IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1204/4/8/13

Victoria House,
Bloomsbury Place,
London WC1A 2EB

19 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 TWO

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: Good morning. We apologise for sitting slightly late, we were locked in discussion over the arguments that you were advancing to us yesterday.

MR. BEARD: I am grateful. Yesterday we had looked at the terms of the Statute and what the Competition Commission had done in relation to the 86(1)(c) test and, just to summarise, the Competition Commission's position is where Parliament has made a statutory scheme which gives the Competition Commission an extensive jurisdiction over overseas transactions which affect the UK, and a duty to investigate such extra territorial arrangements there is no call to read the s.86 test narrowly so as to undermine the effectiveness of the regime, s.86(1)(c) is simply intended to ensure there is some connection with the UK when an enforcement order is made.

The term in s.86(1)(c) "carrying on business" is not defined in the Act, but the Competition Commission has taken it to mean that a person who is not a UK national or a UK registered company can be subject to an enforcement order in relation to conduct overseas where that person is involved in commercial activity in the UK and, as it is, the findings in chapter 11 make clear that Akzo Nobel NV was, more than just marginally involved, it was extensively involved in the operations and strategy of the metal coatings business in the UK. The fact that Akzo Nobel did so through subsidiaries which may or may not have been UK companies or with offices in the UK does not undermine those findings and those findings are unchallenged and, just in passing, it is worth emphasising that the Competition Commission did not simply look at control by Akzo Nobel NV as per its meaning in s.26 of the Act it clearly was doing something more, something more substantial.

Now, just to turn to pick up some of Akzo Nobel's arguments.

THE CHAIRMAN: Before we do that can we just dwell on the "carrying on" business, and what it is that you are suggesting constitutes "carrying on business" – involvement in commercial activity. Put commercial activity on one side, talk to us a bit about involvement, what do you mean by involvement?

MR. BEARD: The direction and monitoring of is the language that is used in the findings in Chapter 11, it is setting strategy, it is setting operational arrangements, I do not want to go into the details because a number of those are in the confidential section, but it is those arrangements both in relation to operations of the business that was operating across the EEA but in particular in the UK, it is those arrangements that constitute the relevant activities by Akzo Nobel which is affecting the commerce in the UK which the group is carrying out.

MR. ALLAN: But are you saying that any degree of directional control is sufficient to mean that Akzo Nobel NV is carrying on business in the UK?

MR. BEARD: Any degree of control?

MR. ALLAN: Are you saying inherently, if we look at *Adams* where, to my mind, a distinction seems to be drawn between a measure of control and a more intensive degree of intervention between the parent company in the trading operations in the country. The way I understood you to be talking just now seem to me to suggest that any degree of direction and control is sufficient to mean that the parent company is to be treated as carrying on business in the UK.

MR. BEARD: That is not the way that the assessment has been made. What has been done is that it is a finding of extensive involvement in operations and strategy.

MR. ALLAN: But if I can interrupt you for a moment, sorry, I think there are two issues here that it would be helpful to grapple with. One, the findings in Section 11, but also there are the criteria to be applied and it has to be said that the report is slightly light on the actual legal criteria to be applied. It would be helpful to hear your remarks.

MR. BEARD: Certainly. Firstly, you refer to *Adams v. Cape*. I will come on to it. The key thing to recall in relation to *Adams v. Cape* is that it is a case concerning the question whether or not a subsidiary and a parent should be treated as a single entity. That is not what is being done here. The question that is being asked is whether or not this company that exists in the Netherlands is carrying on business in the UK. It may do so through subsidiaries, although on the basis of some of the comments made yesterday maybe some of the relevant subsidiaries are not necessarily in the UK. But it does carry on business in the UK through its functional business arrangements - the BU s and SBUs that involve a number of subsidiaries. But that is a different test from the one that *Adams* is contemplating. *Adams* was talking about essentially whether or not the parent company Cape and Capasco was subject to the jurisdiction of the US courts because it was one and the same entity for the purposes of jurisdiction. If you then draw a comparison between the situation in *Cape* and the situation here, somewhat ironically the jurisdiction obviously is well fixed right at the outset with the RNS test.

MR. ALLAN: The substantive jurisdiction.

MR. BEARD: Yes, substantive.

MR. ALLAN: There is a separate issue - and I know you said to us yesterday that they are connected, but there is a separate issue which is what s.86 is about, whether there is personal jurisdiction over AkzoNobel NV.

MR. BEARD: But it is personal jurisdiction to enforce the consequences of the substantive jurisdiction. What we say is that in those circumstances you should not be setting the interpretation of "carry on business" at that high level. We are not trying to say precisely how you adumbrate a list of criteria because it may depend on all the particular facts and circumstances. It may well be a matter of fact and degree. What we say is that the findings that are made of the extensive involvement of AkzoNobel clearly fall within the terms of carrying on business on the proper, ordinary language meaning of those terms in circumstances where those ordinary language meaning of the terms must be considered in the context of the overall structure and purpose of the Act. Yes, s.86(1)(c) does add something more, but we are saying it is not a high threshold and the findings cross that threshold very clearly. But to suggest that there is a single list of what it is that must be considered is not right.

MR. ALLAN: I do not think one could read *Adams* as suggesting that (I am sorry to go back to that case). It is very clear in the Court of Appeal that whatever factors there are to be taken into account, they are not exhaustive or under the combination of factors to be taken into account in a particular case may vary depending upon the facts.

MR. BEARD: I think it is more than that, actually. It may just be worth going to that, if I may, in authorities bundle 1 tab 11. The facts are set out in a head note, but it is just worth stressing that what was going on here was that judgment had been obtained in the States against the parent companies Cape and Capasco in relation to these asbestos related personal injury claims, even though Cape and Capasco had not participated at all in the US proceedings. Effectively, the question that the court is considering can be found at p.335 in the bundle. Although it is talking about enforcement of a default judgment, the test that is applied is: was there a foreign court of competent jurisdiction to make that judgment? If there was not, then there is not a judgment to enforce. That is why I talk about it effectively as being a case essentially about the jurisdiction of the US courts.

If you look down under F: "The issues at the trial before Scott J and his decision" there is some discussion of precisely how these principles work; but essentially the criteria for in personam enforcement that **Dicey & Morris** have set out were considered in the trial before Scott J, and then in the Court of Appeal.

And the first case is if the judgment debtor was at the time of the proceedings, at the time the proceedings were instituted, resident or perhaps present in the foreign country. And that is the test. That is the question that this court is then dealing with, and it then relies on general principles of company law to say, "Well, there are separate legal persons and you

do not lift the veil in ordinary circumstances". And it gives the adumbration of the various considerations that Mr. Ward referred to in relation to those matters at 356, because that is the sub-heading which talks about general principles derived from the authorities relating to presence.

And then, those are subject to a set of criticisms, in particular in relation to single economic units, because what was then being said is it is a single economic unit, and therefore there is enforceability against it; and the claimants said, "Well, there's a whole bunch of old case law saying 'actually you don't effectively lift the corporate veil to deal with this'". But, what is instructive is, if one turns to 362 which is the Court of Appeal's comments after considering that line of case law which says, "Actually, you can treat parents and subsidiaries together in certain circumstances", if you go halfway down at just under D, it is not surprising that in many cases such as *Holdsworth, Scottish Co-operative, Revlon, Commercial Solvents*, the wording of a particular statute or contract has been held to justify the treatment of the parent and subsidiary as one unit, at least for some purposes. So, what the court is saying is that, just as a matter of general company law, obviously you can deal with companies separately, but there are other contexts, they may be contractual, but they may be statutory, where you do not look at them in that way. And further down, under F, it says:

> "As Sir Godfray le Quesne [who was for the defendants, as I recall said] save in cases which turn on the wording of particular statutes or contracts, the court is not free to disregard the fundamental principle in *Salomon v A. Salomon* [that you treat legal persons separately]".

And then it is also instructive just to go on to 364, where it talks —

THE CHAIRMAN: Before we do that, the foot of 362, I, on reading it through, found helpful.

MR. BEARD: Yes.

THE CHAIRMAN:

> "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".

And then it goes on to highlight what that relationship is.

MR. BEARD: Yes, but present through the subsidiary in the place.

THE CHAIRMAN: Yes.

MR. BEARD: But that is in general and abstract terms. That is not in the context of a statute —

THE CHAIRMAN: Indeed so, but even in general terms that is a step that has to be taken.

MR. BEARD: Yes. Absolutely.

THE CHAIRMAN: Not the pure formal relationship.

MR. BEARD: No, no. Absolutely. I was going to say that one of the points about *Adams v Cape* it is not even authority for the proposition that in general company law terms a parent and subsidiary cannot be treated as a single unit in certain circumstances. So, it is not even going that far in relation to general company law terms. And, of course, in order to carry out that assessment, you would refer to the sort of criteria that Mr. Ward had referred to.

MR. ALLAN: And it is clear that in the context of the Enterprise Act in the associated persons test, for example, parent and subsidiary are to be treated as one person. But the associated persons test does not apply to s.86. So, there is no statutory exception here which would allow one to treat parent and subsidiary as one and the same. And I do not understand you to be making that point.

MR. BEARD: No, we are not.

MR. ALLAN: But, just to — no, I understand that. But, to avoid any misunderstanding, as it were.

MR. BEARD: No, no.

MR. ALLAN: I think, all of this gets developed and if we go to p.364 in the bundle, this is where Mr. Ward took us yesterday, and this is what is behind my question to you about it being a question of degree, at 538 C in the report, a degree of overall supervision and, to some extent, control was exercised, that is not sufficient to give the US Court jurisdiction but contrast that with the position where extensive day to day control is exercised and that, it seems, is the dividing line, at least in the mind of the Adams' court which would bring Cape, as the parent, within the US jurisdiction. They attach great importance to the fact at 538 B that Mr. Morgan, who is not Cape, was in executive control.

It seems to me that what this case is telling us is that there is an assessment of degree to be made.

MR. BEARD: Yes, it is.

MR. ALLAN: Then we come to the findings the Commission has made, and this goes back to the discussion that I had with Mr. Ward yesterday about how extensive that degree of control is and we understand your submissions on that point.

MR. BEARD: Yes, and I am not going repeat them, it is clearly extensive operational control and it may well be that if you were talking in general company law terms, the arrangements and fact finding that has been made by the Commission would fulfil the *Adams v Cape* test as a matter of fact and degree. But that is not the question that we have to deal with because we

are not asking ourselves whether the parent and subsidiary are a single entity, we are asking ourselves a different question which is whether or not that parent entity is carrying on business in the UK and effectively we are saying that threshold cannot be higher than *Adams v Cape*, indeed, the structure of the Statute says that that is a relatively low threshold because otherwise the purpose of the Statute would be undermined.

MR. ALLAN: Can I just ask you a bit about the purpose of the Statute? I think it is common ground between the parties that this test in s.86(1) is a test that appears in a number of Statutes – no? You grimace?

MR. BEARD: Sometimes the wording is used in different places, but I do not think that is helpful. Mr. Ward was carefully steering away from any references to the RTPA ---- **

MR. ALLAN: I was interested in that.

MR. BEARD: -- and anything like that yesterday.

MR. ALLAN: This is nothing to do with the Restricted Trade Practices Act. The Restricted Trade Practices Act does not only use this terminology. It is a jurisdictional test that seems to be used in Statutes outside the Competition law.

MR. BEARD: There are circumstances in which similar language is used, but it is not a case where there has been a survey of the use of language in other contexts and they compare and contrast. The one Statute where Akzo did, in the course of its submissions, say: "Look, there is similarity of terminology that is used was in relation to the RTPA provisions, nothing else", so I am not sure where this would take anyone.

MR. ALLAN: Let us not take it any further then.

MR. BEARD: Just at the bottom of p.364 though, whilst we are on it whilst I entirely agree that even in general company law terms we are talking about a situation of matters of fact and degree.that is not the test we are dealing with here. It is just instructive but in relation to that fact and degree at the bottom, at G:

> "We agree with Scott J that the observations of Robert Goff LJ in *Bank of Tokyo v Karoon* [1987] are apposite.
>
> > '[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'."

Somewhat ironically, Akzo Nobel cited this as some sort of authority for the idea that actually the carrying on business threshold should be at a high level yet, of course, here we

are dealing with a statutory scheme which is entirely focused on economic issues, economic harm and effect, that is the reason it is built as it is. So if you were thinking about matters of fact and degree and applying the sort of rubric that applies in *Adams* the context you are thinking of is one to do with economic effect, even when it comes to questions of tests of enforcement, but they go back to the principal point. *Adams v Cape* is just about a different issue. We are not saying that a subsidiary is part of another legal person for the purposes of this analysis. We are asking ourselves whether that legal person, Akzo Nobel NV, carried on business in the UK and whether by subsidiaries or otherwise, and that is the assessment of findings we make. We say the threshold for carrying on business, given the overall scheme of the Act is low. We do not try to set out some exhaustive list of criteria which would meet it, but we explain why it is low and we explain why the findings that have been made well surpass whatever that threshold would be and, furthermore, we accept that *Adams v Cape* is a matter of fact and degree, and we also accept that it may be that the findings that we have made would take you past the *Adams v Cape* threshold, but that is not the point for today.

I do not know whether that assists with the particular points ----

MR. ALLAN: It probably assists as far as it can go.

MR. BEARD: I think that covers all that I was going to say about *Adams v Cape* in any event. If I could just pedal backwards and pick up some of the other arguments that Akzo Nobel raised, if I may? Language of the Act, to some extent I have already touched on this now. The language of carrying on business in the UK is clearly wide enough to include the Competition Commission's findings on the facts and the consequences of narrowing the interpretation which Akzo Nobel seeks just would not be consistent with the nature and purpose of the scheme, because you end up saying that you have jurisdiction for the OFT to review and decide to refer, for the Competition Commission to investigate extensively over a long period, much longer than other merger authorities, the Competition Commission is under a statutory duty to investigate and remedy, particularly in relation to anticipated mergers the principal remedy prevention of an anticipated merger could not be enforced, because the transaction that gives rise, the ceasing to be distinct that gives rise to the relevant merger situation is not something that you could prevent using an enforcement order. So the whole purpose of preventing serious damage to the UK economy would be undermined and we just ask rhetorically: "Why on earth would Parliament intend that provisions should be read narrowly in order to encourage such an outcome?"

