IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1271/4/12/16 & 1272/4/12/16

Victoria House,
Bloomsbury Place,
London WC1A 2EB

24th January 2017

Before:

HODGE MALEK QC
(Chairman)
WILLIAM ALLAN
PROFESSOR COLIN MAYER CBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

INTERCONTINENTAL EXCHANGE, INC Claimant

- and -

COMPETITION AND MARKETS AUTHORITY Defendant

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THE CHAIRMAN: Yes, Ms. Demetriou.

MS. DEMETRIOU: Members of the Tribunal, I will start with ground 1, which is the ground relating to the counterfactual and the new agreement, of course.

We say at the outset that it is very revealing that the applicant's very first ground does not seek to challenge the CMA's reasoning and conclusion on the merger, but instead latches on to a very subsidiary point in the analysis, namely the treatment of the new agreement in the analysis of the counterfactual.

You will have seen from our skeleton argument and from our defence that essentially, broadly, we have two answers to this ground. The first answer is that it is irrelevant, it goes nowhere, and the second answer is that in any event, substantively the applicant is wrong.

I am going to deal with the second way in which we put it first, so I am going to give you our substantive answers first to the various points raised by Mr. Harris, and then I will go on to say in any event this is all irrelevant.

I am going to take ground 1(b) first, which is Mr. Harris' rationality challenge to the CMA's conclusion. This, we say, is an impermissible challenge to the merits. The question for the Tribunal is was the CMA's decision supported by evidence, by probative evidence, and plainly it was.

Just to recall for the Tribunal, the evidence that was before the CMA, it was as follows: first, the new agreement was entered into five months after the merger was concluded; second, there had been very little cooperation between the parties during their 15 years of co-existence before the merger. Indeed, the parties had found it difficult to collaborate.

Could I just remind the Tribunal of the CMA's conclusion in the report on that point. If you look, for example, at paragraph 7.113 of the report, there you have the CMA's conclusion about the lack of collaboration between the parties pre-merger.

THE CHAIRMAN: Do you deal with the 2013 agreement in the report?

MS. DEMETRIOU: The 2013 ...?

THE CHAIRMAN: Agreement.

MS. DEMETRIOU: We do not deal with -- the earlier agreement entered into?

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Can I come back to that point?

THE CHAIRMAN: Yes. I cannot remember whether it is just in your defence, or is it something that was referred to in your report?

MS. DEMETRIOU: Can I come back and answer that question just in a moment?

In relation to the lack of collaboration between the parties, the conclusion at 7.113 is reached on the basis of the parties' interim documents, which are summarised in the preceding paragraph, 7.107 onwards. Just to give the Tribunal a flavour of some of the documents, if you would take up our defence, the CMA's defence, and turn to annex 5 to that defence, and what you have here at annex 5 is a document entailed "Trayport business snapshot" dated May 2014.

Then on page 3, last bullet point:

[***Text redacted***]

Then moving forward to tab 13 --

THE CHAIRMAN: Just give me the page again?

MS. DEMETRIOU: Sorry, that is page 3, last bullet point. Then annex 13, page 7.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: You see there various bullets, and under the second main bullet, third sub-bullet:

[***Text redacted***]

THE CHAIRMAN: Just show me where that is.

MS. DEMETRIOU: That is tab 13, page 7, under "Key challenges". This is an ICE document, "Strategic objectives", and there is a bullet:

[***Text***

redacted]

So this is just a flavour of some of the documents that the CMA was looking at when reaching its assessment that the parties had not been interested in collaborating.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Now, the --

THE CHAIRMAN: Do we have a date for this document?

MS. DEMETRIOU: I am so sorry, let me just double-check that.

THE CHAIRMAN: Because it talks about a road map 2014 onwards.

MS. DEMETRIOU: There's a road map, exactly. I am not sure we have a date for the document, but again that is something I will double-check.

MR. HARRIS: I just notice as well that on my copy it says "Entire document confidential information". I know we have read something out, but that is how it is marked.

THE CHAIRMAN: But you cannot help us about the date.

MR. HARRIS: I can try to find out.

THE CHAIRMAN: Can you?

MR. HARRIS: Yes.

MS. DEMETRIOU: The applicant essentially makes to arguments, it is clear from Mr. Harris' oral submissions. So he says that the CMA's conclusion that the agreement should not form part of the counterfactual was irrational having regard to the emails of 7 and 13 May that were before the CMA. Then he makes a second point, which is a new point, but I'm not taking a point on that, that the CMA acted unfairly in not specifically putting to the parties that it considered that no agreement had been reached as to the scope of the new agreement. So those are the two points on which Mr. Harris focused in oral argument.

We have four responses essentially to those points. The first response is that the CMA's interpretation of the two emails of 7 and 13 May was entirely rational. These were email discussions at a relatively high level.

THE CHAIRMAN: There were no other documents earlier than that date, were there?

MS. DEMETRIOU: No other documents. This was the sum of the contemporaneous evidence as to the negotiations between the parties.

If you would turn up again the --

THE CHAIRMAN: What is striking -- I am not sure whether they exist -- is that it is said the negotiations started in February, and then these are the only emails that were produced.

MS. DEMETRIOU: Yes, and you will have seen that the CMA asked specifically for any other contemporaneous documents but none was supplied, and it is not at all clear why, for example, the email of 14 May, which is part of the same chain, was not simply given to the CMA by the parties. But ultimately that was their choice.

THE CHAIRMAN: Yes, and what is the date when GFI said "You have got to stop these negotiations"? Is that in the chronology?

MS. DEMETRIOU: I think it is 23 June or --

THE CHAIRMAN: It is the end of June, is it, yes.

MS. DEMETRIOU: 23 June.

THE CHAIRMAN: Okay, thank you very much.

MS. DEMETRIOU: There is nothing in terms of contemporaneous documents between 13 May and 23 June.

Just going back to the emails relied on, the emails of the 7th and 13th, which are at annex 2, so it is tab 2 of the first notice of appeal bundle.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: I have got to be careful because this is highlighted as being confidential information.

But could I just ask the Tribunal to note the following points --

THE CHAIRMAN: Where am I looking at?

MS. DEMETRIOU: You are looking at tab 2. This is appendix 2, just after where the decision was to the first notice of appeal. So it is the first notice of appeal, tab 2. So it should be the second tab behind where the decision is, but you may have taken something out.

THE CHAIRMAN: That is fine.

MS. DEMETRIOU: And you will see the emails of 7 May and 13 May.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Could I just ask the Tribunal to note in particular the following points. So if you see the first paragraph, and the bottom line of the first paragraph, the words in brackets and the words immediately before the words in brackets. So what is being said here is this is how it could be.

THE CHAIRMAN: Yes, exactly, yes.

MS. DEMETRIOU: Then the words highlighted by Mr. Harris in the penultimate paragraph on this page about a consensus across "our team", of course that is the Trayport team. So that does not show that there is a consensus between Trayport and ICE. It is talking about the Trayport team, and then you see that by the final paragraph on the first page, which is talking about going at the pace of ICE.

So I would ask the Tribunal to note those points.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Secondly, the second point I wish to make is that if you keep this bundle open and turn to Mr. Bennett's witness statement, which is at tab 12.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: There is a very important piece of evidence in Mr. Bennett's statement. If you look at paragraph 9 of his statement, which is on page 4, you see this.

There he says that in late May, so late May:

> "David Peniket, President and Chief Operating Officer, ICE Futures Europe, Chuck Vice, President and Chief Operating Officer of ICE Inc, Chris Edmonds, SVP Financial Markets, ICE Inc, and David Goone, Chief Strategy Officer, ICE Inc, gave me approval to agree a deal with Trayport, including paying a substantial fee for connectivity. In my view ..."

This is critical:

> "... this was the significant change which made an agreement with Trayport not just possible but probable."

THE CHAIRMAN: Yes.

MS. DEMETRIOU: So what we have there is the applicant's own witness saying that it was only in late May when sign-off was received from senior persons in the ICE group that the new agreement became likely.

That is, in our submission, fatal to the applicant's case because of course the CMA only had the emails of 7 and 13 May; nothing had been provided in terms of documentary evidence from late May at all, and it also puts in perspective the email of 14 May, which was relied on by my learned friend.

THE CHAIRMAN: Is it true that the substance of what is said in paragraph 9 was provided to the CMA through the submission of 1 June at the ICE hearing --

MS. DEMETRIOU: No. So what is said, it is not Mr. Bennett that said -- so that's Mr. Heffron's evidence.

THE CHAIRMAN: I am just looking at paragraph 22.

MS. DEMETRIOU: Sorry, of Mr. Bennett's statement?

THE CHAIRMAN: Yes. It says:

> "Except as stated in paragraphs 8 and 15 above, the substance of the account in this witness statement was given to the CMA."

All I am asking is whether that is accurate in relation to paragraph 9.

MS. DEMETRIOU: No, so when you look at the transcript and the parties' submissions, you do not see anything about paragraph 9 and sign-off being received in late May in those documents.

THE CHAIRMAN: I couldn't see it.

MS. DEMETRIOU: No, it's not there. If it is there, then my learned friend will point to it, but we haven't seen it.

THE CHAIRMAN: Yes, all right.

MS. DEMETRIOU: So that is the second point.

The third point, which demonstrates the rationality of the CMA's conclusion, is that once discussions resumed following the merger, it took five months of negotiations for the new agreement to be concluded. We see that, for example, at paragraph 15 of Mr. Bennett's statement. So if this had been a fait accompli, as the applicant now suggests, then we say that the parties would have reached agreement much more quickly.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: And the fourth point that I advance is that there is no procedural unfairness here. The CMA asked the parties to provide it with contemporaneous evidence, yet the parties did not do that beyond the emails of 7 and 13 May. But what is clear --

THE CHAIRMAN: Can you show me the request from the --

MS. DEMETRIOU: So that is recorded in the annex to our skeleton argument.

THE CHAIRMAN: Yes, let's have a look.

MS. DEMETRIOU: In the notes of the call. So it is the additional documents bundle tab 2.

THE CHAIRMAN: Yes, I have got that, yes.

MS. DEMETRIOU: At the end of that, appended to our skeleton argument, are the notes of the call. If you turn to page 2 of the notes.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Then do you see halfway down there under "CMA comments"? So one of the things that they are being asked to corroborate is, you see above that:

> "ICE told us that new agreements related to negotiations between ICE and Trayport which commenced in the first half of 2015 ... changed its policy."

So what is being said is give us contemporaneous documents to corroborate this.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: So fourthly, in relation to unfairness, we say no unfairness because what's crystal clear, including, apart from anything else, in the CMA's provisional findings, is the CMA's provisional conclusion that the new agreement was not part of the counterfactual. So the parties were very plainly on notice that the CMA was against them on this point and the CMA had asked for contemporaneous evidence and they did not produce it.

What is said against me is, ah well, the provisional findings did not refer to you being against us to the scope of agreement. But what we say to that is that this was only one of the factors taken into account by the CMA, and the duty of fairness just required the CMA to explain the gist of the case against it and put the parties on notice that the CMA was against them on this point. It did not require them to analyse every facet of the CMA's reasoning.

So it was simply the parties' choice not to produce further evidence. In any event, had it produced the email of 14 May, that would not have been an answer because we see that from paragraph 9 of Mr. Bennett's statement, because sign-off was still required and that only happened in late May.

THE CHAIRMAN: I'm sure you have seen it -- I do not know whether it is confidential -- but when you look at the products in the new agreement, there are six products, including 5 and 6, which do not feature in the email exchange.

So whilst oil is excluded as per the understanding in May, when you actually look at the agreement that was signed it has got two categories of product which are not in the May agreements, which is an indication on one view that the negotiations hadn't actually got as far as it is being suggested.

MS. DEMETRIOU: Sir, yes, and there are other changes.

THE CHAIRMAN: You do not take that point?

MS. DEMETRIOU: We do rely on that point and that is part and parcel of the five months. So the five months were not spent twiddling their thumbs, there were further negotiations that went on and there are other aspects of the final version of the new agreement which do not correspond, including the price paid -- which do not correspond to the picture protected in mid May.

THE CHAIRMAN: Yes, I can see what the differences are.

MS. DEMETRIOU: Yes. So in short, we say that this is for all of those reasons an illegitimate challenge to the merits of the CMA's decision and that the CMA had ample material on which to conclude rationally that the new agreement was unlikely to have been entered into absent the merger.

So those are our points of response.

THE CHAIRMAN: But if we take the view -- I'm not saying we do -- that you should have indicated to ICE the oil point --

MS. DEMETRIOU: Yes.

THE CHAIRMAN: I'm not sure I understand, does that undermine the whole decision in the sense that one plank of your evidence goes?

MS. DEMETRIOU: Absolutely not. So even putting the test that would have to be applied at its highest, which is Mr. Harris' point that we would have to show that the decision would inevitably have been the same, we say for all the reasons I have given that that point goes nowhere.

So there is the point that you just made to me, sir, about the lack of correlation in any event on scope between the final agreement. But there is also the point in paragraph 9 of Mr. Bennett's statement where he says it does not matter what happened in a sense. He says it does not matter what happened on 14 May, you can ignore all that because what matters was the final sign-off at the end of May.

So it is not a case of parties simply being able to show the CMA the email of 14 May because on Mr. Bennett's own account that is not important.

THE CHAIRMAN: Do you accept that the Derbyshire test applies in that respect?

MS. DEMETRIOU: Well, before I concede that, can I think about that a little further and come back. But we say even assuming that it does -- and I will come back to confirm whether or not we accept that -- we say that it is met in this case for the reasons that I have given.

THE CHAIRMAN: Yes, okay.

MS. DEMETRIOU: We certainly say --

THE CHAIRMAN: You say even if we take the view that the oil point, let's say, should not have been, one of the factors, for whatever reason, you say that does not affect your assessment that it was more likely than not, absent the merger, this agreement would not have been entered into.

MS. DEMETRIOU: That is quite right, on the evidence produced to the CMA at the time. We say on any view, but certainly the relevant test for the Tribunal is what was the CMA looking at at the time, and was it rational to reach that conclusion.

We also say that the duty of procedural fairness certainly does not require every single point, possible point, to be extracted and put to the other party; they need to be told the gist of the case against them, and the gist of the case against the parties here was fairly and squarely put in the PFs, which is that the CMA did not accept on the evidence that the new agreement was properly part of the counterfactual, and that is more than sufficient to satisfy the duty of procedural fairness on the CMA.

THE CHAIRMAN: Okay, thank you.

MS. DEMETRIOU: I would like to turn now, briefly, to look at grounds 1(a) and (c). So starting with 1(a), what is said here is that the CMA wrongly asked itself whether the new agreement would have been entered into on its current form and not whether ICE would have become one of Trayport's normal venue customers. That is the way it is put.

Just to remind ourselves of the relevant passages in the report. So it is paragraph 6.30 and 6.31. Those are the key paragraphs.

Bearing in mind that the applicant is quite rightly no longer taking a point on the standard of proof, what you see in paragraph 6.30 are two conclusions. The CMA addressed both question. First of all, it considered whether the negotiations would have been successfully concluded; in other words, whether any agreement would have been entered into absent the transaction, and found that this was unclear.

THE CHAIRMAN: What does that mean? As I understand Mr. Harris, he does accept that overall you were applying the right test, which is the balance of probabilities. I fully understand why he has made that concession, but I am not sure whether that concession actually goes further to the extent that what is unclear, i.e. the second sentence in 6.30, whether he accepts that applying the balance of probability test.

MR. HARRIS: You are quite right, sir, I do not.

THE CHAIRMAN: I don't think you do. I hear what you say about that one point.

MS. DEMETRIOU: Do you mean the first sentence -- so the first part of the analysis.

THE CHAIRMAN: I think we all accept that 6.31, when you are saying we did not consider it sufficiently certain that the new agreement in its current form would have been entered into absent the merger, we all accept that is applying the balance of probability test, which is correct.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: What is not accepted by Mr. Harris on behalf of ICE is that was the test you were applying in the second sentence of 6.30.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: Where you say:

> "As such, it is unclear that the negotiations would have been successfully concluded in circumstances where funds were not being ..."

Et cetera.

That is, I think, a key point between you that we need to bottom out.

MS. DEMETRIOU: We have two answers to that.

THE CHAIRMAN: Okay.

MS. DEMETRIOU: So the first answer is that the CMA was indeed applying a balance of probabilities test because that is the test which it accepts, in assessing the counterfactual, that it has to apply. We see that, for example, at paragraph 6.1 where the CMA quite properly says that it would typically incorporate into the counterfactual only those aspects of scenarios that appear likely on the basis of the facts available to it.

THE CHAIRMAN: I'm sure that is one of the reasons why Mr. Harris made the concession that he did. There is that, and there is another passage which makes it clear that you were mindful of what the correct test was, I think. But the point is that whilst at 6.31, it is conceded you have got the right test, the wording in 6.30 is, let's say, less strong, where you say "it is unclear".

MS. DEMETRIOU: Sir, I understand the point, but my answer to it is twofold. So the first answer is that in reading it, then it is not for the Tribunal to construe this like a statute, and you do have to read the document as a whole. You will see from paragraph 6.1 in particular that the CMA was there directing itself properly, and so when interpreting a word like "unclear", then the proper, the natural interpretation of that word, in light of the direction that the CMA has properly applied in paragraph 6.1, for example, is that it is applying a balance of probability test. To take any other view is attempting to read this like a statute and not taking a fair view of the totality of the CMA's reasoning. So that is my first point.

But my second point is even more fundamental and it is this, which is that if you focus on the words in the second part of paragraph 6.30, what the CMA was considering there was on a balance of probabilities -- and that is not disputed -- is whether the final terms would have been materially equivalent to the terms negotiated in the new agreement. So that is what is being considered.

What the applicant says is that what the CMA should have considered is whether or not ICE would become a normal customer, a normal venue customer of Trayport.

THE CHAIRMAN: Exactly.

MS. DEMETRIOU: We say that is exactly the same thing. There is no distinction between entering into an agreement like this, which is a customer supplier-type agreement on materially similar terms to being a normal venue customer. There is just no distinction between those things.

THE CHAIRMAN: To me -- and I am just speaking for myself -- the key thing is, is it going to be a normal customer, and secondly, for what products? You can be a normal customer for one product, let's say iron ore, and that is not going to make a huge difference to anyone. But you can be a normal customer for oil, which will make a massive difference. But that is something you are excluding in any event.

But I understand the point you are making.

MS. DEMETRIOU: Sir, with respect, that is a point in my favour because it shows that the concept of a normal venue customer is meaningless in the abstract and what you have got to look at is, first of all, the range of products.

THE CHAIRMAN: That is the key thing.

MS. DEMETRIOU: That is the key thing, and also the price because if actually the price were completely unrealistic, that would not be a normal venue customer relationship. So what is being said by my friend is, oh, this was all at arm's length, et cetera, et cetera. But that is why it is important to look at whether the terms were materially equivalent.

THE CHAIRMAN: Is price that important, because if at the end of the day you turn on your screen and you are getting ICE prices coming up, does it really matter what the price is?

MS. DEMETRIOU: Well, it might matter to the extent that what my friend is saying is that the key question was whether or not ICE would be a normal venue customer. When you are looking at normal, that means assessing the normality of the relationship between ICE and Trayport against some kind of norm. So that is why the CMA here is saying you have to look at whether the terms are materially equivalent, otherwise this concept of a normal venue customer is meaningless.

So our second point is that there is simply no difference between what the applicant is saying the CMA should have done and what it actually did, which is looking at whether or not it was sufficiently certain that the agreement would have been materially equivalent to the terms negotiated in the new agreement.

Mr. Harris cannot be saying that the CMA had to identify whether the terms would be exactly the same because, as we know, they were not. The key question was: was this agreement going to turn ICE into a normal venue customer of Trayport. That is what Mr. Harris says, and you can only look at that against some kind of a standard, and the standard chosen by the CMA is would it have entered into this agreement or a materially equivalent agreement to this agreement.

