IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1204/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

18 April 2013

Before:

THE HON. MR. JUSTICE NORRIS
(Chairman)
MR. WILLIAM ALLAN
PROFESSOR GAVIN REID

Sitting as a Tribunal in England and Wales

BETWEEN:

AKZONOBEL NV — Applicant

- and -

COMPETITION COMMISSION — Respondent

- and -

METLAC SrL
METLAC SpA — Interveners

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HEARING – DAY ONE

APPEARANCES

Mr. Timothy Ward QC and Mr. Alistair Lindsay (instructed by Slaughter and May) appeared on behalf of the Applicant.

Mr. Daniel Beard QC and Mr. Rob Williams (instructed by the Treasury Solicitor) appeared on behalf of the Respondent.

Mr. Mario Siragusa and Mr. Paul Gilbert (of Cleary Gottlieb Steen & Hamilton LLP) appeared on behalf of the Interveners.

THE CHAIRMAN: Yes, Mr. Ward.

MR. WARD: May it please the Tribunal, I appear for AkzoNobel NV with my learned friend Mr. Lindsay. For Metlac we have Mr. Siragusa and Mr. Gilbert, and for the Competition Commission we have Mr. Beard QC and Mr. Williams.

Sir, there are just three short housekeeping matters to mention before we open the case. Firstly, bundles: we hope you have three bundles of documents and four bundles of authorities. As I understand it, there is just one insertion which we hope has reached you which the Competition Commission provided yesterday that has not got into the bundles. It would be helpful if it could go into the bundles sooner rather than later, as we will want to refer to it fairly shortly in opening It is just some additional sections of the Enterprise Act, which we agree are helpful to the analysis.

THE CHAIRMAN: Can that be done?

MR. WARD: Perhaps it could be done now. (Same handed) Could you insert that at the front of authorities bundle A1, tab 6. These are just earlier sections of the Enterprise Act that come before the sections that are already in there. You will see that at the front of tab 6 there is p.93, a kind of header page for the Act. This should be 93A to N, and then it picks up the sections that are already in there. I am sorry, we should have checked that before you came in.

The second housekeeping point is just about confidentiality. You will have seen that there is extensive mention of material marked as "Confidential" in the report and in the pleadings and skeletons. We are able to avoid mentioning any of that material, at least until we get to the meat of Ground 2. Then there is a period for which we fear it is unavoidable, and what we would respectfully ask at that stage is that the Tribunal could sit in session only including those within the confidentiality ring. We will keep that period to the minimum. It does not apply to our opening, it does not apply to Ground 1 and it does not apply to Ground 3. I thought it might be of assistance to at least flag that issue up now.

THE CHAIRMAN: Thank you.

MR. WARD: Then the third housekeeping point relates to the debate there has been about AkzoNobel's pleading. You will have seen that the Competition Commission took three points on our pleading, suggesting that in certain respects we had gone beyond the notice of appeal in our skeleton argument. We recirculated last Wednesday a re-amended notice of appeal that just included three short paragraphs to encapsulate those contested point, although I should say it is our view that they were largely responsive in any event to the Competition Commission. We asked whether there was any objection to that re-

amendment, and none has been received. So unless there is now, we would ask for that re-amended notice of appeal to stand. I should also say that the Commission was careful to give full answers to those points in any event in their skeleton argument, so we certainly cannot see why there ought to be any issue of substance.

MR. BEARD: If I can just briefly deal with that, I do not think it is fair to say those points are responsive. It is clearly unsatisfactory that they were only raised in the skeleton argument. They are plainly matters that could and should have been raised on the notice of appeal. The requirements for pleading are clearly set out in the Rules. They relate to matters pertaining to the report which have been plain on the face of it. In those circumstances, there is not a good reason why the amendment should be made, but we recognise that in many ways it is easier to deal with these matters if the Tribunal is so minded in the round. We do not think it adds anything to their case, and if the Tribunal wishes to accept those amendments and proceed, notwithstanding the unsatisfactory nature in which these matters have been raised, then, as Mr. Ward indicated, they are dealt with in the skeleton argument.

THE CHAIRMAN: We take the view that amendment at such a late stage is generally undesirable, and the Court of Appeal has recently reminded us in the context of the Civil Procedure Rules that late amendments must be justified on a much sounder basis than has hitherto been the case, but it does seem to us in this case that the amendment adds relatively little and has already been fully addressed, and we propose to permit the amendment.

MR. WARD: Sir, thank you. We take your comments very much on board.

Can I now turn to the substance of the application. As the Tribunal will have seen, AkzoNobel NV applies to quash the decision of the Commission of 21st December 2012 to prohibit the exercise of a call option over shares in Metlac Holding. AkzoNobel NV is of course a Dutch company. The call option is held by one of its Dutch subsidiaries. The exercise of that call option would have given AkzoNobel complete legal control of Metlac, an Italian company.

In 1997 the then owners of Metlac, the Bocchio family, had first granted an option over their shares, but by the time AkzoNobel came to exercise the option in 2011 the Bocchio family had changed their mind, and as you will have seen they launched a campaign of opposition. Among other things, they notified the OFT and the Bundeskartellamt, Germany's highly respected Competition authority.

You will have also seen the Bundeskartellamt cleared the transaction after a full consideration. Seven other Competition authorities have also cleared it. The CC is the only Competition authority to block it. The essential reason why it has is that it considers that

Metlac competes more aggressively on price than the other players in the market in question.

AkzoNobel disagrees fundamentally with much of the Competition Commission's analysis, but this, of course, is an application for judicial review. It is not a review on the merits of the substance of the Commission's analysis, and we have accordingly confined our challenge to three specific judicial review grounds.

What I propose to do by way of opening is provide a high level summary of the grounds, then a short explanation of the key facts, set out the core of the legal framework and then turn to the grounds in more detail.

Starting with the grounds, the first ground concerns the scope of the remedies available to the Competition Commission in this case. As I have already said, it seeks to prohibit the exercise by a Dutch company of an option in an Italian company. That is a matter taking place entirely outside the UK. The essential question is whether it nevertheless was legally open to the Commission to seek to prohibit the transaction. That, in turn, turns on a question of statutory interpretation as to the meaning of the words, "carrying on business in the United Kingdom" in s.86 of the Enterprise Act.

Now, those words place a clear statutory limit on the CC's ability to impose particular types of remedies. And those limits apply, even in cases like this one, where the Competition Commission undoubtedly has jurisdiction to consider the transaction.

AkzoNobel's case is that the CC has erred in law because the facts it has found do not and cannot satisfy the statutory test. It has relied on arrangements which are common to large corporate groups and in substance – in substance -- its decision blurs the distinction between a TopCo in the Netherlands and its legally distinct subsidiaries that are active in the UK. In essence what it does is use an appeal to policy to seek to override the language used by parliament.

Grounds 2 and 3 are both concerned with the quality of the CC's analysis. We are not re-arguing the merits. This is an attack on judicial review grounds on the Commission's process of evidence gathering and analysis.

Ground 2 concerns the CC's analysis of Metlac's pricing. The CC found the transaction would lead to a lessening of price competition because others do not price as aggressively as Metlac. That involves an essentially empirical question: are Metlac's prices lower than the competition, or not? AkzoNobel's essential complaint is that the CC's investigation of this issue did not provide a sufficient basis for its findings. The information it relied on was incomplete. The material it gathered was skewed by the CC's own investigatory

techniques. Part of the CC's response to this argument is to appeal to the overall breadth of its analysis and the various strands of analysis that it did complete. But, this is no answer at all to our point. On this core element of the case, its analysis was wholly inadequate.

Ground 3 is a very short point. It concerns the CC's further conclusion that the merger would lead to a reduction in innovation. But, here, the CC jumped from a finding that Metlac and AkzoNobel both innovate, to a conclusion that as a result there would be a weakening in rivalry in innovation. What it failed to do was investigate two essential questions:

1 Whether the merged group would innovate less than the two separate entities had; and

2 Whether, even so, sufficient competition in innovation would actually remain in the market.

So, that is by way of just a capsule submission of the core of our grounds of appeal. What I would like to do now is very briefly outline the relevant facts before turning to the law. I am going to talk about the transaction, the relevant markets and then the core findings in the Competition Commission's report.

Starting with the transaction, it may be the easiest place to see it is actually in our notice of appeal, none of this is in any way contested, and that is at bundle 1, tab.1, at p.9. There is also an organogram which appears in tab.3 of the same bundle, which is also in the Competition Commission's report. I just want to highlight the core facts in order that we can at least see the background to the issue in dispute.

You will see in para.17:

> "AkzoNobel currently holds a 44·44 per cent stake in Metlac … through its wholly-owned subsidiary, Mortar Investments … The remaining … shareholding in Metlac is held by Metlac Holding — of which ANCI (… a subsidiary of AkzoNobel) currently holds 49 per cent".

So, overall, AkzoNobel holds an indirect 71 per cent interest in the business, but the dispute concerns the remaining 51 per cent of Metlac Holding.

> "AkzoNobel inherited this arrangement in 2008, when it acquired Imperial Chemical Industries".

And the background, as I have already said, is that:

> "In 1997 ICI … had first entered into joint venture arrangements with the Bocchio family and the other then shareholders of Metlac … The arrangements provided for

put and call options, under which ICI would acquire 100 per cent control of Metlac after 10 years".

In 2007 the arrangements were extended and amended. And then underneath the little (a) and the little (b) you will see:

"Under the 2007 agreement, ICI was granted a call option, which it could exercise at any point in the final year of the five-year agreement, over the 51 per cent shareholding in Metlac Holding that it had not acquired outright".

And, that is the call option which is in dispute, acquired by AkzoNobel as part of its acquisition of ICI.

It may be helpful just to look at the organogram which is at tab.3, which hopefully makes all of that clear. It is p.65 of the same bundle, and you can see, you have got "AkzoNobel" at the top which is the TopCo which brings this appeal/application. Then, on the left hand side the 44·44 per cent that was held initially by ICI and then by AkzoNobel. Then, on the right, "Metlac Holding", and a 49 per cent share in Metlac Holding coming down from AkzoNobel Coatings International. The call option is over the 49 per cent in Metlac Holding, I am sorry, the 51 per cent (it already has the 49) it is the 51 per cent currently owned by the Bocchios which is the subject of this dispute. If AkzoNobel Coatings International exercises that option, AkzoNobel gains 100 per cent control of Metlac.

Now, the option was valid from October 2011 until September 2012 and, just for your note, one sees that in the Competition Commission's report at para.4.3 on p.252. (I do not propose to turn it up) and ANCI exercised that call option in December 2011, triggering the opposition of the Bocchios, the filing before the OFT and the Bundeskartellamt and, in fact, proceedings in Italy disputing the validity of the call option, which are also ongoing. But, what is important to appreciate is that the transaction has been considered by competition authorities not just in Germany, but also Austria, Brazil, Colombia, Cyprus, Pakistan, Russia and Turkey. And, again, for your note, you can find that in the report at para.4.7 on p.252.

Only the Competition Commission has sought to prohibit the transaction. And that breadth of notification simply reflects the fact that the business we are concerned with is indeed truly international

I want now to talk about the markets that we are concerned with and first of all the products. As you will have seen, the products we are concerned with are coatings for metal packaging, but not all coatings for metal packaging.

Can I ask you to turn up tab 10 of the same bundle, bundle 1, and p.7 of the report in particular, which is p.218 of the bundle. Here we can find a table with the title: "Metal packaging coatings by end-use" What we see in the left hand column of the table is a division between B&B above the line, and FCG below the line. B&B means "Beer & Beverage", "FCG" means "Food, Caps and Closures and General Line". You can get the flavour of that from the subcategories, beverage, externals, internals and ends, C&C caps, GL General line, aerosols, tubes, etc. Just for your note, you may find it helpful to note – if you have not already spotted it – there is a glossary at the back of the CC's report on p.523 of the annexes.

There is a basic distinction between two types of metal packaging casings, B&B and FCG. It is important to appreciate from the outset that the Competition Commission's findings of substantial lessening of competition are only concerned with B&B. There was a provisional finding in respect of FCG but it was not sustained in the report. We are only concerned with B&B, but you also see there that there are three subcategories of B&B – beverage externals, beverage internals, and beverage ends. Very broadly, what we are talking about is if one imagines a drink can the top and bottom are the ends, the internal is the inside, the external is the coating that goes around the outside of the body.

THE CHAIRMAN: I think you can take this part quite fast.

MR. WARD: Thank you very much. I am almost done, but I want to just draw your attention to one point at para. 10.

> "From its sole Italian site Metlac supplies metal packaging coatings to customers throughout Europe and globally. It manufactures coatings for all the main segments except B2l and BE coatings."

So we are concerned only with B2E – beverage externals, which is the one sector which Metlac is actually active in.

The next point I wanted to emphasise is on the same page, which is para.13, production is relatively concentrated on a global level with three large producers, "AkzoNobel, PPG and Valspar", and then additionally "Metlac" has a strong presence in the EEA. To make an obvious point there are two other powerful competitors out there, no matter what the fate is of this core option.

Finally, over the page, another important feature of this particular market, para. 17:

> "Ball, Can-Pack, Crown and Rexam accounted for almost all EEA demand for coatings for B&B can bodies".

That is, of course, B2E. So there are only four customers. Of these four customers Metlac, in fact, does almost all of its B2E business in the UK with Rexam. We can see that in a little more detail in appendix 6 – tab 11, p.394. There are some confidential figures here which I am not proposing to read out. This is market shares, purchases by selected customers in the EEA in 2011, p.394, and you will see the customers are down the vertical row and the suppliers are horizontal. The second set of figures relates to B2E, and you will see in the column for Metlac there are entries for Ball, Can-Pack, Crown and Rexam which illustrate the point.

Very briefly, how the market is defined by the Competition Commission, this is at para.7.33 of the main body of the report, which is on p.274: "Conclusions on market definition":

> "We concluded that the relevant markets on which to consider the potential effects of the merger are: supply of metal packaging coatings for beer and beverage [B&B] in the EEA … and the supply of metal packaging coatings for FCG."

So it is split between two markets, B&B and FCG for economic analysis considerations.

Then at 7.34: "… the relevant geographic market is EEA-wide."

That EEA-wide market does include activity in the UK, but I wanted to give you a sense of the scale of Metlac's activity in the UK, again without actually reading out any confidential figures. Could I show you, back at p.12 of tab 1 some figures that have not been contested, albeit they do come from my client, at para.37. I just ask you to read that paragraph as large parts of it are, I think, confidential figures. It just provides a sense of scale of Metlac's business in the UK

THE CHAIRMAN: (After a pause) Yes.

MR. WARD: What we see, obviously, is that while the EEA-wide market for metal packaging coatings is very large the effects we are concerned with in the UK are not.

I want to turn back now to the Competition Commission's report and show you its core findings. Its conclusion is at p.364 of the bundle, at para. 9.173. It is really the first two lines:

> "In summary, we found that the proposed merger may be expected to create unilateral effects in the B&B market from a loss of actual competition."

Then you will see at 9.174:

> "In relation to the FCG market, notwithstanding that we saw some evidence indicating that it might result in unilateral effects, given the mixed evidence base … we did not find that the merger may be expected to result in unilateral effects."

So we are concerned only with B&B.

I want now to turn to the Competition Commission's theory of harm, the basis on which it says those unilateral effects will arise and for this, if we could just turn back to bundle p.308, para. 8.127, this is the genesis of the theory of harm.

> "A number of customers told us that Metlac is a particularly aggressive competitor on price compared with the other larger competitors (AkzoNobel, Valspar, PPG) and that this is not at the expense of product quality or service."

The next section of the report is the one we will have to dwell on for the purposes of Ground 2, but for now, if I could just take you to the conclusions that are reached on this hypothesis, p.318, "Conclusions on pricing" half way down the page 8.167:

> "Overall the pricing evidence we have received as set out in paragraphs 8.129 to 8.161 above indicates that in the large majority of instances for which we have data Metlac was the lowest-priced supplier for products in both the B&B and FCG"

And of course we are only concerned now with B&B. Then its conclusions on price are to be found at 9.12 p.332 of the bundle. 9.12 is dealing with one of the specific issues in the report:

> "Whilst customers have indicated that in the event of a price increase by AkzoNobel/Metlac post-merger they could switch ... we are of the view that it is unlikely that Valspar and PPG would replicate the constraint that Metlac currently provides in relation to B2E because they do not compete as aggressively on price as Metlac"

You can see the sections indicated: 8.127 to 8.161. That is the bit you just saw but for now jumped over. We can ignore 9.13 which is confidential. But 9.14:

> "In summary, based on the evidence we have collected, we believe that Valspar and PPG have not competed vigorously on price in relation to B2E in the way that Metlac has done (see paragraphs 8.129 to 8.136). ... Metlac currently constrains Valspar and PPG and the disappearance of Metlac would also remove a competitive constraints on these suppliers ..."