One of the things that Akzo Nobel suggests in its submissions and was touched on yesterday was that the undertakings it had offered – this is undertakings in another particular sense – should have been accepted instead of an order being imposed. But this submission is just going to the wrong target because it is suggesting that the Competition Commission should have accepted a remedy which it had concluded was not effective to deal with the substantial lessening of competition, because they seem to be saying there is no way of implementing the only remedy that the Competition Commission had found to be effective. Of course, we have highlighted the merger guidelines – just for your notes they are in authorities bundle 4 tab 40 at p.1452 – that talk about why it is that in merger control, not just domestic merger control but more generally, structural remedies are likely to deal with a substantial lessening of competition and therefore it is implausible that Parliament would have intended the scheme of enforcement of domestic merger control to be given that narrow and restrictive interpretation that Akzo Nobel propose so that the Competition Commission should effectively be dependent on the goodwill of the parties turning up with undertakings. Of course, if the parties knew that there was no final order making power that will affect the inclination to show goodwill and the extent of the sort of undertakings that would be given and, of course, I have also indicated why it is that it side-steps part of the undertakings enforcement structure itself in relation to s.83. AkzoNobel says yes, but under s.94 there is an injunctive relief process, but we have dealt with that both in the skeleton and yesterday.

I think it is also important to note that the narrow interpretation that AkzoNobel are pressing for, narrow interpretation of high threshold for carrying on business seems to give rise to obvious opportunities for circumvention and evasion of the merger control regime because it appears to be their approach that if you set up a subsidiary in the UK and run your merger through the parent, so the transaction, the conduct, that gives rise to the merger is through the parent, then there is effectively nothing the Competition Commission can do to stop you in relation to that conduct.

That seems to be a very strange situation, given the ability of global companies with which this merger control regime may be concerned to arrange their affairs in all sorts of ways - whether for tax reasons or to deal with the threat of merger control supervision intervention by establishing their businesses through different legal entities.

It would also give rise to arbitrary anomalies which are inconsistent with a proper and effective scheme of economic regulation because you end up with a situation that someone like Metlac could be subject to a final order because they do not have a subsidiary entity

here, but the larger company who may have more extensive interests in the UK could not because it is bigger and more developed and has established a subsidiary here and so on. So again, it feels like a very strange sort of argument that may enable circumvention and can rise to these sorts of anomalies, and undermine the effectiveness of the regime.

AkzoNobel has referred to the broader competition law of context and it has made reference to the term "undertaking" as it is used in the competition law prohibitions. But we just frankly do not understand how this in any way assists with interpretation here. Undertaking is a broad term, an economic concept, that is used in competition prohibition considerations - Chapter 1/Chapter 2 Competition Act, Article 101/102 of the EC Treaty. Of course, by reason of s.60 it is that broad European interpretation of undertaking that is imported into our statutory scheme.

Of course, if an infringement finding is made under competition law it still has to be enforced against particular persons, so the orders that are made by the Office of Fair Trading in the domestic context, or by the European Commission in the European context, are not just against the undertaking as a whole but particular identified legal persons. To that extent, the relevant comparator between the concept of undertaking in competition prohibitions in the merger scheme is with the concept of enterprise (which we have already dealt with) which is the broad economic concept.

In the circumstances I am not going to go to *Viho*; it just does not seem to add anything to the analysis. Similarly, the fact that Mr. Ward says that other language could have been used to deal with this, that is almost invariably true of statutory language. But I think philosophers sometimes say: "True but uninteresting". It tells you nothing about how you properly interpret these terms as they are set in the statute. What is interesting is the language used to pursue the purpose and intent of this Act.

There was a reference to some of the Competition Commission guidance, para.2.24 of that guidance. You probably noticed as we were going through, that guidance talks about jurisdiction. In those circumstances, it is not clear how that is of any assistance here.

Then we got on to the points about European merger control, and AkzoNobel suggesting that of course there was a means by which these problems could be dealt with, that if they had a sufficiently international dimension the place to deal with them was the European Commission.

First of all, this submission is entirely irrelevant. Once a case has been referred to the Competition Commission the scope of the Competition Commission's remedial powers under a UK statute are not affected by the existence of a mechanism at an EU level. Of

course, it is a mechanism at an EU level which might have been, but was not, implemented. The interpretation of s.86 is in relation to the Competition Commission. If you sent the thing out to Europe you would never have engaged the Competition Commission in the first place. So s.86 would never have started to be interpreted. It is only when the matter is before the Competition Commission that s.86 is engaged. Quite how the theoretical possibility that a different course might have been adopted previously cannot for a moment affect how you interpret a provision addressed to the Competition Commission.

The second thing just to note is that the provisions of the EC merger regulation to which Mr. Ward referred are directed to the OFT (again, I stress OFT, not Competition Commission) and it is only a request; it is not a requirement. The EU Commission can turn it down, and that is quite aside from the point that Mr. Allan made that if you are dealing with an international merger that does not relate to other states within the EU, it does not solve the problem in any event. I do not even get into the other point, which was entirely well made, about the timing of the implementation of these various provisions. Indeed, it does appear that the language involved was put in place at a time when we were not even members of the European Community.

That, I think, sums up the position of the Competition Commission in relation to Ground 1. Unless I can assist further on Ground 1 I am going to move on to Ground 2.

THE CHAIRMAN: Thank you.

MR. BEARD: I am conscious that I am going to head off into dealing with some confidential matters relatively quickly. I am hoping to deal with them in a relatively light way and refer to public material predominantly. The difficulty is that some of the confidentiality is just in relation to identity of customers in places. It then becomes very hard to make the submissions.

THE CHAIRMAN: Can you deal with it simply using initials?

MR. BEARD: I can try.

THE CHAIRMAN: I would like to stay in public if possible.

MR. BEARD: That is why I am being slightly cautious. I will do my best.

THE CHAIRMAN: Let us see how we go.

MR. BEARD: Those behind me are slightly concerned, but doing it by initials it may become rather clear who we are talking about. If I dealt with it, rather than by initials, by nodding and tugging a forelock, pointing to a particular passage in the text --

THE CHAIRMAN: Let us see how far we go. All right?

MR. BEARD: OK.

THE CHAIRMAN: If it does become unmanageable --

MR. BEARD: Yes, absolutely. But I cannot use a code of anonymity that is so easy to be cracked.

THE CHAIRMAN: No. If we had thought about it in advance we might have assigned random initials for the various customers, but there we are.

MR. BEARD: Yes. The difficulty that comes, depending on the submissions that are being made about the customers, those that are interested in the market might be able to identify them.

THE CHAIRMAN: The most important thing is that you should be able to make your submissions.

MR. BEARD: I will do my very best.

THE CHAIRMAN: That is the most important thing. If we have to go into private, we will go into private.

MR. BEARD: Yes. Let us start without and see where we get to.

The first thing to note in relation to Ground 2 is that although yesterday we were taken to all sorts of bits and pieces of evidential findings, the challenge is to an SLC finding. In relation to this merger, in essence there were four players, four suppliers. But if the merger were to go ahead there would be three. For many, that would pretty much be enough to identify the fact that there was a problem with this merger situation. You are in a market with only three competitors, you buy one and so you only face two. Not hard, you would have thought, that there might well be a substantial lessening of competition. But that is not how the Competition Commission approached the matter. It looked at a range of evidence, and it is important to look at that evidence in the round, as the Competition Commission did, and in line with the JR case law to which I referred the Tribunal yesterday. You must not be selective and take matters out of context as, with respect, AkzoNobel has. You need to look at the report as a whole.

It is obviously not going to be possible to review the whole of the report and the relevant sections and put everything in context, but perhaps the best place to start is actually the SLC findings which are made in Chapter 9. They help provide some context for the consideration of the evidential matters that are then being challenged by AkzoNobel. It is bundle 1 tab 10 p.330 external numbering.

THE CHAIRMAN: Yes.

MR. BEARD: Chapter 9 Assessment of the competitive effects of the merger. So the key issues that are being dealt with under the statutory scheme, the obligation is for the Competition

Commission to assess whether or not there has been a substantial lessening of competition, and I will come on to the conclusions in a moment.

First of all, at 9.1, there is a consideration of what is called the "unilateral effects analysis", which for those involved in competition law matters is relatively familiar. It is to be held in contrast to a co-ordinated effects analysis so, where a merger might engender coordination between the merging parties and other parties in the market, that is not what the focus of this SLC finding is. And at 9.1, what we see is that the Competition Commission found that:

> "In considering whether the merger may give rise to an SLC in the supply of metal packaging coatings in the UK, we have considered (a) loss of actual competition in supply of metal packaging coatings, focusing on B2E and FCG products, for which AkzoNobel and Metlac overlap (ie both supply the same customer). When evaluating the loss of actual competition, we considered it appropriate to assess whether the merger would result in a loss of competition by virtue of removing rivalry between [companies] that are qualified to supply the same product to the same plant [so, that is Type 1 competition so, for example where Akzo and Metlac are both qualified to supply a particular product to a particular plant for the particular customer] and by virtue of removing rivalry between [firms] that are qualified to supply the same product to the same customer [Type II competition]".

So, any of their plants across the EEA. And then (b):

> "Loss of potential competition in the supply of metal packing coatings focusing in particular on the areas where Metlac is expected to grow and therefore may overlap with AkzoNobel in the future".

So, the focus is on — and this is very orthodox — how does the merger remove rivalry in the market? Nothing radical here at all. And then in 9.2:

> "In what follows, we first set out our analysis of the likely effect of the merger on both B&B coatings and FCG coatings due to any loss of actual competition …. In doing so, we focus upon the impact of the transaction on metal packaging coatings supply in the UK (although we have taken into account evidence from the wider EEA in so far as it informed us of the likely impact of the merger in the UK)".

And then 9.4:

> "… we noted that Metlac has grown in the EEA from being a small supplier to competing at a similar level to the three larger suppliers in the segments where it competes, as shown in the analysis of growth in Appendix L".

This is very important, because what is being said here, and you will see if you read the broader points of the report, as I am sure you have done, is that Metlac has been competing extremely effectively. That is why it has grown. It has been driving market share for itself against its rivals and, in particular, the analysis here is the rivalry with Akzo. So, the growth story is extremely important in relation to the assessment of the loss of actual competition if the merger goes ahead.

It is also important in relation to the consideration of potential competition, because if Metlac is growing and the business strategies that it has suggests that it will continue to grow further, then the impact on potential competition of the merger is also significant.

Then, in the remainder of 9.4, it talks about both FCG and the B&B market. And it notes, in relation to B&B market, that:

> "… where the level of supplier concentration was particularly high, only a few smaller companies were active, and none have grown to the extent that Metlac has".

And then it says:

> "It has priced aggressively whilst offering high-quality products, which was made possible by what is perceived in the industry as a low-cost operation based on production efficiencies. We believe that this business model is different from that of other small suppliers in the industry, and some customers have told us that it is not one which can be quickly replicated.
>
> We consider that this second point is particularly relevant to our assessment and note [our guidelines, 5.4.5 of the Competition Commission guidelines that is quoted]" —

PROFESSOR REID: Before we —

MR. BEARD: I am sorry.

PROFESSOR REID: Before we move on, I would like to pick up on a point towards the end of line 4. You talk about "this business model". You describe it as being different from that of other small suppliers. This document, rather, does so.

MR. BEARD: Yes.

PROFESSOR REID: But, in the documentation we have in the skeleton, for example, you talk a lot also about Metlac's general business model, and based both on the document we are now looking at, 9.4, and the arguments that have followed that in the skeleton, it does seem to me that the idea of a general business model is in fact extremely important to how evidence is interpreted. So, I wondered if you could say briefly what you think is meant both here in 9.4, and elsewhere in the evidence led, by the idea of a general business model.

MR. BEARD: Well what is being said here is that Metlac in dealing with coatings products, both for the B&B sector and the FCG sector, is adopting a model of dealing where it offers high quality products using a low cost operation where it does price aggressively. And it tries to do that across all of its coatings business. It does not select one part of its coatings business to do that.

PROFESSOR REID: Yes. Could I focus on that point?

MR. BEARD: Yes.

PROFESSOR REID: So, you are really saying this general business model is the approach that Metlac takes across all sectors that it is active in, and that by implication part of this success it has achieved in its growth rate is due to the adoption of its general business model across all sectors that it is active in.

MR. BEARD: Yes — although I think it is less important for the attribution of growth and more, so far as this case is concerned, to the question whether or not it is relevant when the Competition Commission was holding oral hearings with customers and other suppliers, and asking them questions outside oral hearings, and so on, that when these customers and other suppliers were coming back and saying, "Well, actually, we do see Metlac as competing aggressively on price", that if they were people that dealt in FCG or in B&B, then it was relevant information for the Competition Commission to understand the dynamics of rivalry between Akzo and Metlac both in relation to FCG and in relation to B&B, and we will come on to a little more.

PROFESSOR REID: Yes, that is right. But, I agree with you from the current context it is not the growth rate that is crucial. What is crucial is the investigation of aggressive price competition, and that business model is part and parcel of the approach taken through price and behaviour by Metlac.

MR. BEARD: Yes. I think we do not shy away from that. It is part of the SLC finding, the key question, "Has there been a substantial lessening of competition? Is there a reduction of rivalry such that the market will be and customers will be in the UK adversely affected?" Here we have got a situation where it was felt that Metlac, on the basis of the evidence, was such as to provide significant rivalry through the way that it operated its business. In relation to FCG of course in the provisional findings, there was concern that there was a substantial lessening of competition in relation to FCG as well as B&B because of the way that that business model operated. But in the final report the difference is that in relation to FCG the Commission concludes that the scope for small scale and alternative entry is much higher in relation to FCG — so that although you remove significant rivalry, nonetheless,

that can be somewhat attenuated, the impact on competition can be attenuated by the expectation of entry and expansion. But here, in relation to B&B you have got the same sort of business model but you do not have the entry and expansion pressure and, in those circumstances, you have a finding of SLC.

PROFESSOR REID: That does clarify. So, you are really saying the common factor here is the business model.

MR. BEARD: Yes. I think that that is undoubtedly right. Obviously we look at evidence which pertains to particular strands of products as well, so, it is not one single piece of evidence. But it is right to put it in context. Because, essentially, what was being found in the Competition Commission's analysis in chapter 9, which is underpinned by its consideration of evidence in chapter 8 and elsewhere in the report is that Akzo and Metlac are rivals. Now, they are clear rivals, that is not challenged. They compete on quality and price, they are two of the four largest suppliers in the UK, after the merger they will not compete on price or innovation or anything and that is a substantial lessening of competition but Akzo is then saying: "You cannot reach that conclusion because you might think that buying out a close dynamically growing rival, which you would ordinarily think would reduce competition does not, in fact, because even if customers are concerned about it, in fact, the other two large players in the market will exert sufficient competitive pressure to effectively fill the gap in the market where that rivalry has been removed, and the Competition Commission says: "No, that just is not right, you are looking at it the wrong way around". What they were doing when they were looking at customer reviews and, in particular, pricing material, was asking themselves whether or not Metlac had real substantive rivalry with Akzo and, in doing so, concluded all of the evidence was consistent, albeit some is stronger than others, it was consistent in relation to B2E products, and in relation to those matters it concluded also that it did not have evidence that Valspar and PPG were entities that were going to fill that rivalry gap that was going to be lost, and it is in that context you have to look at all this pricing material that Mr. Ward has so heavily focused on.

