IN THE COMPETITION APPEAL TRIBUNAL

Case Nos. 1275/1/12/17
1276/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

23rd November 2017

Before:

PETER FREEMAN CBE QC (Hon)
(Chairman)
PAUL LOMAS
PROFESSOR MICHAEL WATERSON

(Sitting as a Tribunal in England and Wales)

BETWEEN:

FLYNN PHARMA LTD AND FLYNN PHARMA (HOLDINGS) LTD Appellant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

- and -

PFIZER INC. AND PFIZER LIMITED Appellant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

_____

Transcribed by ***Opus 2 International Ltd****.*
(Incorporating Beverley F. Nunnery & Co.)
Official Court Reporters and Audio Transcribers
5 New Street Square, London EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

_____

HEARING – Day 12

A P P E A R AN C E S

Kelyn Bacon QC, Ronit Kreisberger and Tom Pascoe (instructed by Macfarlanes LLP)

Mark Brealey QC, Robert O'Donoghue QC and Tim Johnston (instructed by Clifford Chance LLP)

Mark Hoskins QC, David Bailey, Hugo Leith and Jennifer MacLeod (instructed by CMA)

Thursday, 23 November 2017

(10.30 am)

THE CHAIRMAN: Good morning, Mr Bailey.

MR BAILEY: Good morning, sir. Briefly on the issue of confidentiality which Pfizer's leading counsel raised at the end of yesterday, the CMA has been in touch with the Department of Health, and I am pleased to say they do not maintain confidentiality over any of the passages identified in green in the annex to the CMA's written closings.

THE CHAIRMAN: That is very helpful. I am conscious that Mr Brealey's request related to a possible judgment, and of course we have not decided whether we would want to make reference to those passages in any judgment.

MR BREALEY: Of course.

THE CHAIRMAN: And of course there is law governing what we should and should not put in a judgment on grounds of confidentiality which we would have regard to.

MR BREALEY: Of course.

THE CHAIRMAN: But that is helpful, thank you very much.

Right, Mr Hoskins.

Closing submissions by MR HOSKINS

MR HOSKINS: Good morning, sir. Like Pfizer and Flynn I am not simply going to trot through our closing submissions. You have read them, you might not have

looked up all the footnotes yet, and we continue to rely on them.

THE CHAIRMAN: We keep finding new footnotes to look up.

MR HOSKINS: Ms Bacon suggested yesterday that we, in our closing submissions, lacked -- I think she said they were not "fair" or "objective" were amongst the words used. It will not surprise you to know we do not accept her criticisms. I have to say I think the way it was put was pretty unfair to my very professional and hard-working team who worked very hard to produce those closings.

You will be relieved to hear we have resisted the temptation to produce a note on the errors in Flynn's errors note, I do not think that would take anyone anywhere, I would much to prefer to spend my time focusing on the issues in the case, but there is one example I would like to take you to if you would let me set the balance right.

Can you go to the Flynn error document at paragraph 18. This concerns the issue of whether using a revenue-based method for cost allocation in the PPRS is less of a problem in the PPRS because of its portfolio nature than it would be for doing an exercise in relation to individual products. We cited extracts from Mr Williams' cross-examination in our closings, and

what Flynn at note 18 says is that what we said at paragraph 243 of our closings:

"These concerns do not arise in the same way to branded products under the PPRS because excessiveness is controlled at a portfolio level."

We say this was accepted by Mr Williams, and Flynn say no, no, no, you have got it wrong, and they set out a quote.

If I can ask you to go to the transcript. Day 6, page 30. It is the passage that begins at line 3 and what you see is that Flynn in their errors note have cited lines 3 to 14. You might want to quickly have a look at those. (Pause)

Then having read to line 14 you might like to read on, lines 15 to 21, which are not set out in Flynn's errors note.

THE CHAIRMAN: Yes.

MR HOSKINS: That is the passage that we relied on in our closing submissions. The point I simply want to make is if you are going to accuse others of being misleading, you have to do a better job than this.

But let me move on to deal with more important matters. You will look at the evidence and you will weigh it up and that is your job.

I am going to sort of take Pfizer and Flynn together

but separately, if that makes sense. I will take the issues in a logical order, so I will start with market definition, but particularly when I come to excessiveness I will deal separately with Pfizer and Flynn's positions, as you would expect, but I am going to take it as an issue-based approach and start with market definition.

All the parties, certainly Flynn and ourselves, are agreed that the tribunal should look at the dynamic over time, and Flynn says that if you do that, that shows that NRIM and Phenytoin were in the same product market throughout the period of the infringement, and we say the opposite.

I am not going to go over old ground, I dealt with it quite fully in our closings submissions, but I would like to highlight certain points. I think there are nine points.

First of all, as we set out at paragraph 4 of our closing submissions -- it probably makes sense to have our closings to hand while I make my submissions.

THE CHAIRMAN: We have them to hand, Mr Hoskins.

MR HOSKINS: I am sure you have memorised them as well.

THE CHAIRMAN: Alas not.

MR HOSKINS: At paragraph 4 we cite case law that makes the obvious point that some degree of substitutability, some

degree of competition is not sufficient in itself to mean that products are in the same market.

The second point is that Flynn says that the CMA should have obtained further information from wholesalers and pharmacies, but you will have seen from the decision itself and from sitting in this room for the last four weeks that CMA obtained a great deal of evidence from all sorts of people, pharmacies, wholesalers. A lot of work was done. It is not a good point to simply say you should have got more; the question really is: is what is there sufficient and reliable to prove the case?

If you go to paragraph 44 of our closing submissions, you will see that one of the things the CMA obtained was information on the total sales of both NRIM and Flynn 100mg capsules and those figures were updated monthly throughout the investigation. You can see that from the monthly figures. If you look at footnote 37 you will get a reference to all the sources of the information, so that is the sort of level of information the CMA was obtaining.

PROFESSOR WATERSON: Footnote 73, do you mean?

MR HOSKINS: Sorry, 73, yes.

My copy in our closing submissions is so shaded blue for confidentiality it actually makes it quite hard to

follow. I have clean copies which I will hand up if that would assist.

THE CHAIRMAN: That would be very helpful, thank you.

MR HOSKINS: I am going to come back to this, it won't surprise you to learn. (Handed)

The third point I want to make is that in the period from September 2012, which was when the genericisation, if I can use that phrase, of Phenytoin took place, until April 2013 when NRIM came into the market, but of course by definition Flynn's product was the only one in the market, and prospective entry by NRIM of course we know did not prevent Flynn from setting a selling price that was many multiples higher than Pfizer's previous price, so our submission is that it cannot be credibly said, if it is said at all, that the potential entry by NRIM in that period somehow puts them in the same product market. They were not in the market, they clearly did not exert any pricing pressure on Flynn in that period.

The fourth point, as I said, NRIM entered the market in April 2013, and as is recognised in the decision there was switching in that period and that was largely due to Boots and Lloyds. But the effect of that switching should not be overstated. You will be aware that the decision finds one product market for all

capsule strengths and that aspect is not challenged, ie you are looking at all the capsule strengths together for the product market.

If we can go to Flynn's notice of appeal, so that is bundle A, tab 2, and turn to page 38. Because there has been a lot of focus on the 100mg dose, and I understand that, it is the main seller, but the market is all doses. If you look at the table, if you look at the Flynn figures, and of course Q4 is the one that stands out, but if you look at the figures, Flynn alone in the market, yes, a very high share, but when NRIM comes in you will see the spike in Q4 but you will see the figures immediately preceding Q4, you will see the figures immediately after Q4 for NRIM, and you will see the figures for Flynn.

So when one is talking about the importance of entry, and it is said lots of volume was stolen et cetera by NRIM, what Flynn's own figures show you is there was a spike but then things fell back again. So it is not a dramatic capture of the market which is then sustained, it is a spike which falls away.

MR LOMAS: Do we not also know the data for that quarter is suspicious because you have negative imports?

MR HOSKINS: There is a problem with the parallel imports in this. I am not sure it had been suggested there is any

problem with the Flynn and NRIM figures. I am not in a position, because I did not put this together, to say whether this is completely accurate or not. It is put forward by Flynn to support their case, and we are happy to say, well, let us take this on its merits, it may not be exactly correct, but someone has had an attempt at comparing volumes as if they were in the same market, and let us see what it shows. This is Flynn's evidence.

THE CHAIRMAN: What point do you want us to make of this?

MR HOSKINS: I want you to make of this that in Q4 there was --

THE CHAIRMAN: Q4, 2013?

MR HOSKINS: 2013, yes, there is a spike in NRIM's volume but it then fell away immediately following.

THE CHAIRMAN: And then it creeps slowly up again, and then it sinks a bit.

MR HOSKINS: Correct, but the level of it never approaches the spike again. So I am not under this impression anyway. The impression sometimes given is that NRIM comes into the market, dramatic increase in volume for NRIM, dramatic decrease, it is suggested, for Flynn, and the point is that is not maintained over time, these figures show that that is not maintained --

THE CHAIRMAN: Yes. But this is for all dosages and nobody has ever suggested that NRIM marketed anything other

than the 100mg dosage.

MR HOSKINS: Absolutely. And the reason why I am taking you to this, it is for all dosages, and the product market is for all dosages. That is the point.

The fifth point, again we know NRIM entered the market in April 2013 but we also know that Flynn did not reduce its price to below the September 2012 level until April 2014 which is twelve months later. That is not disputed, and that is not consistent with sufficient competitive pressure for NRIM and Flynn to be in the same market. And that is, if you like, at the high point of Flynn's case. That is following NRIM entry, that is the immediate aftermath.

MR LOMAS: I think it is said against you, Mr Hoskins, that on your case, why did they drop the retail price at all? They may have secured a reduction in supply price, fantastic. We have better margins. Why drop your supply price if your position is as strong as that in the marketplace?

MR HOSKINS: It is Mr Fakes' evidence. Let me get the reference for you. K4, tab 4, paragraph 23. So this is a witness statement that was produced by Mr Fakes, director of Flynn, in the interim measures and it said -- you were taken to this by Ms Bacon and she said you should not put any weight on this because this is in

a particular context relating to a suggestion to do with interim relief. But look at what Mr Fakes says, this is not restricted to the particular interim. He says:

"In the normal course of business --

MR LOMAS: Which paragraph?

MR HOSKINS: Paragraph 23, tab 4.

THE CHAIRMAN: This is about the escrow account?

MR HOSKINS: It is. This is the evidence he gave in relation to that. So the point I am making in paragraph 23, beginning at the second sentence, is the evidence he is giving is not specific to the question of escrow. He is describing the normal course of business:

"Were Pfizer to reduce its input price, Flynn would look to pass on all or as much as possible of that reduction to our customers by reducing its selling prices by an appropriate amount. Flynn is not comfortable with the proposal that it should charge its customers a price based on a higher input price than it is actually paying and simply retain that increased differential."

That evidence is given in the context of a suggestion there should be an escrow account to deal with interim measures, but the evidence is clearly in general terms in the normal course of business.

So it may well be that Flynn actually does have

a conscience. It is not looking to charge its customers as much as possible all the time.

MR LOMAS: But is this a Phenytoin-specific comment or is it generic to Flynn's business practices, so in a competitive market that is exactly what you might do, but in a market that is not characterised by competition it will be slightly irrational to pass on a supply price advantage that you have achieved.

MR HOSKINS: This witness statement was produced specifically in relation to Phenytoin.

MR LOMAS: I appreciate that.

MR HOSKINS: That is the best I can do in terms of what he is talking about. But it does not matter whether he is talking specifically about Phenytoin or generally, because the point he is making is a company can choose not just simply to act on the basis of pure economics, it can choose, for example, to say we want to keep our customers reasonably happy.

THE CHAIRMAN: I do not really see what we can do with this other than treat it as a general observation and give it the weight we would attach to a general observation.

MR HOSKINS: The question I was asked, sir, was: why is it that following a price reduction obtained from Pfizer, Flynn might wish to reduce its own prices? I rely on this evidence and I rely on the answers I have given in

the exchange with Mr Lomas, which is supported by this evidence, which is that a company may well take the view that if it does obtain a reduction in its supply price, there is an interest in actually dropping its own retail prices for the reasons of customer relations.

THE CHAIRMAN: These are not the interim proceedings. The interim proceedings took no account of the merits of the case and Mr Fakes is not here to explain what he meant.

MR HOSKINS: Sir, you will give whatever weight you want to give to it, but that is why this is actually quite important. It is a statement given by Flynn not with the cold light of the issues in this case on it. It is a neutral statement that is made by him explaining Flynn's normal course of business, that is why it has value, because he is not seeking to argue a corner, he is being absolutely frank.

The sixth point relates to what happened to Flynn's prices after its price reduction in April 2014. I have taken you to this, I can take it quickly, but I would like to refresh your memory with a document. J1, tab 23. This is a Flynn response to a Section 26 notice and you may remember this, I took Mr Walters to this in cross-examination, but you can see what happens to the prices.

So April 2014, for 100mg you see the reduction. The

figures are confidential so obviously I am not going to read them out. But for 100mg you see a reduction between March 2014 and April 2014. We see that what happens thereafter is -- they remain steady for a period, but then you will see what happens is in August 2014 they actually go up again.

The 300mg, again you see between March 2014 and April 2014 a reduction. You then see it creeping up again immediately in the following month and you see it goes up again at the end of the period. Then for 25mg and 50mg you see that they basically increase over the piece.

So what one actually sees is that Flynn has one price reduction which is said to be due to competitive pressure in April 2014. That is the only price reduction throughout the whole period of the infringement which is said to be due to competitive pressure. And following the price reduction the prices go up again.

MR LOMAS: I think again what is being said against you, Mr Hoskins, is that you see the price reductions for 100 and for 300 but you do not see it for 25 and 50, and because of NRIM's configuration it is the 100 and the 300 that would be subject to competition. So does this not suggest that Flynn adjusting its prices in relation

to those subsectors of the market that are subject to direct competition from NRIM?

MR HOSKINS: You have our submissions on whether the price reduction was actually triggered by competitive pressure or not. Let us assume against me for a moment it was triggered by competitive pressure, then I go back to the case law, some price competition is not enough. What one would show you on this hypothesis is because of competitive pressure there was one price reduction throughout the period of the infringement, and following the price reduction both the price of 100mg and 300mg increased thereafter.

The seventh point is this: NRIM reduced its price in June 2014 following a reduction in the drug tariff price in May 2014. There is a passage that is well travelled but there are some confidential figures in it so it is easier to turn it up than for me to paraphrase it.

The third CRA, bundle D, tab 3. Page 4, paragraph 15. It is the differential in the prices between Flynn and NRIM after June 2014. The figures are in blue but I think they were said yesterday, I do not know if that was an error, but you see the figures there, and you see the graph, and the point was made, well, it may not be exactly the smaller figure, it may be around that by the end of the period.

But you see what Mr De Coninck says, he interprets his own evidence:

"The difference between Flynn's 100mg ASPs and NRIM's ASPs following NRIM's reduction in June 2014 was less than [X] and it reduced over the period to around [Y]."

As was made clear in exchanges between the tribunal and Flynn yesterday, of course the commercial attractiveness of the NRIM product as compared to the Flynn product to wholesalers and pharmacists is actually greater than this differential because pharmacies get the higher drug tariff price and the ASPs are below them, so an ASP difference of that is then magnified. And we set out, do you remember I cross-examined on that, we have reproduced the results, if you like, at C57 and 58, so our closing submissions 57 and 58.

So this shows that the commercial impact, if you like, on wholesalers and pharmacies is actually greater than the simple differential in ASPs because of the drug tariff reimbursement price.

MR LOMAS: In a sense, Mr Hoskins, that rather emphasises the point. Given that gearing effect against the tariff price, why would NRIM drop their prices to below Flynn's if they are not competing on price? It is giving away margin.

MR HOSKINS: Sir, I go back to the same point. Some competition is not enough. Because what one sees -- let us assume that what you have is the Flynn price reduction, then the drug tariff price is dropped, and then you have NRIM dropping its price. It wants to sell more of its products and that may be due to competition or it may be because it just thinks if it is an attractive offer to pharmacists and wholesalers it will sell more.

MR LOMAS: But we probably have a very inelastic demand curve given that people are stabilised on this product and need it to avoid having fits.

MR HOSKINS: Stabilised on NRIM's product.

MR LOMAS: On each product.

MR HOSKINS: Exactly, that is the difference.

Again assume against me for a moment that NRIM's decision to drop its prices below the drug tariff price were the result of some competitive pressure, what one would then expect to see if they are in the same market because of the differential is the switching in volumes.

MR LOMAS: Or a price reaction from Flynn.

MR HOSKINS: Absolutely. But you see neither, that is the point.

So I am quite -- because we have been presented almost as if we are, I use the phrase "binary", we say

there is no competition, we say there is -- that is absolutely not and it is not what is in the decision. But the point is how much competition, how much switching and what does it show.

What actually happened with NRIM if you go to the graph at paragraph 44 of our closings. So the orange line is the NRIM 100mg volume. We know that NRIM reduced its prices in June 2014 and what this shows is there was a reasonably gentle increase in NRIM's sales in July 2014 and October 2014 but then there was a clear decline in NRIM 100mg sales for the rest of the period. You also have the time trend graph that was produced by CRA which shows flat-lining. With these differentials you really would see price competition or shift in volumes and you see neither.

The eighth point, if I can pick this up in the decision at page 229, paragraphs 4.143 to 4.145, this is going to the question of was there in fact switching in that later period? And in relation to Boots and Lloyds we say it is quite clear that after the MHRA guidance they did revert to continuity of supply, and you have seen the evidence on that both in relation to Section 26 notices and indeed the correspondence between Flynn and Boots where Boots is setting out its position on continuity of supply.

The reason I take you to these paragraphs is that the CMA obtained purchase data from Boots and Lloyds, and if you look at the graphs on page 230 you see that they confirm, corroborate, what comes from the other pieces of evidence because they show that Boots and Lloyds did conform with continuity of supply after the MHRA guidance. So there are a number of sources for that.

The ninth and the final point I want to make on market definition relates to the Alliance data because Flynn prayed the Alliance data in aid to try and say there was switching going on in the final period, despite what the other evidence shows.

There are two sources of Alliance data in the bundles. There is what is called the top 20 and there is what is called the top 10. Let us begin with the top 10, that is I1, tab 21. I just want to check one point, sir. (Pause)

The figures again are confidential, I think the names as well, but I just want to explain that this is called the top 10 because it has a breakdown, as you will see, for the top 10 customers. The grand total figure is actually total Alliance sales, so you have the breakdown of the top 10. This I am told is total Alliance sales. What this set of figures shows you is

it tells you the number of packs of NRIM capsules sold by Alliance to its various customers.

In our submission, rather than looking at individual customers, it is more informative to look at the grand totals if you want to see what is happening in terms of the picture.

You can look at the figures going across or we have actually produced a graph which just synthesises -- it depends how your mind works, I am better with figures but some people like graphs. The graph is at N2, tab 34.

Whether you choose to look at the figures or whether you choose to look from the graph, what we see, reading from the left, is that there is a spike -- I use the word "spike" always to mean upwards.

MR LOMAS: So this is aggregate data for the top 10 customers of Alliance.

MR HOSKINS: No, the grand total is all customers.

MR LOMAS: The grand total, right.

MR HOSKINS: Yes, the grand total is all Alliance's customers for NRIM capsules.

So you see immediately the spike in August 2013 then a very large drop thereafter. There is then a bigger spike in November 2013. Then of course we know the MHRA guidance was published in November 2013 and there was

a substantial drop following that. Flynn reduced its prices in April 2014 and the drug tariff prices were reduced in May 2014. However, at least for Alliance there was a spike in sales of NRIM capsules in May 2014 followed by a drop in June 2014.

But you will get the point which is Flynn reduces its prices in April 2014, sales of NRIM capsules go up the following month, which is the opposite of what you would expect. So at least on the Alliance data, which I accept is only part of the picture, that is not consistent with competition between Flynn --

MR LOMAS: I do not want to get --

PROFESSOR WATERSON: Can I ask, these prices, these are the -- at what stage are pharmacies billed for these products? It is an issue as to whether they are billed at the same time as the sales take place or whether they are billed later on.