So we say there is no difference between what Mr. Harris says the CMA should have done and what it actually did.

So those are our two answers to that point.

Now turning --

THE CHAIRMAN: "Materially equivalent", for me it is what is going to come up on the screen and what products are you talking about. Those are the really important factors when you are trying to look at the impact of all of this on other people, as opposed to between ICE and Trayport inter se, and that, you know, it is a fact that the products were not the same.

MS. DEMETRIOU: Yes, that is right and that is a point in my favour.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Because what the CMA was looking at was material equivalents.

THE CHAIRMAN: Okay, I have got your point anyway.

MS. DEMETRIOU: So, sir, just in conclusion on that point, we say that it is clear when you look at section 6 as a whole that the CMA was directing itself properly on standard of proof and that even if that point is wrong, which, of course, we say it is not, that the CMA was asking itself precisely the right question, which is would the parties have entered into a materially

similar agreement. Any other question would simply not have been appropriate in this context and the applicant does not say how it would be appropriate.

Finally, to deal with ground 1(c) -- and I think I can deal with this very swiftly because ground 1(c) raises a gripe about a supposed inconsistency by the CMA of the treatment of the new agreement because it says that the CMA found that the new agreement was not part of the counterfactual, which, of course, is correct in this section. But the applicant says that the CMA also found that it was not attributable to the merger for the purpose of assessing RCBs.

The very short answer is that this point goes nowhere at all, and if you could turn up the section dealing with RCBs, and in particular paragraph 12.197, that is the paragraph complained about by my learned friend. But the short answer is that however this was expressed in 12.197, what the CMA did was to treat the new agreement as being merger-specific for the purpose of analysing RCBs.

Of course, the Tribunal will recall that the parties did not actually provide any proper evidence as to any RCBs of the new agreement and the CMA found -- and you see this at 12.201 -- that there would be no RCBs arising from ICE's ownership of Trayport, and that finding is not challenged by the applicant.

So the short point is that the ground goes nowhere because in approaching the question of RCBs, the conclusion of which is not challenged, the CMA treated the new agreement as being merger-specific. So it assumed it was, even though the parties were saying it was not, so it was making an assumption in the parties' favour, and it considered the RCBs on that basis. So it took into account any benefits arising from the new agreement in concluding that there were no RCBs.

THE CHAIRMAN: In your footnote 331, you state:

"Absent the merger, it was not sufficiently certain ..."

MS. DEMETRIOU: Yes.

THE CHAIRMAN: Is it your case that in fact when you look at the earlier part of the report, section 7, that it was more likely than not that the agreements in the current form would not have been entered into absent the merger?

MS. DEMETRIOU: That is the case in the counterfactual.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: And that is the basis on which the CMA assessed the RCBs. So we say there is no point raised under ground 1(c).

I would like to go back to the question of the relevance of this ground, and we say that ground 1 --

THE CHAIRMAN: Just explain, why do you say then, at 12.197, that they had mischaracterised the counterfactual?

MS. DEMETRIOU: Well, I am not able to give a very clear answer to that question because that depends on exactly what -- I do not know, I can't really give evidence as to what is behind that.

THE CHAIRMAN: No, do not. If it is not within the papers before me I am not --

MS. DEMETRIOU: We say whatever the explanation for that, it goes nowhere because the assumption that was made for the purposes of analysing RCBs was that it was a merger-specific agreement. So any RCBs arising from the new agreement fell to be taken into account.

THE CHAIRMAN: I think it is a reference possibly to 196, the paragraph above. They argued that you adopted a counterfactual where the new agreement was treated as being merger-specific.

MS. DEMETRIOU: I am getting nods from behind me.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: So turning to the point about relevance, we say that ground 1 is wrong for all the reasons I have given. But it is in any event irrelevant, and this provides a very short answer to the various arguments raised by Mr. Harris.

The reason that it is irrelevant is that the new agreement was not found to be part of the SLC. The SLC identified in the report is that the merger would enable ICE, as the sole owner of Trayport, to engage in a strategy of partial foreclosure of ICE's rivals. I have taken you to the key passages when I opened yesterday.

I took you to the key passages of the report which demonstrate that that is the SLC. So the CMA found that in the counterfactual world Trayport would not be owned by ICE and ICE would not be able to control Trayport's strategic direction. So Trayport would therefore continue with its strategy of strengthening its own position by encouraging as much electronic trading as possible.

So that is the counterfactual.

MR. ALLAN: Sorry, Ms. Demetriou, is that question whether the new agreement forms part of SLC in relation to ground 1? Is the question not whether, if the new agreement should form part of the counterfactual, there is an SLC comparing the ownership model with that counterfactual.

MS. DEMETRIOU: Yes, but what we are saying is that the point does not go anywhere if it is correct to say that the new agreement forms no part of the SLC. You can test it this way: so what we say is that if in a pre-merger world ICE and Trayport had signed up to the new agreement, so if they are right on ground 1, then this would logically have made no difference to Trayport's role in promoting competition between venues and clearing houses. So the vice is not -- so what is complained about, what the SLC is, is not that the merger is somehow going to prevent Trayport from enabling ICE's competitors to disadvantage ICE. That is just not the SLC at all. The SLC is all about ICE using Trayport to disadvantage its rivals.

So providing that ICE and Trayport were in separate ownership in the counterfactual, and regardless of whether they had entered into the new agreement or not -- so this is why we say it is irrelevant -- providing they were in separate ownership, then Trayport's fundamental commercial incentive would have still been, even if they had signed up to the new agreement, as set out in the passage of the report that I took you to yesterday.

So it would still have been to encourage as much electronic trading as possible on as many venues as possible in order to maximise the value of the aggregating function that we have seen.

So that would have been the same in the counterfactual whether or not the new agreement had been in place. So the key consideration in terms of the counterfactual is the ownership; it is the ownership of Trayport by ICE which makes the difference and which leads to the SLC.

Had the CMA found that the new agreement was part of the SLC, then, of course, I wouldn't have been able to run this point because then the situation would have been very different, because the applicant would have been able to argue that this part of the SLC, the part that is connected to the new agreement, would have happened in any event because we got it wrong on the counterfactual. But because the new agreement is not part of the SLC, that is why we say this argument does not go anywhere. The very important point to note is that, of course, Mr. Harris agrees with us that the new agreement is not part of the SLC, and we saw yesterday that that is a very fundamental aspect of his vires challenge. You heard him say the new agreement is not part of the SLC and all the CMA has power to do is remedy the SLC, and so it cannot touch the new agreement.

So a very fundamental part of his case is that the new agreement is not part of the SLC, and we agree with that. That is why this ground does not go anywhere at all.

So effectively, to put the point more shortly, if the applicant were right and if the counterfactual should have included the new agreement, it would have made absolutely no difference to the analysis. That is inevitable, adopting that test, inevitable because the new agreement simply formed no part of the SLC. So that is why we say that ground 1 is legally irrelevant to the robustness of the CMA's decision and must fail.

That is ground 1. Could I turn now to ground 5, which is the vires point. Ground 5 of the first NOA and ground 1 of the second notice of appeal.

THE CHAIRMAN: Just hold on one second.

MS. DEMETRIOU: Yes. (Pause)

THE CHAIRMAN: Thank you very much.

MS. DEMETRIOU: Sir, I was going to turn on to look at the vires challenge, which is ground 5 and ground 1 of the second notice of appeal. Could I at the outset just remind you of the key statutory provisions.

THE CHAIRMAN: Just one second.

MS. DEMETRIOU: Sorry. (Pause)

THE CHAIRMAN: So we are going up to issue 5?

MS. DEMETRIOU: Ground 5 and ground 1 of the second notice of appeal, which stand or fall together.

THE CHAIRMAN: Yes, they do, yes.

MS. DEMETRIOU: Can I just remind the Tribunal of the key statutory provisions and they are in the first authorities bundle at tab 2.

There are two provisions to look at. So the first is section 41, which you have seen already, and Mr. Harris took you to these provisions, so the relevant subsections are 41(2), which sets out the duty of the CMA to take action:

> "... such action as it considers to be reasonable and practicable to remedy, mitigate or prevent the SLC or to remedy, mitigate or prevent any adverse effects."

Then at 4:

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

Then if you turn to section 72, this deals with the powers in relation to the initial enforcement order, and you see at subsection (2) that the CMA may:

> "... for the purpose of preventing pre-emptive action ..."

Do various things. So prohibit or restrict the doing of things which the CMA considers would constitute pre-emptive action, and then pre-emptive action is defined at subsection 8 as being action which might prejudice the reference concerned or impede the taking of any action under this part which may be justified by the CMA's decisions on the reference. Essentially, when the IEO was made, you saw that it reflected the language in section 72, so it was expressed in terms of section 72. So what is common ground is that if the CMA had the power under section 41 to require termination of the new agreement, it also had the power under section 72 to require its implementation to be suspended. So that is common ground.

The applicant's case in a nutshell is first of all that the CMA did not find that the new agreement was part of the SLC, so that is the first stage in its reasoning. It says, second, section 41(2) only gives the CMA power to take action to remedy, mitigate or prevent the SLC, and it says the new agreement is not part of the SLC. So it does not seem to come within the powers under section 41(2).

However, Mr. Harris recognises, and he said this very clearly yesterday, that the CMA has a duty, the duty under section 41(4) to have regard to the need to achieve as comprehensive a solution as possible. So it is quite rightly not Mr. Harris' case, and he made this clear yesterday in argument, that the CMA would never have the power in any case to order termination of an agreement such as this, if it were necessary to render the divestiture effective.

But his point is that there is no evidence in this case that the termination of the agreement was necessary to render the divestiture effective. So that is his argument. The relevant reference to the transcript yesterday in which he made those points is page 43, and it is lines 1 to 22 for your note.

We say that that argument is wrong for these reasons. We say that the CMA found, the first step in the analysis is that the CMA found that the SLC would be remedied by requiring ICE to divest itself of Trayport and that remedies falling short of divestiture would not be effective. So that is obviously something set out clearly in the remedies section of the report.

Having found that divestiture was the appropriate remedy, the CMA was required, as Mr. Harris accepts, to have regard under section 41(4) to the need to achieve as comprehensive a solution as is reasonable and practicable. So it was, therefore, obliged to consider how to make the divestiture remedy as effective as possible, as practicable.

Mr. Harris said several times, he asserted that the new agreement had been agreed on arm's length terms. So, of course, is ICE's case, but it was not what the CMA found, and you have seen the relevant parts of the report where the CMA found that it could not conclude that this was the case, could not conclude that a new owner would enter into an agreement like this or that the agreement would have been entered into absent the merger. That was precisely what it found it couldn't conclude on the balance of probabilities.

So in those circumstances and in order to make the divestiture effective, the CMA was entitled to reach the view -- this was a rational finding -- that it should be careful not to saddle any new owner with an agreement -- and the Tribunal has seen the duration of the agreement -- that may not have been concluded on arm's length terms.

THE CHAIRMAN: If the new agreement was entered into on non-arm's length terms, I can fully see where you are coming from. But here you are not actually saying it was on non-arm's length terms. What you are saying is we just do not know.

MS. DEMETRIOU: Exactly.

THE CHAIRMAN: If that is right? What is the burden of proof? What is on the balance of probabilities, because it seems to me what you are saying is we cannot say it is on arm's length terms, we cannot say it isn't. If you said in the report that we consider on rational grounds that this new agreement was not on arm's length terms, I don't think Mr. Harris would have much of an argument. But you are not saying that; you are saying that we cannot satisfy ourselves that it is not on arm's length terms, and in any event you are saying that we would have no objection to a new owner, whoever that may be, entering into a similar agreement with ICE.

MS. DEMETRIOU: That is right, because that would be, of course, on the hypothesis that the new owner was able to determine that this was an arm's length agreement that did not disadvantage it. So you are quite right, and I do not shy away at all from this proposition. You are quite right that the CMA did not make a positive finding that this agreement was not on arm's length terms. It said it couldn't tell, it couldn't decide that question because it is a very difficult question to decide. But what it did decide on the balance of probabilities, what it did decide is that this agreement, or a materially similar agreement, would not have been entered into absent the merger and it was entitled to take that into account.

Can we just turn to --

THE CHAIRMAN: Let's go back. If you have a situation that an agreement is entered into because a merger has taken place, that does not a fortiori mean that that agreement has to be unwound. Do you accept that?

MS. DEMETRIOU: Well --

THE CHAIRMAN: You cannot say every agreement that Trayport may have entered into since its merger which would not have been entered into were it not for the merger has to be unwound. There may be all sorts of contracts that we have entered into that were entered into because of the merger, such as buying certain equipment, but it does not necessarily follow that it has got to be terminated. Surely the test is one that you were trying to apply, which is: is this an agreement that has been entered into in arm's length terms or not.

MS. DEMETRIOU: Sir, can I just say first of all that of course in relation to any merger there are all sorts of agreements that may have been entered into or not, and all sorts of arrangements that have gone to make up the merger. But there is no obligation on the Competition Authority to analyse each of those and determine whether they would have been entered into on arm's length terms.

THE CHAIRMAN: I agree.

MS. DEMETRIOU: Because that would end up placing a completely intolerable burden on the Competition Authority.

THE CHAIRMAN: No one is asking you to take that burden. But the question is that given the practicalities of these mergers, there will be agreements which are perfectly harmless and are entered into on arm's length terms which wouldn't have been entered into but for the merger.

So I think my own view -- I have not spoken with the others -- is that the mere fact that an agreement has been entered into as a result of the merger does not mean that it necessarily has to be unwound. But I accept that if you have an agreement which is not an arm's length, then you would be perfectly entitled to take the view that this is something that should be unwound as part of the divestiture remedy.

But the difficulty -- I am trying to figure out in my own mind -- is how do we deal with the situation where you, as the CMA, are not saying this is a non-arm's length agreement; you are just saying we do not know?

MS. DEMETRIOU: Sir --

THE CHAIRMAN: That is where I have the difficulty.

MS. DEMETRIOU: I understand the difficulty and can I try and answer it in this way.

So what we say is the proper approach is that in circumstances like this, where the CMA is unable to discern whether or not the agreement is arm's length or not, and you can apprehend, you can appreciate, that the analysis required would be an extremely difficult one. It is not simply a question of comparing the terms of agreements to the terms of

Trayport's other agreements because the counterparties might be in very different positions. There may be material differences between them which would require different terms. So it is not a simple exercise. So the question for the Tribunal, we say, in a case like this is that you have to look at what was in front of the Competition Authority. Bear in mind that there is no obligation on it in a mergers case to examine every aspect of something that is connected with the merger and work out whether every aspect was merger-specific or not, and ask yourself the question is what the CMA did rational. We say that is the proper approach. We say it is rational.

Can I take you back to the treatment of this point in the decision, in the report.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: First of all, I just want to put this in context. If you start with paragraph 12.17, you see there a heading "Effectiveness assessment of the divestiture remedy". So that is the main heading, and the analysis of the new agreement falls under that heading. That is the bold heading.

There is now a number of subheadings, and if you move forward in the report, you see a number of subheadings. They culminate in a subheading on page 191, which is "Divestiture remedy: treatment of the New Agreement", but this, of course, is all in the context of effectiveness.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Then you see at 12.75, after the assessment of the new agreement, the conclusions on effectiveness. So this is all part and parcel of the CMA's assessment of the effectiveness of the divestiture remedy.

Then if you look at the reasoning in 12.71, what is being said there is that in section 6:

> "We concluded that it was not sufficiently certain that the new agreement would have been entered into by ICE and Trayport on the same terms absent the merger. Accordingly, it follows that it is unclear whether under alternative ownership the same agreement would have been signed."

So it is reiterating the reasoning that we have just looked at:

> "Given this uncertainty ..."

I accept they are not able to tell one way or the other, but:

> "Given this uncertainty, we concluded that it would be appropriate for any new owner of Trayport to decide whether to accept or reject the terms of new agreement entered into whilst Trayport was under ICE ownership. In order to provide the eventual purchaser with sufficient flexibility to make this decision, we considered that the new

agreement should be fully unwound thereby giving the new owner of Trayport the choice as to whether to negotiate (or not) an agreement with ICE either as part the divestiture process or in the future."

What one sees there is uncertainty by the CMA.

It cannot tell on the evidence in front of it whether it is an arm's length agreement or not.

When Mr. Harris says it is, he is just begging the question; that is not what the CMA found.

It was unable to reach a decision. But the CMA --

THE CHAIRMAN: Can we just go back to 12.71?

MS. DEMETRIOU: Yes.

THE CHAIRMAN: When we look at your assessment of the counterfactual.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: Your conclusion was that on the balance of probabilities the new agreement on materially the same terms --

MS. DEMETRIOU: Yes.

THE CHAIRMAN: -- would not have been entered into absent of the merger.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: That is why you treated it in that way. So we take that as your view.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: Are you saying that the mere fact that it is only entered into because of the merger is the basis for requiring that new agreement to be unwound, or is it that it is your concern that this is a non-arm's length agreement?

MS. DEMETRIOU: Yes, we say the second of those.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: But the second concern, obviously, is affected by the first conclusion.

THE CHAIRMAN: Yes, I can see you can say that they follow.

MS. DEMETRIOU: Yes, but we do not say it follows necessarily. So I do accept the point that you put to me a few minutes ago, which is that you might have agreements which are merger-specific which do turn out to be arm's length.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: But there must be at least some kind of presumption that when you are looking at agreements which are merger-specific that there is a chance they are not arm's length. What is being said here in terms is that the CMA cannot decide. It is unclear, they say, whether this agreement would have been signed under alternative ownership and that it is important to unwind it to give the new owner the choice as to whether to enter into it or

not. One can understand why that is important, because if this is not an arm's length agreement, then what you are doing is conferring a continuing advantage on ICE potentially for many years, potentially in circumstances where an SLC has been found and divestiture, effective divestiture has been found to be the only effective remedy.

So one can see that to render the divestiture effective, if the agreement is not on arm's length terms -- and here the CMA is saying that there is a risk of that happening -- it is important in order to make the divestiture effective that the agreement is unwound. In a sense, ICE's skeleton helps me make the point.

So if you turn up ICE's skeleton argument at paragraph 46, here ICE are saying it is all unequivocally positive, and so on. We say we cannot tell, but if you look at the last couple of sentences:

> "If, hypothetically, ICE were paying under market value for Trayport services, there would be no prejudice to any purchaser of Trayport as the price that the purchaser pays for Trayport will be lower if the income stream generated by the business is lower. It all comes out in the wash."

We say that that is a wholly unsatisfactory answer and we say it neatly illustrates why the CMA's decision to unwind the agreement was rational. Because any new purchaser will find it at least as difficult as the CMA has to evaluate the fairness of the terms of the new agreement and to calibrate the amount paid to reflect the degree to which Trayport is prejudiced by those terms. So the obvious solution to this problem, to this conundrum, is to require the new agreement to be terminated so that the new purchaser could reach its own decision as to whether, and if so on what terms, to deal with ICE.

We say that otherwise, and taking the applicant's suggestion to its logical conclusion, parties could purchase target businesses without notification to the CMA, then they could hobble the business with unfavourable business terms and then insist that these contracts stay in place after a merger.

THE CHAIRMAN: It all depends, because I think in certain circumstances it would be abundantly clear on investigation by the CMA that a certain agreement is not arm's length. So, for example, if the new merged entity decides to have a bulk contract for the purchase of photocopiers to both companies, you can see that that is arm's length. On the other hand, if you have a contract between the two similar to this, you are saying that actually you cannot tell because there is a contract between the two people who have merged and we just do not have the ability to get to the bottom of this issue. Whereas I think Mr. Harris is saying, no, you can. If you had done further enquiries, you could have made an assessment

and take a view one way or the other. You may at the end of that assessment have taken a view that you currently have: we just cannot tell having looking at this information. You can come to a view that having looked at this information and analysed it, these are not arm's length and quite clearly it should go, or you can analyse it and say these seem to be perfectly normal commercial terms.

