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IN THE COMPETITION

Case No.: 1380/1/12/21

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Monday 1 November – Friday 19 November 2021

Before:

The Honourable Mr Justice Marcus Smith
Bridget Lucas QC
Professor David Ulph CBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

BGL (Holdings) Limited

Applicant

v

Competition & Markets Authority

Respondent

A P P E A R A N C E S

Daniel Beard QC and Alison Berridge (on behalf of BGL)
Marie Demetriou QC. Ben Lask and Michael Armitage (on behalf of the CMA)

Digital Transcription by Opus 2

Thursday, 18 November 2021

(9.30 am)

Closing submissions by MR BEARD (continued)

THE PRESIDENT: Mr Beard, you had a fourth point that you were saving up for us.

MR BEARD: You ask with a sense of anticipation, but I feel like I am going to let you down, sir.

So fourth point: yesterday, as you will recall, I was dealing with the contextual points that Ms Ralston had made, none of them saying this is the only metric but pointing out that the CMA just had not contextualised the promotional deals issues that they were relying upon.

The next one I want to go to is just what has been referred to as the, sort of, share of possible promotional days table, if I may.

If we pick it up in our submissions, you will see it at paragraph 353 I think is the relevant reference -- I am sorry, no.

MS LUCAS: Mr Beard, do you mind if I just take a pause?

I am struggling to sign into Opus for the realtime transcript.

MR BEARD: Just one question. Does your domain name at the top have uk05 or does it have uk60?

MS LUCAS: Even that may be above my pay grade.

1 MR BEARD: I am so sorry. The only reason I ask is because
2 that has been a problem that we have all encountered,
3 that we found we were using the wrong one.

4 MS LUCAS: I am sorry.

5 THE PRESIDENT: It may be a general problem because I am
6 trying to sign in and the sign-in worked but I have a
7 ... (Pause)

8 MS LUCAS: We are in, thank you. Sorry to take you out of
9 your stride.

10 MR BEARD: No, absolutely no problem at all. I will just
11 check that the Chairman is in as well.

12 THE PRESIDENT: I am good to go, thank you.

13 MR BEARD: Can I just check, Professor Ulph, are you also
14 signed in okay?

15 PROF ULPH: Yes.

16 MR BEARD: Perhaps I will start again.

17 If we could go to {A/9/102}, please, on the EPE,
18 since we now all have it, just to recall what we are
19 talking about, this is the table -- it was previously in
20 Ms Ralston's first report, but it is replicated here.

21 You will see active numbers of promotional deals,
22 providers, promotional months, promotional days, and
23 there are essentially two points that can come from
24 this.

25 One is you can look at it as a contextual table, how

1 many promotional deal days are going on as compared with
2 how many there might be, but actually the reason that it
3 is there, the primary reason, is just indicating the
4 lack of change between the relevant period January 2016
5 to July 2017, a 19-month period, and the post wide MFNs
6 period.

7 You see that in the percentage numbers of
8 promotional months and promotional days proportionate to
9 the potential.

10 In other words, you are not seeing overall any great
11 shift in the number of promotional deal days or
12 promotional deal months that are overall occurring.
13 Then, as I say, it is put in context, because one looks
14 at it in terms of the number of potential days that
15 there were.

16 PROF ULPH: Mr Beard, one point that somebody could make
17 about that table is the reason why you get those quite
18 small numbers is that you are dividing by some very big
19 numbers and therefore it is not too surprising that they
20 do not change very much particularly when you just do
21 them to one decimal point or even just to the whole
22 percentage point. So it is almost like the converse of
23 the argument where if you look at the change from 6 to
24 9, that looks like a big percentage change because you
25 are dividing by a small number, which is your objection

1 to doing the headcounts, so one might argue that the
2 converse objection works here that you are dividing by
3 very big numbers and therefore nothing changes very
4 much. So how would you respond to that?

5 MR BEARD: Well, I would respond to it in two ways. One is
6 you are still looking, when you are talking about the
7 question we are asking ourselves, which is, is there
8 a substantial effect before and then after in relation
9 to promotional deals, it is relevant to be looking at it
10 as part of bigger numbers.