MR HOSKINS: I do not know and I do not know if the evidence is in the court file. We can find out. I understand there are limitations to all this but the limitations cut both ways.

MR LOMAS: I was going to make a similar point that it depends on what dates you are measuring. If these are dates of sales, and the orders went in in April/May 2014 reflecting Flynn's price change, that would explain the

drop that you get a month or so later if you are measuring sales out the door, so ...

MR HOSKINS: The point I am not saying is because of this particular instant in the Alliance data, look, that proves our case. What I am saying is that this shows the danger of looking at snapshots. This shows why you have to look at the dynamic over time. This also shows why, if you are just looking at Alliance, you might find things that do not look quite right, and I am dealing with Alliance because Flynn rely on the Alliance data to say there was competition in the later period.

THE CHAIRMAN: Is there really any disagreement that we should be looking at the dynamic over time?

MR HOSKINS: Certainly not between us and Flynn.

PROFESSOR WATERSON: I think we were taken to this table yesterday.

MR HOSKINS: You were.

MS BACON: Our version had an extra line on it.

PROFESSOR WATERSON: Yes, I recall that, the line in red.

THE CHAIRMAN: We had the slight impression from your closings that you were looking at snapshots but you are not doing that?

MR HOSKINS: Sorry, that ...?

THE CHAIRMAN: We had the slight impression from your closings that you were taking particular points on

snapshot dates, but you are not doing that?

MR HOSKINS: Sir, one has to look at events --

THE CHAIRMAN: Yes.

MR HOSKINS: -- within the period. My nine points, if you like, are trying to take events that happened throughout the period and put them in the context of whether there was competition throughout the period.

What we would certainly say in relation to the appellants' case is it weighs very heavily on the period before the MHRA guidance certainly came in, which is only I think eight months out the total period.

But, sir, when you say are we looking at snapshots? Yes, you have to look at events within the period. But the point is you then have to evaluate them in terms of a dynamic.

THE CHAIRMAN: You also have to be quite careful that you are ascribing particular dates to particular events when, as my colleague's question indicates, there might be some delay or some --

MR HOSKINS: Absolutely.

THE CHAIRMAN: Yes. We are not dealing with a wealth of highly-tuned information here, are we?

MR HOSKINS: It is not surprising given the details of the market, given the numbers of players in the market, given the intricacies of the market in terms of the way

the NHS buying works, et cetera. There are a lot of players at lots of different levels.

THE CHAIRMAN: But we are dealing with two suppliers.

MR HOSKINS: But then within that you have a number of wholesalers, you have a number of pharmacies, you have the fact that you have doctors prescribing a number of patients, you have CCGs paying -- I am not going to shy away from the fact it is --

THE CHAIRMAN: That is the trouble with markets, they are complicated.

MR HOSKINS: Absolutely. But this is not an unusual exercise for a tribunal such as yours to have to deal with.

THE CHAIRMAN: We are up to it. That is not the question.

MR HOSKINS: Absolutely. The final question for you at the end of the day is: on the evidence that you have, do you consider it sufficiently reliable in the first place to take a view on what the product market is? I sincerely hope you would either way, either for or against, and is it in our favour or in the appellants' favour?

The final point I want to make on the Alliance data because it was prayed in aid by Flynn to suggest a degree of switching in the latter period. If I can do this, there is actually a second graph which brings together a number of streams of the Alliance data. It

is just over the page at N2, tab 34. It's the one we were just in, it's behind the graph we were looking at.

I think the way it was put was that you have seen the figures that following the introduction of the reduced wholesaler model by Flynn in May 2014, Flynn stopped supplying Alliance, and then one saw an increase in the purchase of NRIM by Alliance thereafter. The suggestion was that that must indicate or should be taken to indicate there was switching in the market generally between Flynn and NRIM.

But we actually set out the position in our second graph. We have given you the sources, it is all from the Alliance data. So the blue and grey line are sales of Flynn 100mg capsules by Alliance. Of course what you would expect is following the introduction of the reduced wholesaler model by Flynn in May 2014, you will see the sharp decline in sales of Flynn by Alliance thereafter. So that is the blue and grey lines tailing down from May 2014.

PROFESSOR WATERSON: Would you accept that the fact that Flynn discontinued Alliance actually makes the use of the Alliance data somewhat problematic?

MR HOSKINS: Yes, sir, that is our point. This is primarily a negative point I am making, it is Flynn who pray in aid the Alliance data, and you have the point it is only

a part of the market et cetera.

PROFESSOR WATERSON: It is only for a part of the period, of course, as well.

MR HOSKINS: Yes, I understand. But our point is very much that you have other evidence on this period in the market which is far preferable and it is the exchange that I had with Mr Lomas: you know the price differential, you know it is exacerbated by the drug tariff effect, and yet you see no price competition and you see the flat-lining in volumes. That is what we rely on. This is intended to be destructive on my part.

Just to finish this point. If indeed there was switching between Flynn and NRIM within Alliance after May 2014, what you would expect is that the NRIM lines, the orange and yellow ones, would go up to the same extent that Flynn goes down, and you quite clearly do not see that. There is a spike, it is a fairly gentle one, and then there is a decline.

PROFESSOR WATERSON: Yes, but of course we do not know about other wholesalers.

MR HOSKINS: Absolutely. This is what it is. But it certainly, in my submission, does not support the weight that Flynn want to put on it which is to show that there was material switching in the period after May 2014 so as to indicate ...

MR LOMAS: And if a pharmacy is multiple sourcing, we have no information on whatever discounting or promotion activity may be made by the wholesalers to get marginal volume in trading across those different sources of supply.

MR HOSKINS: You have all the deficiencies that we have.

MR LOMAS: Yes.

MR HOSKINS: That is why in a sense we do pray in aid -- it is the Flynn notice of appeal figures for all capsules, the table I took you to, because that is at a more global level for all the products, and you have our graph at paragraph 44 of our closings. Because these are looking at the sort of global level and that must be the starting place for this, not digging around in the weeds for particular events that happened in Alliance or happen here.

Look at the price and volume movements against each other on 100mg capsules, look at it against all the capsules as a whole. I have given you the Flynn table, and I have given you the figures at J1/23 for Flynn's prices. That is the sort of evidence you should really be focusing on, in my submission, not trying to dig around in the weeds and come up with the particular bits here and there. They might be informative but that is not where you should start.

THE CHAIRMAN: So what you are putting to us is that the volume and prices data overall, the high level figures, indicate a pattern of behaviour, when combined with the various bits of detailed data in the "weeds", as you put it, show that there is not sufficient competition to indicate that NRIM is in the same market as Flynn, is that ...

MR HOSKINS: It is. And the only postscript to add is looking at the dynamic over the whole --

THE CHAIRMAN: Looking at the dynamic. So that is your answer to what is said against you, which is that there ought to have been enough indication from the detailed evidence that was obtained on particular points in response to objections raised by the parties to seek more comprehensive information. Your position is that that was not necessary because you already had the overall picture.

MR HOSKINS: Yes. What we have is sufficient and reliable. Part of the problems of going into the "weeds" is shown by the Alliance data and the sorts of questions you have been putting to me, because you can go chasing down the stuff and where do you stop?

THE CHAIRMAN: I do not think calling data the "weeds" is very helpful, Mr Hoskins.

MR HOSKINS: I am sorry.

THE CHAIRMAN: Frankly. It is the stuff of competition analysis.

MR HOSKINS: I did not mean to be flippant about it. But the point about chasing more detailed information is when do you stop chasing, and we say we stopped chasing at a reasonable time.

THE CHAIRMAN: Fine.

MR HOSKINS: I was going to move on from market definition. I need to say a few quick words about dominance unless you want to ask me any more questions about market definition?

THE CHAIRMAN: No, that is fine.

MR HOSKINS: Dominance I can take this very briefly because neither Pfizer or Flynn has said very much on this. We rely on our written closings. The high point on dominance that appeared before the tribunal was the countervailing buyer power point which, in our submission, took a real knocking during the cross-examination. That is maybe why you do not see the same emphasis on it in closings but that is speculation on my part. You have our written closings on this.

I just make the point that if, contrary to our primary case on market definition, you do choose to split the time periods into two periods, sort of pre-MHRA guidance and post-MHRA guidance, of course you

have in the decision the alternative market definition consideration which puts NRIM in the market pre-November 2013 and finds that Pfizer and Flynn are still dominant. You know that. And really that dominance assessment has not been challenged specifically, you just have the general points on dominance which are prayed against that. And Flynn's main point against the alternative market definition is you should not split the market up into two time periods, you should look at it as a whole.

Again, unless you have further questions on dominance I was going to move on.

MR LOMAS: How do you deal with Ms Bacon's question, which I hope do I not demean making it as a technical point, but if we were against you that NRIM was in the market throughout, there is no finding of dominance in relation to that alternative market definition and therefore the case must fail. Because as I understood the point, that was put as a relatively strong technical finding against you, so on that assumption what would your answer be?

MR HOSKINS: The tribunal has power to decide market definition and dominance as it wishes in light of the evidence and is not constrained by that particular part of the decision. I would pray in aid the football shirts judgment, JJB, paragraph 284. I was involved in

both Aberdeen Journals and football shirts, and Aberdeen Journals was one of the first cases where we were sent back on -- I would say, would I not -- what was a relatively technical point and came back and won.

But certainly JJB is a far closer case to this one than Aberdeen Journals because JJB of course, as you no doubt know, was a four or five week trial with witnesses, and it is in that context that Christopher Bellamy said: we have heard the evidence, we are not going to be hidebound by technicalities, we have heard it, it is a merits appeal, we can decide it. And that is what I would encourage you to do.

THE CHAIRMAN: Just to go back to your position on dominant position. If we found that you were wrong on market definition and that the market included NRIM, I am not saying that but just suppose that, then the CMA's position is that Flynn is still dominant even on that enlarged market?

MR HOSKINS: Absolutely.

THE CHAIRMAN: In all periods, yes?

MR HOSKINS: That is expressly dealt with in the decision of the alternative market definition because the evidence is even stronger.

THE CHAIRMAN: Yes, but just so I have it clear in my own mind you are saying that both and all periods Flynn is

still dominant?

MR HOSKINS: Yes.

THE CHAIRMAN: That is because, although there may be competition, it is not sufficient competition to overcome the finding of dominance, is that right?

MR HOSKINS: Yes.

THE CHAIRMAN: Okay.

MR HOSKINS: Indeed one finds that the level of competition switching actually decreases in the latter period. That is why, if you come to that, you should not shy away from saying they were dominant in that period even if NRIM were in the market.

THE CHAIRMAN: Right.

MR HOSKINS: I was going to move on to the law on abuse of the high pricing.

THE CHAIRMAN: I think we can do another quarter of an hour before we stop.

MR HOSKINS: I think actually on this there is now a fair amount of common ground at least with Flynn. I dealt with this in quite a lot of detail in opening and that hopefully seems to have sieved some of the issues out. I say not everything is common ground but --

THE CHAIRMAN: You are saying the adversarial process is useful?

MR HOSKINS: I am. I am invested in it.

THE CHAIRMAN: Yes, you have a stake in it.

MR HOSKINS: I do.

THE CHAIRMAN: We could debate it, though.

MR HOSKINS: The sort of headline for these submissions is the need for a benchmark price which was a question you put in your list of questions. Your question 2(a) asks: is it necessary to have a benchmark price to which the actual price is compared as part of the analysis in limb one of United Brands? And I do not apologise for going back to United Brands. Authorities C1, tab 3. Page 301. It should be well thumbed by now.

I think we broadly agree with the way Ms Bacon put it, at least this part yesterday. What one finds in paragraph 249, particularly 249, is the essence of what an excessive pricing abuse is. 249:

"... where the dominant undertaking has made use of the opportunities arising out of its dominant position in such a way as to reap trading benefits it would not have reaped if there had been normal and sufficiently effective competition."

So at its core, to deal with the question of whether there is an abuse by excessive pricing, what you are looking to see is whether the dominant undertaking has reaped benefits beyond what it would have got in normal competition. That is the essence, that is the core of

excessive pricing, and that is the benchmark against which a company's prices are to be measured.

Again, like Ms Bacon, I use the phrase "benchmark" rather than "benchmark price", and I will explain why in a minute, but that is the benchmark.

What the court then did in United Brands is it went on to identify practical ways in which you could seek to determine whether that fundamental essence had been met or not. And of course one example is paragraph 252, the classic United Brands.

The first limb involves a comparison of the actual price charged and costs to see if the difference is excessive and that therefore is one of the means of determining whether a dominant company is reaping benefits beyond what it could obtain in a competitive market. That is one of the practical methods. But the fact that a comparison with costs can be used for this purpose indicates that there is no need to establish a benchmark price to answer the question, because classic United Brands itself in the first limb is a comparison between actual prices and costs, not between actual prices and competitive prices. Comparing actual prices and costs is a means of getting to the paragraph 249 question.

THE CHAIRMAN: You would include in costs a reasonable

return?

MR HOSKINS: Absolutely. Sorry, again that is my fault for the shorthand. I also include economic value which I am going to come to in a minute.

THE CHAIRMAN: You include economic value?

MR HOSKINS: Yes, I will explain why.

THE CHAIRMAN: You had better come on to that.

MR HOSKINS: I will come on to that. You would have been disappointed if I did not. The reason why I say including economic value is if you rely on just cost plus, and I include in that the notion of reasonable return, that may not be sufficient in itself to identify the competitive price. And that is, we say, where the concept of economic value comes in.

If I can show you why I say that by reference to Scandlines, I think it deals with it quite nicely. Authorities E, tab 11. If you could turn to page 50 and if I could ask you to read paragraphs 226 and 228, please. (Pause)

In our submission, what is happening here is that if indeed you are looking for the competitive price, looking at cost plus may not be sufficient in itself because the competitive price may also reflect the demand side element. That is why, in our submission, what happens is that economic value is used along with

cost plus, including reasonable return, as a means of identifying the competitive price.

But it is important to note that if that is right, economic value is not on top of the competitive price, it is part of the competitive price. Cost plus reasonable return, economic value, equals competitive price. It is not you get competitive price and then you can start adding economic value on top of it to get more.

PROFESSOR WATERSON: So what you are saying now, Mr Hoskins, seems somewhat different from what your witness Mr Harman was saying, as I recall.

MR HOSKINS: Sir, I am making legal submissions and these are our submissions on the law.

THE CHAIRMAN: We will obviously relate them to Mr Harman's evidence. Can I just ask you on that economic value point, what is your explanation of paragraph 250 of United Brands in that case?

MR HOSKINS: Let me retrieve it.

THE CHAIRMAN: Refresh your memory.

MR HOSKINS: I can pretty much remember it but ...

THE CHAIRMAN: We never put United Brands away, Mr Hoskins.

MR HOSKINS: It is the loaded words "in this case". There are two possible meanings and you are alive to them, you do not need me to tell you.

THE CHAIRMAN: I asked Ms Bacon what "in this case" meant and she said "in this case".

MR HOSKINS: "In this case" could mean in the classic United Brands case. In our submission, that is a preferable interpretation and that is indeed one of the reasons why I have just made the submission I have made to you.

THE CHAIRMAN: But it could mean when thinking about this sort of issue.

MR HOSKINS: It could do, but let me come to that, because we know that in looking at the excessive limb you can look at cost plus, reasonable return and economic value to get to competitive price. The other sorts of options that are available are different types of comparator. If a comparator is a good one then it actually should be telling you what the competitive price is. And if a comparator is a good one it should be including -- you're not looking at it in this way, but a good comparator should be telling you what the competitive price is (taking account of cost plus, reasonable return and economic value). Because the comparator prices will, by definition, be taking account of the demand side as well as the supply side considerations.

MR LOMAS: Is this where we get to the heart of one of the differences between you? Because I do not

understand Flynn or Pfizer to be saying that a comparator is only relevant, if you like, if it is a proxy for the price which you would get in a competitive market or a reasonably competitive market. I think what they are saying is it is a relevant competitor if it is a signpost to or helps the NCA find that price. And I understood you to be saying that you were not comfortable with it as a comparator unless it essentially was that price.

MR HOSKINS: I am dealing with this at a level of legal abstraction to try and get to the principle.

THE CHAIRMAN: To be fair to us, so are we.

MR HOSKINS: Yes. But that is what we are dealing with now, we are dealing with the law.

I can imagine a situation in which you have a proposed comparator and their argument said it is not a perfect guide to the competitive price because of the following reasons. Then it would be a matter for the tribunal to consider whether, by making adjustments to it, it would be a sufficient proxy for the competitive price. But all roads lead to the competitive price.

I make this point because, again, if a comparator is a good comparator at this level of legal submission, in the sense that it indicates the competitive price for the dominant company's product, then it should not be

necessary to take account of economic value on top of that because of the point I have already made: competitive price, cost plus, reasonable return, economic value equals competitive price.

I think part of the difficulty in terms of terminology at least probably comes from the Advocate General's opinion in the Latvian Copyright case. If we can just go to that briefly, authorities C2, tab 39. It is your C3, I am told. Tab 39.

Paragraph 17 of his opinion is where you get the phrase "benchmark" but where you see the phrase "benchmark price". Ms Bacon and I both agree actually it is probably more accurate to talk about "benchmark".

But actually if you look at the way the Advocate General -- these two paragraphs, 17 and 18, are structured, it follows the same basic structure of the Court of Justice in terms of identifying the nature of the abuse and then going on to identify ways in which you can get to that nature in a particular case. I note in his paragraph 17 he refers to benchmark price. Footnote 5, if you follow it through, there is a reference to United Brands, paragraph 249.

So what he is trying to encapsulate in his paragraph 17 is 249 of United Brands, and that is why I say probably the word "price" should be dropped, but

clearly the structure of what the Advocate General is doing mirrors what is happening in United Brands --

THE CHAIRMAN: 249 says trading benefits that would not have arisen had there been normal and effective competition, and 17 says the price that hypothetically would have been charged had there been effective competition. A sort of counterfactual, is it not?

MR HOSKINS: I agree. He is putting United Brands 249 in his own words, I think. And then in 18 he is doing what we see in 252 of United Brands but elaborating upon it saying: but there are other methods of trying to get at the competitive price.

MR LOMAS: Which is then a point of agreement between you and Ms Bacon that what the Advocate General is doing is not necessarily to take the jurisprudence any further but simply to elucidate what the court meant in United Brands.

MR HOSKINS: In this aspect, sir. There are other aspects of it I might not agree with, but in that regard.

I was going to move on to deal with the role of comparators as a legal matter.

THE CHAIRMAN: We will take a ten-minute break.

MR BREALEY: Sir, before we do, 30 seconds. In the light of these submissions that all roads lead to Rome, ie excessive pricing, I would urge Mr Hoskins to just

clarify what he is submitting now, how it fits in with the analysis in the decision. Because we have heard that demand side economic value is highly relevant to whether a price is excessive. And that is just not the way the CMA has approached the analysis in the decision.

THE CHAIRMAN: Is that not for us to assess, Mr Brealey?

MR BREALEY: It is, absolutely. But I think it is important to know whether the CMA now submits that the analysis in the decision is incorrect in the light of the Latvian Copyright case or -- obviously we are appealing this decision. Mr Harman, as you know, sir, looked at limb one, we heard lots of evidence about limb one, limb two. And at closing it appears that a lot of our submissions on economic value are coming into the excessive pricing and I think it is only fair to the defendants to know if the CMA is still pursuing --

THE CHAIRMAN: To the appellants. Fair to the appellants, you mean?

MR BREALEY: The appellants, yes.

THE CHAIRMAN: You are both defendant and appellant, are you?

MR BREALEY: Yes. But it is a serious point, sir. I do appreciate it is for the tribunal to decide, but from our side we would like to know whether the CMA are still pursuing this section C, excessive pricing, section D,

unfair pricing, and the economic value demand side when we appealed this decision was in section D, unfair pricing. So there seems to have been a slight change in the CMA's legal analysis.

THE CHAIRMAN: I am sure you can rely on Mr Hoskins to tell us whether he has changed his position. The purpose of this abstract legal discussion, as you put it, which is partly prompted by our own questions, is to try and get as much clarity on the legal principles that apply here. How they are then applied to the case, to the decision, that is a second -- not a secondary, but a second exercise and I am sure we will come on to that. I would not like to finish today and tomorrow without being clear on that. We must get the law clear, as clear as we can. So we will take ten minutes to get it even clearer.