MS. DEMETRIOU: In relation to that, we say that if that were right, that would be tantamount to imposing a duty on the CMA to carry out that kind of detailed investigation, and we say that no duty exists, that that is simply not what the mergers jurisdiction requires, that the CMA was entitled to look at the evidence it had before it -- and do not forget, of course, that it had asked the applicant for more evidence in relation to the agreement and that had not been provided. But it was entitled to look at the evidence before it and having reached the view on the balance of probabilities that this was a merger-specific agreement, it was entitled to say, "Well, having looked at it all, we are not confident that it is at arm's length, that is unclear, and so, in order to make this divestiture effective, we need to order it to be unwound because the new purchaser is best placed to decide whether it wants to deal with ICE and, if so, how and on what terms."

THE CHAIRMAN: Further to your request on 24 May 2016, when you asked them to provide contemporaneous documents to corroborate what they were saying, which included that the terms were arm's length, what do they give you?

MS. DEMETRIOU: Can I come back? I need instructions.

THE CHAIRMAN: We will take a break now anyway for the transcript writer. We will be back at 12.15.

(12.05 pm) (Short break)

(12.15 pm)

THE CHAIRMAN: One of the things you were going to help me on later on today is what documents did they give you by way of evidence that the negotiations were at arm's length and on normal commercial terms?

MS. DEMETRIOU: So what the CMA had before it were -- and I don't think it got these from the applicant, but it had other agreements between Trayport and other customers, and the CMA examined those agreements but found that, by examining them, it couldn't reach a view as to whether this agreement was at arm's length, in particular because there were differences between those agreements and this agreement, and one of those we have picked up, for example, in our defence. So if you turn up our defence at page 36, it is footnote 113.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: What you see there is that while the new agreement would have permitted further ICE products to be displayed on Joule's trading gateway and granted a licence to ICE to use Trayport's clearing link, it would not have resulted in ICE licensing GV Portal or using the back end software, so ICE's position would have continued to differ from other third party exchanges. So that is one of the points of difference.

The key point is that the CMA looked at the evidence it had, which included the other agreements, and was unable to reach a view, and all of this, of course, has to be seen in the context of the IEO regime. I have taken the Tribunal to section 72 but you see from section 72 that the IEO regime contains broad powers to prohibit agreements where those might prevent, might constitute pre-emptive action because, of course, at that stage the CMA does not know when it is making an interim order, and the purpose -- if I can describe it this way and coming back to a point that the chairman made, the IEO regime recognises that, of course, parties that have merged may carry out things which are on arm's length terms, so it recognises that, but it also recognises that where parties have merged, they may do things which are not on arm's length terms. That is why you have the regime. So what it seeks to prevent, in a precautionary way, is action being taken which may not be on arm's length terms.

THE CHAIRMAN: If you are dealing with agreements with third parties, you would expect normally those would be on arm's length terms, okay? But here you are talking about agreements between the two merged parties.

MS. DEMETRIOU: Exactly.

THE CHAIRMAN: And I think that is one of the differences.

MS. DEMETRIOU: It is a very important difference and you are dealing with an agreement in circumstances where those parties had for 15 years not entered into an agreement. That is the context against which the CMA is looking at this.

Sir, the importance of the point in relation to the IEO regime ties into the question you asked me about documents.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Because you made a comment, when Mr. Harris was making his submissions yesterday, on the question whether or not the order was within the IEO, and you made a comment that what he was doing was presenting a very contentious summary of the facts and you said --

THE CHAIRMAN: He was just giving headlines. I don't think --

MS. DEMETRIOU: Exactly, but it is important to explain what we say about that. What we say about that is that the IEO -- could we turn it up. It is annex 4 to the first notice of appeal.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: This borrows from the language of the Act and you see in the recitals for the purposes of preventing pre-emptive action in accordance with section 72(2), and then at paragraphs 4 and 5 you have the order, or the relevant parts of the order:

> "Except with the prior written consent of the CMA, ICE shall not during the specified period take any action which may prejudice a reference of the transaction under section 22 of the Act or impede the taking of any action under the Act."

Then you have at 5 a similar order. What happened here is that after the IEO was made and without any advance notice to the CMA, the parties entered into the new agreement on 11 May 2016 and the parties informed the CMA on 16 May of that fact, so after they had entered into the agreement and also, incidentally, after Trayport had informed its own customers.

So, to put the point at its lowest, what we have is a position where the parties entered into a major commercial agreement between themselves in the middle of a merger investigation without informing the regulator in advance, although they must have been aware that it was at least -- at least to put the point at its lowest -- strongly arguable that this was a breach of the IEO.

THE CHAIRMAN: What does 5(g) mean? This is:

> "For the avoidance of doubt ..."

MS. DEMETRIOU: 5(g)?

THE CHAIRMAN: Yes. Is that just in relation to customers and suppliers?

MS. DEMETRIOU: I think it must be just in relation to customer and supplier lists of the two businesses. Sir, it is relating to the integration --

THE CHAIRMAN: Okay. So which in 5 do you say is key then?

MS. DEMETRIOU: Well, what we say is that it is really 4 that is the key --

THE CHAIRMAN: I have 4 but you mentioned 5 earlier. I was just trying to figure out --

MS. DEMETRIOU: What I was trying to do -- in showing you 4 and 5, this helps explain the purpose of why these orders are made, which is that you have parties which have merged and what the order seeks to do is recognise that, of course, they have got to carry on their business while this is being investigated and of course some of what they do may well be arm's length activity, which it is not appropriate to curtail, but then what should happen is

that if there is any doubt, so any action which might prejudice a reference, the parties should approach the CMA and ask for consent whether or not to take that action.

So my point is that had they asked for consent, so had they approached the CMA in this case and had they said, "Look, we have got this major new agreement between us and we appreciate that there might be an issue as to whether or not it is at arm's length," which they should at the very lowest have appreciated that might be a point, then what they should have done is approach the CMA and say, "We want consent to enter into it and, by the way, here is all the evidence to show that it is arm's length and why you should give us consent."

Had it done that, then the CMA would have been in a position to analyse all that evidence and take a view. It may well have said, probably would have said, analysing it, that it cannot tell, it cannot tell whether it is arm's length, and this is something which might prejudice the reference.

THE CHAIRMAN: What you are saying is what they should have done is apply under paragraph 4 for your consent?

MS. DEMETRIOU: Yes.

THE CHAIRMAN: And what they will say is, well, they did not think they needed to get consent, will they not?

MS. DEMETRIOU: Can I just deal with that point because that is --

THE CHAIRMAN: I think it is touched upon in the witness statements.

MS. DEMETRIOU: We say that that point is simply wrong on the evidence, and if you look at tab 9, so annex 9 to the first notice of appeal, what you have here is an email to the CMA dated 5 June 2016, so just after the new agreement had been entered into and they had informed the CMA.

THE CHAIRMAN: Yes, you are ahead of me. Where are we?

MS. DEMETRIOU: We are in the first notice of appeal, tab 9.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: So the suggestion that it is somehow -- as Mr. Harris tried to say yesterday -- this point has taken them by surprise and that they never knew that the entering into the new agreement might be a breach of the IEO, if you look at this email, you see there that what is being said is that they will suspend voluntarily the new agreement.

THE CHAIRMAN: They are worried you are going to issue a CMA direction.

MS. DEMETRIOU: Exactly.

THE CHAIRMAN: That is clear from the email.

MS. DEMETRIOU: Exactly. We say what they are doing there is clearly recognising that the CMA might find that the new agreement is a breach of the IEO.

THE CHAIRMAN: Yes, but at that stage the CMA and ICE had already spoken and no doubt words were exchanged and ICE would have been under a clear impression that if steps were not taken by them voluntarily, it was likely that a direction would be given.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: Let us look at the prior position. It is prior to them notifying the CMA of the agreement -- your case must be it was incumbent upon them to come to you and they should have told you.

MS. DEMETRIOU: That is precisely our case because what we say about that is that the IEO is broad, it represents the words of the Act which talk about pre-emptive action which might affect the outcome, and this was a very major agreement that had been entered into five months after the merger against a backdrop -- an agreement between the parties, not with third parties, between the parties against a backdrop whereby the parties had not been in a commercial relationship of this sort for 15 years. We say that to put the point at its very lowest, to put it at its lowest, it must have been -- it should have been obvious to the applicant that this is something that the CMA might have wanted to know about and that it might come within the IEO and that they should have applied for consent, otherwise one wonders what the purpose of the IEO is.

If you are meant to be applying for consent in relation to acts which might end up being pre-emptive, then it is obvious that this kind of agreement between the parties, this kind of major commercial agreement between the parties which they entered into in the middle of the merger investigation, should have been notified to the CMA and they should not have just entered into it without at least notifying the CMA that it was at least arguably a breach of the IEO.

Our point is that when they adopted that, when they adopted that proper course, then they would have been in a position at that stage, no doubt they would have adduced evidence to try and persuade the CMA it was on arm's length and what they wanted to do now is say, having failed, themselves, to adopt the proper procedures, is now complain that somehow the evidence before the CMA was insufficient on which to reach the conclusion, the rational conclusion, that this is a matter which is liable to affect or may affect the effectiveness of the divestiture remedy.

THE CHAIRMAN: If you look at Gordon Bennett at paragraph 13, it shows that he did consider -- someone considered the initial enforcement order, and that it was his understanding from

internal discussions that the order did not prevent negotiations signing of a new agreement so long as it was on an arm's length basis and on normal commercial terms. That seems to be his reasoning.

MS. DEMETRIOU: Sir, yes, that is his reasoning but it is entirely self-serving and it is an unreasonable stance to take because it assumes that it was on arm's length, and it should have been apparent to anyone acting reasonably in the position of Mr. Bennett that the regulator may, at least, have had a doubt about that.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: They have acted in a cavalier way and they now cannot pray that in aid to try and shore up their position in relation to this ground.

THE CHAIRMAN: You are saying that he must have appreciated that this was a controversial thing to do, and he was frightened at the implications of them ringing up and just doing the normal thing and telling the CMA in case they turned round and said, "Well, we do not think this is within the terms of the order", but on the face of what he is saying he did consider whether or not it fell within the order, and he took the view, no doubt having spoken to other people, that it was not caught by the order.

MS. DEMETRIOU: Of course I'm not in a position to doubt the veracity of that evidence but what I can say about it and I do say about it is that that was an entirely cavalier approach to adopt because it should have been evident to anyone in Mr. Bennett's position that this would be a matter that, to put it at its lowest, that might be controversial, or that the CMA might not agree with, given the wide terms the order which reflect the wide terms of the Act.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: Sir, those are my submissions on ground 5 and --

MR. ALLAN: Sir, I am sorry to prolong this discussion --

MS. DEMETRIOU: Of course.

MR. ALLAN: -- could you just help me with the interpretation of the statute?

MS. DEMETRIOU: Yes.

MR. ALLAN: Discussion about section 72 is very interesting but that is dealing with a temporary precautionary remedy, whereas what we are now talking about is the definitive remedy.

MS. DEMETRIOU: Yes.

MR. ALLAN: In relation to 41(2)(b), I almost have the sense that what you are putting to us would require one to read that subsection as to remedy, mitigate or prevent the relevant merger situation, as if --

MS. DEMETRIOU: No.

MR. ALLAN: -- to restore the status quo ante as between the parties.

MS. DEMETRIOU: No, I am not making that argument. We would say that that would not be --

MR. ALLAN: I am sure you are not making it.

MS. DEMETRIOU: We would say no, we would say that that would not be a correct interpretation of the Act. The provision that I am focusing on is subsection (4), so essentially the way that -- the way that we analyse it is to say that what the CMA was doing here in ordering divestiture was ordering a remedy in relation to the SLC, so it decided divestiture was the appropriate remedy to address the SLC, and then it had to consider under subsection (4) how to achieve as comprehensive or as effective a remedy as would be practicable.

MR. ALLAN: That, presumably, has to be with respect to the SLC or, if they explain, arising from the SLC.

MS. DEMETRIOU: That is right, but they have decided -- so the remedy that addresses the SLC is divestiture, and once they have decided that divestiture is the only effective remedy to address the SLC, they have to decide how to make that effective. That can involve all sorts of steps, like appointing a trustee, and so on. All of the individual steps that one might have in order to implement the divesture remedy, they do not all have to be relevant to the SLC. There might be lots of things that you are requiring someone to do in order to divest itself of another company which are entirely unconnected with the SLC, but the key point is you have decided that divestiture is required to remedy the SLC and then a separate stage of the analysis is, "How do we render divestiture effective?" That is why I took you to the structure of the analysis in section 12, which has the big, bold heading, you will recall, which is "Effectiveness of Divestiture" and they then jump through various steps in analysing how to render the divestiture remedy effective. I do not understand -- and it is clear from the transcript yesterday -- Mr. Harris does not disagree with me on this point. He is not saying that every single part of the divestiture remedy has to relate back to the SLC because he accepts that in an appropriate case, if there were evidence, it would be permissible under the Act to require the termination of an agreement such as this, to render divestiture effective but his point is you have no evidence that it was not at arm's length, and that is the point that we have been debating.

Moving on to the second and third grounds in the second notice of appeal, I think I have dealt with, already, in the course of argument in relation to the last ground, the first point we make. The first point we make -- and this is the point that Mr. Harris said is a new point,

which it is not -- is that this -- is that once it is appreciated that the CMA had the power to require termination of the new agreement -- and, of course, here I am assuming I am right on ground 5 on the last argument, on the vires argument, so assuming that the CMA have power to require termination of the new agreement, then we say that it follows from that that it cannot be irrational or disproportionate for the CMA to engage in a valid exercise of its powers, so to require termination of the agreement, so as to restrain a breach of an order that it has validly made.

Grounds 2 and 3 are all advanced in the alternative. Mr. Harris' main point is that there is no vires, but he says even if there was vires, it is all disproportionate, and our very short answer to that is it cannot be disproportionate or irrational if there is power to do it. If, in fact, the IEO was necessary or appropriate because the new agreement was pre-emptive action, and then that was breached, then it cannot be, assuming that there is power to terminate the agreement under section 41, which is the hypothesis for this ground -- assuming there is power to order termination of it, it cannot be irrational or disproportionate to restrain a breach, and that is our very simple first point.

THE CHAIRMAN: You are going back to the point whether or not this agreement was entered into in breach of the order. I would be surprised if Mr. Harris would say that if they have broken the order, you cannot do anything about it. I may be wrong. He may take that point, but his fundamental point is it is not a breach of the order in the first place.

MS. DEMETRIOU: That is the vires point. That is inexplicably linked with the vires point. I accept that.

THE CHAIRMAN: You accept that if it is not in breach of the order this argument does not apply.

MS. DEMETRIOU: If it is not in breach of this order then I cannot make this argument.

THE CHAIRMAN: If it is on normal commercial terms and arm's length, do you accept that it does not breach the order?

MS. DEMETRIOU: No, the question -- that is conflating the question that the tribunal -- that is slightly misrepresenting the question that the Tribunal has to answer --

THE CHAIRMAN: Okay.

MS. DEMETRIOU: -- which is did the CMA take a rational view -- was the CMA's view that it might not be at arm's length rational, and if it was rational, we say that it was, therefore, rational to require it to be unravelled -- so was that decision to require it to be -- to be unravelled, to be terminated on the basis that the CMA cannot tell that it is arm's length or

not, is that a rational decision, and if it is a rational decision, then we say it is within the power of the Act. That is our point in relation to ground 1 -- to ground 5 and ground 1. If we are wrong on all of that, then, in a sense, you do not get to grounds 2 and 3, but grounds 2 and 3 are advanced on the basis that the CMA does have power, did have power, so the decision it took -- the decision it took to order termination of the agreement was within its powers, because it was rational for it to form the view on the evidence it had available and in the circumstances that this might not be arm's length.

THE CHAIRMAN: Sorry to tax you to this -- but if you look at the order --

MS. DEMETRIOU: Yes?

THE CHAIRMAN: -- if, as a matter of hard fact, on the balance of probabilities, it was not on normal commercial terms and it was not at arm's length, there is a breach, and I do not think Mr. Harris disputes that, I think that is the assumption that Gordon Bennett has followed in his reasoning in the affidavit and witness statement that you have just read. If, on the other hand, on the balance of probabilities, it was, in fact, at arm's length and on normal commercial terms, then there is no breach of the order, is there?

MS. DEMETRIOU: That is what I do not accept.

THE CHAIRMAN: I know, but was what you are saying if we take a rational view that it may or may not be on arm's length terms but you just do not know, that, in itself, would amount to a breach of the order?

MS. DEMETRIOU: The starting point is the Act which is reflected in the terms of the order, so section 72, and you have seen from that that pre-emptive action means action which might prejudice the reference or impede the taking of any action, so you do not have to show anything on a -- the CMA does not have to show anything on a balance of probability at that stage. The question is might it prejudice the reference.

THE CHAIRMAN: Can we just look at the order again? Where is it?

MS. DEMETRIOU: The order is annex 4 to the first notice of appeal. Sir, you see, if you look at paragraph 4, what that does is reflect the wording of the Act.

THE CHAIRMAN: You say it must not take action which might prejudice, and you are saying this action might prejudice the reference.

MS. DEMETRIOU: Yes, or impede the taking of any action.

THE CHAIRMAN: Or impede the taking of any action.

MS. DEMETRIOU: "Might impede the taking of any action". So, all I am saying in relation to grounds 2 and 3 in my first point is that they proceed on the basis that there is vires. If there

is vires, then it follows, or it should follow, that the new agreement -- entering into it was a breach of the IEO, because the IEO simply reflects the terms of the Act.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: If there is vires to order a termination, termination of the agreement, then our point is that it cannot be irrational to exercise that power to restrain a breach of an order that the CMA has validly made.

THE CHAIRMAN: You are saying you do not need to establish as a hard fact that on the balance of probabilities this agreement was not at arm's length or not on normal commercial terms?

MS. DEMETRIOU: No.

THE CHAIRMAN: You have to establish that they have taken action which might prejudice, et cetera, or impede, as in paragraph 4?

MS. DEMETRIOU: Exactly, and it is very important -- it is very important that the hurdle is not set too high for the CMA because, as you will appreciate, what the parties have chosen to do in this case is merge -- as they are entitled to do -- is merge, without pre-notifying the merger, and what cannot happen, so the IEO regime is in place to try and prevent an exacerbation of any SLC that the -- and effects arising that the CMA might determine during the course of the reference, and so if the bar was set so high as to require the CMA to make a finding on a balance of probability in relation to each act that the merged undertaking might do, then it would be entirely ineffective. That is why the statutory language is as it is.

Our first point is very simply it cannot be irrational to take action, which is within our powers, which is there to restrain the breach of an order made within our powers. That is an answer to grounds 2 and 3, but we say in any event -- so, even leaving that aside, the direction was a rational and proportionate one, and we say it for these reasons: first, prior to the second notice of appeal, the parties had never suggested to the CMA that it would be technically or practically feasible to implement the new agreement on a temporary basis. Never said that.

If this were possible, the parties could and should have made that clear to the CMA. The obvious time to do that was in response to the remedies working paper, but instead ICE's only response to the working paper was to decline to engage with the CMA's remedies analysis. It just did not engage, and that refusal to engage was maintained despite encouragement from the CMA to cooperate, and you can see the relevant evidence of that at annex 16 to the CMA's defence. I do not ask you to turn it up now.

Neither did the parties submit this evidence with their letter of 4 November 2016, which you will recall is the letter in which they informed the CMA that they intended to implement the new agreement, having previously suspended it.

