IN THE COMPETITION APPEAL TRIBUNAL

Case No. 1279/1/12/17

Victoria House,
Bloomsbury Place,
London WC1A 2EB

10 May 2018-25 May 2018

Before:

MR ANDREW LENON QC
(Chairman)

(Sitting as a Tribunal in England and Wales)

BETWEEN:

PING EUROPE LIMITED Appellant

- and -

COMPETITION AND MARKETS AUTHORITY Respondent

MR ROBERT O'DONOGHUE QC (Instructed by **K&L Gates LLP**) appeared on behalf of the Appellant

MS MARIE DEMETRIOU QC appeared on behalf of the Respondent

Transcript of Epiq Europe Limited
165 Fleet Street, London EC4A 2DY
Tel No: 020 7404 1400
Email: casemanagers@epiqglobal.com
(Official Shorthand Writers to the Court)

Friday, 25 May 2018

(10.30 am)

Closing submissions by MS DEMETRIOU (continued)

MS DEMETRIOU: Mr Chairman, members of the Tribunal, good morning. Can I start just by handing up three additional documents and we will provide them to the other side.

So the first two are excerpts from two authorities that I will take you to in due course, so you can put those aside for the moment. (Handed).

So the third document is a note of submissions I was going to make orally today, relating to instances in which we say that Ping's closing submissions misrepresent the evidence. Rather than take the Tribunal laboriously through those points orally, we thought it might be more convenient if we just reduce them to writing so that you're not -- we don't want you to be left with the impression that the way Ping's closing submissions portrays the evidence is accurate in every respect because it's not.

We make our points here. I don't propose to elaborate on them orally unless the Tribunal has any particular questions or wants me to take you through them. But I felt that it would be a swifter way of conveying the points, rather than laboriously going

through a number of detailed points.

So where I ended my submissions on Wednesday afternoon, I was dealing with the causation issue and I had made the CMA's positive submissions about the uncontested evidence which demonstrates that any difference in Ping's custom fitting rates with those of its competitors are due primarily to other factors which are common ground on the evidence. I was going to turn to Mr O'Donoghue's response to that point.

So if this suits the Tribunal, I just propose to pick up where I left on Wednesday afternoon and address the points that Mr O'Donoghue made orally in his closing submissions on Wednesday in response to the causation argument.

You will recall that he said he had five answers to the point, and I want to have a look at those because we say that none of those answers, in fact, address the point and that indeed it's very revealing that, of the five responses that he makes, only one of them attempts in any way to grapple with the substance.

Now the first point or one of the points that Mr O'Donoghue made -- in fact he led with this in his preliminary remarks to the Tribunal -- was that the causation argument advanced by the CMA is an argument that has been advanced for the very first time in the

CMA's written closing submissions. The Tribunal may recall that in his opening remarks to the Tribunal, when he began his oral closing Mr O'Donoghue said that it was fundamentally unfair for the CMA to change its case in this way and to advance a new case in its written closing submissions and that it shouldn't be permitted to do this.

Now, it is, with respect to Ping, impossible to see the basis for this argument and we are, in fact, very surprised that Ping is advancing this argument because the CMA has not changed its case and the CMA expressly found in the decision that Ping has not shown that any difference between its custom fitting rates and those of its competitors is due to the ban.

So can I take the Tribunal first of all back to the decision which, as the Tribunal knows, is in bundle A, tab 1. I want to start on page 104. I need to take this point with some care because, of course, it's a serious allegation that Ping is making here.

Now, at paragraph 4.108, there the CMA find that the magnitude of any difference in the proportion of custom fitting rates as between Ping and other brands can't be quantified with any accuracy on the basis of the evidence provided because, of course, it was an argument that Ping was making, at that stage on the basis of its

first retailer survey and the SMS industry-wide data, that there was a difference.

Then critically at 4.109:

"Furthermore, even if Ping could establish that a higher number of its customers undergo a face-to-face custom fitting than other custom fit club brands, Ping has not shown that this is a result of the online sales ban. Ping has not provided evidence to substantiate what additional proportion of its consumers who have a custom fitting have been led to do so as a result [we emphasise] of the online sales ban."

Then at 4 110:

"Aside from the online sales ban, several factors are likely to influence a customer's decision to undergo a custom fitting, including the quality of Ping's custom fit clubs, the investments it makes in advertising, the benefits of custom fitting, its reputation for custom fitting and the information provided to consumers. These factors would continue to exist in the absence of the online sales ban."

Then we see at 4.112:

"The CMA finds ..."

That's a finding.

" ... that there are factors other than the online sales ban which lead consumers to undergo a custom

fitting. This is indicated by the following ..."

So there are a number of bullet points there.

Then we have at 4.113 the conclusion:

"Overall, whilst the CMA accepts that the online sales ban is a suitable means to promote custom fitting, it is likely to have only a limited effect in increasing the rate of custom fitting by Ping's account-holders. However, the online sales ban may also lead to an increase in consumers visiting a bricks and mortar store where they do not wish or need to do so."

So you see there that the CMA is precisely finding that the ban is not effective and it is doing it on two bases which are the same two bases that we are advancing to you in closing. One is that there is insufficient evidence as to a differential in rates and secondly, insofar as there is a differential, Ping has not established that that is caused by the online sales ban.

Now, that's not at the end of it because if we go forward to page 120 of the Decision, we see paragraphs 4.146 to 4.147. Now this is in the context of considering proportionality stricto sensu. We see that at the bottom of the previous page, where there is the heading in italics. What the CMA do here, at 4.146 to 4.147, is refer back to the analysis that I just took the Tribunal to. They find that:

"the magnitude of the impact [...] cannot be quantified robustly on the basis of the evidence provided and that the effect is likely to be limited. Any such increase can be achieved in alternative, less restrictive, ways."

You see at 4.147 the CMA's finding that this type and level of benefit can't justify the serious restriction of competition resulting from the online sales ban. As mentioned in those paragraphs cited there, " ... a significant proportion of customers value custom fitting and therefore would have had a custom fitting with or without [the ban]. The online sales ban eliminates the ability and incentives ...", and so on. The Tribunal will have read that paragraph before.

The critical point is that here, in considering proportionality stricto sensu too, the CMA is referring back to its analysis on effectiveness, which we have seen from those paragraphs to which it cross-refers comprises two points, the two points being: we can't establish with any degree of robustness any difference on the rates, but even if there is a difference, that difference is not caused by the ban. Ping hasn't shown it.

We then see the point come up again at 4.219 of the decision in the context of the Article 101(3) analysis.

This is on page 139. We see at 4.219 again a cross-reference back to those critical paragraphs:

"the CMA finds that the online sales ban is likely to lead to only a small increase in the number of customers having a custom fitting before purchasing Ping golf clubs, and less than has been claimed by Ping."

Then there are two points that are summarised. So the first is the differential point, the rates, and the CMA explains why that overstates any differential. Then, critically, the second bullet point:

"Even if the difference in rates of custom fitting were in line with Ping's estimate, as set out above [...[, there are several factors apart from the online sales ban which are likely to be driving this difference, such as the quality of Ping custom fit clubs and its reputation for custom fitting."

Of course those are two factors that the CMA relies on now. We say that those have been substantiated by the evidence.

THE CHAIRMAN: It's fair to say that you rely on other factors now.

MS DEMETRIOU: That's true, that have come out of the evidence. Sir, I will come back to that point because Mr O'Donoghue made another bad point, which is that we have to make an application in order to do so. That's

a thoroughly bad point. I will come back to deal with that.

Now, 4.226 at page 141 makes the point again in a different context. So you see there in terms:

"the evidence on the CMA's file shows that despite the online sales ban, a significant proportion of Ping's golf clubs are purchased without a custom fitting. This is a result of a combination of different factors."

So maybe that's a slightly different point, but it's made in a different context. So we say that in the Decision there is no basis at all for Mr O'Donoghue's assertion that the causation point was not trailed in the decision. Not only was it trailed, it was an important, fundamental building block for the CMA's conclusion that the online sales ban is not proportionate.

Now, Mr O'Donoghue went further than that and he suggested that the very first time that the CMA made this point was in its written closing submissions. You will recall him saying that, had the CMA made the point earlier, then Ping could have adduced evidence in relation to this point and that's all very unfair that it hasn't had the opportunity to do that. Again, this is simply incorrect and I want to take the Tribunal to the CMA's defence at tab 3 of this bundle.

I would ask you first of all to look at page 5, and in order to see how -- I am going to ask you in a minute to look at paragraph 19, but I want to show you the context of that. So if we start at paragraph 16, you see there that Ping is arguing that the alternative measures would be less effective than the ban and the CMA is responding to that. So the CMA says:

"Ping's argument that the alternative measures would be less effective than the ban rests on evidence it has adduced in relation to the rates of custom fitting for Ping's clubs and those of its competitors. According to Ping, that evidence shows that the ban is highly effective at maximising custom fitting rates. In fact the evidence shows nothing of the sort."

So that's the point that's being responded to. It's a point made by Ping that the ban is highly effective. Then we have at 17 the first point. Again, this is all consistent with the decision, which is that the data on the rates is problematic. Then we have at 18 a second point, which is that the differential is on any view modest. That's, again, a point that we made in closing. Then thirdly and critically:

"in any event there is no evidence at all to suggest that the difference between Ping's rates and those of its competitors is attributable to the ban. Ping's only

answer to this is to assert that the ban is 'the most obvious and logical explanation' for any difference. But that is wholly inadequate. The evidence cited in the Decision indicates that there are a range of factors other than the ban that are likely to drive differences in custom fitting rates. Ping's own evidence on appeal supports the point. In those circumstances Ping is wrong to proceed as if it can be assumed that any difference in the rates is attributable to the ban. In the absence of cogent evidence to that effect, it cannot."

So there in the clearest possible terms the CMA is raising the point in its defence and also highlighting that Ping's own evidence supports the CMA's point. But it doesn't leave it there because on page 45 of the defence, so going forward, the defence then goes on to flesh out this causation point in much more detail.

If you could turn, please, to page 45 and paragraphs 131.2 to 131.4 -- so we're at the bottom of page 45:

"In any event ... "

And this is under the heading "Limited effect of the online sales ban", and, of course, the first point at 131.1 is the rates point. Then we get into the causation point so:

"In any event, even if Ping could establish that its own custom fitting rates were higher than those of other brands, it had failed to demonstrate that this[...] was attributable to the online sales ban."

Then at 131.3:

"Indeed there were several factors besides the online sales ban that were likely to explain or contribute to any difference between [the rates]. These included the quality of Ping's custom fit clubs, the investments made by Ping in advertising and in supporting the provision of custom fitting services by its account-holders ..."

Again, that's a point that we rely on in our written closing.

" ... Ping's reputation for custom fitting, and the information provided by Ping to consumers about custom fitting. None of these factors depended on the online sales ban."

Then at 131.4:

"The notion that custom fitting rates were driven by factors other than the existence [...] of the internet sales ban was reinforced by ..."

Then the CMA sets out a number of factors which reinforce its point and then at paragraph 132 spells out in legal terms the relevance of this. So contrary to

Ping's amended notice of appeal, the relevance of this finding is obvious: first, since the ban results in only a limited if any increase in Ping's custom fitting rates, in any event its argument that a less restrictive alternative would unacceptably compromise the promotion of custom fitting is impossible to sustain; secondly, it shows why Ping's case on proportionality stricto sensu must also fail.

"Since consumers are denied the benefits of online shopping in return for at best a limited increase in custom fitting rates, the online sales ban is demonstrably disproportionate."

So there the CMA, in its defence in that paragraph, is spelling out the legal consequences of the factual point it makes. The first of the legal consequences is that, if this causation point is well founded, which the CMA contends it is, then the ban only has a limited effect. That's obviously of the highest relevance when you come to look at necessity and whether the less restrictive alternatives will do because if you have a tiny, minuscule effect, then it's much more likely that less restrictive alternatives are going to achieve the same effect or come close to it, whereas if the ban in isolation makes a massive difference, then one can see that that may colour the less restrictive

alternative and necessity analysis in the other direction.

Now, that's also not the end of it because we then have some analysis at 133 and 134. There the CMA is making the point that Ping's own submissions depend on establishing that the ban is effective. Then 135 and 136 deal with the rates issue. Then we're on, at 137, to causation again. This is really a critical passage. The CMA says it's a critical point:

"the critical point that Ping fails to address is that there is no evidence to suggest that the differences it relies upon, or any difference in the respective custom fitting rates, can be attributed to the online sales ban either in whole or, part."

Then you see:

"Rather than challenging the point, Ping's own evidence supports it."

Now, this is very important because the CMA is here spelling out in a very fair and conspicuously fair way that it is relying on Ping's own evidence to support this point. You see there the instances of Ping's evidence that are relied on in the defence. So Mr Clark identifies consumer awareness, retailer investments and Ping's ability to deliver a wide range of custom fit clubs quickly. So that's the quick delivery point which

we refer to in our written closing. The wide variation in custom fitting rates suggests that a range of other factors, including retailer effort and investment, are key to determining the rate. Again that's a point that we make.

The 2015 US Golf Datatech report reports that Ping remains the perceived brand leader. Again, that's another point we make, brand loyalty. Then at 137.4 Mr Clarke of Clarke's Golf says that "the difference between Ping and non-Ping custom fitting rates is -- primarily he says -- and you will see that in his evidence -- 'primarily because of the wealth of models and variables that Ping offers to the consumer, which increases the scope for custom fitting and is a strong selling point for customisation when trying to sell a set of Ping clubs to a consumer'."

So there that's Mr Clarke of Clarke's Golf own evidence saying that the primary reason is something different to the online sales ban. It's because of the wealth of models and variables.

Then we have reliance on Mr Sims' evidence:

"Part of the reason we sell a greater number of Ping custom fit clubs is because Ping themselves take great pains to facilitate and promote custom fitting. Ping were the pioneers of custom fitting and well known in

the market [...]. Ping's colour-coding system helps to encourage customers to have a custom fit [...]. Ping also offers fast industry-leading delivery of between two to three days. This is important to us as generally all the Ping clubs we sell are made to order."

So, again, he's there pointing out in his evidence in his witness statement some of these key factors. Then we rely on Mr Challis as well and Mr Hedges, who attributes Ping's higher rates of custom fitting to the fact that Ping was the first brand to have started on custom fitting.

So, sir, I am taking this in some detail because it was an unfair point, a thoroughly bad point, made by Mr O'Donoghue and I do need to show the Tribunal in detail that the idea that the CMA has run this point for the very first time in its written closing and taken Ping by surprise is completely unfounded. I hope that the Tribunal sees that from these passages.

THE CHAIRMAN: Yes. Can I just take you back to the second paragraph, the second sentence in 132?

MS DEMETRIOU: Yes.

THE CHAIRMAN: Does this point slightly cut both ways in the sense that, if the online ban has such a limited effect, does that not make it easier for Ping to demonstrate proportionality in terms of weighing up the pros and the

cons?

MS DEMETRIOU: No -- we say "No" because it needs to -- because the way the proportionality analysis operates is that they need to identify their aim, which they have done, and they need to show that this restriction is necessary to the aim. If the effect is very tiny, if it contributes only in a very small way to the aim, then its effect is very small, so it's difficult to say that it's necessary. But, on the other hand, the reason why we have the proportionality requirement in the first place is because shutting off this online sales channel nonetheless has some important consequences. So for that reason we say that they really don't get off the ground in showing necessity --

THE CHAIRMAN: I take your point on necessity, but in terms of the importance of the ban and the inconvenience to consumers, it has some relevance to that argument as well, does it not?

MS DEMETRIOU: Well, we're not putting the causation point in terms of limited inconvenience to consumers.

THE CHAIRMAN: No, I understand.

MS DEMETRIOU: What we're saying is that there are a host of other factors that are responsible for the rates. So we're not saying that the ban causes limited inconvenience to consumers. In fact we say that there

is a limited but sizeable demand for online sales and we see that in the decision, which talks about a 9 to 14 per cent demand. So although that demand is limited, that's significant in terms of overall numbers, and we say that it causes inconvenience for all the reasons that the CMA has explained. Indeed that's what underlies the rationale in Pierre Fabre and in the Commission guidelines on Article 101(3), that internet bans are a bad thing.

So if you're seeking to overcome that starting point, then what you need to show is that the bad thing is outweighed because it's necessary to achieve something else. And if it's not necessary, because in fact you're achieving this aim perfectly well by other means or a fortiori, if you're achieving it perfectly well through other means and could achieve it as well using less restrictive alternatives, then they don't get off the ground. That's how we put the case.

Now, in the course of making his argument -- and this is the point that, sir, you put to me a moment ago about the CMA now relying on some other factors -- I hope I have shown that the majority of the factors are factors that have been trailed in the decision in the defence.

THE CHAIRMAN: Certainly the point is well trailed.

MS DEMETRIOU: I'm sorry?
THE CHAIRMAN: Certainly the general point is well trailed.
MS DEMETRIOU: The general point is well trailed and also some of the detail set out at 137.1 -- if one were to count up, I think probably one would find that maybe five of the seven factors that we have identified are trailed specifically. But Mr O'Donoghue made a point in response to the chairman's question.