(11.45 am)

(A short break)

(11.55 am)

MR HOSKINS: Still in the legal section but I was just going to say a few words on the role of comparators in this analysis. I can take it pretty quickly I think because we have set out the points in our written closings at paragraphs 106, 107 and 108.

If I can just flag up the points. 106, there is no

legal obligation on the CMA to consider comparators. You can arrive at a conclusion of an abuse by way of excessive pricing without necessarily going to comparators.

107, the important issue is whether the methodology relied upon is an appropriate and reliable method, and there is no single adequate method. There is quite a lot of weight put on the language, the phrase used by Advocate General Wahl that all indicators must point in the same direction. That cannot be taken literally. It cannot be the case that if you have five indicators, four are very strong in one indication, one is weak but points the other way, that means there is no abuse --

MR LOMAS: It is not a fruit machine.

MR HOSKINS: No.

THE CHAIRMAN: So your answer to our questions (d) is that other ways could include consideration of comparators, but they need not --

MR HOSKINS: I am just about to come to that. Our position on that is that the Authority does its analysis as we have done, we have looked at comparators but we have not found any to be helpful. Some of those comparators are now brought before you by the appellants and some new ones are brought. And in an appeal on the merits, clearly an undertaking is entitled to put forward

comparators to the tribunal to try to show that its prices are not excessive in spite of the factors relied upon by the Competition Authority in its decision. It is a merits appeal, you will see what we rely on, you will take the submissions on comparators and you will form your conclusion as to what the appropriate answer is. I am going to make detailed submissions on why the comparators are not good ones but that is what we say is the legal position.

THE CHAIRMAN: I think the question you need to clarify for us is let us assume the comparators are sufficiently plausible to offer interesting insights. Let us assume that. I know on the facts of this case you dispute that. At that point is there an obligation on the Authority when taking a decision to take them into account or is it still able to disregard them?

MR HOSKINS: Obligation? There is not an obligation. I am going to give a practical answer because let us assume -- are you saying to me the decision says there are relevant comparators that may be good but we are not going to look at them? Or are we imagining a situation in which the decision says we have looked at the comparators, we do not think they are good, but in the appeal the appellants convince you otherwise? I think it is more likely to be the second. And if, let

us say, in this appeal the appellants say: here there are comparators. The point is you will hear all the evidence, you hear our submissions, you hear their submissions, and again because it is an appeal on the merits you can come to your own conclusion on excessiveness.

It does not mean, therefore, if you come to the conclusion that perhaps the comparators should be given more weight than the authority gave them but it is still not enough to disturb the conclusion of excessiveness that the decision should be overturned for that reason. You should take account of the evidence you hear and come to your on conclusion on the abuse.

THE CHAIRMAN: I do not think that is quite the question I asked you.

MR HOSKINS: I am sorry, I was trying to frame it --

THE CHAIRMAN: I am trying to get behind this fairly bold statement you make which is there is no obligation on the Authority to consider comparators. I know we are not in the same position as Advocate General Wahl because this is not a preliminary ruling, this is an appeal, and his role is to advise a court which is giving advice to another court so it aims off slightly. But what we are trying to get at obviously as our starting point is the correctness of the decision

taken by the Authority. That is the prize, if you like. Okay, there is more evidence on appeal, we have to consider that, and we have the power to take our own decision. But what we are trying to get at is what an Authority in the position the CMA was in, faced with arguably plausible comparators, can it disregard them on the basis of United Brands or is it nonetheless obliged, in light of the advice given by Advocate General Wahl, to take account of them, examine them and see where it leads them?

MR HOSKINS: The former.

THE CHAIRMAN: You say the former.

MR HOSKINS: I say the former because the Authority will have all the evidence before it. And if it comes to the conclusion that the factors that it has, for example cost plus and before and after, are sufficiently strong to justify conclusion on abuse it is entitled to reach that conclusion. And then it is open to the appellants to come to the tribunal and say actually if you take account of the comparators, they are sufficiently strong to actually challenge that decision.

THE CHAIRMAN: I am quite uncomfortable with a proposition that allows the Authority to take a decision on one basis, on the basis that there is a further appeal on the merits. That is not very good administration, is

it? The authority ought to take the right decision on the right evidence and it ought not to have to be subject to appeal.

MR HOSKINS: Yes, but what is the practical outcome -- sorry I am being -- practical in the context --

THE CHAIRMAN: This is a theoretical discussion, we are talking about what authorities ought to do in general.

MR HOSKINS: That is why I asked -- I am sorry to ask you a question but --

THE CHAIRMAN: I am not going to answer a question from you.

MR HOSKINS: That is fine. If you are asking me the question: there is a situation in which an authority has cost plus and has a before and after, for example, and has then plausible comparators, I do not know whether that means comparators that if followed up might become good comparators or whether they are already good comparators.

THE CHAIRMAN: Prima facie good comparators. All comparators have to be investigated, that follows.

MR HOSKINS: You do not like the answer, but I would say as a matter of law, because of what is said by the Court of Justice as well in AKKA, the Authority can say: we have conducted the following investigation and we have come to the conclusion that there is sufficient evidence for excessive pricing in this regard.

THE CHAIRMAN: What I like and dislike is not on the table. It is just understanding clearly what your position is.

MR HOSKINS: It is paragraph 49 of AKKA in the Court of Justice. It is the certain margin of manoeuvre. But my submission is this will -- I know you expressed a problem with it. If the Authority takes that position and it transpires the comparators were good ones, then that will come out in the appeal. But the Authority is, as a result of paragraph 49 of AKKA, entitled to pin its colours to a certain mast.

THE CHAIRMAN: You have lapsed back into AKKA.

MR HOSKINS: It is the Latvian Copyright case. So an undertaking is allowed to put forward -- is obviously entitled to put forward comparators to the tribunal. The tribunal will weigh them with the evidence relied upon by the Authority to reach a conclusion. If a comparator is proposed, the relevant question is obviously quality, not quantity. That is obvious.

The Latvian Copyright case, paragraphs 38 and 41 to 42, any comparator must be selected in accordance with objective, appropriate and verifiable criteria. A comparator does not have to be identical in the same relevant market but that will go to its weight, potentially.

Scandlines, paragraph 169 to 171 and 175, the

comparator must be sufficiently similar to the product concerned for any comparison to be meaningful, and that is obviously going to be very important you will understand when I come to make submissions on the particular comparators in this case because we say not sufficiently similar. It must be ensured that the figures that are compared are really comparable. Choice of comparators depends on the facts of each case. Comparators on a consistent basis. I do not think any of that is going to be controversial.

MR LOMAS: Just to wrap up the conversation we were just having, is the sort of overarching answer to your point in your paragraph 107 that the Authority does accept an obligation to select an appropriate and reliable method?

MR HOSKINS: Absolutely.

MR LOMAS: That is the key test for you.

MR HOSKINS: Absolutely.

MR LOMAS: Okay.

MR HOSKINS: All the other legal points we have covered in our written submission so I am not going to say any more on them, but obviously if you have any questions before I move off the law I am happy to deal with them.

THE CHAIRMAN: I think just coming back to this economic value question --

MR HOSKINS: I am going to come to economic value. In the context of this case I am going to deal with that specifically.

THE CHAIRMAN: Yes, but just keeping it in the abstract, as it were, we did have a question 5 which is whether it is part of a separate free-standing test for whether a price is unfair, or whether it is just part of the excess analysis as you have described. Or even both I suppose.

MR HOSKINS: Whether you are looking at classic United Brands or United Brands in a more global sense, it is not intended, it is not a fruit machine, it is not an arithmetic exercise. You must ensure that all the relevant issues are considered. Now, economic value, you could consider it in limb one, you could consider it in limb two, you could actually consider it somewhere in between limb one and two which is sort of what the decision does. But at the end of the day I do not think there is much to be gained, in our submission there is not much to be gained from trying to be arithmetic and pigeonholing about it. Is economic value relevant? Yes in the circumstances I have indicated where you are using a cost plus analysis. Should be it be taken account of under a heading which says limb one? Should it be taken account of under a heading that says limb

two? It does not matter as long as it is taken account of. The assessment of economic value should not change depending on whether you happen to put it under a heading of limb one or limb two or anything else.

THE CHAIRMAN: You do not like the idea, having gone through limb one and limb two, of then applying an overall sanity test based on economic value?

MR HOSKINS: I think that is probably not attractive for the reason I describe, which is if you are doing at limb one a cost plus analysis and you are trying to get to the hypothetical price, I can see a sense in doing it all in limb one because you are doing cost plus, reasonable return, economic value to get to the price.

But you can do it in the way you described it, sir. You could do the pure cost plus, reasonable return, look at the difference, say is it excessive? And then at that stage say but what about economic value? My submission is it does not actually really matter as long as you do the exercise and you do take account of any economic value which is there.

THE CHAIRMAN: Okay.

MR HOSKINS: I am going to go on to deal with the excessive limb. I am going to deal with Pfizer and Flynn separately --

MR LOMAS: Are we moving away from legal abstraction?

MR HOSKINS: We are moving away completely. Well, if you let me, yes, when you let me.

MR LOMAS: Limb two and alternatives. Are you going to add anything to what you have in your submissions?

MR HOSKINS: I do not think I have anything to add. The law says what it says. If there is a good comparator, if it has been shown to be a good comparator, must it be taken account of before you reach an overall conclusion? Absolutely. We say the case law indicates that the good comparator should be -- if you are doing classic United Brands it would come in at limb one. Again, I am not going to be didactic about it. If there is a good comparator it must be taken account of.

MR LOMAS: Sorry, this is really quite important. We have had a debate with Pfizer and Flynn about whether the alternatives in limb two are true alternatives.

MR HOSKINS: And my submission is they are.

MR LOMAS: Your submission is they are. How do you deal with the point that is being put against you, then, that if there are credible or prima facie comparators for the fairness part of essentially alternative two of limb two, the Authority is not entitled essentially to shut its eyes to that and say I am not interested, I am only going to apply the first alternative, I choose to decide if it is unfair in itself. Because that is

the challenge that is being made to the decision and I think we ought to know what your answer is to that.

MR HOSKINS: Let me start by saying it this way: if there is a good comparator, an Authority cannot reach a decision which is unimpeachable before this tribunal without having that comparator taken into account at any stage.

MR LOMAS: So they are not true alternatives. You would have to do some alternative two?

MR HOSKINS: The question is: do you take account of the good comparator in limb one or limb two?

MR LOMAS: That is slightly ducking the question --

MR HOSKINS: Our submission is as a matter of law, because of the language of limb two, then at limb two unfairness the Authority can choose unfairness in itself or comparators, which means logically and legally that if there is a good comparator it comes in at limb one. Our submission, I think this is where Ms Bacon got in the exchange with you as well, is it is difficult to imagine a situation which, whether you put a comparator into limb one or limb two, will make a difference.

But our submission on the law is if there is a good comparator it has to be taken account of but it comes in -- it must come in limb one if it does not come into limb two but the Authority has a choice at limb two.

MR LOMAS: I am sorry to push you on this but it really is

quite important. On the classic United Brands test, limb one and limb two are trying to do different things. Limb one is saying is there a difference between price and what would be fetched in a competitive market or the benchmark or ... But what is the size of that difference and is it excessive? And limb two theoretically is looking at a different point. It is saying given that you have that differential, is it unfair in the context of something?

What I think the Authority has said is we have two alternatives for that unfairness limb, and we have an unfettered choice as to which we do, and if we find, to be blunt, that the exercise in relation to alternative two is difficult for us because it forces us to take into account comparators and those comparators might show fairness, we can sidestep that entirely and just go on the unfair limb.

And I am not sure it is an answer to that to say, well, if there were comparators we would have taken them into account at limb one.

MR HOSKINS: We are assuming a situation in which reference to comparators makes a difference at the limb two stage that it would not make at the limb one stage. It is adding something. So if you were to look at comparators at limb one --

THE CHAIRMAN: Yes, so it is not a redundant exercise.

MR HOSKINS: -- that would create a lacuna. That is I think the position that is being put. If that is the position then I think, despite the clear wording of the case law, the Authority would have to look at the comparators because there cannot be a situation in which an Authority is able, as I said before, to block out a relevant consideration.

MR LOMAS: That is very helpful. But I think that is, to be honest, a development of the analysis that is in the decision.

MR HOSKINS: It is. I understand that. I understand that. But the point then in this case, the gravamen will become are the comparators good comparators and what do they go to? And my submission is going to be not good comparators and it is not going to affect the result.

But I am not going to the stake on a situation in which there is some scenario in which there is a good comparator that would add something, it can be ignored by the Authority and then it must be ignored by the tribunal.

THE CHAIRMAN: That is very reassuring. At one stage we thought you were. Thank you.

MR HOSKINS: Can I move from the law?

THE CHAIRMAN: We never entirely move from the law,

Mr Hoskins, but yes.

MR HOSKINS: Excessiveness. I will deal with Pfizer first. We deal with Pfizer in terms of excessiveness at paragraphs 130 to 176 of our written closings. We rely on three factors, three principal factors to establish excessiveness. That is the cost plus analysis, what we have called the before and after analysis, the comparison of Pfizer's prices before and after September 2012, and there is also the comparison with prices in other member states but that is of a secondary order as made clear in the decision.

In relation to the cost plus indicator of excessiveness, Pfizer has not challenged the CMA's direct or indirect cost allocations. The 6 per cent ROS applied to Pfizer is based on a number of factors. As identified in our closings at 145 to 147 there is the comparison with Pfizer UK's internal ROS rates. Secondly, and this is closings 148, Pfizer's internal target threshold. Our closings at 149, the ROCE cross-check which is carried out in the decision. And then this is closings 150 to 159, reference to the PPRS.

Adopting that approach, those common costs, indirect costs allocation, 6 per cent. Pfizer's excesses were very well over the mark, we are not talking about marginal issues here, and we set that out in our

closings at 160 to 161. So that is the first indicator we say shows that Pfizer was excessive.

The second is the before and after comparison, this is our closings at 162 to 169. And we do say the before and after comparison is an indicator of excessiveness. You have the submissions set out in the closings, we have made them before, on the relevance of the fact that it was said to be loss-making.

I draw attention to paragraph 166 of our closings. The evidence is that it had been either unprofitable or marginally profitable for many years. Contemporaneous documents describe it as borderline commercially viable. And I draw attention to 168 because there were issues around loss-making commercial viability, if I can put like that, and the continuance. But what is quite clear in our submission is the September 2012 price increases went far beyond what was necessary to render the product if I use the phrase "commercially viable" because that is what Pfizer talks about in its documents.

If I can show you just the extract from Mr Poulton's evidence when I put this in cross-examination. Day 4, page 80. I can pick it up at line 18 on page 80. I had had one attempt and then I said:

"Mr Poulton, with respect, that is a politician's

answer. You did not answer my question."

Then if you can read from there down to line 10 on page 81. (Pause)

We say it is clear on the evidence that alleged to be loss-making pre-September 2012 the increases went way beyond what was necessary to make it whatever phrase you want to use, commercially viable, reasonably profitable, above the competitive price, et cetera, whatever. The scale of it is just so high that you can rely on the before and after as an indicator of excessiveness but we rely on it with the cost plus.

I am going to come now to economic value because this now does appear to be Pfizer's main point.

THE CHAIRMAN: Just on this, are you making two points? One is that the difference between the post-2012 and the pre-2012 price is by any standards large.

MR HOSKINS: I would use probably a more extreme adjective.

THE CHAIRMAN: Yes. I am trying to be moderate.

MR HOSKINS: I understand you have to be moderate.

THE CHAIRMAN: You are also making the point it does not really matter if it was loss-making and it probably was not.

MR HOSKINS: We have taken account of the alleged losses and you have seen the calculations --

THE CHAIRMAN: I have seen that.

MR HOSKINS: -- that has not been challenged. So I am not putting the case that you should find it was not loss-making. I am saying take Pfizer's submissions at face value and you will see the scale of those losses compared to the scale of the --

THE CHAIRMAN: So it is a scale argument.

MR HOSKINS: Yes.

THE CHAIRMAN: It is a very large difference. Right.

MR HOSKINS: And a scale argument in context. It is not simply it is very large, we put it in context by looking at the losses and then the returns that came as a result of the increases.

Economic value. This is in our closings beginning at 312. If I can pick it up at 317, our position is this: when deciding whether or not to ascribe economic value to patient benefits from this product, it is relevant to consider all the medical characteristics of the product. You cannot just look at efficacy which is what Pfizer would have you do.

At paragraph 318 we have set out what Professor Walker's evidence was on the product. Extremely effective at controlling seizures? Yes. Recommended as a third line treatment. Non-linear pharmacokinetics, NTI. Difficult for petitioners to regulate the dose or to combine it with other

medications. Has been superseded in many clinical situations by newer medicines which have a better safety and tolerability profile. So superseded in that sense, still effective but this is the way it is used in practice according to Professor Walker.

Paragraph 319, although it is effective, if I can use the phrase "negative aspects", I hope you will understand why I use that, of the product means that it is now only recommended as third line treatment and the majority of prescriptions for Phenytoin are therefore for historic patients already stabilised on the drug, not new patients. You will see that, cross-examination of Walker, Day 5, page 54, lines 9 to 13. It is footnote 612 in our closings.

That is what you should be looking at when focusing on whether to ascribe economic value to in light of patient demand because that is --

THE CHAIRMAN: It is fair to say, is it, Mr Hoskins, that all your submissions on efficacy, non-efficacy, good aspects, bad aspects of this product derive from the evidence of Professor Walker? There is no separate evidence from the CMA on this?

MR HOSKINS: No.

THE CHAIRMAN: You have drawn from Professor Walker's opinions?

MR HOSKINS: Yes.

PROFESSOR WATERSON: By implication, what Professor Walker says, he is talking about both capsules and tablets?

MR HOSKINS: Yes, a lot of the time, yes. So for example in relation to when he talks about continuity of supply, the guidance et cetera, it is Phenytoin he talks about.

PROFESSOR WATERSON: Yes, exactly.

MR HOSKINS: Without distinguishing generally between capsules and --

PROFESSOR WATERSON: I may come back to that.

MR HOSKINS: Yes. So the majority of prescriptions are those who are historically stabilised. The other two situations are really minor and I put that to Professor Walker. Very few new patients are prescribed with the product. Again you have the reference to the cross-examination of Walker at footnote 613.

At paragraph 320 we make the point that this is well-known. In Attheraces the Court of Appeal recognised that Article 102 does not envisage that the economic value of a product is what it will fetch, ie what consumers are willing to pay, there is something more than that. It is well-established.

At paragraph 321 what we say is the concept of a customer's willingness to pay is not apposite in this case in any event because you have the fractured nature

of the NHS and the way in which drugs are prescribed, dispensed, paid for. So for example, the CCGs have no choice but to pay for the product which has been dispensed to patients. Patients who benefit from the product do not exercise any choice based on a willingness to pay, it is the nature of this market. Willingness to pay does not go along with people who decide what drugs get prescribed and dispensed, et cetera. So willingness to pay cannot play any material role in the assessment of economic value in this case.

Paragraph 322, we rely on the opinion of Advocate General in Tournier, not just because it is an Advocate General's opinion but --

THE CHAIRMAN: I am quite interested in that, yes.

MR HOSKINS: An Advocate General's opinion is advisory, that is what it is for the Court of Justice, that is what it is for this court. You weigh it and you are not bound by it.

THE CHAIRMAN: No. But we take it into account.

MR HOSKINS: Yes. But the reason we rely on Advocate General Jacobs is not just because it is an Advocate General's opinion, it is because we say what he says is insightful and is right. It is paragraph 65 which I am sure you are well familiar with now. We have

set it out again. He says:

"The criterion of the importance of music to the business in question is superficially attractive since it appears only logical that those who need music more should be prepared to pay more for it. However, it appears to me that the usefulness of the criterion breaks down in a situation where a given category of users is completely dependent for its functioning on the supply of music and where, because of the absence of competition, that category must in effect pay whatever price is required of it."