In contradistinction to that, you have seen the evidence that the parties had submitted in June 2016, that implementing the new agreement was a complex process that could not easily be stopped and started for technical and business reasons, and, just to remind you, that is at annex 8 to the first notice of appeal, and it is paragraph 19 of the document --

THE CHAIRMAN: We read that yesterday.

MS. DEMETRIOU: You have read that.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: What we say about that is this: all of those reasons continue to hold good, or may continue to hold good in this context, and the question for the tribunal, I am sure I do not need to remind you is whether or not the CMA's view is rational of all of this. Mr. Harris says it is all very different now, and we say that when you look at those reasons, that it is perfectly rational to conclude that those reasons will continue to hold good or continue to have force in this context too, and we say that the attempt made by the applicant to explain the conflict in its evidence is utterly unconvincing, and one cannot escape the conclusion that it is giving evidence that suits it -- different evidence according to what suits it at any particular time.

The short point is that looking at those reasons and looking at the evidence put forward, by ICE, it is not irrational for the CMA to take the same -- to take the view that these considerations apply now, such that it would be no easy matter to implement the agreement and then effectively terminate it, suspend it, and the threshold, I remind you, is a rationality one.

THE CHAIRMAN: Their point is that, "If we tell our customers and tell people generally, that this is only a temporary thing and that there is always a risk that it is going to be unwound later at the direction of the CMA or this tribunal", that is a different scenario from the one that is contemplated at paragraph 19.

MS. DEMETRIOU: Well, sir --

THE CHAIRMAN: That's what they are saying.

MS. DEMETRIOU: -- that is what they are saying, but we say on proper analysis that it is not really a different scenario because one is still looking at disruption of technical actions and of customer relationships, and so even if you tell them that, "This is what might happen", you still have action which has been taken, which is difficult to unwind and we say in the

context, where what we are trying to do, what are we are seeking to do, the rationale behind this is to have an effective divestiture, which leaves it up to the new owner, we say that these reasons, or many of them, continue to hold good such that it is perfectly rational to take the view that it would be not easy to simply suspend these agreements -- these acts once they have been operated.

That is the CMA's position.

Moving on to ground 2, and, of course, ground 2 seeks to challenge the CMA's assessment of the benefits to ICE of pursuing a partial foreclosure strategy, and we say that with the exception of ground 2(d), which is the point about dominance, which is a point of law, this ground is, in reality, an illegitimate attack on the merits of the CMA's conclusion, and that there is no criticism of the overall approach, but what is criticised are points of detail, and before I address each of the elements of ground 2, I would just like you to look at appendix F to the decision, which is the quantitative analysis, because it is important to stand back and have a look at the totality of the evidence, and for this purpose I just want to take to you paragraph 61, right at the end of appendix F. Does the Tribunal have that?

THE CHAIRMAN: We are still looking for it.

MS. DEMETRIOU: It is appendix F to the reports.

THE CHAIRMAN: Yes. I have got F now. It is paragraph 61.

MS. DEMETRIOU: 61, which is on page F/14 at the bottom.

THE CHAIRMAN: I have got that.

MS. DEMETRIOU: You will recall that the parties produced a quantitative analysis and the CMA carried out its own quantitative analysis having examined that of the parties, and it is the last sentence of paragraph 61:

> "We found that even the parties' estimates of the plausible potential gains were greater than our highest estimates of the cost of foreclosure".

When looking at the question of benefits and incentive, it is important to bear in mind that even the applicant's low estimate of benefits was higher than the CMA's highest estimate of costs.

The applicant's ground 2(a) is that the CMA could not predict whether ICE would benefit from a partial foreclosure strategy because the CMA cannot predict whether liquidity will switch, and we see that from notice of appeal, paragraph 118. That is the essential complaint in 2(a). It is closely related to 2(b). Our short answer to this point is that this ground is based on a false premise because the applicant is wrong to say that the CMA

accepted that it had could not predict whether liquidity would shift; the CMA quite plainly found that it would.

If I can I just remind you of some of the relevant paragraphs but there are more references than this, but if you look at paragraph 8.114, you see there:

> "In relation to the parties' argument that liquidity is sticky and would not move as a result of foreclosure, in section 7 above we accepted that this is the case to some extent, but ultimately concluded that liquidity can shift and that venues and clearing houses do compete through potential head to head competition. Most obviously, this possibility is demonstrated by the parties' own example of CME's successful entry into coal."

What is being said there quite clearly is, "Well accept that liquidity is sticky", but it is certainly not an acceptance that volumes will not shift.

THE CHAIRMAN: Over time, yes.

MS. DEMETRIOU: Over time, but the premise of this ground is that the CMA has somehow accepted that it cannot predict whether liquidity will shift and that is not correct.

THE CHAIRMAN: What you are saying is it is not for us to go through all the products that you would have individually, past or present or future, and then take a view, "Well, this one might shift, this one might not shift", and all that. What you are say is just looking at the inherent probabilities, over time risk which, at least in some of these products is more likely than not to shift.

MS. DEMETRIOU: Sir, that is precisely our point and we have a further point which is relevant both to ground 2(a) and to ground 2(b). This is a related point, which is this; section 7, which looked at competition pre-merger, is extremely important to this part of the challenge because what section 7 does is that on the basis of a wide range of evidence of probative value, the CMA found that pre-merger there was competition between ICE and its rivals, close competition, and that competition took the form of head to head competition, potential competition, where they constrained each other through potentially moving into different product markets and also dynamic competition. It found there was competition despite stickiness in the market.

THE CHAIRMAN: No one disputes there was competition.

MS. DEMETRIOU: Sir, that is a critical point in all of this because if Mr. Harris were correct that somehow the CMA has not clearly found that volumes could shift, then it would not have found that there was competition in the market. There is obviously only competition on the basis that volumes can shift despite stickiness. If it had found that, well, this is a

very sticky market and therefore there is no way that volumes can shift, then there would be no competition in the market. That is why we say that the findings in section 7 are very, very important when it comes to analysing benefits and incentives, because it was looking at the market and it was saying that even pre-merger, so even before you have a situation where ICE is using Trayport and its ability to affect and promote competition, even before that, then the stickiness in the market does not prevent liquidity switching.

THE CHAIRMAN: You look at the internal documents, they are all talking about trying to increase market share and including in specific products.

MS. DEMETRIOU: Exactly.

THE CHAIRMAN: So --

MS. DEMETRIOU: Exactly. This just makes a nonsense of the applicant's point that the CMA did not find that liquidity could shift. It makes a nonsense of it. That is the whole purpose of section 7, and, as you have said, sir, there is an internal document, there is all sorts of evidence which the CMA relied on. I took you to the opening yesterday -- I am not going to go through all of that again -- that demonstrates that the basis on which the CMA concluded that there was competition in its market despite the stickiness, is because volumes can and do shift. That is the base for its finding of competition in the market.

That is a very important point underlying our response both to ground 2(a) and to ground 2(b). I think you have my points on ground 2(a) because you have just summarised them, and I have added this point, but now moving on to ground 2(b), the essential complaint here is that liquidity is sticky and the CMA did not do enough to show ICE would benefit from pursuing foreclosure strategies. That is the point that is made there, and, essentially Mr. Harris' argument is that he says the CMA jumped from finding that the merged entity would have the ability to harm ICE's rivals to then finding that it would benefit it to do so, so he says that there is a logical gap.

What we say about that is that there is no logical gap, first of all, because the CMA did properly look at benefits; it did not leap from ability to assuming that there was, therefore, benefits, but, secondly, we say that these factors are very closely related and they do overlap in this case and that is something that is recognised in CC2 that Mr. Harris took you to yesterday, and just to briefly turn that up, that is in volume 3 of the authorities at tab 32, internal page number 50 on the bottom left-hand corner. The paragraph that Mr. Harris took you to yesterday was 5.6.6.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: And he said that the authorities typically frame their analysis by reference to these questions, so (a) ability, (b) incentive, (c), effect and his point is that we have conflated (a) and (b), but it is important also to look at 5.6.7, so:

"In practice the analysis of these questions may overlap and many of the factors may affect more than one question".

We say that that is true in the present case.

This goes back to the point I have just been making in relation to the fundamental importance of section 7, and you saw yesterday that expressed -- I took you to paragraph 7.3 of the report --

THE CHAIRMAN: Can we put this away for now?

MS. DEMETRIOU: You can put that away, thank you.

Sir I took you yesterday to paragraph 7.3 of the report, which says that it is very important to look at the nature and level of competition between ICE and its rivals, because if ICE competes closely with those of its rivals that use Trayport's software, it makes it more likely that the merge firm will have an incentive to foreclose ICE's rivals and adversely affect competition. That is an important explanation of why these factors overlap in this case.

In looking at the CMA's analysis of whether or not ICE would benefit from the foreclosure strategies, then the Tribunal, in my submission, has to bear at the forefront of your minds the analysis in section 7, which is that there is fierce competition -- pre-merger there was fierce competition between ICE and its rivals, and that the merger -- and this is unchallenged -- gives ICE the ability to harm its rivals, and so we say that from that there must be a very strong chance that this will benefit ICE. That is the starting point, but the CMA did not stop there. The CMA went on to consider the analysis -- it went on to assess the benefits and its assessment was robust, and I will take you to some paragraphs in the decision to make that good, but would it be convenient to do that after lunch.

THE CHAIRMAN: It would be.

PROFESSOR MAYER: Can I just ask: so your argument is basically that the existence of competition provides ICE with the ability to harm its competitors. Could there be an argument the other way round, that a high level of competition would actually make it difficult for any one party?

MS. DEMETRIOU: We are not saying that the existence of competition gives ICE the ability to harm its rivals because the ability -- the ability -- stems from ICE's control post-merger of Trayport and the importance of Trayport in the market. It is the two key facts that give it the ability. One is ICE's sole control of Trayport and the second is the importance of

Trayport in the market. You have seen how 85 per cent of market participants rely on Trayport. These are the key facts which give rise to the ability, but the reason that competition in the market is so important is that if it were the case that the sticky liquidity meant that there was effectively no competition between ICE and its rivals, then even though it might have the ability to do something through the control of ICE, that would have no impact because volumes could not shift but what the important thing in section 7 is that in finding that there is effective and fierce and close competition in the market, the CMA has found that despite stickiness of liquidity, nonetheless competition is effective, which means that volumes can and do shift. That is the way I put the point.

PROFESSOR MAYER: Yes, I understand that point, but I was simply arguing that -- or asking whether actually competition may diminish the extent to which there would be an impact in terms of the actions of ICE.

MS. DEMETRIOU: In what way?

PROFESSOR MAYER: Insofar as that there are a large number of parties and that the extent to which it can change the degree to which it is capturing the market would be more limited in the case of a high level of competition.

MS. DEMETRIOU: That was analysed in section 9, where what the CMA was looking at there was barriers to entry and whether or not in fact what might happen is that -- so the CMA has analysed this -- in fact what might happen is that if the Trayport offering became unattractive, for example, even though now a huge number of market participants are dependent on it, whether or not they would then move to, for example, another software provider, so it has analysed all of that and found not, and there is no separate challenge to any of those findings.

PROFESSOR MAYER: Okay, thank you.

THE CHAIRMAN: Before you finish, you will come back to the Derbyshire point?

MS. DEMETRIOU: Shall I do it quickly now or shall I do it afterwards?

THE CHAIRMAN: Do it afterwards. There may be more than one view on Derbyshire as to whether or not that just applies on consultation or whatever, but have a look at that.

MS. DEMETRIOU: Okay.

THE CHAIRMAN: How are you doing for time? You have got until 3.30 but we have been asking quite a lot of questions.

MS. DEMETRIOU: I am hopeful that I should finish by 3.30.

THE CHAIRMAN: That is all right, okay.

MR. HARRIS: Sorry to interrupt; we had been under the impression that it was until 3.

THE CHAIRMAN: No, 3.30.

(1.03 pm) (The short adjournment)

(2.00 pm)

MR. HARRIS: Sir, you asked me to look into a date over the short adjournment. That was annex 13, I think to the first notice of appeal bundle.

THE CHAIRMAN: Let me just get that.

MR. HARRIS: It might have been 13 to the defence, actually.

THE CHAIRMAN: Oh, is it?

MR. HARRIS: Yes, I beg your pardon, it's annex 13 to the defence, an internal ICE slide document. The answer is it is 27 June 2014.

THE CHAIRMAN: Yes, okay.

MR. HARRIS: As you know, our answer to all of those documents is that that is their --

THE CHAIRMAN: It is before Mr. Bennett came over --

MR. HARRIS: Before the road to Damascus was ever even seen on the map.

THE CHAIRMAN: Thank you.

MS. DEMETRIOU: Sir, I was on ground 2(b), but can I before that just go back to a couple of points the Tribunal raised with me.

One was the 2013 agreement, and you asked is it in the defence and the answer to that is no.

THE CHAIRMAN: In the report?

MS. DEMETRIOU: Sorry, in the report.

THE CHAIRMAN: I couldn't see it in the report, but I did see it in the defence.

MS. DEMETRIOU: It is in the defence, not in the report. We made a mistake in the defence and that is corrected in the skeleton argument.

THE CHAIRMAN: So it is not in the report but in defence. I saw you correcting it in your skeleton.

MS. DEMETRIOU: Exactly. So we slightly overstretched in the defence and we corrected that in the skeleton argument.

MR. HARRIS: If we could assist on that, we found a reference to it in the report.

THE CHAIRMAN: Oh, did you?

MR. HARRIS: Not for the same reason that we are now talking about it. But on internal page 106, paragraph 7.181, what we can see is that the CMA -- large parts of that are confidential. So I don't want to go into the detail, and I am not sure it really matters, but we can see that the CMA did have the document in mind --

THE CHAIRMAN: In line 3, you mean? It says:

[***Text redacted***].

MR. HARRIS: Yes, exactly. I think that is confidential, possibly. But in any event, if you look at the first line and that line, you can see that it was a matter that the CMA did -- did have it in mind, and we -- fairly been accepted now that that is wrong.

THE CHAIRMAN: But it does not seem to have made any difference to the decision.

MS. DEMETRIOU: No.

MR. HARRIS: Perhaps I will reply on that.

THE CHAIRMAN: You can, but just reading the decision, it does not seem to have had much prominence. You can say something to assist our case, you may say that is a factor showing that the concept of the agreement between the two parties being impossible is one even prior to the road to Damascus being --

MR. HARRIS: As indeed we have done.

THE CHAIRMAN: I have got that point, yes.

Yes, Ms. Demetriou.

MS. DEMETRIOU: Can I now move on to the point about judicial review that you raised with me, whether we accept the inevitability.

THE CHAIRMAN: Yes, the Derbyshire point?

MS. DEMETRIOU: Yes. Can I hand up just in the context of making this point, two authorities because you will appreciate that the point that has never been put to us was a point of procedural irregularity before Mr. Harris' submissions.

So I want to explain our position. So we do accept the Derbyshire test. So our starting point is that we accept that if Mr. Harris can show a judicial review flaw in relation to a part of the decision, then that would be a basis for quashing that part of the decision unless we can show that inevitably the CMA would have reached the same conclusion anyway.

So we accept the test, but what we say in relation to the procedural fairness point made by Mr. Harris in relation to the scope of the agreement and of that not being in the provisional findings, is that before you get to that point, of course, you have to asked yourselves what does procedural fairness require, so what is the scope of the public law duty.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: I made my point that what is required is that the gist of the point be put to the applicant, and I am just handing up an excerpt from a textbook on judicial review, a well-known textbook, which explains the relevant authorities. If you look at paragraph 6.28, you see that, two thirds of the way down that paragraph:

"However, fairness does not usually require the drawing up of formal charges ..."

This is in relation to charges, obviously:

> "... detailing matters such as the precise date, time and place on which events are said to have taken place: a fair procedure can usually be achieved by informing the individual of the general nature of the allegations by way of an outline or gist of them. The requirement is to afford the individual a fair opportunity to meet the case against him or her, and this requirement is often met by the provision of a gist of an allegation."

I will just hand that up so that you see the base for the submission I was making. But we also make another point, and I have handed up a House of Lords authority in *Al-Mehdawi*. The point that this establishes is that where an allegation of procedural unfairness stems in a fact, the explanation for that is in fact that the applicant did not do something it was supposed to do, then the public body -- that cannot result in a breach by the public body of its duty.

If you look at internal page 8 of this judgment, you see there the nub of the reasoning. So it is the second main paragraph, the second paragraph on that page:

> "These considerations lead me to the conclusion that a party to a dispute who has lost the opportunity to have his case heard through the default of his own advisers to whom he has entrusted the conduct of the dispute on his behalf, cannot complain that he has been the victim of a procedural impropriety or that natural justice has been denied to him, at all events when the subject matter of the dispute raises issues of private law between citizens. Is there any principle which can be invoked to lead to a different conclusion where the issue is one of public law… I cannot discover any such principle."

You see all of that summarised in the headnote.

So what we say about that is that where, as here, it was open to -- and we will make this point in two contexts, one in relation to the point about the scope of the agreement and the 14 May email. We say that is the applicant's own fault that it did not put that material before the CMA. So it now cannot be heard to complain of a procedural irregularity on the part of the CMA.

We also make the point in relation to the submission that the CMA should have done more in ascertaining whether this was an arm's length agreement. You have my points about the IEO procedure and the fact that what the applicant should have done here is approach the CMA and ask for consent to implement the New Agreement. It should then have adduced

what evidence it wanted to adduce in relation to the arm's length terms. So those are the points we make there.

Just going back, I should have mentioned in relation to the inevitability point, which we accept as a matter of law, where you have a decision for which two or more self-standing reasons are given, so where the CMA is saying we find X on the basis of A and B, and either A or B on their own would be sufficient to lead to the calculation X, then you do not have to ask that question because it is clear that if you knock out one reason, then the other is sufficient.

So if that is a correct interpretation of the CMA's reasoning, if the CMA has given more than one reason and each is self-standing in support the conclusion, then you just do not get to the inevitability test, because it is plain that you can look at each individually and that the fact that one might be knocked out does not impugn the conclusion.

MR. ALLAN: Do you have authority to cite to us for that?

MS. DEMETRIOU: We can find authority, but we say that that does not need authority because that is a question of looking at how the decision is structured.

It is relevant when it comes the remedy issue, which is ground 4, because there we say that the CMA's rejection of the parties' remedy proposal had two bases. We say it is clear from the report itself that those two bases are self-standing. So whether you apply the inevitability test or you say it does not need to be applied, it all amounts to the same thing.

If you apply the inevitability test, then when you are saying is because they are self-standing reasons, if one of them is flawed then because the other one is self-standing, it is inevitable that the CMA would have reached the same decision. But we say that it may not make a difference, that the analysis is in fact you do not get to that point because you analyse the decision and you say where there are self-standing reasons then obviously you have to treat each of them as being sufficient in itself to reach the conclusion. But we can try and find an authority to that effect if that would be helpful.

THE CHAIRMAN: You clearly cannot provide it today, but if you can provide it tomorrow and then Mr. Harris will have the opportunity to send us any countervailing authorities by Thursday, that is a fair way of dealing with it. I see Mr. Harris is nodding.

MS. DEMETRIOU: I am grateful.

So I was on ground 2(b) and I had made the points about the overlapping nature of this issue and the overlapping nature of the ability of ICE to harm its rivals and the state of competition in the market, how that overlaps with the benefits that ICE would receive.

I was going on to say that in any event the CMA's assessment of benefits was robust, and if I could ask you to turn up the report again and start at paragraph 8.107, which is under the heading "The benefits of foreclosure".

We see there -- I have taken you to 107 and 108 before -- that pre-merger, ICE and Trayport had conflicting incentives. It explains what those were and then the CMA goes on to explain whether the -- it says at 109:

> "We considered in more detail whether the merged firm would want to engage in either the total or partial foreclosure of ICE's rivals using the various mechanisms outlined in the previous section on Trayport's ability to foreclose. As set out in that section ..."