Our second ground is focused on this central aspect of the CC's analysis, and in particular the paragraphs which are indicated there in para.9.12 at the end, namely 8.127 to 8.161. But I will come to that later when I deal with Ground 2.

Our challenge on Ground 2 is essentially to this empirical issue: are Metlac's prices more aggressive than those of its competitors? Whilst there is a great deal of other material in the report (it is a very thick document) the Competition Commission has not disputed a point

we made both in our notice of appeal and in our skeleton argument. If we succeed in our challenge to those passages on Metlac's pricing then the report cannot stand.

The third ground of our challenge relates to a separate element in the Competition Commission's determination. In addition to effects on price it found a loss of rivalry in innovation. I will just show you that finding now for completeness. That is at 9.57.

> "Conclusion on loss of actual competition in B&B market - B2E. For the reasons set out above, we are of the view that prices sought by suppliers for the B2E products that AkzoNobel and Metlac are currently qualified to supply ... are likely to increase post-merger. [Then three lines down] We would also expect a weakening of rivalry in innovation, particularly when AkzoNobel and Metlac are head-to-head ..."

That is the target of our challenge on Ground 3.

Then finally on the report, if I may I will just take you briefly to the section on remedies which starts at p.366. You will at para.11.1:

> "Having concluded that the merger may be expected to result in an SLC, we were required to decide whether action should be taken to remedy, mitigate or prevent the SLC ..."

I am going to take you briefly through the relevant statutory sections, but you will see at 11.3 it says:

> "The Act requires that, when considering possible remedial actions, we shall 'in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practical to the substantial lessening of competition and any adverse effects' ..."

At 11.4 it observes that:

> "Remedies are classified as either structural or behavioural. Structural remedies, such as divestiture or, in the case of an anticipated merger, prohibition are generally one-off measures that seek to restore or maintain the competitive structure of the market ... Behavioural remedies are measures that are designed to regulate or constrain the behaviour of merger parties with the aim of restoring the level of competition ..."

Then it says at 11.5: "In merger inquiries the CC will general prefer structural remedies to behavioural remedies."

Then at 11.19, I would ask you to note that it is recorded that:

> "AkzoNobel made a formal remedy proposal and provided draft undertakings to us on 14 December 2012". Then the proposals are summarised over the page at (a), (b) and (c). I just want to give you the flavour of this rather than the detail:

> "(a) an undertaking not to reduce the range of B2E products AkzoNobel and Metlac made available to the four B2E customers ... (b) an undertaking not to increase the prices at which AkzoNobel and Metlac are currently selling B2E coatings to customers … except to reflect raw material price increases; and (c) an undertaking to license to develop, manufacture, market sell and distribute the Metlac coatings to a third party supplier to facilitate its entry into the B2E segment."

There then follows reasoning explaining why the CC decided those remedies would not be satisfactory. The remedy ultimately selected by the CC is explained at 11.100 which is at p.383.

> "We concluded that the only remedy that was likely to be effective was prohibition of the transaction. This would be an effective remedy and would have no associated risks. We have been unable to identify another remedy that would be similarly effective in addressing the adverse effects of the proposed transaction."

Of course, the legal issue in Ground 1 is whether or not that remedy was legally open to the Commission. I will look in more detail later at the findings upon which it concluded that it was.

I will turn now to the law. I want to say something about the test for judicial review and then briefly address the statutory framework. It is common ground that the Tribunal must decide this application on the same principles as a court would apply on judicial review. I want to make six points about those principles. Two deal with overall approach, three then deal with our grounds of judicial review, and then I want to make a point about the evidence basis for judicial review.

Our first point is the judicial review is flexible and the nature of review depends upon the subject matter of the challenge. To make this good I would like to show you, please, in authorities bundle 2 the *IBA Healthcare* case at tab 18. This is a case that deals precisely with the question of the approach to judicial review in Enterprise Act cases such as this one, and in particular I would like to take you to p.601 of the bundle, p.1130 of the report, which forms part of the judge of Lord Justice Carnwath, as he then was. You will see towards the bottom of the page the heading "Principles of Judicial Review", and Lord Justice Carnwath says:

> "The tribunal was required to apply the principles which would be applied 'by a court on an application for judicial review' (s.120(40)). On its face, this seems a clear indication that, notwithstanding the tribunal's specialised composition,

the review was not to take the form of an appeal on the merits, but was limited by the ordinary principles in the Administrative Court."

Then there is a certain amount of the Tribunal's judgments in that particular case, which we are not concerned with. Picking it up at para.90, I would like just to take you through 90 to 93:

"For example, the tribunal was right to observe that its approach should reflect the 'specific context' in which it had been created as a specialised tribunal; but it was wrong to suggest that this permitted it to discard established case law relating to 'reasonableness' in administrative law, in favour of the 'ordinary and natural meaning' of that word. Its instinctive wish for a more flexible approach that *Wednesbury* would have found more solid support in the textbook discussions of the subject, which emphasise the flexibility of the concept of 'reasonableness' dependent on the statutory context.

91 Thus, at one end of the spectrum, a 'low intensity' of review is applied to cases involving issues 'depending essentially upon political judgment'. Examples are …"

and then a number of cases are cited –

"… where the decisions related to a matter of national economic policy, and the court would not intervene outside of 'the extremes of bad faith, improper motive or manifest absurdity'. At the other end of the spectrum are decisions infringing fundamental rights where unreasonableness is not equated with 'absurdity' or 'perversity' and a 'lower' threshold of unreasonableness is used."

Plainly, this case is neither of those. Then reading on to para.92:

"A further factor relevant to the intensity of review is whether the issue before the tribunal is one properly within the province of the court. As has often been said, judges are not 'equipped by training or experience, or furnished with the requisite knowledge or advice' to decide issues depending on administrative or political judgment. On the other hand, where the question is the fairness of a procedure adopted by a decision maker, the court has been more willing to intervene …

93 The present case, as the tribunal observed, is not concerned with questions of policy or discretion, which are the normal subject matter of the *Wednesbury* test. Under the present regime (unlike the 1973 Act) the issue for the OFT is one of factual judgment. Although the question is expressed as depending on

the subjective belief of the OFT, there is no doubt that the court is entitled to inquire whether there was adequate material to support that conclusion."

Then perhaps I could turn on to para.100, after certain authorities are discussed, it says:

"I have referred to these cases in some detail, because they show that the tribunal did not need to rely on some special dispensation from the ordinary principles of judicial review. Those principles, whether applied by a court or a specialised tribunal, are flexible enough to be adapted to the particular statutory context. No doubt the existence of such a special jurisdiction will help to ensure consistency from case to case, and the expertise of the tribunal will better fit it to deal with such cases expeditiously and with a full understanding of the technical background. However, the essential question was no different from that which would have faced a court dealing with the same subject matter. That question was whether the material relied on by the OFT could reasonably be regarded as dispelling the [issues in the case]. That question was wholly suitable for evaluation by a court. It involved no policy or political judgment, such as would be regard as inappropriate for review b the Administrative Court."

In application to this case, we ask you to note the following: having regard to our grounds, our first ground is essentially a question of statutory construction, wholly within the province of the court. The second and third are concerned simply with the quality of the evidence. They are issues that the Tribunal is wholly equipped to assess, being: has the Competition Commission sufficiently investigated empirical questions? They do not turn on issues of economic or policy judgment in respect of which the Commission would no doubt claim a wide margin of appreciation.

Our second point, this is the second context point, is that the context of this claim calls for a careful scrutiny, and we rely on three points. The Competition Commission is an expert competition authority. It has conducted a 32 week investigation. This was not just a quick look. Of course, the order that it seeks to impose is exceptionally far reaching, even if a familiar one to merger lawyers. It essentially seeks to override the exercise by AkzoNobel of the contractual rights that the Bocchios have granted. What we submit is that the result of this is that the Tribunal is, accordingly, entitled to hold the Competition Commission to a high standard, albeit applying conventional judicial review principles.

I would just like to show the Tribunal some supportive authority for that proposition, this time in bundle A3, tab 28, the *BAA* case, which of course I know is familiar to Mr. Allan.

The paragraph in question is on p.978 of the bundle, para.20(7), and you will see there is reference to fundamental rights in that case, because there was an argument based on the European Convention on Human Rights in addition to a domestic rationality test:

> "In applying both the ordinary domestic rationality test and the relevant proportionality test… where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset …"

in that case Stansted Airport –

> "… the Tribunal will naturally expect the CC to have exercised particular care in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor …"

and that factor is present here. Then just put that into its proper context, in the last six lines the Tribunal also says:

> "It is a factor which is to be taken into account alongside and weighed again other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which modifies such width to some limited extent."

The point I have already made is we are not essentially concerned here with an evaluative judgment so much as empirical questions about Metlac's pricing and about innovation. With those two overarching submissions about the approach to judicial review, I want to turn to three points just to make good the very obvious points about what the grounds of judicial review are that are relevant here. The first is actually to be found in this same judgment of the Tribunal in 20(3) on p.974. I have already read very similar wording from *IBA Healthcare*:

> "The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it …"

This is the duty of reasonable inquiry, and it spells out what the issues are. Then it cites over the page some very famous authority, particularly *Tameside*, and then a decision of this Tribunal, *Barclays*, and then it says in about the sixth line:

> "The CC 'must do what is necessary to put itself in a position to properly decide the statutory questions'."

Then a submission of my friend Mr. Beard is accepted and is not challenged, that this, itself, is subject to a rationality standard. In other words, this is a facet of the question of whether

the CC's approach is *Wednesbury* reasonable, but that itself is conditioned by the questions we are actually asking in this case for the reasons I have already explained. And, if there is any doubt about that one can see that *IBA Healthcare* is cited at the bottom of the page. So, the Tribunal had well in mind the judgment of the Court of Appeal about the flexibility of the rationality test.

My second judicial review point we can also take from 20, sub-para.4 on p.975 of that judgment. It says:

> "A rationality test which is properly to be applied to judging whether the CC had a sufficient basis in light of the totality of the evidence available to it for making the assessments and reaching the decisions it did".

In other words, was the evidence basis sufficient? And that, as you will have seen and as I will explain, is a core strand in our judicial review challenge. Is the evidence basis sufficient for the conclusions?

THE CHAIRMAN: And, of course, the word "totality" there might be very important.

MR. WARD: Very important. I entirely accept that.

MR. ALLAN: But also you will note the following sentence: "Evidence of some probative value". So, it is a balance.

MR. WARD: Sir, I entirely accept it is a balance. And the question at the end of the day is, looking at the totality of the evidence, having regard to the context, having regard to the empirical nature of the questions, having regard to the Competition Commission's status as an expert body, having regard to the Draconian remedy that it wants to apply, does it have enough evidence? That is the question.

And then the third very well established ground of judicial review we rely upon can be taken from the *Tesco* case, also decided by this Tribunal, this time in authorities bundle 2 at tab.23

MR. ALLAN: Sorry, are you still on your third principle, or have you moved on to your fourth?

MR. WARD: This is my third principle.

MR. ALLAN: This is your third principle.

MR. WARD: Yes, sorry.

MR. ALLAN: Sorry, I thought para.23 was with your third principle, that is another element of your -----

MR. WARD: In case I have sown any confusion quite inadvertently, my three principles are:

> * Has the Commission taken reasonable steps to acquaint itself with the relevant information, in other words the duty of reasonable inquiry?

* Secondly, does it have a sufficient evidential basis for its conclusions?

And the third one, which I am now coming to:

* Has it taken into account relevant or irrelevant considerations?

Those are the precepts.

MR. ALLAN: Thank you.

MR. WARD: And, if I may, I will take you now to the *Tesco* judgment of the Tribunal. Tab.23 of authorities bundle 2, at p.871 of the bundle. This is, I think, an exceedingly well established set of propositions. I just wanted to take the Tribunal to paras.77-78.

"The grounds of judicial review are well-established. They frequently overlap with each other. It is not uncommon for a particular flaw in a decision or a decision-making process to fall within more than one ground. Failure of a decision-maker properly to take account of a relevant consideration in reaching its decision is among the grounds most frequently relied upon in judicial review. It is sometimes considered under the broad label of irrationality, but is also (and perhaps more appropriately in the present case) treated in its own right as a ground of challenge to the validity of a decision. This ground, and its converse ground of taking account of an irrelevant consideration, clearly reflect the fact that judicial review is in general about legality and the decision-making process rather than the merits".

And then an important qualification of 78:

"Nor will a court necessarily quash every decision in respect of which it is established that a relevant consideration was left out of account: the reviewing court will normally consider whether the factor could have been material to the challenged decision. If the factor, though strictly speaking relevant, is too insignificant to have affected the decision, then its validity may be unaffected".

So -----

MR. BEARD: Sorry, it may just save time if the Tribunal could read on paras.79-80, it may not be necessary then to go back to those.

MR. WARD: Of course.

MR. BEARD: Sorry. Perhaps it is not something that needs to be read out, if it could just be -----

MR. WARD: If you would like to just read those, of course.

MR. BEARD: Thank you.

MR. WARD: Now, there is not much difference of substance, I think, between us and the Competition Commission on these principles. There is, though, a difference of emphasis, in the sense that you will have seen the Competition Commission's defence and skeleton

argument emphasise that this is all simply a matter of *Wednesbury* rationality. We do not shy away from that. What I have sought to show you in the last few moments is that that *Wednesbury* test is context dependent. And, here, we are dealing with the kind of questions the Tribunal is well equipped to answer.

And then the final point I was going to make on the law of judicial review is about evidence. The Tribunal is constrained to consider the reasoning of the Competition Commission as contained in its report. And there are two aspects to this proposition that I want to show you briefly. The first is to be found in authorities bundle 1 at tab.10, a very well known leading authority on the question of new evidence at judicial review. It is the case of *Secretary of State for the Environment (ex parte) Powis*. And, at p.255 of the bundle numbering is a very well known statement of the law. It runs from G to the bottom of the page and just over the page. I would ask the Tribunal to just read this, it is a statement of the principles on which fresh evidence can be admitted on judicial review. If I could just ask you to read to over the page, the end of the paragraph.

So, the point is there are very limited circumstances in which fresh evidence can be adduced at judicial review. None of those circumstances apply here. We raised the point about that in our skeleton argument. We will see in due course whether it becomes necessary to argue further about that principle.

But, the other point about the evidence basis for judicial review is that both the Competition Commission and Metlac are confined by the terms of the Competition Commission's own reasoning. It is not open to them to put a gloss on that reasoning or to materially expand it. And that proposition is made out in the *Tesco* case. I am conscious the bundle has just gone away so, if I could just give you the reference, it is para.125 of the judgment in the *Tesco* case, which is at authorities bundle 2, tab.23.

THE CHAIRMAN: We will look at it.

MR. WARD: Thank you, sir, it is bundle 2, 23. I am so sorry for not being more organised about that. It is at p. 888 of the bundle. In that particular case, which was a s.120 judicial review, the Commission had put in a statement which sought to explain its reasoning – not something that has been done in this case, of course, still, in our submission, helpful to see. You will see, picking up at 124, you see how the issue arose.

> "The important point is that an assumption, which the Commission now says underpinned its recommendation … but which is by no means self-evidently correct, has not been articulated let alone properly analysed and considered in the report."

Then it rejects various arguments and then at para. 125 says:

> "Nor in our view does the fact that the Commission (with assistance from the interveners) has sought to substantiate that assumption by means of evidence and submissions in the course of these proceedings satisfy the need for such investigation and consideration. We do not believe that this is an appropriate way of supplementing the Report's consideration and findings in relation to significant issues in a major market investigation of this kind."

So the core proposition is we are concerned with the reasoning that is contained in the report. That is all I was going to say about judicial review.

PROFESSOR REID: Could I just back track on why you raised the matter of the admission of fresh evidence? Does this relate to your most recent amendment?

MR. WARD: No, sir. It relates to certain points we took on Metlac's skeleton argument where we suggested in our response that they had sought to adduce new matters that were fresh and not before the Commission. I raise it now simply because I am going through the law and we will have to hear what they actually say in due course.