He says that is the situation of the French discotheques. That observation you can see is consistent with what we have submitted is the fundamental core of United Brands which is the need to identify a competitive price. You see his reference to the absence of competition in his analysis there.

What Advocate General Jacobs, in our submission, is saying is where there is no choice and no competition then the notion of economic value breaks down. The notion of economic value as being a component of competitive price breaks down.

PROFESSOR WATERSON: Is he saying it breaks down completely in your view?

MR HOSKINS: Our submission is that that is the conclusion

but I am going to make an alternative submission to you in case I am wrong on that. I think it may break down completely depending on the facts of the case but it is certainly a possibility, yes. As I submitted earlier, economic value is used along with cost plus and reasonable return as a means of identifying the competitive price. I submitted that therefore it cannot add something in addition to the competitive price. It is part of, not in addition to.

How do we apply then this to the present case, the core of United Brands, the observations of the Advocate General? This is paragraph 323 of our closings. In this case most of the patients, ie those historically stabilised, have no choice but to keep taking the product. And the need for patients to keep taking the product is because of its inherent limitations, in particular, non-linear pharmacokinetics and its NTI.

The need to keep taking the product is not the result of any form of consumer choice it is not the result of willingness to pay a premium for that particular product. We are talking about the patients here. The reason why they take the product, the reason why they have to take the product is a result of medical advice that was put in place. And the reason for the

medical advice, this is Professor Walker's evidence, he did not necessarily agree that it was necessary, but his evidence as to why the guidance was put in place was that it was in essence to protect patients from the limitations of the product, ie the NTI and non-linear pharmacokinetics and the risk that if you switch you will have seizures.

So the fact that patients who are already stabilised on the product have to keep taking it is therefore not actually a demand side factor which reflects consumer choice at all. And if it is not a demand side factor reflecting consumer choice then there is no reason to ascribe economic value because there is no demand side factor which is relevant to it.

The punchline is that patients do not choose to take the product, they have to keep taking the product. They are not exercising a choice, they are not exercising a willingness to pay for this particular product as opposed to any other.

MR LOMAS: I think the difficulty that gives you, Mr Hoskins, is the consequence that therefore there is no economic value. If you need something to be seizure-free or to survive in a more extreme case, you would have thought that meant that it did have an economic value to you, you would pay for the thing

that is necessary to keep you alive. It seems to me, we discussed this a bit in opening, does not this analysis break down along the following approach: if you have something that is quite useful it adds some economic value and people choose to buy it. If you have something that is very useful it adds more economic value, the demand side is stronger and they will pay for to get it. If it becomes essential then you suddenly say it has no economic value and nothing should be added.

MR HOSKINS: That is not our position. That is the position that is set up in Pfizer's closings at paragraph 130, 131, 133 where they posit the notion of a cancer drug which is the only effective treatment for a particular type of cancer, that is what they set up. And that sort of brings us into me trying to answer the question, the point you have just put.

We say that that, taking that specific example, is really a straw man because the question of economic value has to be considered on all the facts of the case. What are the facts in this case that distinguish it from, for example, the unique cancer drug or the position you have put to me? First of all, if a product is still in patent, for example a breakthrough cancer drug, then its economic value should reflect that,

indeed that is the purpose of -- in a sense, the patent protection is to give a monopoly to recoup the rights. But what we see is that that position changes following patent expiry. You remember the passage in Napp, paragraph 416. I will take you to it. Authorities 1, tab 1.

THE CHAIRMAN: But that --

MR HOSKINS: If you would let me build the answer ...

THE CHAIRMAN: Okay.

MR HOSKINS: A1, tab 1. Paragraph 416. So that is an example of a situation in which you can have a product that gets a premium, whether you call it economic value or reflecting a reasonable return because of R&D, it gets a premium, but because of an event that happens, which is the expiry of the patent period, suddenly that element of the justifiable price falls away. And you have the point here that we are dealing with a drug that has been long off-patent, but you will understand why I give this example. It is not a complete answer but hopefully you will see why I say it is relevant.

Phenytoin is also very different from Pfizer's putative "best and only treatment in the market" for a specific cancer. The reason for that is as follows: whilst Phenytoin is still effective as a treatment, as

Professor Walker explained, it has been superseded in many clinical situations by newer medicines which have a better safety and tolerability profile and, as a result, very few new patients are prescribed with Phenytoin.

MR LOMAS: But those are the ones we are talking about.

MR HOSKINS: Sorry, I don't understand the question, sir.

MR LOMAS: I do understand that Phenytoin is less frequently used and is a third line supplier. But for the people for whom it is prescribed --

MR HOSKINS: I am coming to that.

What is clear, therefore, from Professor Walker's evidence, if you walk into a doctor's today there are a number of better treatments than Phenytoin. Again I use the notion "better" to cover all the aspects, good and bad, of the particular drugs. If you walk into hospital today and you are diagnosed with epilepsy it is very unlikely you will be diagnosed with Phenytoin.

THE CHAIRMAN: Prescribed.

MR HOSKINS: Prescribed. Let us then look at the cohort of historic patients who are stabilised on Phenytoin. Absent continuity of supply, what would those patients do, what would the doctors of those patients do? They would move the patients to the better drugs, the ones that have better safety, better tolerability. The only

reason why the historic patients remain on Phenytoin is because of the continuity of supply principle which itself arises because of the limitations in Phenytoin.

MR LOMAS: Sorry, is that right? I thought they were prescribed Phenytoin because it was the medically right solution for the particular problem they had given how they were sensitive to other forms of treatment and what worked for them. The continuity of supply is about which brand of Phenytoin they are prescribed.

MR HOSKINS: But that is relevant to whether you are going to ascribe economic value to Phenytoin capsules. That must be the same. My point is whether you are on, for example, Phenytoin capsules or Phenytoin tablets, the reason why you have to keep taking Phenytoin capsules or tablets, or a particular brand of capsules or tablets, is because of the limitations in the drug. If it were not for the limitations in those drugs, when you went back to the hospital the doctor would say "You are on Phenytoin. There are many better drugs now. I am going to give you one of those because those are better in terms of tolerability, safety, et cetera". See Professor Walker's evidence.

MR LOMAS: I do not think that is Professor Walker's evidence. What he is saying is, okay, the better drugs work well for many people, but there are some people for

whom Phenytoin is an effective drug, albeit that it has NTI and non-linear pharmacokinetics. But for those people the best option for them is Phenytoin.

MR HOSKINS: There is a very small cohort of the patients for which that is correct.

MR LOMAS: And a declining one, but yes.

MR HOSKINS: Exactly. But the majority -- that is why I took you to Professor Walker's evidence. The majority of the patients currently taking Phenytoin are taking it because they were historically prescribed it and those are the majority. If you go back to paragraph 319 of our closing submissions, and let us go to Professor Walker's evidence, Day 5, page 54.

I do not know if you want to look at this with his report because you will then get the three categories and it will put it in context. So if we go to Professor Walker's report at the same time, his first report, D, tab 9, paragraph 5.11 in his first report at page 10. Three categories:

"Phenytoin prescription still occurs in three main situations. Historical patients who have already been prescribed, in combination with other anti-epileptic drugs in patients with drug-resistant epilepsy who have not responded to first or second line therapies ..."

Which is the point you were just putting to me, sir.

"... and patients who have been given Phenytoin as an emergency treatment and who have continued ..."

Those are the three categories he identifies. And if you go to the cross-examination at page 54, lines 4 to 13. (Pause)

THE CHAIRMAN: Yes.

MR HOSKINS: So I am focusing on that because that is the majority of the profile. Now, it may break down and you may put to me, well, insofar as there is a small minority --

MR LOMAS: That is not -- I quite understand that if you were to re-run those patients with today's technology you would not find a large group of them stabilised on Phenytoin.

MR HOSKINS: Yes.

MR LOMAS: But as at today, in the prices we have in the market today, we do have that cohort and for them Phenytoin is what stops them having seizures.

MR HOSKINS: And the reason why -- that is absolutely right. The question then is, and that is why I go back to Advocate General Jacobs, are they completely dependent on the product? Yes.

THE CHAIRMAN: So it is a dependency point. You say they are dependent.

MR HOSKINS: It is that and it is the absence of competition

point. He gives two factors for saying it would not be appropriate to ascribe economic value in particular situations. And it is completely dependent and it is a lack of competition. Both those elements apply to Phenytoin capsules.

MS BACON: I am sorry to rise, I just have a question. When Mr Hoskins says "the product", does he just mean Phenytoin in general, or is he saying Phenytoin capsules with a particular brand? It is just not very clear. Because as I pointed out yesterday, if that is supposed to refer to a particular brand, then he needs to explain the 90 per cent of prescriptions being written -- I just want to clarify that.

THE CHAIRMAN: Mr Hoskins, do you see any need to clarify?

MR HOSKINS: I do not understand the question.

THE CHAIRMAN: The question is are you talking about Phenytoin in general or are you talking about Pfizer-branded, Pfizer-manufactured, Flynn-supplied capsules?

MR HOSKINS: Generally speaking, when I use the phrase "the product", I am using it in the same way as the decision uses it, which is capital P, Product, which is Pfizer Phenytoin capsules and Flynn Phenytoin capsules.

THE CHAIRMAN: I am not sure if capital letters come on to the transcript but it does not matter.

MR HOSKINS: That is the problem, that is --
MR BREALEY: Can I just make one point, I do apologise for getting up but it is so important. Picking up on Mr Lomas' point. If one can go to tab 10 and paragraph 3.1.A, this actually is relevant to what Mr Lomas was putting to Mr Hoskins and it is very important that it is sorted out now rather than in reply.
THE CHAIRMAN: The second expert report?
MR BREALEY: The second expert report, paragraph 3.1.A, where clearly the CMA still are taking continuity of supply out of context. Section 3, second report, 3.1.A.
MR HOSKINS: There is a wealth of evidence about --
THE CHAIRMAN: I think Mr Hoskins is entitled to make his case.
MR BREALEY: He is. I am sorry.
THE CHAIRMAN: And we will make of it what we make of it. I think we understand that he is saying even though the patients Mr Lomas has referred to are receiving valuable therapy, you are saying that that should be disregarded for economic value purposes because they are, in your words, completely dependent, that is your case?
MR HOSKINS: Completely dependent and there is no competition.
THE CHAIRMAN: And no competition.

MR HOSKINS: Therefore you should not be ascribing economic value to the product because, for the reasons described by the Advocate General, that does not take you to a competitive price.

PROFESSOR WATERSON: Can I take you to a hypothetical here. Suppose that patients were prescribed Phenytoin and there was no medical difference between capsules and tablets, if tablets happened to be much cheaper then what would be your answer about economic value?

MR HOSKINS: Economic value -- if tablets have the same profile as capsules then neither of them would have economic value --

PROFESSOR WATERSON: You said are they completely dependent and is there a lack of competition. Supposing there was significant competition in tablets and that patients were just prescribed Phenytoin without specifying capsules or tablets, would the economic value then be the price of these tablets which were subject to competition?

MR HOSKINS: So competition in tablets but not in capsules.

PROFESSOR WATERSON: Yes.

MR HOSKINS: I am hesitating because -- and it may not actually make a difference to the answer to the question you are putting to me. The reason I am hesitating is I just do not know off the top of my head whether

prescriptions are written for Phenytoin or whether they are written for Phenytoin capsules. That is why I am hesitating.

PROFESSOR WATERSON: I am taking a hypothetical.

MR HOSKINS: You would have to -- the Advocate General's position may still apply but you would have to look at all the facts of the case. My position is that in relation to this product you have both aspects of Advocate General Jacobs' indicia, complete dependence and lack of competition, and therefore not appropriate to ascribe economic value when coming up with the United Brands 249 competitive case.

THE CHAIRMAN: In our earlier discussion of the market you were putting to us that there might be competition but not sufficient competition. So it is not no competition, it is not enough competition.

MR HOSKINS: That is right. I understand that. When you read an absence of competition.

THE CHAIRMAN: An absence of sufficient competition is what you think Advocate General Jacobs would have said had he thought about it?

MR HOSKINS: He was not dealing with this case but that is my submission, absolutely. The absence of sufficient competition still makes the Advocate General's observation a valid one.

THE CHAIRMAN: So just to be clear one more time. So for those patients for whom there is not complete dependency, and we accept there are some because they are new prescriptions --

MR HOSKINS: Historic patients.

THE CHAIRMAN: You still disregard those, the value they get from the therapy, you still disregard that because there is no competition?

MR HOSKINS: For the historic stabilised patients we are talking about?

THE CHAIRMAN: No, I am talking about the new patients. Professor Walker's three categories.

MR HOSKINS: In that category this argument would not run the same way, but our argument would be that because the majority of patients are the historic ones then that would be a very limited --

THE CHAIRMAN: So there would be some economic value but not very much.

MR HOSKINS: Indeed. Which is the alternative I am about to come to.

THE CHAIRMAN: I thought you might be coming to that.

MR HOSKINS: Because the alternative position is even if the tribunal were to conclude that some additional non-cost economic value should be ascribed to the product, then any such value could not be sufficient to prevent Pfizer

and Flynn's prices for the products being abusive.

The reason we say that is as follows: economic value, there can only be one pie. It cannot be that you have economic value and Pfizer gets the whole benefit of it and Flynn gets the whole benefit of it. Economic value is one pie and it has to be split between Pfizer and Flynn. And when you are splitting the economic value, which is a non-financial element, you have to look at the different roles played by Pfizer and Flynn in the manufacture, supply and distribution of the product in bringing it to market, and it is quite clear from the facts that it would be Pfizer who would be the recipient of the lion's share of any economic value.

Given the very large extent of Pfizer's excesses as set out in the decision, our submission is that any economic value you did give could not save Pfizer. And because Flynn only gets a slither of the pie because of the role it plays, any value you put on economic value to Flynn equally would not be sufficient to save it. That is the alternative argument.

THE CHAIRMAN: But it would cast doubt on the reasoning in the decision.

MR HOSKINS: That alternative is in the decision. But I come back to: you have heard all the arguments, you are perfectly capable of proceeding in that way. To put it

another way, in practical terms, if you were to say: the decision does not deal with this, so what should we do, quash the decision or remit it back to the CMA, I do not think that is going to benefit anyone. You are in a position where you have heard all the evidence. The CMA is not going to be in any better position and then bring it back to you. You are well equipped to determine this issue now. Remittal is not necessary.

THE CHAIRMAN: Move on.

MR HOSKINS: I am going to deal now with Pfizer's comparators, and they have put forward two. They have put forward tablets and other AEDs. The way that Pfizer sought to deploy its comparator, I think it principally said that they were relevant to establish the economic value of the products. They were not using them in the excessive limb, for example to show what the reasonable return should be, they are simply focussing on them as an indicator of economic value. But it does not really matter how you use them, but you can clearly use comparators in a number of different ways.

Tablets we have dealt with at paragraphs 267 to 283 of our closing submissions. I would just like to emphasise and develop some of those points.

As a general remark at the outset, we would submit the facts surrounding tablets in our submission make it

clear they are not a good comparator for identifying the competitive price within the United Brands sort of paragraph 249 core of excessive price, because it is quite clear, whatever happened to the price of tablets, they were not set by competition.

Let me deal first with the role of the Department of Health. At paragraph 268. It was quite telling that Mr Ridyard stated in cross-examination -- he accepted:

"The tablet price has its problem as a comparator if you do not believe that the Department of Health effectively regulated the price of the tablet."

There is a lot of confusion about what are the appellants saying when they say the DH "regulated" the price of the tablet. Our submission is that what the evidence shows is that the DH asked for a meeting with Teva, the DH indicated it was unhappy with the price of tablets and Teva agreed to reduce the price. That is the essence of what happened.

There is a different case put in Pfizer's closing submissions. One finds it particularly at paragraph 83. What they seem to be suggesting is that, rather than the scenario I have described, that what happened was, after the meeting, the DH imposed a unilateral reduction by way of reducing the drug tariff. So that is Pfizer's closings at paragraph 83. I think that is the point

they are making, but it was not repeated in Mr Brealey's oral submissions to you.

I must admit that came as a bit of shock to us when we read the written closings. But the suggestion that the DH implemented unilaterally the price reduction via a series of reductions of the drug tariff of course did not appear in -- indeed it is not consistent with -- Mr Beighton's own witness statement. If we just remind ourselves what Mr Beighton says in his statement. That is B1 at paragraphs 5 to 8. (Pause). You see that is consistent with the scenario I described as our understanding of the evidence. The DH call meeting, the DH say unhappy, Teva offer reduction. It would be extraordinary if what had actually happened was, following the meeting, there had been unilateral reductions imposed through the drug tariff if that did not appear in his witness statement.

The Pfizer submissions come from certain passages in the cross-examination, both by Mr Brealey and myself, of Mr Beighton, so we should look at those. That is transcript Day 5, page 19, line 9. This I believe is Mr Brealey's cross-examination of Mr Beighton. You see Mr Brealey's questions between 9 and 12:

"Question: You've told us that the DH said they wanted it reduced. What happened? Did they -- did you

discuss it with the officials? Did you -- how did the meeting play out?"

Then you will see the description that he gives. I think the only thing I can ask you to do is to read through to line 23 on the next page. (Pause). You will see from this that what is conspicuous by its absence is any reference to the drug tariff.

THE CHAIRMAN: Isn't that the reimbursement price?

MR HOSKINS: Yes.

THE CHAIRMAN: That is line 13.

MR HOSKINS: Yes, but that is not -- sorry, you are right to pick me up. What is conspicuous by its absence is an indication that they were going to use the drug tariff or reimbursement price as a unilateral vehicle for reduction. The closest you get to that is between lines 19 and 23. Then you get Mr Brealey saying:

"Just so I am absolutely clear on this ..."

And you will see the exchange that follows down to line 10. But again what does not become absolutely clear is that what Mr Beighton is saying is that there were post-meeting unilateral reductions through the drug tariff.

MR LOMAS: Line 6 on page 21 does say:

"They told us it would go down to 30".

MR HOSKINS: It is not clear if that is what is being said

in the meeting. The DH is saying -- I am just speculating. Teva come back in and say: we will offer you 40, and the DH says: no, no, no, we want you to put it down by 30 in a phased reduction. Or whether the DH is saying: no, no, no, we are going to, after this meeting, put it down using the drug tariff by means of a phased reduction. It could be them telling Teva to do it or it could be the DH saying: no, we are going to do.

MR LOMAS: Yes, I agree.

MR HOSKINS: The other passage that is relied on in Pfizer's closing on this point is at page 38, and this is my cross-examination of Mr Beighton, at lines 7 to 22. Again I invite you to read that. Again, just to note that Mr Beighton did not state that the DH implemented the £30 unilateral price itself via a series of drug tariff reductions. So our submission is the passages that are relied on by Pfizer to support this are equivocal at best and they are inconsistent with witness statements and, if this is what happened, you would expect to find it in a witness statement. But it is also inconsistent with what Mr Beighton said to me, but I note the time. I can probably finish this point in five minutes, or whether you would rather rise?

THE CHAIRMAN: Finish the point.

MR HOSKINS: Thank you. What of course would happen in any

event when Teva reduced the price is there would be a reduction in the drug tariff price that was published. That would inevitably follow. If I can just show you Scheme M, which is at H1, tab 16. At paragraphs 22 to 26 sets out the general mechanism, and explains the drug tariff price is set by reference to manufacturers' prices.

PROFESSOR WATERSON: Just to be clear, this is talking about category M.

MR HOSKINS: Yes.

PROFESSOR WATERSON: Not Scheme M.

MR HOSKINS: Sorry, I am not sure there is a distinction for this purpose in relation to tablets. But you are right, there is a distinction. But there is also a mechanism in Scheme M for the DH to reduce the drug tariff, and you see that in paragraphs 28 to 30. There is a specific mechanism set out. But you see there is a process to be followed. For example in 29:

"... a Scheme member shall provide to the Department on reasonable request information such as the following ..."

And at 30:

"In its examination of the reasonableness of a company's costs and prices, the Department would have regard to factors such as the following ..."

