstated does rely on the PI prices in this spreadsheet. We do not know exactly what he is going to say, but what is being said here in terms of factual evidence is that those tend to understate the actual price.

PROFESSOR BEATH: But I think we understand the issue, so we are unlikely to have the wool pulled over our eyes in the course of the proceedings.

THE PRESIDENT: He says that it is unlikely to have been higher than the actual PI price, and he says it might have been understated - that is all he says - because of the incentive. There is an inference.

MS. DEMETRIOU: If the Tribunal's point is that we can address this through submission and cross-examination----

THE PRESIDENT: I would think so. It would be very odd to keep it out, given everything else about this, and the spreadsheet is coming in. It is just completing the explanation of what they are talking about.

MS. DEMETRIOU: I do see that, Sir. You have seen from our skeleton argument the way we put the point, which is that they were refused permission to adduce further evidence on the PI point, but it was not necessary for them to put para.10 in. It does not go to the open and closed prescription points. In a sense, the proof is in the pudding, because when Dr. Stillman addressed the open and closed prescription points in his further expert report he does not refer to para.10 at all, because the actual parallel import prices are not necessary to calculate the open and closed prescription prices. So it is an unnecessary paragraph which we say circumvented the Tribunal's refusal of their application made back in December to adduce further evidence on the PI point. I hear what the Tribunal says, and if you think that it should be let in and we can deal with it through cross-examination and submissions, so be it, we have made our point and it is really for you to reach a view.

THE PRESIDENT: Yes. We think it can come in. Whether it actually goes anywhere, whether you need to cross-examine on it, but if you think you should then you can.

MS. DEMETRIOU: Very well.

THE PRESIDENT: So we will admit para.10.

The next issue, point 2 on the agenda, is about concurrent expert evidence. We have looked at the statement - which, if I may say, was extremely helpful, and we are grateful to the experts for the effort they made - and our feeling, subject to seeing what the CMA say, so if you want to address us on it, Ms. Demetriou, you can, but we felt there is no reason why all the matters dealt with in that first joint statement cannot be dealt with concurrently through what is generally referred to as a 'hot tub', and there will be an opportunity for all counsel to cross-examine − to a limited extent, because that is the whole purpose of the hot tub − after each topic. We do not see any reason to take out certain parts of it. Provided there is sufficient time for that, we think that will work well.

We, of course, have not seen the joint statement to come from Ms. Webster. Having looked at the reports we think that that whole area is not suitable for concurrent evidence. It is quite detailed and technical, and we think that should be dealt with by cross-examination in the ordinary way.

I think that was broadly the position of all the appellants.

MR. FLYNN: I believe it is, Sir.

THE PRESIDENT: Ms. Demetriou, I think the CMA were wanting to segregate this?

MS. DEMETRIOU: Sir, yes, but we only want to take out one bit. The only part we want to take out of the joint statement is issue 2(i). Can I just explain our thinking there? Issue 2(i) is essentially the *ex ante* analysis of whether, from the point of view of economics, these particular agreements are likely to have any effect on competition, so it is the likely effects of these particular agreements from an economics point of view. Issue 2(ii), which is the subject of the second joint statement which we do not have, which everyone agrees is more appropriately explored through cross-examination, is, we say, the other side of that same coin, because that is the *ex post* analysis of the actual effects on competition. So we say that those two issues are two sides of the same coin.

When it comes to the legal test, thinking about the legal test that has to be satisfied, then we say, of course, that the actual effects, what happened in the event, are not relevant to the legal test. They are not relevant certainly to the object case because you do not have to conduct an effects analysis, and they are not really relevant to the effects case, because what you have to show is likely effect. So the key point from the point of view of legal analysis is point 2(i) and the *ex ante* analysis of the likely effect of these particular agreements.

Then, of course, you have point 2(ii), which is actual effect in the event, the *ex post* analysis, which is there essentially as corroborative evidence to assist the Tribunal to determine who is right or who is wrong on point 2(i).

We say that those two segments of evidence fall to be considered together and should be treated in the same way for procedural purposes.