Could we turn up the transcript from Wednesday. I think it would be easier to have that open.

I think it's labelled "Day 7", but Mr Lask tells me it's actually Day 8. Yes, it's labelled -- there are two Day 7s. So it's the second Day 7 and it's page 58.

(Pause)

So you will see the point that's made by Mr O'Donoghue. This is one of his five points that -- it's a point I have just been dealing with about it being unfair for the CMA to advance a new case. Then the chairman at line 14:

"Is it open to the CMA to invite the Tribunal to make findings of fact which are different from the findings in the decision?"

Mr O'Donoghue says:

"Well, sir, it would require an application on specific legal grounds."

Then he says:

"If the CMA [made that application] ... we would have quite a lot to say about [it] ..."

So that's his answer.

But that response does not give the Tribunal an accurate answer to the question that the Tribunal posed.

The first point I wish to make is that given what I have shown the Tribunal in terms of how this point was very clearly highlighted, there is a question as to whether, sir, your point arises in the first place. So there is a question as to whether it actually arises because, of course, the decision does make the factual finding that we now rely on about causation and it does make the factual finding that the ban doesn't contribute to a material degree to the aim of custom fitting.

To make clear the position generally in response to your question, it's very well established that the Tribunal is perfectly entitled to make additional findings of fact that emerge from the evidence before it which were not made by the CMA in its decision. That, in a sense, is perfectly logical because why have an appeal on the merits at all where the Tribunal is confronted and has the benefit of new evidence that wasn't before the CMA. It's ridiculous to say that

the Tribunal shouldn't make findings of fact based on that evidence unless those findings were specifically made by the CMA in its decision. Why are we all here if that's the position?

We see this in terms in the two authorities. They're very long judgments. I have just handed up excerpts. But if you could look first at the JJB Sports judgment. It's paragraph 284. What the Tribunal says there is that it has now heard -- "New evidence before the Tribunal" is the heading:

"The Tribunal has now heard a great deal of evidence, much of which is not referred to in the decision. Such a situation is a common occurrence in appeals to the Tribunal which are appeals 'on the merits' and effectively take the form of a new hearing."

Then you see the relevant reference to the provision of the Act:

"Indeed, as the Tribunal observed in Napp, it's virtually inevitable that at the appeal stage, matters will be gone into in considerably more detail than was the case at the administrative stage. New witness statements may be filed; new documents may come to light; a witness may say something in the witness box that has never been said before. Sometimes a new development will favour the OFT, sometimes it will

favour the appellants. In our view, provided each party has a proper opportunity to answer the allegations made, and that the issues remain within the broad framework of the original decision, we should determine this appeal on the basis of all the material now before us."

Then the Tribunal there referred to Napp. We have provided the relevant paragraph in the Napp judgment, which is the other document I handed up. That's paragraph 134. Again, the Tribunal there is saying:

"In those circumstances it is virtually inevitable that, at the judicial stage certain aspects of the decision are explored in more detail than during the administrative procedure and are, in consequence, further elaborated upon by the director."

That's obviously the director of the Office of Fair Trading.

"As already indicated, these are not purely judicial review proceedings. Before this Tribunal, it is the merits of the decision which are in issue. It may also be appropriate for this Tribunal to receive further evidence and hear witnesses. Under the Act, Parliament appears to have intended that this Tribunal should be equipped to take its own decision, where appropriate, in substitution for that of the director. For these reasons the ... analogy is not exact."

So we say that that is what accurately states the position. The question the Tribunal has to ask is: are the factual points that have emerged -- and let's take an example of the factual points because one factual point that's clearly very important that emerged in the evidence that didn't emerge in the administrative phase was the difference between Ping and the other manufacturers in terms of the minimum inventory requirements. That's a point which two of Ping's witnesses say is the biggest contributing factor to Ping's higher rates.

Now, that's a point which will not be found in the decision in those terms, but it's a point which came out of the evidence. But it's plainly, squarely, within the four corners of the decision, of what was found by the CMA and it's evidence which -- it falls within the category of additional facts that are bound to come out in a merits appeal. So of course the CMA can rely on them and there is no unfairness because, as the CMA made absolutely clear in its defence, it was intending to rely on Ping's own evidence to establish this point.

Now, I think that deals this point. I want to move on now to another point raised by Mr O'Donoghue. Can we take this again from the transcript, from Day 8, page 54? (Pause)

PROFESSOR BEATH: I only have up to Day 7.

MS DEMETRIOU: So there are two Day 7s. It's labelled "Day 7" but it should say at the top "23 May". Do you have one that says "23 May"?

PROFESSOR BEATH: Yes.

MS DEMETRIOU: So that is actually Day 8. If you look at the previous -- I have mine all tabbed up in a file, but if you look at the previous transcript, that's 18 May because that was the end of the evidence, and there was then a gap, and that's also labelled "Day 7" so in fact 23 May is Day 8. Does the Tribunal have it?

PROFESSOR BEATH: Yes.

MS DEMETRIOU: So I am looking at page 54. It's the bottom of that page. I think actually I should deal very quickly with the first point made by Mr O'Donoghue, which is the concession point. That's at lines 18 to 22. I think I have dealt with that in showing you the decision. There is plainly no concession in the decision that the causation point is wrong. Quite the opposite. So I think I don't need to say anything more about that.

The second point is that Mr O'Donoghue says that it's unfair that the CMA has conducted its case to date on the basis that Ping was no different to its rivals when it comes to custom fitting or promoting custom

fitting, but now turns around and says that Ping is so different that the difference causes these rates.

Now, again, on analysis that's really a variation on the first point that I have been dealing with because the CMA doesn't concede that. It doesn't proceed on that basis in its decision. On the contrary, it said that there are other differences which explain the difference -- any difference in rate. But, of course, the CMA does say in its decision and continues to say in its closing submissions that there are, in some respects, similarities between Ping and the other brands. For example, in relation to the custom fitting process, the CMA does say -- it said in its decision and it says now -- that the custom fitting process, the use of the launch monitors, is effectively a single process. So in that respect it's true. Ping is similar to the other manufacturers. But nowhere in the decision will the Tribunal find a statement that the CMA's case is that Ping and its rivals are the same in all respects.

It is conspicuous that Mr O'Donoghue didn't refer, in making this point -- which is, with respect, rather a vague point -- it's conspicuous that he didn't refer the Tribunal to any particular passages in the decision to make it good.

But we have revisited the decision with this point

in mind and we could not find any references in the decision which are inconsistent with the CMA's case as advanced now in its written closing submissions. Indeed we have already seen the passages which are entirely consistent with its case that there are differences which drive any difference in rates. So in finding that at paragraphs 4.109 to 4.113 of its decision, of course the CMA was necessarily contemplating that there were differences between Ping and the other brands.

If one takes up the decision, just to give Tribunal a flavour of the type of the respects in which the CMA found that there were similarities, which must be the kind of thing Mr O'Donoghue is referring to -- if we pick it up at page 22 and paragraph 3.23:

"Although the main manufacturers may recommend a particular brand-specific custom fitting process, in practice the same fitting process and equipment (such as a launch monitor) is used regardless of the brand [...] and consumers may try several brands [...] simultaneously."

Well, yes, the CMA did say that and we continue to say that -- there is no change in case -- but that's a different point. We see similarly at 3.29, over the page:

"Notwithstanding that Ping was a pioneer in

developing and promoting custom fitting, Ping acknowledges that over the past decade its competitors have increasingly adopted this commercial [model]."

Then we see, for example, over the page again at 3.34:

"Leading golf club manufacturers [...] promote the benefits of custom fitting on their websites."

So these are respects in which the CMA has found that there are similarities, it's true. So it has never been the CMA's case and it's not the CMA's case now that they're different in all respects. That has never been the CMA's case. In fact an important part of the CMA's case is that there is a lot of similarity between Ping and the other brands and that that is a factor which helps demonstrate that the ban is disproportionate. But in several material respects the CMA does say there are differences and that these explain the difference or any difference in rates insofar as there is one.

Now, I want to turn now back to the transcript to pick up another point Mr O'Donoghue made, this time at page 55. This is at lines 12 and following. So he says there that the CMA's case on this point is hopeless because, for that case to be made good, there would need to be a comprehensive comparison between Ping and its rivals and it says that the CMA should have carried out

such a comprehensive comparison.

We see later on a reference back to Professor Beath's point about the thought experiment, which is something I will return to a bit later on in my submissions. But the gist of the point here is that the CMA's argument is hopeless because, in order to make it good, it was incumbent on the CMA to carry out a very wide-ranging investigation into what other manufacturers do.

Again we say this point is not well founded and there are two points to make here. The first point is a very short one, which is that the burden is on Ping on this point, as we have explained and as the Racecourse Association case have explained. I'm not going to elaborate on that point because we have said what we have to say about it in writing and we say it's clear.

Secondly, in any event, it's not the case that the Tribunal -- if you look at the bottom of the page, Mr O'Donoghue's complaint is that the Tribunal has no information on which to decide the point. Well, that's simply not the case because the Tribunal does have evidence before it on which to decide the question and it is evidence which is undisputed. So this isn't a case in which there is a dispute on the evidence on these key factual findings and where the Tribunal is

being asked to prefer one party's evidence over another. We're not in that territory here as regards this point because the evidence is Ping's own evidence -- as the CMA made clear in its defence it was going to rely on -- Ping's own evidence as set out in its witness statement and as explained further in cross-examination.

It's also not true -- and we see the suggestion here on page 56, lines 15 to 17 -- that some kind of econometric analysis needs to be carried out to regress out the effects of the other contributing factors. No, we say not at all. The task for the Tribunal is much more simple than that. It must decide whether Ping's ban makes a material contribution to Ping's aim of promoting custom fitting, and that's a contribution which is significant, which is more than marginal, and, if so, whether that material contribution can be addressed without unacceptable compromise by alternative measures.

When assessing whether the ban makes a material contribution, the Tribunal will have to take a view on (a) whether there is a differential between Ping's rates and its competitors and (b), if so, whether that differential is caused in material part by the online sales ban. It doesn't, of course, need to calculate the precise numbers. It needs to look at the evidence in

the round and take a view. It's wrong to say -- quite wrong to say -- that the CMA should have carried out a comprehensive survey of other manufacturers. That would have been unnecessary and disproportionate because the CMA was assessing the lawfulness of Ping's online sales ban.

This is a vertical case, not a horizontal case, and in addition much of the evidence that is before the Tribunal on the question of causation is evidence from the retailers or, in the case of Mr Hedges, from a representative of many retailers who stock a range of brands and are therefore very well placed to comment on differences between the manufacturers.

Now, it should also be borne in mind in this context how this all evolved in terms of procedure because Ping put in the supplementary retailer survey, of course, after the decision was taken. The Tribunal will recall that Ping chose to disengage from the investigation process, from the administrative procedure. The very purpose of Ping filing the evidence, the supplementary retailer survey evidence, was precisely to try to demonstrate that the ban is effective by comparing Ping's rates to its rivals'. That was the approach adopted by Ping.

Now, had it been put in during the investigation,

the survey, then, of course, the CMA would have had statutory powers and, had it felt it appropriate or necessary, it could have used its statutory powers to test that evidence. But it's wholly misconceived for Ping to say that the CMA should be somehow shut out now from challenging that evidence or from making submissions on that evidence. That's the purpose of this appeal.

Now, the final point made by Mr O'Donoghue is over the page on the transcript. I have taken his points in a slightly different order to the order he took them in. This is what he called the fourth point and it's at the top of page 57. It's in fact the only one of Mr O'Donoghue's five points that attempts in any way to address the substance of the causation argument. He says that:

"the CMA's argument has a spurious precision because it wrongly assumes that one could remove the internet policy and that all of the other things Ping does, which are said to make it different, would remain unchanged and we say that is highly unlikely."

Now, the first point to note is that Ping has not made out a positive case that all of the differentiating factors that the CMA has referred to would disappear if the online sales ban were removed. It simply has not

addressed that point in its evidence. We say it's highly unlikely that they would disappear because -- take Ping's heritage as a pioneer of custom fitting, that couldn't be affected by removal of the online sales ban, so that's one factor that is simply incapable of being affected by the removal of the ban.

Take Ping's imposition of contractual requirements on its retailers to promote custom fitting, well, on that the Tribunal has Mr Clark's evidence that Ping would most likely not shy away from those contractual obligations if the ban were removed.

Now, Mr O'Donoghue, in this part of his submissions, gives us an example of a large network of account-holders which he says would shrink. That submission is on proper analysis dependent on Ping's free riding argument. It's essentially the same point. I am going to come back to deal with the substance of that a little bit later because I am going to deal with free riding separately. But we say that's that what that amounts to. It amounts to an argument that free riding would become such a problem that the network would shrink.

Now, I'd like finally to deal on this point with Ping's repeated assertion in its closing submissions, both written and its oral submissions, that the online

sales ban -- and the Tribunal will recall this phrase -- sends out the strongest possible message to the consumer to be custom fit. So Ping says, "Well, that drives consumers into stores and that's why it's effective".

My submission is that that assertion, because it is an assertion, shouldn't be used to mask Ping's failure to grapple properly with the causation point and with the point of whether in fact the ban is effective.

In fact, we say it's very revealing that in both their written and their oral openings Ping places so much store in relation to that point on Mr Mahon's evidence in cross-examination. So that's what they put sort of front and centre of their submissions on this point. Ping says that Mr Mahon agrees that the ban sends out the strongest possible message to consumers, but it is important to look at the context in which Mr Mahon said that, at that's at Day 5 of the transcript, page 68.

Do you see halfway down page 68 Mr O'Donoghue says:

"Sir, I have no further questions."

Then there is re-examination by me and the question that is relied on -- and indeed great weight is placed on -- the answer that great weight is placed on by Ping is the one immediately above that:

"Now the final measure the CMA suggests is that you

could have a message promoting custom fitting online. I think you agree with me that the message that Ping has today in its internet policy is the strongest possible message that can be sent from that perspective."

And then Mr Mahon says:

"By way of custom fitting being the right way --

"Question: Yes.

"Answer: -- yes, I would agree with that. Yes."

So now the context in which this is being made is that what Mr O'Donoghue was putting --

THE CHAIRMAN: Sorry, I'm afraid we haven't found that in the transcript.

MS DEMETRIOU: I'm so sorry. Do you have Day 5, page 68? This is the end of Mr O'Donoghue's cross-examination of Mr Mahon. Does the Tribunal now have that?

THE CHAIRMAN: Yes.

MS DEMETRIOU: So what's relied on -- and indeed it's put centre stage by Ping -- is Mr Mahon's last statement that he would agree that the internet policy is the strongest possible message that can be sent to the consumer about promoting custom fitting.

That's relied on very heavily by Ping. But we say that's revealing. It's revealing that this is, in a sense, their best point, because when we see the context of it, we see that what Mr Mahon was being asked

about was the CMA's suggestion that a retailer could have a message on the website promoting custom fitting, and so that's what was being put to him, and then he was being asked, "Well, don't you agree that the internet policy is the most effective way of conveying that message?" So it's in that context that he was addressing the point.

Now, what he certainly wasn't agreeing to, because it wasn't put to him, was that the online sales ban is the cause of Ping having higher custom fitting rates than its competitors as opposed to other factors. He wasn't asked to consider that. Of course we know that in his own store Ping does not have the highest custom fitting rates. So it's not enough to assert effectiveness. Ping has to do more. They have to show that there is a material proportion of customers whom the ban causes to have a custom fitting who would otherwise not have one.

The Tribunal has our submissions on this, on the rates point and on the causation point. But we say that that stands to reason. So the CMA's case on rates and causation stands to reason when you start to think about, "Well, who is this cohort of customers that might possibly be driven to have a custom fitting by the ban but wouldn't otherwise have a custom fitting?"

So we say that it's important to really try and break that down because it's not enough just to assert that this is going to happen in a widespread way or that the ban causes this in a widespread way because first of all we know that custom fitting rates are high across the board, across all brands, so, in other words, the vast majority of customers wish to visit a store and have a custom fitting -- we know that -- and we know that there is healthy inter-brand competition -- indeed this is a point that Ping presses on the Tribunal -- and we know that the other brands are available online. So that means that a customer who wishes to buy online and doesn't wish to buy in-store will generally not be driven into stores by Ping's online sales ban because they will take advantage of the healthy inter-brand competition and buy another club online. That's the starting point.

So, third, that leaves a cohort of customers who are not affected by the inter-brand competition, so in respect of whom Ping has some degree of market power because they want Ping and nothing else. So that's a cohort of customers that's left in respect of which Ping has some market power. They form the view that they don't wish to buy another brand.

Now, let's look at that cohort, which is obviously

a smaller cohort than the starting point. The majority of those customers we know will go into a store and have a custom fitting in any event because we know that that's what most customers want. So ban or no ban, that's what the majority of those customers will do. This is not only because custom fitting rates are high across all brands, but because Ping itself has specifically promoted itself as being the leader in custom fitting.

So take those Ping loyal customers, they're likely -- and this is borne out by the survey evidence -- to think that custom fitting is even more important than the majority of consumers who anyway think it's pretty important. So that cohort of Ping loyal customers are more likely than the average customer to go into store, ban or no ban, and obtain a custom fitting.