Sir, it is important to note that at this point in the analysis there is a reference back to the section on ICE's ability to foreclose its rivals:

> "As set out in that section, our view is that the use of these mechanisms by the merged firm would have a substantial negative impact on the competitiveness of ICE's rivals. As a result of the delays in listing their products, restricted functionality of the software they rely on, and the potential leaking of their confidential 'soft' information resulting in a loss of first-mover advantage, rival venues and clearinghouses would find it more difficult to attract and retain the business of traders, who would be more disposed to use ICE instead. This is particularly the case in light of our view that here it is appropriate for us to take a relatively long-term assessment horizon, over which this impact on volumes is likely to be substantial."

Because of the reference back to the section on ability to foreclose, I will come back to that section. But just finishing with this section of the report, what we have in 8.110 is the CMA saying there that it is important that it did in fact take account of its findings in section 7, and those were the points I was making just before lunch.

Then at 8.111 to 8.115 we have a description of the CMA's findings in relation to the categories of benefit that ICE would receive by engaging in the strategies of partial foreclosure. Those are, to summarise, at 8.111:

> "Gaining additional liquidity from rivals."

Then in the next paragraph:

> "Help to prevent ICE's rivals from challenging ICE to win its volumes in the future."

Then at 8.113, we have that:

> ICE "may be able to increase the rate at which OTC bilateral trades switch to being cleared."

I will come back to that because that is a separate point raised by Mr. Harris.

Then at 8.114:

> Helping "ICE to obtain volumes from its rivals in those existing products where it has little or no current position."

And at 5:

> Helping "ICE to gain control of new markets and segments."

Much of the evidential basis for these findings is set out in section 7, and I took you to all of that yesterday. So that is why I say there is a very important overlap between section 7 and these conclusions.

Just to highlight some of the points in section 7 that were taken into account, if we go back to section 7 -- and these are just examples, I took you in more detail to this yesterday. But if we start with 7.27, which is on page 66, we also examined ICE's and third parties' internal documents to assess the extent to which potential head-to-head competition was reflected in the strategies of the relevant exchanges to enter into new asset classes. For example, we noted evidence from ICE's internal documents that it appears to have broad ambition to expand and win liquidity over European liquidity asset classes, and that was a point that the Chairman made before lunch.

Then 7.29, our assessment of EEX's activities demonstrated a similar picture:

> "We observed that in recent years EEX has expanded its presence in TTF, where ICE is an incumbent, and has been able to maintain a share of over 10% of exchange executed volumes of this product for a number of years."

This is another example.

7.38:

> "In our view, an example of dynamic competition is the introduction of a non-multilateral trading facility by EEX."

I would just ask you to note what else is said in 7.38.

7.50:

> "In the coal asset class 90 to 100% of OTC trades were sent for clearing, making it a particularly lucrative asset class for OTC clearing. In 2011, ICE held 90 to 100 % of these volumes, but as of 2015 this fell to 40 to 50%. CME now holds the remainder of OTC cleared volumes in this asset class."

That is another example of liquidity shifting.

7.54:

"Beyond ICE and EEX, we considered whether there are any examples of clearinghouses challenging one another in product categories where they previously had little or no volumes. A major case study of this is in the clearing of OTC executed coal trades. Historically, ICE had 100% of this business, but CME entered this product in 2011 and over the course of the following two years increased its share from nothing to around 70%, which it has broadly maintained since. We note that the growth of CME's market share was in part achieved as a result of market growth and attracting new volumes, as opposed to direct switching between them."

So in part.

Then 7.60:

"An example of this dynamic competition is represented by the past strategic partnership between ICE and ICAP in the oil asset class."

I won't read out the confidential material.

So these are just examples of the findings made by the CMA on the basis of wide-ranging evidence, evidence of probative value, that switching, despite stickiness, can and does take place.

I said that I would return to the section on ability to foreclose because that, of course, is relied on by the CMA as well in the section of the report -- we saw that at paragraph 8.109 -- in the section of the report dealing with benefits.

So could you turn to paragraph 8.23. Here, the CMA at 8.23 found that ICE might increase the price of Trayport's software and the CMA expressly found that a significant price increase would likely have an effect on the ability of some rival venues to compete with ICE.

ICE, of course, disagree with this conclusion. It disagrees with it because it suggests that traders might not respond to a relative decrease in the competitiveness of other venues by switching to ICE, or that traders might not trade at all if other venues were less competitive than ICE. We see that in its notice of appeal, but these points were all fully considered by the CMA, and we see that at paragraphs 8.23 to 8.28.

We say that when you read those paragraphs, it is crystal clear that the CMA was entitled to find, given the market context of close competition between ICE and its rivals, that an increase in Trayport's fees to ICE's rivals will make traders more likely to use ICE as a venue.

The second point is at 8.31, over the page to 8.33. What is said there is that the CMA found there that ICE could reduce Trayport's service levels in either of the following ways. First,

we have at 8.32 that it could lower Trayport's service levels while continuing the development of its own web ICE platform. We see from 8.32, effectively forcing traders to use web ICE.

Then at 8.33, it could do it by lowering Trayport service levels for connections to other exchanges or clearing houses while maintaining service for ICE products. Again, what we say about that is that the CMA's findings were supported by substantial evidence. That is set out and explained at paragraphs 8.31 to 8.33, then also over the page, 8.38 to 8.41.

I just ask the Tribunal, after the hearing, to remind itself of those paragraphs and that evidence. But by way of example, looking at 8.31, we have NASDAQ, which is ICE's rival, saying that the merged entity could provide ICE with a better solution or a first mover advantage in adaptations of systems, for example, if Trayport were to make significant changes in the way exchanges connected or how trades would be reported or orders were routed. It would be very easy for Trayport to create barriers for competitors. That is, for example, what NASDAQ says.

Thirdly, moving on to 8.58, we see there that the CMA found that Trayport could delay the launch of rival exchanges' new products, and that by these means ICE could more easily gain a first mover advantage. Again, what we say about that is that the CMA's finding is based on proper evidence.

Mr. Harris criticised yesterday the three examples that we gave in our defence and that are in the report of Trayport playing a direct role in innovations, saying that three examples are too few. But that misses the point. The critical point is that they are just examples supporting the conclusion that the CMA reached on the basis of a wider range of evidence before it, evidence that included, for example, that of venues and clearing houses. If we look at paragraph 8.47, we see that.

So 8.47, 8.48 and 8.54, so venues and clearing houses, third parties provided specific examples of mechanisms that could be used to delay the introduction of their products.

It is also important to bear in mind that the CMA was not just focusing on Trayport's role as a collaborator in product development, which is what the three examples go to; they were also concerned about its role as gatekeeper providing access to the market for new products, developed by market participants by themselves. We see that from 8.55.

So we see that nevertheless.

> "Even where the development work is minimal and mechanical, Trayport would still have the ability to frustrate ICE's rivals' plans to launch new products given that it is the gatekeeper that comes between traders and rivals' venues/ clearinghouses."

Then just moving on, my final point in this section, to paragraph 8.68, paragraphs 8.68 to 8.70.

The CMA found there that:

> "ICE would be able to gain a competitive advantage over its rivals by though the access of 'soft' information regarding its rivals' product information."

Again, we say that is supported on the evidence and there is no separate challenge made to that particular conclusion by the applicant.

So in summary, we say that it is just simply wrong to suggest that the CMA conflated or unlawfully conflated the questions of ability to harm with the question of benefits. In fact, when you read the report in its totality and you focus on section 7 and 8 in particular, there was wide-ranging evidence on the basis of which the CMA was entitled to find that ICE would gain significant benefits from pursuing the partial foreclosure mechanisms, and the rationality challenge simply does not get off the ground.

I move on to ground 2(c), which is the point which complains that the CMA's quantitative analysis is inconsistent in two respects with its qualitative analysis. Again, we say that these points are unfounded.

Could I ask you again to turn up appendix F, which is the quantitative analysis section. So the first point that is made is that the CMA in its quantitative analysis forecast a lot of switching from OTC bilateral trades. It says that this is not reflected in its qualitative analysis. They say rather, to put it another way, this must have been reflected in its qualitative analysis, but there is no evidence, it is not justified by the evidence.

If you turn to paragraph 33 in appendix F, you see there:

> "For these reasons we did not accept the Parties' view that the merged firm would not be able to achieve any benefits from switching OTC uncleared volumes onto its exchange. Rather, we considered that as a result of partial foreclosure ICE could switch some OTC uncleared volumes onto its exchange, but that the extent of this switching would be lower than that of OTC cleared volumes. We therefore again examined three scenarios, and in all cases used lower degrees of switching than for other volumes, (i) no switching, (ii) 5% switching and (iii) 10% switching."

You see already what is being assumed is not very much, and in the low scenario no switching from OTC bilaterals is assumed, zero.

Even in the low switching scenario the benefits of foreclosure exceeded the maximum predicted costs, and we see that by looking at the table. So if we compare the tables -- sorry, let me just find the correct table.

So if you go first of all to table 2, which is at the bottom of F10, do you see the low scenario and then you have the total gains of foreclosure? It is the very last figure in bold at the end of that column.

Then if you go to table 4, which is on page F13, if you go to the high cost scenario and you see the figure of costs at the bottom. So even if you are looking at the low benefit scenario, the high cost scenario -- and remember the low benefits scenario ignores OTC bilateral switching -- then you still have total benefits exceeding maximum costs.

In its skeleton argument, ICE says that this is not a sufficient net benefit to make a foreclosure strategy worthwhile. But this is not a good point and it is not a good point because it focuses solely on the lowest case scenario for benefits and the highest case scenario for costs. But you need of course to get a measured picture to look at all of the scenarios.

If you look at the medium and high scenario, so going back to table 2, you see the medium scenario benefits. What you can do in order to test the point is simply exclude the volumes of switching from bilateral OTC trades. So if you exclude those, then you end up -- I can't discuss the figures because they are confidential, but it is a relative easy exercise to undertake.

If you exclude the OTC bilateral switching from the medium scenario, then you end up with a figure which very substantially exceeds the costs.

THE CHAIRMAN: Which one is that we take out of that column?

MS. DEMETRIOU: So it is volume switching from OTC uncleared to ICE's exchanges, and if you go across to the medium scenario you see a figure.

THE CHAIRMAN: I have that.

MS. DEMETRIOU: If you deduct from that the final figure and compare that to the medium scenario or even the high scenario costs -- there is low and high scenario costs in table 4 -- then we get, according to the medium scenario, excluding OTC bilaterals, a comparison.

So we say that you have got to undertake that analysis properly to get a proper measured picture of the point.

So what these figures show beyond doubt is that the CMA's quantitative analysis does not depend on this kind of switching. We say, secondly that there is moreover no inconsistency between the quantitative and qualitative analysis in this respect, because in both types of analysis the CMA is exploring the possibility that there would be over time a degree of switching to ICE from OTC bilaterals. It does not rely on this occurring, and in terms of the qualitative analysis, you see that from 7.65 and 7.66 of the report.

You will recall Mr. Harris took you to those sections. The CMA is not saying here that we are reliant on this point in qualitative terms or that it is a very important point. They say:

> "We consider the exchanges may target bilateral trades at least to some extent."

So that is the way it is put, and we say that is totally consistent with the quantitative analysis. This is not a point which is a point relied on -- you can see by the way it is put, treated both quantitatively and qualitatively. It is not a point which underpins the analysis on benefits. It is simply quite properly exploring that this may be a benefit and it is something which should be taken into account.

That is the OTC point. The other point made under this head relates to potential gains where ICE does not have existing products or volumes. ICE's complaint is that there is not sufficient evidence to justify the CMA's quantitative analysis in this regard. But, again, we say that the inclusion in the quantitative analysis of predicted switching in markets where ICE has no existing presence is consistent with the qualitative analysis and the underlying evidence. That is set out fully in our defence at paragraph 140.

I am not going to take you to it, but we rely on all of that. I do not have the time to go through it in detail, but in summary the evidence shows that exchanges and clearing houses can and do gain liquidity in markets where they do not have an existing presence. Can I give you some references.

So in relation to exchanges, 7.28 and 7.29 of the report, and you will also see at 7.141 of the report evidence that Trayport plays an important role in that. So some exchanges told us that Trayport played an important role in helping them to launch new products by providing aggregated access, and then there are some examples given of what exchanges have said. So that is exchanges.

Clearing houses. If you look at paragraph 7.54 of the report, after 7.53 we have 7.54:

> "Beyond ICE and EEX, we considered whether there were any examples of clearing houses challenging one another in product categories where they previously had little or no volumes. A major case study of this is in the clearing of OTC executed coal trades. Historically, ICE had 100% of this business, but CME entered this produce in 2011 and over the course of the following two years ..."

I have read that paragraph to you, but that is an example which is relevant to you in this context.

Again, 7.56, the applicant is wrong to suggest that Trayport was irrelevant to this market shift; there was evidence before the CMA, robust evidence, that it was.

Then, of course, do not forget that as the CMA explains, for example, at paragraph 7.169, one of the fundamental findings in the report was that Trayport's market role before the merger involved influencing where liquidity gathered. So it follows that ICE's control of Trayport would enable ICE to use Trayport to influence where liquidity gathers for ICE's own benefit, and this could, of course, include winning volumes in markets where ICE has no existing presence.

So, again, we say in relation to this point there is simply nothing in it, and the Tribunal will have well in mind the high hurdle that the applicant has to mount in showing that the decision is irrational. This is a merits challenge.

I move on to ground 2(d), which is a legal point. Ground 2(d) is an argument that the CMA was obliged, in the light of its analysis of Trayport's market position, to consider whether Trayport holds a dominant position. What is said against me is that it is obliged to do that as a matter of law because if it does hold a dominant position, then the law on preventing or seeking to prevent abuse of dominance is something that must be taken into account. So that is what is being said.

We say that this argument, which never formed part of ICE's case during the administrative procedure, we say that it is wrong for three reasons.

The first reason is this. Quite simply the CMA was not obliged as a matter of law to consider whether ICE was dominant. Mr. Harris took you to annex 16 to his first notice of appeal, which he said contained a list of references to dominance. But they are not references showing that the CMA considered the question of dominance. In fact, the CMA did not consider whether Trayport was dominant. It reached no view on this question in the report, and we say that the CMA was not obliged to ask itself this question. This was expressly accepted by ICE in its skeleton argument at paragraph 79(a).

Could you just take that up very briefly. So that is in the bundle of additional documents, tab 1, and 79(a):

> "ICE does not say that the CMA was obliged to make a finding whether Trayport was dominant."

So it accepts that point in its skeleton argument, but in oral submissions Mr. Harris relied on the *General Electric* case, and he seemed to be saying that this was, contrary to his own skeleton, a required part of the analysis. What we say about that is that *General Electric* was a case decided under the old EC merger regulation. It is not binding on this tribunal, which is looking at the UK merger regime.

But importantly, under the old version of the EU merger regulation, a concentration could be prohibited if it created or strengthened a dominant position. So that was part of the merger's test. So dominance was therefore a mandatory part of the analysis, which is not the position in relation to the UK mergers regime.

So we say that the comments of the court of first instance in *General Electric* are therefore not relevant here. So it is not authority for the proposition that the CMA has to consider dominance in every merger's analysis.

The second -- the true position is as the parties agreed in their skeleton argument -- is that the law prohibiting the abuse of dominance is a factor that it would have been open to the CMA to take into account if it had gone to consider whether or not Trayport was dominant. But it did not have to do that. That is not an obligatory part of its analysis.

The second answer we have to the point is that this is a very strange argument for the applicant to raise because its own case is that Trayport does not hold a dominant position. So on ICE's own case the CMA was obliged to decide that Trayport was not dominant. That's the case. We say it is not logically open to ICE now to argue that the CMA was obliged to take into account the duties of a dominant undertaking on the basis of a finding of dominance that ICE contends would have been legally wrong in any event. We just say the whole thing is a muddle and incoherent.

The third answer that I have is that a key part of the CMA's findings is that it would be difficult to detect at least some of the partial foreclosure methods that ICE might adopt. For our note, a reference to part of the report -- a paragraph that finds that is 8.128.

So that, of course, would make it more difficult to pursue enforcement action against ICE, against the merged entity, for abuse of dominance. If it is difficult to detect, how do you take effective regulatory action? We say that one of the very purposes of the mergers regime is to protect market participants against the risks of undetected abuses of dominance by addressing SLC before abuse is allowed to arise. That is why the mergers regime is fundamentally different to the ex post facto type of regime, which is to be found in Chapter 2 of the Competition Act and Article 102 of the Treaty. That sounds with particular force in a case like this where detection of some of these mechanisms is very difficult.

Finally on ground 2 we have ground 2(e), which is the complaint about the comparison with GFI, the former owner of Trayport. Again, we say this is a blatant attempt to review the merits of the CMA's decision.

Standing back from it, the CMA found there were four key reasons why GFI was in a different position, so that you could not conclude, on the basis that GFI have not pursued

the partial foreclosure mechanisms, that it was unlikely that ICE would do so. There were four reasons on which the CMA based its conclusion.

All of those are robust conclusions that were made on the basis of evidence, and its reasoning is unimpeachable. There is an irrationality here.

Turning to the relevant parts of the report, the analysis is at paragraphs 8.138 to 8.148 under the heading "Comparison with GFI ownership". The first point, at paragraph 8.138, is that the CMA found that it was relevant to take account of the fact that ICE also undertakes the clearing of trades as well as execution, whereas GFI is only a venue and not a clearing house.

On that, in order to save time, can I take you to our defence at paragraph 146. Could I just ask you to read paragraph 146 and the worked example that we have got there, which illustrates why it was reasonable for the CMA to take account of this point. (Pause)

THE CHAIRMAN: Yes, I have read that.

MS. DEMETRIOU: Secondly, at paragraph 8.140, it was relevant to take into account the fact that, because ICE had its own front end screen product, it would be more protected than its rivals, including GFI, from any partial foreclosure strategy that adversely affected Trayport's quality. Further, a reduction in quality in Trayport's front end screen might drive adoption of ICE's own front end screen, but there would have been no corresponding benefit for GFI.

These were all logical points, but what ICE says is that this concern relies on the prospect of ICE damaging Trayport's quality for all users, whereas the CMA's theory of harm was based on target foreclosure of specific rivals. But the short answer to that is that that is a wrong characterisation of the CMA's decision, because in short the CMA's theory of harm envisaged both things. We see an example at 8.31, which is the theory of harm consisting in the damaging by the merged entity of the quality of Trayport's product for all users by general lowering of service levels.

That is something, of course, which applies to everybody. It is simply wrong to say that the CMA's theory of harm was solely based on targeted foreclosure of specific rivals.

Thirdly, 8.141, the CMA found that to the extent ICE would face some limited risks from foreclosing its close competitors, these are likely to be smaller than those that GFI would have faced from doing the same.

As an exchange, of course, ICE's closest competitors are either exchanges, whereas GFI's close competitors were other brokers, and Trayport tends to rely more heavily on broker customers than exchange customers, with the consequence that attempting to foreclose

broker customers would pose much more of a risk to Trayport and Trayport's revenues than attempting to foreclose exchange customers.

ICE criticises this finding on the basis that the CMA's SLC finding was based on the prospect of foreclosure of exchanges, brokers and clearing houses, not just other exchanges. Of course, I make the first observation that this argument is inconsistent with its argument that foreclosure would be targeted. But further, the CMA's conclusion is perfectly rational on this point. It was saying that because Trayport was more reliant on brokers, there was more of a cost involved in foreclosing brokers, which would have acted to reduce GFI's incentives to pursue the foreclosure mechanism. The same does not apply to ICE, which could benefit by reducing, for example, investment for ETS, back end and GV Portal, which are the products used by rival exchanges with much more limited costs.