THE PRESIDENT: I can see they are two sides of the same coin, except one being *ex post* with a lot of detail of what actually happens, scrutiny of facts. It is not that they are not conceptually related, it is just what is a practical way of testing the evidence. It might all be irrelevant, but that is a submission of law. That is a separate point.

In so far as we clearly have to look at it in case that submission is wrong, that, as I think you accept, because it is a lot of detailed analysis and testing of various progressions, what is being included, what assumptions have been made, and so on, that is something that is really not suitable for the Tribunal, and that is accepted.

MS. DEMETRIOU: Sir, of course we do accept that.

THE PRESIDENT: But the first part, nonetheless, it is just what the nature of the evidence is that is being given, and because it is *ex ante* we cannot see any reason why it cannot be explored

by the much more efficient method, when it is practicable - it is not always practicable - but if it is practicable then it is more efficient and produces often a better outcome.

MS. DEMETRIOU: Sir, can I make two practical responses. I understand the point that you have just made to me. The two practical responses are this: the first is that although of course we accept that the *ex post* analysis is more granular, and for that reason we have said all along it should be explored through cross-examination. The *ex ante* analysis, at the least the way that the appellants have run the case, is also granular, though not as detailed, but pretty detailed. What it will require, we say, are the precise terms of the agreements to be put to the experts as well as factual points from the surrounding factual matrix, and we say that that is something that is best done through cross-examination through the parties' counsel deciding which documents to put to the experts. You are looking at the precise terms of the agreement and the surrounding factual matrix.

Sir, we say for that reason there is good reason for it to be explored through cross-examination.

The second point is that there are, of course, links made in the evidence - and this is the two sides of the same coin point - between particular issues. Just by way of example, Dr. Majumdar discusses in his *ex ante* analysis how the agreements could induce GSK to lower the price of Seroxat. That is also a point made by Dr. Stillman in his first report. Those are both key features of their *ex ante* analysis.

Then, of course, there is the question of whether or not the agreements actually did have that effect on the price of Seroxat, and that is addressed in the *ex post* - for example, in Dr. Stillman's second report. We say for that reason we think it is important for the parties, when addressing one of these points, to also be able to address with that expert the second of the points, and put to the expert any inconsistencies between the two.

So we say there are two practical reasons, in essence, as to why we think this part of the evidence would best be dealt with through cross-examination. It may look superficially attractive to say that it can all be done in the hot tub, but because of the way that the appellants have run the case we say the practical reality is that there will have to be reasonably detailed reference to the documents and the surrounding facts for example, and we think that is best done through cross-examining.

THE PRESIDENT: (After a pause) Ms. Demetriou, we understand the point you are making and think that it has some force, but we think that the way to address it most effectively and most efficiently is to allow a bit more time for cross-examination - to take that evidence in a hot tub, but to allow rather more time for supplementary cross-examination than might be

normal, so that you can put, if you wish, detailed points by reference to the other report to the experts rather than to take it in a different way. So that is what we propose to do.

That takes us to point 3 on the agenda, the approach to be adopted for dividing and allocating responsibility for issues common to the appeals. We have read what all the appellants have said, and that you are making every effort to do that. We are not going to make any further directions in that regard. You have heard our views and what has been said by me on a previous occasion. We leave it to you all to avoid unnecessary duplication in your skeleton arguments. All we can say is that if you do duplicate each other in your skeleton arguments that will irritate the Tribunal, and I do not need to say it, it is not good advocacy to irritate the Tribunal. With that warning it is up to you. We say no more about it.

That takes us to the timetable. Can I just confirm our understanding: Professor Young, the psychiatrist, is not being cross-examined by the CMA, thank you. The factual witnesses are now accepted. The CMA's factual witness is not being cross-examined by anyone, and the CMA is wishing to cross-examine three witnesses, Dr. Reilly, Mr. Horridge and Mr. Sellick, and that is it? Yes. Thank you.