So how about then the fraction -- so we're then now whittling it down to a tinier cohort -- of Ping loyal customers who don't view custom fitting as important. So we know that's only some of them and we know that there is a range which is being put at between 10 and 20 per cent. The Tribunal is aware of the confidential figure of Ping customers who do currently buy in-store without a custom fitting so we know that some of these

customers do exist.

Now, some of these customers may well switch to buying -- if there is no online sales ban, it's true that some of those customers may well switch to buying Ping clubs online because it's more convenient and they don't want a custom fitting, but that won't affect Ping's custom fitting rates, so that the removal of the ban won't affect Ping's custom fitting rates if they do that because those customers already buy without a custom fitting, so the ban isn't causing anything different in relation to them.

So what does that leave? That leaves a tiny, we would say minuscule, cohort of customers who are loyal to Ping who would not buy another brand, who currently have a custom fitting in-store, even though they could buy on the phone, but who would, absent the online sales ban, buy online. We can whittle this cohort down even further because some of those customers will buy online following a custom fitting, because we know that Ping itself gives out specifications at its Gainsborough facility and that some retailers do give out specifications. The clear evidence is that if a customer does that, it will lead to a well fitted club. So there is no damage to Ping's aim there.

So you're left with an even tinier cohort of

customers who are loyal to Ping who currently have a custom fitting in-store but who would, absent the ban, buy online without a custom fitting. We say that once you view it in that way, it's not surprising that the CMA found that, when you analyse the evidence, the ban has little to no effect.

We say not only is that cohort of customers very tiny, but Ping can take effective steps absent the ban to encourage them to have a custom fitting and both Mr Sims and Mr Hedges made this clear.

I'd like to take you just to two parts of their evidence. So Mr Hedges on Day 4, at page 29, line 24 -- does the Tribunal have that? So he says there:

"What the internet gave us the opportunity to do was communicate to golfers, to educate them on the alternatives. Prior to the internet, the only way we could communicate to our customers was through the post or with magazines, which is very expensive. So the internet gave us the ability to digitally communicate cost-effectively and to preach the gospel according to custom fitting. So we have been able to influence the customer and make them aware, prior to which they probably weren't. That is why the trend of custom fitting is growing, because people are becoming more educated."

Now, that is important evidence, we say, because it shows not only that the less restrictive -- there is Ping's own witness saying that these less restrictive alternative measures of having warning messages on the internet are effective, as the CMA says. He says, "Not only are they effective, but they have allowed us to bring more customers into store and have a custom fitting". So they must be very effective indeed.

Then we see Mr Sims' evidence which is at the same tab at page 117. He says there that -- do you have page 117? So he's explaining his internet site and he says:

"We basically rebuilt that site. So the background to our internet process, obviously in paragraph 6, was that when I went to Silvermere the business was doing 4.2 million per year. It had no digital representation. I use that phrase differently to retail. It had no digital representation. It was poorly represented. So if you want to encourage people to come to your place -- digital is here to stay -- you need to digitally represent."

So he goes on to explain what they did and he also goes on to explain -- and this is a point that he makes a bit further -- that their turnover leapt from 4.2 million to 9.1 million by doing precisely this kind

of thing.

So all of this evidence reinforces and confirms the CMA's finding in the decision that the ban is not materially effective to achieve Ping's aim and that it's unnecessary and disproportionate and that the aim is actually met very effectively by taking these online measures which both Mr Hedges and Mr Sims say have driven customers, more customers into stores to be custom fit than would otherwise be the case.

Now, sir, I am going to move away from causation and I have one very short point on counterfactual before I get on to free riding. Should I make the short point and then rise for the ...

So on counterfactual -- I can deal with this very quickly because to some extent I have dealt with it already, but the point is this: that throughout its submissions Ping posits a counterfactual world in which, absent the online sales ban, it would allow any online retailer to sell its clubs. We say that not only is this implausible, it runs counter to the evidence of Mr John Clark of Ping, who confirmed that in the event that the ban was lifted, Ping would continue to require its account-holders to demonstrate a commitment to custom fitting.

Can we turn up that evidence because it's important.

It's at transcript Day 3, page 50? There is a series of questions that begin at line 1 of page 50. I am putting to Mr Clark this point, so I'm saying to him, "Well, if you required your online retailers to be committed to custom fitting, it wouldn't have quite the doomsday effect that you're trying to paint". I ask him a number of questions. Then if you go on to page 51, I say at line 3:

"So if Ping had to lift the online sales ban as a result of the CMA's decision -- so if your appeal fails -- it still wouldn't sell to those retailers, would it?"

"Those" being the high-volume online retailers who have no commitment to custom fitting.

"Answer: I guess we would have to treat each application as we do on the merits of each application.

"Question: But it's still likely that you would want a commitment to custom fitting, isn't it?

"Answer: I don't think our commitment to custom fitting would diminish. We would expect -- we would like to do business with retailers who respect and want to support Ping's philosophies.

"Question: Do we see that in relation to soft goods, that you select your online retailers; you don't just let anyone sell your soft goods online?

"Answer: Yes, and I think that decision is to make sure that the people who are selling -- even selling soft goods online are quality retailers, online retailers who are operating from an inventory and can deliver quickly to the consumer."

So he says there -- he accepts in terms that Ping would continue to require its retailers to commit to custom fitting. So we say that that's obviously the plausible scenario. That's what Ping Inc does in the United States and it's what Ping does, as we see there, in relation to the online sale of its soft goods. It lays down criteria that must be met by its online retailers.

We have seen clearly in the evidence that there are online retailers who sell online but are nevertheless committed to custom fitting, so they're not mutually exclusive things, which is the picture that Ping is trying to impress on the Tribunal. Their own witnesses demonstrate that. So Mr Sims of Silvermere is a case in point, as is Foremost Golf, which itself sells online on behalf of its smaller retailer members who can't afford their own transactional website.

Now, that's an important point because what Ping say is, "Well, lots of our smaller retailers are going to go out of business if there is online sales because they

can't afford a transactional website". Well, that's undermined, wholly undermined, by the evidence of Mr Hedges, who, on behalf of Foremost Golf, precisely as he explained in detail, operates a transactional website which shares the profit of those sales with those small online retailers. These, of course, these small retailer members of Foremost Golf, are the very people who are investing in custom fitting, yet they sell other golf clubs online through Foremost Golf with no detraction from their overall commitment to custom fitting.

So the reality of the position we say is that, absent the online sales ban, Ping would be able to select its retailers, of course according to non-discriminatory and objective criteria -- but it would be able to require its retailers to commit to custom fitting and it would be able to adopt the type of measures that the CMA has canvassed in its decision to encourage customers to get a custom fitting. We have seen from the evidence of Mr Hedges and Mr Sims how effective those measures can be.

That's the proper counterfactual in our respectful submission and Ping's submissions don't grapple with this important point at all. All they say is, "Let's put it over to the CMA again. The CMA hasn't explained

what's meant by requiring a commitment to custom fitting". Well, that's a thoroughly bad point because it's, of course, for Ping to decide when it implements -- if this ban is lifted, it's for Ping to decide how it's going to go about requiring a commitment to custom fitting and they have singularly failed to grapple with this point.

So what the Tribunal should do -- and this is a point that runs through the case -- what the Tribunal should do, in our submission, is to compare the current position with a situation in which Ping golf clubs are being sold not by online retailers loading them out of warehouses up and down the country who have no interest in custom fitting at all, but by online retailers who are promoting custom fitting in accordance with Ping's criteria, contractual criteria.

This is an important point. It goes both to the question of effectiveness of the ban, because the effectiveness of the ban needs to be measured against a realistic counterfactual and not an unrealistic one, and it's also highly material to free riding, which I will come to now, perhaps after the short break for the stenographers, if that's a convenient moment.

(11.35 am)

(A short break)

(11.46 am)

MS DEMETRIOU: May it please the Tribunal, I want to move on now to free riding. It's worth pointing out at the outset that none of Ping's contemporaneous documents refer to free riding as a specific concern. We say that that's telling because the concern in this case is very much a theoretical one. The evidence flatly contradicts any suggestion that free riding is a problem in practice.

Now, we have dealt with this fully in our written closing submissions, but what I would like to do is highlight for the Tribunal some of the key points. Before I do that, I want to make four threshold points.

The first point is that it is important to be clear as to how free riding fits into the analysis in this case. The free riding concern is a particular concern. It's a concern that a customer will be custom fit in a store that has invested in custom fitting and that that customer will then take their specifications and buy from an online retailer who does not make those investments.

I want to be clear about what the CMA says Ping needs to show. So Ping needs to show not just that this takes place or even that it might take place more often if the online sales ban were removed -- what Ping needs

to show is that it would take place sufficiently more often, so to such an extent that retailers would no longer be incentivised to provide custom fitting services at all or that their investments, the investments made by retailers in custom fitting, would materially decrease. So that's what Ping needs to show because, of course, free riding is a feature of many competitive markets. So it's not enough to say, "Oh, well, there is a free riding problem. This sometimes takes place". The question that the Tribunal will have to address is whether removing Ping's online sales ban would cause it to take place in a sufficiently widespread or extensive way so as to amount to a problem in terms of material reduction of incentives to invest.

It's an important point and it affects the way the Tribunal should approach the evidence in our submission because Mr O'Donoghue urged the Tribunal, in his oral closings on Wednesday, to place weight on various assertions made by some of the retailers, including Mr Challis, for example, to the effect that they're concerned by free riding. But the question is not whether retailers are concerned by free riding, but whether the removal of Ping's online sales ban would lead to a free riding problem, of the type that I have explained, in practice.

We say that Ping's evidence doesn't really transcend this line. So it's true that their retailers say, "Well we're worried about this", but it doesn't really transcend the line that it needs to cross, which is to show that there would be a sufficiently widespread problem in practice. In fact we say the evidence contradicts that submission.

It is interesting in this regard that no concrete evidence -- the Tribunal will have picked up in the evidence and in some of the submissions that until 2012 Acushnet, which produces Titleist, similarly had an online sales ban and then, as a result of litigation where that ban was challenged in the High Court, there was a settlement and following that settlement in 2012, Acushnet removed its online sales ban.

But there is no evidence that has been adduced by Ping in these proceedings to show that the removal of the ban by that manufacturer actually materially decreased incentives to invest. In fact we see the opposite trend, which is that investments have been increasing steadily.

Now, the second threshold point that I wish to make is that Ping seeks to suggest -- it speaks in derogatory terms about the CMA's retailer witnesses, Mr Patani, Mr Lines and the complainant, and it says, "Well,

they're necessarily free riding and that's a bad thing". We want to simply point out that this submission, this type of submission, overlooks the fact that customers may have their specifications after either paying for a fitting or purchasing clubs from the retailer that fitted them and wanting to purchase more clubs or receiving their specifications from a manufacturer's fitting centre, such as Ping's in Gainsborough or a manufacturer's fitting away day, and Annex 1 to the CMA's written closing submissions shows that it is plausible numerically that many of the current online purchases of golf clubs may indeed be purchasers that have availed themselves -- that have their specifications.

The Tribunal heard the consistent evidence from the witnesses that those consumers, those consumers who have their specifications and who are choosing from the multiple custom fit options offered by some websites as opposed to the more limited standard fit options that some websites also make available -- those consumers are unlikely to be guessing their custom fit specifications and it stands to reason.

It was a point that I put to most of Ping's witnesses that, "Where you have a long drop-down box of 75 different customisable options, it doesn't make sense

to suppose that a customer who doesn't know their specifications would be selecting one of those as opposed to the standard fit options".

So in addition, as Mr Patani and Mr Lines underlined in their evidence, if an in-store retailer is losing customers in that way because, as they explained, the in-store retailer, given that customers want to be custom fit -- the in-store retailer has an advantage. The customer is on-site and they should be able to conclude the sale. If they're not concluding the sale -- we know that most of them do, but if they're not, then it must be because the online retailer is offering a better detail in some way, probably on price. But it follows not that the free riding concern arises because these online retailers are doing something bad. On the contrary, increased price competition is a good thing for those customers that value price over personal service. The question that the Tribunal will need to grapple with is whether removal of the ban leads to that happening to such an extent that it undermines Ping's objective.

Thirdly, you heard Mr O'Donoghue in closing refer to the alignment of incentives. It's a little unclear at times whether this is the same as the free riding argument or whether it is something a little bit

different. It appears to be a point that Ping is running off the back of Mr Holt's evidence. We say that it is important to identify precisely what that point is.

We can see it from Ping's written closing submissions at paragraph 109(b) and it's on page 44. So what Ping says there is:

"Were the internet policy to be removed (and irrespective of the question of free riding) ..."

So they're putting it forward as an additional reason.

" ... Ping retailers would no longer have the same incentives to invest in in-store custom fitting if they can sell the same clubs online without the additional cost of custom fitting."

Then they set out how that point was explained by Mr Holt. It is important to see exactly what the point is. You can see that in the bottom part of the citation. So he says:

"The reason I say that's not necessarily a free riding problem [this is the incentives point], but is nevertheless a problem in terms of achieving high custom fitting rates, is that it may be that that retailer would still retain a sale, it might do so online, so it's not technically characterised as a free riding

problem, but it's an incentive alignment issue."

So what you can see there is -- because it's important not to -- there has been much discussion about incentives, but it's important to actually nail down what Ping is talking about. It's a slight extension of the free riding argument, so they're saying that not only does free riding reduce investments because a customer can take their specifications elsewhere, but even if the particular retailer who is custom fit retains the sale, that might lead them to reduce their investments.

Ultimately this is a factual question -- this is the fourth point I wish to make -- which is that ultimately Mr Holt accepted that whether or not the removal of Ping's online sales ban will lead to a material reduction in investment in custom fitting, whether because of free riding or because of this slightly different alignment of incentives point -- whether that is so is a question of fact. Mr Holt accepted that. Because it's a question of fact, then, of course, Mr Holt, who is an expert economist, didn't address the question of fact. He wasn't being called as a factual witness and he evidently wasn't presented with the factual material that he needed.

If we can go back to the transcript, just to show

you that point -- it's Day 2. This is the non-private transcript of Day 2 and it's pages 106 to 113. I would ask the Tribunal in its own time to read the whole section, but I just want to highlight a few key parts. Does the Tribunal have that? So it's Day 2, page 116.

THE CHAIRMAN: Yes.

MS DEMETRIOU: So halfway down page 106, I was exploring with Mr Holt the idea that the incremental effect -- because it was put to him, "well, none of the other retailers have bans and so that free riding hasn't been a problem, and then I say:

"In relation to the incremental effect ..."

In other words the incremental effect of Ping removing its ban.

"... that might vary, might it not, from retailer to retailer ..."

He says:

"I think that is fair, yes."

"Question: One reason why that might vary is the importance to the particular retailer of the Ping brand?

"Answer: That is possible."

Then over at 107, line 12, Mr Holt has given various factors that he says might theoretically play into this. I say:

"But those are factors that may well vary -- I think

you have said it yourself -- from retailer to retailer?

"Answer: Yes.

"Question: They're all factors you say are potentially relevant to the question of whether free riding would be problematic --

"Answer: Yes, I think so. That's right.

"Question: -- in the event that the ban is lifted ..."

Then he highlights his incentives point, which is the bit that's excerpted in Ping's written closing that I just took you to. Then if you go down to page 108 line 17:

"The assessment of those incentives or incentive alignments, that's a fact-sensitive matter, I think you've just accepted, and one of the factors that may be relevant to that are the obligations that the account-holders, in the event that the ban were lifted, would continue to be subject to under the selective distribution regime. That's also fair, isn't it?"

So that's the counterfactual point. He says:

"Yes, I think what that indicates, though, is that there are important factors ...

So he is accepting the proposition that essentially it's fact-sensitive. Then at 109 I put it to him again at the bottom:

"Well, that depends on the incentives, which is a fact-sensitive question, so it depends on whether the incentives would change -- the incremental change which is represented by the lifting of the ban, it depends on the extent to which that would affect retailers' incentives, which again is fact-sensitive, and there may well be contractual mechanisms that Ping could put in place. That's not an issue that you're an expert on, is it? ...

"Answer: No, I'm not a retail expert."

Then I say:

"Given that this is a highly fact-sensitive matter ...", [you're] not actually reaching a conclusion on what would happen in fact?

That's at 16 to 17 of page 110. He says:

"No, I think -- well, in that regard I'm not. I am just trying to understand or explain what the likely consequences of that would be.

And then we have at 113 at page 7:

"Question: But, in any event, the effect that that would have on a consumer's incentives is not something that you have specifically looked at for the purposes of this report because, as we have seen, you have confined your analysis of free riding to the specific point relating to charging."

"Answer: No, I think it's the retailer factual witness evidence ...", essentially which is relevant.

So what you see is that the question of whether removal of the online sales ban would increase free riding to the point that it became a problem is not something that Mr Holt was asked to address because it's a question of fact and that also is the response to Mr O'Donoghue's jibe that the CMA should have adduced expert economic evidence on this point. It's ultimately a question of fact.