PROFESSOR REID: Right, because the wording in that extract was about serious matters of misrepresentation or fraud and so on – that is not the territory you are going into?

MR. WARD: No. Sorry, perhaps I should have been clearer as to why I was adducing it in the first place. What the *Powis* case says is there are limited circumstances in which the parties to a judicial review can adduce new evidence which was not before the original decision maker, such as the circumstances that you just mentioned. None of the circumstances arise in this case, no one has suggested that they do, but in our submission in Metlac's original skeleton argument they did include some new material that had not been before the decision maker, and we have made the submission in our skeleton that that material should be disregarded as a result. This authority is the underpinning of that submission. It may prove unnecessary but I did not want to expose us to the criticism that we relied on an authority in our reply that we had not opened when we opened the case, so we put it in play and we will see whether it matters when we hear what Metlac actually has to say. I hope that clarifies it.

PROFESSOR REID: It does clarify it, thank you.

MR. WARD: Sir, unless there are any other questions on the judicial review framework, I wanted to turn to the Statute and take you through the critical provisions of the Enterprise Act. I am conscious that some of this will be very familiar. That is to be found in authorities bundle 1 tab 6, where we have some important additional sections.

The origin of this case is a reference by the Office of Fair Trading to the Competition Commission and the duty to make those references arises under s.22 which is at 93A . What you will see is that it provides:

> "The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that …"

two conditions are satisfied:

> "(a) a relevant merger situation has been created; and
>
> (b) the creation of that situation has resulted, or may be expected to result, in a substantial lessening of competition …"

The OFT only has to reach a provisional view about that, but those are exactly the same questions that the Competition Commission has to reach a definitive answer on when it decides the case. So it is, in our submission, useful to see what is involved in the test that the OFT is applying.

Relevant merger situations are defined in s.23 at p.93C.

> (1) For the purposes of this Part, a relevant merger situation has been created if –
>
> (a) two or more enterprises have ceased to be distinct enterprises;

and I ask you to highlight the word "enterprises" -

> "(b) the value of turnover in the United Kingdom of the enterprise being taken over exceeds £70 million"

Then (2):

> "For the purpose of this Part, a relevant merger situation has also been created if –
>
> (a) two or more enterprises have ceased to be distinct enterprises ….
>
> (b) as a result, one or more of the conditions in subsections (3) and (4) prevails or prevails to a greater extent."

and (3) and (4) deal with, respectively, goods in subsection (3) and services in (4), but they are otherwise the same. The effect of these provisions is that if the merging parties will overlap in the supply or purchase of goods of a particular kind that together amount to the 25 per cent or more of a share in the United Kingdom then the threshold condition is satisfied.

So, just to take you quickly through that language. 23(3):

> "The condition mentioned in this subsection is that, in relation to the supply of goods of any description, at least one-quarter of all the goods of that description, which are supplied in the United Kingdom or in a substantial part of the United Kingdom –

(a) are supplied by one and the same person or are supplied to one and the same person."

So if, as a result of the merger, one person will have a more than quarter share of the goods in the United Kingdom then there is a relevant merger situation.

I want to make three points about this section. The first is it is concerned with enterprises rather than legal persons specifically. Two or more enterprises have ceased to be distinct. If one turns ahead to the definitions section at p.133 "Enterprise" is defined about eight lines down, at p.133, just before the gap: "Enterprise means the activities or part of the activities, of a business", so is not defined in terms of legal persons.

The second point on s.23 is that the draftsman has been careful to talk in certain respects about persons, not enterprises, because one sees in 23(3) the test of overlapping supply talks about "persons". Then (b) over the page, if one looks at 23(3)(b) it is wider because it talks not just about the persons but "persons by whom the enterprises concerned are carried on." So it captures a wider group of persons but is talking about legal persons.

So there is a carefully drawn distinction there within the section.

Then the third point to make is that the definition of "relevant merger situation" does not relate to the location of the merging entities; it relates to one of two things: either turnover within the United Kingdom or supply of a quarter of all goods in the United Kingdom. So the focus is on what may be happening in the United Kingdom, but it does not turn on the location of the persons who may be behind the enterprises.

I am moving on to s.26, if I may, at p.93G. This is the where the draftsman explains what is meant by "enterprises ceasing to be distinct". The crucial point to make here is that in this section the draftsman has focused on the issue of control of the enterprises by bodies corporate. 26(1):

"For the purpose of this Part, any two enterprises cease to be distinct enterprises if they are brought under common ownership or common control."

So we have the concept of control coming in. Then at 26(2):

"Enterprises shall, in particular, be treated as being under common control if they are (a) enterprises of interconnected bodies corporate"

- and I will show you the definition of that in a moment, but just before we leave this section, 26(3):

"A person or group of persons able, directly or indirectly, to control or materially to influence the policy of a body corporate …."

may be treated as having control.

That is important because that is a section that talks about substantive control, not merely formal, not merely a shell company holding shares, but the active exercise of control. So this is about control by persons. At 26(2)(a) it talks about "interconnected bodies corporate" and that is a phrase that is defined again in the definition section of the Act at s.129. Could I ask you to turn back to p.133 where we were a moment ago looking at "enterprises". The definition is at subparagraph (2) on p.133:

> "For the purposes of this part any two bodies corporate are interconnected if (a) one of them is a body corporate of which the other is a subsidiary; or (b) both of them are subsidiaries of one of the same body corporate."

In other words, the parent/subsidiary relationship is firmly in the draftsman's mind in this section. So the overarching submission I make about these sections is that the draftsman has been very careful to distinguish between "persons", "groups of persons including subsidiaries" and "enterprises" which are not equivalent to any particular legal person. These are the core provisions which bestow jurisdiction upon the Office of Fair Trading and in turn provide the foundation of any remedy by the Competition Commission.

Sir, I know the time and I am aware that it is often the practice in this tribunal to take a short mid-morning break. Of course, I am entirely in your hands.

THE CHAIRMAN: Would the transcribers welcome a five minute break? We will take a five minute break.

Adjourned for a short time

MR. WARD: Thank you. I am close now to the end of my trawl through the statute and getting on to the substance of Ground 1, perhaps another ten minutes at the most. I am just going to start by showing you s.36 at p.95, which is where the tests we have just been looking at feed into the Competition Commission's role. You will see it addresses the same questions as the OFT; it just has to reach a definitive answer. 36(1):

> "Subject to [below] the Commission shall, on a reference under s.33, decide the following questions: (a) whether arrangements are in progress or in contemplation which ... will result in the creation of a relevant merger situation and (b) if so, whether the creation of that situation may be expected to result in a substantial lessening of competition [so the same two tests] ... (2) The Commission shall, if it has decided ... that there is an anti-competitive outcome ...decide… whether action should be taken."

In terms of process, just very briefly, at s.38, p.97:

> "The Commission shall prepare and publish a report on a reference under section 22 or 33 within the period permitted by section 39."

Section 39 allows a 24 week period, but then at 39(3), the Commission may extend it by no more than eight weeks. That has happened in this case to give you 32 weeks.

Then the question of remedies is dealt with at s.41, p.100 of the clip, 41(1):

"where a report …has been prepared and published …and contains the decision there is an anti-competitive outcome:

> "(2) The Commission shall take such action under section 82 or 84 as it considers to be reasonable and practicable:
>
> (a) to remedy, mitigate or prevent the substantial lessening of competition …"

And 41(4):

> "In making a decision under subsection (2), the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects..."

So one should note that the duty is not a strict duty to apply a comprehensive remedy in all cases, it is to apply such a comprehensive remedy as is reasonably practicable.

Then the remedial powers themselves are set out in Chapter 4, which starts on p.102 under the head of "Enforcement", and it runs from s.71 to s.95. The first tranche of that is concerned essentially with various interim remedies, but the final powers of the Competition Commission are set out from s.82, p.111.

> "(1) The Commission may … accept, from such persons as it considers appropriate, undertakings to take action …"

Section 83 is certain powers if undertakings are not complied with.

Section 84, final orders. That is what we are concerned with directly in this case.

> "(1) The Commission may, in accordance with section 41, make an order under this section.
>
> (2) An order under this section may contain -
>
> (a) anything permitted by Schedule 8 …"

It is common ground that, in principle, the kind of prohibition the Commission seeks to impose in this case is within Schedule 8. So perhaps I can save time and not show you that.

Then the provision that we are primarily concerned with is s.86, which is at p.114. You will see it governs enforcement orders. "Enforcement orders" are defined to include certain provisions of the Enterprise Act in 86(6), including s.84, which is the power to prohibit that the CC wishes to use in this case. The critical words are in 86(1):

"An enforcement order may extend to a person's conduct outside the United Kingdom if (and only if) he is –

(a) a United Kingdom national;

(b) a body incorporated under the law of the United Kingdom or any part…; or

(c) a person carrying on business in the United Kingdom."

Of course, it is common ground in this case that (a) and (b) do not apply and the question is only whether (c) applies.

It is important to appreciate what the scope of this provision is. It says nothing at all about enforcement orders concerning conduct within the United Kingdom. It only applies to conduct outside the United Kingdom. The reason it is in play here is because we have the exercise of an option by a Dutch company in respect of an Italian company. That, it is agreed, is conduct outside the United Kingdom, but for anything that is being done in the United Kingdom, this is completely irrelevant.

To put that in context, you will recall that the relevant merger situation is defined by a measure of turnover in the United Kingdom or by a share of goods in the United Kingdom. The substantial lessening of competition that we are concerned with is competition in the United Kingdom. So it does seem inevitable, in our submission, that there will be significant economic activity in the United Kingdom in any case where those threshold tests are satisfied, but this is a special rule that applies only to a remedy that relates to conduct outside the United Kingdom. What it is saying evidently is that there must be a close connection between that conduct and the United Kingdom for such a remedy to be permitted, because, by its nature, it is essentially extra-territorial.

With that I can turn to Ground 1, which is of course about the meaning of these words "a person carrying on business in the United Kingdom". Our essential case on Ground 1 is that the Commission has erred in law in concluding the test is satisfied in this case. The broad interpretation that it has placed is, in our submission, contrary to the intention of Parliament. Before I make those legal submissions, I want to show you now the factual findings that are the basis of the CC's conclusion, and they are in bundle 1, tab 10, starting at p.380. You will see that there is a sub-heading, "Carrying on business", because in the course of the Commission's procedure AkzoNobel essentially made the point which now forms of this ground of the appeal, namely that AkzoNobel NV was not, itself, carrying on business in the UK. From 11.90 through to 11.96 are some factual findings by the Commission. We would ask you to read them, of course, with care, if you have not already had the opportunity to, but I want to just highlight the gist of them now and show you the

conclusion that was reached. We would emphasise four points. Firstly, picking up 11.90, AkzoNobel's business is organised into a series of business units and sub-business units. One sees that explained in para.11.90.

11.91:

> "AkzoNobel told us that depending on the specific activities and customers served, the organisation … is either by market or by geography… We therefore recognised that there was a distinction between the corporate structure of AkzoNobel and the operational structure of the Group."

If you see that footnote 222, you will see in the confidential section is a list of certain AkzoNobel subsidiaries that are in the UK. I am not sure it is exhaustive so much as illustrative.

Then a very important point is made at the end of 11.91:

> "In our view, these arrangements, which are common among large corporate groups, reflected a structure in which the decision-making is centralised within the Group."

So it is accepted these are common arrangements. Then it is said:

> "As part of our analysis we also reviewed information supplied by AkzoNobel in relation to its contractual arrangements with customers and suppliers …"

So who is doing the contracting?

The next section is confidential. What I want to do is direct you, if I may, to the core propositions that it contains. You will see 11.92(a) is dealing with the question of customer contracts, who was a party to the customer contracts. Could I just ask you to read those first two lines of 11.92(a). And then, again, in 11.92(b) the first two lines talk about "supplier contracts". Who is the contracting party in the supplier contracts? And then (c) is non-key supplier contracts where the same approach arises.

And, again, at 11.93, the CC says:

> "These contractual arrangements reflect the situation … not unusual for a group structure of a multi-national company where certain aspects of the contractual arrangements are at subsidiary level we noticed the purchasing arrangements had significant aspects that were centralised".

Let us just look for a moment at what those are. And, you will see in 11.92(b), it explains what the centralised element is, in the third line. So, these paragraphs make clear what role, if any, the HeadCo, AkzoNobel NV, which we are concerned with, has in any contracting arrangements.

At 1194 it talks about board minutes. It says these are not unusual arrangements.

"We did not consider these arrangements were unusual for a group structure of a multi-national company, did not find them determinative".

And then we consider the organisation of the group and the involvement of AkzoNobel NV, which is obviously the critical question to assess decision making arrangements.

"AkzoNobel told us that it had only peripheral involvement".

Now, the CC rejected that description as peripheral involvement.

"As we noted, the four members of AkzoNobel NV's board of management and four leaders with functional expertise have responsibility for day to day management of the company, the Executive Committee".

I think there must be a typo there unless I have done it an injustice. But then it explains what this management involves. And, I think the best thing I can do is to just ask you to read the confidential section, down to the end of 11.96.

THE CHAIRMAN: Yes.

MR. WARD: I am obviously somewhat constrained at the moment as to what I can say about this, but the high level point I wish to make is that these are, in our submission, again typical arrangements of a well-ordered multi-national corporate group. And much of what we see here is essentially wholly internal group organisational matters.

In the paragraph below, which is non-confidential, the CC says it is:

"extensive and includes the approval of operational decisions".

But you will have seen that whilst we do not challenge that factual finding, or any of these factual findings, put in context of what we are actually talking about, in large part of what we have here is much more in the line of high level strategy or group organisational issues. And certainly very far indeed from micro-management, active trading — anything of that kind.

And then, finally, the conclusion that the Competition Commission drew at the end of 1198, going over the page:

"The structure in place, in our view, is one in which the operations within the group are centrally monitored and directed, which limits autonomy within the BUs and SBUs in practice".

And as a result it says:

"AkzoNobel NV carries on business, including in the UK".

That is the essential question. It is perfectly clear from these facts that the Executive Committee is indeed limiting the autonomy of the businesses which undoubtedly do carry

on business and the subsidiaries which carry on business. But the question is whether those limits on autonomy mean that the TopCo itself is itself carrying on business in the UK. That is the question. Our submission is that the answer must be "No", and that this cannot be what Parliament intended.

MR. ALLAN: Could you just help me a little with the way in which the lower levels in the functional structure of the business units and the sub business units correlate with the subsidiaries in the formal corporate legal structure, which I am a little bit unclear about?

MR. WARD: Yes. I think the answer is that the business units do not, but that the sub business units do effectively act through subsidiaries. There is a passage in here which, I hope, explains that. My understanding is that the sub business units were essentially equivalent to subsidiaries. Would you give me a moment, sir?

THE CHAIRMAN: Yes.

MR. BEARD: It may assist — I do not know if Mr. Ward is looking at, actually looking at 11.90?

MR. WARD: 11.90. Thank you so much.

MR. ALLAN: There is a sentence, well, it just says:

"The subsidiaries within the group sit within these business units".

MR. WARD: Yes, I think that probably was what I was thinking of. And, we see what was said about who does the contracting. In the non-confidential passage, it says:

"We saw sales contracts entered into by some of these companies".

And then there is the confidential section I drew your attention to.

MR. ALLAN: Well, it must be the case, must it not, that the contract will be concluded by a legal person —

MR. WARD: Of course.

MR. ALLAN: — for the reasons that you are advancing in relation to s.86.

MR. WARD: Exactly.

MR. ALLAN: The issue that we are also concerned with is about the relationship between those subsidiaries and the functional units which comprise the structure. I mean one thing is — and I do not know whether it is germane to this — but I notice that in para.21 of your notice of appeal it says that AkzoNobel has subsidiaries which carry on business in the UK,

"although not generally in respect of the supply of metal coatings" —

MR. WARD: Yes.

MR. ALLAN: — which is precisely what we are concerned about here. So, it suggests that the sales in the UK which are the concern of the Competition Commission, are being made by

some body outside the UK. No-one actually, I think, says in the report or elsewhere what bodies those are, which is itself a little bit unclear.