So if there is to be a unilateral reduction in the drug tariff price, there is a process to be followed and, if the DH were simply to do it without following it, you can imagine what would happen. There would be legal consequences. But I cross-examined Mr Beighton specifically about these powers, paragraphs 28 to 30 of the scheme, and he agreed that this process did not happen in relation to tablets. That is transcript Day 5 at page 24. It begins at line 17 and goes to page 25, line 24. Crucially you will see page 25, lines 21 to 24:

"Question: But, of course, Teva never got to this stage because, as you say, you had one meeting and you agreed a price with the DH?

"Answer: Yes, that's true."

T5, page 24, line 17 down to page 25, line 24.

So when Mr Beighton was specifically asked: did the DH use its powers to unilaterally impose a price reduction in the drug tariff, he said "no". Therefore we say there is no good evidential basis to support Pfizer's submission that that is in fact what happened. It is simply not made out. We say the tribunal should therefore proceed on the basis I suggested, which is what happened was the DH asked for a meeting with Teva, indicated it was unhappy with the price of tablets and

Teva agreed to reduce the price.

Sir, that is a good place to stop.

THE CHAIRMAN: Subject to this point about initial offer was not enough and then ...

MR HOSKINS: I accept that. We have Mr Beighton's evidence on the --

THE CHAIRMAN: Is that a good point?

MR HOSKINS: It is.

THE CHAIRMAN: Thank you very much.

(1.05 pm)

(The short adjournment)

(2.00 pm)

MR HOSKINS: Good afternoon. I am dealing with Pfizer's comparators, and I am dealing with tablets, and I am at paragraph 268(c) of our closing submissions.

The point there is that regardless of what happened with the DH in 2007, what we know is that certainly at least by 2013 the DH was not happy with the price of tablets because that is when it raised concerns with the OFT. So certainly by 2013 it cannot be said that the DH considered the price was fair.

But even if the Department of Health had regulated the price of tablets -- I use the word "regulated" to mean whatever happened it does not assist the appellants for a number of reasons.

The first point, and this is at paragraph 269 of our closings, is that prior to the launch of the product neither Pfizer nor Flynn had any contact with Teva or with the DH to ascertain the reasons behind the price reduction of the Teva tablets and the circumstances of the meeting. We have given the references there at paragraph 269 of our closings.

What the appellants did was they observed the drug tariff price reducing and that is what they based their assumptions on. I will come back in a little bit to the significance of looking at the drug tariff price.

Paragraph 271 of our closings, it is quite clear from the evidence that both Pfizer and Flynn became aware that the DH was not content either with the price of tablets or with the capital P Product.

First, Walters, paragraph 26, confirms that at the meeting on 6 November 2012 the DH told Flynn that:

"... it did not consider the tablets to be a relevant comparator."

Also:

"Flynn should not assume that the DH was happy with the price of tablets."

Mr Walters accepted that Flynn were aware that the DH were still very unhappy with the price increase of the Product, capital P, following the meeting on

6 November 2012. And there is also evidence that Pfizer was aware that the DH was concerned about the price of the Product, and again we have given you the references in our closing submissions.

But the problem with all this -- and I am sort of looking at the moment through the optic of Pfizer and Flynn's knowledge intentions, et cetera, but of course abuse is an objective concept, it is not dependent on the subjective intention of the parties. You may take account of it but that is not what the core of abuse is.

And paragraph 237 of our closings, whatever was thought by the appellants at the time, as a matter of law a dominant undertaking is not protected from application of competition law by virtue of the fact that a regulator has facilitated or encouraged the conduct.

You have seen Deutsche Telekom but I am going to go back it. It keeps getting swept aside by the appellants but this really is an important point. Authorities C, tab 29. I think it is your C3. Paragraphs 81 to 88.

THE CHAIRMAN: No, C2.

MR HOSKINS: Sorry.

THE CHAIRMAN: You led me astray, Mr Hoskins.

MR HOSKINS: I took you to this in opening so I am not going to dwell on it. A company can escape from competition

law where it is required to do something, but where it has a choice to do something it cannot escape competition law by reference to the fact that a public body was involved. You see that from paragraph 84 of Deutsche Telekom:

"The mere fact that the appellant was encouraged by the intervention of a national regulatory authority to maintain the pricing practices which led to the margin squeeze of competitors, who were at least as efficient as the appellant, cannot as such in any way absolve the appellant from responsibility under Article 82 EC since, notwithstanding such interventions, the appellant had scope to adjust its retail prices for end-user access services. The general court was entitled to the find on that ground alone that the margin squeeze at issue was attributable to the regulation."

So even if the DH had "regulated" the tablet prices, Pfizer and Flynn were free to price wherever they wanted. And if it happened that as a matter of objective analysis they price at an excessive level, cannot rely on the DH's dealings with Teva to get them off the hook as a matter --

THE CHAIRMAN: Are they saying that because the Teva price was at a particular level with the assistance of the Department of Health, therefore the capsule price was

not abusive? Or are they saying the tablet price is a reasonable benchmark for assessing whether the price is fair? There is a slight difference between those two, is not there?

MR HOSKINS: I think they may be saying both.

THE CHAIRMAN: At different times or at once?

MR HOSKINS: I do not know, it is probably a question for them. But my impression --

THE CHAIRMAN: Which one are you replying to?

MR HOSKINS: I am replying to both because I say the point I am making goes to both. Because if you are looking at tablets as a relevant benchmark, if in fact you have established that the prices are excessive, for example because of cost plus and because of the before and after, it would be very odd if you could then refer across to the tablet price to say that that means everything is all right regardless of cost plus and before and after, and I pray in aid Deutsche Telekom for that. Because when you are looking at whether something is a suitable comparator or not -- I will come on to it, this is another point I will come on to but you are aware of it -- you do not have to, the Authority or the tribunal does not have to establish that the price for tablets was excessive. It is simply a question in this context of is it a relevant comparator?

THE CHAIRMAN: And whether it is excessive is one of the factors you would be considering in whether it was a good comparator or not.

MR HOSKINS: Yes. But you do not have to as a matter of law establish that the tablet price was excessive in order to say it is not good comparator.

THE CHAIRMAN: As a matter of law you have to decide whether it is a good comparator.

MR HOSKINS: Yes.

THE CHAIRMAN: And that may be one element of that.

MR HOSKINS: Indeed.

THE CHAIRMAN: I am not sure you are right to say as a matter of law you do not have to.

MR HOSKINS: I am not sure -- we may be at cross-purposes.

THE CHAIRMAN: Maybe we are.

MR HOSKINS: For our submission we say you should not look at the tablets as a comparator for a number of reasons. One of the reasons is that tablets themselves are subject to continuity of supply, NTI, et cetera. The point that is made against us in relation to that is you cannot point to the potential problem in the tablet price to knock down the comparator without showing that the tablet price was excessive as a matter of law. That is the point I am addressing. You do not have to do that in order to decide --

THE CHAIRMAN: I think it was put slightly less strongly: you ought to investigate whether there is anything in the tablet price that does make it a bad comparator.

MR HOSKINS: That is what we say we have done. Absolutely.

THE CHAIRMAN: You say you have done that?

MR HOSKINS: Yes.

THE CHAIRMAN: Right.

MR HOSKINS: I will come on to that. That is a point I am going to come on to. There are a number of points in relation to that.

THE CHAIRMAN: Presumably all this material about what Flynn or Pfizer thought the Department of Health did or did not think goes to the merits of the fine.

MR HOSKINS: As well.

THE CHAIRMAN: Yes. You say they do not apply here at all.

MR HOSKINS: Exactly. I am saying as a matter of law it does not apply.

THE CHAIRMAN: So not "as well". "Instead".

MR HOSKINS: Yes, instead.

I come on to the point we have just been discussing, sir, which is --

THE CHAIRMAN: Can we put Deutsche Telekom away?

MR HOSKINS: We can. What are the reasons why the CMA concluded, and you can and should conclude, that tablets are not a relevant or good comparator? We have set out

a number of these factors in our closings, paragraphs 274 to 283. The point at 274 is the point I have just made to you, observing the conditions on the tablets market indicates that it is unlikely that the price of Teva tablets will be the competitive price you are looking for, for paragraph 249 of United Brands. And that is because tablets have an NTI, non-linear pharmacokinetics, they are subject to continuity of supply, and that means again that the preference is to maintain stabilised patients on a particular brand.

PROFESSOR WATERSON: That leads, to me, to a puzzle which is if that were literally true then we would not have expected any entry into this market. Yet there has been entry into this market.

MR HOSKINS: Are we talking tablets and capsules?

PROFESSOR WATERSON: Into tablets.

MR HOSKINS: Yes.

PROFESSOR WATERSON: So on what basis have firms entered the tablet market if people who are previously on Teva are supposed to be maintained on Teva?

MR HOSKINS: This will probably make at least one of you smile. But if you look at Professor Walker's evidence the use of Phenytoin, be it capsules or tablets, the use of capsules or tablets is not limited to the stabilised historic cohort although that is the main -- certainly

for Phenytoin capsules that is the main body of patients.

So for example a company could take the view, looking at the high price of tablets perhaps: we are going to enter this market and we are going to build up a cohort of new patients.

PROFESSOR WATERSON: That does not seem to me to be the complete explanation because they would be playing with 10 per cent of the tablet market which is, as a whole, smaller than the capsule market. It may be less than 10 per cent, it may be 5 per cent of the tablet market. So for me it is still a puzzle.

MR HOSKINS: I understand the puzzle, I am not sure I can help. But my legal submission is it is not contested, it is common ground that tablets have an NTI, non-linear pharmacokinetics, and are subject to continuity of supply.

PROFESSOR WATERSON: My point is not going to be in relation to that. But carry on.

MR LOMAS: Is part of the answer to that back to the evidence of Professor Walker, that on his evidence before the November 2013 guidance the guidance was, shall we say, less rigid, less well understood, less well publicised, less well followed and hence there was more room for people to assume that they could compete

with tablets.

MR HOSKINS: It is possible. I am nervous because I am entering into the realms of speculation. I understand why we are hypothesising. It is not my role to --

THE CHAIRMAN: It comes back to the point you put to us, which is the Authority did not have to investigate tablets if it was otherwise satisfied that they were not a good comparator and I think the questions we are asking follows from that failure to investigate. Because in the course of this hearing questions have arisen about what was going on in relation to tablets which are unanswered.

MR HOSKINS: Sir, there was not a failure to investigate. There is a specific section in the decision that addresses the question of tablets as a comparator.

THE CHAIRMAN: Yes, I am aware of that. But it does not amount to an investigation.

MR HOSKINS: This is a sort of procedural issue. It does tie in with the questions you were putting to me this morning. If you are an authority and someone brings a comparator, potential comparator to you, and you conduct an investigation and you reach the conclusion on the basis of that investigation that it is not going to be a helpful comparator, you then as a reasonable authority would stop.

What cannot be the case, in our submission, whether it is a matter of substantive or procedural law, is that if someone brings a potential comparator to you, you must conduct a full investigation to the absolute limit of your powers before you can say it is not a good comparator. It must be acceptable for an authority to conduct an investigation and at any stage of that investigation to reach the conclusion that it is not worth us going any further because there is not going to be a good comparator.

THE CHAIRMAN: The problem we have with that argument is that this is the identical molecule. It, is the same substance. So medically, therapeutically, it is an obvious place to start. What you then have to do is to see whether the price looks to be a realistic price for comparison purposes.

MR HOSKINS: A competitive price.

THE CHAIRMAN: Okay. A useful price to get to the answer whether the capsule price is excessive or not or unfair or not. But it is a reasonable line of inquiry, surely, to look at what lies behind the price that is there in the drug tariff price and in the supplier price of the principal supplier of tablets. It is not unreasonable to want to look at that. And I think the Authority did look at that.

MR HOSKINS: It did, absolutely.
THE CHAIRMAN: The question is: how far did they look?
MR HOSKINS: That is right, absolutely.
THE CHAIRMAN: And what we are finding out in the course of this hearing is that there are unanswered questions.
MR HOSKINS: Of course there will be. There inevitably will be --
THE CHAIRMAN: Significant unanswered questions like how many other suppliers were there? Was it really a market with only one supplier? Is it a tablets market at all?
MR HOSKINS: Sir, the decision does not say there is one supplier. The decision recognises there are a number of suppliers of tablets. There is a finding in the decision on that.
THE CHAIRMAN: Okay. And is each of those suppliers in its own little dominant position by virtue of continuity of supply --
MR HOSKINS: The point made in relation to that is tablets have -- the NTI non-linear pharmacokinetics are subject to continuity of supply. So there is not a formal finding of dominance but there is the recognition that any competition there is will be constrained by those factors.
PROFESSOR WATERSON: There is also in the decision a table, and you have drawn our attention to a table of your own

regarding the price of the tablets, and it appears to be quite interesting because it says in the decision that Teva's tablet price started decreasing in 2013. This is 3.491 of the decision.

THE CHAIRMAN: Yes, page 189.

MR HOSKINS: Yes.

PROFESSOR WATERSON: So an interesting question would be what was the price of the tablets at the time that the capsule was actually launched, the Flynn capsule?

MR HOSKINS: I am going to come to that actually because there is a difference between the drug tariff price which was observed and the actual selling prices of the tablets. And given that abuse is an objective concept, we say the proper comparator when you are looking at Pfizer/Flynn's ASPs is obviously to look at Teva's ASPs, not ASPs to drug tariff.

PROFESSOR WATERSON: Yes.

MR HOSKINS: This is paragraph 282 of our closing submissions. What one finds is that if you do the comparison on a consistent basis you see by 2013, so that is looking at launch at September 2012 so that is why we are taking 2013 here, Teva's ASPs for a 28 pack of tablets had fallen to £[✂] a pack. That is the ASPs. Now, a comparison between that price and Pfizer and Flynn's ASPs show that both Pfizer and Flynn charged

more than the Teva ASP and that is even though Pfizer is further up the distribution chain.

So even if you say, well, we are concerned tablets may be a comparator, let us assume they are a comparator, what is this telling us? It is not telling us that the Pfizer and Flynn prices were acceptable.

PROFESSOR WATERSON: No, but it might be telling you that [✂] a pack would be acceptable.

THE CHAIRMAN: A pack is 28 capsules.

MR HOSKINS: I understand, yes. The footnote deals with -- if you look at footnote 533, that deals with the adjustment. The question then is the extent to which the tablet price exceeds cost plus et cetera and before and after.

Our submission is where you have the cost plus analysis that we have done which shows the level of excess we have done where you have the before and after for the product, then on our analysis of the tablets market, for the reasons I have described, that is not sufficient to disturb the finding based on cost plus and before and after.

MR LOMAS: I was very puzzled by this. You could look at this the other way and say assuming that the appellants are right and the tablet is a relevant comparator, you

have evidence here that the time capsules launched, they were priced [✂] per cent higher than the comparator that they say represents economic value.

MR HOSKINS: Yes.

MR LOMAS: I do not think this argument is in the decision, perhaps I have missed it if it is, but you would have thought that was quite a strong point in relation to whether the pricing of capsules was excessive or not.

MR HOSKINS: Sir, that is why we are praying it in aid.

MR LOMAS: You are putting it in your closing submission, but we have been sitting here for four weeks and I do not think this point has surfaced at this stage. It seems to me quite a relevant issue.

PROFESSOR WATERSON: Yes. It may just be that one has misunderstood the point.

MR HOSKINS: It is at page 439. Actually it appears in the penalties section but it is at page 439. The figures -- before you go to that, page 189 of course has the Teva ASPs we have just been talking about. Then at page 439, it's at (d) above that, that is Flynn. And the equivalent is 433(d) for Pfizer on that page.

The reason we have brought this to the forefront in the closings is because of the way some of the argument in cross-examination has gone.

THE CHAIRMAN: Which page are we meant to be looking at?

MR HOSKINS: 433(d) is the point made in relation to Pfizer.
PROFESSOR WATERSON: Do you mean page 439?
MR HOSKINS: Page 433 for Pfizer.
THE CHAIRMAN: Let us have a look at that. That says that Pfizer did not know what prices were actually paid and that goes to negligence in relation to fines.
MR HOSKINS: What we have is we have page 189, which sets out the ASPs of Teva, you then have the point that are made in the penalties --
THE CHAIRMAN: 189 sets out the drug tariff prices.
PROFESSOR WATERSON: And it gives a snapshot.
MR HOSKINS: Yes, it says Teva's ASPs et cetera --
THE CHAIRMAN: By 2013. It does not say when it got to that or what happened afterwards.
MR HOSKINS: By reference to a document.
PROFESSOR WATERSON: It is interesting as to how the Teva price has fallen to that level, in my opinion.
MR HOSKINS: Your point is: is that because of competition et cetera? I understand. But the reason why we are deploying it is the one Mr Lomas identified which shows that the difference in ASPs means you cannot rely on the Teva tablet price to justify the Flynn/Pfizer price. And then there is the separate question which is was this put in this way in the decision? To which I have said the answer is no. And the reason why we are

raising it this way now is because following the development of the trial, we thought this was an important point to bring to the tribunal's attention.

THE CHAIRMAN: I have some difficulty in following this. Does it mean that if, as my colleague points out, if the Teva price, and with it the drug tariff price, has fallen because of competition, we do not know, we are just speculating --

MR HOSKINS: We do not know.

THE CHAIRMAN: -- it then becomes quite an interesting comparator.

PROFESSOR WATERSON: Yes.

THE CHAIRMAN: But you say, no, no, it is not because it is too low and they took the wrong price and they priced their products too high, but in principle it is still a valid comparator, just that drew the wrong comparator. We are in wholly uncharted territory here.

MR HOSKINS: If it is a comparator it does not help them is my point.

THE CHAIRMAN: I am not sure about that. It raises questions.

MR LOMAS: I admit to being slightly confused by this. We are on the penultimate day of the hearing and the underlying assumption throughout had been that Flynn were pricing at starting off some 20 per cent below the

tablet price which raised a whole number of questions about whether it was a valid comparator and so forth.

If you have data that suggests that the price for tablets is in fact set in relatively competitive market conditions -- do not know, an assumption -- but actually Flynn is pricing [✂] per cent higher than that, the whole tenor of the analysis of the market is completely different.

MR HOSKINS: I understand. We are praying this in aid for that reason. And then the next question the chairman is putting to me is: well, is this in the decision? The answer is no. But we say we are entitled to put this because it is clearly a relevant argument.

MS BACON: This is a wholly --

THE CHAIRMAN: It does represent quite a considerable change in your case.

MS BACON: It is a wholly new point. There are points on that which we would have wanted to make had that ever been put to us. It is not in the decision. It is not even in this bit of the decision. There is nothing in the decision at all that draws this kind of comparison and says that our prices were actually, as Mr Lomas says, [✂] per cent higher than the ASPs. There are lots of answers we would want to give to that.

Where are we supposed to go? Am I supposed to go

away and respond to it overnight? That is wholly unreasonable.

THE CHAIRMAN: Well, there is no expert evidence on it.

MS BACON: No.

THE CHAIRMAN: Mr Brealey, do you have anything to say on this question? You are not normally backward in coming forward.

MR BREALEY: I fully endorse what Ms Bacon has just said and I fully endorse the questions from the tribunal. Because far from being a point in the CMA's favour, it is actually a point in our favour.

So if one does go back to paragraph 282 -- I will not make submissions, but the first point is we cannot have a change of case at this late stage, and maybe we will bring up Imperial Tobacco for tomorrow. But paragraph 22, just so Mr Hoskins knows, is actually giving a slightly misleading -- not intentionally, but it's a misleading picture because we have a figure on the left-hand side, which I do not actually think is confidential, we have the [✂]. That should be compared to, for example, the March figure. And if you take the March figure, Pfizer's price is £[✂] and Flynn's price is I think £[✂].

So if you take the Teva ASP, and I will deal with this tomorrow, but by 2013 there were several

manufacturers in this market. And it is a perfectly valid point, why were they entering if the barriers to entry were so high? We would say it is because of competition, they were switching. But on the price you can compare the [✂] Teva with [✂] Pfizer. And this is a competitive price. It is under Scheme M, Category M.

So it is a Scheme M, Category M price, as a result of which several manufacturers are competing, and therefore if Mr Hoskins does not like the drug tariff price, which we would say is the price you would take because that is the cost to the NHS, this is a United Brands paragraph 249 classic and we are not far off that price. In fact, Pfizer is below a competitive price of [✂]/[✂] Therefore it was a thoroughly bad point, with the greatest respect, and it helps us.