11 Now, I will come on to how Professor Baker and the
12 CMA are saying, well, those numbers are too big, but
13 they are still big numbers, so it gives us a sense of
14 context, and then in relation to the changes I will go
15 on and I will break it down particularly focusing on the
16 wide MFN covered HIPs only.

17 We still do say what we are seeing are very small
18 numbers. We are seeing small numbers in absolute terms,
19 given we are talking about a three-and-half-year period,
20 we are looking at small numbers in absolute terms in
21 relation to promotional deals, we are looking at small
22 numbers in terms of changes, which is why we criticise
23 the use of percentages of these very small numbers, and
24 we also say that when you look at this in context you
25 are seeing very little going on or not enough to suggest

1 that there is some sort of wholesale change in
2 competition going on before and after, which is of
3 course what is needed to be shown in order to show that
4 you have a non-insignificant effect here.

5 So we do still say they are meaningful. I entirely
6 take your point you end up with a small percentage
7 because you are using a big number, but that in itself
8 is instructive.

9 Let me deal with one or two of the criticisms that
10 have been levelled at these tables by Professor Baker.
11 Paragraph 353 {B/64/120} in our closing submissions.

12 Professor Baker had two objections to the analysis.
13 First of all, he said the numbers assumed an insurer can
14 simultaneously promote on PCWs. Under cross-examination
15 he accepted that that was just arithmetically wrong, he
16 had just misread the table. That is fine.

17 Then he said but not all 32 insurers would
18 simultaneously promote because they would want to ensure
19 they are in the top five, and therefore rather than
20 using 32 HIPs potential days you should only use 20
21 effectively. We said we do not accept that because
22 promotional deals can be ones where you do not end up in
23 the top five, but even if you take that you are still
24 looking at a very big number overall, and you are not
25 changing the way in which you look at a shift in

1 behaviour because that does not alter anything.

2 There was a third point that was raised which is to
3 do with what you include in that table. The way in
4 which Professor Baker approaches this is to say, well,
5 what you should look at is which promotional deals were
6 agreed during the relevant period and agreed afterwards,
7 because those would be affected by the wide MFN at the
8 point of agreement, potentially, and, therefore, that is
9 the meaningful measure.

10 Ms Ralston says that is not the sensible way of
11 doing it. It is not a matter of consistency. We accept
12 that Professor Baker adopts a consistent approach on
13 this, but it is not a sensible way to do things.

14 Ms Ralston is just asking for the sake of
15 understanding the level of promotional deal activity and
16 the level before and after how many promotional months
17 and days were actually going on during these two
18 periods.

19 The problem with Professor Baker's approach is if
20 a deal is agreed before the relevant period, he excludes
21 it. He excludes it entirely. The problem with that
22 is -- well, there are a number of problems with that.
23 First of all, what you are doing is failing to recognise
24 that there is relevant promotional deal activity going
25 on during the relevant period which risks then skewing

1 your overall analysis by suggesting that there was less
2 going on beforehand than in fact there was, so that is
3 a problem.

4 The second is it becomes highly sensitive to when
5 renewals or reconsiderations of deals occurred which
6 would be a moment at which you could say, legally, on
7 the CMA's theory, the wide MFN was biting, and he
8 accepted he has not really looked at those issues.

9 So you have those two problems. So you can skew and
10 you have these difficulties in relation to renewals, but
11 of course there is a third problem that he does not
12 really recognise at all.

13 The wide MFNs in question did not spring into being
14 in December 2015. These wide MFNs were operating
15 beforehand and then they stopped in November 2017, so in
16 fact by excluding deals that started beforehand, he is
17 failing to recognise that actually that was conduct that
18 was essentially contrary to the CMA's case on the wide
19 MFNs. So he was undercounting effectively the effect of
20 the wide MFNs just because he sort of lives in denial
21 about the period beforehand. So we think there are
22 three criticisms all of which are essentially solved by
23 Ms Ralston's approach.

24 So we say the way that Ms Ralston has done it is
25 sensible, and the way in which Professor Baker has done

1 it is not, and this is not just a theoretical issue
2 because if we could just go to {F/317/9} --

3 PROF ULPH: Sorry, Mr Beard, just before you do that, if
4 I am understanding your final point, your point is that
5 there is a distinction between the period of time over
6 which wide MFNs operated by ComparetheMarket were in
7 place and the relevant period as defined by the CMA?