MR. WARD: The answer is that the sales are being made by bodies that have the legal personality to contract, evidently, as you put to me, sir. But the crucial question for us in a sense is not whether a sub business unit is carrying on business in the United Kingdom, that is not the question. The question is whether AkzoNobel NV, sitting on the top of this structure, which undoubtedly it is, is itself carrying on business. Now, there may be, or there may not be, some grey area questions about some intermediate entities within that structure; we have legal persons at the bottom in the form of what I believe are 449 subsidiaries, in fact, worldwide, who are doing things that legal persons can do; we have got a TopCo at the top, which is the Commission's target because the TopCo has the legal authority to authorise or not the exercise of the option; and then between the two is this corporate structure which, as the Commission says, is just typical of a large international corporate group.

MR. ALLAN: So, it is your case, is it, that where decisions are made within a sub-business unit or a business unit, those are the decisions of the subsidiaries within those units and not the decisions of Akzo Nobel NV?

MR. WARD: My answer is a qualified "yes", in the sense that like the Competition Commission I am constrained by what the findings actually are in this report. The qualified "yes" is the real question is what is Akzo Nobel doing. I can see there might be other questions about what is in that framework, but nothing in that framework in our submission can translate into carrying on business by Akzo Nobel NV, the only question we are concerned with. Now, whether some sub-business unit that has something to do with the supply of coatings in the UK, say, maybe is entering into negotiations with Can-Pack, say, in the UK for Can-Pack's UK factory – just as an example – so that that is carrying on business, it may well be. But that is just not the question. It is not the set of facts we have. The only question is what is Akzo Nobel itself doing, and the answer to that is just on these facts as we have already been through. So further down the chain carrying on business may or may not, it depends what is happening. As you say, sir, there may be subsidiaries outside the UK who are doing deals, placing contracts, negotiating tenders and so on and so forth, in the UK in respect of which Akzo Nobel may well accept they are carrying on business in the UK. That is all, if I may say so, hypothetical. I do not actually know what my clients would say about any of that and, as we are penned in by the facts, as the Competition Commission

found them in this judicial review, in my very respectful submission it is not actually a question we need to answer.

If may I will turn to my three sets of submissions on this. First, just in highlight, Parliament intentionally limited the scope of available remedies. Secondly, the choice of language in the Act makes clear the Commission's interpretation cannot be right; and thirdly, we make a submission about the need to adhere to the general law on corporate personality. When I have done that I will turn briefly to the Competition Commission's counter arguments.

Our first point is absolutely fundamental, and it is a point the Competition Commission has not properly grappled with. Parliament has deliberately introduced a limit on the Competition Commission's powers to impose remedies in s.86, even in cases where it has jurisdiction. We have seen that because relevant merger situations are expressed in terms of enterprises not legal persons, so the jurisdiction to consider a merger does not depend in any way on the activities of a specific person or the location of a specific person. It depends on turnover and the share of goods in the UK.

Section 86 is dealing with a special case, it is conduct outside the United Kingdom, it is extra-territorial jurisdiction, and it is in those cases that the limitations we are concerned with come into play. It is just no answer at all for the Competition Commission to say, as it does, that our interpretation unhelpfully curtails its remedial powers, because that is precisely what Parliament intended. It is the inescapable logic of this Statute that there will be cases where the Competition Commission has jurisdiction but that it cannot impose an order of prohibition. That is just perfectly plain that Parliament intended that outcome.

Our second point concerns the language of the Act itself which, in our submission, is inconsistent with the Competition Commission's approach, and we break it into two heads. First, the language that Parliament did use; and secondly, the language it chose not to use.

May I take you back to the Enterprise Act, which is in authorities bundle 1 at tab 6, p.132. This is the definition section, and there is not a definition of carrying on business in the United Kingdom, but there is a definition of business, and what it makes clear, in our submission, is that business is an activity, a commercial activity, and carrying on business is carrying on a commercial activity in the United Kingdom, and we see this from 129: "Business includes", so it is not exhaustive, but it is indicative:

> "a professional practice and includes any other undertaking which is carried on for gain or reward, or which is an undertaking in the course of which goods or services are supplied."

So that is "business". "Carrying on business" is doing these things, and "carrying on business in the United Kingdom" is doing these things in the United Kingdom.

THE CHAIRMAN: The definition of "business" is entirely circular is it not? It simply means "Business" means business.

MR. WARD: I see your point and I make simply a broader point that this is about carrying on an activity and if it is a carrying on activity to carry on business it must be an activity in the United Kingdom.

What is, in fact, in our submission, is of more assistance is to look at the words that Parliament did not use, the choice it made, because if Parliament had wanted to extend the Competition Commission' jurisdiction to bodies such as Akzo Nobel's TopCo it could and would have used much wider wording, and there are clear candidates for this both inside and outside the Enterprise Act. If Parliament had used any of these concepts Akzo Nobel would have had no ground to challenge on this point. I am going to show you two, but for your note, if I may, in our skeleton argument we set out a number of other examples at pars. 76 to 84. Let me just focus on two. The first one you have already seen and it is over the page if the bundle is still open, which is "Interconnected bodies corporate" on p.133. "For the purposes of this Part any two bodies corporate are interconnected …" if one is a subsidiary of another, or if they are both subsidiaries (s.129(2)). I showed you that earlier because that formed part of the analysis of common control where it is necessary to decide whether enterprises have ceased to be distinct. I also showed you that it was about active control in that context not just formal control.

These relationships of control, whether they be purely formal or active do suffice for the purpose of whether or not enterprises have ceased to be distinct, but Parliament has not applied this definition in s.86, it has taken a much narrower view.

Anticipating a submission Mr. Beard is going to make, it is true that the jurisdiction rules are based on this wider notion of enterprise, but that notion has not been adopted here. If the interconnected persons test had formed part of s.86 again Akzo Nobel would have no argument, if it was sufficient that any person in an interconnected group was carrying on business in the United Kingdom we would have no case on this, but of course Parliament chose not to use that language.

My second example comes from the wider competition law context. I do not want to labour this point because I know it is very familiar to you. Competition law is concerned with undertakings. Undertaking is a much wider concept than person. Just very briefly, to remind the Tribunal, if I may, just turning up tab 5 in the same authorities bundle, we have

extracts from the Competition Act 1998, p.69. The two core provisions of our domestic competition law, p.69, s.2 of the Competition Act 1998: "Agreements preventing, restricting or distorting competition. "Subject to subsection 3, agreements between undertakings" which satisfy certain conditions are prohibited.

Then at s.18 on p.79, this deals with unilateral conduct:

> "... any conduct on the part of one or more undertakings which amounts to the abuse of a dominant position ... is prohibited."

Those provisions of course reflect EU law and the concept of "undertaking" comes from EU law. If I may, I will just show you briefly the lead authority on the meaning of "undertaking" which is in A3, a decision of the European Court in the case of *Viho*, tab 32 p.1071 of the bundle. Fortunately we need not be concerned with the facts. I would just like to take you through paras.50 and 51. This is a classic statement of the law:

> "The Court of Justice has also held that 'in competition law, the term "undertaking" must be understood as designating an economic unit for the purpose of the subject-matter of the agreement in question, even if in law that economic unit consists of several persons, natural or legal' ... Similarly, the Court of First Instance has held that ... economic units which consist of a unitary organization of personal, tangible and intangible elements which pursues a specific economic aim on a long-term basis and can contribute to the commission of an infringement ... Therefore, for the purposes of the application of the competition rules, the unified conduct on the market of the parent company and its subsidiaries takes precedence over the formal separation between those companies ..."

So competition law is concerned with economic units irrespective of the internal organisation. Then at 51:

> "It follows that, where there is no agreement between economically independent entities, relations within an economic unit cannot amount to an agreement ... [picking up at the four line] Where, as in this case, the subsidiary, although having a separate legal personality, does not freely determine its conduct on the market but carries out the instructions given to it directly or indirectly by the parent company by which it is wholly controlled, Article 85(1) does not apply ..."

So in other words, if a subsidiary does not freely determine its conduct but carries out instructions given to it directly or indirectly by the parent which wholly controls it, it is all part of one undertaking. These are the kinds of factors that the Competition Commissioners

relied on in this case: direction by the TopCo and the limiting of autonomy, to use its words. That is the essence of "undertaking".

In our submission, it is evident that if that is what Parliament had had in mind, it would have used the word "undertaking" in the Enterprise Act just as it did in the Competition Act. The Competition Act was two years earlier, and the Enterprise Act is complementary to it. We have put some references in our skeleton at para.81 to White Papers and the like which make absolutely clear that the two go as a whole, as a reform of our domestic competition law.

Again, if the concept of "undertaking" had been used, AkzoNobel would have no point to make at all under this head. Instead, almost paradoxically, the actual word "undertaking" is used in the Enterprise Act but in a totally different sense which, in our submission, underlines our point. I can take you back, if I may, to the Enterprise Act s.129, to the definition of "business". Bundle 1 tab 6 p.132. This is the point the Competition Commission took, in our respectful submission, that rather helps us:

> "Business includes a professional practice and includes any other undertaking which is carried on for gain or reward."

But obviously not used in the sense of the Competition Act - undertaking in a much more ordinary English language sense. But the crucial point is that Parliament could, of course, have used undertaking, just as it did in the Competition Act, if that is what it meant.

Of course, where we are talking about enforcement orders, as we are here, it could have ruled that enforcement orders could have been made against any person forming part of an undertaking at least if the undertaking carried on business in the United Kingdom. There would have been no difficulty of drafting in doing that, but it is a deliberate choice to draw it much more narrowly in terms of what a particular person is doing if they are outside the jurisdiction.

In our submission, what is needed then for "carrying on business in the United Kingdom" is something much more than we have here, which is just the ordinary exercise of control that forms part of an undertaking with a TopCo at the top and subsidiaries at the bottom. But nothing we have at all in the Competition Commission's findings can possibly satisfy that requirement.

Our third head of submissions concerns the general law and the case of *Adams v. Cape* in particular, which is also in bundle A1. I anticipate this case may be familiar. It is very lengthy, and mercifully we do not really need to look at very much of it. It is at tab 11 bundle A1. In our submission, the Competition Commission's argument fails to respect a

key principle identified in this case. May I start by showing you the head note p.259. It was perhaps remarkably argued for 18 days in the Court of Appeal - a different era - in front of a very strong court. The issue was actually about the enforcement of judgments, so a very different context than here. May I just take you through the crucial parts of the head note, just to put the dicta into context. It starts on p.260.

> "Until 1979 the first defendant, Cape, an English company, presided over a group of subsidiary companies engaged in the mining ... and marketing, of asbestos. The marketing subsidiary in the United States of America was a wholly owned subsidiary ... incorporated in Illinois ... The marketing subsidiary worldwide was the second defendant, Capasco ... Asbestos from the South African mines was sold for use in Texas"

Then there was litigation. You will see, if you drop down to E, further plaintiffs instituted actions in Texas. "Cape and Capasco took no part in the… actions maintaining that the court lacked jurisdiction and they were prepared to let default judgments be entered into against them and then resist their enforcement in England. That is what these proceedings were all about - could these default judgments be resisted? The central question, as analysed by the Court of Appeal, was whether the HeadCo, Cape, was carrying on business in Texas through its subsidiary. If we can just pick up the head note on p.262 A to B:

> "An overseas trading corporation was likely to be treated by the English court as present within the jurisdiction of the courts of another country only where either such a corporation had established and maintained at its own expense in that other country a fixed place of business and had carried on from there its business for more than a minimal period of time through its servants or, agents or through a representative; that in either of those cases presence could only be established where the overseas corporation's business ... had been transacted ... in order to ascertain whether the representative had carried on the corporation's business or his own..."

Let me just show you a little bit of the operative reasoning, and what I want to show you is a part which is a statement of the general law. It begins at p.532D of the report, p.358 of the bundle, and was dealing with an argument that the HeadCo and subsidiary should be treated as a single economic unit:

> "There is no general principle that all companies in a group of companies are to be regarded as one. On the contrary, the fundamental principle is that 'each company in a group of companies… is a separate legal entity possessed of separate legal rights and liabilities'.

> It is thus indisputable that each of Cape, Capasco, NAAC and CPC were in law separate legal entities. Mr. Morison did not go so far as to submit that the very fact of the parent-subsidiary relationship … rendered Cape or Capasco present in Illinois. Nevertheless, he submitted that the court will, in appropriate circumstances, ignore the distinction in law between members of a group of companies treating them as one, and that broadly speaking, it will do so whenever it considers that justice so demands."

That submission was rejected, but of course in European competition law under the concept of "undertaking", you can treat them as the same.

There is then some lengthy consideration of authorities, but if you turn on just a few pages to p.362 of the bundle or 536 of the report, after the authorities have been reviewed, it says at B:

> "We have some sympathy with Mr. Morison's submissions in this context. To the layman at least the distinction between the case where a company itself trades in a foreign country and the case where it trades in a foreign country through a subsidiary, whose activities it has full power to control, may seem a slender one."

Then there is a little bit more authority, and then picking it up between F and G, it says in the fifth line of the paragraph:

> "… save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the principle of *Salomon v. A Salomon* merely because it considers that justice so requires. Our law, for better or worse, recognises the creation of subsidiary companies, which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.
>
> In deciding whether a company is present in a foreign country by a subsidiary, which is itself present in that country, the court is entitled, indeed bound, to investigate the relationship between the parent and the subsidiary. In particular, that relationship may be relevant in determining whether the subsidiary was acting as the parent's agent and, if so, on what terms."

Then yet more authority. Then over the page at 538, 364 of the bundle, three lines down, it says:

"As to the relationship between Cape and NAAC [the subsidiary], it is of the very nature of a parent company-subsidiary relationship that the parent company is in a position, if it wishes, to exercise overall control over the general policy of the subsidiary. The plaintiffs, however, submitted that Cape's control extended to the day to day running of NAAC …"

Then it has got some facts.

"A degree of overall supervision, and to some extent control, was exercised by Cape over NAAC, as is common …"

So this kind of control is just what parent-subsidiary relationships are all about. Then, picking it up again between F and G:

"In our judgment, however, we have no discretion to reject the distinction between the members of the group as a technical point. We agree with Scott J that …

'[Counsel] suggested beguilingly that it would be technical for us to distinguish between parent and subsidiary company in this context; economically, he said, they were one. But we are concerned not with economics but with law. The distinction between the two is, in law, fundamental and cannot here be bridged.'"

So we take two propositions from these passages. The first is that it is a fundamental principle of company law that each company has to be treated separately, even if they form part of a corporate group, and even if there is full power of control. So the mere fact of that control, or its being exercised, cannot, in itself, undermine this principle.

Secondly, what the Court of Appeal is making clear is those kind of relationships are just inherent to a parent and subsidiary arrangement. To remind you what is said:

"… it is of the very nature of a parent company-subsidiary relationship that the parent company is in a position, if it wishes, to exercise overall control …"

MR. ALLAN: Does the Court of Appeal's approach not also make it clear that it is the degree of control exercised by the parent that is crucial, because what the Court of Appeal says here is, "There is a measure of control exercised by the parent company", and it is clearly hypothesising that if that control had extended to day to day control and the finding might well have been opposite. What I would appreciate, and you may already have said as much on this as you want to, is how you say that approach of the Court of Appeal should be read in conjunction with the unchallenged finding in 1197 that the participation of AkzoNobel

NV through ExCo is extensive and includes the approval of operational decisions. Are you saying that, even though it is extensive, it is still a measure of control?

MR. WARD: We are saying that, it is a measure of control.

MR. ALLAN: It sounds rather an extensive measure of control.

MR. WARD: Not if the whole passage is read. If one reads the whole passage, including the confidential parts that I have alluded to, one sees what that measure of control actually amounts to. Our submission is that, when you see what it amounts to, it is, in fact, the ordinary conduct of a corporate group. Our overarching submission is that if that serves to suffice in truth it collapses the distinction, because in truth what it means is that any TopCo, doing ordinary things that TopCos do, in an ordinary kind of arrangement that the CC has accepted is ordinary, will be carrying on business in the United Kingdom. For all practical purposes, this distinction that Parliament has drawn would simply be gutted.