Fourthly -- and this is paragraph 8.142 -- the CMA found that ICE may be less focused than GFI on protecting and growing Trayport revenues because these represent a significantly smaller proportion of ICE's overall revenues than they did for GFI. What ICE says about this is that it is inconsistent with what ICE says is the CMA's acceptance of ICE's rationale for the acquisition of Trayport. But in fact, the CMA did not accept, did not make any comment on ICE's rationale for its acquisition of Trayport.

You have seen the relevant part of the report where it simply recorded, as "ICE stated that its rationale was ..." There is no conclusion there as to whether or not the CMA accepted it, and the CMA is not obliged to consider or decide whether the explanation given by ICE was correct or not.

The key point here is that once the CMA found that the merger would give rise to the SLC, so once it found that the merger would give rise to the SLC, including that ICE would have the incentive to use Trayport partially to foreclose its rivals, once it made that finding, which, of course, is the gist of the report, then it was entitled to take into account this factor; this factor becomes relevant in light of that finding.

So those are my submissions on Ground 2. I think I can deal with ground 3 very quickly. Ground 3 now turns to costs, and the appellant's complaint is that the CMA should have conducted further investigations into two aspects of the costs to the parties of implementing a partial foreclosure strategy. You see immediately the way that that is put, "further investigations into".

One of the fundamental problems was Ground 3, which goes back to the principles I foreshadowed at the outset, what the Tribunal said in *BAA*, which is picked up on by the Tribunal in *Ryanair*, which is that the court should not intervene, the Tribunal should not

intervene merely because it considers that further enquiries would have been desirable or sensible. It should intervene only if no reasonable authority could have been satisfied on the basis of the enquiries made.

So that is the test. So it is a very high hurdle. One of the difficulties with this ground is that the applicant does not even identify why further enquiries would have been of value.

The second threshold difficulty with this ground is that these complaints are directed at the qualitative aspect of the CMA's analysis of costs, and there is no separate challenge to the CMA's quantitative analysis in which the CMA concluded -- and you have seen the CMA's conclusion on costs and you have seen -- I make the point again -- that the CMA's highest estimate of potential costs was lower than the parties' estimate of the plausible potential gains. So the Tribunal has that point, and we say that this ground has to be viewed in that context. So no separate challenge is made to that.

But those are two very simple reasons why this ground does not go anywhere. But we have substantive answers to the points made by my learned friend, and these are in our skeleton at paragraphs 129 and following, but they may be summarised as follows.

So there are two grounds, Ground 3(a) and Ground 3(b). Ground 3(a) is an argument that the CMA should have conducted further investigations into whether Trayport's customers would switch to another software provider in response to a partial foreclosure strategy. The position is that the CMA did fully consider this point.

Mr. Harris' submissions, what they came down to seem to have been that the CMA should have asked third parties what they would do. But in fact the CMA did carry out such enquiries, and we see that from paragraph 9.22 of the report, which is precisely on point.

So if you see 9.22 at page 162 and then going to the end of the first bit of the paragraph:

> "The difficulty in achieving this was highlighted by a number of third parties."

And then (a):

> "An exchange told us that it was not Trayport's front-end system and functionality itself that was unique, but its level of distribution and market information, and that it would take a long time and require 'substantial investment' to create a 'new Trayport' ..."

(b):

> "Similarly, CME told us that Trayport's competitive advantage did not stem from any particular technology or software component. It drew on its own experience when it told us that since 2011, it had spent an estimated [amount of money] and five years trying to 'gain traction' with its energy futures trading platform CME Direct..."

"(c) An exchange told us that whilst an alternative system with all the same features did not currently exist and would require a very significant investment and time to be developed, this move would require all brokers to coordinate a system switch on a joint basis ..."

It comes back to the point Mr. Allan put to my friend yesterday about the collective boycott:

"... as otherwise no software supplier would build all these features for one single customer. IHS Market said a firm launching a rival to Trayport would face significant challenges. It said that doing so would depend significantly on the commitment of key market participants since a new platform would need to secure a critical mass of liquidity from the first day of launch."

So there was ample evidence from third parties, which seemed to be Mr. Harris' complaint. But standing back from it all, the CMA's conclusion that a partial foreclosure strategy would cause the parties to suffer some costs but that these would be limited, was reasonable in light of the following conclusions that it reached, all of which are supported by evidence. So first of all, that many of the partial foreclosure mechanisms would be hard for market participants to detect -- for your note, that is paragraph 8.128 -- or would take the form of incremental changes which would not fundamentally undermine the Trayport platform or force market participants to use an alternative. Again, for your note, 8.121.

Secondly, same paragraph, 8.121:

Venues, especially brokers, "are highly dependent on Trayport, with no effective current alternatives to its services…" It follows that ICE's case has to be dependent on the prospect of a third party software provider becoming a viable alternative to Trayport where none currently exists. Third, the market has high barriers to entry for an alternative system underpinned by the strong network effects enjoyed by Trayport.

Again, see section 9 of the report where all that is analysed. Also there is a history of failed attempts to produce a credible rival to the Trayport platform.

Fourthly, the risks of switching to a different software provider would be substantial because persons considering switching would be aware that by doing so they would lose the benefit of the network effect.

So we say in the light of those conclusions, all of which are supported by the evidence, the CMA's conclusion, overall conclusion, that the level of switching would be low was a rational conclusion for it to reach.

The second point, ground 3(b), is an argument that the CMA should have conducted further investigations into whether traders would punish ICE for any partial foreclosure strategy by

using ICE's competitors, essentially. The CMA found that this was not credible, and if you could turn up the report at paragraph 8.123, you will see there that the CMA squarely confronted that point and said that:

> "…if traders sought to punish ICE, there would be a cost to switching away from ICE's services to alternatives they had previously rejected. This is particularly so given that, as a result of partial foreclosure the attractiveness of these alternatives would be diminished. In essence, such retaliation would require traders to respond to a decrease in the attractiveness of ICE's rival venues and clearinghouses by switching to using them more - the opposite of the reaction we would expect. As a result, we find that such retaliation is not credible, and therefore that the threat of this would not constrain the merged firm's behaviour."

This was plainly justified in light of the reasoning there. So first of all it's just not credible that traders would deliberately make themselves less competitive. Then also, if you look at paragraph 8.127, you see that also relevant is the difficulty in detecting partial foreclosure mechanisms, particularly for traders who are, of course, one step removed from ICE's rival venues and clearing houses, against whom such strategies would likely be implemented.

So again, on this point we say a plainly rational decision and, properly analysed, the claimant's challenge is an illegitimate challenge to the merits of the CMA's conclusions.

I am going to deal finally with ground 4, remedies. Ground 4 is a challenge to the CMA's rejection of the separation element of the parties' remedy proposal.

There are two points that are made against us by ICE. The first point is that the CMA was wrong to ask itself the question would the separation element make Trayport fully autonomous. So what is being said is that the CMA set the bar too high, asked itself the wrong question. The second point is that the CMA misdirected itself about the duties of company directors under section 172. So those are the two points.

I foreshadowed the threshold difficulty that we say the applicant has, and that is that the CMA rejected the separation element for two free-standing reasons. My solicitors behind me have been busy in response to Mr. Allan's request for an authority, and we do have an authority. Shall I hand it up now? This may obviate --

THE CHAIRMAN: You can. That is fine. (Handed)

MS. DEMETRIOU: So going to the back of the report, page 1176, and at the bottom of 1176 you see this:

> "On this authority, Mr. Lester submitted that the invalidity of even only one of reasons given by the Commission invalidated their decision that it would be inappropriate for

them to entertain or consider the applicant's complaint. In reply, Mr. Hoffmann accepted that where reasons given by a statutory body are mixed and impossible to disentangle, as indeed was the situation in the *Rochdale* case, then the invalidity of one is sufficient to vitiate the whole of the decision based upon such reasons, even if many of them are valid. He nevertheless submitted that where the reasons given are separate and alternative, then the mere fact that one can be criticised is not sufficient to vitiate a decision to which the statutory body would in any event have come had they left the invalid reason out of account.

"For my part, I cannot accept Mr. Hoffmann's entire submission on this point as he stated it. I respectfully agree that the material law is as was stated by Forbes J, but with one qualification which reflects part of Mr. Hoffmann's submissions and was not relevant in the earlier case. Where the reasons given by a statutory body for taking or not taking a particular cause of action are not mixed and can be clearly disentangled, but where the court is quite satisfied that even though one reason may be bad in law, nevertheless the statutory body would have reached precisely the same decision on the other valid reasons, then this court will not interfere by way of judicial review. In such a case, looked at realistically and with justice, such a decision of such a body ought not to be disturbed."

So that, we say, makes good the point that I was --

THE CHAIRMAN: That is very helpful. But we will obviously give Mr. Harris a chance to respond to that by giving us any alternative authorities.

MS. DEMETRIOU: Of course.

THE CHAIRMAN: So still until Thursday.

MR. HARRIS: Thank you.

MS. DEMETRIOU: So our threshold answer is that the CMA indeed renewed the separation element of the parties' remedy proposal for two free-standing reasons, and I would ask you to revisit paragraph 12.125, and we say it is clear from this paragraph:

"So as noted above, we concluded that ICE continuing to hold Trayport as a wholly-owned subsidiary was incompatible with the aim of achieving autonomy from ICE for a newly formed Trayport board. Nevertheless, even if we had concluded that the parties' proposals on operational autonomy were effective, we considered that the separation element would require ongoing monitoring and that compliance with the separation element would itself be difficult to monitor."

Then 12.126:

"This ongoing monitoring, supervision and oversight would give rise to monitoring costs for an indefinite period given that we have not concluded that the SLC would be time limited. In addition, we concluded that the need for monitoring would introduce risk as to the overall effectiveness of the parties' remedy proposals."

So what is being said is that even if we are wrong on autonomy, even if we are wrong on that, we have got a separate reason. So even if we had agreed with the applicant on autonomy, we have got a separate reason, which is that ongoing monitoring would be too difficult and indefinite.

So what we say is that applying the test in this authority, we say it is plain that the CMA's decision would have been the same even if the applicant's challenge is well founded. Of course we say it is not well founded, and I will come on to deal with that, but we say even if well founded -- so even if the CMA was wrong to find that -- the conclusion on the autonomy bit was wrong, then that only eliminates one of the two self-standing reasons. So we say for that reason alone Ground 4 goes nowhere. It does not get off the ground.

But in any event, our case is that the CMA's analysis of the separation element was lawful. Just by way of context, it is important to bear in mind -- and we have seen this from section 41(4) of the statute -- it is important to bear in mind that the CMA has a duty to have regard to the need to achieve as comprehensive a solution as is reasonable and practicable to the SLC.

It does this in two stages. So first of all the CMA identifies -- and we see this from the structure of the report -- the remedies that are effective in addressing the SLC from the various options that it is considering, including those put to it by the parties. If more than one remedy is equally effective in addressing the SLC and its adverse effects, then the CMA will then consider proportionality and adopt the least costly.

In this case, of course, the CMA found that only divestiture would be an effective remedy. So that is the context of the enquiry. ICE's complaint is that essentially the CMA elided the question of effectiveness with the question of whether the separation element would create an independent, an autonomous Trayport. That's the complaint, and we say that that is unfounded because the SLC in this case consisted in the ability of the merged firm to pursue a strategy of partial foreclosure because of ICE's control over Trayport. So that was the vice.

So the vice was: compared to the counterfactual in which, you have seen from section 8, ICE and Trayport had conflicting incentives, once ICE owned Trayport and had sole control

over Trayport's strategic direction, then that would enable the merged entity to pursue the partial foreclosure mechanisms.

So in addressing the SLC, it was critical that the CMA needed to address the question of control because that was the key vice. That was the vice giving rise to the SLC that needed to be addressed.

So that is why the CMA was correct to ask itself the question which it did, the question being: does this separation element permit an autonomous, fully independent and autonomous Trayport? Of course that is the question, because the vice is that control of Trayport by ICE permitted the partial foreclosure mechanisms to be pursued. It is not surprising, therefore, that the parties themselves, in putting forward their remedy proposal, addressed matters in those terms.

So what the parties themselves said, they claimed that the SLC could be effectively remedied by creating an independent and autonomous Trayport. If you just turn up our defence, and it is annex 3 to our defence, and page 2 of this document, which is the remedy proposal, and you see heading C "Autonomous operation of Trayport", and 13:

> "Trayport will be a separate legal entity within the ICE group and operate as a separate and distinct business with its own independent board of directors and senior management team."

So what the parties are saying is this will render Trayport autonomous. That is their case, and they were right to put the case in that way; they were right to put it that way because the vice that the CMA needed to address, the SLC that it needed to remedy, was caused because of ICE's ability to control the strategic direction of Trayport. We say it is a very simple point.

Of course, prior to its notice of appeal, the parties had never suggested that the separation element would be effective in addressing the SLC even if it failed to achieve autonomy. So we have had no explanation of why the question the CMA asked is wrong. So why would it be that even if this separation element does not achieve the autonomy that is claimed for it by ICE, how would it in those circumstances remedy the SLC. Even now it does not explain the basis on which it would. So we say there is nothing in this point. The CMA ask itself the right question.

The second point that is made relates to the question of section 172 of the Companies Act, and it is important to see the context in which that is referred to. It is footnote 292, which is to be found on page 207 of the report. If you go back to 206, you see paragraph 12.122, and:

"The primary issue which would undermine the effectiveness of the separation element lay in ICE being the ultimate owner of 100 per cent of Trayport, which we consider to be incompatible with a fully independent and autonomous Trayport."

Then over the page, "Reasons":

"We consider that ICE's full ownership of Trayport combined with its industry knowledge, standing and greater financial resources would likely result in ICE's influence being disproportionate to its voting rights."

Then at (b):

"Even if ICE representatives on the new board did not retain any voting rights, although the parties did not propose this, we consider that other members on the new board would still attach weight to their views and that ICE would still retain the ability to influence the New Board."

I would ask you also to note the reasoning at 12.123 and 12.124. But then there is the footnote to (b) at 292, and what is said there is:

"In addition ..."

So this is an additional footnoted point. So we say that:

"It is clear from a fair reading of the report that it is a subsidiary and non-essential aspect of the decision."

So even if the applicant is completely right on what section 172 means, we say that it is a subsidiary part of the decision, it is an additional point. It is plain from a fair reading of this that this is not a point which is necessary to the decision. We say that if you just eliminate the footnote, the decision would have been inevitably the same.

THE CHAIRMAN: But the footnote in itself is fine, but it is not the complete picture. What they are saying is of course you are entitled to take into account the interests of your shareholder, but there comes a point that what you mustn't do is prejudice effectively the business in the bottom line of the company of which you are a director.

MS. DEMETRIOU: Yes.

THE CHAIRMAN: I think that is their point. I don't think they say, well, you totally misunderstood the law in your footnote. What they are really saying is it is only half the picture and what about the other half.

Is that right, Mr. Harris?

MR. HARRIS: That is a fair summary, sir.

THE CHAIRMAN: Yes.

MS. DEMETRIOU: If that is right, what we say about that is that there are mechanisms through which the CMA found that the merged entity could partially foreclose ICE's rivals, mechanisms that can achieve partial foreclosure without harming Trayport, at least without harming it to the degree where section 172 would become relevant.

So, indeed, we say in relation to that you will recall that Mr. Harris argues in relation to his GFI arguments that all of the foreclosure mechanisms would be targeted and none of them would harm Trayport generally. That is his point in relation to GFI.

Of course he is making an inconsistent here point here. But we say that some of the foreclosure mechanisms could be carried out, even taking section 172 at its highest, the obligation, and even assuming that everyone complied with it at all times. So, for example, the merged entity could take action which favours ICE without reducing its general offering, without reducing the quality of its service or damaging its revenues. For example, if it is choosing between two investment decisions: do we support ICE's new product or do we support EEX's new product? That kind of decision.

THE CHAIRMAN: Yes, I can see that.

MS. DEMETRIOU: So we say that on no interpretation of section 127 could it be said that something like that would conflict with the directors' duties. But even if that is wrong -- and we say it is not obviously, but even if it is wrong, the fatal point from the applicant's point of view is that section 172 cannot provide an answer because it would require frequent and ongoing compliance with it, would require frequent and indefinite ongoing monitoring.

This point is illustrated by the applicant's response to the CMA's submissions. The CMA made submissions that if the applicant were right about the wide-ranging effect of section 172, this would mean that no vertical merger would ever give rise to a competition concern. That is what we were saying. We said that section 172 cannot be that effective, because otherwise no vertical merger would ever have to be scrutinised. What the applicant said about that in response, they say that that isn't right because, for example -- they give us some examples -- a shareholder could ratify a director's decision and harm the subsidiary. But we say that just goes to demonstrate, even on the applicant's case, how much reliance would have to be placed on effective monitoring of compliance with the applicant's proposal.

So you cannot just point to section 172 and say it is all going to be okay, because even if that were prima facie an attractive point, you still have to make sure that all of these directors who are taking all of these decisions indefinitely going on into the future actually comply with their duty under the Act, and that comes back to the CMA's point on

monitoring, which is its second self-standing reason. So for those reasons we say that ground 4 is unfounded.

Can you just give me a moment to see if there is anything I have missed. (Pause)

Unless the Tribunal has anything, those are my submissions.

THE CHAIRMAN: Okay. We will take a break for five or ten minutes and then we will hear Mr. Harris in reply.

MR. HARRIS: Thank you very much.

(3.14 pm) (Short break)

(3.30 pm)

Submissions in reply by MR. HARRIS

THE CHAIRMAN: Yes, Mr. Harris.

MR. HARRIS: Members of the Tribunal, unlike yesterday afternoon by 3.30 when my toes had turned to ice, in the non-client sense, I am now rising in temperature and I wondered if I could have permission to remove my jacket?

THE CHAIRMAN: Of course you can. No problem.

MR. HARRIS: Rather than fiddle with the temperature, because that has gone from one extreme to the other. Thank you very much.

My task, of course, is to not repeat my submissions, which I do not propose to do, but it is more than that, as you know, sir. As an advocate I don't want to bite off more than I can chew and I don't want to simply rattle off every single thing that I feel I could say in response, because that is defeating the object.

THE CHAIRMAN: Yes, yes.

MR. HARRIS: I am going to do the following, if I may.

I am going to begin with that topic which is foremost in our minds, remedies, because that is the one that Ms. Demetriou finished with. We say there are several short, quite distinct and simple problems with that that she cannot overcome on the face of her report. Then I am going to deal with some overarching points about Ms. Demetriou's in particular appeal to intuition: this is intuitively a case where there is a problem. Then I am going to deal with some short points on vires, reply to that. So if you like, ground 4, some points about intuition, and then ground 5. Then to the extent that the time permits, I will pick up some more detailed points. I will obviously be dealing with Ms. Demetriou's point about it is all in section 7. Look at section 7, you understand the case. In particular, ICE faces a lot of competitors and that provides the missing link between ability and incentive. It is all about ... I am going to deal with that.

I hope you will forgive me, after that, time permitting, it will be a more traditional style reply of Ms. Demetriou said this and I say this. But obviously not on every point.

With that introduction, perhaps on ground 4, replying to remedies, Ms. Demetriou's most recent submissions. She said that there were effectively three issues, and the first of them was she said: I defeat Mr. Harris' challenge altogether because I have two free-standing reasons. So even if everything that he has to say about the separation element is right, it does not make any difference because look at my completely self-standing, free-standing reason about monitoring. Bob is your uncle, that stands by itself and it disposes of the challenge.

She produced with admirable backroom ability during the course of her various submissions on her feet, an additional case ex parte *Owen*. I will put in something short about that, because we will have a quick look.

My initial reactions are as follows, and we say meet the point completely. What it says on the passage to which Ms. Demetriou took you at 1177 towards the end in Lord Justice May's judgment is essentially very similar to the *Derbyshire Primary Care Trust*.