THE CHAIRMAN: That is a helpful clarification, thank you.

MR. BEARD: Mr. Williams very helpfully suggests that in relation particularly to the question you have been raising, Professor Reid, para. 8.220, just turning back to p.328, we are going to come on to this but it is sensible to just take it now. You see:

> "Metlac's sales have grown in recent years at a faster rate than the market growth and its projections indicate its plan is to continue to grow aggressively. Customers

have told us that they are interested in growing their spend with Metlac,(whether or not the industry converts to BPA-NI)"

And I will come on to that in relation to innovation:

"We believe that future growth by Metlac is likely and that Metlac would continue to increase its market share, mainly at the expense of Akzo Nobel, PPG and Valspar and that in order to do so it would continue to price aggressively."

I think that possibly captures ----

PROFESSOR REID: Thank you.

MR. BEARD: So I am grateful to Mr. Williams for that. If I may, I will just flip back to Chapter 9, and I will take it relatively quickly. The point on unilateral effects was that losing a particular growing firm to a merger, particularly where it might be expected to grow into a more significant competitive force, something that is recognised in the Competition Commission guidelines as being particularly important, that is what is being referred to in the quote and in para. 9.5. Then obviously, in 9.6 what is being said is a significant proportion of large and small customers that provided us with evidence indicated that they had significant concerns about the transaction.

"They commented on the particular dynamic competitive force that Metlac brought to the markets which they saw as being removed by the transaction and not able to be replicated by smaller suppliers or by a change in conduct on the part of the larger suppliers."

That is the overall position. If customers in the market are concerned about a merger that is going to ring alarm bells because if a merger is going to create a substantial lessening of competition the canaries that smell the gas are likely to be the customers.

So then we move on within Chapter 9 to the loss of actual competition in relation to B&B and obviously this is focused on B2E, and there is a more extensive account of the degree of overlap that exists, the substantial degree of overlap that exists between Akzo Nobel and Metlac in terms of their abilities to compete. At 9.11: "It is generally the case" that where Akzo Nobel and Metlac overlapped, so whether in terms of being qualified to supply a particular plant or supply a particular customer:

"…Valspar and PPG were also active on both types of overlap we have identified. We assessed the extent to which Valspar and PPG would be likely to constrain the merged entity so that any post-merger price rise or reduction in quality of offering would not be profitable for Akzo Nobel. Against the background of our evidence that Metlac tends to price aggressively in areas where it is active we have

considered whether removal of this constraint would result in a significantly lower level of competition in the market given the presence of PPG and Valspar."

So they were specifically focusing on this question of do they fill the gap, and the point I would just emphasise there is against the background of our evidence that Metlac tends to price aggressively in areas where it is active. There has been lots of criticism about skewed analysis of evidence. What the Commission was interested in was whether removing that Metlac rivalry that had been seen in the market was significant. So it is obviously going to be the case that what they are concerned about is the extent that Metlac is coming in as the lowest price supplier, it is showing itself to be aggressive in the market because if there is evidence of that, and that is being removed from the market, loss of rivalry, damage to competition, do Valspar and PPG fill the gap? They look at all the evidence, they say "No". 9.12 in more measured terms sets that conclusion out.

"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."

So that is where you get to a conclusion in 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. As explained in paragraphs 8.127 to 8.161 Metlac currently constrains Valspar and PPG and the disappearance of Metlac would also remove a competitive restraint on these suppliers, possibly leading to less vigorous price competition, when contracts currently held by these two companies are rebid, in the absence of supply-side response from any other suppliers which we discuss next."

Then in this section there is a discussion of market entry and expansion, expansion by suppliers already active and B2E is the first part of that. You then turn on to 334, entry by suppliers that are not yet active in B2E, and there is an extensive consideration of these matters.

Then at 336 there is consideration of countervailing buyer power in B2E because obviously if there were buyer power then that might constrain the merged entity, so that although the rivalry between Metlac and Akzo Nobel had been lost nonetheless the merged entity could not push up prices, drop quality, reduce innovation and so on because of buyer power. That is then considered and, in particular, customers are asked about it because they are obviously the people whose buyer power matters, and the responses from the customers are

set out in particular at 9.43, so those are the four customers. That evidence is then considered, and just in passing I should note at p.339/340 Mr. Ward took you to this section about how the GfK NOP survey had been considered. It is just worth noting that that survey was being considered in the context of the countervailing buyer power arguments. I do not think that was in any way clear from the way that the matter was being put yesterday, and what was being said there is this supposed robust analysis of the impact of a small but significant price increase was not helpful in all of the circumstances. So what was being said was that in relation to these questions it was not of assistance. That does not, in any way, undermine the evidence that has gone to the first part of this analysis concerned with the loss of rivalry, lack of actual competition.

The conclusions are drawn on loss of actual competition at 9.57:

> "For the reasons set out above, we are of the view that prices sought by suppliers for B2E products that Akzo Nobel and Metlac are currently qualified to supply (in the UK or somewhere in the EEA) are likely to increase post-merger. More specifically, we would expect to see an overall increase in prices sought by suppliers when B2E contracts contested by Metlac are rebid, as Metlac will have been removed as a potential low price competitor for these contracts. We would also expect a weakening of rivalry in innovation, particularly when Akzo Nobel and Metlac are head-to-head in the race to develop new formulations or minor changes to existing products (and this is also relevant to our views in relation to potential competition) (see Appendix G for more detail on innovation."

I will come back to that in relation to Ground 3.

Just on 9.58:

> "In arriving at our view of the effect of the merger in B2E, we have also taken account of the fact that [x] of the four customers expressed concern about the effects of the merger, in particular the loss of competitive pricing in the market."

Then we get on to loss of actual competition in FCG which is a lengthy section and obviously deals with the issues concerned with expansion which, in the end meant there was possible expansion and entry which meant that there was not an SLC.

Then at p.355 we have the loss of potential competition. I am just going to really focus on 9.116:

> "As we set out in paras. 8.210 to 8.212, evidence from third parties indicated that there are a number of opportunities for Metlac to become qualified and start supplying customers with additional B2E products, in both the UK and in the EEA.

Overall, this evidence suggested that the extent of overlap between Metlac and Akzo Nobel would be likely to increase in the future and therefore the constraint that Metlac currently places on Akzo Nobel in the overlapping product/customer pairs would extend to additional pairs. We also noted that customers indicated that the B&B market may move towards a requirement for BPA-NI coatings …"

- these are the more environmentally friendly coatings -

"… in the future. The evidence provided to us indicated that Metlac, along with Akzo Nobel, Valspar and PPG, was developing BPA-NI B&B coatings and we were of the view that a move to BPA-NI B2E coatings would enhance Metlac's ability to further expand its B2E supplies, given its strong position in the development …"

I interpolate "the innovation" -

".. of BPA-NI coatings. (see Appendix G)."

PROFESSOR REID: Could I briefly note that when it comes to your Ground 3 it would be very helpful to cross refer to this material here.

MR. BEARD: Sorry, the appendix G material?

PROFESSOR REID: To the description of technologies in 9.116.

MR. BEARD: Yes, I will deal with that, there are sections in Chapter 2 and appendix G and I will provide the references. There is quite a lot of it, it may be that it is reading for another day rather than to be read out, but I will do that, certainly.

Just on 9.117:

"We were told by Metlac that it intended to strengthen its position in the B&B sector through the development of a BPA-NI."

And then there is more discussion of those matters, in particular in relation to B2I and BE products which Metlac is not supplying and whether or not it will expand into them. So the conclusion, just for completeness, on potential loss of competition, particularly in relation to B2E is found on p.361 at 9.152 – it broadly reiterates what I have already taken you to. Just to summarise, what the SLC finding is doing is saying that taking one of the four competitors out changes the dynamics, it increases concentration, it creates a lot of rivalry, there is not enough entry or expansion pressure to fill that gap, the existing other players in the market (particularly Valspar and PPG) are not going to fill that gap, there are huge overlaps between AkzoNobel and Metlac. Removing that rivalry therefore gives rise to a substantial lessening of competition. AkzoNobel is then saying eliminating this fast growing competitor does not have that effect at all and the Competition Commission have

no evidence to support that conclusion. I say no evidence because that is what AkzoNobel really needs to show in a judicial review test. It cannot show it did not like it, or there were bits it did not fancy, or there were little bits where it could have been done differently; that should have been done differently. That is not enough. It is not enough to say the Competition Commission could have got more or should have got more. Those are precisely the sort of claims which are insufficient to make out a judicial review claim. With that in mind I will briefly then go back to Chapter 8, which is the chapter which deals with some of the evidential findings upon which the conclusions in Chapter 9 were based. As Mr. Ward very candidly put it yesterday, his challenge is in relation to parts of paras.8.127 to 8.161. When he turned up para.8.127 he said this is the genesis of the theory of harm. It is not the genesis; it is not the start. I suppose in Old Testament terms it is not even like Ecclesiastes or Job, or one of those halfway through books. It is quite a long way through Chapter 8 that the attack really begins. That is not good enough. It is necessary to look at the whole of Chapter 8 and what the Competition Commission was doing here. Page 274 is the start of Chapter 8:

> "8.1 The following section sets out the evidence we collected on pre-merger competition within the markets for the supply of metal packaging coatings. In particular, we considered the nature and extent of rivalry between AkzoNobel and Metlac and how this compares to rivalry between these firms and their existing competitors. In doing so we considered evidence relating to market structure, market development (growth and innovation), product-customer overlaps, switching and pricing."

I am not going to say that customer views or pricing are not important. But it is important to see those strands of evidence where the attacks have come in the context of the overall assessment. Looking at market structure and market development as well as the extent of overlap that exists between the proposed merging parties, switching and pricing matters. What we then have, as we turn over the page, at 8.4 is the start of a section on the nature of competition in the metal packaging coatings industry. You can only make the sorts of assessments of whether or not there is a substantial lessening of competition when you have looked at the nature of competition in this market. You cannot do it by looking at tiny slices of data in relation to pricing and say there should have been more pricing points. That is not good enough. You have to look at the thing in the round. The nature of competition in the metal packaging coatings industry sets out the important of the role of qualification in relation to choice of supplier. It does say at some length and in some detail

so that the dynamics of competition between the different suppliers is properly considered and explained in this section.

Then when on comes on to 8.60, the next major heading: "Pre-merger competition in the metal packaging coatings industry":

> "8.60 In what follows we describe the main suppliers in the metal packaging coatings industry and summarize which segments they are active in and how they compare with one another in terms of size in both the EEA and the UK."

So not only looking at the structure of the market, how competition works, but also looking at levels of concentration in the market, market share.

If one moves on, perhaps just to give a flavour of it (it is a fairly lengthy section) at p.293 for example there is the culmination of several pages of tables looking at different cuts of market shares, and there are market shares by volume in the UK in B&B, B2E and B2I in 2011 and also by value. The figures are confidential but the parameters are not. You see that in B2E you have got parameters for AkzoNobel of 31 to 40% and Metlac 11 to 20%; by value 41 to 50% for AkzoNobel, 11 to 20% for Metlac.

Then if one turns over the page, it is not just static analysis of market share that is being carried out; one sees at 8.76 a section devoted to considering how the dynamics of competition in the industry have been reflected in the development of the industry. It looks at the growth in the industry, who is growing. It identifies AkzoNobel and Metlac as the key suppliers growing fastest. You can see that at 8.79.

Then also at 8.81 I just note:

> "The analysis above indicates that Metlac has grown significantly in the last few years across all main segments where it is active."

Then if I can just turn to the conclusions in relation to its overall section on pre-merger competition at 8.86 on p.297:

> "In summary, Metlac has grown rapidly in all B&B and FCG segments in which it is active, especially in sales outside Italy where it competes most directly with AkzoNobel."

So it is looking at Metlac's business as a whole, recognising that there are two markets that it is dealing with, but looking at the business as a whole. "In relation to B2E (and the EEA), whilst AkzoNobel and Valspar have grown over the last three years, over a five-year period AkzoNobel" [certain confidential information] and then "in relation to FCG, Metlac has grown faster than any other supplier".

Then we move on to the next section of analysis: the extent of current competition between AkzoNobel and Metlac vs others. 8.88:

> "AkzoNobel submitted that Metlac was not its closest competitor and that their product ranges were largely complementary. Metlac, on the other hand, has stated that AkzoNobel is its closest competitor.
>
> "8.89 In our provisional findings, we reviewed the level of competition between AkzoNobel and Metlac, based on evidence of the pricing pressure Metlac places on AkzoNobel; evidence of procurement in the markets and switching between suppliers; and information from third parties and AkzoNobel's internal documents."

So this is an extremely instructive section, dealing with the extent of rivalry, current competition, drawing on a whole range of evidence, yet apparently, according to the challenge, this is not part of the theory of harm; this is not the genesis of the theory of harm. Then you will see down at the bottom "Measuring pre-merger competition on the basis of customer/product overlap". I will not go into the detail here but actually it drew on material that AkzoNobel had been providing: the MIS database, in order to analyse what it was that constituted the extent of rivalry between AkzoNobel and Metlac.

AkzoNobel was maintaining that Metlac was a minor player and it is a far less close a competitor to AkzoNobel than Valspar and PPG. So the Competition Commission was gathering this data and considering it, and assessing the extent to which those sorts of propositions were true, or in fact there was real close and substantial rivalry between AkzoNobel and Metlac. What one sees at p.299 para.8.97 is the start of the Competition Commission analysis:

> "It seemed to us that the above analysis was capable of providing an indication of the proportion of sales over which we might expect rivalry between AkzoNobel and Metlac to be particularly strong, because they are both qualified or able easily to qualify."

Then, if one turns on (and I am skipping slightly ahead) in tables 17 and 18 on p.300 what you see are very big overlaps. Table 17 in the EEA, table 18 in the UK, 21 to 30%. Then interestingly, in para.8.100:

> "However, we considered that there were three reasons why the figures generated by this analysis would understate the proportion of sales over which pre-merger competition between AkzoNobel and Metlac might be strong."

So it had taken the AkzoNobel data; it had analysed it; it had found that there were very substantial overlaps; and then said actually this understates the extent of rivalry between the

two. Then over the next few paragraphs it articulates why it thinks there is a material understatement and reaches conclusions at paras.8.119 and 8.120. What one can see here at 8.119 and 8.120 on p.306 is:

> "Overall, this analysis indicates that a significant proportion of UK sales in B2E and FCG have been exposed to some form of rivalry between AkzoNobel and Metlac ..."

The key metric for assessing whether or not if you remove rivalry between AkzoNobel and Metlac there is going to be an adverse impact on the market in the UK. That is because there is type 1 or type 2 competition.