I was going to take you a further passage in *Cape* which makes good your proposition, Sir, but also puts it into context, if I may, and that is at p.530 of the report. You will see that the Court of Appeal derives three broad propositions and then identifies ten potentially relevant factors. Position (1):

> "The English courts will be likely to treat a trading corporation incorporated under the law of one country… as present within the jurisdiction of the courts of another country …"

Pausing there, this is a different context, which we accept, as the Competition Commission says, but to fill out the picture of what was really decided in this case –

> "… only if either (i) it has established and maintained at its own expense a fixed place of business of its own … or (ii) a representative of the overseas corporation has for more than a minimal period of time been carrying on *the overseas corporation's* business in the other country at or from some fixed place of business.
>
> (2) In either of these two cases presence can only be established if it can be fairly be said that the *overseas corporation's* business …has been transacted at or from the fixed place of business. In the first case, this condition is likely to present few problems. In the second, the question whether the representative has been carrying on the overseas corporation's business or has been doing no more than carry on his own business will necessitate an investigation of the functions which he has been performing and all aspects of the relationship".

And then at 3, it identifies the following questions which are likely to be relevant. And, if you skim-read down there are ten of them, and (e) is the degree of control. That is, as Mr. Allan says, one of the factors. And in this case it is actually the only one that has been looked at by the CC. And it says, above B over the page, actually, it is worth picking up (i):

> "Whether the representative makes contracts with customers or other third parties in the name of the overseas corporation, or otherwise in such manner to bind it".

This list of questions is not exhaustive, and the answer to none of them is necessarily conclusive.

And then, just above D:

> "Nevertheless, we agree with the general principles stated [in the *Jabbour* case] … 'A corporation resides in a country if it carries on business there at a fixed place of business, and, in the case of an agency, the principal test to be applied in determining whether the corporation is carrying on business at the agency is to ascertain whether the agent has authority to enter into contracts on behalf of the corporation without submitting them to the corporation for approval...'. On the authorities, the presence or absence of such authority is clearly regarded as being of great importance one way or the other. A fortiori, the fact that a representative, whether with or without prior approval, never makes contracts in the name of the overseas corporation … must be a powerful factor".

So, what we have here is a set of factors of which control is just one. It is a question of degree. Of course the Competition Commission says that this is not applicable, this authority. We of course accept the context is very different, but it is very high consideration, and the Competition Commission has of course not addressed the whole panoply of factors that are alluded to in *Cape* it has just bet the farm on the issue of control. And, in our submission, that degree of control is just the ordinary relationship of TopCo and subsidiary. The Commission used some fairly broad language, as you say, sir, but when one looks at what we are actually talking about, it is just matters of routine.

THE CHAIRMAN: So, *Adams v Cape*, is very illuminating in the context of time in which it was decided, but it does not really address the position of a global business carried on by a group in which you would not be able to locate a single company which carried on the business, but you would be able to identify a whole load of companies who individually played their part in carrying on the business.

MR. WARD: Sir, that is an entirely fair point, and of course the question that we are concerned with is a narrower one, which is only whether the TopCo is carrying on business.

THE CHAIRMAN: Yes.

MR. WARD: So I accept — I have shown this to you because in our researches it was the most illuminating higher authority on what "carry on business" could mean. It is not our case, and it is not the Competition Commission's case that it is binding or decisive of the issues that you have to consider.

So, what, then, is the Competition Commission's case, by way of response? Well, in essence, it has two limbs to it. The first one is, one could use the shorthand, "active engagement". They nominally accuse AkzoNobel of being focused purely on the question of formal control, that our argument is purely addressed to the question of whether it is sufficient that AkzoNobel formally controls its UK subsidiaries. But that is not our case at all. Our case is about the active engagement, the active way in which AkzoNobel TopCo operates. But the crucial point is that what the Commission has found is that the TopCo limits the autonomies of the subsidiaries by monitoring and directing. But we talked about the position regarding contracting against confidential, there are no findings that the TopCo does anything in the form of buying or selling or directly dealing with customers, processing orders or deliveries, there is no finding that the subsidiaries are merely executing its orders in the manner of a principal/agent relationship. What it has found is entirely unsurprising, which is that the TopCo exercises managerial oversight and control. But, when one reads the confidential sections it is entirely clear that there is a very large area of commercial freedom within those limits. So, we are not just concerned with formal control, we are talking about the substance of control, and our submission is that the practical effect of the Competition Commission's argument is that almost any TopCo will be held to be carrying on business on this basis. Activities that are entirely typical of a corporate group. The effect of that is to collapse the distinction that Parliament has very carefully drawn by focusing on individual persons, not associated persons, not undertakings, but individual persons. And that is why we say that, in substance, this is contrary to the intention of Parliament.

The second head of the Competition Commission's argument is really just based on policy, because it says that the interpretation AkzoNobel argues for will be inconvenient or absurd, and that is in its defence at para.71. And the reason it would be inconvenient or absurd is that it would be stuck. The Competition Commission would be stuck. There would be situations in which it had the power to investigate a merger between enterprises, but not the power to impose the remedy of its choice in the form of prohibition. It says that cannot be

right. But, we make five short points in reply, and that will conclude our submissions under this head. So, just five short points:

* Firstly, just to echo a point I have already made, it is absolutely clear that Parliament intended there were restrictions on remedies, even in situations where the Commission did have power to investigate a merger. Those restrictions cannot simply be blue-pencilled on policy grounds. In particular, this is not a provision implementing EU law where purposive considerations can trump. We are concerned with the intention of parliament.

* Secondly, again echoing a point I have already made, this restriction is a narrow one. The overwhelming likelihood is there is conduct in the UK if the jurisdictional test is satisfied, if there is a substantial lessening of competition in the UK. This restriction is only on conduct outside the UK.

* But, thirdly, the Commission still retains remedial powers, even in cases like this one. And, to go back to the statute, it has a power to accept undertakings, and it can enforce those undertakings. I will just show you that very briefly, it is in A1, tab.6, s.82.

THE CHAIRMAN: Yes. You took us to this.

MR. WARD: I took you to it, sir. I will not take any more time. There is a power, it is common ground there is a power to accept undertakings. What the Commission says by way of answer is, "Well, why would anyone offer such undertakings in circumstances where there is no power to make a final order?" In other words, "If there cannot be a prohibition, why would anyone offer undertakings?" Well, actually AkzoNobel did in this case, as you have already seen, although they were rejected. But, more pragmatically, the reality is that the provisional findings stage is often, one would not use the word "negotiation", but certain remedies are proposed, and certain remedies are counter-offered. It may well be very much in the interests, even of a body outside the UK like AkzoNobel, to offer undertakings rather than get faced with a behavioural remedy in the UK it does not like. That is the practical reality of merger control.

Now, the other point that is made under this head by both the Competition Commission and Metlac, is that, well, putting it bluntly — the Competition Commission likes prohibition-type orders, but it does not much like behavioural remedies because they are not generally as effective. But, the truth is that it has been recognised that there are limits to these remedies in the Competition Commission's own guidance.

Could I ask you to turn to bundle A4, tab.40. This is the Competition Commission's own guidelines about merger remedies. I want to show you p.1454 of the bundle where it says, at 2.23, "International constraints".

> "In an international merger, the CC will consult competition authorities in other jurisdictions to seek consistency and effectiveness in the approach to remedies".

And then, in 2.24:

"Where the CC has jurisdiction over only a small segment of an international merger [ie the part that is taking place in the UK] the choice of appropriate remedies may be limited significantly by the constraints of extra-territorial enforcement. The desirability of consistency with the approaches adopted by other national competition authorities may add a further constraint...." So it is accepted there, the inevitable, which is that this is a limitation of the CC's ability to impose prohibition remedies in some mergers which have an overseas dimension, and that takes me to our fourth point.

It may well be that remedies regarding conduct in the UK will not be the Commission's first choice but its obligation is to achieve a solution – as comprehensive a solution as is reasonable and practicable – under s.41. Its ability to do so is constrained by s.86.

Then fifthly and finally, if these limitations really are a problem, if they are going to make merger control as difficult as the Competition Commission would like you to believe, there is a solution in the form of a reference of the merger to Brussels, because the European Commission does not face any of these difficulties. This can happen in two ways in a case of this kind. First, Akzo Nobel could have, and wished to make such a reference in this case but was pre-empted, but it was open to the Office of Fair Trading to do so. Can I show you the EU merger regulation. I see it is two minutes to one, but I think this will take maximum five more minutes.

THE CHAIRMAN: Carry on.

MR. WARD: Thank you. That merger regulation is at, I think, authorities bundle 3, tab 30. Just of course, just to emphasise, the merger law we have been concerned with is UK domestic law, English domestic law, it is not EU law, but there is in addition an EU merger framework of course. It is governed by the merger regulation, and there are three ways in which a case can end up in front of the European Commission in Brussels, and I will just show you them all very briefly.

Starting at Article 1, on p.1034, after the recitals. "This Regulation shall apply to all concentrations with a Community dimension", which means that certain fairly large turnover thresholds are satisfied at Article 1.2. We are all agreed this merger does not

satisfy those thresholds, so it was correctly dealt with in the UK. But there are still two ways the case could have ended up in Brussels. The first one is Article 4.5 on p.1036:

> "With regard to a concentration as defined in Article 3 which does not have a Community dimension … and which is capable of being reviewed under the national competition laws of at least three Member States, the persons or undertakings referred to in paragraph 2 may, before any notification to the competent authorities, inform the Commission …"

So if none of the national merger authorities have started to look at this, and if there are three at least that will be looking at it then you can go one stop shopping and take the case to Brussels. That was exactly what Akzo Nobel sought to do in this case, but they were actually pre-empted because the Bocchios had referred the matter to the Bundeskartellamt before Akzo Nobel were able to do this, so that does not arise either.

Then there is a third way the matter can go to the Commission, which is referral by the Office of Fair Trading, and that is Article 22, p. 1046: "One or more Member States", by which it means the authorities of the Member States

> "… may request the Commission to examine any concentration … that does not have a Community dimension …"

and then in the second paragraph:

> "Such a request shall be made at most within 15 working days of the date on which the concentration was notified …"

The point of this is that it allows a body like the OFT that has the merger sitting on its desk to say: "This case is more appropriately dealt with in Brussels than by us, and obviously cases with a large international dimension are apt for this process. I was going to just show you what the OFT says about how it uses the Rule ----

MR. ALLAN: The question I was going to ask you, or the points I was going to make and invite your comments on is that if you are looking at Article 22 as relevant to the interpretation of s.86(1) it is only a partial solution, is it not, because it is a requirement of Article 22 that the concentration should have an effect on trade between Member States and it must at least be conceivable that there are transactions of an international nature which could not have an effect on inter-State trade, but could have trade between the UK and the United States, or the Far East or whatever, so if you are trying to make a broader point about the interpretation of s.86, not what the OFT could have done in this case, then I am not sure quite how Article 22 gets you there. Also, if I may, a second point, perhaps, if you are looking at Article 22 as some kind of guidance as to the interpretation of Statute and

determining what Parliament's intention was, Article 22 is obviously 1989 vintage, whereas I think you said in your own notice of application, s.86 goes back at least to the 1973 Fair Trading Act – in fact, I think to the 1948 Monopolies and Restricted Trade Practices Act, when merger level at the EU level was not even thought of at that point.

MR. WARD: Sir, of course, I hope we are not falling into either of those traps. The Competition Commission's case partly is: this would be an absurd result because there would be all sorts of practical problems and there would be nothing we can do. Article 22 is a response to that in part to say: "Here is a piece of machinery. It can only work in cases where there is an effect on trade between Member States. In any case where we are talking about the EU that is a threshold that is very easily satisfied of course, as we know. But in cases that are outside the EU it may not be. So we do not argue that it is a complete solution in all cases, nor do we say that it is a guide to the interpretation of Parliament, even though, of course, the Enterprise Act was re-enacted after the merger regulation but that is not our submission. It is more that we are meeting a case that says: "The world is going to end if Akzo Nobel's interpretation is correct", what I want to show you and was about to come to, is that the OFT has anticipated that Article 22 could work in precisely these kind of cases. So it is a narrowly confined submissions as you rightly suggest, sir.

With that, if I may, I will just take you to the OFT's jurisdictional and procedural guidance which is at bundle A4, at tab 41. One picks it up at p.1593 of the bundle, which talks about the application of Article 22. At 11.47 it says the OFT will examine whether the various tests are satisfied for the application of Article 22.

> "The OFT will also take into account other considerations in trying to establish whether a merger might be appropriate for an Article 22 referral request, including any third party feedback and whether a relevant geographic market affected by the concentration is wider than national [the period is EEA, of course] the concentration is subject to filing in several EU Member States ... [as you see, the answer was definitely yes, and then most importantly the second bullet point]; suitable remedies for any competition concerns identified would lie outside the OFT's jurisdiction"

But if there were a remedial problem here in dealing with the case within the UK then it says at 1149:

> "The OFT will carefully consider whether the Commission appears the best-placed authority to consider the merger in terms of gathering relevant information and, if necessary, securing appropriate remedies. This is more likely when the assets concerned by the transaction are located outside the UK when, for example, it would

be difficult for UK authorities to obtain a remedy in the event that the merger is found to raise competition concerns."

Then just a procedural point which deals with a point Metlac have made:

"Article 22 ... provides that Member States have 15 working days to make a request for referral from the date on which the transaction is notified or, if no notification is required, otherwise 'made known' to the relevant NCA. Commission guidance stipulates that the notion of 'made known' should be interpreted as implying sufficient information to make a preliminary assessment ..."

Metlac say how could there ever be time to even look at this? That is the answer to their point.

My point is not intended to be a point of statutory construction; it is just that when you hear the submissions this afternoon or tomorrow about how much of a detriment this would be to the good administration of merger control, the reality is exactly this situation is anticipated in this guidance and, moreover, like it or not s.86 is on the statute; it does bear a meaning; it does curtail the Commission's remedial powers, and in our respectful submission it should not be interpreted in a way that simply strips that section of any real practical meaning.

Those are our submissions on Ground 1. I am sorry to have strayed a little bit beyond one o'clock. I feel confident of finishing on time of three quarters of a day. That still seems about right, we hope.

THE CHAIRMAN: You might have to reassess that because we are not coming back until ten past 2.

MR. WARD: I will do my best. Thank you.

Adjourned for a short time

THE CHAIRMAN: Yes.

MR. WARD: Sir, thank you. Our second ground of application is concerned with the quality of the Competition Commission's economic analysis. There are, in our submission, three overarching flaws with that analysis. The first is what we have called sampling bias. The CC focused excessively on Metlac's own customers rather than those who also purchase from somebody else. We are not using the term sampling bias in some highly technical sense, but we have derived it from the CC's own guidance. One of the few documents I am going to need to show you, apart from the report, on this ground of challenge is that guidance from authorities bundle 4 tab 44. I just want to show you enough to get the sense of what we mean by sampling bias. This document is a joint publication of the CC and the OFT "Good practice in the design and presentation of consumer survey evidence in merger

inquiries". You will see at para.1.1 on p.1760 what the purpose of the document is. It is advice to parties who appear before those bodies:

> "During our investigations into mergers, the Office of Fair Trading (OFT) and the Competition Commission (CC) both receive submissions of evidence derived from surveys of consumers that have been commissioned for the specific purpose of helping to understand aspects of a merger. These surveys are usually commissioned by management consultancies or economic consultancies and conducted by market research agencies. All of these groups are the intended audiences for this document."

Then it contains various advice about how to ask questions to elicit useful answers. I just would like to show you a few short passages. At p.1767 para.2.10 it talks about the body of research into good practice and then it has bullet points:

> "In particular, good consumer survey design should: present questions in context; avoid ambiguity or confusion [then 3] not influence consumers to give particular answers."

Then reading on at p.1770 "Population description and sampling":

> "3.6 The briefing given to the market research agency should include a clear description of the population of interest"

In other words, which group is it that you need to ask the questions of. Then at 3.10 is where sampling bias is specifically mentioned on p.1772:

> "Careful consideration should be given to avoiding sampling bias or non-response bias that leads to an unplanned excessive participation in the survey of a type of consumer with one view on the questions, in preference to another type of consumer with a systematically different view."

Then it gives examples of good and bad practice. The bad practice example is very revealing, in our submission, at 1773 box 3.4: "Potential problems in the cover letter invitation with a paper self-completion survey." Then in the box it says what the problematic cover letter would look like:

> "The Competition Commission (CC) is conducting an inquiry into whether the merger of Supplier X and Supplier Y may be expected to result in a substantial lessening of competition in the supply of services to their users. The CC is currently taking evidence from interested parties."

And it says in the bold text below:

> "Cover letter sent out with a paper self-completion questionnaire to all users of the merging suppliers' services. It highlights the use of the consumer survey to

investigate a lessening of competition and refers to consumers as 'interested parties', both of which may tend to encourage tactical responses."