Now, turning to the factual evidence -- we set this out in our written closing submissions at paragraphs 200 onwards -- what I would like to do, rather than reading that out, is to highlight the key points that we make for the Tribunal. So perhaps if the Tribunal could have our written closing open from paragraph 200 onwards.

I am going to make the points and then occasionally refer you to passages in our written closing. But the first point I make is that the evidence is clear that custom fitting is becoming more popular and that custom fitting rates are increasing and the evidence also shows that investment in custom fitting has been increasing and that this is driven by consumer demand.

Second, the evidence shows that investment in custom fitting is precisely one of the ways -- it's a very

important way in which the type of small on-course retailer competes, differentiates itself from online-only retailers, and it provides them with an effective means of competing because we know that lots of consumers want to be custom fit which is not something that can be done online.

Thirdly, the retailers sell and custom fit clubs for multiple brands and the vast majority of Ping's retailers' investments in custom fitting are multi-branded. We know that the other brands do sell online and yet neither the other brands nor the retailers have been deterred from investing in custom fitting. On the contrary, we say that the evidence shows that investment has increased. You have all the evidence of Mr Sims. It's really not disputed that investment in custom fitting has been increasing.

Fourthly, we know that the smaller retailers are able also to recoup their investment not just through the sale of golf clubs, but through the sale of other goods or provision of services, such as golf lessons. We know from Mr Hedges that the majority of Ping retailers do supply those other goods and services and indeed Mr Hedges explained that Foremost Golf requires it of its members. So it requires its members to offer golf lessons and services like that. So that's another

way in which these investment costs can be recouped.

Fifthly, despite the availability of every other brand of club online, we know that conversion rates -- and, again, this is undisputed evidence -- are very high, indeed around 90 per cent. You have seen all the various retailer witnesses in these proceedings talking about conversion rates between 80 to 100 per cent and that was the consistent evidence of all the witnesses. What it demonstrates, it demonstrates in terms that only a small proportion of customers are in fact free riding.

Sixth, similarly we know that, although some retailers give out custom fitting specifications, others don't and it's open to a retailer not to do so. Again, this is a way in which a retailer can protect itself against free riding and I think this is a point that Mr Doran put to Mr O'Donoghue in the course of his submissions because -- I think, Mr Doran, you put to Mr O'Donoghue the example of American Golf which has taken the decision not to hand out specifications after a custom fitting.

Well, what Mr O'Donoghue says is, "Aha, that demonstrates that there is a free riding problem", but we say, "no, it demonstrates that there may in theory be a free riding problem, but in practice American Golf has taken a very effective measure to protect itself against

free riding so there is no free riding problem in practice, in fact.

THE CHAIRMAN: It's easier for American Golf than it would be for a small retailer --

MS DEMETRIOU: Sir, that's a fair point, but we say that a variety of retailers don't hand out their custom fitting specifications and the ones that do tend to be the ones that charge. So what they're doing in charging, that's another way of protecting themselves against free riding, deterring people that essentially are chancers and come in and ask -- either don't turn up or come in and take their specifications away.

But either way, there is a means of protecting yourself against the free riding problem, whether by charging or whether by not charging and not giving out the specifications.

Seventhly, there is no evidence that the incremental effect of Ping's online sales ban being removed will change this picture at all. So we say the picture up to this point is compelling against there being a problem in practice and there is no reason why all of these factors, all of these trends, should change, why the increased investment that's going on at the moment, increased investment in custom fitting, should suddenly reverse, because Ping alone lifts its online sales ban

in circumstances where no other manufacturer has one.

We say the true position is as set out by Mr Hedges in his press interview, rather than in his witness statement. We have set out at paragraphs 209 to 210 of our written closing what it is that Mr Hedges said and his colleague, Mr Martin, said. What they both said was entirely consistent with each other. What they were saying there -- the Tribunal has that set out in our closing. What Mr Hedges was saying there is, "No, we thought the internet might be a threat and lead to lots of free riding, but in fact it hasn't turned out to be that way and that's because lots of customers -- lots of consumers want to be custom fitted and this gives our smaller people a competitive edge". That's wholly consistent with the point that he made that I took Tribunal to a little earlier, when I was cross-examining him, when he said that, "The internet has been a fantastic thing for driving footfall into the smaller retailers because we have managed to preach the gospel according to custom fitting". It's all of a piece.

This is not something -- so Mr Hedges -- I see that the expression "volte face" is a particular favourite of Mr O'Donoghue's, but I think we can safely say that Mr Hedges' witness statement constitutes a volte face, and Ping has not dealt in its closing submissions

with -- has not made any real attempt to try to square the circle in terms of how Mr Hedges has now, in his witness statement, reached this very different view that a majority or many of his members might be put out of business.

Now, in a way this all makes perfect common sense because the one thing -- and it's something that many of us may have done -- to go into a large department store, for example, and ask a sales assistant in the TV or the hifi department a few questions about what TV or hifi might suit you and then ten minutes later go out and try to find a better deal online. It's one thing to do that, but it's actually quite a different thing, when you think about it, to trot down to your local golf course, where you probably play golf, go into a small store run by a single individual, which is what most of these retailers are, ask the individual to carry out an hour-long custom fitting, during the course of which you're having a chat with him or her and he or she is being very helpful in terms of recommending the best clubs and carrying out the fitting and offering golf lessons -- you may have had golf lessons from that person -- and then brazenly turn around at the end of the hour, ask for your custom fitting specifications and go and find them more cheaply online. It just doesn't

really fit with what most -- well, it assumes some degree of brazen behaviour which I think most consumers don't have.

Now, that's why we see -- it's not a point -- it's a point I am putting to you in terms of common sense, but I'm not obviously purporting to give evidence. What we say is that that explains the very high conversion rates which are in the evidence and we say that that follows as a matter of common sense.

Now, in fact, what the evidence shows is that this picture will not be changed at all by the removal of the online sales ban that Ping operates. As Ping says -- Ping says, "Well, removal of our ban is going to be the straw that breaks the camel's back". That's their submission. But, on the contrary, it wouldn't change this picture at all or to any material degree. We have dealt with this in detail in our written closing submissions from paragraphs 215 on page 76 to paragraph 225. I would ask the Tribunal to go back and read those paragraphs again, if I may.

I just want to focus -- because we say all of those points are highly relevant points, but I want to just draw your attention to the point made in paragraph 223, because a point that Mr O'Donoghue makes is, "Well, these retailers are very dependent on Ping because we

see that their Ping turnover is about £10,000 on average". Well, we say that's a point against Ping because, when you look at that £10,000 figure -- and we have analysed this at paragraph 223 -- that figure is the turnover figure, and when you look at how that translates into profit margin, then, of course, it's lower than that, about half that -- we see that from paragraph 223.2 -- so you're down to £5,400.

Of course that's an overstatement because it excludes the retailer's costs and we say that, in that context, it's simply not plausible that in the absence of the online sales ban a retailer making £5,400 worth of profit would go out of business or that their incentives would be materially reduced. We say that because they wouldn't lose all the £5,400 because we know that the conversion rates are very high, so if you were to apply the 90 per cent conversion rate, you would end up with £540. There is no reason to suggest the conversion rate is going to change. Why should it?

Then we know also that most Ping account-holders sell other brands and provide other services which is the point I made a bit earlier about having other means. So even if you're a customer who has come in, had their custom fitting and is brazen enough to be one of the 10 per cent that walks out and buys the clubs elsewhere,

they may still ask for golf lessons or buy a golf bag, so you can't take those figures at absolute face value.

Then we say -- this is an important point as well -- no significant Ping-specific investments are required because all of these investments are multi-branded. So we say that this shows very clearly that the incremental effect of Ping's ban being removed is not going to change the general picture, which is a very, very clear indeed, that free riding is not a problem in practice.

Now, Mr O'Donoghue gave Mr Challis as an example of someone who had lost business to free riding, but in fact his evidence doesn't establish that the losses he refers to are due to free riding at all. You will recall that he talks about a loss to his business of about £300,000 worth of turnover, but he says that he has a 90 per cent conversion rate of custom fitting to sales and so it's wholly implausible that that amount is going to be due to free riding. When I asked Mr Challis if the reduction in turnover was due -- so I put to him, "You've got a high conversion rate. It must be due to carrying out fewer custom fittings", and his evidence on that was very confused. At one point -- and the Tribunal can see this from the transcript -- he said that, "The downturn was due to the torrential rain we have had for the past six months". Well, that's nothing

to do with free riding.

In fact, in any event, it's obvious when you look -- and I'm not going to go back to the transcript now, but if the Tribunal does revisit it, it's obvious that it can't be due to reduced numbers of custom fitting because we worked it out and on the figures you would have to be doing ten fewer custom fittings a day to amount to that £300,000 and in fact he says he does fewer than five or around five in total, so it just doesn't really make any sense.

Now, of course, he may well -- and we accept that he's telling the truth when he says his turnover has reduced by £300,000. We're not challenging that. But what we say is that it's not due to these problems.

Now, finally on free riding, much of the investments into custom fitting are, of course, investments made by Ping itself, and that's true of the equipment, the golf clubs and also all the other investments it makes into its brand. It's also true of the support that Ping gives to its retailers. We say it's highly unlikely that removal of the online sales ban will have a material effect on Ping's investment into custom fitting. This is dealt with very well in the Decision, but it's also corroborated by the evidence. It is simply implausible that Ping would materially reduce its

investments because -- it's implausible because we know that custom fitting is becoming more and more important for consumers, so why would Ping act against what consumers want? It's implausible because there is strong inter-brand competition and all the other manufacturers are investing in custom fitting and they're doing so without the online sales ban and it's implausible because Ping's history and pioneering spirit is focused on custom fitting.

So we say that for all those reasons Ping's evidence does not establish that removal of the online sales ban will result in a free riding problem that's significant enough to result in material reduction in investments. In fact, the undisputed evidence establishes the precise opposite.

Sir, members of the Tribunal, there is one more point I want to make, subject to the Tribunal's questions, before sitting down. I want to end my submissions by taking the Tribunal to the Ker-Optika judgment which you will recall we have relied on significantly in our defence and in our opening skeleton argument, but I haven't had the opportunity yet of taking the Tribunal to it. I would ask you to turn it up. It's at authorities bundle 3, tab 69.

This is the case, the Tribunal may recall from our

skeleton argument, about the online sale of contact lenses, so selling contact lenses over the internet. It's also referred to in the decision because the CMA refer to Ker-Optika and the measures referred to by the court as being examples of the European Court endorsing some of the less restrictive alternatives that are canvassed by the CMA in its decision.

Now, it is a case on free movement of goods, so it's not a competition case, but we say it's nonetheless an instructive case. It's an instructive case because the European Court similarly had to consider whether a ban on internet selling was proportionate, and the approach to proportionality we say doesn't really differ as between free movement and, in this context, competition law. The European Court took a very similar approach to the question of proportionality to that taken by the CMA in its decision. I just want to show the Tribunal how it did that.

If we start with paragraphs 13 to 16, which if you look at the page numbering on the bottom right-hand corner is page 12251. We can glean the essential facts. So Ker-Optika was the retailer and it sold contact lenses via its internet site and by a decision -- the authority prohibited that activity. Then we see over the page at 16 that:

"[The authority] relied, in particular on the provisions of the Ministry of Health Order, under which the only ways in which contact lenses can be sold are either in a shop which specialises in the sale of medical devices or by home delivery for final consumption. Neither the name nor the content of the latter concept covers selling via the internet."

So the measure under challenge didn't specifically say "You can't sell on the internet", but essentially the thrust of it, the upshot, was that it was an internet ban.

Then you see at paragraph 20 the questions that were referred are reformulated by the court and the court says:

"By its questions, which should be examined together, the referring court asks in essence whether EU law precludes national legislation […] which authorises the sale of contact lenses only in shops which specialise in the sale of medical devices and which prohibits, consequently, the sale of contact lenses via the internet."

Then you see a consideration, so there were two main points in the case. One point was whether the measure fell within a particular directive and the court held it didn't fall within the particular directive, but the

next question was an assessment of the lawfulness of the measure as against the treaty provisions on the free movement of goods. So there were two parts of the judgment.

So it first of all considered the directive and at 35 to 38 -- so some of its reasoning -- when it then comes on to look at proportionality and the free movement of goods, it refers back to this reasoning so I just point it out. So at 35, you can see the public health purpose served by the legislation, so:

"On that point, it should be observed that contact lenses come into direct contact with the eyes and constitute medical devices the use of which may, in individual cases, cause eye inflammations and even lasting visual impairment, medical conditions which may be caused by the mere wearing of contact lenses. The requirement of prior medical advice can therefore be held to be justified."

But then:

"In that regard any person who wishes to wear contact lenses may be obliged to undergo a precautionary ophthalmological examination in the course of which a check is made that no medical factors preclude that person from wearing lenses and a determination is made of the exact values, in diopters, of the correction

required. However, that examination [and this is important] is not inseparable from the selling of contact lenses. It can be carried out independently of the act of sale, and the sale can be effected, even at a distance on the basis of a prescription made by the ophthalmologist who has previously examined the customer. Consequently, it must be held that it is possible to separate from the selling of contact lenses the obtaining of medical advice which requires the physical examination of a patient and on which the sale may be dependent."

Now that's important because the aim that was being served by the legislation in that case was, we say, obviously a more weighty aim than the aim that's being invoked by Ping in this case because it goes to -- the requirement that you have an eye test and that an ophthalmologist checks to see whether or not in fact you can tolerate contact lenses is something which is necessary because it can otherwise lead to visual impairment, so it's a very weighty aim. But what the court is saying is that that doesn't require that you always have to sell in a shop because you need to separate out the two elements of the sale. So one is the fact that of course you need the check by the ophthalmologist, but the second is that the sale of the

contact lenses can be separated from that.

Of course, the court found that those elements are separable, so the court didn't accept the kind of argument that Ping is pressing on the Tribunal in this case that the two elements are inseparable. So Ping is saying by analogy in this case that custom fitting and the sale of well-fitted golf clubs are two inseparable things and so that's why the ban on internet selling is justified, but the court here, in relation to an aim which is much more weighty, is saying entirely the opposite thing. It's saying that you can separate those out.

Then it goes on -- so if you then turn on to paragraph 57, you see the heading above. So we're now into free movement of goods. You see, first of all, in a passage which precedes this, that the court finds that there is a prima facie restriction on free movement of goods which takes you into the question of justification. You see the heading, "Whether the restriction on the free movement of goods is justified". Then you see:

"According to settled case law an obstacle to the free movement of goods may be justified on one of the public interest grounds set out in article 36 TFEU or in order to meet overriding requirements. In either case,

the national provision must be appropriate for securing the attainment of the objective pursued and must not go beyond what is necessary in order to attain it."

So it's the same test that the Tribunal is being asked to apply in this case.

Then, at 58, the court deals with the aim in the case and says that the aim is public health and that ranks foremost amongst the assets and interests protected by the treaty, so it's a very weighty public interest aim.

Then we see at paragraph 60 the finding, as in this case, that the legislation was appropriate for securing the attainment of the objective pursued. So as the CMA found, it's an appropriate measure so it's rationally connected to it.

Then we see at 61 to 63 a reiteration and reference back to paragraph 35 of the very serious risks of using wrong contact lenses. That's referring back to the passages I just took the Tribunal to.

Then you see at 64 the finding that the measure is appropriate. We see that in 64. Then you see at 65:

"It is also necessary, however, that that legislation does not go beyond what is necessary in order to attain that objective, in other words, that there are not other measures less restrictive of the

free movement of goods by means of which that objective could be achieved."

So that's the point that was live in that case and it's the same point that's live in the present case.

Then you see at 66 to 69 an analysis of this by the court. If you look at 67, what the court is saying there is that there is nothing in the evidence to suggest that it's a requirement of the legislation at issue either that an optician must make every supply of lenses dependent on an examination or that those conditions are imposed on each occasion where there is a series of supplies of lenses to the same customer.

So, again, there is a very good analogy with the present case because here Ping hasn't required its retailers only to sell where a customer has been custom fit. So it's the similar point that is relevant here to the proportionality analysis.

Then, at 68, the court makes the point that obtaining such advice must be held to be optional, so even though it's very important -- very, very important, because it can lead to visual impairment if you don't have it -- it's optional and it's primarily the responsibility of the client, of the customer.

Then it says at 69:

"However, customers can be advised in the same way ,

before the supply of contact lenses, as part of the process of selling the lenses via the internet, by means of the interactive features on the internet site concerned, the use of qhich by the customer must be mandatory before he can proceed to purchase the lenses."

It refers back to the other case on which we have relied also in our skeleton argument. Again, you see that this is precisely what the CMA found in its decision. So the CMA found in its decision that there are a number of measures that can be taken on these internet sites, tick-boxes, warnings, encouragement, all of which Mr Sims and Mr Hedges say are effective, all of which American Golf does, Foremost Golf does, which can provide the advice needed. You don't need to go into a store.

Then the court goes on to explain that at 70 to 73. You see at 72 that in relation to the extended use of contact lenses, that that must be accompanied by supplementary information and advice, but that, again, can be given to the customer by means of interactive features to be found on the supplier's internet site.