8 MR BEARD: Yes.

9 PROF ULPH: That is your point? Okay.

10 MR BEARD: Yes.

11 PROF ULPH: Just to make sure.

12 MR BEARD: In fact in relation to the example I am going to
13 go to, which is Legal & General, if the wide MFN was put
14 in place back in 2011 or something, and so when it
15 entered into a deal in, say, August 2015, it was doing
16 so contrary to the CMA's interpretation of the operation
17 of the wide MFN.

18 So if that deal then runs on during the relevant
19 period, it is a bit weird to say, "Oh, no, no, no, I do
20 not count that as promotional deal activity contrary to
21 the wide MFN, I just exclude it because of the time the
22 deal was entered into", so I do make the three points,
23 but I am just pointing out how that works.

24 PROF ULPH: So essentially these were deals which were
25 agreed while the wide MFN was in place, that is your

1 point?

2 MR BEARD: That is my third point.

3 PROF ULPH: That actually corresponds to Professor Baker's
4 definition. He wants to look at promotional deals that
5 are in place, when the wide MFN was in place. The fact
6 that the relevant period was defined by the CMA might be
7 slightly different than that, I think. It does not get
8 round the point that on his own definition those deals
9 would be included.

10 MR BEARD: It is difficult, I cannot ask him this now, but
11 I see your point, Professor. The point is he excluded
12 this deal on that basis, so I see, Professor, your
13 point, which says, well, actually on Professor Baker's
14 own approach he is slightly incoherent, but the point
15 I am making is a very simple one, which is Ms Ralston's
16 approach effectively solves all these problems because
17 it is just looking at activity during the two periods
18 rather than trying to do these sort of taxonomies about
19 renewals and when it was entered into and so on, and
20 also avoids the risk of skewing.

21 Anyway, just let us pick up, if we may, {F/317/9}.
22 That is not the right page, so could we turn on if you
23 would not mind, just flick on another page. No, could
24 we go down to {F/317/19}? No. It is the wrong
25 reference. I will come back to that.

1 The point I am going to make in relation to that
2 Legal & General, which is the deal that is excluded, is
3 that in the material provided by Legal & General it
4 said, "We entered into a deal in August 2015. It was
5 supposed to end in December 2015, but it was effectively
6 run on", they say to November 2016. In fact it was
7 only June. The point we make is that even if
8 Professor Baker were right about looking at dates where
9 you re-engage in fact Legal & General reengaged and
10 effectively extended that agreement in December 2015.

11 But we have to go through detailed evidence in order
12 to get to that point. I will come back to it.

13 As I say, you get some context from this. You get
14 an indication of not significant changes.

15 In its closings, although this is not coming from
16 a witness, the CMA in their first appendix have tried to
17 rework some of these tables. If we could just look at
18 that, we have not been able to work through all of the
19 numbers that they have used, and we are a bit doubtful
20 about the numbers they have used in relation to three of
21 the tables, but thankfully -- sorry, appendix 2 to their
22 submissions {B/67/1}.

23 It is somewhat unusual. We do not have this from
24 a witness, because all of these tables have previously
25 been provided by witnesses. The CMA have decided they

1 will go off and rework these tables, and essentially
2 what they have done is that they have tried to break out
3 from Ms Ralston's table non-covered HIPs and covered
4 HIPs, and they have tried to use promotional day
5 denominator just using 20 HIPs rather than 32. That is
6 what they appear to have done. But we are not confident
7 that some of the other numbers in these tables are
8 right.

9 Here you have -- there are four tables, if we just
10 go over the page {B/67/2}. So they have broken them out
11 and they have tried to put them into different
12 categories, and you will see that on some of them they
13 have excluded the Legal & General deal that I was just
14 referring to, which we say is just wrong.

15 Then if we go back just back up to the first page
16 {B/67/1}, the key table here is effectively the covered
17 HIPs table because the covered HIPs table of course is
18 asking whether or not there was a material change in
19 behaviour in relation to the covered HIPs when they
20 became uncovered HIPs.

21 So going back to our discussion about spillovers and
22 effects yesterday, that is the crucial thing, because
23 that is the thing that would act as this notional
24 trigger in changing the way competition works.