Then it says it is all very technical as well.

So that is a very high degree of sensitivity to this issue in my submission. But this is not what one could call blatantly loaded kind of question but the suggestion of what the CC is doing is enough to trouble the CC and the OFT, at least in this guidance. Then at 3.12 it talks about the need for screening. So you get people who are (just in the last two lines):

"... genuinely able to answer the survey in a way that is representative of the population of interest."

Then finally 3.13:

"Thought should be given as to whether the appropriate sample to provide views on a merger is all potential consumers of a product, the customers of all of the firms ... or only the customers of one or both of the merging parties."

In other words, you just have to look very carefully at who you are asking the question of, and you have to frame the questions in a way that is scrupulously neutral.

Our overarching flaw here, which we submit is of this flavour, is that the CC focused on evidence of pricing from customers who purchased from Metlac. What it did not do is look at customers who did not purchase from Metlac. The point is an obvious and intuitive one. It is not surprising if the customers who do purchase from Metlac think that its prices are lowest, or even that those prices are lowest for those particular products.

What it leaves out of account, though, is the purchases made from other suppliers. It may be that those other suppliers are used because they are cheaper than Metlac, or it may be that there are non-price reasons why other suppliers were preferred. On any view, in our submission, this is extremely important.

The second and related point, which again comes back to this guidance, is that in one instance in particular the CC asked questions which strongly presupposed the answer that Metlac's prices were in fact more aggressive.

Our third overarching submission is that the CC wrongly conflated evidence from the FCG market, where it made no finding of SLC, with the B2E market. The finding in question is only about B2E, as I explained in opening. The CC has rightly accepted in its skeleton that as a result it needed evidence on B2E; it could not just rely on FCG. For your note, that is para.30 of the CC skeleton, tab 8 p.202.

There is a reason of principle why it cannot gloss from one to the other; because it has actually found the conditions of competition are different. It has found that there is no SLC

in the FCG market but that there is an SLC in B2E. So even though to the outsider the products may seem very similar, there is a material difference in the conditions of competition. Evidence from one is not evidence for the other.

May I now take you to the decision, you will see the CC recognised the force of this point in at least one instance. This is on Volume 1 p.339 tab 10. You will see at para.9.50 the CC refers to some survey evidence that was obtained by AkzoNobel conducted by GfK NOP about switching. The important point is that no weight was attached to this evidence, and that is 9.51.

> "We do not consider any weight can be attached to this evidence for several reasons. Of the 23 companies that responded to the survey (107 that were approached) just two indicated that their organisation purchased B2E products "

So mostly it was not about B2E –

> "… and therefore formed the sample of the question in relation to B2E, and moreover :
>
> (a) …"

This is confidential, but could I ask you to read (a), and then actually (b) as well. (After a pause) So the CC said, "This survey is not helpful to us because it is not about B2E, it is about other aspects of the market place". We do not dissent from that proposition, but we do say is that the proposition must be pursued to its logical conclusion, which is that what matters here is B2E evidence, not FCG evidence.

Just to make good that proposition in law, I want to show you one judgment of the European court. I think it is the only authority I am going to show you this afternoon, I am pleased to say, and it is in bundle A3, tab 34. It is a case you may be familiar with called *Schneider*. What this case shows is that when you are considering the effects of a merger, you must look at the markets actually in question in the merger. You cannot move from national markets that might be affected to pan-European aspects of the company's operation. Let me just take you through it fairly quickly, if I can. I am afraid there is no headnote, but the simplest thing to do is to turn to para.40 which is at bundle number 1192. What you will see is that the European Commission prohibited a proposed merger between Schneider and a company called Legrand as incompatible with the Common Market, and at 41 it says:

> "The Decision includes a description of the sector for low voltage electrical equipment, a definition of the national sectoral markets affected by the merger …"

So it looks at national markets. Then at paras.57 and 58, 1197 of the report, it says:

> "The Commission concluded … that the transaction would create a dominant position as a result of which effective competition would be significantly impeded on the following markets …"

I am not going to read them out, but if you look they are specific national markets for specific bits of electrical equipment, such as markets for moulded case circuit breakers in Italy. There is a whole list, which you will see if you turn the page.

Then at para.148 we see Schneider's complaint about this, p.1219 of the bundle. It says:

> "… Schneider complains that the Commission carried out, in Section V.C of the Decision, an overall analysis at European level of the impact of the transaction, instead of proceeding country by country on the basis of the definition of the product markets set out in …"

which are the markets I have just shown you.

The court essentially upheld this complaint, and if we move on to para.164 on p.1222 of the bundle, the court observes:

> "The Commission's analysis of the effect of the disputed concentration on each of the national sectoral markets affected by the transaction is none the less also founded on the positions held by the merged entity outside those markets, inasmuch as the Commission took into account its unrivalled geographic coverage, i.e. the fact that its activities to the whole of the EEA."

So it was talking about a certain degree of economic power outside those individual markets.

Turning on to p.1225, we see the court concluding that that approach was wrong, and it is paras.170 and 174.

> "170 Thus, although the Commission used the national dimension of the sectoral markets for low-voltage electrical equipment to demonstrate that a dominant position would be created or strengthened in those markets, it nevertheless had recourse to evidence of economic power drawn from all the national sectoral markets, irrespective of whether the concentration would give rise to competition problems on those markets.
>
> However, the Court observes that the creation or strengthening of a dominant position on national sectoral market could, in this instance, be apprehended only on the basis of evidence of economic power relating to those markets, possibly

supplemented by a consideration of transnational effects, assuming such effects should be shown to exist …"

which they could not.

So the gist of this is very clear. When you are concerned with the effect on competition in a particular market, your concerns have to be based on evidence from that market, not wider concerns. In *Schneider*, the wider concern was that it was powerful across the EU. In our case the concern is that the Competition Commission is relying on evidence about FCG, even though it has found no SLC in that market.

MR. ALLAN: How far does *Schneider* take you? Does it exclude the possibility, in your view, that a finding that an undertaking behaves in a certain way on market A might be an indication of the way it would be expected to behave on market B? Obviously you have to consider whether it is appropriate to draw that inference, but are you taking *Schneider* to exclude the possibility of that inference?

MR. WARD: No, *Schneider* itself says there could be in that context transnational effects, but the question is, what is the basis for assuming that what you have found in one market does have an impact on, in *Schneider* terms, market power in that particular national market? In *Schneider* they say, "Circuit breakers in Italy, we are finding there is a dominance".

The question is, is the position in Germany in any way relevant to that? What the European Court is saying is that that is not a self-proving proposition, there has to be same basis for a transnational effect.

Here, we have a whole lot of evidence for FCG, but we also have a finding that the conditions of competition are different. In our submission, that means you cannot just glibly assume that what is said about FCG is applicable to findings on to B2E. What I will show you when I get to the end of my submission is that when B2E was drilled down into specifically the actual result was the opposite. So I am not making as bright line a submission as you put to me, Sir, but I do submit that this is a very important consideration that the Competition Commission has just ignored.

THE CHAIRMAN: We will see how you develop it.

MR. WARD: With that I am going to turn to the actual Decision, and I think for the most part that is going to be the only document we need this afternoon, and that is back in bundle 1. I want to just begin by reminding you of something we have already seen very briefly at p.332, I am sorry, bundle 1 at 332. You have seen these paragraphs already. You will see at para.9.12, a paragraph we have already looked at, in the last three lines:

"We are of the view that it is unlikely that Valspar and PPG would replicate the constraint that Metlac currently provides in relation to B2E because they do not compete as aggressively on price as Metlac (as outlined in paras.8.127-8.161)".

THE CHAIRMAN: I am sorry, could we have —

MR. WARD: Yes, it is 332, para.9.12. I was just reading the last three lines of para.9.12, and I am seeking to make a very short point, which is it is paras.8.127 to 8.161 that are relied on as the basis of the pricing finding. And those same paragraphs are mentioned in 9.14 in the third line about the price constraint that Metlac offers. That is the analysis we are attacking. In our submission, if it succeeds, the decision must fall.

Before delving into the detail, I want to just give you a very short over-view of how those sections break down that passage of the report, and it starts at 308. At 8.127 (you have seen this before):

"A number of customers told us that Metlac is a particularly aggressive competitor on price".

Then that proposition is tested. 8.129 talks about customer views. And then, over the page at 8.130 is about information obtained by the BKartA, the Bundeskartellamt, because what you will see in the footnote on that p.132, the Competition Commission obtained a partial set of the questionnaires that the Bundeskartellamt had received in its investigation. Then, at para.8.134 we have the results of the Competition Commission's own customer survey exercise which it also conducted, where it says:

"Customers … have confirmed to us the [views they gave] to the BKartA".

So, you have got two sources of customer view information, the BKartA and the Competition Commission's own. Then, over the page, at 8.137, the Competition Commission's analysis of Metlac's prices, so now we are on data rather than customer views. And on the data there are, again, two sources: 8.138 is data provided to the Bundeskartellamt, and then, moving on quite a long way to 8.147, we have the CC's own attempt to do a price comparison, to actually look at price data rather than just customer views. So, in principle, there are two types of information:

* Customer views, do we think Metlac is cheap?
* And data, what are the prices actually being charged?

And then the conclusion is at 8.167 on pricing, which you have also seen already, and that is at p.318, which is conclusion on pricing, third line. Metlac was the lowest priced supplier for products in both B&B and FCG.

THE CHAIRMAN: Sorry, for a number of —

MR. WARD: For a number of products, yes. And then 8.168, a point that we are also going to be picking up as part of this conclusion, it says in the third and fourth line:

"We received evidence … that Metlac has been used by a number of customers to extract lower prices from the competitors".

That is the pricing analysis that we challenge; and what we are going to do is explain why each part of that is flawed. I am starting with "Customer views", which is back to para.8.129. And I want to make clear that it is not our submission that customer views are legally irrelevant, in other words the opinions of customers. But nor are they self proofing. What is required is corroboration of those views. And, here, there were reasons to be particularly cautious about them. Given the limitations of the customer view material, particularly in respect of B2B, what the Commission needed to do during its 32-week inquiry was to also obtain some properly empirical information about those prices.

And, sir, if it is convenient at this point, I do want to start talking about some of the confidential material for I suppose about the next three-quarters of an hour, or half an hour or so.

THE CHAIRMAN: Right. We agree that we will sit in private.

MR. WARD: Thank you, sir.

THE CHAIRMAN: Will anyone who is not in the established confidentiality ring, please leave the hearing room.

(For in camera hearing see separate transcript)

MR. WARD: I think this will take me five minute, sir.

THE CHAIRMAN: When you make reference to Metlac being peculiarly disadvantaged in providing technical support, that was because its manufacturing facility was in Italy.

MR. WARD: Yes.

THE CHAIRMAN: And you take that to constitute a significant disadvantage to technical support?

MR. WARD: There is no service on the ground in the UK. That is the crucial point. Not just that its factory is in Italy. But, no support team in the UK.

Can I now turn to Ground 3, very quickly? This is concerned with something other than price, namely innovation. And the reason we deal with it is it was a further strand in the finding of SLC. One sees that at p.341 of the bundle, para.9.57 of the report. You will see that it says:

"For the reasons set out above, we are of the view that prices sought by suppliers … are likely to increase post-merger".

That is the pricing issue we have been talking about. And then, four lines down:

> "We would also expect a weakening of rivalry in innovation, particularly when AkzoNobel and Metlac are head-to-head …".

Now, there is some important context here, which is that previously, the CC, in its provisional findings, the CC had made a finding that the merger would actually reduce Metlac's innovative qualities. And, for your note, that is in the provisional findings at paras.9.9 and 9.11, bundle 2, tab 24, p.980. So, that part of the case fell away. But they still found there would be a reduction in innovation. And it is worth seeing what the Commission says in its defence as to why this finding can be maintained, and that is at tab.5 of this core bundle at para.193 which is on p.119. It says:

> "… the CC did not maintain a finding that Metlac was a particularly innovative supplier [so that is the thing that has gone] which would be 'lost' through the merger, it does not follow that the merger would have no impact at all on levels of innovation."

Well, it may not be irrational but it is a finding that requires some actual evidence, evidence on two key questions. One, would the merged group, with its pooled R&D departments actually compete more strongly on innovation or, at least, as strongly?

Secondly, would the merged group be required to compete strongly on innovation because of competition? It is just not self-evident that in going from four to three this would be bad for innovation, if so, any four to three merger would fail on the grounds that there would be an SLC in innovation.

The Commission's defence on this is essentially to say: "We made a judgment on the evidence, and we cannot find which supports this proposition." We can find evidence that says: "Metlac, among other suppliers, are innovating" in appendix G but I think we will leave that for the Competition Commission to identify the evidence that actually demonstrates that there will be a reduction in innovation as a result of this merger beyond the bare proposition that instead of four parties we have three.

PROFESSOR REID: Could I make a point there, if I may, about 193 and the sentence beginning on the fourth line down: "It is on no view irrational for the Competition Commission to have found that a reduction in the number of competitors would reduce competitive pressure." To what extent are we thinking of that as an empirical statement or as an analytical statement, if you like, about some model of oligopoly that the Competition Commission may have in mind?

MR. WARD: That is a difficult question to answer at that level of abstraction. I think that the answer is it is put as an analytical statement and it is not an irrational proposition that a reduction in the number of companies will reduce the amount of competitive pressure, but the question is: what is the evidence that this merged group will actually compete less strongly in this area? You have two parties in the market at the moment, they both have R&D departments. In theory those departments can be pooled, they may be stronger, they may benefit from the combining of their resource – they may not, they sit back and say that now the market is less competitive there is less we have to do, but those are questions which require analysis and evidence and if this is intended to be a sort of analytic proposition it is just not sufficient.

PROFESSOR REID: It possibly is not but there are, for example, models of patent racing that indicate racing formats stimulate higher levels of innovation, and if you have firms that are joined together in this way that may reduce that incentive to innovate. So I am saying it may be as much an analytic statement as a quantitative statement and in that sense there are, I think, rational oligopoly models that would say this was a sensible statement to make. It could be argued.

MR. WARD: I see the force of your point but part of the answer is that the CC actually says there was ample evidence for its findings and that is at para. 189 of its defence. The problem is that all that evidence amounts to is saying that both parties are, in fact, innovating in certain ways. That, as a matter of empirical evidence just does not get me home. So that is the submission.

I am very grateful. I have taken longer than I had hoped. Unless there are any questions, those are the submissions for Akzo Nobel.

THE CHAIRMAN: You will have another opportunity in reply, anyway. Thank you very much. We will take a five minute break at that point.

(Short break)

MR. BEARD: Sir, members of the Tribunal, what I intend to do this afternoon is, after making one or two remarks, go into one or two points rather briefly on JR standards; I will then move on and try to get through as much as I can of Ground 1 this afternoon.

On the judicial review standards point, obviously we have set out in our defence (just for your notes core bundle tab 5 paras.37 to 44) some of the key references. I will just, if I may, take you very briefly to extracts from three cases.

May we start in authorities bundle 2 tab 20. This is a merger case *Somerfield v Competition Commission*. Somerfield had bought a number of supermarket stores from Morrison

following Morrison having bought Safeway. Somerfield, having purchased those stores, then had to go through a merger inquiry. The conclusion of that merger inquiry by the CC was that they were going to have to divest 12 supermarkets. The concern that was articulated by Somerfield was that it was jolly unfair that they should have to divest any at all, and in particular where the Competition Commission had come along and said you must not divest those stores to what were referred to the "low price retailers" or the LADs (Aldi, Lidl and those sorts of grocery suppliers), that was terribly unfair and improper, and the CC had no good basis to restrict the terms of the divestment.

The relevant analysis of this starts at para.166, which is the Tribunal's analysis. What the Tribunal was analysing was a big pile of evidence that had been put in in relation to how it was that you should assess whether selling to particular types of grocers maintained competition in relation to divested stores, or not. One of the key pieces of information that was put forward was a competitive impact assessment. Somerfield came along and said: you have not given enough weight, o CC, to that competitor impact assessment and if you had done then you would have realised that these LADs, if they bought these 12 stores or any of them, would offer a real competitive threat in the relevant locality.