> "120 We noted that (i) for a large proportion of these B&B and FCG product lines, either PPG or Valspar or both are also qualified to supply (the plant or the customer), and (ii) in the FCG segments, in general, other suppliers are qualified to supply too. These suppliers may then be exerting a constraint. In what follows we consider the extent to which Metlac is a significant competitive force, in particular among the four largest suppliers. In doing so, we considered the extent to which Metlac is one of the lowest-priced suppliers because it is more likely that unilateral effects will arise when this is the case."

So this then contextualises essentially what is being considered in paras.8.127 onwards. I do not deal with the bit in between; it is to do with pricing and bidding markets. I do not think it is material but it is not challenged.

That sets the scene for what is then going on in 8.127, the supposed genesis of the theory of harm. What you see in 8.127 is:

> "A number of customers told us that Metlac is a particularly aggressive competitor on price compared with the other larger companies (AkzoNobel, Valspar, PPG)..."

So it is almost like a falsification theory. You have got clear evidence of substantial rivalry; you have got evidence of significant market shares; you have got an understanding of the dynamics of competition. But now you are checking whether in fact Valspar and PPG will fill the gap in this rivalry because actually Metlac was not doing anything substantive in terms of the notional rivalry that had been previously identified. That is what you are then testing in this section. The first thing that is said is:

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

Then 8.128:

"In what follows (and in Appendix K) we set out: the customer views we have collected on whether Metlac is an aggressive competitor on price; our analysis of how Metlac's prices compare to other suppliers; our analysis of the extent to which customers have actually switched to Metlac and/or used the ability to switch to Metlac to extract lower price; and our analysis as to whether any lower prices are likely to be sustainable going forward."

The criticisms that are levelled are essentially in relation to those first three points. But it is necessary to consider the criticisms in their context. Starting with the first --

THE CHAIRMAN: Before we start with the first, I wonder if we might take a five minute break.

MR. BEARD: Sorry, I missed the time. I apologise.

THE CHAIRMAN: We will take a five minute break.

Short break

THE CHAIRMAN: Mr. Beard, you will probably want to pace your submissions to us. We have used up a bit of your time in the questions we have asked but — if you want to bear that in mind.

MR. BEARD: I am grateful. I am afraid I am going to be until lunchtime, I am sorry, but I am over-running.

THE CHAIRMAN: Yes.

MR. BEARD: I was just dealing with the key parts of 8.128, highlighting where the challenges come in. I am not going to use entirely Mr. Ward's taxonomy of criticisms, but our understanding is that the attacks come in two forms, one is on the customer view evidence, and one is on the pricing evidence. So, let us just deal with the customer view material first. Essentially, there are two strands of evidence that are in part attacked. The first seemed to be the customer views material that had been provided to the BKA and then by the BKA to the Competition Commission in so far as both that are provided to the BKA permitted it, and this was obviously a key line in the notice of appeal. But we have already really seen that there is pretty much nothing here to see. When we look at what was actually in the BKA's consideration and findings, and you have seen this, and I will just reiterate it, it is at bundle 2, tab.18, but at para.103 in the BKA decision:

"Some purchasers complained in the purchaser survey that the undertakings Akzo, PPG and Valspar offer their products for a high price. Other purchasers [noted] that there is no intensive competition among these companies. When looking at the prices the undertakings, Akzo, PPG and Valspar did not receive good marks".

It is entirely consistent with the other pieces of evidence that the Competition Commission identified in relation to those issues. Then, at 104, there is the criticism that, it seems to place an awful lot of weight on the word "however":

> "However the analysis of the individual prices reveals that the prices of Metlac are not always the best compared with Akzo, PPG and Valspar".

I just pause there. There is no dispute about that proposition. It is not the Competition Commission's contention that Metlac was always lowest on price. It was not trying to assess that. It was trying to assess whether or not Metlac was a significant competitor and whether there was real rivalry between it and Akzo. It does not need to find that always Metlac is the lowest priced at all. And, actually, when you look at what material the Bundeskartellamt looked at, actually it says:

> "Nine of the undertakings involved in the survey purchased a certain product from Metlac at the same time also from another undertaking, [so it was buying from two]. Four of the undertakings named prices of which Metlac prices were the best".

So, four out of nine, almost a half of them, were the best, being Metlac.

> "For three [of the] undertakings, Metlac prices were higher than the … competitors whereas in the case of two of the undertakings the Metlac prices were in some cases more expensive, and in some cases cheaper".

So, in six of the cases Metlac was cheaper in at least some of the products. Well, we just do not see why there is any issue here. This is perfectly sensible evidence for the Competition Commission to take into account in asking itself, "Does Metlac price aggressively?" "Does it go for lowest prices?" "Yes, it does". There is nothing more to see here.

So, the second strand of customer view material that is criticised is in relation to the Competition Commission's own questions. And here I think the principal argument is that there is some sort of sampling bias, and that there was a "bad question" asked. There are actually a couple of points to deal with here. As far as we can see AkzoNobel essentially takes issue with the first sentence of para.7 of Appendix K. So, if we could turn up Appendix K, p.471 in the first bundle. So, para.7 says:

> "Metlac was often mentioned as the lowest-priced supplier by customers that purchase a substantial share of their demand from it. Customers also mentioned that Metlac was sometimes used to extract better terms even when the customer did not switch purchases to them; Metlac was perceived as a high-quality and innovative provider as well as a low-priced supplier; and Metlac currently has an edge over AkzoNobel (for possibly next generation) BPA-NI products".

Now, in para.8 you have got customer comments. These are from oral hearings. So this was not anything to do with questionnaires. It was actually oral hearings with customers where this information came through. And obviously one of the customers referred to is one where Metlac sold a great deal of external beverage coatings and told us that Metlac was often the lowest priced competitor. It was perceived as offering very fair commercial terms relative to other suppliers, and I would ask you to just read that next sentence. When you are asking yourself the question, "Did Metlac bring to bear a rivalry that was not going to be met, the gap filled by Valspar and PPG, this sort of first-hand testimony is of course extremely important. This is people coming before the Competition Commission in questioning sessions and providing evidence. It is up to the Competition Commission what weight it places on that sort of evidence. There is no scope for a judicial review challenge in relation to that. That alone might be sufficient for the Competition Commission's conclusions. But, actually, what you see in relation to comments of other customers was that in relation to the way that Metlac ran its business, Metlac was the lowest cost player on all products in relation to the second customer. And the third believed generally that Metlac was the lowest priced supplier for these products. So, this is -----

MR. ALLAN: I am sorry, can we just, this is purely for a point of clarification, in relation to the third customer.

MR. BEARD: Yes.

MR. ALLAN: Can we just cross-check what is said there, where it talks about the product ranges that it purchases, with 9.13 in the report.

MR. BEARD: Yes.

MR. ALLAN: There seems to be a degree of confusion as to whether the customer is an actual purchaser.

MR. BEARD: I think it is 8.211.

MR. ALLAN: Is an actual purchaser.

MR. BEARD: Yes, if you go to 8.211 and 8.210, I think 8.210 and 8.211 actually set out the accurate position. That is all confidential, so I will just ask the Tribunal to read it. (Green is not the happiest — Blue is worse, I think).

MR. ALLAN: Yes, particularly 8.211 — yes.

MR. BEARD: Yes. I think it may have shown up on the database but they may be test volume scores. So, strictly speaking, I think the statement is correct, but the accurate overall position I think is better set out in 8.211 if that helps.

MR. ALLAN: Thank you. That is all I wanted to know. Thank you.

MR. BEARD: There is no issue taken, in considering the evidence, there was one customer who made the statements that are set out at 9. But, quite why that is not compelling evidence upon which the Competition Commission could make relevant findings in relation to customer views is mystifying.

We then get on to para.10.

> "We also examined responses to our questionnaires from major customers (this overlaps but extends the customer base with whom we had oral hearings)".

So it is going further. This is getting into questionnaires, but it is just important to stress the oral hearings point,

> "… and from small customers (although the response rate of this group was lower than the group of large customers). These confirmed the general picture that emerges from the hearings".

So, hearings, face to face evidence the highest priority, effectively, in its ordering. But then, being cross-checked against the broader picture:

> "Of the 14 customers that were supplied by Metlac, only one customer [x] stated they did not see Metlac as a low priced supplier. Responses from four customers were unclear".

Now, 11:

> "AkzoNobel submitted that these responses were biased, as it would be surprising if companies which purchased from Metlac did not view it as a low-priced supplier. It also criticised the response rate … comparing this [with the rate of response to BKA]. We examine this issue below, but note that even if it were the case that mainly Metlac customers had responded to our questionnaire, we are entitled to accord weight to their views. The fact that not all customers respond does not affect the value of the responses we received to our inquiry".

Those are just unimpeachable statements. And, again, it is for the Competition Commission to decide what weight to attach to them. But, actually, it goes on, in paras.12-15 to explain how the responses to material that were being provided were not just from Metlac customers, they were from people that were customers of AkzoNobel and, indeed, of Valspar and PPG. Indeed, there were more AkzoNobel customers that were being questioned than there were Metlac customers.

So, here the Competition Commission is clearly taking reasonable steps to look at a wider pool of customers and as to the suggestion that there is not enough specifically about B2E here, it is just worth recalling what is being done; it is testing whether, if Metlac disappears,

there will be competitive pressure from Valspar and PPG to fill the gap left. The question is, does Metlac compete on price significantly? What is its business model? How do customers view Metlac's way of doing business? And, looking at a range of customers is instructive in that regard. And so, it is right to take into account comments and observations, customer views made more generally across both B2E and FCG: indeed there is a slight irony we were noting last night, that this argument that you should not take into account views of customers who are supplied in relation to FCG or FCG and B2E, is slightly ironic because, of course, Akzo Nobel argued and I will just give you the reference at para. 7.7 at p.269 of the report, how close the two markets were when looking at supply side issues, and how the production systems and arrangements in place were so similar between them. But of course now, faced with the prospect of this particular challenge a different line is taken.

In any event, certainly the point that was made by Mr. Ward in relation to the *Schneider* case (authorities 3, tab 34) – I will not go to it unless the Tribunal wishes – really does not add anything. It is not saying you cannot draw on a range of evidence at all, it depends on what the question is you are seeking to test and what evidence it is that you are looking at. In that case, the European Commission talked about general dominance across the EU without looking at the circumstances of the individual market where the actual dominance findings have to be made, and that was not good enough, the court said. That is completely understandable but it tells you nothing about whether or not it is appropriate to look at broad customer views in the context of this inquiry and, indeed, even in the paragraph that Mr. Ward referred to in the Judgment (para. 171) the court specifically said that trans-national factors could be relevant to national markets' analysis in relevant circumstances. So the very mischief it was most concerned about in that case, because of the way the Commission had proceeded was there may be circumstances where that is perfectly relevant.

Again, no good reason why you cannot take into account the range of customer views, no reason why the Competition Commission was not entitled to give the views the weight that it did. There was not a bias that meant that all this material had to be ignored. Finally, on this, even just in relation to the point about B2E, one set of the customers is strongly of the view that Metlac will give lowest prices, one set does not say that, but a third, who is qualifying Metlac specifically for B2E, the customer we have just been looking at, as considered at para. 8.210 and 8.211, made it very clear that it saw Metlac as a low pricing provider and, if I may, I will just go to Appendix K, p.472, if you still have it open, at para. 8, third bullet point:

"[X], which purchased [coatings] from Metlac, believed generally that Metlac was the lowest-priced supplier for these products… [It] expected that for the products for w hich it had received and negotiated prices, Metlac would be cheaper in x per cent of the cases. [X] also used cheaper offers from Metlac to extract lower prices from existing suppliers without switching its purchases. [X] said that it was interested in Metlac supplying all its product ranges to exert pressure on other suppliers."

And, if I could, I will just move on to para.40. I suppose I should just put it in context by reference to para. 39.

"Overall, the evidence presented above shows that while Metlac was not always able to offer the lowest prices across the entire period to the customers it supplied, in the large majority of instances for which we have data it was the lowest-priced supplier. In particular, the data and analysis suggested that Metlac had (After a pause) a price advantage especially for B&B and FCG …"

And then there is discussion of FCG and then the conclusion:

"Metlac was the lowest priced supplier less frequently than when only the three major competitors were present."

Paragraph 40:

"In its response to our provisional findings Akzo Nobel submitted that the differences in prices…"

So, in other words, Metlac being a lower price supplier -

"… might be due to the different level of performances in the coatings supplied by various suppliers (even though they were meant for the same end-use) and, therefore, a straight price comparison could be meaningless. To address the issue raised by Akzo Nobel, we asked the relevant customers … for which we have information from BKartA to comment on any technical differences between the coatings supplied by various suppliers."

* [X] told us that most of Metlac's products had a higher solid content than the other qualified competitors which could translate in cost savings …"

Then the following paragraph is from another customer who -

"…told us that the weight per thousand cans and the service levels could be different and when Metlac was qualified its products were top runners on both these measures."

Then the third customer - it is hard to read that one without dealing with the confidential material.

The last one:

> "[X] and [Y] responded that technical differences affected the cost of coatings and were therefore taken into consideration in selecting the supplier. However, Y did not provide specific information in relation to the products listed in the table.
>
> * In its hearing with us, we asked [X] whether there were aggregation or other reasons why the Metlac products listed in its submission to BKartA were not in the lowest. [X] told us …

And then it explains:

> "No, because those prices are current prices … we have a database of all of our quotes …"

and explained those matters. Then [X] says:

> "… Do we unashamedly use a Metlac price occasionally to improve the big 3 pricing? Yes, of course. Of course, that is our job, but I would ask you to look at the growth in Metlac. We have not just done that. We have increased the amount of business we have given Metlac and would continue to do so if it was not for this whole Akzo Metlac thing being up in the air.
>
> … I think we should show you the premium that we are facing today for [BPA-NI] products. We have a slide on that, that is a pretty serious issue for us, and generally we have found that when we have had a Metlac BPA free or BPA non-intent solution, it has always been 90 times out of 100 the cheapest.
>
> … Where there is competition, we do better. Where we have Metlac, we do better. The golden rule."

Another criticism of the consumer views' material was that somehow there was a consumer survey that was not properly carried out and that there were skewed questions being asked and, in particular that appeared to relate to the question that was asked about whether Metlac's prices were used as a stick.

It is the comment in relation to the further paragraph made by X that I have just referred to that was actually being followed up in this regard. When I say "followed up" that is precisely what the question was. If you recall it was question 30 (bundle 3, tab 29) p.1172, you do not need to go to it. Actually, the title is: "Question 30: Follow-up question." It was not sent out as a part of any questionnaire, it was sent out in an email. We have copies of it but I do not suppose that troubles anybody. So it was not part of a survey it was the

Competition Commission testing whether what it had been specifically told by X in an oral hearing was correct. The guidance that Mr. Ward placed so much weight on is concerned with surveys which are going to be the subject of detailed statistical analysis. It is not to do with a Competition Commission question that is following up on some statement at an oral hearing that you are trying to clarify, particularly when what was being done here was a question specifically seeking to ascertain whether anyone else had had the same experience, and that was perfectly justified. A full consideration of this is effectively set out in Appendix K at paras. 18 to 27, and is summarised, for your notes, at para. 8.188 of the report – it may just be easiest to go to that summary.