25 You will see -- I think I have used these numbers

1 previously -- that the move from five promotional deals
2 to nine is tiny, it is a tiny number. Yes, it generates
3 a big percentage, but that really is not meaningful. If
4 you are saying that incremental change is four
5 promotional deals, the idea that that is triggering some
6 general change in the market that is going to have some
7 broad effect is just not a plausible story in and of
8 itself.

9 The other point to make here -- and this goes to,
10 Professor Ulph, your point -- here we are dealing with
11 a smaller category. We are still getting tiny
12 percentages in relation to promotional days, actually
13 the change as a percentage of promotional days, from
14 tiny number to 1% larger tiny number, but more than
15 that, this is excluding that Legal & General deal, and
16 what we have done overnight is look at what happens to
17 this if you include that Legal & General deal.

18 I am not sure we have it electronically, which may
19 deprive Professor Ulph of the benefit. I have hard
20 copies of it. I am very sorry, particularly since,
21 Professor Ulph, this is something -- I can -- it is
22 going to be emailed over now to Professor Ulph.

23 Can I pass these up?

24 THE PRESIDENT: Please do and, Professor, if you let us know
25 when you have received it. (Handed)

1 MR BEARD: Professor Ulph, has that been received?

2 PROF ULPH: Not so far.

3 THE PRESIDENT: I do not know, Mr Beard, if you want to try
4 another point and wait for the email to arrive. I would
5 not want us to lose time due to --

6 MR BEARD: Yes. Sir, I will give you the headline in
7 relation to it. The headline, Professor Ulph, Tribunal,
8 is that when you include back in the Legal & General
9 deal, what you get are still tiny numbers, and you see
10 no change in percentage terms before and after when you
11 use the 32 HIPs promotional deal base or the 20 HIPs
12 promotional deal base. Since this is supposed to be the
13 key change that acts as the trigger, this is clear
14 evidence that the CMA does not have a story about some
15 iterative shift in the competition.

16 I will come back to that when Professor Ulph has the
17 email, but if I could move on, I have made the headline
18 point.

19 THE PRESIDENT: Yes.

20 MR BEARD: Shall I press on?

21 THE PRESIDENT: Please do.

22 MR BEARD: If we could then just move on, then, to
23 paragraph 355 {B/64/121} in our closing submissions.
24 This is about some flawed data gathering. I am not
25 going to labour the point, I have made it previously,

1 about the shifting nature of definitions in questions,
2 the ambiguities in questions, the failure to specify
3 what is really important in the questions posed, and you
4 will see in paragraphs 358 and 359 we have set out in
5 particular the changes in definitions that were used in
6 relation to promotional deals.

7 Now, we anticipate the CMA's answer to that is going
8 to be, yes, but we had a data set of 68 or 69
9 promotional deals, and we weeded it to make sure we were
10 only dealing with promotional deals where we know that
11 the premium changed and in those circumstances what we
12 know is that even on the narrowest version of wide MFNs
13 those deals are notionally within scope. In other
14 words, we have gone and checked.

15 Now, we have not been able to do a full and
16 comprehensive analysis, but we just do not think that is
17 right.

18 In order to assist, I am just going to go back to
19 the CMA's submission, closing submissions. This is at
20 {B/66/1}.

21 In {B/66/1} to their submissions the CMA have
22 included a table that sets out all of the 69 promotional
23 deals across the three-and-a-half-odd years that we are
24 talking about, and you will see it is by PCW, then the
25 HIP involved, the HIP and brand, agreed during and

1 after, covered by the wide MFN, retail discount, PCW
2 contribution, start date, end date, type of deal and
3 then some notes.

4 You will see that in the "type of deal" column they
5 have said, well, look this was a price discount, except
6 for some of them where they have said it was a cashback.

7 Now, we say that where you have got a cashback,
8 there is not a good reason to treat those as necessarily
9 within the scope of the wide MFN. You would need to
10 have very clear evidence that in relation to those deals
11 actually the cashback was fed in right at the start to
12 discount the premium, and it was not a situation where
13 you got a headline premium and a cashback later or the
14 cashback was separated out because if that were the case
15 it does not fall within the scope of the arrangements.
16 So we do not think those should be included.