Bearing that in mind I think I will outline our thinking on the timetable and how that applies so that one also works back from the end, as it were. As regards penalties, that is purely a matter of legal submissions. We do not see any sense in having submissions on penalties in opening, then closing submissions on penalties, then oral submissions on penalties. We think penalties can be dealt with, therefore, in your closing submissions, written and oral, and it does not take other days to address.

On that basis, our thinking is that for openings, yes, this is a heavy case, and openings are very helpful, but we have had detailed notices of appeal, which, of course, are far fuller than pleadings in the regular courts, and we will have skeleton arguments. So we think two days of openings for the appellants should be sufficient. We would have thought that one day for the CMA should be sufficient. The CMA has asked for three days for cross-examining the factual witnesses. That struck us as quite generous if there were only three factual witnesses to be cross-examined. Our view is that the CMA can have four days for opening and cross-examination of factual witnesses. It is up to you, Ms. Demetriou, or you and your team with Mr. Turner, if you want to take a day and a half to open, you will only have two and a half days to cross-examine the factual witnesses. If you think you need three days to cross-examine the factual witnesses, you will only have one day to open.

On that basis, the factual evidence will conclude on Monday, 6th March.

The other point I should have made at the outset is we do think it is preferable to segregate the Chapter II argument, not the factual evidence but the expert evidence on Chapter II, and to take it with any submissions on Chapter II.

One would start the hot tub that we have just been referring to on 7th March. That would go for the 7th, we are not sitting on the 8th, and the 9th, and could go, if needed, to the morning of the 10th, because of the matter we have just discussed.

One can then start the other part of the expert evidence on the afternoon of the 10th, and we think it should be given two and a half days. Someone had suggested two days, we think probably two and a half. So that would be the afternoon of the 10th, the 13th and the 14th.

In allowing the two to two and a half days for the hot tub and supplementary cross-examination, that will not include the Chapter II part of the experts' report. What I think is in the joint statement - that has been put in the contents as point 3 - will not be covered in the first hot tub. There will be on that basis, we think, ample time to deal with the issues, including cross-examination.

That will mean that the case on Chapter I concludes on Tuesday, 14th March, leaving the 15th and 16th for the Chapter II case - that is to say the hot tub on Chapter II between Dr. Stillman and Professor Shapiro, and any opening submissions on Chapter II as well.

One would have thought one day for that hot tub on that one issue should be adequate. A day for submissions may be more than adequate, so we may even finish early, but it will give us the benefit of two days for only two parties. Everyone else, of course, will be released.

That will then conclude the opening arguments and evidence. We then adjourn and you have Friday the 17th, the weekend if you wish, and the 20th and 21st to do your written closings. We receive them on the 22nd, so we have time to read them. Then the week of 27th March is for closing submissions. Because we have not had argument on penalty before, we think it probably is best to follow the traditional approach and allow the appellants to start to make their closings, the CMA to respond, and then brief replies. That would be, we think, two days for the appellants' oral closings, Monday and Tuesday, two days for the CMA, Wednesday and Thursday, and Friday for the appellants' replies, given that there are five appellants.

So that is what we have in mind, having had regard to all that you have said, the two timetables we have seen, and the fact that we are not having two rounds of legal argument on penalty, which struck us as superfluous, and the way we are doing the hot tub.

We are, of course, open to any comments, objections, observations, and so on.

MR. FLYNN: Sir, the only point - I think I understand the structure that you have suggested and I think it can all fit in - I would perhaps raise again is the order of closings in that, on the penalty points, we did want an opportunity to address the Tribunal orally, and we will have those one way or another. The penalty points, of course, are in the pleadings and will be in the skeleton arguments, so it is not as if the CMA will be taken by surprise on that. I think it is more likely, to be frank, that in a case where the CMA's case has evolved at each stage, as we have explained, that there will be things in the CMA's closings which we may need to deal with extensively. That is why we suggest that the order that is not usually followed in this Tribunal but is generally followed in most courts and tribunals in this country would be the sensible one in a case like this, which is that the appellants have the last word after the respondent has been heard. I think that is important in this case.