MR HOSKINS: Sir, there are two different points of view being put. Ms Bacon says must not look at it. Mr Brealey says yes please, I can deal with it, and I want you to look at it.

THE CHAIRMAN: I think it might help if we just reminded ourselves that all this came up in the context of whether the tablet is a good comparator. So let us try and stick to that, shall we? I think what is being put to you, not through us but through the appellants, is that your paragraph 282 may actually make tablets

a better comparator. You are putting that to us as something in your favour. I think I am putting to you that it might not be quite so much in your favour as you think.

MR HOSKINS: I understand.

THE CHAIRMAN: Do you want ten minutes to think about this or are you happy to go on?

MR HOSKINS: I am sure the CMA would love to have a chat to me about it. I am happy to continue, but it makes sense if those behind me want to talk to me.

THE CHAIRMAN: It is being put to you that you have changed your case.

MR HOSKINS: I am grateful.

THE CHAIRMAN: We will give you ten minutes.

(2.34 pm)

(A short break)

(2.44 pm)

THE CHAIRMAN: Where are we?

MR HOSKINS: Can we go to the decision at page 176, please. This is the section of the decision that assesses the relevance of tablets as comparators. In relation to the question of substitutability, if you go to page 178, you will see that as part of Section 26 exercise it was not limited to asking questions about dispensing practices for capsules, it also asked questions about

dispensing practices for tablets and you will see the summaries that are set out there.

So that is one of the prime reasons the decision relies upon for saying tablets are not a good comparator because tablets were themselves subject to these limitations in terms of switching. That is point one.

I am not going to summarise all the points in the decision, I am just going to highlight some.

The second point is that the decision then also looks at the changes in the drug tariff price for Teva tablets from April 2005 up until effectively the time of the decision. What the decision states is that between April 2005 and December 2007 there were a series of significant increases in the drug tariff price of tablets, and the result of those increases was the price had increased by 6,584 per cent.

The drug tariff price for tablets was reduced in October 2008 following Teva's discussions with the DH. But we know that even at that stage, as the decision says, the drug tariff was still some 1,665 per cent higher than it had been prior to April 2005. That is the decision, paragraphs 4.174 and 5.508.

Those are two of the reasons, two important reasons, why the decision finds that tablets are not a good comparator. Because remember you are looking for the

price in a competitive market, not the price in a market that may have some competition. And because of the NTI, continuity of supply et cetera, the CMA formed the view that the tablet market was not going to be a fruitful source of the competitive price.

You then have the point that created the heat and light and why you gave me the chance to rise which is paragraphs 282 and 283. You put it to me: we are dealing with the question of the relevance of comparators. Pfizer and Flynn's evidence is that subjectively they referred to the drug tariff price of tablets when setting their prices, and their case has been that you should have regard to the drug tariff price of tablets as a comparator in this case.

The point we would make in relation to paragraphs 282 and 283, which is certainly not a new point, is that it is not a good point to say the Teva drug tariff price is a good comparator. Why is that the case? Let us go to Mr Beighton's evidence. That is T5, page 15. Day 5.

If I ask you to read lines 1 to 13, you see Mr Beighton there is talking about the difference between actual selling prices and the drug tariff price, and he puts an order of magnitude on it at the relevant time of about two or three times higher.

THE CHAIRMAN: "In those days":

"... two or three times higher than the prices that were being provided by the generics companies in those days."

MR HOSKINS: Yes.

PROFESSOR WATERSON: When are "those days"?

MR HOSKINS: I think this relates to 2007.

MR LOMAS: Does this go to your point that the comparator is ASPs, not drug tariff?

MR HOSKINS: It goes to the point that it has always been the case, and we see it in Scheme M itself, and it has been part of the basis of the hearing, that there is a substantial difference between the drug tariff price and the ASPs. So if Pfizer and Flynn are coming to you and saying the drug tariff price of tablet is a good comparator, we say it is not a good comparator because ASPs are clearly lower than the drug tariff price. The comparison, in order to get at what a competitive price for the product must be, must itself be with a competitive price, and as a starting point that has to be at best the ASPs of tablets, not the drug tariff price.

So the way I put it is: Pfizer and Flynn's case is the drug tariff price of tablets is a good comparator and we say the answer is it is not.

PROFESSOR WATERSON: But do you say that the ASPs of the tablet is a bad comparator?

MR HOSKINS: That is where I thought I was not being allowed to go by the chair but I will happily respond to Mr Brealey's point if I am allowed to. But I do not want to trespass.

THE CHAIRMAN: Can we just deal, before we move on, to this exchange between me and Mr Beighton that you referred to in paragraph 274.

MR HOSKINS: Of our closings?

THE CHAIRMAN: Presumably it's from the same cross-examination. Why the price has gone up by this 6,000 per cent and the relation between the drug tariff price increase and the supply price increase was nudged up.

MR HOSKINS: Yes.

THE CHAIRMAN: I took this to be a comment on the situation in 2007.

MR HOSKINS: Yes, that is right.

THE CHAIRMAN: That is right.

MR HOSKINS: Yes, absolutely.

THE CHAIRMAN: So the statement Mr Beighton made that there was only one company making the product, that clearly was not the case later on, was it?

MR HOSKINS: That is right. This seems to be a difference

in time. So 2007 one company. Later on other companies.

THE CHAIRMAN: Okay. Now what is it you want to address that you say I stopped you addressing?

MR HOSKINS: I did not want to -- the question was put to me whether -- the submission I have just made is the drug tariff price of tablets is not a good comparator in this case.

THE CHAIRMAN: And that is what you say you are saying in 282?

MR HOSKINS: I can rely on that and it is not a new case. The question put to me was: if you look at the ASPs, do you say that is a good comparator or not?

THE CHAIRMAN: I think that is territory we are not in, on your --

MR HOSKINS: That is why I asked whether you wanted me to answer the question or not. My answer would be: if you look at it, it would help us. But I am not going to ...

THE CHAIRMAN: I am not sure that I am the person who is holding this up actually. I think this is the way your case has developed and that question arises from your case.

MR HOSKINS: Sir, if you're saying to me: are you saying you want to run a case that you must look at the ASPs and it will help you? I do not have to go there. I can simply

say the comparator that has been offered by Pfizer and Flynn is drug tariff price of tablets --

THE CHAIRMAN: Sorry, it is entirely for you to decide what case you want to run.

MR HOSKINS: I understand.

THE CHAIRMAN: If you want to change your case from what you have run up to now, then I think you need at least our knowledge if not our approval.

MR HOSKINS: My case is this in relation those paragraphs: because of the disparity between the drug tariff price and ASPs, then Pfizer and Flynn's proposed comparator of the tablet, the drug tariff price is not a good comparator.

MS BACON: I would like to know where Mr Hoskins says that is in the decision because I still have not found it.

MR O'DONOGHUE: Sir, there is a more fundamental point which is one thing that has not been talked about in this context is the clawback mechanism. Because there is a clawback mechanism whereby the drug tariff and the effective price paid by the pharmacies are aligned, and there is a very, very complicated series of mechanisms to do with clawback, which we dealt with in detail on the --

THE CHAIRMAN: We know about that.

MR O'DONOGHUE: We are to take all this on trust, on the hoof, at the 59th minute of the eleventh hour, it is

simply unacceptable.

MR HOSKINS: I think Mr O'Donoghue is tilting at windmills. The point I have just made is we are saying that they cannot rely on the drug tariff price, and the fact that the ASPs are below the drug tariff price has always been in the case. It is referred to, for example, at paragraph 5.513 of the decision. That is not a new point.

THE CHAIRMAN: I think what is being put to you is that the Authority did not regard tablets as a good comparator because the tablet price, whether drug tariff or ASP, was not set in such competitive conditions. And I think what is being put to you now is the point you have made about the disparity between the ASP and the drug tariff price of tablets, and indeed the behaviour of both of them, raises questions as to whether that reason for not regarding tablets as a good comparator is correct. That is really what you have to deal with.

MR HOSKINS: My submission is --

THE CHAIRMAN: You do not have to engage in a detailed examination of the ASP, you have to explain why it is still correct that tablets are not a good comparator.

MR HOSKINS: My submission is that the drug tariff price of tablets is not a good comparator. The reason it is not a good comparator are the reasons set out in

the decision, and they have been well travelled in this proceeding, which is that there is a difference, a material difference between the drug tariff price and the ASPs. That is our submission.

THE CHAIRMAN: That is your point and you say that is in the decision.

MR HOSKINS: Absolutely. It is in the decision, absolutely.

THE CHAIRMAN: I think you can deal with that in reply.

MS BACON: Could we have a paragraph number even?

MR HOSKINS: I gave you one, 5.513.

I took you this morning to cross-examination, admittedly in the context of capsules, which was on the basis of the difference between the drug tariff price and the ASPs. I took you to Scheme M, and you have seen Scheme M a number of times, which says that Scheme M -- that is what tablets are subject to. The price is set under Scheme M to give an incentive to pharmacies to dispense --

THE CHAIRMAN: Let us just be clear. You say your piece and you can reply tomorrow, Ms Bacon. 5.512 and ...

MS BACON: I am told it is 5.513.

MR HOSKINS: 5.513 and 3.141 is where you see the disparity in the decision.

THE CHAIRMAN: Okay. Right.

MR O'DONOGHUE: We would also like to know where in the

defence it is located.

MR HOSKINS: You have my point and the reply can be made. This is not a new point. It is a response to a comparator that has been put forward.

MR LOMAS: Mr Hoskins, I take your point, but can we just look at the first sentence of 282 which is your written closings. You are saying:

"If any comparison were to be drawn on a consistent basis it would be a comparison of ASPs."

MR HOSKINS: Yes.

MR LOMAS: I understand that. You then go on to say, and I just want to check that this is right and verified. You are saying here that a comparison between that price, which is essentially [✂] per pack on a comparative basis, and the price has changed by -- on the launch of the product, so that is 2012, September 2012, which remained stable for a year thereafter, shows what is shown in that table. That is the CMA's representation on this, is it?

MR HOSKINS: I will need to unpick the dates --

MR LOMAS: It would be helpful if you could do that.

MR HOSKINS: I will. I am not going to shoot from the hip.

You also have over the page at 283, because that is obviously looking at just a particular point in time which is around the time of --

MR LOMAS: Yes, then you do the averages.
MR HOSKINS: Yes.
MR LOMAS: Yes, I understand that. The second point was I think from what you were saying earlier in relation to limb two and our debate about the alternatives, it seems the CMA's position is that something is either a comparator or not. It is a sort of binary test.
MR HOSKINS: No --
MR LOMAS: You are not saying that?
MR HOSKINS: There is a question of weight. The decision has not given weight to certain comparators that were put forward. Some of those comparators are now on the table again, some are new comparators. But it is obviously not the case that it is all or nothing, it is a question of weight.
MR LOMAS: Because where I was going with this is that in 282, albeit on a hypothetical basis, you say that if a comparison were to be drawn it would be between ASPs. Does that get over the threshold that you accepted before lunch that if there was a prima facie case in relation to comparators, the CMA was not entitled to go directly to unfair of itself, the first alternative?
MR HOSKINS: Sorry, can you just ... it is my fault for not following.
MR LOMAS: Let me put it again as clearly as I can. In

paragraph 282 you are accepting that at least theoretically, whether it is in the decision or not, a comparison between ASPs, between tablets and capsules, is of interest, and my question --

MR HOSKINS: Our primary position is tablets are not a good comparator. If they are a good comparator you have to look at ASPs.

MR LOMAS: Right. And my question was that this morning I think we established that in relation to the two alternatives in limb two, if there was a prima facie case of a relevant comparator, the CMA was not entitled simply to ignore it and go on unfair in itself. My question is: is the material you put forward in 282 sufficient to get over that test of a prima facie comparator?

MR HOSKINS: I would say not for all the reasons I have given prior to that: continuity of supply, et cetera. So that is my answer, which is not a good comparator because of these reasons. But if you were to go to tablets as a comparator it would have to be ASPs/ASPs, not ASPs/drug tariff --

MR LOMAS: I understand, thank you.

MR HOSKINS: I think that is all I have to say on tablets. The next issue I was going to was Pfizer's other AEDs. If I can pick this up in our closings at paragraph 284.

You see this throughout the evidence, and I will come back to it some more, but given I am dealing with Pfizer I am just looking at what Mr Ridyard said.

He stated -- this is paragraph 284 and footnote 540, it's a reference to second Ridyard, paragraph 36 -- that:

"A wide variety of commercial, regulatory and historical factors contribute to the prices that are charged for AEDs within the complexities of the UK healthcare system."

There is a well trodden path to first Williams, paragraph 32, if we can go to that. D/11. Page 8, behind tab 11. You see the heading "Rates of Return" above paragraph 32? Then what he says is:

"There is an assumption in the SO that returns on generic drugs should necessarily be lower than branded drugs ..."

But what he then does is he indicates a number of different factors that can affect the rates of return of generics and these include number of suppliers, volumes, accessibility of manufacturing capabilities, numbers of years off-patent, difficulty of manufacture, limited sources of API, niche markets, declining market and unusual characteristics in prescribing regimen.

I put these paragraphs to Mr Ridyard in

cross-examination and he agreed with the proposition that each of the facts set out in these paragraphs could affect the reasonable rate of return. The reference for that is cross-examination Ridyard, Day 5, page 208, line 4, to page 210, line 6.

So when you are looking for a drug to compare to Phenytoin you have this very serious problem at the start that the rates of return, the prices, are affected by this large number of factors which will -- not all the drugs will even have the same factors in common. There can be different factors that apply. There is a whole matrix involved before one can decide whether it is a good comparator.

And it is clear, and I think Mr Ridyard accepted, that these sorts of factors are not taken into account, most of these factors in his analysis. When he offers up the five AEDs he takes account of certain aspects but he does not do, not surprisingly as it would be very difficult, this whole gamut of comparison.

Similarly, beyond these sort of market characteristics, characteristics of drugs et cetera, it is also important to know what the costs are for each product. You cannot just do a bare comparison of prices in order to come up with a reasonable ROS or indeed to know whether a price you are comparing to is competitive

or not. You have to know what the costs are. And costs were not taken into account by Mr Ridyard in relation to his five AEDs.

A further point in relation to Mr Ridyard's five AEDs is they are not actually all category 3 drugs. Category 3 drugs are the ones not subject to restrictions.

If you go to the MHRA guidance at H2, tab 32. This is the MHRA November 2013 guidance. We see in the middle of the page in bold category 1, category 2, category 3. And in relation to Mr Ridyard's five AEDs, you will see that Topiramate, Lamotrigine and Oxcarbazepine are in category 2, and Levetiracetam and Ethosuximide are in category 3. And you will note from the definition there that category 2 products are subject to some restrictions, they are not unrestricted:

"For these drugs, the need for a continued supply of a particular manufacturer's product should be based on clinical judgment in consultation with patient and/or carer taking into account factors such as seizure, frequency and treatment history."

So it is not the full category 1 but nor is it the freedom in category 3.

Our basic submission in relation to this is that the wide range of differentiating factors makes it

inherently difficult to identify an appropriate comparator product to identify the competitive benchmark to use the United Brands notion for Phenytoin.

If we go to Mr Ridyard's, I think it is his first report, so bundle D. Second report. Tab 8. You will see this is where, from paragraph 40 on, he sets out his analysis for the five AEDs he says are the best comparators.

In his reports Mr Ridyard focuses on a comparison with the branded version of the five AEDs and there are a number of reasons we say why this is not a good basis for a comparison. We deal with this at paragraph 285 of our closings. It is obvious and it was accepted by Mr Ridyard, as you would expect, that there is a choice for the originator product between price and volumes. When the generics come in if you set a high price you lose volume or you can price low and gain volume but it is a pay-off between the two. But that was not something he took into account in his analysis, that pay-off between that price and volumes.

You remember we produced volume figures based on the PCA data Mr Ridyard had relied on and Clifford Chance have come back with their own analysis of that which is N/20. I am quite happy to work on that basis. If we go to N/20. Keep Mr Ridyard's second report. It should be

in N1. You will see on page 2 they have done their own analysis, and depending on the way you cut the figures, I am happy to go on theirs because it is still shows the same picture.

If you look at Lamotrigine, what we see is that the branded products all lost substantial market in the entry of generics. So branded Lamictal and Lamotrigine, you see the figures there. Branded Keppra, et cetera. Ethosuximide disappears because the brand was actually discontinued and that is why the figures are zero.

So what we see is that at the prices set by the branded products, they lost substantial volume. We say that is clearly a different position from Phenytoin. So if you look at table 4.5 at page 254 of the decision, this is on the market as found in the decision, but you will see the sorts of levels, they are confidential, but you see the levels of market share retained by the product if you can peer through the blue, you will see they have an order of magnitude larger than the proposed five AEDs referred to by Mr Ridyard.

As an alternative, if you were to find against me that NRIM were in the same market, of course you could take similar figures from the table I showed you this morning at Flynn's notice of appeal, paragraph 123. Do

you remember the table we went to this morning for all the strengths of the capsules, and you remember hopefully roughly what the volumes are. But whichever one you go to you see that Phenytoin maintained a high price and a high market share. That means it is not a good comparator.

Because we say decision 5.49, I have taken you to it before, you might want to turn it up again, is the definition of what a reasonable rate of return is, it is what the CMA is working towards, so 5.49. Our submission, if you are looking at reasonable rate of return as ensuring a sufficient financial incentive to produce a product, then of course you must take account of prices and volumes. Indeed of course United Brands tells us that you are looking for a competitive price which itself means you must look at, we say, prices and volumes because that is the essence of competition.

To put a very trite example, selling 2 million products at £1 is better than selling one product at a £1 million. That is a terrible example but you get the point.

So what we have is in relation to Phenytoin you have the massive price increase in September 2012, you have it maintaining high prices, we went through all this this morning in terms of there was the one drop but

still high prices. But whilst maintaining high prices it also maintained high volumes.

That is why the five AEDs that Mr Ridyard has identified are not good comparators because he looks at the price and works out a margin for them. But the examples he looks at, yes, have a high price, but the volumes are shot down, and that is why they are not good comparators to tell you what the competitive price is for Phenytoin.

PROFESSOR WATERSON: There is of course an issue here that because these are not in category 1, you would expect the generics to gain a greater market share. That is not an argument for not using them but it may be an argument for using the generic --

MR HOSKINS: I am going to come to that now. I am just about to do the generics. What actually happened was whilst Mr Ridyard focused on the branded products as comparators, Mr Brealey for Pfizer in his submissions suggested that one should look at the generic versions of Mr Ridyard's five products. He said they were subject to competition and therefore they provided I think he used the phrase "a weighty indicator" of the economic value of AEDs to the NHS. So that is where I am going to now because there has been a focus switch away from branded on to the generics.

Just as a starting point, Mr Lomas made the point to Mr Brealey that there is an issue with comparing Pfizer's prices to Flynn with the drug tariff prices paid to pharmacies because there is a difference. But even if you ignore that issue in terms of these comparators, what does Mr Ridyard's analysis show you in relation to the generics? Let us go to his second report, D/8, at page 17. He sets out a series of graphs for each of the products and if you look at the one on page 18 for Topiramate. I am in bundle D, tab 8 at page 18.

PROFESSOR WATERSON: Sorry, we have ...

MR HOSKINS: There is an 8 and an 8A.

So you see on page 17 he is dealing with Topiramate and then there is a graph and the purple line is Topamax, the branded product. Then there is the generic, Topiramate, which is the orange line. Then Phenytoin is the broken blue line and that sets out both the reimbursement price and Pfizer's ASPs for them. I will note in passing the difference between the reimbursement price and the ASPs.

So let us look at Topiramate. The branded product, purple line, stays fairly constant. As Mr Ridyard tells us in paragraph 40 of his statement:

"Following the loss of patent protection, a generic

entered the market in 2009 ..."

And that is the orange line. If you trace that line over time you will see what happens. The reimbursement price for the generic Topiramate collapses down and it ends up at -- that figure is confidential, but you will see where it ends up.

Then you have Pfizer's ASP for Phenytoin and the reimbursement price for Phenytoin in the blue dotted lines you see are significantly in excess of the generic price for Topiramate.