17 Then you have some at the bottom like the one at the
18 bottom of the page, which is a shopping voucher, and
19 again, we say plainly that should not be treated as
20 a promotional deal that would be subject to prohibition.

21 Now, obviously the CMA has recognised this in some
22 of these cases, and on some of their analysis, they have
23 included these deals, and in other of the analysis they
24 have taken them out. So there is rather a mixed bag and
25 we think that is totally unsatisfactory because it means

1 that the basis on which you can read various of the
2 tables is unclear because in some of them they appear to
3 be using a data set that includes deals that would not
4 otherwise be prohibited by the wide MFN which we say is
5 a wrong approach.

6 But the problem is worse than that because it turns
7 out that some of the types of deal price discount
8 examples they are relying upon do not appear on the
9 evidence to be price discount deals.

10 Now, we have not done a comprehensive audit of this,
11 but if we pick it up in our submissions at paragraph 159
12 {B/64/52} and I will try do this without going into
13 private, you will see that we gave an example in
14 relation to RSA Insurance Group (More Than) about their
15 promotional deals evidence.

16 RSA Insurance Group (More Than), on occasion deals
17 that RSA Insurance Group (More Than) did are referred to
18 as cashback deals, but there are several deals in this
19 table with RSA Insurance Group (More Than) that are said
20 to be price discount deals.

21 So far as we can see they have only got evidence for
22 one of those other deals being a price discount deal,
23 and in relation to the rest we think they have misread
24 the evidence from RSA Insurance Group (More Than).

25 If we could go to {F/535/2}, please --

1 MS DEMETRIOU: Sir, I am really sorry to rise, but I may be
2 able to short-circuit this discussion. It may help
3 Mr Beard.

4 THE PRESIDENT: Of course.

5 MS DEMETRIOU: We have reviewed -- obviously we put this
6 together over the weekend, and there are indeed two
7 deals after the relevant period with this HIP which are
8 reflected in this table. One is on page {B/66/2}, just
9 in case this short-circuits Mr Beard's submissions, at
10 the bottom of page 2, the penultimate entry -- I do not
11 know what page of the bundle that is again, but it is
12 the same table, the following page.

13 THE PRESIDENT: Yes, I have it in hard copy.

14 MS DEMETRIOU: That says "Price discount", but it was in
15 fact a cashback deal.

16 On page {B/66/3} there is one on the middle of the
17 page, there is the same HIP, seven down, and that
18 again -- so it is dated -- the start date is 4 May 2019,
19 if you can see that. So that also should say cashback
20 deal, and the other deals of this HIP are correct. So
21 those are the only two errors that we have identified on
22 this table in case it assists.

23 THE PRESIDENT: Ms Demetriou, that is very helpful and I am
24 sure you can provide in your own time an updated version
25 correcting those points.

1 From our perspective, this is of course a helpful
2 collocation of material provided it is just that,
3 a collocation of material that is already in evidence,
4 and I wonder if when you provide an updated table you
5 could just give us an indication of the source of the
6 data in the record.

7 MS DEMETRIOU: Of course.

8 THE PRESIDENT: Because we are very happy to accept, as it
9 were, reworkings of existing evidence. What I think we
10 would not want to have is fresh material that obviously
11 will not have been subject to the process that we have
12 gone through in the last couple of weeks.

13 MS DEMETRIOU: Sir, of course, we entirely accept this. It
14 is not new material. If we had had time we would have
15 put sources, but we will provide a corrected table with
16 the sources.

17 Sir, just to be clear, the other table which is the
18 next appendix that Mr Beard took you to, that is really
19 just a reworking, it is not new evidence as such, it is
20 just a reworking of Ms Ralston's table but making an
21 adjustment, so it is --

22 THE PRESIDENT: Indeed, that I got. This one, one can be
23 fairly confident the material is somewhere, but I think
24 if I were to go back and try to check it I would not be
25 able to do that.