And at 73:

"Moreover, the Member State may require the economic operators concerned to make available to the customer a qualified optician whose task is to give to the

customer, at a distance, individualised information and advice on the use and care of the contact lenses. The provision of such information and advice at a distance may, moreover, offer advantages, since the lens user is enabled to submit questions which are well thought out and pertinent, and without the need to go out."

So you see that what the court is finding here is that these less restrictive measures -- so imparting all of this information and these warnings and interactive features on an internet site, they are sufficient to render disproportionate the ban on internet sales, and that's despite the fact that obviously the risks of not having a medical examination prior to wearing contact lenses are so much greater than the risks of buying a golf club that isn't properly fit, which ultimately can only harm your golf game and not your eyes, not your sight.

So at 74 to 76 we see the conclusion:

"It follows from the foregoing that the objective of ensuring protection of the health of users of contact lenses can be achieved by measures which are less restrictive than those provided for under the legislation at issue in the main proceedings."

We see that over the page, that the Member State has acted unlawfully in adopting this legislation which

contains a prohibition on internet sales and it's not proportionate.

So we say that the CMA's decision very much follows this line of reasoning in Ker-Optika and that in fact, for the reasons I have given about the weightiness of the aim in Ker-Optika, it being more weighty, and the risks being greater of not having the examination than in respect of a customer that doesn't have a custom fitting for golf clubs, that the present case is a fortiori the Ker-Optika case. It plainly is.

Now, in case Mr O'Donoghue should say, "Well, this is different because it's free movement of goods and we're in a competition case", we remind the Tribunal that Ker-Optika was specifically cited by the European Court in Pierre Fabre, so that was a case that the court cited, so it obviously thinks the kind of proportionality analysis carried out here under free movement of goods is highly relevant.

I said I'd come back to Professor Beath's very pertinent remark when we were all opening about the very difficult task that the Tribunal is confronted with and I think Professor Beath expressed it as being a thought experiment. Standing back from the present case and returning to that observation that Professor Beath made, we say that this need not be a thought experiment, it

need not be an imponderable question, because what you see here is the European Court of Justice taking a relatively broad-brush approach to the question of proportionality. It considers the necessity issue and finds that there are less restrictive ways of meeting the aim in that case, which is also what the CMA did in its decision. The CMA found that there were less restrictive ways of meeting Ping's objective.

What the court is not doing in Ker-Optika is saying, "Well, we can see that if you have these interactive features, that may result -- that may help some people reach the view that they need a medical examination, but there may be some customers or some patients who slip through the net because it's not quite as effective as having a ban on internet sales", so you don't see any of that kind of granular analysis in the court's judgment at all. The court is not there analysing, "Well, let's see precisely how effective the ban on internet sales is in terms of forcing people into opticians or ophthalmologists to get their examination and then let's analyse precisely in statistical or empirical terms how effective would the less restrictive measures be and, oh, there is a slight gap between the two, there is a delta, therefore they can't be less restrictive". No, the court is not taking that approach. It's taking

a much broader-brush approach and that's the approach the CMA took in its Decision.

But what Ping has then done on this appeal -- and it's important to be very clear about this -- what Ping has done is invite Tribunal to approach the question of proportionality in a far more granular manner. So Ping has said, "No, the CMA's approach won't do. It won't do. We're going to adduce precise rates. We're going to conduct a supplementary retailer survey and show you that these rates are higher and the ban is effective to a specific degree", and it's inviting the Tribunal to show that the ban is effective and the less restrictive alternatives are not as effective to the same degree. So it's Ping and not the CMA that is pressing this highly granular approach on the Tribunal.

Now, the CMA, of course, has to defend the appeal that's made and has to engage with these points and the Tribunal has our key submission that we advance, that Ping hasn't made good its case, but we say fundamentally that if Ping is going to ask the Tribunal to carry out that kind of granular exercise, to look at extents and degrees, it cannot leave the job half-done. But that's what Ping has done.

So in particular what Ping is doing is saying, "Look at our supplementary retailer survey. It establishes

a differential in rates and ergo it establishes that the ban is effective". Now, it doesn't because it's left the job half-done because if it is going to ask the Tribunal to go down that road, it also needs to deal with causation, which it hasn't dealt with at all.

So we say that Ping's criticisms of the CMA, so its argument -- for example, Mr O'Donoghue's point that the CMA should have adopted a very wide-ranging investigation into other manufacturers' practices -- that must also be seen in this light because the CMA's approach accords precisely with the approach in Pierre Fabre and in Ker-Optika. That's the approach the CMA took in its Decision and it's Ping's attempt to force a much more granular, detailed, statistical, empirical -- essentially an effects-based approach on the Tribunal that gives rise to Mr O'Donoghue's criticism. I mean, if such an approach is not required, of course it doesn't matter that the CMA hasn't gone out and done a wide-ranging effects investigation into what other manufacturers do. But we say that's not required because this is an object case and these cases lay down precisely the kind of approach that is needed.

Standing back, the Tribunal, I hope, can see that the entire premise of Ping's argument runs counter to the much more robust approach adopted by the

Court of Justice in Ker-Optika where it was considering the same question. It is no wonder, we say, that the CJEU did adopt a robust approach because the case law, both of it and the practice of the European Commission and the guidance of the Commission, is consistent in saying that online sales bans are damaging. So it's unsurprising that they adopt that approach to proportionality.

Now, sir, finally I think that you mentioned AEG Telefunken and paragraph 73 and I just want to come back very quickly to that point. I think you have it in authorities 2. I'm sorry, it's not in the bundle. The Tribunal pointed out that the AEG Telefunken case is not in the bundle in whole. I think one question that, sir, you raised was paragraph 73 of the AEG judgment. Does the Tribunal have the entire copy of the judgment?

PROFESSOR BEATH: I put mine together.

MS DEMETRIOU: I'm grateful. I just want to make a brief point on paragraph 73 because I think that the point -- this, of course, sets the test very high and I think that's the point that, sir, you were putting to me. It's important to understand what the aim was that was being invoked by the manufacturer in that case and we see that from paragraphs 40 and 43. So the legitimate aim in that case that was being invoked was that the

particular clause was indispensable for the survival of the specialist trade and the selective distribution system. So that's the aim which was being assessed and that's why proportionality is assessed in the light of that aim, because it was put very high by the manufacturer in that case.

Of course in this case we're not really in the same position because Ping isn't saying, "This is absolutely essential to the survival of our selective distribution system". It's making a different claim, which is that its legitimate aim is the promotion of custom fitting. So the precise analysis there is that, you have to show that everything -- the world is going to come to an end in order to meet the proportionality test -- is higher than I can say applies in the present case because it's a different legitimate aim. I hope that makes sense. That's the point I wish to make on paragraph 73.

So, sir, members of the Tribunal, unless there are any questions, those are the CMA's submissions in closing.

THE CHAIRMAN: No, thank you very much, Ms Demetriou.

Reply submissions by MR O'DONOGHUE

MR O'DONOGHUE: I had hoped to finish before lunch. That is not now going to happen, but I will be as brisk as

I can.

I want to address three points, three areas: first to pick up on a number of Ms Demetriou's legal submissions; second, I want to spend quite a bit of time on causation; third, I want to respond to the alleged benefits or disbenefits of what the CMA is contending for in the Decision.

Starting with some legal points, Ms Demetriou was asked by the Tribunal about the distinction between Article 101(1) and Article 101(3) and with respect her submissions on that point were incoherent.

The Tribunal's question was, "If, as the CMA says, a full proportionality assessment is required under 101(1), then 101(3) becomes redundant", and we say that that is clearly right, and if the CMA is correct, then it writes Article 101(3) out of the statute book.

In particular, Mr Doran made a very perceptive point, which is that if the third condition of Article 101(3), indispensability, is a cumulative condition, then failing proportionality on 101(1) automatically will mean that one of the cumulative conditions in 101(3) is not satisfied. We say for obvious reasons that cannot possibly be correct.

Now, Ms Demetriou didn't grapple with that point. She made a different point and she had two responses.

She said, "Well, on the inter-brand effects on competition, they will come in under 101(3) and wouldn't feature under 101(1)". With respect that's not an answer to the point which was put to her, which is about proportionality. She made a second point, which is that there will be no difference between Article 101(1) and Article 101(3) in this case, but there might be in other cases, and frankly I didn't understand that submission.

The second point we wish to raise is that Ms Demetriou continues to be clearly wrong in saying that objective justification is the same thing as proportionality. Now, we made the point in closings at paragraph 62, if we can briefly turn that up. Sir, it's on page 28 of my version. I don't know if that's -- it's the last point made in paragraph 62, which is quite a long paragraph. So it's footnote 73 and a sentence which is linked to that. So we make the point that objective justification is not the same as proportionality. Then at 73 we footnote a number of cases where we make good that proposition.

Now, it was striking in her submissions that Ms Demetriou did not deal with most of the cases we set out there. One can see why she avoided those because they are dead against her. So, for example, if one

looks at the footnote, Commission v Italy:

"It must not only be objectively justified, but must furthermore also be in conformity with the principle of proportionality."

So these are two different questions and it is wrong to conflate them. We get a second example at the bottom of the page, where again it is crystal clear that we're talking about two different things.

Now, the only case she did attempt to tackle is the Wolzenburg case. If we can quickly go back to that, it's in supplementary authorities bundle, tab 11.

So we can actually pick up the factual matrix from footnote 73 of our closings. So it was a case where the court had to consider whether a Dutch law was compatible with discrimination on grounds of nationality and it provided that Dutch nationals would not be surrendered to other member states under the European arrest warrant scheme where the request was made for the purposes of executing a custodial sentence in other member states and nationals of other EU member states would be surrendered, however, so long as they had not been continually resident in the Netherlands for five years.

Just to pick this up in the judgment, which is the part Ms Demetriou took you to. If we start at paragraph 64, please. The last sentence:

"It is therefore necessary to examine whether the different treatment of nationals of other Member States is objectively justified."

Then if one looks at 68, about halfway down the court says:

" ... may be regarded as being such as to ensure that the requested person is sufficiently integrated in the Member State of execution."

So that was objectively justified.

Then if one goes to 69, they say, second sentence:

"[It] must also be proportionate."

So there is a second, distinct step and you see the conclusion then at 73 on the facts of the case.

So we suggest it is clearly wrong to suggest this is an acceptable test. There is a clear distinction between objective justification on the one hand and proportionality on the other.

Now, if I may hand up one further case which puts this argument beyond any question whatsoever. It's the case of Pastoors.

MS DEMETRIOU: Is that a case in the footnote or is it a new case because it hasn't been provided to us and it's very late in reply to adduce a new case.

MR O'DONOGHUE: It is a new case. If Ms Demetriou wants to respond to that case, I'm in no position to object.

It's an extremely short case and the point is a very short one. Can that be handed up, please?

Sir, the reason I raise this, it is a case referred to in Wolzenburg so it doesn't come out of the blue. (Handed)

It's a very, very short and simple point. So you will see in paragraph 2 that there was a truck driver who resided in Germany and committed certain road traffic offences in Belgium. Then in paragraph 8 there was a difference in approach between a road traffic offence committed by a Belgian resident person and some resident in another member state. You see at the end of paragraph 8 that Belgium essentially required the lodging of a positive security in the case of road traffic offences by non-nationals and there was a risk that the vehicle would be impounded if that wasn't paid.

Then if we go to paragraph 21 at the top of page 308 -- so the court says, last sentence:

"There is therefore a real risk that enforcement of a judgment against a non-resident would be impossible, or at least considerably more difficult and onerous."

And 22, the critical point:

"That situation therefore objectively justifies a difference in treatment between resident and non-resident offenders."

So there was a clear finding that there was objective justification. Then at 24 the court says, "Well, that's not the end of it".

"Under the court's case law, however, where where a Community regulation does not lay down any specific penalty or infringement ...[and so on], the choice of penalties, which must in any event be effective, dissuasive and proportionate"

Then over the page at 26, the court reaches the finding that a national legislation question is manifestly disproportionate.

So there you have a case where a measure which was objectively justified was subsequently found to be manifestly disproportionate.

That really puts an end to any suggestion that objective justification as a matter of EU law is the same thing as proportionality. The objective justification is an anterior question which simply goes to the basic question of what is the aim and is the measure rationally connected with that aim. It has nothing to do with proportionality whatsoever.

To put this another way, what "objective" means is "purpose", what is the object of the measure in question. It has nothing to do with proportionality; it has nothing to do with objective versus subjective. It

is simply asking, "What is the aim of the measure in question?", no more, no less. It's a very basic question: is this a legitimate aim?

The question under object under Article 101 is the same basic question: what is the object or purpose of the measure? When the court says "objective justification" in the context of object, that is what it means and that is all that it means and it certainly does not mean proportionality in any shape or form. It is a prosaic question to do with the question of aim and is that aim legitimate and rationally connected with the objective.

It is therefore quite wrong -- I mean, we were accused of being heretical for saying that objective justification was different from proportionality. In my submission it is clear that it is heretical to suggest that objective justification is the same as proportionality. This case makes it crystal clear. So there is a fundamental legal error at the heart of what the CMA is saying. When you see objective justification, it is simply the question of purpose, object and whether that is rationally connected with the measure or agreement in question. It has nothing to do with proportionality.

In a sense, this isn't very surprising because

I have made this point a number of times and it hasn't really been responded to. The suggestion that in an object case, which is supposed to be the clearest most obvious, plain and manifest restriction of competition, that you would answer that question through a complex inquiry that is entirely fact-sensitive into various fine grains of proportionality, it's completely unsustainable and -- I have made this point repeatedly -- that is the antithesis of object. Object must leap out of the page, and if you are beginning down a line of inquiry that has to do with proportionality, you are clearly on the wrong track and you're about as far removed from object as it is possible to be. That case, if it is a case at all, can only be an effects case.

Now, the third point, which I think, Mr Chairman, is really your question, if objective justification doesn't mean proportionality, which in my submission is manifest, what on earth does it mean? You have put a number of points to myself and Ms Demetriou. Let me just summarise very clearly what Ping's position is. So we do say that the suggestion that we have this full-blown ex parte Fedesa fine grain proportionality assessment is completely and utterly mistaken. Again, that is the antithesis of object.

To reiterate the point I have made, all it means is that you have a plausibly pro-competitive legitimate aim that has a rational connection to the agreement or clause in question. No more, no less.

Now, we have given our examples in our trial skeleton at paragraph 135 as to how limited this inquiry is. We pick this up at paragraph 133 of our trial skeleton. So we make the point at 132, which is the point I have mentioned, which is that, the question is quite a prosaic one: "whether the rationale or relative agreement is plausibly pro-competitive or not."

Then we have a number of examples of that. So we say at 133:

"In Delimitis the Court concluded that an exclusive dealing obligation benefits both the supplier (which may be able to plan its production more efficiently) and the distributor (which may as a result be able to secure access to supplies and obtain better conditions)

Then a very, very important point over the page at 135. So in those cases all you're asking yourself is the same question: what is the object or purpose of the clause in question and is it something which is plausibly pro-competitive or not? To put the question another way, for something to be an object it must, as

we saw in Cartes Bancaires, be something that by its very nature restricts competition. It is something serious, obvious, plain and, if it is ambivalent or involves a multilayered fine grain analysis, it cannot be object. So in a sense the object bar for Ping is very low. If Ping can show that its policies have a legitimate plausibly pro-competitive aim of maximising custom fitting, that is the end of the object case.

Now, 135, an important point, once you have made a determination that the object in question is a legitimate one, in other words it is objectively justified, that objective is a legitimate rationally connected measure, what you then don't do and what you don't see in any of these cases is go on to say, "Well, there is this plausibly pro-competitive legitimate objective, but that objective could be achieved in any one of a number of other ways that would be more proportionate". You simply don't see that. So, for example, to go back to Delimitis, it would have been perfectly open to the court, on the CMA's analysis, to say, "Well, hang on, you don't need exclusivity. If you offer rebates to this distributor, that would be enough to incentivise the distributor to make the investment in the new market". The court doesn't even begin to ask those questions.

Again, one is taking essentially a quick look at the purpose of the agreement of the clause in question and does it have a plausibly pro-competitive aim, and the bar for the CMA in terms of showing an implausible pro-competitive aim is necessarily extremely high because they always have the option of bringing an effects case if there is ambivalence. So by imposing a relatively high bar on object, they are not shut out in any shape or form because they have the fallback position of an effects case if they so wish. So there is a logical reason why the bar for Ping in terms of showing plausible pro-competitive objective justification under object is a low one.

The CMA has a second option based on effects if it wants to bring that case. Now this isn't something exotic to do with franchising or exclusive dealing. We can pick this up in Metro itself, which is the authority on selective distribution. That is authorities 2, tab 35. So there were a number of distinct measures which were put before the court in terms of compliance with Article 101. If we can pick it up at paragraphs 26 and 27, please.

Does the Tribunal have that? So the obligation in question -- this is one of four obligations challenged -- was to supply for resale only to appointed

wholesalers or retailers. Then you see at 26 there was a question as to whether it exceeds what is necessary to maintain a selective distribution network and so on.