But let us look at the next comparator, it is particularly telling, Lamotrigine. Second Ridyard, paragraph 43 says this is one of the ones that is under Scheme M. It is the same. The orange line is the price of the generic and you will see where it ends up. You see the sorts of prices that have been charged for the generic. Indeed they are lower than the prices that Mr Brealey set out. Do you remember he gave you his table, table D, and he set out the price for Phenytoin at a 6 per cent ROS. I am not sure if that was confidential or not, that figure. £31. And you look at the price of Lamotrigine, and if Lamotrigine is telling you what the competitive price is for Phenytoin, if it is a good comparator you see that the CMA is spot on.

The next one, the third one, is Levetiracetam.

Mr Brealey's table of course was a snapshot. Again look at the orange line, you see where it starts in 2012. You were given the price at the top of the cliff. You see where it goes to. Again it really only serves to confirm if this is a good comparator that the 6 per cent ROS in the decision for Phenytoin is in the ballpark, if these are good comparators.

PROFESSOR WATERSON: The 6 per cent ROS is not on these graphs, is it?

MR HOSKINS: No. Mr Brealey handed you a table, table D. I am not sure where it went in the bundles to be honest. I am told it is in N2.

MR LOMAS: While that is going on, Mr Hoskins, you are taking us to branded and you are taking us to generics.

MR HOSKINS: Yes.

MR LOMAS: As comparators. To pick up on the debate we were having I think on both Tuesday and Wednesday, how does the CMA now characterise Phenytoin capsules? Are they a niche generic? Are they a branded product that is off-patent? If we are looking at branded and we are looking at generics, we are comparing them with what by way of class or type?

MR HOSKINS: I am not going to put a label on it because, as Mr Ridyard said, there is a very particular set of facts that applies to Phenytoin. In our submission it is just

not helpful to try and say this is a generic, this is a branded, this is a branded generic. It is Phenytoin and we are looking for a good comparator. You have been suggested branded products as comparators, you have been suggested generic product as comparators, but I am not sure trying to put that label on Phenytoin helps.

MR LOMAS: Does that have the consequence that if Phenytoin is for these purposes in economic terms something of a hybrid between the two, there is a question as to whether either is a good comparator.

MR HOSKINS: Yes, that is one of the points we make. Because there are very particular factors that relate to Phenytoin and one of them is of course the big price increase. You made this point I think to Mr Brealey. There is a big price increase which is not typical. Sorry, I think you made it to Mr Ridyard. It is not just typical. And that is the problem, one of the problems, absolutely.

Just to finish the trawl through the generics, Ethosuximide, the generic price cannot be a good comparator for the reasons given in the last two sentences of paragraph 50 of Mr Ridyard's second report. You see in paragraph 49 he explains the point I made earlier, that the branded supply of the solid dosage form was discontinued in 2007. The main form of the

generic is the solid dosage. And then he explains the price of the generic has increased substantially due to shortages in supply. So that is not going to help us.

Then finally Oxcarbazepine. The drop here is less dramatic, it does not take us near the 31 the way some of the other ones have. It is still below Pfizer's ASP and the reimbursement price.

But our primary position is there is a real problem with just picking up products, even other AEDs. But if you are going to look at the other AEDs then at least two of them suggest the CMA is spot on.

PROFESSOR WATERSON: Where is this "spot on" coming from?

MR HOSKINS: I have not done my job very well.

I understand. I am glad you picked me up.

Mr Brealey's table apparently has not been added to the bundle. I have it in loose form. I do not know ...

THE CHAIRMAN: I think you are putting to us that Mr Ridyard's evidence proves your case.

MR HOSKINS: Absolutely.

THE CHAIRMAN: I think we need to be clear about that.

MR HOSKINS: You need to be given, if you do not have it somewhere, the table that Mr Brealey handed up which was how Phenytoin compares with other AEDs. On the back of that, the last page, there was D, a table showing a price comparison of other important AEDs.

THE CHAIRMAN: I think we are now with you.

MR HOSKINS: Thank you. So you will see that the third row is Pfizer Phenytoin capsule at ROS 6 per cent. So that is where the figure of £31 comes from. And then Mr Ridyard sets out a number of comparators with the prices of the five generic products. And I think, Professor Waterson, it was you who asked him: why did you pick this date? And he said: because that was when the product was launched.

The reason I am taking you to Mr Ridyard's graphs is to show you the generic price did not stay static at that date. The ones I say support our case, if you are going to go to this as a comparator, but you have our point, not good comparators, Lamotrigine, page 19, because you will see what competition does to the price of Lamotrigine, that is the orange line.

MR LOMAS: They stabilise at about £31 for six months, yes.

MR HOSKINS: Equally over the page at 20, Levetiracetam, you will see where the price goes very rapidly.

So for praying in aid generics as good comparators, and of course this will also show you because the reason Mr Brealey took you to these was -- he said the reason for going to generics was as comparators for what the economic value was of Phenytoin. So again if these are good comparators and take you to the economic value of

Phenytoin, you have my point.

Sir, does that clarify?

PROFESSOR WATERSON: Yes.

MR HOSKINS: I am sorry if I am going too fast but you will understand why.

THE CHAIRMAN: I think we understand what you are saying.

MR HOSKINS: Thank you, that is all I can ask for.

If I can deal with Flynn. Again in relation to Flynn we rely on two basic indicators of excessiveness. The first is cost plus and the second is before and after. In relation to cost plus, in terms of identifying the reasonable rate of return I took you to decision 5.49 which sets out the definition of the reasonable rate of return.

Just to remind you:

"The purpose of a reasonable rate of return is to acknowledge that an undertaking will require a financial incentive to engage in activity of supplying a good or service as a return of capital invested and/or as a reward for taking on any risk associated with these activities."

So that is what we are looking for in a reasonable rate of return. And the decision applies a rate of return to Flynn of 6 per cent but the decision says that that is a generous allocation. The choice of 6 per cent

is justified by a number of indicators. The first one is absolute margins.

If I can ask you to go to our closings, paragraph 178. I hope you will remember this passage of cross-examination of Mr Walters where I put to him what Flynn would have earned on Phenytoin if the ROS had been 6 per cent, 5 per cent, 4 per cent, and then compared it where it would have fitted in his portfolio.

Flynn in their oral closing submissions suggested absolute margins were irrelevant. In our submission they are clearly relevant to establishing a reasonable rate of return for the reason I have already given. Because if you are looking at what a reasonable financial incentive is in order to encourage a product still to be made, you cannot just look at price, you have to look at volumes as well.

The reasonable rate of return must take account of both, otherwise it is meaningless. Because if you say the price is 1 million, if you only sell one that tells you nothing. So you have to look at both. And that is why this absolute margin analysis is very relevant because it shows that 6 per cent is a very reasonable, indeed generous, rate of return for Flynn.

The second point we rely on for the rate of return for Flynn being set at 6 per cent is the nature of the

activities it carried out when compared to Pfizer. This is paragraphs 185 to 192 of our closings submissions. Because if you find you agree with us that 6 is an appropriate rate for Pfizer, then applying 6 to Flynn is clearly generous given the activities, the relative activities that each carry out in bringing Phenytoin to the market. So that is the limited activities point.

The PPRS, the famous PPRS, the tail of the dog, who knows. We deal with this at paragraphs 193 to 199. I am not sure anything is to be gained by going through it again. I do point out that in our defence we had the annex which dealt with the PPRS in some detail in terms of the transfer profit prices et cetera, and when those points were put to Mr Williams he largely agreed with them, save when it came to the last point which is to determine whether you could, through the out-turn costs, come up with a reasonable figure and he said no, no, no because of research and development.

But if you look at paragraph 198 of our closing submission, the points at A to C were accepted by Mr Williams and those are the points that were made in our annex. So I do not intend to deal -- it is a technical issue, we have dealt with it in writing and I do not think I need to go into it any further.

That is the rate of return of 6 per cent, that is

how we get there, that is why we say it is appropriate. There is then the question of the allocation of common costs because that is an essential part of cost plus. Again I just want to highlight a number of points, I am not going to repeat them all.

First of all if you can go to our closings at paragraph 220. There is a confidential thing here so I will try and behave myself for once. You will see what the effect of a volume-based approach is, it actually allocates 20 per cent of Flynn's common costs to the product even although it was only one of X products in the portfolio.

It might seem a sort of very high level point, but stand back, does that look an unreasonable basis? Our submission is clearly not. In fact it suggests it is a reasonable basis.

What Flynn have of course is a revenue-based approach. Our closings, 224. It is actually common ground that a revenue-based approach carries with it a risk of the circularity bias. There is no dispute between Mr Harman and Mr Williams on that. So as we say if you go to 250 of our closings, what Mr Williams has done is a number of calculations to try and deal with that circularity problem in using revenue.

The two sensitivity analyses which do not have the

circularity problem of course suffer from another major flaw. That is because they employ a common costs pool, half of which are not actually common costs. We have set this out in the closings but you will hopefully remember that point.

So those sensitivity analyses do not work for that reason.

The final model he uses is a genuine common costs pool but he then uses a ROS of 21 per cent. That 21 per cent is the average of the non-manufacturing generic companies' ROSs that Mr Williams sets out in annex 3 of his second report. Let me just show you that so you have it in mind. D/12, page 22, annex 3. If you go to page 23, the second subheading from the bottom, "Aggregate non-manufacturers", you see the ROS figure and the 21 per cent figure.

The way in which it is used, the models in which it is used, if you turn to the third Williams, so tab 13 at page 21, there is a table there. You see note 2 at the bottom of that table:

"Reasonable return has been based on the 21 per cent ROS identified as the average of non-manufacturing generic companies set out at annex 3 of Williams 2."

So that is where the 21 per cent comes from. I will explain later why that is not an appropriate comparator

to adopt for reasonable ROS. I am going to come back to the Flynn comparators.

But that is why we say none of the proposals put forward by Mr Williams are reasonable, should not be accepted. Two of them are not true common costs, third one ROS of 21 per cent, and I will make a submission why that is not an appropriate ROS.

So we say our approach to cost allocation, our volume one, was both reasonable and appropriate and it was preferable to any of the options that Mr Williams has put forward. That is the first basis of our excessiveness analysis for Flynn.

The second one is the before and after analysis and we have set that out at our closings at 209 to 212.

I have already been through --

THE CHAIRMAN: While we are on Williams, are you going to deal with 252, to which I think Ms Bacon took exception?

MR HOSKINS: We have dealt with it in writing prior to that. I was not going to say anything else because what you have, what we have said in relation to Mr Davies' evidence is what he says in relation to Flynn is that activities they carry out are typical of generic companies. But of course he was not aware, for example, of the indemnity in the exclusive supply contract between Flynn and Pfizer.

What Mr Davies does not deny, and I put this to him in cross-examination, was that the activities carried out by Pfizer bringing the product to the market are greater than those of Flynn, and that is actually the point we rely on for establishing the 6 per cent.

THE CHAIRMAN: I think the point I was alluding to was that all Mr Williams' work in your submission is in vain because even if any of his approaches are accepted, Flynn's prices would still be excessive.

MR HOSKINS: I see that point.

THE CHAIRMAN: Yes.

MR HOSKINS: I see that point.

THE CHAIRMAN: I think Ms Bacon got rather worried about that. Is that something --

MR HOSKINS: It is the same point we have had a number of times. You have heard all the evidence. You are perfectly equipped to decide whether limb one is satisfied or not, and the fact that you do not decide it is for exactly the reasons why the CMA found it does not matter. We are into the JJB territory --

THE CHAIRMAN: I am being very pedantic, I should not be pedantic. Are you saying to us that even if we accepted one of Mr Williams' approaches, and I think that would go to the whole reasonable return argument, not just costs allocations, then the actual price is still

excessive?

MR HOSKINS: Yes.

MR LOMAS: So we can accept one but not more than one.

MR HOSKINS: You should not accept any.

MR LOMAS: No, I know. But one would not be sufficient, you would say?

THE CHAIRMAN: None is sufficient.

MR HOSKINS: None is sufficient.

THE CHAIRMAN: All of them would be insufficient is what you are saying.

MR HOSKINS: They are all excessive in the context of the case.

THE CHAIRMAN: Right. Ms Bacon I think said that was the first time she had heard that.

MR HOSKINS: It is the JJB point. We have been here for four weeks. You are perfectly capable to decide it. You should decide it.

This is not a sort of dead letter, otherwise I would not need to be here. You would all sit down with the decision and Mr Brealey and Ms Bacon with pick holes in it and you would decide. But it is a living exercise, this trial, and the question for you at the end of the day is --

THE CHAIRMAN: Must try and keep it alive.

MR HOSKINS: The question for you at the end of the day is:

are you in a position to decide an issue? And, if you were to decide it, was there any unfairness to Pfizer or Flynn because they have not been able to deal with the issue properly? But if both of those boxes are ticked then you can and should decide issues.

THE CHAIRMAN: I have taken ten minutes of your time. Are you going to carry on until 4.30 pm or do you want to break again?

MR HOSKINS: I am not a huge distance away. If there is any time left, Mr Bailey wants a moment in the sun.

You have our cost plus for Flynn and you have our before and after for Flynn. We say that establishes excessiveness. Then the next question is: are there any relevant comparators that should be taken into account that would overturn that conclusion?

Flynn has proposed a number of comparators. Basically they are based on looking either at other generic companies, which are Mr Williams and Mr Davies, or at other products in Flynn's portfolio, which is CRA, Mr De Coninck.

Our main submission is really a very simple one and it is one I have already effectively made in relation to Mr Ridyard. We are seeking to identify an appropriate comparator to tell us the competitive price for Phenytoin, a very particular product with very

particular characteristics, and our submission is that one cannot credibly expect to find an appropriate rate of return by looking at other generic companies generally or at different types of product, albeit they happen to be in Flynn's portfolio.

Just to show you some of the evidence again about why there are differences and problems with this exercise, if you go to our closings at 259(b) you see the evidence we refer to there. First of all, this is first Williams, paragraph 65. You see from footnote 478 Mr Williams said:

"There is seldom a uniform gross margin in a company's portfolio."

Mr Williams agreed that there may be:

"... a fairly wide spread of gross margins within a company's portfolio of products."

And you see the reference at footnote 479.

So that is obviously particularly relevant to the CRA approach of can you look at other products in Flynn's portfolio? Mr Williams' evidence is there will be a wide spread in relation to individual products within a portfolio.

I then go back, you probably do not need to turn it up -- actually it probably is worth going back to it. So first Williams, paragraph 32. D/11. The paragraph

I have just shown you, 32(a) and (b). I have already made the point to you that this identifies a wide range of considerations that could affect the rate of return earned by generic drugs. This is the matrix point.

None of the proposed comparators -- Williams, Davies, De Coninck -- take account of these sorts of issues. Ms Bacon sought to rely on the fact that Phenytoin was a so-called niche drug and said, well, actually, looking at other companies or other products which are not niches, therefore actually we are doing the CMA a favour there, that is in their favour.

But that is not correct. If you look at paragraph 32(b) of Williams it is quite clear that, whatever "niche drugs" means, niche drugs have themselves different attributes, including difficulty of manufacture, limited sources of API, et cetera. So niche products themselves have different attributes.

When pressed, Ms Bacon suggests that Phenytoin was a niche drug for two reasons. She said it falls into the limited market point and the declining market point. But if you look at actually what Mr Williams says about the limited market point, niche markets, he gives an example of where a product may attract high margins:

"Niche markets, where the cost of development of the generic presentation have only a limited market over

which they can be recovered."

But of course that is not Phenytoin because Flynn had no development costs to recover in relation to Phenytoin. Equally, whilst Phenytoin had a declining market, we know it was a largely captive market for the reasons that are well travelled.

In any event, there is another real problem with seeking to justify a high ROS for Phenytoin by reference to niche drugs and that comes out in Mr Davies' evidence. If you go to Mr Davies' reports, this is at tab 5 of this bundle D.

PROFESSOR WATERSON: Just before we do that, it reads to me as if Mr Williams there was talking about the cost of facing an entrant who might seek to come into this market --

MR HOSKINS: Sorry, which particular aspect --

PROFESSOR WATERSON: Paragraph 32(b):

"Niche markets, where the cost of development of the generic presentation have only a limited market over which they can be recovered."

To my mind that reads as if he is thinking about another company coming into the market and thinking about whether the investment in getting their product accepted would be worthwhile. So a company may decide against that if the market is small, and therefore the

return on the existing company may be higher, but --

MR HOSKINS: Sir, I would suggest that that is not what he meant, although I am speculating now. But you remember Mr Beighton's evidence, do you remember the slides he presented, and he actually described a niche product as one that faced limited competition.

So in my submission what is being referred to here, and I will take you because there is the same sense --

PROFESSOR WATERSON: Same point.

MR HOSKINS: -- in Mr Davies, is that what a niche product is, it might have a limited market because there is a limited pool of patients who will require the drug. But the reason it is a niche market -- one of the reasons is because it is actually not subject to material competition.

PROFESSOR WATERSON: I think we are making the same point actually.

MR HOSKINS: I am sorry. That is the point I wanted to go on to in relation to Mr Davies. Again I keep thinking United Brands paragraphs 249: are these good comparators? No, because they do not face competition.

So Mr Davies at tab 5, paragraph 14:

"To avoid this intense price competition arising from multiple suppliers, generic companies seek to obtain competitive advantages by ..."

And you see (c):

"Launching niche generics which are typically products with some initial barriers to entry for competitors. These barriers may be a lack of API suppliers, specialised manufacturing processes and/or patent or regulatory hurdles. Without multiple competitors driving down prices, the niche generic product supplier has a higher than average gross margin until the arrival of additional competitors who consider that the market value in the UK and/or other EU countries makes it worth developing a bioequivalent product. As such, whilst in the short-term a niche generic may not have any or many competitors, in the medium term it is likely to face greater competition based on price."

I asked him about this particular passage in cross-examination. If you can go to the transcript at Day 6, page 134. You see at line 17 I read out as I just have done -- I am sorry, I am going too fast. You see at page 134, line 17, I read out paragraph 14(c).

If I can ask you to read what follows, so page 135, line 4 to page 136, line 3. (Pause)

So we see that for Mr Davies, the notion of a niche generic is one that does not face competition in any meaningful sense. That is why 249, United Brands, not

good comparators.

And he refers and I took him to the BGMA document. Again you have seen it but I would like to take you to that again because it is very important, it is the generic industry body. What do they say about these sorts of drugs? H2, tab 42.

MR LOMAS: Before we do that, Mr Hoskins, one of the things I am stumbling over in relation to this, and it may just be common ground between us, I do not think Phenytoin meets any one of the categories that are being set forth in paragraph 14(c) for itself being a niche generic. It did not face lack of API supplies, it did not have specialist manufacturing processes, it did not have patent or regulatory hurdles.

MR HOSKINS: It did not have those ones. What it did have from Mr Williams' evidence is declining market.

MR LOMAS: A slowly declining market, but as you said, one with a very stabilised client base --

MR HOSKINS: Absolutely.

MR LOMAS: -- not one likely to collapse cataclysmically.

MR HOSKINS: I am only hesitating because you cannot lift a definition of "niche" off the shelf --

MR LOMAS: It is a bit sui generis.

MR HOSKINS: Exactly. What is more important is are you looking at products that are going to give you the

competitive price?

MR LOMAS: Yes.

THE CHAIRMAN: And are they products which are genuine comparators? See the case law which requires that. And our answer is you cannot find one because of the matrix.

MR LOMAS: Yes.

MR HOSKINS: But the BGMA document, it is H2, tab 42. You remember seeing this, I hope. I put it to Mr Davies. It is the written evidence submitted by the BGMA in relation to the recent Act of Parliament that was adopted, this is part of the preparatory stage. It is paragraphs 2 and 3 on the second page, particularly paragraph 3. (Pause) So you see the sorts of problems with looking to those sorts of products as comparators.

There is also obviously a battle between Mr De Coninck and Mr Harman in relation to the particular graphs and that really boils down to an issue of should you look at volumes as well? Should you look at unit costs as well? You remember that debate? I am trying to short-circuit it at this time of day.