THE CHAIRMAN: It is the same chap, is it not?

MR. HARRIS: Yes, I think that is right, yes, yes. That is right, Lord Justice May. There we go.

That probably explains why they are very similar, if not identical.

He says that you would have had to have reached precisely the same decision on the other valid reasons. Picking it up at D:

> "You would have to be satisfied that although a reason relied upon by a statutory body may not properly be described as insubstantial, nevertheless even without it the statutory body would have been bound to come to precisely the same conclusion on valid grounds."

This is a high test, and I would just like you, if you may, on this first point that Ms. Demetriou makes to turn up the decision and we will see the supposedly free-standing reasons that would lead inevitably to precisely the same conclusion.

You might have thought if that were to be the hurdle to be overcome, the report would say reason 1, but never mind about reason 1 because look at my reason 2, it is completely separate and distinct. But that is in fact not what we get in the report.

If you could turn it up, please, on internal page 208 at paragraph 12.128, this is the key section because, as the heading states, it is our conclusions on the separation element. The relevant one is (b), I took you to that in opening.

THE CHAIRMAN: We looked at that, yes.

MR. HARRIS: The first sentence is not important because that is about entrusting it to the new board, so we can put that to one side. But the next sentence is the key sentence. Ms. Demetriou has to spell out of this sentence two completely separate and free-standing reasons such that if one is dismissed as judicially flawed, judicially flawed in a review sense, then nevertheless you get -- but that is not what it says.

It says:

> "We also have some concerns ..."

So that is in addition to the complete autonomy concerns raised above:

> "We also have concerns in relation to how an external monitor might be able to verify compliance."

That is all it says. It just says "we have some concerns".

It does not say that they are fatal. It does not say that they are unsurmountable. It does not say that they amount to a free-standing reason so as to dispose of the separation element. It just does not say that. It is worse for the CMA for this reason, which was we said -- and I don't believe this is disputed -- that we are happy to engage with you, CMA, about any alterations or changes or flexes to our party's remedies proposal because this was part, as you know, of that term of art, parties' remedies proposal. Let us know if you have some concerns. We were not put any concerns during the administrative phrase about, oh well, the monitoring, whether it was done in this way or that way. We weren't told, forget it, monitoring off the table, full stop.

Okay. So on our view the first of these supposed responses does not get over the hurdle set out either in *Derbyshire* or in *ex parte Owen*. For that reason that point does not dismiss my complaint about remedies.

Then counsel for the CMA was talking about this suggestion that there can be some of the partial foreclosure mechanisms that damage Trayport and some that do not. But in fact, the reason that our separation element addresses the substantial lessening of competition that is referred to in the report -- and this was another complaint, we do not understand how your remedy actually works. The reason it works is because in fact our separation element does address all of the vertical foreclosure theories that are actually referred to in the report.

All of the foreclosure mechanisms, partial foreclosure mechanisms, involve damaging the Trayport business, and it is because they all involve damaging the Trayport business that our separation function, with the separation of roles and duties of directors, can address all of them.

Ms. Demetriou says in a manner that is just, with respect, wrong, no, it is not all of them. Some of them might damage Trayport and some of them might just favour ICE, for example. She even gave you the example on her feet, as advocates are wont to do: what about some decision about favouring an ICE centric, if you like, investment over some other investment? That might be conceptually a different genre of damage from some other partial foreclosure mechanism or some other mechanism, but it is not in their report. You will not find that in the report.

So that one is an unfair point to put back. What we do know, however, is that in actual fact prior to that submission that was made orally, there seemed to be agreement between the parties to the fact that all of the mechanisms damage Trayport. In that regard, can I invite you to turn up, please, the defence at paragraph 193. That is in a separate bundle.

THE CHAIRMAN: Yes.

MR. HARRIS: Picking up at the top, at a particular reference:

> "ICE argues that section 172(1) would prohibit Trayport's directors from taking action that would sacrifice Trayport's own commercial interests in favour of its 100% shareholder, ICE. As ICE acknowledges at paragraph 194, that kind of sacrifice of one company's interests in other group member is "*the essence of a vertical foreclosure concern*."

So that is indeed ad idem between the parties; it is about sacrificing the company's interests and that being the essence of vertical foreclosure concerns. In other words, the CMA, as we apprehend that, is agreeing that the sacrifice of Trayport's interests is what is going on in this case. It is the essence of the vertical foreclosure concern which they have put forward.

This is of considerable importance on the remedies grounds, gentlemen, for this reason: that if there were no sacrifice for Trayport in pursuing a vertical foreclosure strategy, which is what we are now told orally, at least in some respects, then Trayport already would have pursued it. A profit maximising company, no damage to Trayport, no sacrifice to Trayport's interests, well, obviously it would have already done it.

Take, for example, some of the foreclosure mechanisms: raising its prices, okay? So profit maximising outfit in the market, we are told, apparently now, notwithstanding what is said in 193, oh well, you can do this without damaging yourself, they obviously would have done it. Likewise, all the rest of the points follow in the same logical order: damage your service, reduce your service proposition. That probably means saving some costs or saving some costs relative to what you would otherwise have spent. Well, they would have done that as well.

It translates through all of the other examples of the partial foreclosure mechanisms. For example, delaying the launch of new products. Well, if there is no damage to Trayport, if it does not impact on Trayport, they already would have done it. It is inevitable. A feature of this case is that the vertical foreclosure theories that are put forward involve ICE using its control over Trayport to cause Trayport to do things that sacrifice Trayport's interests. That is the point of this case, and we heard that repeatedly from Ms. Demetriou, about taking the control of Trayport.

But the reason, of course -- and bringing this now all full circle -- why is that therefore relevant to my challenge to remedies. Well, it is like I said a few moments ago, it is relevant because on our remedy you cannot do things that damage Trayport even if they are in ICE's interest, because Trayport has its directors and they are bound by their directors' duties. That, sir, is the point you put to me to clarify is that your case.

PROFESSOR MAYER: Can I just make sure I understand? Is it not the case that there could be a benefit to ICE that is no detriment to Trayport, but that would have no benefit to Trayport if it was an independent firm?

MR. HARRIS: Are you asking me could there conceptually be a benefit to ICE that would not be of either a benefit or a detriment to Trayport?

PROFESSOR MAYER: Would not be a detriment to Trayport but if it were an independent firm, Trayport would not have undertaken it.

MR. HARRIS: Well, I do not know of an example, and I certainly do not see one in the report. So for judicial review purposes that is the principal answer. If that were to be relied upon, where is it in the report.

But the second answer for today's purposes is that the CMA has to rely upon and defend the partial foreclosure mechanisms that it does refer to, and those, as I said a moment ago, all of them involve damaging Trayport. If they did not, they would have happened anyway.

So I take your point, Professor Mayer, conceptually and analytically I have no difficulty. I do not have an answer to you, but one of the reasons I do not have an answer is because it is not mentioned anywhere in the report that I'm attacking, and therefore for my purposes it does not matter.

PROFESSOR MAYER: Thank you.

MR. HARRIS: So I am afraid I am hopping about a little bit in my own notes, so if you will just bear with me a moment. Sorry, I am confusing myself. I thought I had another point to respond to on remedies, but the reason I am confusing myself is because effectively the

third point is what is the relevance and importance of the footnote, the directors' duties. But I dealt with that very briefly. You know what our case is.

THE CHAIRMAN: I know what your case is.

MR. HARRIS: It is not attacking the text in the footnote. It is a more fundamental point about how it does achieve effectiveness once you understand what is going on the in the report. That is what I have to say about remedies ground 4 in terms of reply.

Then I said I would make some points about Ms. Demetriou's repeated appeal to substitution. She, as you know, eloquently, as she always does, said: but, gentlemen, take a step back, think about this, it's the biggest venue of this type, acquiring the biggest software provider of that type, and it is an essential input to somebody else, and really it is obvious. Intuitively, you have to think to yourself this is going to be a case where there is going to be a competition law problem.

But we say, hang on a minute, if it is so intuitive that when a market participant obtains the biggest software provider that is a critical input into all of its competitors' and rivals' ability to compete, why did GFI not do it? If intuition was of any value in this case, it would have led to GFI, or at least intuitively GFI, doing the same thing. But GFI owned the same software provider, GFI competes against these same people, had it for seven years and did not engage in any of these partial foreclosure mechanisms. So it is very far from intuitive. Quite the opposite.

Knowing about GFI, the only real world example that we do have, you should have taken a step in the other direction and thought maybe I am barking up the wrong tree with my intuition. Maybe that is what has gone wrong in this case. We don't know. Maybe the CMA has relied too much upon this supposed intuition, and therefore it has not dealt with sufficient rigour with the necessary steps in the reasoning.

As you know from my opening, that is the nub of our complaint. It has not taken a sufficient grip or handle upon this market, and in particular the stickiness and liquidity.

I am about to come to the supposed panacea in response to all my submissions, oh, it is all in section 7. I will come to that in just a moment, but we say it is precisely because it is not intuitive in this sort of market once you understand the rudiments of the market context, and in particular traders deciding where to trade and traders being very concerned with liquidity, and therefore there being a great deal of stickiness, that you have to go the requisite miles. I just caught myself. I was about to say go the extra mile, but actually you just have to go the requisite mile in actually analysing and setting out how ability translates into incentive, taking into account that incentive is both benefits viewed against costs. It is no good -- so

this is now my point about -- actually, I am now going to move to section 7 and I will come back to the overview points on vires in just a moment.

It is no good just appealing to, well, look at section 7. Section 7 says there is a lot of competition. It does, and Ms. Demetriou was at pains to point out -- this is vital to her case because she does not have a linkage that is spelt out in section 8. She said never mind that, because really it is all in section 7; section 7 talks about fierce competition, section 7 talks about head-to-head competition, potential competition, dynamic competition and all the types of competition you can think of.

THE CHAIRMAN: And you do not challenge that.

MR. HARRIS: We do not challenge that, but that does not get her home because the mere fact that there is competition does not explain how you can get liquidity -- and this is my two links in the chain from my opening -- to get yourself home on this partial foreclosure analysis, you have to say that notwithstanding that, there is competition, because essentially there is liquidity -- I do beg your pardon -- stickiness of liquidity. How am I going to explain, and therefore set out with sufficiently cogent reasoning in my report -- how am I going to explain that it moves, full stop? Then that is link number 1, and then link number 2, it does not matter. Even if anywhere in the report that had been done, which it hasn't, it would still not be enough because you have to explain that it moves from, say, EEX or NASDAQ, or somebody like that, and it has to move to my exchange. No good me fiddling around in the market and causing liquidity to shift if it does not shift to me.

So every single time, and the mere recitation, no matter how many times it was done and no matter how convincing it sounded at the time of "It is a competitive market, there is lots of competition", that does not get you over the hurdle. That why we kept say -- I hope it may make more sense to you, why I kept on saying every time you need to show the shift and show it to us. It became a bit of a mantra and I apologise for that.

But that is why, and it is not met by section 7. What we say with respect is that it is rather telling now that Ms. Demetriou has to rely upon section 7 because she hasn't got the linkage.

If you recall from my opening, the other point she did in the skeleton, was, oh, it is the flipside of the coin, it is inexorable and it is logically inevitable, and those are all quotations from the skeleton. I was saying, well, okay, you say that and you assert it, but where do you actually show it in your report? You don't do it.

That is what I have to say about the new theory of linkage and how it does not stack up.

Then that takes me on to vires in these overview comments, and we are very grateful to Ms.

Demetriou on behalf the CMA because she has been very candid, very candid. She said quite openly that it is to do with fairness of giving the would be other new buyer, the putative other new buyer of Trayport the choice -- in the skeleton the phraseology used was: they would otherwise be lumbered with a potentially unfair agreement.

Just picking up my notes, there was one other key phrase. Ms. Demetriou submitted just five minutes into her submissions on ground 5:

> "So we had to be careful not to allow the new owner to be saddled with an unfair agreement."

We say, good. So actually we have understood what you were doing. There is no question of anybody misunderstanding what this email was trying to do; it was thinking it was appropriate to give some flexibility and a choice to somebody else because they thought it might not otherwise be fair. Fine. Is that in the statute? No. End of story. The statute does not say that. That is why it is ultra vires. So they lose.

Then Ms. Demetriou says, as we know from the openings, well, effectively even if that does not work, it is all about effectiveness of the remedy. But I went through that in opening. It does not say that in the report, and sensibly how can it be said to be needed for effectiveness in circumstances where the CMA -- I think this is 12.198 -- says quite openly, well, we are quite happy for somebody else to have this agreement. Even then on top of that -- and I am not going to go very far with this because it is in danger of being representative of my opening, but it is not coherent, we say, to say that somehow a new revenue producing agreement, which Trayport is massively in favour of -- look at the evidence of Mr. Heffron -- that they have been trying to obtain for, I think -- the number of years Ms. Demetriou used a couple of times, which I have to accept, was 15 years. In trying to get this very agreement for 15 years -- and then they get it and it produces -- we have seen the revenue figures -- lots of revenue, how does that make divestiture more difficult? It does not at all.

Then on top of that, even we know that there were plenty of people out there bidding for this company. So it just does not stack up, with great respect.

So that is, we say, a fundamental problem for the --

THE CHAIRMAN: I am just trying to figure out where you draw the line. Can we look at 12.71.

MR. HARRIS: Yes, please. Yes. The more we look at this, in my submission, the better my case gets.

THE CHAIRMAN: Well, let's see. That goes back to the earlier finding, yes, which we now interpret means on the balance of probabilities they take the view that the new agreement, at

least on the same terms or serial terms, would not have been entered into were it not for the merger.

Does that mean that irrespective of the terms of that document, and whether or not it has been, let's say, an unfair agreement or unbalanced agreement, does that mean that the CMA got power to say, well, without the merger you would not have had the agreement, so we are going to ask you to get rid of the new agreement?

MR. HARRIS: No, because the power is shrouded entirely by reference to the SLC and the adverse effects, and they are addressing themselves to a completely and utterly different question. As you, sir, made the point I think both to me and Ms. Demetriou, they then do not even answer that question. They do not even answer the question was it at arm's length or not.

But the critical point on vires is obviously the next two or three paragraphs. Would it be appropriate for a new owner to decide whether ... Well, if you are some normative adjudicator not shrouded by the Enterprise Act jurisdiction, fair enough, maybe you would want to ask yourself is it fair, is it appropriate, should I give them flexibility, should they have the choice. But that is not what the CMA is allowed to do under the Act.

MR. ALLAN: I would just be interested to know really what your response is to the case put I think by the CMA, which is that the decision was made that the only effective remedy would be divestment in order to restore independence of Trayport. That is the premise. That is the remedy which, on their assessment, is required under section 41(2)(b).

What then follows is what are the mechanisms that are required to ensure that independence, and that includes relieving Trayport of an agreement that may be unduly burdensome to them. Is it your case that the CMA does not in any circumstances have power to do that, or would you say that they have power to do that subject to certain specific constraints?

MR. HARRIS: I think there are really three answers to that, if I do not lose sight of them on my feet. Perhaps logically the first is that is not what they say. This supposed analysis about comprehensive effectiveness of the remedy, which is now one of the responses, that is not in the report, so that defeats it.

The second answer -- I think I have already lost the third -- it will come back to me -- is that let's assume for the moment that it might be relevant were it the case that the agreement were not on arm's length commercial terms, it might be relevant to the question of effectiveness, assuming they had addressed that (inaudible). They do not actually find that, okay? So I think that logically comes second.

Then I think the third one is we do not accept, as you know from our proportionality and rationality challenges in the second and third grounds of the second notice of appeal, that it necessarily follows -- I certainly do not accept today -- that even if there were some supposed difficulty about arm's length terms, that it necessarily follows that the right outcome is to terminate the new agreement. That does not necessarily -- it could be disproportionate or irrational.

What you know from the way the interim enforcement order is set out -- and one of the many, many reasons we take issue with this allegation about breach -- is that you can seek advance, if you like, sanction, for a new agreement. The point -- I was going to develop it later, but I will deal with now -- is that in actual fact when you turn it up, one of the things it says in terms is that if there is a change to a change to an agreement then it is acceptable to report it after the event, especially in circumstances where you bona fide as is set out in our evidence, take the view that it is not a breach of the interim enforcement order.

So I hope that that answers the enquiry.

THE CHAIRMAN: Can we still go back to this.

MR. HARRIS: Please.

THE CHAIRMAN: If you look at 12.70:

"Some third parties believe that the New Agreement was specific to the merger and should therefore be terminated."

MR. HARRIS: I am sorry, which paragraph?

THE CHAIRMAN: Well, 12.70.

MR. HARRIS: Yes.

THE CHAIRMAN: And then you get on to 12.71:

"... not sufficiently certain on the balance of probabilities."

It seems to me that the reasoning here is that on the balance of probabilities, this agreement would not have been entered into absent of merger. Now you have got the merger, hence on the balance of probabilities it has been entered into because of the merger, and that because of that then it should be unwound. Have I misunderstood what the reports say?

MR. HARRIS: Yes, because what are they saying here? It is very clear, in my respectful submission, that the reason it should be set aside is nothing to do with the SLC, which is their statutory power, but it is because they think that it would be -- and here I am quoting:

"... appropriate for a new owner of Trayport to decide whether --

THE CHAIRMAN: What I am trying to get back to: why is it appropriate? Because if you look at the reasoning, you start off at 12.70 and look at 12.71, the reasoning seems to me that it is

merger-specific, and absent the merger on the balance of probabilities, the agreement would have been entered into. That seems to be the reason and why it is appropriate.

There is nothing in there that says Trayport may have been taken advantage of or that it may not have been at arm's length.

MR. HARRIS: If that is right -- as you know, I say it is clear what -- but if that is right, that is also ultra vires because that is Mr. Allan's point from earlier, which is status quo ante. If it is merger-specific and you are just trying to reverse it out to the position pre-merger, then that means what you are aiming for is taking you back in time to the status quo ante, and that is not what the statute says.

So that would be four square in my favour, but of course, Ms. Demetriou disavows that. At one stage, I think in our earliest written submission, we made the point that if and to the extent that this is an attempt to go back to the status quo ante, that would be ultra vires. The written argument has rather moved on since then because Ms. Demetriou obviously knows that is not permissible. So she says no, and then there is the new theories about effectiveness and what have you, and the reason this is so difficult.

Again, at the risk of repetition, the more you read 12.71 to 12.74, the worse it gets for the CMA. There is just no way out for the CMA, given what it says there. It does not matter how much you twist in the wind, how many new arguments you come up with, how you try and flex it or nuance it, there is no way out. This is a total slam dunk, with great respect.

Those are, if you like, in many ways the overview points, and I am already at three minutes past four, so I am plainly not going to deal with every other point.

THE CHAIRMAN: You do not need to. I think that we have got --

MR. HARRIS: I will just say, I am going to try on my feet to pick out what I think are the bigger ones.

THE CHAIRMAN: Yes.

MR. HARRIS: But I would obviously say that a large part of the detailed responses, unsurprisingly, I have already dealt with in writing because we had the to-ing and fro-ing. So in particular -- and I know it is hard at this stage of a hot room and listening to me all this time and ground 2 in particular -- ground 2 -- it has got some detailed points in there, but every single point that Ms. Demetriou raised we have dealt with in writing. So I probably will not be covering a lot of those in depth, but I am going to pick up a couple of points, if I may, on the counterfactual analysis.

Just before I get there, I am going to invite you to not agree with Ms. Demetriou about *Tetra Laval*. She says effectively sideline it, it is one dictum.

We say, with great respect this supposed not very important dictum is Mr. Justice Sales, as he then was, who happened to know quite a bit about judicial review. He introduces it with the words "no doubt". He says it is no doubt that their standard of review alters in circumstances akin to the *Tetra Laval*, and of course we know from the CEC's own guidelines that the critical point -- this was, I think, 6.5.1 -- that they themselves equate all non-horizontal mergers together.