What the challenge was concerned with was whether or not the CC was allowed to balance the evidence as it did. If you turn on to p.702, these are some of the conclusions on these matters:

> "174. It seems to us that the competitor impact assessment, on which Somerfield strongly relies, at first sight provides no support for including the LADs as regards the Kwik Save stores and only some support, at the margin, for the inclusion of the LADs [as purchasers] in the competitor set as regards Somerfield stores.
>
> "175. To the extent that the competitor impact assessment could be said to support Somerfield's case, the CC's response is twofold: first, in defining the parameters of a competitor set, the line has to be drawn somewhere; and secondly, that the CC had ample other evidence to support its conclusion ... We accept both points."

At 176 it talks about how the CC has the discretion to evaluate these sorts of matters where you are dealing with a stack of evidence, some of which, in my learned friend's terms, might be referred to empirical evidence. But you have to evaluate all of that evidence; you have to evaluate empirical material. What it emphasises in paras.176 and 177 is that the CC is entitled to determine these sorts of questions in the round:

> "As far as drawing a line is concerned, precisely where the line is to be drawn on an issue such as this is for the CC to evaluate: no doubt there will always be arguments

in borderline cases. In our view it would need a strong case to show that the CC had manifestly drawn the line in the wrong place. Even taking the competitor impact assessment standing alone, it seems to us far from manifest that the CC has drawn the line in the wrong place.

"177. In so far as Somerfield is arguing that the CC should have rejected as irrelevant the evidence other than the competitive impact assessment set out in [the report] ... we see no basis for any such argument. As the CC submits, and as the Tribunal held in *Aberdeen Journals, ...* in determining questions of market definition, the evidence should be looked at 'in the round'. Indeed, it is highly desirable in our view that a statistical analysis of the kind set out in Appendix B should be considered together with other available evidence. The weight to be given to that evidence is for the CC to evaluate."

It may seem trite but it is nonetheless important. I then turn on, if I may, to tab 22 which was the Sky challenge in relation to another merger, Sky and ITV, where Sky had bought a minority shareholding in ITV and was arguing in fact it did not cross the relevant threshold to constitute a relevant merger situation. One of the factors that came up in that case was whether or not, with a shareholding of 17-odd per cent that Sky had, they had the ability to block special resolutions at ITV. If you turn on to p.773 in that case what you see is the analysis of the Tribunal in the judicial review concerned with Sky's ability to block a special resolution.

I will not take the Tribunal through the relevant paragraphs from 110 through to 119, but it goes without saying (and it is clear from these paragraphs) that there was a vast amount of empirical and expert material submitted in the course of those proceedings trying to show that in fact the CC as wrong, that it was not entitled to conclude that Sky would be able to block a special resolution.

The paragraph I direct the Tribunal's attention to is on p.777 para.119 which just echoes what we have seen in the *Somerfield* decision and again reflects standard judicial review principles:

"In assessing the evidence it was for the Commission to decide what weight to place upon different aspects of it. The Commission's assessment in this regard can only be questioned in an application of this kind in very limited circumstances. In our view it is not possible to characterise as 'perverse' or 'irrational' the Commission's preference for the voting outcomes of ITV's several general meetings which took

> place prior to the Acquisition over the outcome of the single general meeting which took place after the Acquisition, when considering likely future voting patterns."

Then it goes on to consider the range of other material that had been submitted and say that it is up to the Commission to consider these matters in the round, and it is only if it is perverse and irrational that there is any basis to overturn the Commission's findings. I will not take the Tribunal to the case at tab 23 which is the *Tesco* case. I had asked the Tribunal to read paras.79 and 80 of that decision when Mr. Ward was going through it.

I will therefore then turn to the third of the cases I was going to take the Tribunal to in relation to judicial review matters. That is the *BAA* case to which Mr. Ward did refer, at least in relation to certain extracts from it. That is in authorities bundle 3 tab 28. This case was a judicial review challenge, slightly different circumstances because it was a market investigation rather than a merger control decision. So there had been a market investigation as to whether BAA holding control of Heathrow, Stansted and Gatwick (in particular around London) was creating a competition problem. I am conscious that one member of the Panel is cryingly familiar with this case! Nonetheless, if you will forgive me, there are certain passages I did wish to refer to.

The challenge was brought by BAA that the Competition Commission was not entitled to require the divestment of Stansted, in the course of which there was a discussion of the relevant principles of judicial review to be applied by the Tribunal. Those are found at para.20 p.973. It refers there at the start of para.20 to s.179(4) Enterprise Act, as in pretty much precisely the same terms as s.120, so we are talking about judicial review principles again. So one can read across here. One does not need to deal with subparagraph (1) or indeed (2) which raised issues concerning the operation of the European Convention of Human Rights.

> "(3) The CC, as decision-maker, must take reasonable steps to acquaint itself with the relevant information to enable it to answer each statutory question posed for it (in this case, most prominently, whether it remained proportionate to require BAA to divest itself of Stansted airport ...)…"

There is a citation of *Tameside* and *Barclays Bank* and the quote to which Mr. Ward referred:

> "The CC 'must do what is necessary to put itself in a position properly to decide the statutory questions'."

That is referring also to the *Tesco* case, which is the one at tab 23. The bits that he did not read:

> "The extent to which it is necessary to carry out investigations to achieve this objective will require evaluative assessments to be made by the CC, as to which it has a wide margin of appreciation as it does in relation to other assessments to be made by it … In the present context, we accept [the CC's] primary submission that the standard to be applied in judging the steps taken by the CC in carrying forward its investigations to put itself into a position properly to decide the statutory questions is a rationality test …"

Then there is a quote from a case called *Bayani*, which is also in the bundles, which is in turn quoted with approval in a case called *Khatun*, which is also in the bundles, but it is the quote there that is instructive:

> "The court should not intervene merely because it considers that further inquiries would have been desirable or sensible. It should intervene only if no reasonable [relevant public authority] could have been satisfied on the basis of the inquiries made."

Then we come to sub-para.(4), the majority of which I think Mr. Ward did read to you, and the Tribunal highlighted the fact that here it was being said that the question before the Tribunal was whether or not the CC had sufficient evidential basis in the light of the totality of the evidence.

The second point I would stress, which was highlighted by Mr. Allan in the course of Mr. Ward's submissions, there must be evidence available to the CC of some probative value on the basis of which the CC could rationally reach the conclusion it did.

It is also, I think, necessary and appropriate just to turn on to sub-paras.(5), (6) and (7) here. I will not read all of them but I would ask that the Tribunal review these paragraphs, because what is done here by the Tribunal is to emphasise that where one is talking about consideration such as those highlighted by Mr. Ward, nonetheless we are dealing with matters where there is a broad margin of appreciation for the Competition Commission as the body gathering and assessing the evidence to reach its conclusions, particularly in relation to social and economic judgments. The standard of review to be applied – this is part way through para.(5):

> "… will be to ask whether the judgment in question is 'manifestly without reasonable foundation'. Where, as here, a divestment order is made so as to further the public interest in securing effective competition in a relevant market, a judgment turning on the evaluative assessments by an expert body of the character of the CC whether a relevant adverse effect on competition …"

that is just the market investigation test –

> "… exists and regarding the measures required to provide an effective remedy, it is the 'manifestly without reasonable foundation' standard which applies."

I will not read the rest of that because it strays on discuss human rights issues.

Then in (6):

> "It is well-established that, despite the specialist composition of the Tribunal, it must in accordance with the ordinary principles of judicial review …"

and it is citing *IBA*, to which Mr. Ward took you.

> "Accordingly, the Tribunal, like any court exercising judicial review functions, should show particular restraint in 'second guessing' the educated predictions for the future that have been made by an expert and experienced decision-maker such as the CC. (No doubt, the degree of restraint will itself vary with the extent to which competitive harm is normally to be anticipated in a particular context …)"

and to that extent there is some European authority. This then refers to the consequences of the intervention in that case requiring divestment.

Then on to sub-para(7):

> "In applying both the ordinary domestic rationality test and the relevant proportionality test under Article 1P1 [of the Convention on Human Rights] where the CC has taken such a seriously intrusive step as to order a company to divest itself of a major business asset like Stansted Airport, the Tribunal will naturally expect the CC to have exercised particular case in its analysis of the problem affecting the public interest and of the remedy it assesses is required. The ordinary rationality test is flexible and falls to be adjusted to a degree to take account of this factor …"

Of course this was in the context where BAA had, since privatisation, owned Stansted, and it was being told to get rid of it – rather different from a situation where a company is coming along and saying it would like to buy.

Nonetheless, what is important here is the next bit:

> "But the adjustment required is not as far-reaching as suggested by Mr. Green at some points in his submissions."

With no disrespect to Mr. Ward, in the light of his submissions earlier, his name could be interposed there

> "… [the flexibility that is required or appropriate] is not as far-reaching as suggested by [Mr. Ward] at some points in his submissions. It is a factor which is to be taken into account alongside and weighed against other very powerful factors referred to above which underwrite the width of the margin of appreciation or degree of evaluative discretion to be accorded to the CC, and which the modifies such width to some limited extent. It is not a factor which wholly transforms the proper approach to review of the CC's decision which the Tribunal should adopt."

Then para.(8) talks about reasons for decisions and what is required, and then it cites that case that is quoted in the *Tesco* judgment at para.79, the *National House Building Council*, suggesting that you must obviously review the report as a whole:

> "…it is not the function of the Tribunal to trawl through the long and detailed reports of the CC with a fine-tooth comb to identify arguable errors. Such reports are to be read in a generous, not a restrictive way: see [*National House Building Council*.] Something seriously awry with the expression of the reasoning set out by the CC must be shown before a report would be quashed on the grounds of the inadequacy of the reasons given in it."

I am sorry to have taken a little time over that but I think that perhaps helpfully encapsulates what it is against which this Tribunal must assess the grounds that are brought.

It is obvious how those matters pertain to Ground 2, which is essentially a selective reading of the report, picking out little bits and pieces and not considering the evidence properly in the round. I will come on to deal with that, but it is also true in relation to Ground 3.

Ground 1, of course, has been put on the basis that it is some sort of point of law. In fact, of course, as we will come to see in relation to Ground 1, it is trying effectively to sidestep factual findings that were made about the position of AkzoNobel NV, and its extensive involvement in the operations in the UK relating to metal packaging coatings, and it turns round and says, "Well, actually, the legal threshold, we are not going to tell you precisely what it is, this carrying on business threshold, but what we know is you have not crossed it with extensive operational involvement". There is no good basis for that. It is not a legal question. The term "carries on business" in the UK affords the Competition Commission a degree of margin of assessment. That is precisely what it did and articulated in Chapter 11 of its report. It reached an entirely unimpeachable conclusion about these matters.

AkzoNobel argued before the Competition Commission that its involvement in matters in the UK was only peripheral. That was rejected as a matter of fact, that cannot be re-

opened and, to be fair to Akzo Nobel, they are not seeking to challenge those factual findings. However, having reached that position that they are not challenging those factual findings they do not have a good basis in Ground 1.

So dealing with Ground 1, I will deal with it in three stages: a brief review of some of the statutory provisions, although I hope to take that relatively quickly since Mr. Ward has been through some of them, a brief look at some parts of Chapter 11 and what the Competition Commission actually did, although again Mr. Ward has taken you to certain of those passages, and then explain why that was entirely right and lawful, picking up some of the various Akzo Nobel arguments along the way.

So, starting with the first of those three stages. If we could take up authorities bundle 1, which contains the Enterprise Act at tab 6. Mr. Ward started at s.22, I am not sure anything turns on this for the purposes of this case, but just to be accurate the relevant provision to which the Tribunal should refer is perhaps s.33, which is on p.93M. The reason I say that is because it sets out the duty upon the OFT to make references in relation to anticipated mergers, which is what this is. Section 22 is to do with completed mergers. The tests are materially similar, the difference is only that in an anticipated merger case, as the name suggests, you do not yet have the relevant transaction that has given rise to the ceasing to be distinct between two or more enterprises.

You will see in s.33 on p.93M: "The OFT", so the first phase regulatory body: "shall" and I interpose, in relation to completed mergers it is within four months, in relation to anticipated mergers because they have not yet happened there is an open timetable:

> "The OFT shall, subject to subsections (2) and (3), make a reference to the Commission if the OFT believes that it is or may be the case that-
>
> (a) arrangements are in progress or in contemplation which, if carried into effect, will result in the creation of a relevant merger situation; and
>
> (b) the creation of that situation may be expected to result in a substantial lessening of competition within any market or markets in the United Kingdom for goods or services."

So parallel with s.22. If we then turn back to p.93C, Mr. Ward took you to s.23 which defines what constitutes a relevant merger situation and, as he emphasised, what domestic merger control focuses on is the concept of merging enterprises. In other words, this concept that is specific to the merger regime, which encompasses a range of activities carried out by potentially a number of persons including by a number of legal persons. The reason I emphasise that is, as you will see, when we come on to talk about undertakings and

the comparison with EU law, that is the relevant comparative concept. But, what we have in s.23 is the definition that a relevant merger situation arises where two or more enterprises, so these groups of legal persons in many cases, have ceased to be distinct, and there are two conditions that mean that you have got a relevant merger situation. One is where you have this turnover of the enterprise being acquired of over £70 million in the UK, or the supply of goods or services is raised above 25 per cent within the UK. So there is a connection with the UK, but when it comes to identifying the ceasing to be distinctive enterprises, which is dealt with under s.26, the transaction, the arrangement, the anticipated arrangements that constitute the ceasing to be distinct are not necessarily connected with the UK in the sense that those transactions can be occurring exclusively outside the UK. Indeed, that is precisely the case here. The transaction that will result in the Akzo enterprise, which is constituted by all sorts of legal persons, and the Metlac enterprise, which is constituted by somewhat fewer persons, ceasing to be distinct would relate to a share transaction between companies outside the UK in relation to shares that are registered outside the UK.

The reason I emphasise that is because the jurisdiction of the Competition Commission and, indeed, the OFT before it is dependent on there being a relevant merger situation, in other words, there being a ceasing to be distinct of two enterprises, there must be some connection with the UK but the ceasing to be distinct, the transaction itself, does not have to be within the UK, and Parliament transparently recognised it did not have to be within the UK.

Of course, in the present case what we have is scrutiny by the domestic authorities of a proposed transaction which will occur outside the UK, and of course the reason that is pertinent is when we come on to deal with the questions of remedies and what should or should not be available it is obvious in relation to a regime that covers both completed mergers and anticipated mergers, that particularly in relation to anticipated mergers one would expect Parliament would ensure that where the jurisdiction of the regulatory authority is triggered by events overseas that could happen, and those events would give rise to a substantial lessening of competition in the UK, that Parliament would afford the regulator the power, subject obviously to the qualification in s.86, to be able to stop that going ahead, because otherwise in relation to an anticipated merger situation what is being contemplated is that the foreign transaction can occur – it has not yet occurred but it can occur – notwithstanding that the jurisdiction has already been conferred on the domestic regulators, you should let it happen, let the SLC manifest itself subject only, perhaps, to behavioural remedies; that appears to be the case according to Akzo Nobel.

Back to s.26, the only point I think that is important to highlight, members of the Tribunal who dealt with merger cases in the past will be familiar with the slight oddity of the way in which enterprises cease to be distinct in the UK, but to put it simply, and to paraphrase s.26, there are essentially three levels of control. If you acquire complete ownership of an enterprise there is a relevant merger situation. If you acquire control, which in rough terms is more than a 50 per cent share in an enterprise, then in those circumstances you will be said to have control as well, but there is a third threshold which is lower, having only material influence, indeed, that was what occurred in relation to Sky.

MR ALLAN: We do not need to go into this, I do not think. The way you put it is not quite the normal way, but it is immaterial ----

MR. BEARD: It is absolutely immaterial, I hope, to all of this. I note that some comments were made about the substantive assessment that needed to be carried out in relation to it, I just wanted to clarify the three thresholds in relation to it. If the Tribunal is happy to move on.

THE CHAIRMAN: Certainly.

MR. BEARD: Then we have s.36, which are the questions to be decided in relation to anticipated mergers. Again, Mr. Ward has taken you to parts of s.36, that is on p.95. The questions are mandatory for the Competition Commission, it has to answer those questions, and those questions are: whether there is an RMS (relevant merger situation), whether there is a substantial lessening of competition, an SLC, and what steps should be taken in relation remedying any SLC and, in particular, 36(2)(a) is: "whether any action should be taken by it under section 41(2) …" which Mr. Ward then took us to. He took us to 38 and 39 which are the mandatory requirements to provide the report.