1 MS DEMETRIOU: Of course, we will do that, sir.

2 THE PRESIDENT: That is very helpful.

3 MR BEARD: There are a couple of points to make.

4 First of all, in relation to the overall data in the
5 table, leaving aside the categorisation, that data is
6 CMA data set that we have had access to. Indeed, there
7 was a point in cross-examination where I put an extract
8 of a promotional deals table, I think it was to
9 Ms Glasgow, and that was actually drawn from this data
10 set. So the basic data set, no issue. But I am not
11 content with the idea that the CMA can now come along
12 and provide corrected versions of this table
13 re-categorising items within it, and that is what
14 Ms Demetriou is saying she wants to do, and the reason
15 I say that is it is fine for Ms Demetriou to say, "Okay,
16 we see your points you have made in relation to this, we
17 see your points. Actually, you are right, you are
18 right, we did not get these ones categorised correctly",
19 because that illustrates the point we are making that
20 the way in which you asked questions and the way you
21 interpreted evidence was wrong, and I do want to go to
22 {F/535/2} just to make this point. I accept the
23 concession by Ms Demetriou, but it is important for the
24 Tribunal to understand that it is not just a matter of,
25 oh, we knocked two out, because if you knock two out of

1 the after period then of course you get different
2 comparisons going on.

3 Ms Demetriou will say, well, there are only two, but
4 of course we are dealing with small populations, and the
5 point I want to make in relation to this is that if you
6 look at the top of the page where there are five deals
7 referred to, the two deals Ms Demetriou are now saying
8 should come out --

9 MS DEMETRIOU: Sir, just to clarify, we are not saying they
10 should come out. I will make my submissions afterwards,
11 we are not saying they should come out, because we think
12 cashback deals are caught.

13 THE PRESIDENT: That is fine. Just so that you are both
14 clear as to how we will be approaching this sort of
15 material, the problem with competition cases is you have
16 disputes running at two levels. You have a dispute as
17 to what the data is and you have then a dispute as to
18 what the data means once you find out what it is.

19 MR BEARD: Yes.

20 THE PRESIDENT: We will, I am quite sure, be doing our own
21 reworkings as to what the data actually is before we go
22 on to working out what it implies.

23 So you are absolutely right to make the points you
24 are making, Mr Beard, and Ms Demetriou you will be
25 absolutely right to respond, because this sort of

1 re-categorisation is precisely the sort of thing that we
2 will be looking at, but you are right, Mr Beard, to
3 stress that the fact of re-categorisation does indicate
4 a certain controversy about the data, which we entirely
5 take on board.

6 MR BEARD: This is the reason I do not want to just leave it
7 there, particularly because Ms Demetriou is saying we
8 are not going to take these out of consideration.

9 THE PRESIDENT: I understand.

10 MR BEARD: So if I may --

11 THE PRESIDENT: Please do. I just wanted you both to
12 understand where we are coming from.

13 MR BEARD: Obviously what we have been doing in the main in
14 our submissions is saying, you know, taking the data as
15 the CMA have been looking at it, they did not do
16 a proper job in relation to it, but we are also saying
17 your analysis of the underlying data is wrong at a more
18 granular level. We can only do that by example, and
19 this is one that we are pointing to.

20 If we look at this, you will see this is a response
21 from RSA Insurance Group (More Than) to various
22 questions from the CMA, just under Section 26.
23 Actually, could we just go back a page {F/535/1} so the
24 Tribunal can see the main questions being asked? Thank
25 you.

1 So you will see it in 1 that the CMA understands
2 that 14 agreed Promotional Deals with PCWs.

3 Can you identify them, start and end date, agreed
4 discount, and if we just go over the page again, thank
5 you very much {F/535/2}.

6 Then they came back with this table.

7 Now, the two deals that Ms Demetriou is referring to
8 are the first and the fourth on that table, I believe.
9 The first and the fifth, I apologise.

10 Up until now, these have been categorised as price
11 discount deals. That is obviously not correct, and, as
12 we understand it, the reason for this, if you go down
13 the page, is effectively these have been treated as
14 price discounts on the basis that the cashbacks were fed
15 into the price premiums, and if you look at (d):

16 "Explain how the retail prices for the relevant
17 products under the Promotional Deal were reduced on the
18 relevant PCW and whether other retail prices on other
19 PCWs were changed ..."