Then if you can read 27. It's really the bit in the middle, so:

"The Commission considered that the obligations imposed in this connection under the agreement do not exceed what is necessary for an adequate control and constitute a normal duty for a wholesaler since, in the case of consumer durables, the identification of the retailers supplied and of the goods delivered constitutes a normal requirement in running a wholesale business."

So that is exactly the analysis that we have advocated. You ask yourself whether the clause or agreement or measure in question has a plausibly pro-competitive rational connection with the system in question and no more, no less. It is a very prosaic question. Again, what you're not asking yourself is, "Well, are there any number of other ways in which you could achieve this by less restrictive means?" It is a simple, straightforward analysis that it is entirely consistent with object.

MS DEMETRIOU: Sir, could the Tribunal read the rest of that paragraph and the next sentence which is critical.

Mr O'Donoghue hasn't asked you to read it.

MR O'DONOGHUE: I am very happy for you to do so.

Again one sees it very clearly from Coty. In Coty there was a ban on the use of third-party platforms. All the court said is, "Well, it seems to us that Mr Coty, he doesn't have a contract with Amazon and therefore it is more difficult for him to regulate what they do with these products". It is a very simple and obvious point.

What the court is not doing is saying, "Well, Mr Coty could impose on his retailers a whole series of obligations in terms of their dealings with Amazon and that would be a less restrictive way than a third-party platform ban". The court doesn't even enter into any such discussion because, once you have understood that the requirement in question is normal, is legitimate, has a plausible pro-competitive rationale in the context of this selective distribution system, that is the end of the analysis. It cannot be a restriction of competition. If the CMA or any other authority wishes to make a more complex case, that can only be an effects case because, if one is in the realms of asking about these complex alternatives and fine graining, that is the antithesis of object.

Now, drawing all this together, in my submission it

is then very clear what one gets from paragraph 39 of Pierre Fabre. All the court is saying there is that if the measure in question does not have a legitimate aim, in other words it doesn't have an object that is justifiable, then there may be an object infringement. It is saying no more and no less than that. We entirely agree with that. Again, in a sense it is a truism. If you have a bad object and you do not have a legitimate aim, then there is an object infringement.

What you don't get and what is a clear error of law is to say that when you see objective justification in the context of object, what the court is really saying is, "Aha, it's all about proportionality". That is a clear error of law. The proportionality question, insofar as it has any bearing, goes to the anterior question under Metro which, again, is not something we're considering in this case.

THE CHAIRMAN: So how do you read paragraph 39, then?

MR O'DONOGHUE: Sir to repeat, you have my point that as a matter of EU law objective justification is not proportionality. That's the first step. Now, the second step is, well, if it's not proportionality, then what is it? As I have shown you in a series of cases, Delimitis, Pronuptia, Coty itself and in fact Metro, the court is asking a very simple question which is entirely

consistent with the question of object, which is: what is the purpose or the aim in question and is the clause or agreement rationally connected with that aim?

So it's a question of plausible pro-competitiveness and no more, no less. So to answer your question, sir, in very direct terms, when you see objective justification in the context of object, it is simply: what is the purpose of this measure and is that purpose something which reveals in and of itself harm to competition that is consistent with object?

THE CHAIRMAN: So you read that as saying that all agreements constituting selective distribution systems which don't have a plausibly pro-competitive aim are restrictions by object?

MR O'DONOGHUE: Sir, yes. One can see this, of course, in Pierre Fabre itself. The object in that case, the justification, the objective justification, was a sham and it isn't very surprising that that bad aim, that illegitimate purpose, the lack of objective justification, is something which would fail an object analysis.

Now, of course, in most cases selective distribution would not be an object, but it really goes to the question of the aim or the purpose. It has nothing to do with proportionality in any shape or form.

Now, just to complete this, if I can hand up something else, please.

THE CHAIRMAN: Can you at some point also answer the question that I have put to Ms Demetriou?

MR O'DONOGHUE: I am coming to that next, sir. I have it very firmly in mind. The short answer is it is entirely consistent with what I am saying and I will explain why.

So, sir, if I can hand this up. This is a report by the Commission on the e-commerce section. (Handed)

MS DEMETRIOU: Sir, I have to say, it was open to Mr O'Donoghue, if he was going to adduce new things in reply, to have given me this last night. I could have looked at it. It's really not the way to run litigation. We're at the end of a three-week trial and I'm not having a proper opportunity to look at this. It's simply not right to pull things out of the hat during a reply and there is absolutely no reason why this couldn't have been provided to me before court. I could have looked at it and addressed it in my submissions and it's really not acceptable.

MR O'DONOGHUE: I am very happy for her to come back. This was actually handed to me during this morning. It's not something I had up my sleeve.

THE CHAIRMAN: I will certainly give Ms Demetriou the opportunity to reply.

MR O'DONOGHUE: I can't argue.

Sir, it's slide 5. So it's a reflection on selective distribution case law, including the most recent case, Coty. So they say:

"No change of general approach.

"Step 1: Assessment of Metro ..."

Then you see Metro criteria.

Now, one of those, of course, is proportionality and we have always accepted that. Then they say:

"If the Metro criteria are satisfied, then the agreement falls outside Article 101 completely."

And then:

"Step 2: If Metro criteria are not met, then as a second step you must conduct an assessment of a restriction of competition by object or by effect."

That is entirely consistent with the interpretation I have advanced of paragraph 39 and is entirely consistent with the L'Oreal judgment which I have shown the court and which Ms Demetriou has not responded to. It is entirely consistent with paragraph 116 of Advocate General Wahl's opinion in Coty, where again he sets out the two-step analysis. The upshot of all this is very clear. If, as the CMA has done, one is trying to shoehorn proportionality into object under the guise of objective justification, that is a clear error of

law.

Sir, I see the time.

(1.03 pm)

(The luncheon adjournment)

(2.00 pm)

MR O'DONOGHUE: Mr Chairman, before the lunch-break I was summarising Ping's position on objective justification. To reiterate the point in its simplest form, we say that "objective justification" simply means something that is justified by reference to your object or purpose and that is all it means.

It is a very intuitive proposition, object is purpose or objective. In an object case you're asking yourself what is your purpose and does that purpose rise to the very high threshold under Cartes Bancaires of being a bad purpose or an illegitimate purpose, and that is all that paragraph 39 of Pierre Fabre means. No part of my case involves trying to wish away paragraph 39 of Pierre Fabre or indeed any other part of it. We rely on Pierre Fabre. We say there is a perfectly coherent and intelligent explanation of paragraph 39 and the judgment as a whole that is entirely consistent with the two-stage analysis we have always advocated for.

Now, what is very striking is I put in my closings, both orally and in written form, the L'Oreal case, which

makes crystal clear -- paragraphs 20 to 24 -- the two-stage approach: step 1, Metro; step 2, restriction of competition, is it object or effect.

We haven't had a single response from the CMA on L'Oreal. I took you in my closings to paragraph 116 of Coty, Advocate General Wahl, again, where he makes crystal clear question 1, Metro. If Metro are not satisfied, question 2, object. In that case -- I mean, this really is the nail in their coffin -- he said, "Well, if you had asked me about object, having not satisfied the Metro criteria, I would have said it is not an object". So that makes clear beyond any question that these are two separate stages and the answers to question 1 and question 2 may be different.

Now, we haven't had a single response on either of those two cases, and I made the point in my closings that if the CMA is to rely on the question of binding effect in section 60, their submissions implicitly but clearly would involve the Tribunal finding that L'Oreal and Coty were incorrectly decided. Given that they haven't addressed these cases, it's difficult to see where they go on that.

Now, sir, back to the two points you discussed with Ms Demetriou. One is paragraph 73 of Telefunken and the other point is the question of objective necessity. If

I can take those in reverse order. If we go back to Telefunken, please. If we can start, sir, at paragraph 67 because that puts the issue in context.

Sir, does the Tribunal have paragraph 67?

PROFESSOR BEATH: Sorry, what's the bundle reference again?

MR O'DONOGHUE: AEG Telefunken. There was an extract in authorities 2, tab ...

PROFESSOR BEATH: Tab 41.

MR O'DONOGHUE: 41, yes.

MR DORAN: I have it.

MR O'DONOGHUE: But there was an incomplete version of the case in 41. The chairman raised paragraph 73, so that's what I want to look at now.

If we start at paragraph 67 -- does everybody have that?

PROFESSOR BEATH: Yes.

MR O'DONOGHUE: -- there were two separate allegations. The first allegation was refusing to admit to the network and then there was a price-fixing allegation which was a second allegation. Then if you go down the page to 70, the court considers the distribution policy pursued by AEG.

Now, 71 is the important point. Mr Chairman, do you have that?

THE CHAIRMAN: No, I do not, actually. Sorry, I'm a bit

behind.

MR O'DONOGHUE: Mr Chairman, I can hand up a spare copy.

THE CHAIRMAN: I have it. It's okay.

MR O'DONOGHUE: (Handed) This is obviously important, sir, because you have raised the point and I want to be clear where we're coming from.

Let me quickly read some of it. So at 67 you see that there were two separate allegations, one, refusing to admit, second, price fixing. Then at 70 the court is considering the general distribution policy pursued by AEG. 71 is the critical paragraph because AEG had a rather ambitious policy and they said -- so halfway down:

"It was AEG's view that the maintenance of a high profit margin was absolutely essential for the survival of the specialist trade and that undertakings dispensing with a high profit margin must automatically be regarded as incapable of providing the very expensive services associated with the specialist trade."

Then over the page, 72:

"That attitude cannot be regarded s being in keeping with correct application of the selective distribution system, since the maintenance of a minimum profit margin for traders cannot in any case be, as such, one of the objects pursued by means of such a system."

So, sir, pausing there, in my submission what this is clearly addressing is that you cannot justify price fixing and high profit margins by reference to the legitimate objects of selective distribution. In particular you see in 72 that the guaranteeing of a minimum profit is not a legitimate object of a selective distribution system.

So AEG was running this frankly hopeless point that, "We need to have these very high profits price fixing because otherwise we cannot have selective distribution". Now, at 73, unsurprisingly the court gives that a pretty short shrift. It says:

"The Metro judgment refrred to above,on which AEG relies to justify its attitude, established in reality a causal link between the maintenance of a certain price level and the possibility of the survival ..."

I think, sir, it's the word "survival" you have focused on and I will come back to that.

" ... of the specialist trade in conjunction with an improvement in competition and permits a restrictions of price competition only to the extent to which such a restriction appears necessary to ensure competition at the level of the services the level of the services provided by the specialist trade."

Now, in my submission, the court there is saying two

things. It is saying first of all, as a matter of selective distribution, all the network entitles you to do is to impose qualitative criteria, and to that extent and that extent only you can limit price competition. What I am saying is that the corollary of that is you cannot then argue, given that legitimate justification of selective distribution, that on top of that you need to be able to fix prices or guarantee a minimum profit margin to justify selective distribution. So to fit that within the rubric I have been advancing before lunch, it is not a legitimate object, it is not objectively justified, in selective distribution to guarantee for your traders either a minimum profit margin or some fixed high profit margin.

That's all the court is saying. When they refer to "survival", all they're saying is, "Well, given that you can, through qualitative criteria and selective distribution, limit price competition on an intra-brand level to some extent, that is all you need". What you cannot do is turn around and try and justify effectively price fixing and say, "Well I need that to survive". That was obviously a hopeless objective.

Sir, I think the question in your mind, without being presumptuous, is, well, when you see the word "survival" there and you then look in the objective

necessity case law under ancillary restraints -- I think it's the parity point, if I may now come to that.

So on the question of objective necessity, which is the ancillary restraints doctrine, we have a number of submissions. So the core submission, sir, is that the concept of objective justification in the sense used in paragraph 39 of Pierre Fabre has nothing to do with objective necessity under the ancillary restraints doctrine and in fact it would not only be wrong, but is potentially dangerous to conflate those two separate things.

Now, a small but important starting point is there is no authority for the proposition that objective necessity and objective justification are fungible. All they have in common is one word.

The second point is the one I have taken you to before lunch and touched on briefly after lunch, which is that what "objective justification" means is something pretty prosaic: what is your purpose and is that purpose rationally connected to the aim of the clause or agreement in question?

To go back to the Belgian case we have seen, it was a legitimate aim. It was objectively justified to require non-nationals to have some security if they're found guilty of road traffic offences in Belgium. So it

is really a question of basic purpose: is this a purpose which has a rational connection with some objective that is legitimate?

Now, the ancillary restraints doctrine, by contrast, we say is something quite different and is addressing a more extreme type of situation because the premise of the ancillary restraints doctrine is that I have typically horizontal competitors who are colluding together, so under normal circumstances that collusion would probably be a cartel, but the way and the only way they get off the hook is by saying, "Well, this restriction may at first sight seem like a cartel, but you must understand that it is related to and ancillary to a main operation, which is a good thing". So the classical situation is where horizontal competitors agree not to compete and that is for the purpose of them forming a joint venture which, say, brings a new product to market.

The critical thing to understand in that situation is that there is a presumptive or, in reality, a restriction on the competitors. They are colluding. All the ancillary restraints doctrine does -- and this is why, sir, it is necessarily a strict test -- is it says, "If you want to fall outside the scope of Article 101 completely, notwithstanding what we see as

presumptive collusion, that is a difficult thing to do". It is in that context and that context only that there is a relatively demanding requirement that the operation in question should be difficult, if not impossible, to undertake without that collusion.

That is a very different situation to the present for a simple reason. In our case the whole question is whether there is a restriction to begin with, whereas in the ancillary restraints context there is a presumptive restriction, you have competitors who are colluding and then the question is, "Well, is that related to a main operation which has a pro-competitive purpose?" So it's a very different kind of analysis in our submission and we say that it would be wrong in principle and potentially quite dangerous to conflate objective necessity in the ancillary restraints context with the question of objective justification which arises in respect of object.

Now, sir, one final legal submission. So Ms Demetriou finished with a flourish on the Ker-Optika case. We are frankly surprised she has sought fit to raise that at this stage. There are two very simple reasons why it doesn't get her anywhere. The first reason, of course, which she conceded, is that it is a free movement of goods case and all the court is

addressing there is the question of proportionality. You have my submissions that when we are looking at objective justification, which is the question in this case, that has nothing to do with proportionality. So as a matter of principle the case doesn't assist her in any way because it is considering a completely different point to the question of objective justification which arises under the object case law. So that's the first point.

Now, the second related reason why it doesn't really assist her is that if, as I have submitted, all "objective justification" means is what is the object or purpose and is your purpose rationally related to or justified by a legitimate aim, then in this case the question of legitimate aim and suitability have been conceded by the CMA. That is paragraph 4.102 and 4.113, which I will come back to.

Now, the context in which, in paragraph 44 of Pierre Fabre, the court referred to the Ker-Optika case and the related German case -- it was in the context of Pierre Fabre's illegitimate aim and the court was not discussing the case, because it simply didn't arise, in the context of proportionality. Our case, as I indicated, the question of legitimate aim, has been conceded, so it simply doesn't arise. So we are

surprised that Ms Demetriou finished with this case because it doesn't get her anywhere.

So that is my first topic. The second topics which I hope will be somewhat briefer are the questions of causation and the question of benefits and disbenefits.

THE CHAIRMAN: Before you leave the law, I come back to this point that I find difficult, which is -- if you look at your flow chart, it's a question of how an SDS can fail at stage 1 because it fails the proportionality requirement that you have referred to there, but it can somehow get home under 101(3). That's the point that I find difficult.

MR O'DONOGHUE: Well, sir, it goes back, I think, to Mr Doran's question on Wednesday, which is that the assessment under the Metro criteria, it is not a full-blown competition assessment. As we saw on paragraph 27 of the Metro case, it is something much broader brush. So, I mean -- let's go back to Metro because this, I think, is a good illustration.

It's in authorities 2, tab 35 and it's paragraph 27. This is a point we looked at before lunch. Does the Tribunal have that?

THE JUDGE: Yes.

MR O'DONOGHUE: Sir, the court says there:

" ... [this requirement reflects] an

adequate control and constitute a normal duty for a wholesaler ...", and so on.

So the assessment at that stage, because it is not a competition assessment as such, is, "Well, is this type of obligation legitimate and reasonably related to the objectives of selective distribution?" As you see in the context of necessity which is the proportionality point under Metro, it is nothing like the sort of fine-grained assessment that one would conduct under 101(3). It is something which is far more broad brush and is, in a sense, almost banal, which is, "Is this connected with the normal operation of selective distribution?" So it is a much more truncated non-competition assessment. It's a different type of assessment. It clearly has some competition element in the sense that if one is -- if the requirement is that the criteria should be qualitative, in a sense that has a competition component.

But what you're not doing, because you were not at this stage assessing the question of restriction of object, is conducting the full-blown competitive effects and the balancing. That comes at a later stage. So the first answer is that it is a different type of assessment. Now, the second answer, of course, is that if you follow my steps, you can fail the Metro criteria,

so -- on this it would not be necessary -- but it is nonetheless possible, as we see in paragraph 116 of Advocate General Wahl and Coty, for it not to be an object.

Now, in that analysis one doesn't even get to 101(3) at all. You can fail Metro, not be an object, and then there is nothing to exempt.