THE PRESIDENT: We are giving you the last word.

MR. FLYNN: You are giving us replies, I do see that, Sir, but that will be----

THE PRESIDENT: You say the CMA's case keeps evolving. Whether it does or not, you will have the CMA's written closing and time to read it quite carefully, more time than usual. You will be able to address it in your oral closing. The idea that the CMA is going to come up with points in its oral closing that are not in its written closing, that is unusual. They are really responding to your written closing. If they do, you will have a reply.

MR. FLYNN: I have made the point, and that is why in this particular case we have suggested throughout that it is would be appropriate to do it the other way round. I hear what you say, and I can sense an indication.

THE PRESIDENT: I know you are doing a written closing, but this will be your first oral submissions on penalty.

MR. FLYNN: It will.

THE PRESIDENT: So I think it is correct that the CMA should hear them and respond to them.

MR. FLYNN: That is, of course, why we also originally suggested carving that out, because that would not have been appropriate at the opening stage. This is not one of those cases where the consequences for penalty flow from whatever the Tribunal might find on infringement. There are certain points in relation to penalty to which we attach some importance.

THE PRESIDENT: I do not see why that cannot be effectively accommodated this way. It seems to us that it can work and, as I say, you will have on Wednesday, 22nd March the written closing. So you will have ample time to pore over it and pick up any points orally where you say they have parted from their previous position.

MR. FLYNN: Yes. I have made the point, Sir, and that is as far as I can take it.

THE PRESIDENT: Thank you. Any other of the appellants want to address this proposal? Mr. O'Donoghue?

MR. O'DONOGHUE: Sir, at the risk of irritating the Tribunal regarding the timetable, there are four other parties on the generics side, and the upshot of the openings and closings as presently tee'd up is that there is a realistic possibility that the four generic parties would have something like one hour and 15 minutes each to open and close their case. Sir, the assumption will be that GSK would seek the lion's share of the two days, so perhaps as much as one day. That is a horse trade we will have to have with them. There is a realistic scenario, Sir, which is that to open and close this mammoth case we have one hour and 15 minutes each. In my submission, and I have not spoken to Ms. Kreisberger, Mrs. Ford and Mr. Kon, that is manifestly insufficient. We take the point that there are skeletons, but there is a material risk, in my submission, that we are uniquely prejudiced by this approach. Even as much as an hour each for each of the Generic parties would do a lot to redress that balance.

THE PRESIDENT: Mr. Kon?

MR. KON: We would adopt those submissions.

THE PRESIDENT: What you are saying is that you would like is two hours and a quarter instead of one hour and quarter - that is basically the point I am hearing?

MR. O'DONOGHUE: Sir, we are in the unusual position that the CMA has got actually more time than it asked for. The four days in cumulative terms is more than the original proposal for openings and cross-examination.

THE PRESIDENT: Mrs. Ford, do you want to add anything?

MRS. FORD: Sir, I would echo the concerns expressed by Mr. O'Donoghue. An hour and a quarter to open and to close for a case of this scale does seem extremely insufficient.

THE PRESIDENT: There is a lot of overlap between the points that you take. There are some particular points.

MRS. FORD: Sir, there are. We have, as we have explained in our skeleton, taken steps to try and co-ordinate, and we will continue to do so. Nevertheless, we do have parties with distinct interests and it is necessary for them to be given an appropriate opportunity to open and to close.

THE PRESIDENT: Ms. Kreisberger, are you joining the chorus?

MS. KREISBERGER: I am afraid I would simply join in with that chorus. We set out our position in the written submissions, which is that there is a genuine concern on the part of the client. Having been subject to a penalty in this jurisdiction, my client is based in

Germany, and it did wish to express its concern that it has a proper opportunity, a fair opportunity, to set out its case, and these are complex issues.

MR. O'DONOGHUE: Sir, at the risk of being a jack-in-the-box, one practical point, Ms. Webster is now allocated, I think, two and a half days for cross-examination----

THE PRESIDENT: Ms. Webster?