THE CHAIRMAN: Yes, thank you.

MR. BEARD: What you had was a range of responses, they do not appear to have been skewed by the question but, in any event, even if the question had been expressed differently, what the Competition Commission was properly doing there was testing whether some customers did use Metlac as a stick and was this extent of Metlac's competitive force in the market going to be lost if it was followed up by Akzo Nobel. So there was nothing in relation to any of the criticisms of the customer views that were elicited both by BKA and by the Competition Commission in oral hearings, questionnaires and follow-up questions, that can properly be criticised, and certainly nothing that suggests that there is a flaw in the analysis by the Competition Commission that justifies any finding that the decision should be quashed on a judicial review test.

PROFESSOR REID: For 8.187 and 8.188 could I clarify the relationship between the questions asked there and what you said was a follow-up version in email. Does that relate to the follow-up email, or does that relate to the primary questionnaire?

MR. BEARD: I think that some of the responses in 8.187 – I stand to be corrected – are to do with the questionnaire and the responses in 8.188 are focused in relation to the email question but we will double check that.

It may be that both sections are concerned with the email, but it is nonetheless a follow-up question that was concerned.

PROFESSOR REID: I say that because it just does make a slight difference when you talk about "a questionnaire", which you might think of as scientific instrument, whereas your follow-up version was to follow-up on a statement made from the oral hearing by email and might not be regarded as, in that sense, a questionnaire. It is a small technical point, you do not need to deal with it now.

MR. BEARD: Yes, if this should say a follow-up question rather than a questionnaire, I am not sure that anything would turn on it in any event.

PROFESSOR REID: That is right.

MR. BEARD: And I think it is also important to distinguish, although it does not matter for these purposes between the sort of general customer surveys that may be carried out, for instance, when you want to do a SSNIP test analysis, and questionnaires that are sent out by the Competition Commission to gather information which may be seeking specific pieces of evidence and are not seeking to obtain material that then is to be treated as part of some sort of broader statistical analysis, but that is just a caveat to be placed.

If I may, I will move on to the pricing criticisms, having dealt with the customer view criticisms. The pricing material consideration in Chapter 8 begins at 8.137, and there were two strands of this pricing material. There is the pricing material from the BKA and then there is the pricing material that was additionally obtained by the Competition Commission. In relation to the BKA material, the point that Akzo Nobel seems to be making is that whilst the evidence does point to Metlac being the lowest price in a high percentage of instances it would have been better to have more data and in that regard Mr. Ward took you to Appendix K, table 1, which is at 478, just so you are familiar with it.

THE CHAIRMAN: Yes.

MR. BEARD: We are not quite clear what the criticism is of this, because it is not that the data is flawed or, indeed, that the conclusions being drawn from it are wrong. That data in the Competition Commission's view was consistent with the customer views which it was obtaining and was of assistance. Again, it is important to bear in mind the question the Competition Commission is testing here is: is the loss of them as a competitor going to be filled by others? What it has got is that in relation to a selection of suppliers to customers it has clear indications that it is not always the lowest in price but lowest in a significant number of instances.

As we raised in our skeleton argument, we are not quite clear what it is that it is being suggested the Competition Commission should have done in addition in relation to this. We are not suggesting that it is a vast database of material; we are not suggesting anything of the sort. The report is absolutely clear what the material it is that has been relied upon and the extent to which it has been relied upon. It is essentially of use in showing consistency in relation to the assessment of Metlac. Two of the major four customers, the sample of data is clearly relevant and helpful.

Then we move on to the further Competition Commission pricing work, the consideration of which begins at para.8.147. Here, in essence, the criticism seems to be from AkzoNobel that we should have done more. I will not go back to the judicial review case law about the discretion that the Competition Commission has as to the enquiries that it should make, but it certainly was not irrational for the Commission not to have done more in relation to this. Indeed, in our defence (just for your notes) at paras.161 to 165 the context and chronology of this inquiry is explained. The Competition Commission carried out this analysis because of concerns about the extent of the BKA pricing data and the nature of the BKA pricing data and the extent to which relevant comparisons could be drawn. Those concerns were dispelled through further work, so this additional work became less relevant and the Competition Commission was perfectly entitled not to go further because the principal reason for the additional analysis had fallen away.

It having transpired that this additional analysis faced worse comparison problems than the original pricing analysis, the Competition Commission just did not pursue it. That was plainly reasonable. The Competition Commission still had ample evidence to support its conclusions and indeed that evidence (as I have already been through) was consistent. Of course, it goes without saying that the Competition Commission was working to a statutory deadline. Its working paper on this was published on 24th November and comments came back on 3rd December, and work on remedies was progressing in the meantime. I suppose, to use the language of *Somerfield* the line had to be drawn somewhere, and the Competition Commission was amply justified in drawing it where it did.

But there is something else here, because Mr. Ward has been saying you should have done more and this was a key failing because this was a situation where at segment level (as it is put in 8.155 p.315) "Metlac was cheapest for [X] out of [Y] B2E coatings". He says that is somehow of assistance to him. It goes without saying that since what was being tested was did Metlac offer lowest price pressure, we would not accept that it assists him in any way in any event. But what is interesting is that Mr. Ward says there should have been more done. Let us move down to 8.157:

> "Due to the different range of products even with a narrow end-use (such as a gold epoxy lacquer for internal three-piece food cans), we cannot be completely confident that our analysis compares exactly similar products. Even within a narrow end-use a company may supply more than one product, priced differently depending on its performance (eg abrasion resistance, special colour features etc) and cost. [This was the bit Mr. Ward did not read yesterday] We also acknowledge, as AkzoNobel submitted, that different

customers are very likely to be charged different prices for the same B2E product, and averaging prices across customers might distort the assessment as to who is actually the lowest price supplier of a product. AkzoNobel also submitted that the prices charged for B2E products will vary over time."

So it is AkzoNobel who submitted that this pricing methodology did not work and then the Competition Commission says we therefore have considered very cautiously the results of this analysis and attached limited weight to it. So Mr. Ward is taking a position in these proceedings that appears to be entirely contrary to what AkzoNobel was actually saying to the Competition Commission at the time when it had this analysis. It was criticising the methodology. It did not at the time, interestingly, have all the underlying data because of confidentiality concerns, but it weighed in very fully, studs up, in relation to the methodology. It wheeled out its expert economists who said in bold type in a submission that this material was not of use because of its methodology. "Importantly, it can provide no meaningful insight into the intensity of bidding competition between the four firms currently active in supplying B2E products".

I have got copies of the economist's submission. It was in the Notice of Application bundle and has dropped out of the core bundle. I can provide those for reference. If you wish to see that now I can pass them up.

THE CHAIRMAN: We may as well have them now and slot them in the bundles. (Handed)

MR. BEARD: What we suggest is that they are slotted into Volume 3 behind tab 37. The reason we say that is because tab 37 is AkzoNobel's response to the Competition Commission.

THE CHAIRMAN: Exactly so.

MR. BEARD: Since it has been handed, if it helps, I will just direct the Tribunal to p.4 "Competition Commission's price comparison analysis is likely flawed and provides no meaningful insight into the intensity of bidding competition." Then the bit in bold that I quoted is on p.6. But this is really of secondary importance.

The key point here is that it was entirely within the lawful range of assessment by the Competition Commission not to place any significant weight on this material and also not to take its enquiries in relation to it any further. Whether AkzoNobel or its economists think differently now is not material. In relation to both of the strands of the pricing material, the BKA pricing material and further pricing material that the Competition Commission enquired about, there is no good reason for criticising the Competition Commission's approach and no good ground for judicial review.

That really leaves us then with technical support criticisms. We have explained in our defence at paras.168 to 173 that we looked into technical support. It is not an issue the Competition Commission overlooked. Mr. Ward showed you some of those references yesterday and I do not need to go back to them. They show that the Competition Commission was fully aware of the need to consider technical support levels and that there is an express finding that Metlac's success in the UK without a local team indicated it was not necessary.

What he did not show you was the Competition Commission's express finding that Metlac managed to price competitively without compromising quality including on technical support. If I may, that is back in Appendix K para.4, p.471. If you start halfway down the paragraph:

> "Other important factors included the quality of the product, technical support to a plant, capacity of the supplier, access of the supplier of metal packaging to raw materials, specifications of the buyer of the metal packaging coatings produced by the supplier, supplier R&D expenditure/innovation potential and avoidance of dependency on one supplier. The evidence we collected suggests that Metlac is well ranked by customers with respect to most of these competitive factors (reliability, quality of product, technical support, R&D, etc) and it does not appear therefore to pursue a low-quality/low-price strategy."

So, we spoke to various people including B2E customers and this was the finding, so why does AkzoNobel say this is not enough? It seems to be saying that the finding does not say which customer it relates to, and that B2E is different. As far as B2E is concerned Metlac has two B2E customers. They did not say that Metlac offered a low quality/low price offering. Indeed, if one looks at the parties who said that local support teams are necessary, in para.7.30 it is only in relation to FCG. So that does not undermine the finding in Appendix K at para.4.

As to the argument that B2E is different, Mr. Ward took you to Appendix F para.56. However, that paragraph is saying there is a barrier to entry: you have to be able to offer technical support to enter. But Metlac of course has entered and it has satisfied customers. Indeed, if you look back at para.55 on p.413 what you see is that [X] customer is saying that Metlac is really entirely up to the job. So whether or not there is a perception that Metlac offers lower quality because it is in Italy, on Akzo's account, that is not the view of customers receiving the service. So although Mr. Ward says Metlac faces a particular disadvantage because it is in Italy, that is not what the Competition Commission has found;

it is not borne out by the material it saw; and AkzoNobel has not begun to make out a case that the Competition Commission acted irrationally in drawing the line where it did.

Unless I can assist further on Ground 2, I am going to move on to Ground 3. I think that covers the criticisms of the evidential material in Chapter 8 that was levelled by Mr. Ward.

THE CHAIRMAN: Yes, do, thank you.

MR. BEARD: We are in the territory of innovation. The finding is a simple one; it is about a loss of rivalry. It is quite right that the finding made in the final report is a less extensive finding than had originally been proposed in the provisional findings in relation to innovation. Just for your notes, and given Professor Reid's question earlier, it is perhaps just worth turning up at p. -- Mr. Williams very sensibly reminds me that just for completeness it is perhaps worth emphasising that the definition of BPA-NI is found on p.523 in the Glossary, this being a non intent, in other words, not intentional inclusion of Bisphenol-A in the relevant coatings. This is different from BPA free, because there can be some unintentional inclusion by contamination. BPA is apparently a hormone, a weak hormone.

In any event, at p.244 in the main part of the report at para.2.73 there is a section on new product development that runs through for a couple of pages, and deals with the development of BPA-NI in particular. And what it is saying is that because of these changes in environmental standards, because of the need to develop BPA-NI products potentially, there could be a radical change in the way that the market will work and how people will compete in relation to products, because different product will essentially have to be proffered. This obviously gives opportunities for growing and dynamic competitors, because they are able to innovate in relation to these new standards. I know that there is a wealth of economic literature about when these sort of regulatory step changes happen and the opportunities this sort of thing provides. In a way, this is what is going on here.

Obviously the CC has not gone into a PhD on, you know, disruptive steps in competitive markets, but that is essentially what we are seeing here. But, for Professor Reid, the new product development section is perhaps best articulated there, and it spells out how BPA-NI products may come forward and the significance of them.

And then, if I may just pick it up then in a section entitled, "Future developments", which is one of the latter sections in chapter 8 which begins at p.325. So, this is after the various sections on pricing and so on that we have been previously dealing with. But, "Future developments":

> "In this section we consider what will happen in the future in relation to Metlac's growth. There is evidence to suggest that Metlac will continue to grow significantly

in the future in B2E and FCG, but also in the B&B segment more generally where there may also be scope for significant change as a result of the introduction of BPA-NI products (we discuss this, and the implications it has for the merger, in Section 9)",

to some of which I have already taken you. That is the SLC section.

At 204:

"Innovation is an important part of the competitive process for some product lines, with suppliers competing to develop new chemical formulations to make metal packaging look better or stand out from competing products. We have been told that the industry is on the cusp of the most significant change in decades, as it may be required to stop using products containing BPA which would affect both the B&B and FCG markets. We were told that Metlac was a recognised innovator both generally and also, more specifically, in relation to development of BPA-NI products which if correct, raises the possibility that Metlac could end up being a strong competitor in segments affected by the move towards BPA-NI".

So, this is the consideration of innovation. And then one turns over the page to para.8.207:

"One third party indicated that Metlac's R&D would be a rationale for AkzoNobel's purchase of Metlac. Appendix G sets out further details of the parties' developments of BPA-NI portfolios together with information from AkzoNobel's internal documents and from third parties in relation to innovation in the metal packaging coatings industry".

And then there is a discussion further on about Metlac's growth and its potential for growth in relation to new products and existing products. But, if I could take the Tribunal just to Appendix G briefly, Appendix G is entitled "Innovation and product range" and Appendix G considers whether Metlac is an innovative firm. That is how it starts, it is at p.429, I am sorry.

THE CHAIRMAN: Thank you. Yes.

MR. BEARD: Yes, the internal numbering on CC documents is G1, so that it helps identify the appendices. But 429, as I say, the appendix considers whether or not, whether Metlac is an innovative firm, Metlac's ability to innovate is relevant to whether or not it would be able to continue to supply its current customers and also grow its business.

"We considered customer and competitor views on Metlac's level of innovativeness, and also considered whether the merger would be likely to result in less rivalry on innovation".

So that is the key question. Are you going to end up with less rivalry on innovation? We have already seen that there has been a section talking about new product development. There is a consideration in chapter 8 about the future developments and the importance of innovation, and what we have here is an extensive discussion of what is going on in the market and how innovation works. I am going to leave the Tribunal to read the entirety of Appendix G; but I would highlight in particular paras.21-30 because here what we have got is an account of BPA-NI innovation, and innovation in particular in relation to B&B.