Our submission on that, and I will put it shortly, is that if you are trying to identify a reasonable rate of return in the way it is defined in the decision, I have already made this submission to you, that you have to look at volumes to do that. Otherwise it is

meaningless, you cannot just look at prices and margins in isolation.

Equally, we say you have to look at unit costs in order to have a meaningful reference point for where there is a reasonable rate of return. If you do that where you end up, I think it is set out at paragraph 305 of our closing submissions, is Mr Harman's graph which attempts to plot all these factors. You see we have lifted that from first Harman, paragraph 4.7. It is a wonderful technical debate/statistical approach et cetera.

What this does show -- it does not show that Phenytoin is excessive. But what it does show is that CRA's comparators are not good ones for identifying a reasonable ROS for Phenytoin. Because Phenytoin -- remember CRA are looking at the products in Flynn's portfolio, and if you take account of factors which are relevant to looking for relevant ROS, Phenytoin does not fit within the pack. That is simply where we take it.

But this whole debate really is about whether CRA's comparators are valid or not, and our primary point is they are not valid because you cannot just look at other products in Flynn's portfolio and look at gross margins or product contribution without taking account of all the other matrix and factors I have identified.

Can I finish on this point by just reminding you of paragraphs 308 and 309 of our closing submissions.

THE CHAIRMAN: And 310, presumably.

MR HOSKINS: I was not going to remind you of that again. But you have the points at 308, we have not ignored comparators, we just have looked at the ones that were put to us in the investigative process and did not think they were good ones. And then 309, you have seen the submissions, I do not need to repeat them.

THE CHAIRMAN: So you have nailed your colours to the mast here.

MR HOSKINS: Hopefully.

THE CHAIRMAN: You are not obliged to seek out comparators.

MR HOSKINS: There is no legal obligation to do it. And what the CMA did is in relation to the ones that were put to it, it did consider them but decided that they were not good comparators.

As I submitted earlier, the CMA is entitled to form the view that comparators are not good comparators without conducting a full investigation of the comparator. That is our submission on that.

The things I have not dealt with orally are unfairness, but I was not intending to say anything because we have set that out in writing and I dealt with the law earlier. And I also was not intending to deal

with Pfizer's ground four because I have made written submissions on those and those were rigorously tested by the tribunal with Mr O'Donoghue, I do not have anything to add to that.

THE CHAIRMAN: Yes. We can take it you do not accept Pfizer's ground four, is that correct?

MR HOSKINS: I think you have that sense from me.

So unless you have any further questions I am going to hand over to Mr Bailey.

THE CHAIRMAN: We will be very pleased to hear Mr Bailey.

MR BAILEY: I would be grateful if we could rise for five minutes.

THE CHAIRMAN: Yes, five minutes.

(3.55 pm)

(A short break)

(4.00 pm)

Closing submissions by MR BAILEY

THE CHAIRMAN: Mr Bailey.

MR BAILEY: May it please the tribunal, I am going to address four issues that relate to the penalties that were imposed on the appellants. They are: first, to answer the question asked by the chairman on Monday about the relevance of the penalty guidance to the tribunal as a matter of law. Secondly, to address the question of intention and/or negligence. Thirdly, to

make a brief point on the question of seriousness. And fourthly, to address part of Pfizer's fifth ground of appeal in relation to the deterrence uplift at step four of the CMA's penalty calculations.

In opening I took the tribunal to the tribunal's decision in Napp Pharmaceutical. Since that decision, there has been an amendment to the Competition Act that I do not believe has been drawn to the tribunal's attention. The chairman asked on Monday what is the relevance of the guidance to the tribunal. You were told that essentially you have a free hand. That was Day 10, page 164.

With respect, that is not quite right. It is a small point, but section 38 subsection (8) of the Competition Act provides the tribunal must have regard to the penalty guidance. Paragraph 1.4 of that guidance -- for the tribunal's note, it is page 50 of the Purple Book. This was an amendment inserted by the Enterprise and Regulatory Reform Act of 2013 and it took place on 1 April 2014. So of course at the time when the tribunal took its decision in Napp, this obligation only applied to the then Director General of Fair Trading but now it also applies to the tribunal as well.

As the tribunal will be aware, in Napp itself the

tribunal did not disregard the guidance.

THE CHAIRMAN: I think Sir Christopher Bellamy said we will take it into account.

MR BAILEY: We will not disregard it, precisely --

THE CHAIRMAN: Is there any difference between having regard to and not disregarding?

MR BAILEY: I am simply bringing it to the tribunal's attention. I did say it is a small point, but I think it is only right you are aware that it is now in the statutory framework, that is the only point I am making. It therefore does not mean you have a free hand, it means you must have regard to the guidance. Should you wish to disregard it, of course the tribunal will have to provide reasons why it ought to be disregarded. That is the extent of the submission.

THE CHAIRMAN: Very helpful. Thank you.

MR BAILEY: Turning then to the question of intention or negligence, we set out the question that we say is relevant at paragraph 351 of our written closings, and then we go on at paragraphs 355 to 362 of our written closings to provide what we say are the answers to that question.

In closing, Pfizer has made the submission that we were running a case based on so-called superintent and that we have now in some way abandoned that case.

I would simply like to make some submissions in relation to that.

The first is that superintent has never been part of the CMA's case. That is set out in the decision, and indeed is then summarised in the written closings. We say first of all that superintendent is not the legal test which must be met in order to impose a fine. We make that point at paragraph 365 of our written closings.

But the suggestion was made that the CMA had failed to put its case to Mr Poulton that we had essentially pulled our punches. In relation to that, we say that the evidence before the tribunal on intention and/or negligence should be assessed as a whole and that is what we have sought to do in our written closings.

Pfizer characterised our case as fixating on a couple of smoking guns -- essentially set out in G1, tab 10, it is not necessary to turn it up -- and that we failed to put to Mr Poulton that he intentionally sought to fleece the NHS.

We say that is a mischaracterisation. We are not relying on just a single phrase and a couple of emails and one can see that in the decision itself, paragraphs 7.17 to 7.20. And we do not contend nor do we need to contend that Mr Poulton personally sought to

rip off the NHS. That is why it was not necessary to ask him about his own intentions.

In relation to the emails that Mr Poulton sent, we say that they are relevant, indeed they are revealing. They are part of the evidence which we invite the tribunal to take into account when assessing this issue.

As to the email that referred to the accusation of Pfizer fleecing the NHS, we say that this meant Pfizer either knew or ought to have known that customers would find a dramatic increase in price unacceptable. Rather than accepting or perhaps reasonably reflecting on those potential criticisms, we say that Pfizer did this deal with Flynn and essentially sought to pass the buck. That is an issue that goes to whether or not these prices were in some way unfair and whether they were justified.

As to the other email that is referred to, which is the one where Mr Poulton says Teva was earning supernormal profits, that is his perception, our submission is that Pfizer ought to have realised on reasonable reflection that the tablet price was not at a normal competitive level. Indeed, in G1, tab 5, Mr Poulton himself described the drug tariff tablet price as an anomalous one.

If it would assist the tribunal I have also prepared

a note that just briefly summarises the points that were put to Mr Poulton that we say go to this issue. They are all derived directly from the transcript. It is only one page and it simply goes through the points and how we say a case that the CMA has made in relation to intention or negligence was indeed put to Mr Poulton. (Handed) We do not say that is the entirety of the evidence, we are simply trying to meet the criticism being made that in some way we had failed to put our case which we do not accept.

So that was the first issue I wished to address in relation to intention and/or negligence.

The second is a recurring criticism that is made by both appellants that the approach adopted in the decision was, and I paraphrase, off the wall, it was unforeseeable, and it is not right to expect them to be sort of a clairvoyant to anticipate the approach that was adopted.

I have two points make in relation to that in addition to what is said in the closings. The first is we say that whether or not an infringement is intentional or negligent, it is not about guessing what the Competition Authority might do. Clearly that would be almost an impossible task.

THE CHAIRMAN: Do not disparage your client.

MR BAILEY: That was not intentional. I am simply saying it is not necessary to show that the appellants could predict the method or precise calculations or -- in Flynn's closings they refer to whether or not they could anticipate Mr Harman's conceptual framework. That is not the test.

So far as what is required, we say that the appellants needed to reasonably foresee the factual elements that underpinned the infringements found against them.

In relation to that, taking it briefly, in relation to Pfizer, three points. Pfizer could not have been unaware that it was charging excessive prices. The excesses over its costs were on any scale, as the chairman put it, large, regardless of the view that one takes of the appropriate rate of return.

Taking that together with the fact that it knew or at least ought to have known that its supply prices bore no resemblance to the previous Epanutin price, and then having received the letter from the Greater Manchester Medicines Management Group in October 2012, this should have made it abundantly clear to Pfizer that its prices were excessive and unfair.

I accept Flynn is in a slightly different position. In relation to Flynn, we say the starting point is the

absolute margins that Flynn was earning. Again on any view they were extremely high, I don't understand that to be in dispute. Indeed it was higher than all its other products added together.

Mr Walters says in his first statement at paragraph 62 that we are in the real world and what matters to them is that their total revenues exceed their total costs. My submission is the question arises: what is the reason why they were earning those very high absolute margins? Mr Lomas observed yesterday the treaty prohibits unfair selling prices. It does not refer to profits. So in my submission, in order to understand the significance of the absolute margins, one has to ask why are they earning those very high margins?

At paragraphs 185 to 192 of our written closings we have set out why we say there was no justification in terms of risk or investment or the activities being carried out by Flynn in relation to Phenytoin. So there was no justification in terms of what they were doing.

We also say that Flynn knew or ought to have known it was making these returns because it faced no effective competition. As Flynn's own medical director put it in June of 2012, they were going to benefit from, in his words, generic pricing freedom. That is G1, tab 60.

But if there is any lingering doubt, my submission is that Flynn could not have been unaware of the outrage felt on the part of its customers. And as the Court of Appeal observed in Attheraces, the purpose of the competition rules is to protect the customers and here their views were being made very, very clear.

Indeed, as we set out at paragraph 359 of our closing, it was in light of that letter that Flynn realised, or one of its non-executive directors realised that clearly we have to take legal advice. That is not the sort of reaction one would expect if problems under competition law were completely unforeseeable. Indeed, they had been foreseen by the Greater Manchester Medicines Management Group. So for those reasons we say the case on intention and/or negligence is made out.

I would like to turn then to my next issue which relates to the question of seriousness.

The appellants challenge these infringements as being among the most serious. This is dealt with in the decision, just for the tribunal's note, from paragraph 7.68 onwards and there were various reasons that are given, I am not going to simply repeat those now.

I think for present purposes I would like to simply stress one point. Yesterday Mr Lomas observed -- it is

Day 11, page 61 -- that the reason why the treaty prohibits unfair selling prices is to stop consumers from being exploited. With respect, we wholeheartedly agree. We say in this case exploitation was arising in two ways. First, that there was serious financial harm, and we summarise that at paragraph 282(c) of our skeleton argument. The point I would like to add is that that was not the only damage. There is also a cost to patients in terms of those that would use the healthcare system. It was because of the need to pay the appellants' high prices for the Phenytoin capsules that clinical commissioning groups had to try and find money and take it from elsewhere. They had to sort of essentially cut back on other medical services. Almost the opportunity cost of having to fund the higher priced Phenytoin, other healthcare services and other patients will thereby be exploited and will suffer.

I accept of course that it is not easy to measure that sort of effect in monetary terms.

In my submission, it makes it no less real and it is one that is put in the decision. Paragraph 7.70, subparagraph (b), and I apologise, sub-subparagraph (2) on page 451, the CMA makes the point:

"The increased cost of Phenytoin sodium capsules has resulted in CCGs having to relocate funding from other

services and treatments. Therefore, the harm caused by the infringements is not restricted to the product."

There is a cross-reference in footnote 1377 to an extensive part of the decision that sets out the views of the CCGs. I am not going to go through that. The tribunal will have read it and can look at it in the future. But the key finding is at paragraph 5.399 and, for present purposes, I think the point can be taken as neatly summarised again by my favourite entity the GMMMG in its letter of 10 October 2012, where it pointed out that the, at the time, allegedly unethical and anti-competitive behaviour was at the expense of patient care. For the tribunal's reference that is G1, tab 83.

So in answer to a point that was made against me in Pfizer's closing that, well, we were the ones drawing an analogy with a cartel and that this cannot be anywhere near as bad as a cartel, my submission is, first of all, one should compare like-with-like. That is consistent with other parts of the case. Secondly, that a cartel may inflict financial harm but it will not have this additional harm that flows from the unfair pricing in this case, which is what reinforces the seriousness.

THE CHAIRMAN: The point made about cartels surely is that

they contain an element of deception and, therefore, are equivalent to theft. That somehow makes them more serious than unilateral conduct which is a matter of economic assessment.

MR BAILEY: It is not disputed that cartels are very serious and the CMA treats them as such.

THE CHAIRMAN: You are not trying to push us in that direction?

MR BAILEY: No, not at all. All I am simply saying is just because cartels are very serious does not mean that other types of conduct can be equally serious perhaps in a different way.

PROFESSOR WATERSON: But perhaps the more appropriate thing would be to say supposing there was a cartel to supply a particular drug and that raised prices to the NHS, that would have a similar effect.

MR BAILEY: Yes, I would accept that. Yes.

THE CHAIRMAN: The other point that is said is that there are hardly any stand-alone excessive pricing cases, and I suppose you would say to that that is not because they are not serious and harmful, it is because they are rather difficult.

MR BAILEY: Various competition cases raise degrees of controversy, degrees of complexity. It is absolutely right, sir, that the points made by Pfizer about

the legal context, the fact that this is said to be the first pure stand-alone excessive pricing case should not detract from the grave nature and serious consequences of that conduct and, therefore, that is why we say it is important, and we had an obligation in section 36, subsection (7)(a) to have regard to punishing the serious behaviour. So we say that is why it deserved the percentage that it was given.

If I can turn then to my final issue and that concerns deterrence. As the tribunal will be aware, Pfizer's fine was increased at step four of the calculation and, as Mr O'Donoghue put it in monetary terms, it was increased by £67 million, or 400 per cent.

I would just like to address two main arguments that are made to challenge that increase on the ground for deterrence. It is said that the uplift is unprecedented and it is said that the uplift is unnecessary because the Department now has regulatory powers under the Health Service Medical Supplies Costs Act. In relation to the unprecedented point, we say that that is essentially irrelevant. The uplift is necessary and appropriate on the facts of the case and what Mr O'Donoghue failed to mention was £67 million sounds like a lot of money in the abstract but, put it in context, Pfizer's overall size and financial position,

it has a worldwide turnover of $48.9 billion. That is set out in paragraph 7.104 of the decision. 99.9 per cent of that turnover is outside the market with which we have been concerned. It is, in my submission, clear that leaving the unadjusted step three penalty, which is confidential, where it was would simply result in an inconsequential penalty. It would not change the future conduct of Pfizer or a company of Pfizer's size or its incentives to comply with competition law.

Moreover, we say that a key to the fining regime is that a fine, to be effective, must make sure that committing an infringement does not end up providing a reward to the infringer. To put it another way, to deter bad behaviour, you need the fine to offset the financial benefits of the infringement. We say at paragraph 7.108 and following that was precisely why it was necessary to increase the fine here because, if we did not, essentially Pfizer would be found guilty of an infringement, if that is what tribunal ultimately determines, but then would have reaped the trading benefits from charging excessive prices and the infringement would have paid off. And we say that cannot be right as a matter of policy.

THE CHAIRMAN: Is that straying into the field of private

enforcement?

MR BAILEY: No, sir, because we were not engaged in a process of trying to work out the elicit profits that had been earned by Pfizer. All we are saying, in accordance with paragraph 2.17 of the penalty guidance, is that it is relevant and appropriate to take into account the estimated financial benefits. So this is not trying to work out the difference between the unlawful price and the lawful price. That is the proper function of private enforcement. Here all we are looking to do is ensure the effectiveness of the fine and to achieve appropriate deterrence.

MR LOMAS: I think it was a similar point. I was just going to say you would not put it under the heading then of disgorgement?

MR BAILEY: I would not put it under the heading of disgorgement. No, sir.

MR LOMAS: Although it is quite close.

MR BAILEY: I can see there are similarities, but that is not the purpose for what we are seeking to increase the fine.

THE CHAIRMAN: This statutory amendment you have drawn our attention to, was that introduced for any reason?

MR BAILEY: I am not aware that Hansard refers to any debate preceding the introduction of that amendment. Clearly

Parliament is taken to be aware of the approach that the tribunal had adopted in Napp and thereafter. That approach had been endorsed by the Court of Appeal in JJB. I said it was a small point. Almost it is sort of a statutory codification, perhaps a statutory appreciation of the tribunal's approach.

THE CHAIRMAN: A statutory confirmation.

MR BAILEY: Indeed, yes.

THE CHAIRMAN: Of existing practice.

MR BAILEY: Yes.

THE CHAIRMAN: Not an attempt to correct practice in any way.

MR BAILEY: No, that is not the submission I was making. I was simply drawing it to the tribunal's attention so you were aware of all the statutory provisions that are meant to be relevant.

THE CHAIRMAN: Thank you.

MR BAILEY: The last argument -- I am conscious of time and the tribunal indicated it wished to rise at 4.30 pm -- is Pfizer's argument that there is no need to worry, there is no need to increase the fine, because regulation will come to the rescue. We say that is wrong for two reasons. First, whether any future mischief on the part of Pfizer will be subject to regulation is, as Donald Rumsfeld put it, "a known

unknown". We do not know if and when the Department will seek to use its powers under the 2017 Act or what the result of that will be. The one thing we do know is that regulation can and does change. Between the date of the decision in this trial, the 2017 Act was enacted. But the second and, in my submission, the more important reason is, regardless of any possible regulatory intervention, the uplift at step four remains important for the purpose of deterrence. We are not simply seeking to deter Pfizer, the undertaking, from committing exactly the same infringement.

Paragraph 2.17 of the penalty guidance refers to the need to specifically deter Pfizer from, and I quote:

"... breaching competition law in the future."

It makes a similar point at paragraph 1.35. So the purpose of deterrence is to give incentives to an undertaking to comply with competition law, and I would say in this case specifically the Chapter II prohibition and Article 102. So it is not enough for Pfizer to say: you have caught me, I will not do it again, there is now a rule out there which means you do not have to increase my fine. Because, as we all know, there are always loop holes in regulation. There are always opportunities that dominant firms may seek to reap trading benefits to which we say they would not be

entitled and the whole objective of seeking to increase the fine for deterrence is to stop that from happening.

In opening the chairman asked Mr O'Donoghue: who are we seeking to deter? My answer to that question is: we are seeking to deter the Pfizer undertaking as a whole, and we say that is necessary and appropriate given its size, given the financial benefits that it derived, and that, whatever regulation may exist and may or may not apply to Pfizer's behaviour, we say that the uplift was appropriate because, regardless of the external controls, it is looking to the internal decision-making and the attitude that Pfizer has towards complying with competition law.

THE CHAIRMAN: Where in the overall scheme of the calculation of the fine does pure punishment come in?

MR BAILEY: In my submission it comes in at step one, and the reason for that is because at step one the CMA is looking at gravity, seriousness. And that is saying: have you done something that is either by its nature very serious or the consequences very serious. In this instance at paragraph 2.6 of the penalty guidance it says an important consideration is whether direct or indirect damage to the consumer has been done. In my submission, this is a paradigm of that. That is our case. And, therefore, by directly exploiting consumers,

that is why it is the most serious infringement. We say in the decision it is antithetical to the competitive process and, therefore, that is why the fines were imposed at the level they were.

Unless I can assist the tribunal further, those are my submissions.

THE CHAIRMAN: No, I think that is sufficient. Thank you. So that concludes the CMA's closings.

MR BAILEY: It does, sir.

THE CHAIRMAN: Tomorrow we have reply.

MR BREALEY: I think just in the morning.

THE CHAIRMAN: Just in the morning. That is what I am assuming. The morning means up until lunchtime, does it?

MR BREALEY: Up until lunchtime.

THE CHAIRMAN: Or until 12 o'clock. We will see how we go. 10.30 am. Thank you very much.

(4.35 pm)

(The hearing adjourned until 10.30 am on Friday, 24 November 2017)

INDEX