MR. O'DONOGHUE: Ms. Webster.

THE PRESIDENT: No, I do not think so. We have said that area that Ms. Webster covers. I have assumed that there will be cross-examination of Dr. Stillman and Dr. Majumdar as well.

MR. O'DONOGHUE: Two and a half days strikes us as potentially quite long for that.

THE PRESIDENT: So you do not need that long for cross-examining Ms. Webster. Ms. Webster is being cross-examined by the appellants.

MR. O'DONOGHUE: Sir, yes, that would be the expectation. We may well have some supplemental questions, but I cannot imagine there would be many.

THE PRESIDENT: So you are saying that basically the cross-examination of Ms. Webster will be conducted by the GSK team, with a few supplementary questions - is that what you are saying?

MR. O'DONOGHUE: Sir, I cannot speak for the others, but obviously the evidence has been led by GSK. One would therefore expect that they would take the lead in cross-examination. We shall have to see whether everything has been done to our satisfaction. Obviously we are cognisant that we do not get to replicate.

THE PRESIDENT: It may be that that is where we can gain some time, as it were, that is the suggestion being put.

MRS. FORD: Sir, certainly, for our part, we do not have an expert in the ring, or indeed at all, and so we envisage possibly very minor supplemental questions to put our case as necessary, but we would not envisage ourselves playing a huge part in the cross-examination of Ms. Webster.

THE PRESIDENT: Yes.

MS. KREISBERGER: Sir, could I just raise one point that may be relevant to your consideration? We talked about the amount of time available for the hot tub on Chapter I between 7th and 10th March. It would be helpful to know when Dr. Jenkins will be required. Dr. Jenkins is not part of issue 2(ii). It would be useful to set out, if possible, the division within the hot tub now between 2(ii) and the remaining topics within that two and a half day period.

THE PRESIDENT: Yes. I think we probably cannot do that in court today. We will try and give some thought to that before the hearing.

The message coming through, I think, is that we have been over-generous in allowing cross-examination, and even the possibility, therefore, of ending a day earlier and bringing the whole closing process a day earlier----

MS. DEMETRIOU: Sir, we do not agree that you have been over-generous in the time allocated for cross-examination. It is all very well for Mr. O'Donoghue and Mrs. Ford to say they have only got supplemental questions, but unless GSK is saying that they will be less than a day with Ms. Webster, then I think we cannot count on having a shorter period than that for cross-examination.

As everyone said in their skeleton arguments, it is pretty detailed stuff. We, in our proposal, allocated three days for these points, and so we think two and a half days is right.

THE PRESIDENT: We have put it to two and a half.

MS. DEMETRIOU: Yes. Sir, can I address you also on the issues relating to additional time for the other appellants in opening and closing?

THE PRESIDENT: Yes.

MS. DEMETRIOU: Sir, in our submission, respectfully, this point needs to be considered in conjunction with the issue of avoiding duplication. We have heard what the Tribunal said about not imposing additional strictures at this stage on the appellants, and I am not seeking to dissuade you from the view you have taken in relation to that. You will, of course, recall that at the second CMC you said that what you expected to see was an identification of the common issues between the appellants and an identification of which of the appellants was going to take the lead both in their skeleton arguments and orally on those points, and that everyone else has to either adopt or disagree or make supplementary submissions, but not duplicate.

Sir, you will be aware that there are other cases in which there are more than one claimant or appellant where the courts do impose greater strictures. We have heard what you have said about trusting them to avoid duplication, but that means that there is a considerable burden on the CMA. You have seen the notices of appeal, and if we are faced with five different skeleton arguments saying similar things in slightly different ways in circumstances where we have less than a week to respond, we say that leads to unfairness for us. We can live with that, but what must not be allowed to happen, in our respectful submission, is that that is followed through to the hearing so that the absence of more rigid

structures on the appellants leads to a position where they get considerably more time than the CMA, which is defending its Decision.