So, what is being spelled out here is, effectively, if there is a race to innovate, different suppliers working with different customers, it is fanciful in these circumstances for AkzoNobel to turn round and say, "Well, actually, taking Metlac out of this wouldn't affect this race". There would obviously be a loss of rivalry between Metlac and AkzoNobel in relation to innovation. That was the conclusion that the CC reached in relation to this. A loss of rivalry in relation to innovation. There was no need for the CC separately to be considering whether Valspar or PPG would run their race differently or seek to innovate differently if the merger had occurred — or indeed to separately consider precisely how it is that the hypothetical merged entity would deal with innovation. Because, once you had identified that there was rivalry in innovation and it would be lost, it was a conclusion well open to the CC that that loss of rivalry in and of itself was something that gave rise to supporting evidence for the finding of SLC, and it is important to make clear that this conclusion was not crucial overall to the SLC finding. It was merely part of the supporting assessment that the loss of rivalry was not only in relation to price and quality, but it was also in relation to innovation.

If I could just go back to the main part, the main body of the report, to just pick up the conclusions in relation to these matters — I should say, just for your notes, that there is an interesting para.18 in Appendix G that essentially says, "Well, you can't just add up R&D spending in any event if you merge R & D departments. Innovation is more complicated than that, so any hypothetical assessment would be jolly difficult". But that is not crucial to the overall assessment of these matters. It is just a recognition of the way in which innovation is carried out and the way in which rivalry in innovation is important in a particular market.

At 8.227:

> "In our view, where Metlac is active [I am sorry, this is at p.329] it exerts a significant constraint on the behaviour of the larger suppliers. It has steadily gained market share by offering low priced technologically sound products without losing profitability. Its

ability to provide nimble, innovative products and service is highly valued by customers, including those customers that make up a large proportion of the industry demand in the EEA and the UK".

And of course we have already seen in relation to paras.9.6 and indeed 9.9 that I took you to earlier, that the loss in rivalry would be in relation to price and non price aspects, such as product innovation. And, of course, this is particularly important where the industry is going through a step change potentially in relation to BPA-NI which was explored very thoroughly and fully by the Commission both in Section 2 and in Appendix G as well as in Section 8. So, it is not necessary for the CC to have gone on and carried out some further inquiry about whether the merged entity would have innovated to the same extent where you had reached a conclusion that there would be a loss of rivalry in relation to innovation and detriment, and it was therefore entitled to reach the conclusions it did.

Unless there are further questions from the Tribunal in relation to the third ground, those are the Competition Commission's submissions in relation to those matters.

THE CHAIRMAN: Thank you.

MR. BEARD: I am most grateful.

THE CHAIRMAN: Thank you very much.

MR. BEARD: Might I just ask, for clarity, I mis-spoke at one point during the transcript, at which point Mr. Williams made a relevant noise that I referred to a confidential nature.

THE CHAIRMAN: Yes, there was a small eruption on my left.

MR. BEARD: Yes, well —

THE CHAIRMAN: But we will correct the transcript.

MR. BEARD: I am most grateful.

THE CHAIRMAN: We decided not to stop the flow! What we propose to do now is to rise early for the short adjournment, and then give you a clean start at a quarter to two if that will be all right.

(Adjourned for a short time)

THE CHAIRMAN: Mr. Beard.

MR. BEARD: Just one brief matter. In relation to the question raised by Professor Reid about paras.8.187 and 8.188, we checked over the short adjournment. In 187 it really should say question rather than questionnaire because all of the responses that are dealt with in 8.187

and 8.188 are in response to the emailed question. As I say, we have copies of the email but you have the question already.

THE CHAIRMAN: Thank you. Yes, Mr. Siragusa.

MR. SIRAGUSA: (No microphone) Thank you again for allowing me to appear. I will just make a few brief submissions on some aspects of the case, without repeating what my learned friends have already said.

THE CHAIRMAN: Thank you.

MR. SIRAGUSA: First, the question of whether Akzo Nobel NV carries on business in UK. I refer to Chapter 11 of the report, in particular the paragraph 11.90 of the Report, on p.169, which is p.380 of the bundle. As we have learned, and is referred to at the very beginning of paragraph .11.90 Akzo has a large number of subsidiaries in different countries and it appears that several of them are active in UK and elsewhere. So what we have here is not the situation in which we have one subsidiary in UK which is in charge of business activities in the UK; we have a number of subsidiaries spread throughout the group which do that. I think this is a relevant factor in assessing the question of who is doing business in UK because I think this structure does require a centralised management in order to be able to provide the service to UK customers. This is exactly what I think has emerged in this section. There is a business unit structure which Akzo has in parallel to the corporate structure. That is the conclusion reached by the Commission in this section of the report. So I think this is the first point I wanted to make.

Secondly, with respect to the findings which are made in the section, the findings of the existence of the business unit structure, the findings that the business unit structure is highly centralised, the finding that ExCo, in which AkzoNobel has an especially important role, as we can see from the report. I think all those findings are based around four important documents which are in the bundle. They are confidential documents so I do not wish to read them out here. I simply call to the attention of the Tribunal (I am sure you have already looked into it) in particular, tab 22 of volume 2 which contains the Authority Schedule, tabs 33, 38 and 40 of bundle volume 3 which are answers which have been given, responses given by AkzoNobel, to Competition Commission questions.

These are the relevant evidence which clearly has been used by the Competition Commission in reaching its conclusions in this section, and they are highly relevant to the issue of the question of carrying on business of UK.

I will turn over to another issue which has been raised by Akzo, in particular the question of whether or not the transaction should have been reviewed in Brussels rather than in the UK.

Akzo suggested that Brussels would have had the powers to prohibit the transaction, and invites us to infer that it was a decision that was taken by Metlac to bring this case in UK rather than allowing it to be brought in front of the EU authorities.

There is no dispute, I think, about the fact that the transaction does not fall within the definition of a concentration with a Community dimension. One way it could be referred to Brussels was basically at the request of Akzo, if Akzo wanted to activate the mechanism of Article 4(5). We went through that mechanism yesterday in the discussion. In certain circumstances the acquiring party is able to request a reference to the European Commission. It was not possible for Metlac to apply to Brussels under Article 4(5).

We look at the chronology of events which has been put by Akzo. I would refer to bundle 4 of the core bundle, p.67, a summary of which has been prepared by AkzoNobel. At p.67 of the bundle we see the beginning of section 3 of that tab. We see that at date September/November 2011 AkzoNobel decided to make a an application under the Article 4(5) reference procedure to the European Commission to review the transaction. That is when they decided to make it. There is no indication that such a reasoned submission has been made, but that is when it decided to make one, in the period September/November. If you look at the witness statement by Ms Millenaar which is on p.56 of the bundle in the middle under section 12 on that page you see that there is a reference to a meeting which took place on November 2011 where AkzoNobel officially informed Mr. Bocchio that it would be exercising its call option and would *inter alia* be seeking to obtain the necessary merger control approvals.

I refer to this evidence simply to make clear that Akzo had abundant time to make any reference it wanted to the Commission, and as you know it is a confidential process, and Akzo certainly had the time to explore that alternative if it was really interested in that.

Then we come to the review in Germany. German law - and you can look at this in tab 36 Volume 3 authorities bundle - provides for an obligation on each party to a qualifying merger to notify it. This is a requirement under German law. If you look at Volume 3 p.1324 this is a translation of the relevant Germany law ... para.59 of the law which states specifically at p.1324 ... specifically states that the obligation to notify shall be upon the undertakings participating in the concentration. So both Akzo and Metlac had an obligation to notify under s.59 of the relevant Act. That is exactly what happened. Metlac filed on 28th December and Akzo followed on 9th January with their notification.

It was still open to the Bundeskartellamt to go for the post-notification referral procedure. Of course, we also looked at this yesterday. This is the Article 22 procedure, where

Member States can request a referral to the European Commission. In the submission made by AkzoNobel there is some reference to the fact that they did ask the German authorities to make a referral request to the Commission and the German authority refused to do so. Metlac was not involved in this at all. Akzo has also suggested that in the UK the OFT might have made such a request under Article 22. We note that Akzo Nobel had already made such request to Bundeskartellamt, who ... considered it unnecessary to make a referral. I simply wanted to make one submission in response to what Mr. Ward said yesterday, referring to the OFT's guidelines on Article 22 references, and referring to the authority in bundle 4 tab 41 p.1594. Mr. Ward directly pointed to the second bullet point at the top of that page. It says that one thing the OFT has to take into consideration, in order to decide whether to make a reference is the availability of suitable remedies. But it is the third bullet point which seems to me interesting because there it says:

> "Whether the transaction has already been reviewed by one of more Members States and, if so, whether a further review by the Commission will be useful and proportionate."

Of course, that was precisely the situation in which we were, having the German authority already in the process of reviewing the transaction at the time the OFT was considering this question.

THE CHAIRMAN: Could you just repeat that reference for me, please?

MR. SIRAGUSA: The reference is authority bundle 4 tab 41 p.1594.

THE CHAIRMAN: Thank you.

MR. SIRAGUSA: OK. Very briefly to come to the issue of whether, as suggested, a prohibition order issued by the Commission would raise concerns under international comity. This is one of the arguments that have been raised by Akzo. I will say two things. First of all, s.86 Enterprise Act on its own terms clearly applies to conduct outside the UK. Secondly, I refer to the *Gencor* case which is in tab 33 volume 3 authorities bundle p.1107, para. 93. This case concerns an acquisition in South Africa, so it is outside the Community and, of course, the question of comity was raised. And the judgment clearly states that there is no barrier under international law to the application of merger control outside the Community. In its para. 90, the court specifically says:

> "Application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community."

Then, of course, the court goes on and analyses whether or not there was any new and substantial effect in the Community and finds that there was. Then it goes on at para. 102 and 103, this is at p. 1110, where they analyse whether there is any problem under the principle of non-interference of the principle of proportionality in exercising their jurisdiction. Of course in this case it is interesting that the South African authorities had determined that there was absolutely no competition problem according to the applicable South African law. The court says of course the South African authorities made a finding completely different from the finding made by the European Commission and, at para. 103 of this Judgment p.1110, where the court states that there was no conflict because the South African authorities simply concluded that there was no issue, that the concentration agreement did not give rise to any competitive policy concern and the law did not require that such an agreement would be entered into. The reference is to State action doctrine: it is not mandated that the merger should take place under South African law, we find that the South African authorities found at the time that there was no problem and the competition rules were certainly not an obstacle, but the Commission finding was completely the opposite.

Also in that respect they find there is no obstacle under the rules of public international law and you find this is stated also at para. 108, and the conclusion is reached on the following page.

Now, very briefly, I turn to the second ground: pricing. The first point, this has already been mentioned, relates to the findings of the Bundeskartellamt as compared with the findings of the Competition Commission. I think it is very important to stress that there is really no inconsistency between the two analyses which have been conducted by these two authorities. I will not repeat all the various evidence to which my colleague has already referred, I will simply call your attention to an interesting aspect of the Bundeskartellamt decision, if you take the text of that decision which is in vol.2, tab 18 of the core bundle, where at p.787 there is a reference to "Supplier switch analysis and pricing", and a reference to a survey which was made of the customers, and the survey consisted in listing from 1 to 6, the customers which were most competitive in price, so that grade 1 was given to the lowest price up to grade 6 for the highest price, and as you see there in the text of the decision it says that:

> "15 of the customers asked give Metlac the mark 'good' or 'very good' for price. No other company was given such a rating."

Then in the footnotes, both footnotes 36 and footnote 49, which is on p.792 you find scores that each producer got. Metlac scored 1.8, Akzo Nobel 3.9, PPG 3.9 and Valspar 4.1, and, I repeat, the higher the score the higher the price, so a lower score was indicative of a lower price, which I thought was an interesting result which again is in line with all the other findings which have been mentioned so far.

The customers' views in this industry, as has already been said, are extremely important because of the characteristics of the product, which, depending on how much solid content or solvent is in the product, its use may be very different. There can be a much more efficient use if the product has certain characteristics, and the "applied" cost to the customer depends very much not only on the price but also on the characteristics of the product. Therefore, the customers' views in this industry are very, very important because of this technical aspect of the product and you find several references in the report to this characteristic of the product which is extremely important.

The conclusions which were reached by the Bundeskartellamt, as has been said, are not very different to the conclusions which were reached here because in the conclusion, again if you look at the end of the decision of the Bundeskartellamt in particular, it is para.108 of its decision, vol.2 p.793 "Conclusion", in which it is stated very clearly that competition in the market is reduced and para. 108 starts by saying that there were presentations that:

> "Metlac is a powerful undertaking with an aggressive price structure and that in particular for this reason Metlac is 'sold up' from the market in order to remove a powerful competitor from the market cannot give rounds for a single dominance."

So the issue here is not the result, it is not that, even the German authorities thought that there would be a reduction in competition but simply this was not enough to meet the German test which, as you know, is different than the test that you are called to apply and the Competition Commission was applying.

I now turn to the comments made by Mr. Ward with respect to the Competition Commission questionnaire. I will make a very simple observation in addition to what has already been said. If you look at the questions and you find a summary of the questions in tab 10 of the core bundle at p.322 and para. 8.187 at the top of the page. The issue is whether or not the question was put in terms favourable to Metlac, suggesting that only the Metlac price was used as a stick to obtain better prices from competitors, that is the argument that has been made. But the question, as the Competition Commission notes in its report, was not complete because the question posed to the customers also asked how often the customers used other supplier's prices as a lever in their commercial relationship, so it

was not asking only about the Metlac price, but the question was comprehensive and you find that in para. 8.187 at the very end of that paragraph:

> "Alternatively, if Metlac's pricing was not used as a negotiating factor with other suppliers any more frequently than any other metal packaging coatings supplier's prices are used to negotiate a lower price, customers were asked to indicate this."

And if you go back to the question which was put, you find that in bundle 3, tab 29, p.1 172.

THE CHAIRMAN: I think we did look at this before.

MR. SIRAGUSA: I only wanted to point out the second part of that question, which does include a reference to other products.

THE CHAIRMAN: Indeed so.

MR. SIRAGUSA: I can turn to another very brief comment on the importance of the views of customers. I have already said not only because of their technical expertise and technical appreciation in using the product, which is very important in this type of product, but also those customers were not only asked questions by the Competition Commission, they participated in the proceedings. There were meetings, there were interviews, there were conferences in which they participated, so they were acting throughout the proceedings, and so they did not simply answer the questionnaire. They are very sophisticated customers which I do not think can easily be oriented into one sense or another. I think this is an important factor which has to be taken into account, and the fact that the customers support the position of the Commission where a small number are representing a very high percentage of the total purchases in Europe and in the UK. So this has to be taken into account. Akzo Nobel has said only few customers were particularly concerned with this matter, but of course those customers were very, very important and their views are to be taken into account.

I now briefly turn to my last point, the price comparison exercise which has been made by the Competition Commission. I refer to the table which is p. 486 of the bundle. This is the exercise which was done by the Competition Commission asking producers to identify competing products, and I am looking at the first nine products which are indicated at the top of this table 6, at p.486. Akzo Nobel is making the point here that only in one product Metlac has the lowest price, and these are the third products, if you start at the top and look at 7, 8 and 9. And so those are the products which are listed in this list under the title "External OPV varnish for DWI", if you see that. And then you have the other two products on top of those, which are external matt tactile OPV varnish for DWI and Beverage External 2 Piece Water Aluminium.