If we go on to s.41 there is a particular passage here that he did not refer to which I think is important. First, s.41 is Parliament imposing a duty upon the Competition Commission to remedy the effect of completed or anticipated mergers. It is quite right that in 41(2):

> "The Commission shall take such action under s.82 or 84 as it considers to be reasonable and practicable –
>
> (a) to remedy, mitigate or prevent …"

but it is still a duty and, of course, that is also subject to the provision under 41(4) which is, in some circumstances, seen as an exhortation:

> "(4) In making a decision under subsection (2) the Commission shall, in particular, have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the substantial lessening of competition and any adverse effects resulting from it."

But the point that was not read that I think is important is 41(3):

> "The decision of the Commission under subsection (2) shall be consistent with its decisions as included in its report by virtue of s.35(3) or 36(2) …"

It would be 36(2) here because we are dealing with an anticipated merger.

> "… unless there has been a material change of circumstances since the preparation of the report or the Commission otherwise has special reason for deciding differently."

The reason I draw the Tribunal's attention to that, it is not challenged by Akzo Nobel that there is jurisdiction for the CC to carry out its lengthy investigation process, to answer the questions as to what would be an effective remedy if an SLC is required. The duty under s.41 is to take a decision which is consistent with the terms of that report and the action that is being referred to in relation to the questions posed in relation to 36(2). So it shows a consistency between the basic inquiry and investigation scheme in relation to the report and the remedial steps that are intended to be taken.

I will then just briefly move on to 82. What I would note in relation to 82 is, of course, s.41 says where you have a concern, of an SLC then you have a duty to remedy taking steps under sections 82 or 84. Section 82 is in relation to final undertakings being proffered by relevant persons in order to remedy the sorts of concerns that have been identified, a substantial lessening of competition, and the adverse effects. What is notable about it is that that power to accept final undertakings rather than for example to move immediately to a final order is subject to itself an order making power under s.83, and that is effectively giving power to ensure that where undertakings are given and they are not fulfilled the CC can step in and impose orders in place of those undertakings.

The reason that this is significant is because Akzo Nobel has stressed if you cannot impose final orders you can, at least, accept final undertakings because the final undertakings can be given by anyone, there is no condition that they have to be people that are carrying on business in the UK. But a slight oddity of the position is that if a person gives undertakings and then welches on them, and the Competition Commission decide that, rather than trying to seek some sort of injunctive relief because there is power to go after an injunction under s.94, but given the nature of undertakings often it would be hard to go and get injunctive relief and they may not capture the best way of dealing with the problem once an undertaking has been breached.

Parliament has specified that you can impose orders following the breach of an undertaking, but those orders under s.83, so effectively providing teeth to back up the undertakings, those

are subject to s.86. The reason I highlight that, as is probably evident, is that if it is being suggested that actually there is some nice remedial solution in relation to undertakings, Parliament actually built in a mechanism for dealing with breaches of undertakings and operating a system of orders under s.83, and yet if the case is that you cannot make final orders and undertakings should be put in place, it is equally the case that you cannot operate s.83. Then you fall back on this injunctive relief power, which is in s.94. There are two problems with that, one is the practical enforceability of it, and the second is that you have just circumvented the mechanism that Parliament built for dealing with breaches of undertakings.

Then we come on to s.84 itself, the final orders provision, and just a couple of brief points to make in relation to this, Mr. Ward took you to it.

> "The Commission may, in accordance with s.41, make an order under this section. An order under this section may contain anything permitted by schedule 8 and such supplementary consequential or incidental provision as the Commission considers appropriate."

Schedule 8 is in the bundle; it is at p.137. I will not take you through it. It is a schedule to be read at leisure, but what it involves is an adumbration of a range of powers that are extremely extensive that the Commission can exercise, but what is important about schedule 8 is it does not have to be only in relation to the merging parties. Schedule 8 powers can apply to other people; customers would be an example. So schedule 8 gives this vast range of powers to the CC and, of course, you have supplementary, consequential and incidental powers, under 84(2)(b), but you have very, very wide powers covering not only the merging parties. You can probably immediately see where I am going to go with this. It is more than understandable that when it comes to questions of imposing a final order Parliament would have intended that if you are imposing a final order on somebody then there should be some sort of connection with the UK. That is going to be particularly the case if you are dealing with some third party that was not actually part of the merger itself. So when we turn on to s.86 and look at Enforcement orders: general provisions, and we look at 86(1): "An enforcement order may extend to a person's conduct", so this is an enforcement order including, in particular, orders under 83 or 84: "… outside the United Kingdom if (and only if) he is (a) a United Kingdom national" – there is an obvious connection, or:

> "(b) a body incorporated under the law of the United Kingdom or of any part of the United Kingdom …"

so a UK legal national in some sense; and

"(c) a person carrying on business in the United Kingdom."

Now, 86(1)(c) is obviously the key provision that we are dealing with today, but it is easy to see why Parliament is saying that there must be some connection if you are not a UK national or a UK registered company. But that does not mean, as Mr. Ward has repeatedly said, that s.86 is somehow intended to curtail substantially the ability of the Competition Commission, or the UK regulatory authorities who have jurisdiction to investigate matters which cause a substantial lessening of competition and by doing so impose adverse effects on the public in the UK, should be left in a position where when they think the only effective remedy is prohibition or, in a completed merger, divestment, that somehow a very high hurdle must be overcome. There is no good reason for that.

MR. ALLAN: But just to follow the logic of the point you made about the ability of the Competition Commission to impose orders on third parties, schedule 8, and the need for some form of jurisdictional connection in that respect, s.86 makes no distinction that I can see between the jurisdictional connection required for a party to the transaction and to a third party, so in a sense could it be said that if you need a high threshold to protect the legitimate interests of third parties, that threshold applies also to the merging parties.

MR. BEARD: If AkzoNobel were wanting to pursue that line I am sure they would have suggested it. It seemed to us rather that what you have got here is an indication that where you are dealing with conduct outside the UK you must have some sort of connection with the UK.

The point I am making is that where you are dealing with third parties, that is going to be something that may not be related to the structure of the merger itself. You may need to make autonomous findings in relation to it. Where you are talking about the merging parties, the idea that you are necessarily going to be in territory, particularly in relation to the sort of global multi-national entities that are engaged in mergers that affect a whole range of jurisdictions, that actually you are going to have to carry out some very substantial analysis and overcome some very high hurdle is not consistent with the overall scheme of the Act at all. It does not need for there to be a high threshold in any circumstances. But what you could not do is in relation to a third party impose an obligation where they were not carrying on business in the UK. You needed that connection. But I do not think you could read it backwards and say you must therefore have a high hurdle.

MR. ALLAN: But you would agree with the proposition, would you, that the standard is the same, whatever party we are talking about, whether it is high or not?

MR. BEARD: It is a case of a distinction being drawn. It is right to draw to the Tribunal's attention the scope of Schedule 8 and the way that it is applied, that is undoubtedly right. The circumstances in which you would be imposing an obligation on a customer operating outside the UK purchasing for someone outside the UK would be relatively unusual. I do not know of any cases in which that has ever been suggested. But what it does do is show that if you are a customer, for example, that were to be subject to some sort of conduct restriction even though you were not party to the merger, the CC would specifically have to go and show that you were carrying on your business in the UK in relation to those matters. I do not think it takes matters much further forward. I think the point I am making is that it is understandable that Parliament puts in place a requirement that when you are coming to deal with enforcement orders that you have some sort of connection. After all, if you look at the other provisions that you are dealing with: 86(1)(a) and (b) you can be dealing with a UK registered company, so a UK national, which is predominantly not doing business in the UK and still you would be able to tick the enforcement order box very quickly indeed. It might be said, it is a bit strange that the requirements are not cumulative in those circumstances, but the scope of jurisdiction is sufficient in all the circumstances because Parliament has specified it as such.

MR. ALLAN: That is standard international law, is it not?

MR. BEARD: If you have power over them, of course, but in the scheme of the statute that you are dealing with where you are talking about the effects on the UK and what you are concerned about are impacts on the UK markets and adverse effects on UK consumers, then --

MR. ALLAN: We have got two different things and we should not dwell on this for too long, but we have got substantive jurisdiction and we have got *in personam* jurisdiction and we are talking about *in personam* jurisdiction. That is probably enough.

MR. BEARD: I think the substantive jurisdiction does inform the way that the *in personam* jurisdiction has to operate in relation to s.86 because the *in personam* jurisdiction should be interpreted so as to facilitate the substantive jurisdiction that the statutory scheme is there to provide. That is the essence of the CC's case.

MR. ALLAN: You should carry on.

MR. BEARD: Yes. Having traversed those parts of the statutory scheme, I will just briefly deal with Chapter 11. I am conscious of the time. I do not know whether the Tribunal is going to continue to sit.

THE CHAIRMAN: Until 4.30 or a convenient break.

MR. BEARD: If I may, I will try briefly to deal with Chapter 11.

THE CHAIRMAN: 4.30, or if afterwards, a convenient break.

MR. BEARD: I am grateful. May we go to core bundle 1, the decision, Chapter 11. It is actually the section at p.380. I am going to deal with this very shortly because this will be familiar, I think, to the Tribunal. The section where the Commission specifically considered whether or not Section 86(1)(c) was met in relation to AkzoNobel NV is found from 11.88 onwards. I direct the Tribunal's attention to 11.90.

> "We understand that within the AkzoNobel Group there are a number of wholly owned subsidiaries which are incorporated different countries [Mr. Ward suggests there are several hundred]. We saw sales contracts entered into by some of these companies [so they have consideration of contracts] relating to the supply of metal packaging coatings products in the UK (and correspondence between these companies and their customers) but, in our view, neither the identity of the contracting entity nor the corporate structure reflected how in substance strategic and operational decisions were made within the AkzoNobel Group."

So a specific finding: we have looked at the contractual arrangements that have been provided to us, but we do not think that that gives us the answer as to how decisions were being made within AkzoNobel Group. Then there is the note that I think Mr. Ward came back to:

> "We noted that AkzoNobel's business activities, such as its activities in the metal packaging coatings industry are organized by Business Areas (BAs), Business Units (BUs) and Sub Units (SBUs). For example, AkzoNobel's metal packaging coatings business activities were organized by the SBU ANPG [AkzoNobel Packaging Coatings Group], which AkzoNobel told us did not have separate corporate identity as a legal entity (AkzoNobel also told us that the relevant BU did not have separate legal identity). The subsidiaries within the Group sit within these Business Units."

Then there is a discussion in the confidential section that I would direct the Tribunal's attention to, just in those last three lines.

What is obvious here is that the CC is directing its mind to the contractual arrangements that exist in relation to supplies being made in the UK. It is reaching a conclusion that that is not a satisfactory way of analysing the strategic or operational arrangements that are made within AkzoNobel Group. It is then trying to work out how, when you have these multiple legal persons that are being slotted into different arrangements, different business units,

different sub business units, you should understand how those business units and sub business units are operating in practical terms, and who is running what within them.

11.91:

"AkzoNobel told us that depending on the specific activities and customers served, the organization of the SBUs and BUs is either by market or by geography."

So it is not by legal entity. Essentially, what we are looking at is a centralised arrangement for strategic direction.

"We noted that AkzoNobel told us [I refer to the confidential sentence there.] We therefore recognise that there was a distinction between the corporate structure of AkzoNobel and the operational structure of the Group. In our view these arrangements, which are common among large corporate groups, reflected a structure in which the decision-making is centralized within the Group."

Mr. Ward said it is common, and that is a problem here. We are just entirely agnostic. If it happens to be that if you found that other corporate groups were organised in a similar way and had centralised arrangements for strategic and operational decision-making, then it may well be that what he referred to as TopCo within those groups (which would be the relevant entity against whom an enforcement order might be made where it was in charge of the ceasing to be distinct transaction) they may well on another occasion be also caught by s.86(1)(c). But the fact that that may well be the consequence of this interpretation to us is neither here nor there.

MR. ALLAN: I just wanted to explore a little bit with you the indications of a finding of centralisation within a group. When I was talking to Mr. Ward this morning about this I got the impression that there is a distributive decision-making structure within the group. It is distributed by function, market or geography rather than legal subsidiary. It does not necessarily seem to me that it follows from the fact that you have a functional decision-making structure that that decision-making is then centralised within the group. So I am wondering on what basis the CC made the finding not only that there is a functional decision-making structure, but also a centralised decision-making structure.

MR. BEARD: I think that probably it is easiest to answer that by skipping over the page and looking at paras.11.95 and 11.96. I will not read them out because substantial chunks of them are confidential, but I would ask the Tribunal to read those.

THE CHAIRMAN: When it says ExCo manages the company's day to day operations, before the confidential part. I have stopped there. What company do you think is being referred to there?

MR. BEARD: ExCo is undoubtedly in relation to AkzoNobel NV. I do not think there is any dispute in relation to that. In fact, if one goes back to section 3 at p.248, I think there is a slightly more detailed exposition of these matters.

THE CHAIRMAN: Can you give me the reference again?

MR. BEARD: Section 3, p.248. The start of section 3 is on p.247, and it is a description of the companies, but I think the description of ExCo is in para.3.8:

> "AkzoNobel told us that AkzoNobel NV operated a two-tier corporate structure as a required by Dutch law. It had the Board of Management which reported to the independent Supervisory Board. The Board of Management was responsible for management of the company. The company had appointed senior managers together with the Board of Management, collectively known as the Executive Committee (ExCo) …"

I think probably that is the relevant part, and that is:

> "… the organisational body responsible for the day to day management of the company including the strategic direction. ExCo included members who had responsibilities for Business Areas and Country responsibilities."

Mr. Williams points out that if you go on to 3.9:

> "ExCo also included members who had responsibilities for Business Areas, functions and specific countries/regions."

Then 3.10 and 3.11, which are all confidential, also expand on that, although they repeat some of the points that I have already directed you to in 11.95 and 11.96.

MR. ALLAN: I was just going to say, is the CC's finding in relation to the confidential matters that the level of control exercised by ExCo in relation to those issues is sufficient to constitute day to day control, or is it the fact that we have some functional structure of this kind all, in a sense, collapses in NV? Is it about the level of control that is actually exercised by ExCo over the specific issues discussed in the authorities, rather than the fact that there are business units and sub-business units that make those decisions?

MR. BEARD: That is right. The conclusion is drawn at 11.97:

> "In our view, these arrangements …"

which are the arrangements which are dealt with in the confidential paragraph, 11.96 –

> "…. show that the participation of AkzoNobel NV through ExCo is extensive and includes the approval of operational decisions."

What it is saying is that those factors, those arrangements, are such that the involvement of ExCo in the activities, the functional areas, as I think you put it, is extensive and that means

that the CC considers that AkzoNobel itself does not have, as AkzoNobel put it, a peripheral involvement in directing strategy in the UK. Actually, it is heavily involved in strategic and operational matters.

MR. ALLAN: And an example of that, and I going to be oblique, is that the financial thresholds referred to in 11.96 are as low as [blank]?

MR. BEARD: Yes. That was a matter that was clearly taken into account and specifically referred to as such.

It is important to take this in context. As I say, what was going on in Chapter 11 was the CC was looking at the contractual arrangements, it was looking at the functional structure and it was looking where the operational and strategic decision making for the different functional units was being undertaken. That is not saying that particular legal persons or functional units took no decisions, or anything silly like that. What it is saying is that on the basis of the material it saw and assessed it clearly considered that ExCo had extensive involvement in both those operational and strategic decisions.

I would just draw your attention back to the confidential sentence in 11.91, because what is important there is the indication of where strategic planning was and was not being undertaken.

Without wanting to labour the point already anticipated in submissions on judicial review, the point is that here the CC plainly had evidence to support its conclusion that there was extensive involvement of ExCo in the operational decision making and strategy in relation to the UK. That is neither challenged nor realistically challengeable, and that is what the CC says constitutes the basis for AkzoNobel NV being found to carry on business in the UK. To some extent, that is the end of it. Although it has been put as a legal point, once that finding is made it has a legal basis. It has a factual basis, and in those circumstances there is not any good reason why it should be said that the threshold for consideration of carrying on business that it set in 86(1)(c) is somehow not met by that extensive investment.

I was going to move on to a number of AkzoNobel's specific arguments, but perhaps now is a moment unless the Tribunal has particular questions.

THE CHAIRMAN: No, we will resume tomorrow at 10.30.

(Adjourned until 10.30 a.m. on Friday, 19th April 2013)