As the Tribunal has pointed out, there is a huge amount of overlap in these appeals. My learned friends talk about an hour and a quarter each, but that is only on the basis that GSK takes a lot of time itself. It is really up to them to discuss sensibly with each other who is going to take the lead on each point and only make supplemental submissions as necessary. If they go through that process, we say that it leads to a place where similar amounts of time should be afforded to the appellants collectively on the one hand and the CMA on the other hand. That is the only fair way to go about things.

Sir, we do resist strongly the suggestion that the CMA should have less time in closing. At the moment what has been allocated is three days to the appellants collectively, including reply, and two days to the CMA. That already gives the appellants more time collectively than the CMA, but we think that that is fine - two days is enough - but what we would resist is any further imbalance in the amount of time given to the other sides. We think that would be unfair. As I have said, we are already facing a considerable burden in having to respond to what may turn out to be five very full skeleton arguments making the same points in slightly different ways, and that is something that we would wish to avoid.

THE PRESIDENT: Yes, thank you. We will rise for a few minutes.

(Short break)

THE PRESIDENT: We have taken account very carefully of all that has been said. First of all, as regards the skeletons, we will expect you all to indicate in your skeletons which are the issues that you are, as it were, leading on, and which are the issues where you are basically adopting what another appellant is saying, and you may have a supplementary paragraph, but basically you are relying on appellant number two who has dealt with that, so that the position is clear.

As regards cross-examination of experts, we are not going to change the timetable we have outlined. If it goes short, all well and good. We think it is better to build in a bit of reserve time, because otherwise one really gets into problems if issues cannot be explored and that is evidence and cannot be covered by a written note or anything.

As regards closings, what we are going to do is this: on the 27th, the Monday, we will sit until five o'clock, and on the 28th we will start at ten and we will again sit until five o'clock. On the basis that GSK goes first, GSK will have from 10.30 until three on the 27th for its oral closing. Appellant number two, and you can decide between you your order, so I am not putting a name to it, will be between three and five, two hours. On Tuesday 28th,

appellant number three between ten and 12, appellant number four between 12 and three, allowing an hour break for lunch, and appellant number five between three and five. So you will get two hours each which, with co-ordination of subject matter and you will want to address your individual penalties, we accept and take that into account, seems to us quite adequate, because you will have had written closings, which we will have carefully read. So this will be just elaboration and explanation and response to questions on the written closings.

We have given you a full day for replies because of the number of appellants. Normally one would not give a full day for replies after a two day closing by the other side. That, we think, gives that extra time, not quite the two and a quarter hours, but two hours, that was being urged upon us.

Can we then move to the last item, which is the other issue raised. I think that is disclosure of the notices of appeal that the CMA has requested. Ms. Demetriou, we have looked at the summary of the grounds of appeal as published in the Official Journal - I think it is not in our bundle, but we have all had a look at it - which does identify quite clearly what are the basic grounds, though obviously not the arguments, taken by Merck, Xellia, Alpharma and Generics UK, who are three of those appellants now before us. We have to say that we really do not see that we will be assisted by looking at detailed long documents of notices of appeal. Those are the arguments they are making to the Court of Justice, but they are not relevant to the arguments they are making to us, and we have got rather a lot of paper to read in this case and so we do not welcome being burdened with additional paper.

If, at some point, as I indicated at the last CMC, we get to a stage where the Tribunal is considering whether to make a reference, it might be appropriate at that point to ask to see a notice of appeal. We do not think it will serve us to look at those documents now.

MS. DEMETRIOU: Sir, yes, we can certainly deal with it in that way. We had in mind that, following the discussion at the last CMC, if the Tribunal is in a position of considering whether to make a reference then it will, of course, be very important to assess whether or not the relevant grounds of appeal are well founded or not. That may well feed into the question of whether a reference is necessary. We anticipate that seeing the full notice of appeal, of course without the exhibits or anything confidential, would put the Tribunal in a much better position to assess whether or not a ground of appeal is a substantial one or an insubstantial one.

THE PRESIDENT: I see your point, and that may well be right, but we can address it at that stage if we get there.