Without adding any new evidence, I simply want to comment as to the statements which were made yesterday by Mr. Ward. If you look at this definition of these products, "External OPV" is a very standard product, broadly used in the industry, and in B&B and with B2E typically there are few products which are the large standard use and then a number of specialty products. So, this product is clearly a standard product which presumably sells in very large quantities. The other product, external matt, is an external characteristic of the can, the matt, it is a specialty product. Similarly, the first product to the one in the three first lines, and you will see that there is a reference, there is a footnote in that chart which refers to the fact that the interpretation of this category has been fairly difficult. What Metlac gave was the figure relating to an external matt tactile OPV varnish and you can imagine that "tactile" means that you can touch it and has a special feel, a special touch to it, is again a very special product.

So, I think that the comparison was made between a standard product which sells at very very high quantities, together with two relatively niche products, specialty products, which of course are a completely different level of pricing. And I think this is as relevant in appreciating their importance. Of course, as we know, the Commission did not place particular reliance on this exercise and it simply concluded that it was broadly consistent with the other findings which were made in —

THE CHAIRMAN: Now, when you are telling us that these are standard products and niche products, do we get that from the report itself? Or, is that you bringing to bear some other material that we may not have seen?

MR. SIRAGUSA: Okay. I should have referred to the fact that in particularly B2E there is this difference between "standard" and "niche" product. You find it in a couple of points in the report, in particular at p.333 of the core bundle, 333 of the core bundle. If you look at s.9.21, there you have the statement, "While there are some niche products, the vast majority of B2E production involves commoditised coatings with few customers demanding large volumes."

THE CHAIRMAN: Yes.

MR. SIRAGUSA: And then you find, again, the statement in p.372 of the bundle, s.11.31 and that is a statement from AkzoNobel where it says:

> "In the B2E segment where the coatings are relatively highly commoditised, there are far fewer SKUs than in the FCG market".

THE CHAIRMAN: I am sorry, can you give me the reference again for that?

MR. SIRAGUSA: Page 372.

THE CHAIRMAN: Yes, got that.

MR. SIRAGUSA: And 11.31.

THE CHAIRMAN: 11.31 and it is part way through, is it?

MR. SIRAGUSA: Yes, it is in the second line, AkzoNobel noted —

THE CHAIRMAN: The second line. Thank you. I have got it.

MR. SIRAGUSA: And then it continues, very briefly, there is a reference to "tactile", if you see there. It says:

> "However we also understand from AkzoNobel that 'products such as tactile varnish, thermographic inks or glow-in-the-dark inks, provide examples of how downstream branded goods suppliers are still interested in [B&B] coatings which enable them to differentiate themselves from their competitors'".
>
> Those are the niche products that I was referring to.

THE CHAIRMAN: Yes.

MR. SIRAGUSA: I am simply, I am not wanting to bring any new evidence, my Lord, I simply wanted to comment on the denominations of those products.

THE CHAIRMAN: Yes.

MR. SIRAGUSA: From the denomination of the product itself, it seems to me, one can make this distinction which is typical of the B2E sector. That is the only thing that I wanted to say. Finally, on the relevance of FCG, this argument has been treated, I would simply add one general comment. The issue that some of the examples of competitive pressure exercised by Metlac refers to food and general line products, FCG products, as not being relevant to the analysis of the B2E. I simply want to say I fully agree with what has been said on the non relevance of the *Schneider* case. I simply want to say that this evidence shows what is the approach of Metlac, what is this business model of Metlac; and so I think it is very much relevant in order to establish the effect on competition of the proposed transaction. And on the business model, Mr. Ward has suggested that the ability of Metlac to offer lower prices is somehow linked to the fact that Metlac does not provide the same level of customer assistance, and he said this because Metlac does not have a presence in the UK. Metlac has a team, an international team, which goes visiting customers all over Europe, and I think that the ability of Metlac to properly serve the customers to their satisfaction has been shown in several points of the report. I will only quote one point which is in the report itself at tab.10 p.308 of the court bundle, para.8.127, where it is stated at the beginning of that paragraph:

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

and there is a reference to other material which is similar to this which is contained in other parts of the report.

The business model is certainly centred on lower price, on one plant, as you have heard, which is a state of the art plant which is able to provide products throughout Europe with lots of emphasis on research and development of new products and in the production, it is a fully automated plant which I think explains very much the ability of Metlac to be competitive on price and we find reference to this in some of the annexes to the report. It is enough simply to mention Annexe L on growth and capacity; Annexe M on margins; Annexe K, I think you find there several references to the ability of Metlac to expand; and its range of products which Metlac is able to offer; and so forth.

And, finally, and my last comment is on innovation, I will simply add to what has been said the Commission has focused very much on Bisphenol A non-intent products, but as you know, the report also says that Metlac is a potential entrant in B2I segment and in the BE segment (beverage ends) and of course in order to do that you have to develop new products, to induce customers to switch to you. It is not only the price, as we said, it is also the quality and the technical characteristic of the products which are very important, all these efforts, of course, will be frustrated if the merger took place, and also and there is reference in the materials to the fact that the Metlac is very responsive to tailor-made products which try to respond to the specific demands of customers, and this is something which may be, largest producer are less willing to do because of their priority on large volumes and commodity products.

Finally, some very minor remarks on certain of the statements which were made concerning Metlac. I would like to make absolutely clear that the option to which of course Mr. Ward referred yesterday was exercisable within a certain period. It did not have to be exercised. It was not that type of option and, in any event, the option is subject to antitrust clearance, as is absolutely clear.

Second, the litigation to which Mr. Ward referred, in Italy, has not been initiated by Metlac. That is also, I think, a very important point.

And, finally, on the question that was mentioned by Mr. Ward, that Metlac has only relatively small sales in the UK — and he pointed to the level of sales in 2011 which, he mentioned, it is okay, I will not mention the amounts, but in any event there were

mentioned, they are indicated in the documents. Well, I want simply to point out, if you look at Table 20 in Appendix I, p8, it is p.459 of the bundle. And if you look at Table 20 you will see the progression of the sales of Metlac in the years 2009, 2010 and 2011 which I think it's very very impressive, and there is a reference to, you will find in some of the confidential materials the precise figures that we are talking about, they are basically from the figure of 2009 to 2011, they have doubled in two years, and they further increased in 2012 and 2013. So, I think this is a very important element which has to be taken into account. So the progression, there is a very clear trend of growth, not only in the European community but specifically in the UK, which I think is very important.

And also another important factor is that Metlac now has a very important percentage of the B2E market. The figures which are indicated are around between 11 and 20 per cent in respect of Metlac. This simply in the B2E market which I think is an important consideration, in particular when you add that this market share to the market share that Akzo has which, as you know, is very very important, and it is between 40 and 50 per cent. Those figures are indicated in the tables which are attached in Table 31, for instance, or Appendix I, at tab.11, p.462. You have the reference. Okay. And, unless you have any questions, I will stop here. Thank you.

THE CHAIRMAN: Thank you very much for your help.

MR. WARD: I am going to make a number of points in reply. I hope to be brief. I am going to follow the order of Mr. Beard's submissions. So, I will start with the legal standard that applies to judicial review.

There is common ground, but there are important differences as to the approach to reasonableness. At one point yesterday, Mr. Beard suggested that the legal test might be whether the Commission's approach was manifestly without foundation. But as he also said yesterday, in fairness that is a test that applies to "social and economic judgements". It is a test that may be of assistance if what you are trying to do is decide whether to increase the rate of income support or what the level of homelessness assistance might be to asylum seekers. But here we are dealing with empirical factual questions about Metlac's pricing. That is not a matter of social or policy judgement; it is right at the centre of the Tribunal's core competence, namely the appraisal of factual evidence. There is no reason at all why the Tribunal should be somehow deferential about that.

Mr. Beard also suggested that the standard in this case might be very different from that in the *BAA* case because that case involved the divestment of the major asset. But here, analytically the position is the same: AkzoNobel is being deprived of the right to exercise a

long-held option obtained through commercial arrangements. So we do not accept that somehow a less intensive kind of scrutiny would be involved.

Earlier today Mr. Beard suggested, at least, that all he had to show was that there was some kind of evidence, at least something that the CC could base its findings upon and that that would get him over the *Wednesbury* test. But that is not right. The correct question to ask is whether the findings are reasonably justified by relevant facts. The citation for that (I will not take you back to it now) is in the *IBA Healthcare* case at para.45 in authorities bundle 2 tab 18.

As to the approach to carrying on business, Mr. Beard again suggested that the Competition Commission had a wide margin of assessment in determining whether AkzoNobel was carrying on business and that this was almost incapable of challenge. But of course the words in the statute do bear a legal meaning. They must be applied in accordance with the intention of Parliament. If the CC's decision and the findings it has made cannot satisfy that meaning, it is simply erroneous in law.

I will turn now to the observations made about s.86 itself. Mr. Beard said that the essence of the CC's case was that the *in personam* jurisdiction should be interpreted to facilitate the substantive jurisdiction. That was in p.63 of yesterday's transcript. He said that you would expect Parliament to have provided that where the CC has jurisdiction to consider a merger it would also have the power to stop it. But this is a fundamental fallacy because, as we submitted yesterday, plainly whatever s.86 does mean, it is a limit on the power to impose remedies in certain circumstances in respect of behaviour overseas. So for the Competition Commission to say that this would curtail its remedial powers is to do no more than to simply restate the intention of Parliament.

Mr. Beard was asked today what it was he said that carrying on business amounted to. He said that the test was satisfied if the TopCo was involved in commercial activity. That formulation is quite astonishingly broad. He conceded that its effect would be that AkzoNobel was carrying on business in the whole of the EEA, but it is broader than that; it is the whole of the world. AkzoNobel is a completely international company. So that test is plainly not right. Mr. Allan said is any degree of control going to be sufficient to satisfy the test? Mr. Beard declined to answer. He also declined to identify the criteria that would apply. What we see therefore is the Competition Commission is inviting the Tribunal to award it the widest possible powers in this respect and, in our submission, effectively to rewrite the Act and to take away the constraint that s.86 has imposed.

Turning to just a few of his arguments of detail on the Act, Schedule 8, Mr. Beard said it applies to third parties just as much as to merging parties, and what he called this vast range of powers could then apply much more widely. But that, of course, is all the more reason to suppose that the threshold it applies is actually a significant one, not one simply to be washed away. Otherwise, the Competition Commission might be in a position to impose mandatory orders on all manner of unsuspecting TopCos around the world.

Part of their argument is that their position is untenable for lack of remedies without this kind of approach. He made the point that the power to enforce undertakings by order also depends upon s.86, that it would be an enforcement order captured by s.86. That is correct and it is unsurprising because that would be another form of mandatory order against person outside the jurisdiction. The statutory logic of that is very obvious. But it does not mean the Competition Commission is toothless because it still has enforcement powers under the Act. He did not show you s.94 of the Act, but I would like to, very briefly, if I may. It is in authorities bundle 1 tab 6 p.120. This is not affected by s.86. The heading of this section is "Rights to enforce undertakings and orders".

> "(1) This section applies to any enforcement undertaking or enforcement order.
>
> "(2) Any person to whom such an undertaking or order relates shall have a duty to comply with it.
>
> "(3) The duty shall be owed to any person who may be affected by a contravention of the undertaking ...
>
> "(7) Compliance with an undertaking ... shall be enforceable by civil proceedings brought by the Commission for an injunction or for interdict or for any other appropriate relief or remedy."

That applies equally to undertakings and orders. So ultimately if someone is intransigent, recourse may be had to the courts. That is precisely the same in a case that s.86 applies to and in a case which it does not.

Another point that Mr. Beard makes is he raised the spectre of avoidance, that somehow if we were right there could be some ingenious corporate structures established that would thwart the competition regime. Again, that point would arise on whatever interpretation you adopt of s.86, assuming you do not pencil it out of the Act altogether, because there is going to be some conduct which is outside the reach of the Competition Commission. But the example he has put forward, we submit, is fanciful that a UK enterprise may establish an overseas HeadCo purely for the purpose of thwarting this remedy. As much as anything, there would be all sorts of other tax and commercial consequences of such a step. It is not

just like setting up some peripheral shelf company or something of the kind. It is just a far-fetched submission, in our submission.

The other point he made is that there was of course a difficulty that the Act had to be enforced against persons and that may explain why it had not used the concept of undertakings. Of course Parliament could have used the concept of undertaking in the European Community sense. It could have provided that it was sufficient for any person within an undertaking to be present in the United Kingdom. This is not conceptually difficult; it is not a drafting difficulty; it is a deliberate choice by Parliament as to how the frame the requirements of s.86.

What, then, is the test and why do we say it is not satisfied, despite what Mr. Beard said? Our starting point regarding the facts is that, as Mr. Beard urged you this afternoon, it is necessary to read the report as a whole. That requirement applies just as much to the Competition Commission as it does to my clients. There, what we urge is that you look at the substance of the Commission's findings on carrying on business, not just a few generalised conclusions it reached on the basis of the facts that it found. This is particularly important in respect of the operational decisions that Mr. Beard relied upon, and which the confidential text makes clear were of a very limited nature indeed.

What I would like to do is just make a few points by way of high level summary without delving into the confidential material. In large part what we see is simply a range of internal organisation matters which are inevitably part of a large corporate group of this kind. There is approval of spending decisions over a certain level. Although some of the thresholds are relatively low, all of this is purely reactive. It is not a case of a TopCo directing subsidiaries as to what it should do, what it should buy, who it should contract with. Again, we remind you what is said about contracting arrangements in para.11.92. You will recall it is confidential: who does and who does not contract. On this Mr. Beard said that the contractual arrangements did not provide a satisfactory way to analyse the structure of business units and sub business units. But we are not concerned with whether the business units or sub business units are carrying on business. The only question we are concerned with is whether AkzoNobel NV, the TopCo, is doing so. Our submission is what we have here is nothing more than you would expect in a well-run corporate group. It does limit the autonomy of the subsidiaries, and indeed the business units, but it leaves them a very wide area of commercial freedom.

This is all consistent with the fact that, as AkzoNobel explained, it is actually a holding company. The reference for that is in the report at p.248 para.3.7. There is, of course, a

well-established distinction between operating companies that undoubtedly carry on business for reward, and holding companies that hold interests and typically receive income through dividends.

In the case of a large corporate group there will nevertheless be structures to make sure that the operations of the group are managed effectively. Here we have seen AkzoNobel's ExCo has that kind of role. But it is not carrying on the business. To take just one example, the strategic role that we have been talking about is in fact to produce a five year plan every three years, so it is updated every three years. The reference to that, for your note, is in bundle 3 tab 33 p.1259 para.2.11.