THE CHAIRMAN: Yes, that's supposing it is an object.

MR O'DONOGHUE: Well, then the answer is my first, which is it is a fundamentally different type of assessment. It is not a competition assessment in the sense that you would look at competitive disbenefits, competitive benefits and conduct the weighing and balancing. So it is a different type of exercise.

MR DORAN: Sorry, that seems to suggest, though, if you satisfy those criteria, you have an incredibly broad-brush competition assessment without any look at, you know, is there anything obviously -- is there an obvious competition issue here because the criteria that you list in your question 1 don't appear to have a competition component as such.

MR O'DONOGHUE: Well, sir, that is right, but there has --

MR DORAN: It's only if you fail. So it's only if you fail that you get a competition assessment. If you pass, you --

MR O'DONOGHUE: Indeed. It is a different type of assessment, it's not a sort of free pass, because, as you see in Metro itself, a number of these obligations failed the Metro criteria. So they have to be related to selective distribution objectives and if there is any doubt you will fail -- so take the first step, legitimate aim. A very good example, of course, is Pierre Fabre itself because in Pierre Fabre the fact that the aim was a sham meant you lost on limb 1 of Metro and, on any view, you would have lost under object, even if somehow you managed to scrape through Metro. So if your question, sir, is, "Well, is there then a gap?", my answer is "No" because the selective distribution in terms of the legitimacy of the aim -- it is circumscribed in a relatively narrow one in one sense in that it has to concern qualitative criteria and it must be something that is rationally connected to and necessary for the operation of selective distribution.

Now, to go back to the point you made on Wednesday, "Well, could I sort of sneak in some resale price maintenance under Metro?", and the answer is emphatically "No". So it is not a sort of free pass. You see, indeed, from Telefunken itself that if you're trying to sneak in a bit of price fixing in the context of Metro, you're not going to get on very well. So it

is not permissive in that sense. It is permissive only in the sense that if the legitimacy of your objective is connected to and necessary for the operation of selective distribution, then you may well fall outside 101(1). But if you go beyond those relatively confined contours, then you do have to consider the question of restriction of competition and, if it's anything extraneous like price fixing or some sort of absolute territorial restraint, then you will almost certainly fail at the first hurdle, which is, "Well, this isn't rationally connected to selective distribution" and therefore we have to go on and consider the question of object.

MR DORAN: Sorry -- forgive me for pressing the point just for a second -- so you could say -- if you take the first arrow to the right on your table here, you could say "Yes" to that but actually "No" in the sense of you've got a bit of price maintenance in here so you could fall into 101 again.

MR O'DONOGHUE: Well -- so "Yes" in the sense that the terms and conditions of the operation of selective distribution in terms of the qualitative criteria, they would be fine, but this outlier in the form of price fixing, that doesn't get a wave-through.

MR DORAN: Okay. All right. Thank you.

MR O'DONOGHUE: That would obviously be subject to a full-blown assessment and would almost certainly be an object, as we see in Telefunken.

So this isn't at all permissive. It is permissive only in the sense that if you're doing something within the well-understood contours of selective distribution and nothing else, then you may well fall outside 101(1). But if there is any doubt as to the legitimacy of your aim or that you're going beyond the qualitative criteria in Metro, then you have failed question 1 and you're fairly and squarely in the territory of restriction of competition.

In that sense the two steps, they make logical sense. There is no gap. Even in relation to object, as I indicated, if for some reason the CMA could not find an object, they always have effects. So there are a series of sequential questions and steps and there is no gap at any stage.

MR DORAN: You don't require a sort of Metropole-type approach where you can drop in having -- because you don't satisfy the criteria?

MR O'DONOGHUE: No.

MR DORAN: No. Okay.

MR O'DONOGHUE: So it's a perfectly coherent scheme and what is incoherent is to introduce proportionality into

object because you have just done that bit --

MR DORAN: Indeed. I am with you there. I understand that. Thank you.

MR O'DONOGHUE: Sir, moving on to causation. I do need to spend a bit of time on this because it is obviously important to the case and a number of things have been said in relation to Ping's submissions that are not correct.

Now, to recall the starting point, go back to the Decision, please. I just want to catalogue the concessions that we say have been made in relation to at least certain aspects of causation.

So starting at 4.102 -- we have seen this. I can take it very quickly.

"The online sales ban ensures that consumers can only buy in-store or over the phone. This provides account-holders with an opportunity to promote custom fitting."

Then 4.113 -- sorry, yes, there is a point about limiting effect which is right to mention.

At 4.113:

"Overall, whilst the CMA accepts that the online sales ban is a suitable means to promote custom fitting, it is likely to have only a limited effect in increasing the rate of custom fitting by Ping's account-holders."

Ms Demetriou has taken you to the next sentence which I'm very happy for you to read. Then 4.209:

"The CMA finds that Ping has established a limited causal relationship between the online sales ban and the benefits associated with custom fitting to satisfy the first exemption condition."

The last reference, 4.222:

"Given the above, the CMA finds that there is likely to be a direct causal relationship between the online sales ban and the benefits associated with custom fitting ..."

And they go on to make the point about it being limited.

So those are the concessions. Now, linking that back with what we said on objective justification, we say that based on those concessions it is impossible for the CMA to run a case under object that Ping does not have objective justification because they have, subject to the caveat of it being limited, conceded that the internet policy is legitimate in terms of its aim and is suitable to achieve the objectives of causing increases in custom fitting, albeit they say it is limited.

We do make the point that with those concessions they run into a brick wall on object because they have conceded, albeit to a limited extent, that the aim put

forward by Ping as reflected in the internet policy is legitimate and as a matter of causation increases custom fitting and custom fitting is, as is common ground, a manifestly pro-competitive measure.

So we say there is a sort of logical impossibility at the heart of this case which is with those concessions you cannot bring a case on object. You may be able to bring a case on effect, but they're not bringing such a case and we don't need to deal with that.

So whatever the contributions as a matter of causation made by other factors, these concessions remain and it is this point that the Tribunal must focus on. The fact that there may be other reasons that add to the internet policy is irrelevant because the point of principle and the point of positive direction has been conceded and they are stuck with those concessions as set out in the Decision.

The second point is that the only aspects of effectiveness that the CMA has made any attempt to quantify or at least flesh out in the Decision are those that Ms Demetriou has showed you at paragraph 4.112. It's internal pages 104 and 105. So there are three reasons given and we have at all stages attacked each and every one of these reasons advanced. For your

reference, sir, it is paragraph 81 of our skeleton and this is replicated in our closings. We suggest that these measures are effectively dead in the water because the CMA has advanced no evidence on any other point.

Now, I do accept in the Decision that there is reference to other factors, some of which are now trailed in the CMA's closings and in Ms Demetriou's submissions, but the point we're making here is that, in terms of something being fleshed out or articulated or even an attempt at something approaching quantification, this is essentially all you have.

The third point is we were criticised for requiring the CMA to conduct some wide-ranging inquiry into the position of other manufacturers. We say that criticism is unfair. We're making a very simple point, which is that if, as has been advanced, the case is that Ping's policies, particularly on custom fitting, are different to other manufacturers, the Tribunal is in a very difficult position in that it has no idea what terms and conditions and what policies the other manufacturers impose.

If the Tribunal is to conduct and compare and contrast and conclude that Ping is so different that those differences explain the difference in custom fitting rates, there is critical material the Tribunal

would have needed or would certainly have been assisted by that has simply not been gathered.

It is clear from the evidence of Ms Aspinall -- and I put this to the Complainant -- the Complainant offered to give the CMA copies of other manufacturers' terms and conditions -- it would obviously be unlawful for Ping to have such information -- and for reasons that are entirely unexplained, the CMA apparently did not take up that offer.

Ms Aspinall went as far as to suggest, "Well, we were only interested in internet policies. Why would we have looked at anything else?" In my submission the answer is obvious, that they needed to look at other parts of the manufacturers' policies and terms and conditions if they're to advance a comparative point that Ping is so different to all the others.

I did use the phrase "black hole" and the Tribunal has a black hole because it has simply no cardinal or metric or even a document on which it is to conduct this comparative exercise. At most what you have are snippets from random witnesses without any underlying documentation. This is a significant gap. It has nothing to do with Ping's position on the alternative measures. It is not information, as I said, that Ping could properly lawfully acquire. That itself might be

a competition infringement. You shouldn't have your competitors' terms and conditions and their price-lists and so on. So there is an evidential gap on a significant scale that makes the Tribunal's task very, very difficult indeed.

If, as it does, the CMA is to rely on these points, it was at least incumbent on it to take up the offer from the complainant to gather the basic terms and conditions. [redacted]

It certainly doesn't appear in the Ping case file and it seems it was never gathered. Ms Aspinall gave the impression that there was no earthly reason she would have been interested in that information and we don't understand that.

So where this leaves the CMA in terms of causation is really no more than what is set out at paragraph 4.110 of the Decision, which Ms Demetriou took you to. The way in which that case has been put is through opinions of a smattering of non-expert witnesses as to whether they accepted this or that and this or

that might or might not have an effect on Ping's custom fit rates and we say that is a plainly inadequate way to put the case on causation.

The fourth point is, in my submission, the critical point, and this is detailed and I apologise for that, but I must make this point. We say that as a matter of evidence, whatever the legal test is, Ping has put together an overwhelming body of evidence showing that the internet policy is the single-most important, indeed lynchpin cause of its custom fit rate differential.

I am going to quickly give you the references, but it is very, very important in my submission that the cumulative impact of this evidence, virtually none of which was contested in cross-examination, is taken into account by the Tribunal because we say it is an overwhelming picture.

So starting with the general position, the first reference is Mr Clarke's statement which is B2, tab 7, paragraph 20. Sir, what I am going to do, unless the Tribunal would like me to do it otherwise, is give you the references and the quotations. They will then be on the transcript and the Tribunal can go back to them at a later stage. So there is Clark, B2/7, paragraph 20:

"If Ping custom fit clubs were sold online I would

expect that the custom fitting rates for Ping golf clubs would go down significantly."

Challis, B2 tab8, paragraph 9, he refers to the investments made by Ping:

"These are all factors in Ping's success in custom fitting, but in my view a key element is the internet policy, which is the most effective way to ensure that retailers have the opportunity to promote custom fitting to customers."

That's some general points.

The next point is the question of impacts on behaviour as a matter of causation, John Clark 1 Bundle B1 tab1, paragraph 49:

"The level of investment by retailers into the promotion of custom fitting will inevitably be different (smaller) if online sale of golf clubs which are not dynamically custom fitted were to be allowed."

Dave Clarke, B2, tab 7, paragraph 19, he says:

"At Clarke's Golf we have invested in a new and fully equipped launch monitor, we employ experienced and highly trained fitters and we have dedicated considerable space in our shops to custom fitting. High volume internet retailers do not have these investments. The obvious risk is that we would do the custom fitting and the consumer would then go to an online retailer who

would take advantage of our efforts and investments by making the sale. This would simply be unsustainable for a retailer like Clarke's Golf."

Then Mr Holt, his cross-examination, Day 2, page 107, starting at line 24:

"No. I've actually highlighted a separate issue, which in my view is equally if not more important, which is the importance of the alignment of incentives between Ping and its retailers. So this is not a free riding concern; it's a concern around the incentives that the retailer would continue to have, if you remove the online sales ban, to spend as much effort as before in trying to encourage -- and carrying out the investments to fit its staff -- sorry, to train the staff -- but also to carry out the fitting process.

"The reason I say that's not necessarily a free riding problem, but is nevertheless a problem in terms of achieving high custom fitting rates, is that it may be that that retailer would still retain a sale, it might do so online, so it's not technically characterised as a free riding problem, but it is an incentive alignment issue which has a direct consequence for custom fitting rates."

Then turning to the question of provision of custom fitting, Clark 1, B1, tab 1, paragraph 50, talks about

the increased risk of distributors stopping providing custom fitting at all, saying at paragraph 58 that small retailers are particularly vulnerable.

Mr Challis, B2, tab 8, paragraph 19:

"If golf clubs become commodity products that are not custom fitted as standard, for example through an increase in online sales, many retailers will go out of business."

Challis 2, B2, tab 9, paragraph 7:

"For the reasons set out above our custom fitting service is not simply sustainable unless, in the vast majority of occasions, I sell to the customer the clubs after a custom fitting."

Then importantly there is a large body of evidence on the internet policy changing the behaviour of customers and retailers. Mr Hedges, paragraph 14, B2, tab 4:

"Ping's rate is higher because in order to purchase Ping golf clubs you must provide specifications via a custom fit process that the internet policy is designed to support."

Hedges 1 paragrapgh 20,B2, tab 4:

"[Online sales are good for those who want high volume.] This is why in my opinion Ping's internet policy is definitely an important contributor to Ping's

success in custom fitting."

Paragraph 23, B2, tab 4:

"This policy allows us to reach a wide audience of potential consumers and encourages our customers to come into the shop to get properly fitted."

Paragraph 14 of Hedges 2, B2, tab 5:

"Furthermore it is my view that the increase in custom fitting across brands has been driven to a large extent by Ping's focus on and promotion of fittings which has clearly had the effect of driving more customers into stores."

Mr Sims, paragraph 15, B2, tab 6:

"the internet policy operated by Ping is the most effective measure a manufacturer can use in an online world to ensure that custom fitting of its clubs via a face-to-face interaction takes place or, at the very least, that there is a phone conversation prior to purchase."

Paragraph 26 of Sims:

"As such I believe that Ping's internet policy is significantly more effective in promoting custom fitting than if Ping were to require retailers to implement the alternative measures put forward by the CMA."

Mr Clarke, B2, tab 7, paragraph 8 -- this is Dave Clarke:

"At Clarke's Golf we agree with Ping's internet policy in respect of clubs. It is doubtless a key factor in increasing Ping's custom fitting rates across the market and is the strongest possible message to encourage consumers to take advantage of the expertise of our professional fitters."

Mr Holt, at paragraph 7.3.2, makes the point that consumers are subject to a present bias that they will choose what is the most convenient thing for them in the short term even if it is not in their best long-term interests. That was in the context of the internet policy and its effects on behaviour.

He gave further evidence at 7.3.3 on behavioural economics and the concept of the nudge phenomenon.

It shows that customers will respond to small stimuli, such as a phone conversation.

Then at 8.3.4 he sets out reasons based on behavioural economics which show that consumers will be particularly stimulated to buy a product if it is associated with something for free, such as custom fitting.

Now, I did cross-examine Mr Mahon on a very explicit basis on the causation point and I put the very word "causation" to him on a number of occasions. Now, just to pick up -- Ms Demetriou sought to make a forensic

point on the back of Mr Mahon's cross-examination and I just want to pick up on a couple of points.

Now, the starting point is what I said in closings on Wednesday, which is that Mr Mahon, when I put the causation point to him, set out a three-stage process whereby consumers would be driven to the retail store for a custom fitting. So stage 1, you will recall, is the message on the website, "You cannot buy this online. Click here for a free custom fitting". So that is the first driving mechanism.

The second stage is, if you are not persuaded to book a custom fitting there and then, there is a designated telephone number to call, and if you call that number there will be a further conversation by which you will be persuaded or attempted to be persuaded to come in for a custom fitting. That is a second mechanism that drives the consumers to the retail store for a custom fitting.

Now, there is a third stage which was in a sense news to Ping. He says in paragraph 30 of Mahon 1 that they have a sort of manual workaround whereby, if the customer is still not persuaded of the benefits of custom fitting, there may be a facility to check the product out manually.

Now, from Ping's perspective that is probably not

something that they should be doing, but the critical point is that he makes the point at paragraph 30 that that mechanism, which he calls "obstructive" -- that was his word in the statement -- leads to much lower online sales than the online sales of Ping's rivals. We have seen from his numbers that the figure is about 1 per cent for these telephone sales.

So there, in my submission, we have uncontested evidence from their own witness about the causative mechanism and he does give a relative position. He makes clear that even through this third step of the workaround, which he says is "obstructive", the rivals' online sales are appreciably higher. So that is the critical point.

Now, just to pick up on a point Ms Demetriou made in relation to his cross-examination. So we can pick this up on Day 5, if the Tribunal has that.

PROFESSOR BEATH: Which Day? Sorry.

MR O'DONOGHUE: Day 5, sir.

PROFESSOR BEATH: Day 5, right.

MR O'DONOGHUE: So for the Tribunal's note, my cross-examination on the point of causation begins on page 51 and that's the three steps that I took you to. I do emphasise the point that I explicitly conducted my cross-examination on the basis of using the word

"causation" to be fair to the witness because it was the CMA's witness and I wasn't sort of shadow-boxing or trying to, in an oblique way, trick him into giving up the game on causation. So I put it fair and square to him as a matter of causation. You will see his evidence there, which I have summarised.

Then if we go on to end of page 57 and top of page 58 -- so I said to him at page 57, line 21:

"But there is a critical difference which you're overlooking, which is apart from this workaround [which is paragraph 30 of his statement] which I think you agree is obstructive and minuscule or minor, if you're interested in Ping, this policy drives you to the store --

"Answer: Yes, absolutely.