So there is no distinction between a non-horizontal that is vertical, as compared to a non-horizontal that is conglomerate. That was one of Ms. Demetriou's points. So we say these are distinctions without a difference, and you can properly have regard to *Tetra Laval*, including the reference that is made to it in the *BAA* case. Again, in *BAA* it was said -- and this was subparagraph 7 of paragraph 20. This is on the Convention right, which again, Ms. Demetriou said effectively disregard that, or it does not alter. But the fact remains that unequivocally they say in that sort of a case "You have to exercise particular care".

THE CHAIRMAN: I think both sides accept the correctness of paragraph 20 of *BAA*. It is what you draw from it, yes?

MR. HARRIS: Yes. The reason I mention it as one of my few reply points is that it reached the point in Ms. Demetriou's submissions where she said, having made, in her submission, overstated submissions about the standard of review, therefore all of my points fail because they are all critically dependent upon an overstated standard of review, which is wrong. That is why I address it. That is just not right.

I would just like to draw your attention on the question of counterfactual to something that was absolutely deafening by its silence in Ms. Demetriou's submissions. So you will recall that I went to the very deliberate trouble of taking you to every paragraph in the decision that is referred to in my first notice of appeal at paragraph 115.

So this is the footnote -- I beg your pardon, footnote 115 point, as an epithet for this afternoon, as we run out of time, that is the point. Footnote 115. They were, as you will recall, all of those paragraphs in the decision that draw a distinction between being in the club, being a customer and being out of the club, not being a customer, and there were seven in my footnote and then I added one that had been addressed in Ms. Demetriou's skeleton, namely 7.187.

So there were at least eight, and that is effectively ignored in the CMA's response. They say, oh no, what is really going on in this decision is not to do with in or out of the club; it is to do with something else. The SLC is all to do with something else. To which my response is we just do not get it. Your own case is read the report as a whole. Here are

multiple references in the report to the distinction that you yourselves draw between being in the club and being out of the club.

We say we would have been in the club anyway, wholly irrespective of the merger because of the road to Damascus and the change in attitude and Mr. Bennett joining the team, and what have you. Now you are saying ignore all that, that has got nothing to do with it.

I just want to remind you of just one of them because it is so compelling, in my submission. It is in the summary, no less. It is paragraph 44 of the summary, so this is the point, that we are effectively told on the counterfactual argument, it is of no relevance and/or misheaded. It reads at paragraph 44:

> "Of particular importance we consider that a loss of competition between ICE and its rivals would have a longer term detrimental consequence ..."

Second sentence:

> "We also consider that under ICE ownership, Trayport would no longer seek to promote competition and shape market structures in favour of its venue customers and in competition with ICE. We place particular weight on the loss of this dynamic."

That says it all. That cannot now be shuffled off, ignored, sidelined, said to be irrelevant. This is a critical part of the analysis.

THE CHAIRMAN: Are you saying that Ms. Demetriou did not answer your point or are you saying that she did but you do not agree with her answer?

MR. HARRIS: No, she is saying effectively you can ignore all of that because the SLC is about trying to promote more trading on Trayport as opposed to somewhere that is not Trayport. That is really what is going on in this decision.

But we say what are all these other references, then? It seems to us that you place particular weight on the fact that are you in the club, are you a venue customer or are you not a venue customer.

MR. ALLAN: Sorry, Mr. Harris, is what she saying not that the crucial point is that you now own the club and that changes the dynamic?

MR. HARRIS: Yes, but the point is what we say is that we would have become in the club -- because we are talking about the counterfactual. We would have become in the club wholly irrespective of the merger, okay? So you cannot blame this change on the merger because it would have happened anyway.

MR. ALLAN: But there is still a difference, is there not, not between you being a member of the club and you owning the club?

MR. HARRIS: That is true. That is true. But the passages that I have referred you to, the footnote 115 passages, that is not a distinction that is being drawn in the decision. It is are you in or are you out. That is the dichotomy, in or out. We say we would have been in anyway, and you are the ones who seem to think it is so important because you keep on mentioning it. Then you say it is of particular importance and particular weight. You now cannot sideline it. You cannot shuffle away from it and pretend that it does not matter, and that's a big flaw.

THE CHAIRMAN: You are saying you are in the club because of the new agreement?

MR. HARRIS: We are saying that we would have been in the club in any event because of the new agreement.

THE CHAIRMAN: But that new agreement does not, for example, include oil. You are in the club for certain products but not all products. Is that right?

MR. HARRIS: Yes, it has its -- the scope -- you know, some things are in the scope and some things are not in the scope. But again, that is not the critical distinction in all the footnote 115 paragraphs. It is in or out, customer or not customer.

THE CHAIRMAN: Yes.

MR. HARRIS: And that, with respect, has not been answered, that point in the response, and it is a crucial flaw.

THE CHAIRMAN: Can I just ask, Ms. Demetriou, have you answered this point in the way that Mr. Allan --

MS. DEMETRIOU: What we say, this point is not relevant because our fundamental answer is that the new agreement is irrelevant to the SLC.

These points about in and out of the club are only relevant if Mr. Harris is saying that somehow the new agreement is connected to the SLC. But his case on vires is that it is not connected to the SLC, otherwise he does not get off the ground on vires. So we say that all these references that he has referred to are simply irrelevant because the key point that the Tribunal has to consider is, is the new agreement part of the SLC or not. We are agreed on both sides of the bench that it is not.

Once you accept that the new agreement is not part of the SLC, then that is what leads to the conclusion that this whole debate on ground 1 is simply irrelevant to the decision. That is our point. So we have answered it. It is irrelevant because no link between the new agreement and the SLC.

THE CHAIRMAN: The same point that she said before. That is fine.

MR. HARRIS: Very clever, very clever.

THE CHAIRMAN: Look, you say that she has purported to give an answer, but it is an answer that you say is incorrect, rather than that she hasn't given an answer.

MR. HARRIS: Insofar as the answer is ignore large chunks of my report because they are all irrelevant. Well, if that is really an answer, it amounts to a technical answer. But you cannot have it both ways; you cannot say to this tribunal, as she has done, read the report as a whole, add it all together and then you sideline something that you yourself have described as of particular weight and of particular importance that has multiple references running throughout sections, including the critical section 7.

Yet that is what Ms. Demetriou does because she knows that this is a problem and so she has to say all irrelevant. We say, no, I am entitled to look at your report, does it hold together, does it stack up on the face of your own report. It does not stack up because what you are now saying, and you went to great length repeatedly to say about in the club and out of the club. You are now saying nobody cares about that, it is all irrelevant. That does not work, with respect.

It takes me on to another point, which was debated, about the word "normal venue customer" or "materially identical terms". It just does not matter. What we say is on your own report you talk about in or out of the club. It does not matter whether you are in or out of the club on any particular terms.

Sir, this takes your point as well about was oil in it or iron ore, or whatever else may or may not have been in it. That is not how it is set up in all the footnote 115 paragraphs. It does not say, well, the critical difference is -- does Trayport support customers who deal in, say, oil or gas or iron ore as opposed to not supporting its customers who deal in gas futures, or whatever else these clever traders deal in. That is not what it says. So it does not matter, normal venue customer or abnormal customer, a customer on these terms versus those terms.

Then I do have to respond on a slightly more detailed point about Mr. Bennett. We probably, in light of the time, will not turn up the particular documents unless you would like to do so. But you may recall from Mr. Bennett's witness statement -- this is at paragraph 22 -- if you don't, I will happily turn it up -- that he told the CMA on his evidence about the internal approval at the upper level of the company in three ways. One was the June 2016 submission, which I think you have now all had the opportunity to look at. One was the transcript of -- I cannot remember the date. Was it --

MR. ALLAN: 12 July 2016.

MR. HARRIS: Then he says that the third one was in telephone conversations. It is the very final sentence of his paragraph 22.

Ms. Demetriou says in response, well, you did not tell us, we cannot find any reference in the June submission or the transcript of the July hearing. But they do not address Mr. Bennett's evidence that all of the above things, including internal approval, were dealt with in one of the three methods, the third one being telephone calls. So that is an unanswered point.

Insofar as there is an attempt to answer it by reference to annex to the skeleton argument that Ms. Demetriou put in with the new document, the redacted document, with respect that just does not work. Because if you can turn that one up at the back end of her skeleton argument. I think that might be in the additional documents bundle if you do not have it loose.

THE CHAIRMAN: I have it with the skeleton.

MR. HARRIS: I am grateful.

So as I pointed out in my opening, the document is in effectively two parts. There is a generic heading and then a blackout. Then it is "Notes of call with ICE" on a day. The date is 24 May. So that is notes of call between the CMA and ICE.

What Ms. Demetriou points to is on the second page between the two hole punches under the heading "CMA comments":

> "We asked ICE to provide us with contemporaneous documents to corroborate this."

What is the "this" in the phone call with ICE? The "this" is the bullet point above, or the two bullet points above including negotiations resuming -- you can see what it says. So that is what they are asking for contemporaneous evidence --

THE CHAIRMAN: Wait, wait. You have a number of bullet points, yes? Are you saying that the CMA comments, when they are asking ICE to provide us with contemporaneous documents to corroborate this, only relates to what?

MR. HARRIS: It relates to all of them, the critical bit being it does not talk about the supposed dispute about the scope of the agreement and whether or not oil is in or out. Okay?

So whatever they are asking for in the call on 24 May with ICE, and they then ask for contemporaneous documents about, does not include the new point that was not in the PFs that does appear in the final decision about scope, the oil point.

Then we move over the page, and this is the second part of the document, talking about a different phone call on a different day with different people. This is now the next day, the CMA talking to Trayport, and in that conversation, just above the redacted bit, the

penultimate bullet above the redacted bit, that is where the issue arises about not getting oil markets. This document does not record the CMA saying to Trayport the next day on a different point about the scope of the agreement, including the oil point, oh, send us all your contemporaneous documents. So that is not what is happened.

Then this point, just so that you know, if you had the letter I handed in yesterday, 20 January -- I have some more copies in case it is not to hand. (Handed) They are double-sided.

As you know, we queried this, and at the top of the second page, because I know you have had an opportunity to read this, but at the top of the second page we queried the point that was raised in the skeleton about seeking contemporaneous documentary evidence, including about scope.

It comes back, the letter from the CMA:

> "The fact that the CMA did not specifically ask for documents relating to whether the product scope of the new agreement had been agreed in May 2015 is irrelevant."

So they accept that they did not ask specifically for contemporaneous documents going to the question of scope, including about oil; that is common ground.

They then say it is irrelevant for various reasons. But as you know, that means I still have a perfectly good fairness point. We did not know this was in dispute.

THE CHAIRMAN: Look, if you look at page 2 of the annex, or whatever, on one view they are asking you to give them contemporaneous documents to corroborate what you are telling them about the new agreements relating to negotiations between ICE and Trayport which commenced in the first half of 2015. So on one view they just want to see what documents do you have in relation to those discussions. I think it is common ground, I think from you, that there are no documents prior to May 2015. Is that right? Or is it simply there are no documents that you have disclosed?

MR. HARRIS: No, I would have to just check when those negotiations first started --

THE CHAIRMAN: We know your case is they started in February, but I am not sure whether there are in fact any documents relating to those negotiations prior to May 2015.

MR. HARRIS: No, sir, and with respect, I would say that does not matter for this reason, which is: the point that I am attacking as being an unfairness point is that it is now said oil not being in the scope is one of the reasons why you would not have reached this agreement in any event.

THE CHAIRMAN: That is one of the reasons that they put in the final report; it was not in the provisional --

MR. HARRIS: Yes, and it boils down to just a simple point from me. It's just not fair. You did not raise it at the time. If you had raised it at the time, whether the documents that I would use to rebut your supposed point were generated in February, March, April or May does not matter. I would have generated documents.

As it happens, there is one that completely pots the point on 14 May, reading up the chains of emails. But what's unfair to me is you did not ask for it. You rely upon it, you did not ask me, and it is common ground now from the letter that they did not specifically ask. That is that it says. They did not specifically ask, albeit they now say it is irrelevant.

It is interesting, we say we are back into the *Derbyshire PCT* and/or *ex parte Owen* case here because Ms. Demetriou said it does not matter for another reason now because it would have been the same decision anyway. We say no, you have to satisfy the inevitability hurdle. You rely upon this. We say that it is wrong, and unfair as well as wrong, and you cannot just glibly say, with great respect, oh well, do not worry about it because we would have reached the same decision anyway.

If we are right, then you have to remit it and then they make up their mind properly on the proper evidence as to whether or not they would have taken the same views.

So what I am going to do, I am just going to, if I may, filter through some of the other points. I have not really reached, with any degree of throttle, why I say these points about breaching the interim enforcement order are wrong, and I am not now going to be able to do it. But in many ways you have already got the point, sir and members of the Tribunal, which is you cannot on the one hand say it is obviously a breach because it might not have been on arm's length terms in circumstances where your own case is "I can't tell whether it is arm's length terms or not".

On top of that, Mr. Bennett, as you yourself pointed out, sir, he said, look, we had a look at this and we thought it was not in breach. That is a conscientious look, and it was rather unfair for Ms. Demetriou at one point to say it was not specifically in relation to this, but it was -- at one point she suggested, oh well, you might be saying one thing to suit you at one stage and one thing to suit you at another. The fact is that is sworn witness evidence that cannot sensibly be contested, and I am very grateful --

THE CHAIRMAN: The CMA do not have to accept that the witness evidence is accurate. They do not have to accept that.

MR. HARRIS: No --

THE CHAIRMAN: Whether or not that is credible or not is a different question, but they are not required to accept it.

MR. HARRIS: No, but there is another reason, and I am grateful to Mr. Lindsay here because he has told me three or four times not to forget to say this and I was just about to forget to say it. It is that Ms. Demetriou says inter alia, look at the facts, there was 15 years of trouble between these companies and then it happens within months of them starting to talk about the merger or actually merging. We say, yes, but you are completely losing sight of the fact that there was an unequivocal, undisputed sea change in relations.

That is, yet again, my road to Damascus point. Secondly, and a point that may not be quite at the forefront of your minds, not least of all because it has not been at mine, is that on the facts it is indisputable that the merger negotiations began -- this is the February point -- they began and they carried on for months utterly prior to there being any merger even in contemplation. It was not even on the market, this business.

The agreement discussions. Sorry, if I misspoke. It is the agreement discussions about the new agreement, started in February and there was no suggestion that Trayport was on the market.

So when Ms. Demetriou says, as she does, oh well, it is not that surprising, is it, I mean, these are not even third parties, it all looks a bit fishy, we say hang on a minute, these started, these negotiations, at a time when they were third parties and there was no suggestion that they would ever be anything but third parties. Then my learned friend places reliance on, if you like, the supposed fishiness of the fact that five months, that seems like a long time. We say, with great respect, you do not appear to have taken account of the points that Mr. Heffron sets outs in his witness statement at paragraph 14 onwards.

He makes a series -- with great respect to Mr. Heffron, who at least is in court, they are rather mundane points. They are things about how technically it takes time to do this and there was lots of interfunctionality in a software sense. Anyway, there is a whole series of reasons about why. There is nothing untoward or fishy, or whatever, about it taking five months. So those points, they do not really take the CMA anywhere.

May I just take one moment because I am anxious to distill some key points rather than some non-key points.

THE CHAIRMAN: Yes. (Pause)

Mr. Harris, I am not saying we are going to find this, but if we find that the new agreement was wrongly treated and should have been part of the counterfactual, what are the implications of that for the rest of the case? What do you say we should be doing?

MR. HARRIS: On that one, sir, we say that is a flaw that would have to be sent back to the CMA. You would have to remit on that issue because it is sufficiently important. It is the footnote 115 points again. So that one's a remission.

MR. ALLAN: Could you just explain a little bit further on what the implications of that remission -- suppose we find against you in relation to grounds 2 and 3.

MR. HARRIS: That is still a remission, if I am right on ground 1.

MR. ALLAN: We would then remit to the CMA for them to reconsider the issue of the counterfactual and to the extent that the counterfactual alters the assessment of the substance?

MR. HARRIS: Precisely, and I think -- doing the best off the top of my head to paraphrase, but the relevant statutory provision, I think, says something like the CMA then takes a new decision on the remitted matter in light of the directions given by the Tribunal. Those directions come within the form of your judgment, if you are with me on that, and as I think you appreciate very well, the remission of remedy, if I am right on ground 1 or, for that matter, on 2 and 3, stands in contrast to the vires remedy. That is a quashing.

I couldn't quite remember, but Mr. Lindsay made sure I do not misspeak. Ground 4 would be remission as well. We say if my submissions on that find favour, then that's a remission.

So the one that is different is vires. No vires means you cannot make the order; you quash the order, full stop. The rest, if I am right, they lead to remission.

If it comes to that and your provisionally minded to accept any of the grounds and you would want any guidance even from us or from the CMA about how we say that should translate into the remedy that you give, then I have no doubt you could ask us and we would happily submit.

So I am going to end, then, on just one final point, which is this. I know you are aware of this, but I can't resist just, if you like, ending on the point, which is my two links in the chain.

You have to show a shifting of the liquidity and you have to show it to ICE, and you have to show that to the requisite convincing standard. I mean, this is almost so obvious that we haven't said it, which is that the causal link for that shifting has to be the partial foreclosure method. It has to be misusing Trayport's software, abusing your dominance, if you like, and using Trayport software to cause a shift in liquidity and to ICE.

The task, with great respect -- and I would like to end on this note -- where this decision just goes wrong is it never ever gets do anything approaching a sufficiently cogent set of

reasoning about using Trayport to shift liquidity in this market and using Trayport to shift liquidity to me or my client.

So, sir, gentlemen, unless I can be of further assistance, those are the reply submissions.

THE CHAIRMAN: That is fine. You have been of great assistance and so has Marie Demetriou, and we are going to have to think about who is right because you both cannot be right, obviously, and it will take us about two weeks to come to a decision.

MR. HARRIS: I am very grateful.

THE CHAIRMAN: We will try to do it as quickly as possible.

MS. DEMETRIOU: Can I just raise one short point, which is a factual point.

At the beginning of his reply, Mr. Harris said that the CMA hadn't put its concerns about the parties' remedy proposal to the parties. That is just factually incorrect, because of course there was the remedies working paper, which is at annex 14 to the defence. Our point that I made earlier is that the parties simply failed to engage with that, and you will see the relevant correspondence at annexes 15 and 16.

So I just wanted to correct that factual point.

THE CHAIRMAN: Are there any specific paragraphs in the remedies working paper that you think --

MS. DEMETRIOU: Yes, it is paragraph 159 onwards.

THE CHAIRMAN: Tell me where the remedies working paper is.

MS. DEMETRIOU: It is at paragraph 14 of the defence, and paragraphs 129 onwards were where the CMA put the difficulties it had with the proposed remedy to the parties. I am just correcting the factual point made by Mr. Harris, which is that he said in reply that these points were never put, the CMA never explained its difficulties.

THE CHAIRMAN: I will look at that separately.

MR. HARRIS: Would you mind also looking at our skeleton, footnote 108 on the same point?

THE CHAIRMAN: Sorry, what paragraph?

MR. HARRIS: It is footnote 108, which is to be found on internal page 38, attached to paragraph 99.

THE CHAIRMAN: Yes, I will look at that.

MR. HARRIS: There are numerous references to where we say we were willing to engage and refine the remedies proposal.

THE CHAIRMAN: You are going to come back on *ex parte Owen* if you feel you need to.

MR. HARRIS: We will come back to say either here are some very brief further points or an additional point --

THE CHAIRMAN: Keep it to one page.

MR. HARRIS: -- or we are not making any.

THE CHAIRMAN: Yes.

MR. HARRIS: Thank you very much.

All right, thank you very much.