But that does not make AkzoNobel NV the legal person carrying on these businesses. Our core submission is as a matter of statutory interpretation this kind of degree of control cannot be sufficient to mean that the TopCo is itself carrying on the business. You have had our submissions about the Parliamentary language. Of course, we do accept that it is possible, on other facts, that a TopCo might be doing much more than this. It might be giving detailed directions; it might be contracting in its own right; it may truly, in a commonsensical sense, be the person carrying on the commercial activity. But that is very different from the kind of limits on autonomy (to use the Competition Commission's words) that it found in this case. If the Competition Commission is right, s.86 would become a dead letter.

Just before going on to Ground 2 I want to come back to *Adams v. Cape* in the light of the discussion between Mr. Beard and Mr. Allan very briefly. It is worth turning it up, if that would not be too much trouble. It is in authorities bundle 1 tab 11. The first question is what is *Adams v. Cape* actually about? It is clearly not about carrying on business as in the Enterprise Act; it clearly is about enforcement of judgments overseas. I just wanted to show you why carrying on business becomes so important in *Adams v. Cape*. It is at p.347 of the bundle where, having looked at a great deal of authority on this question, over 18 days in the Court of Appeal, the court distils down the issue. Page 347 D of the bundle numbering. Summarising lots of authority the court says:

> "Thus, the effect of Salter J.'s decision was that if a foreign judgment is to be enforced in this country against a corporation, it must be shown at that the relevant time (a) the corporation was carrying on business, and (b) it was doing so at a definite and 'to some reasonable extent permanent place'."

That is just to show you why we get into the argument in *Adams v. Cape*. I do not submit the context is the same, but Mr. Beard sought to suggest it was really about something

completely different, but at the end of the day the Court of Appeal is trying to apply those words.

The second point he made related to bundle p.356 which is where the Court of Appeal set out its ten factors that are likely to be relevant. Essentially, Mr. Beard hedged his bets a little bit here and said something like: if these are somehow a relevant test we have satisfied it anyway in this case. Our respectful submission is that that is a hopelessly untenable proposition. What you see on p.356 in that last long paragraph is a list of ten factors. The only two materially that have been considered here are (e) – what degree of control is there? Then, over the page (i) – whether the representative makes contracts with customers or other third parties in the name of the overseas corporation. Of course, you appreciate from the confidential material what the answer to that question is, and I showed you yesterday, just to remind you, at F what the court said is the fact that a representative never makes contracts in the name of the overseas corporation must be a powerful factor, so it cannot really be sensibly said that they have addressed their mind – of course, they said it is not relevant, so plainly they have not addressed their minds to it – but it cannot be sensibly submitted that if *Adams v Cape* is the right approach that somehow this decision is in accordance with it.

The final point I want to make on *Adams v Cape* relates to the findings of fact that were actually made in that case, and it is at p.364 of the bundle. The plaintiffs lost, the court decided the Judgment was not enforceable, and that in effect the HeadCos were not carrying on business through the subsidiaries. But, it is worth just looking briefly at the reasoning at (c) to (e) on bundle p.364. Just above B the court said:

> "The plaintiffs, however, submitted that Cape's control extended to the day-to-day running of NAAC [the American subsidiary]. They challenged the finding of fact made by Scott J that Mr. Morgan was in executive control…[We further examine the facts and we say] Our conclusion, shortly stated, is that the finding was justified by the evidence. A degree of overall supervision … was exercised … as is common in the case of any parent-subsidiary relationship … In particular, Cape would indicate … the maximum level of expenditure and would supervise the level of expenses incurred by Mr. Morgan. Mr. Morgan knew that he had to defer in carrying out the business activities of NAAC to the policy requirements of Cape."

Skipping down further, half way between D and E:

> "There is no challenge to the Judge's findings that (a) the corporate financial control exercised by Cape over NAAC in respect of the level of dividends and the

> level of permitted borrowing was no more and no less than was to be expected in a group … [and] (b) the annual accounts of NAAC were drawn on the footing that [the] … business was its own business …"

Obviously, I do not want to overstretch the point but the factual findings are, to some degree, at least, illuminating.

With that, if I may, turn briefly to Ground 2. Mr. Beard was keen to stress that the Competition Commission's findings must be read as a whole and that the Tribunal should not focus on isolated paragraphs, but this is an argument that the applicants simply cannot win in these kinds of proceedings. If it challenges broad swathes of the report, the reply will inevitably be that you are trying to re-run the merger inquiry. If it challenges isolated passages the complaint is it is guilty of cherry-picking. But, what we did instead therefore was focus on a core empirical issue in the case which is namely whether Metlac was aggressive on price. I would just like to show you, I am afraid not for the first time, the paragraphs to rewind you back through the reasoning, to show you why this is undeniably central and we have undeniably challenged the critical paragraphs. If you go to the report, please, at p.341, para. 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 Akzo Nobel and Metlac are currently qualified to supply … are likely to increase post-merger."

Rewind back, please, to paras. 9.12 and 9.14. 9.12 in the third line:

> "… we are of the view 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 to 8.161)."

Then, again, in 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. As explained in paragraphs 8.127 to 8.161 Metlac currently constrains Valspar and PPG …"

8.127 to 8.161 is the passage in the report that we have focused on, and that is because that is the core of this essentially empirical issue: does it or does it not compete aggressively on price?

It is also right for me to say that in both our notice of appeal and in our skeleton argument we asserted that if we succeed in our challenge in this respect the decision cannot stand.

That was at para.118 of the notice of appeal and in our skeleton, para. 121, I think I said again yesterday that it has never been disputed, so whilst Mr. Beard has pointed to a whole range of other analysis and sections and considerations, the question that you are invited to consider under this head is whether those paragraphs contain sufficient analysis, taken, of course, with the analysis that goes with them.

One of our core points, as you heard me develop the case yesterday is that the Competition Commission erred in eliding evidence from FCG and evidence from B2E. Mr. Beard's essential response to that submission is to point to what he called Metlac's business model, and, as he described it, that was a model of low cost and aggressive pricing. But as to low cost, that is an issue that the Competition Commission simply has not investigated. May I show you one reference in the report for that at p.323, para. 8.196. It says:

"We have not been able to compare cost information for Akzo Nobel and Metlac."

Although, in fairness, it also says: "We note that there is a general industry perception that Metlac is a low cost producer." It is hard to know what that would be based on given the usually confidential nature of that kind of information. So that is low cost, that cannot help.

THE CHAIRMAN: But what about 8.193?

MR. WARD: Sir, this is a finding about whether the strategy of low pricing is sustainable.

THE CHAIRMAN: Yes, that is the context of it.

MR. WARD: Yes, absolutely, and our point on that is very simple. It begs the question of whether there is a strategy of low pricing which again takes us back to the section of the report that we are actually challenging. But I am just making a separate point here, which is if this business plan is based on low cost, low cost is not an issue that has ever been investigated. The other element in the business plan is supposedly aggressive pricing, but this is where the argument just becomes circular, because that is exactly the issue that we are seeking to investigate, and the difficulty is that what has happened here is the Competition Commission has found two different markets for a whole range of different reasons, FCG and B&B, and it has simply elided evidence from one to the other. As Mr. Allan said yesterday when we were discussing *Schneider,* if the Commission wanted to rely on factors from outside the B&B market we do not say it is impossible, but to use your words, Sir, you have to consider if it is appropriate. In other words, there has to be a rationale for reading that material across. Alluding to this business plan is, in our respectful submission, just to beg the question.

Another point that Mr. Beard threw into the mix was about effects on potential competition, and he showed you part of the material upon that, but unfortunately not the critical

conclusion, so I would like to take you to that very briefly. That is at p.361 of the report. Mr. Beard showed you 9.152 and 9.153 where issues are raised about this. What he did not show you was 9.154 and 9.155. Above the confidential bit he said:

> "However, we did not believe that such entry into BPA-NI … will occur very soon. That said, a number of obstacles to Metlac's entry which we saw have changed somewhat …"

- and then there is some confidential material. Then at the end it says:

> "… we do not currently have sufficient clarity to be able to state that entry is sufficiently certain and sufficiently imminent such that its removal would, on its own, give rise to significant unilateral effects in the B&B market.
>
> 9.155 However, we considered that the risk that the merger removes the potential entrant from B21 to BE reinforced our conclusion that the merger will result in unilateral effects in the B&B market."

An obvious point that we made in our notice of appeal is that you cannot reinforce something that is not there, so that cannot help the Competition Commission if it is wrong on its core finding about pricing. In fairness to the Commission it actually accepted that and conceded the point its defence and, for your note, that is at para.174(b) of the Competition Commission's defence. So potential competition is of no assistance.

I will now turn very briefly to a few points in reply on the analysis itself. You had all our submissions yesterday.

MR. BEARD: I am sorry, just before Mr. Ward finishes off, just on that he cited this paragraph in the defence. It is important to stress that the point made in the defence at 174 is to do with B2I and BE, not B2E. The potential competition issues in relation to B2E are dealt with in paras. 9.152 and 9.153. 9.154 and 155 are to do with B2I and BE which are the parts of the market in which Metlac is not at the moment. So there are two dimensions to potential competition and I do not want Mr. Ward to proceed on the basis of a concession he supposedly says is made in the defence which is not.

MR. WARD: All right, I will just read the words we rely on in the defence, and I will leave it to the Tribunal. "It is admitted that the Competition Commission's findings concerning a loss of potential competition in B2I …" I am so sorry, Mr. Beard is actually right, and I apologise unreservedly, it is about B2I and BE, but the point is good whether it is conceded or not. I recant my apology ---- (Laughter)

THE CHAIRMAN: Go out and come back in again and we will start again.

MR. WARD: What they say is:

"It is admitted that the Competition Commission's findings concerning a loss of competition in the B2I and BE market segments would not of themselves support an SLC finding, and that is clear on the face of the report."

As Mr. Lindsay very helpfully pointed out to me a moment ago it is in those segments that the issue of potential competition arises. Actual competition is B2E

MR. BEARD: No.

MR. WARD: Well, if we have that wrong perhaps Mr. Beard can just reply. I do not want to spend a lot of time on the pleadings. Our submission is that it is perfectly clear that you cannot offer support for a finding that is not there. Our primary case is the finding of loss of actual competition is not made out. I am sorry, we have taken up too much time on that.

Let me go now to the substance of this part of the analysis. On the Competition Commission's analysis of customer views we were really making a simple point, which is that only two of the B2E customers expressed any view, and those views were polar opposites. I just hope you can recall without mentioning their names. As they were polar opposite views that just not tell you anything useful about B2E.

The issue of sampling bias, as we called it here, was not about the questions that were asked or even who the questions were asked of, it was about the finding that was made; and the finding that was made was only about Metlac's customers. There was not a finding more generally about other customers, other customers who might not have bought from Metlac, who might have had reasons for thinking Metlac was not a good proposition.

Use of Metlac's prices as a stick, Mr. Beard's defence was essentially to say, "Well, this question was put as a follow up question rather than in a questionnaire proper", as if that somehow accounts for why the question is completely loaded. But, obviously, the same standards of fairness and good practice must apply whether the question is in a questionnaire or in an email, which seems to be the main point of distinction. He said, "Well, the responses were not skewed by the question", but that of course entirely begs the issue. Unless you ask a fair and open question you do not know what answers you will get back.

THE CHAIRMAN: Sorry — can I just take you back briefly, because I just want to clarify the point in relation to responses from only two customers in the B2E segment.

MR. WARD: Yes.

THE CHAIRMAN: And, just to ask for your comments on 9.43(c) page 338 in the bundle, and it is there is another customer.

MR. WARD: Line (c), yes, the customer at line (c).

THE CHAIRMAN: The other customer referred to there.

MR. WARD: Yes.

THE CHAIRMAN: Who does not seem to appear anywhere else in the report, but it does appear to express some views. I just wanted your observations on those, if you had any.

MR. WARD: Yes, may I just briefly confer, make sure I get this right. (After a pause) I am sorry, sir, if you will just give me a moment. Sir, the core point about this is that this particular customer was not a B2E customer at that time. So these observations do not relate to B2E.

THE CHAIRMAN: I understand that, except it says that it has more bargaining power in relation to B&B, and the only overlap area within B&B is B2E. I am just trying to clarify what you are —

MR. WARD: My point is, it is customer views, but customer views not derived from experience in B2E itself.

MR. ALLAN: Is that not what line 43 is addressing? Of four customers active in B2E, (a) (b) and then the one we are thinking about, is on the list. Are you saying that is wrong?

MR. WARD: Yes, they are active in B2E but just not buying from Metlac. That is the point.

MR. ALLAN: But then the point the chairman makes I think is what they are saying about B&B more generally would seem to bear on B2E.

MR. WARD: Yes. Well, so, that is right as far as it goes. Where that takes us, then, is to the final part of the analysis, the Competition Commission's own price comparison. And we essentially pointed out the striking fact that the confidential material in 8.152, just to remind you, p.314, was startlingly at odds with the rest of the analysis, and yet the Competition Commission had decided to place no weight on this, even though — even though — it was able to be satisfied that the price comparison carried out by the Bundeskartellamt was sufficiently robust to rely on. And the point we made was, "Well, surely you could have taken the same steps to satisfy yourself in this case".

And Mr. Beard's response firstly, of course, was to say, "Well, we have all the discretion we need to do it however we want", but our answer to that is to say, "But look, here was an opportunity to get some objective data across the market". And then he says, "Well, you yourselves criticise the adequacy of this exercise", and he handed up a paper to show you. And that is of course true. But it is also true to say that AkzoNobel was extremely critical of most of the Competition Commission's analysis. But what we are stuck with here is that in certain respects the Competition Commission itself at least was satisfied. And if it was satisfied with price analysis conducted by the Bundeskartellamt, we simply submit it ought

to have taken the same steps to satisfy itself about its own. And in short what that meant was going to the customers.

I have two more brief topics to cover. Firstly, service levels. The point is a short one. It is clear from the evidence that service levels are particularly important in B2E. But the Competition Commission's analysis simply does not distinguish between B2E and FCG, so it is a further manifestation merely of the same point.

On innovation, there is just nothing there. What we heard Mr. Beard explain is that Metlac is a recognised innovator; that there is innovation at the moment particularly in respect of BPA-NI and that there would be a reduction in participants in the market from four to three, therefore there is a reduction in innovation. But it is just not that simple. The question that the CC had to ask itself was whether in fact this merger would reduce innovation in the market place. It is perfectly possible that the merged R&D departments would be stronger not weaker. It is just not self-proving that because you go down from four to three, innovation is weakened.

And unless there are any questions, those are the submissions for AkzoNobel.

THE CHAIRMAN: No. Thank you very much. Thank you all for your assistance. We will, of course, reserve our decision and you will be informed when it is ready for circulation.