"Question: -- otherwise you cannot buy Ping.

"Answer: It's unique to Ping, yes, in that it will drive you into store."

It was suggested that the points we put in closing in relation to Mr Mahon were taken out of context. I would suggest the context is crystal clear and he is a devastating witness for the CMA on causation because he is their witness.

Now, a few final references, if I may, and then I will move on to my final point. There is clear

evidence from the Tribunal that the internet policy changes behaviours. So starting with Clark 1, B1/1, starting at paragraph 41, he sets out the investments that Ping makes in custom fitting, in the form of training, free demo days, fitting irons and so on. Then at 48, the critical point:

"It would not be economical for Ping and for its retailers committed to fitting to make these investments and provide such facilities if a potential customer could obtain a custom fitting in a bricks and mortar store and then order the clubs online from a retailer who makes no or little investment in custom fitting."

Then at 67 a similar point and also at 103(g) of Clark 1 and a further point at paragraph 46 on his returns policy because the point he makes is an intuitive one. He says that Ping has a returns policy that is different to the other manufacturers today, but he does suggest that Ping would have to abandon its returns policy at paragraph 68, in the event of a transition to online selling.

So pausing there, one of the reasons in our submission why it's slightly unfair to Mr Clark and to Ping to put the CMA's causes on one side of the balance sheet and the internet policy on the other is that there is clear evidence from Mr Clark that, because the

internet policy is the lynchpin, if you remove that, there is a knock-on effect on the other things that Ping does, so, in other words, one cannot disentangle the internet policy from these other factors because these other factors may not exist or continue to exist in the same form they do today in the absence of the internet policy.

So to put the point in another way, the weakness in the CMA's causation point is that it is a static assessment and the question for the Tribunal is a dynamic one in the counterfactual. If you remove the internet policy, what, then, is the impact on all the other things that Ping does in relation to the promotion and maximisation of custom fitting? We have put in a range of factual and expert evidence on the question of incentives, on the question of changes. The CMA, it was perfectly open to them to put in expert evidence contesting the points about incentives, behaviour, and we have nothing.

We do say that that is a weakness in their case, if they're advancing these other causes, and we do say that the CMA's static case is an unrealistic one because it has to be a dynamic assessment based on a counterfactual of the internet policy no longer existing. You have clear evidence from Mr Clark on multiple fronts, all of

which, by the way, were not contested in cross-examination, that there would be a knock-on impact of removing the internet policy on what Ping does and on what the retailers do, so there would be a change, an adverse change, to incentives and behaviours, and none of this has been contested.

If the question is one of materiality, we say we have more than discharged that burden. There is a large shopping list of essentially uncontested evidence. As I said, most of this was not even cross-examined on, which on a cumulative basis gives rise, in our submission, to an overwhelming picture that the internet policy is the most important factor that is supporting the differential between Ping and its rivals.

One final point: Mr Clark, at paragraph 67 of Clark 1, which is B1/1, he does make the point that the consequences of the Decision are that Ping has to start selling standard-fit clubs or has to offer limited variations in so-called custom fit clubs online and he does say that this is a fundamental change to Ping's current business.

So we do make the point about materiality and we say that, by contrast, the factors mentioned in paragraph 4.110 of the Decision in quite general and non-specific and certainly unquantified terms really

don't get the CMA anywhere.

Now, a final point in terms of what Professor Beath calls the "thought experiment" and how are we to get a handle on this. I touched on this in my closings, but it's to reply to Ms Demetriou's submissions on this point. In our submission the Tribunal doesn't need to speculate in great detail about the counterfactual because you have very clear and convincing evidence as to how this brave new world would look.

You have evidence from Mr Patani, Mr Lines and the Complainant. These are businesses, largely online, which together have a combined turnover of almost £20 million. That turnover is not far away from Ping's total UK hardware sales. These are businesses whose only reason for existing is to make high-volume sales, and online business, albeit ones supported by a bricks and mortar shop in each of their cases, can only survive on the basis of the economies of scale and scope. If the only weapon is price, the only way you succeed and survive in that market is by having the lowest possible costs and that requires you to have the highest possible volumes.

Their commitment, therefore, is to quantity and their online sales facilities are designed to maximise volume and quantity and to make the process of

increasing quantity and purchasing as easy and quick as possible.

Look at their ratios. They have well over 90 per cent of online sales and single-digit percentages of in-store custom fit sales. In our submission it is common sense and clear how these businesses and others like them, because there will be others, would act if there was no internet policy but there was some vague message to do with promoting as a contractual matter. It is obvious that they would seek to maximise quantity over quality and equally obvious that custom fitting would simply be an obstacle that they would easily either disregard or pay lip service to. You recall Mr Lines' statement, "Custom fitting is not my responsibility". We do not speak of these people in derogatory terms. We are simply recognising the reality of their quantity-based, high-volume business model.

[redacted]

This is someone who is in the Ping distribution network and the only purpose in bringing Mr Lines and Mr Patani forward is that these are companies who have bricks and mortar outlets, substantial online businesses and these are put forward to the Tribunal as the exemplars of the brave new counterfactual world in the absence of Ping's internet policy.

Now, in this context Ms Demetriou says, "Well, you could restrict the number of dealers". Now, leaving aside whether that would be lawful, again, it fundamentally misunderstands the economics. The question is not the absolute number of predominantly online retailers; it is a question of scale and scope. All one needs is literally a handful of largely online businesses who would be vying to achieve the highest possible volume of sales and therefore the lowest levels of economies and there will be a race to the bottom among these high-volume performers.

So it isn't a question of there being an absolute number of those. The question is what is the nature of their businesses and what is the commercial check model

they will pursue and it will be high-volume sales, quantity and not quality.

Again, we do not speak of Mr Lines and Mr Patani in remotely derogatory terms. That is their choice as to how to conduct their business. We have been critical of the Complainant [redacted]

Again, if someone inside our network with a strict obligation is commercially motivated to ride roughshod over it and ignore custom fitting, not do any promotion, imagine the brave new world in which companies like that, in the absence of the internet policy, have to do something warm and cuddly to do with promoting custom fitting. It is obvious what they will do and it is obvious that there is no effective contractual means or device by which Ping could remotely control their behaviours.

I come to my final point, which is the scale of the benefits now being pursued by the CMA. We are slightly at a loss to understand what exactly is the CMA's position because we started in this proceeding on the basis that the CMA considered that there was significant

demand for online sales and therefore there would be a lot of free riding retailers and consumers out there who would benefit from the Decision. The figure bandied around is that there were something like 14 to 19 per cent [sic] of consumers out there just waiting for a free ride.

Now, we have had a very strange spectacle in closings whereby the CMA has effectively run away from that case because it sees its dangers and is now trying to convince the Tribunal that in reality there will be next to no one and Ms Demetriou in some ways has tried to ride these two horses in a way that is fundamentally incomprehensible.

Now, starting with what the Decision says -- we can pick this up at 4.47. At that stage the CMA was saying that the internet is an important sales channel both within the UK and the EU more generally. So they seem to be teeing up a strong free rider case. But in the face of unequivocal evidence from Ping's retailers and actually, also, the CMA's retailers that the internet policy -- its removal will cause extensive free riding, damage Ping's retail network and cause consumer harm, in its closings and orally this morning the CMA has advanced a genuinely surprising argument.

The CMA's case now is that there will be no adverse

effect on Ping's distribution network and indeed free riding will not materialise as a problem at all because of conversion rates, the limited portability of prescriptions and the unexplained ability of Ping to limit its online sales by certain distributors.

Now at paragraph 213 of their closings the CMA says:

"It follows that, although there is some portability of custom fit specifications, this is limited. This is a significant point because, without such portability Ping's free riding concerns cannot arise."

Now, we say this is a very, very striking conclusion indeed because the CMA's case is that each and every consumer who will buy online will be a free rider. That is the only possible rationale for this Decision. But without such portability it now says that there may be no free riding concern, but the consequence of that, of course, is that there will then be no online purchasing.

We are genuinely baffled by this argument. It is not what the Decision says. The CMA is correct, there will be no free riding, but it is also correct that there will be no purchasers who benefit from this Decision. The Tribunal might well be tempted to ask, what is the point of the millions of pounds spent in the last several years by both sides? Why has public money been devoted in this way? Why have you had a lengthy

trial with more than a dozen witnesses to no apparent end?

The reality is that, faced with overwhelming evidence of harm to Ping's distribution network, the CMA has been forced in an opportunistic way to erode its own argument concerning the benefits of the Decision and we say they are left standing on a precarious and slender ledge.

Now, just to unpack some of the supposed benefits of this Decision -- so Ms Demetriou made a plaintiff cry for the online shopper; "Why shouldn't they be allowed to buy online?", she said in her closings, "They've had a custom fitting. They know their specifications ...", and so on, but the Tribunal in our submission should ask itself what precisely is the disbenefit that this poor shopper would suffer.

The first is an inability to some extent to use price comparison websites and you have our submissions on how limited that point has now become. It ignores all the other ways in which consumers can and do compare prices, more obvious ways, and even in respect of price comparison services it is a limited and comparison point.

It is connected to a further important point, which is that the CMA repeatedly refers to the internet policy

as a "ban", but it is not a ban. Advertising is possible of products online and Ping is not banning. It is being proportionate.

So the second alleged disbenefit to this ever-shrinking group of consumers is that at the point of purchase the buyer faces the inconvenience of not being able to click to buy. Ms Demetriou says that instead they have to traipse to their local bricks and mortar store to buy the club. With respect, that is entirely incorrect. The consumer in that case has two choices. They can pick up the phone and order over the phone or they can order online. When they're ordering online, it is important -- when one is thinking about this in terms of the drop-down boxes, it is not as simple as the one click on Amazon. It will be a complicated, iterative and lengthy process of populating a series of drop-down boxes. [redacted]

it isn't very difficult to make a telephone call and conclude a sale. So we don't understand the question of inconvenience and if there is a disbenefit in terms of convenience, it is truly a marginal one.

The third point made by Ms Demetriou is the question of distance selling. She said, "Well, if you saw a good price 100 miles away, you couldn't buy from that

retailer". Again, we say that is incorrect. That is not what the internet policy says. A consumer sat in London can buy Ping clubs from a retailer in Scotland today. They simply have to do so over the phone rather than look on the internet. Their clubs will be shipped to them in London typically within 48 hours and, again, this shows the proportionality of the internet policy.

All that really leaves is two people: the clumsy golfer who has driven over his or her clubs and the Spanish millionaire who wants a second set of clubs for his villa in Spain.

Now, in our team we have referred to these examples as the "unicorns" because we are not aware of them actually existing, but even taking them seriously and on their own terms, if the individual in question, as Ms Demetriou has suggested, has had a custom fit the week before or in recent proximity and then drives over their clubs, of course they can replace those clubs through Ping. All they have to do is get the unique barcode number on their Ping club, ring up the retailer and/or Gainsborough and that will be replaced in double-quick time. They can buy from the retailer of their choice in that way and the same is true of the Spanish millionaire.

So the highest the CMA now puts its case is that the

very small number of customers who will be able to free ride, because she now says free riding won't materialise, will have the benefit of being able to fill out their specifications online in these drop-down menus rather than reading them out over the telephone. If that is the long and short of this case, it has been a complete and utter waste of time and public money to get to this pointless conclusion.

It is about as thin gruel as one can really imagine and we do say that in riding these two horses, the CMA -- they really can't have it both ways. They cannot proactively argue in closing that there will be little or no free riding, few or no purchases online and no benefit for those purchasers beyond the convenience of clicking online, but also say that the internet policy is disproportionate and unlawful, and the CMA in reality has argued itself into a blind alley.

Now, just before I sit down -- so you have these illusory benefits in our submission on the one side. Then on the other side you have to look at Ping and the impact on Ping. Now, Ping has strived for more than 50 years to pioneer and develop custom fitting. Through the genius of Karsten Solheim and his son, John Solheim, it has driven competition based on quality to the highest possible levels. This has benefitted consumers

in their millions. It has caused Ping's rivals to up their game and to try to copy Ping to some extent and it is the ultimate compliment to Ping that everybody now sees that Ping is right.

So fundamentally what this case comes down to is whether Ping should, as it has done for the last five decades, have the right to decide how to run its business. It is clear beyond any question in these proceedings that Ping's only objective is to increase competition, product and quality. It has been enormously successful in doing so. That is on any view a weighty and worthy and pro-competitive objective and it is about as clear an expression of competition as you can imagine and the CMA now says that Ping's business should be turned on its head. But for what, set against these marginal or nugatory benefits that in closings are now advanced by the CMA?

We do say this is an exceptional case. You have a family company that has pioneered innovation and spent 50 years developing and maximising it. It has done so undoubtedly at the expense of short-term profits. The only reason it has done this is because of its total commitment to competition based on quality. This Tribunal may never again be faced with such exceptional circumstances. If the bar is high, only companies like

Ping, with the highest possible levels of commitment and integrity, can meet it.

Reply submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, may I deal with the two new authorities that were handed up? The first is the Pastoors case. If I could just ask the Tribunal to take that up. So you will recall that Mr O'Donoghue submitted that this establishes -- he says it put an end to any question and establishes that objective justification is not proportionality.

Now, we say it does no such thing and one only has to look at the structure of the judgment. So if you turn back to the relevant paragraph -- so it's 22 to 24. So what the court is saying there is that that situation therefore objectively justifies -- they're talking about the factual situation, and the court says that that objectively justifies a difference in treatment, and they say because it is appropriate to achieve the aim. Then they say:

"Such difference [...] is in conformity with point 2(b) of the resolution."

Then they go on to say that, however, the appropriateness is not the end of it because there is another limb which is necessity. So this is fully compatible with our submissions. You can see that in

the structure of the judgment. Sir, members of the Tribunal, we are concerned by this point because it would be quite wrong for the Tribunal to go away with the impression that objective justification and proportionality are different.

We say that it follows -- one can see from Pierre Fabre itself that the reference "objectively justified" must be a reference back to proportionality. But had this case been put to me earlier, then I would have come back with a whole host of judgments that say the opposite. Some of them are already in our submissions. You see that in our closing. Ker-Optika is another example. We say that this point is simply an incorrect one.

The other document, which is the e-commerce and EU competition document, the Tribunal sees from the very first page that -- sorry, on Pastoors there was one more point I wished to make, which is that Mr O'Donoghue uses this as the basis for saying that objective justification just means you look at the object. But of course it's very important here to bear in mind that, as you see from paragraph 4.47 of the Decision, the object found by the CMA is preventing this passive sales channel, so that's different to Ping's aim in trying to justify it. The object is prevention of this passive

sales channel.

Now, moving on to this document here, you see that -- on the first page:

"The views expressed are purely personal and do not necessarily represent an official position of the European Commission."

When we researched over lunchtime who the author is, she's not even very high up in the European Commission. She is a case-handler. So we say it's really a measure of the other side's desperation that they would hand up this unauthoritative document in their reply.

But if the Tribunal is interested in the official position of the European Commission, then we have set that out in material terms in our defence, which is bundle A, tab 3, at paragraph 85.2. I don't ask you to turn it up now, but that's what the Commission says officially.

Finally, because again it's important that the Tribunal is not misled as to the CMA's case, Mr O'Donoghue said at the very end of his submissions this our case is confined to that cohort -- the only benefits would be the cohort of consumers that are free riding, but, sir, members of the Tribunal, you will have well in mind that that isn't the only cohort of consumers that the CMA says benefits from lifting the

ban --

MR O'DONOGHUE: Sir, I'm sorry, there is no reply on this point.

MS DEMETRIOU: I will finish it in five seconds. In particular, there is the 10 to 20 per cent of Ping customers who don't want a custom fitting. So it's wholly wrong of Mr O'Donoghue to proceed in reply on a misstated basis for the CMA's case.

Now, those are the only submissions I wanted to make which arise out of Mr O'Donoghue's. Unless I can assist any further, those --

THE CHAIRMAN: On this document --

MS DEMETRIOU: Yes.

THE CHAIRMAN: -- you say that the step 1/step 2 analysis is wrong. I appreciate that it wasn't exactly what was done in Pierre Fabre, but ...

MS DEMETRIOU: Yes, so what we say is wrong -- so we say that step 1 is unhelpful to Mr O'Donoghue because it clearly says that proportionality is part of step 1. But we say that it doesn't seem to be to us fully consistent with paragraph 39 of Pierre Fabre because what paragraph 39 says is that you carry this out -- you apply the Metro criteria and, of course, one of the -- the last final Metro requirement is that the criteria and the selective distribution system don't go further

than is necessary, ie that they're proportionate, and if you don't satisfy those criteria, you're an object restriction. So we say -- this is a little bit unclear, but we say insofar as it suggests something different, then it's wrong. It's just the views of a Commission official.

THE CHAIRMAN: Okay.

Thank you very much.

Thank you both for your excellent submissions and for all the work that your respective teams must have put into them. In terms of housekeeping, if you have any corrections to make on the transcripts, could you do so by next Friday and could you also supply to the Tribunal Word versions of the skeleton arguments and the closing submissions.

Thank you very much, then.

(3.15 pm)

(The hearing concluded)