MS. DEMETRIOU: Very well.

THE PRESIDENT: Ultimately, the grounds for reference are either, it seems to me - and I have not discussed this with my two colleagues, so this may get developed - because we are bound by something found by the General Court, and we are hearing submissions that it is wrong, but we are nonetheless bound, the way out of that is to make a reference whether or not it is in the appeals of the *Lundbeck* parties, or because there is some difficult point of competition law where the position is not clear and one would make a reference anyway. Those are the two basic grounds to make a reference, but I can see what you say, that when we do come to look at it and formulate it we might even want to ask whether there is some distinction or overlap or whatever, and then it might be helpful. I think we can leave that until we get to that point.

MS. DEMETRIOU: Sir, we are content with that. What we had in mind was almost a third category whereby you are bound by a particular finding of the General Court, and the appellants are saying, "Aha, we have appealed that", and then the Tribunal would want to be in a position to assess whether the relevant ground of appeal is a strong one or a weak one in determining whether to make a reference or not.

If you are saying that we will see if we get to that point and we can address the issue again then, then we are content with that.

THE PRESIDENT: Yes. I am not sure whether we would quite assess whether it is strong or weak, but we might want to assess whether it is actually the same point or a different point. If you are content to proceed that way, that is what we would suggest, and we can revisit this at the appropriate stage.

Other than the point that Ms. Kreisberger raised that we try and look at the detailed timetabling of the hot tub and give that some more thought now that we have established its bounds, is there anything else that any of the parties wish to raise?

MS. KREISBERGER: In terms of an agenda for the hot tub, is the Tribunal content to have as the agenda items the high level propositions in the joint statement, or does the Tribunal think there is a need for any different sort of agenda, and, if so, how should we go about formulating it?

THE PRESIDENT: Our present thinking is that we will use that as the agenda, but if, when we read more thoroughly into the case than obviously we have had a chance to do at the moment before the case starts on the 27th, and no experts are giving evidence that week, there is anything else, then we will let you know.

MS. DEMETRIOU: Two additional points on the mechanics of the hot tub, the first we flagged in our skeleton argument, which is that, of course, there will be occasions where Professor Shapiro is facing two or three other experts in the hot tub, we are very keen that the Tribunal should ensure parity of airtime, if I can put it that way, so that Professor Shapiro has sufficient opportunity to respond to each of the other experts in the hot tub, otherwise he is outnumbered.

Secondly, I understood the Tribunal to be saying that we are all agreed that there should be the opportunity for supplementary questions after the Tribunal's questioning.

THE PRESIDENT: Yes, and we will do it by topic rather than all bunched together at the end. I think that is more satisfactory.

MS. DEMETRIOU: I am grateful.

THE PRESIDENT: We may give this more thought. At the moment it appears that, just in terms of arrangements, the arrangements are likely to be that counsel will have to vacate the front row and the experts will be along the front row facing the Tribunal, because you cannot fit more than two people into these witness boxes, and when counsel comes to ask questions they would ask from there, from the witness box to the experts. It is not perfect, I quite see that, but we have got to work within the lay-out of the court, and we cannot extend that witness box to accommodate three people.

MS. DEMETRIOU: Sir, would it be possible to use - we agree that is not perfect, especially if supplemental questions are being asked, if the experts had their back to counsel.

THE PRESIDENT: No, counsel would come up there to ask the questions.

MS. DEMETRIOU: Yes, but it is also important to see the demeanour of the experts when answering the Tribunal's questions, and I was wondering whether it might be possible to use both of these----

THE PRESIDENT: That is used by the shorthand writers at the moment, so that is one of the difficulties. We really do not want them opposing each other in that way, we would like them together. As I say, that does seem to us the only practical way that it can be done. It means that you will be behind the experts when they are answering the Tribunal's questions as opposed to facing them.

This affects everyone, so if you have any other thoughts or suggestions we will be very happy to receive them.

MS. DEMETRIOU: Perhaps we can put our heads together.

THE PRESIDENT: Anything else? No. Thank you all very much.

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