20 So they are asking about how they did this. Before
21 I do that, it is just worth noting that in this table
22 you have three deals that are cashback and two which are
23 rate reduction, so the question is asked generally about
24 all promotional deals, and you have three cashback and
25 two rate reduction, and the answer is:

1 "In terms of how prices were reduced [14] supplies
2 [these] prices to the PCWs via a data feed. Those
3 prices are then displayed to potential customers
4 accessing PCW's website. During the period of
5 a Promotional Deal involving a rate reduction, [14]
6 sends reduced prices via the feed and these are viewed
7 directly by potential customers.

8 "A Promotional Deal agreed with one PCW does not
9 result in changes to the prices displayed via any other
10 PCW. There may be unrelated changes ..."

11 Now, in the Decision -- I am not going to take you
12 to it, but it is, just for your reference, at {A/1/233}
13 and the relevant footnote is 833. I am sorry, the
14 relevant footnote is 834. You will see on the
15 right-hand side about five lines from the bottom, the
16 reference to RSA Insurance Group (More Than's) name, and
17 it is a reference to this document that I am in now, and
18 if we just go back up the page so we can see what the
19 footnote is saying, it is footnote 834, and you see
20 7.191:

21 "In particular, the CMA asked 13 providers how they
22 implemented promotional deals and in every instance the
23 providers told the CMA that they reduced the price on
24 the relevant PCW during the promotional deal."

25 So that is why I say what the CMA was doing was

1 saying, we can count these in because actually this was
2 a price reduction.

3 If we then go back to the document we were in, which
4 is {F/535/2}, just reading that answer, it is at best
5 ambiguous what was done with cashbacks because the
6 reference is to reduced rates being fed through in
7 pricing, so it is at best ambiguous whether or not RSA
8 Insurance Group (More Than) was actually reducing its
9 prices fed through in relation to premia in relation to
10 the cashback deals because that answer is about the
11 reduced rate deals that they have.

12 But actually it then becomes clear when you read the
13 next answer (e):

14 "Explain whether [14] checked that the price changes
15 outlined at (d) were implemented and if so how."

16 So it has talked about price changes on rate
17 reductions, it is a bit ambiguous as to whether or not
18 it is also talking about cashback -- we say, actually,
19 it is pretty clear that the CMA must be treating it as
20 at best ambiguous:

21 "All [such] price changes undergo a testing and
22 sign-off process. This involves a separate testing team
23 running test cases through the rating engine and
24 ensuring the correct premiums are returned. Attached to
25 this letter is sign-off documentation for the two

1 Promotional Deals in the above table which involved
2 a rate reduction. We also monitor our premiums after
3 a price change is implemented ..."

4 Now, the natural inference there is, reading it all,
5 yes, where there was a rate reduction deal, the pricing
6 was fed through and there was a reduction in rates, no
7 surprise, but in relation to the cashback deals that was
8 not happening.

9 Now, I agree it does not say, "And we did not do
10 this in relation to cashback deals", but because all of
11 these answers are specifically about rate reduction, the
12 inference is cashback did not do this, and it is notable
13 that the insurer sends through the two sign-offs of rate
14 reduction having been checked by its team in relation to
15 rate reduction deals but not in relation to any others.

16 THE PRESIDENT: I am not for a moment inviting you to take
17 us to this documentation, but just so that I have an
18 idea of what you and your clients have been able to see,
19 have you seen the sign-off documentation there
20 referenced and is it in the --

21 MR BEARD: I do not believe we have.

22 THE PRESIDENT: -- bundles?

23 MR BEARD: No.

24 THE PRESIDENT: Right.

25 MR BEARD: I think to be fair to the CMA --

1 THE PRESIDENT: You have not asked?

2 MR BEARD: No, we have not asked, but we have been looking
3 at these points about what the definitional problems in
4 questions would potentially result in. Because this is
5 going back to our broader point about: you did not ask
6 the right questions and you have an unstable evidential
7 base here. So we were looking and we were thinking,
8 well, hang on a minute, they categorised some of these
9 as cashbacks, what have they done in relation to the
10 others, and then we went back through and we identified
11 this.

12 No, we have not asked, but it is fairly clear that
13 the two are about those rate reduction deals, because
14 that is what is said here. So I imagine that even if
15 you asked, what you will get is confirmation that those
16 two are covered, but you do not get anything in relation
17 to cashback deals.

18 The point I am making is the broader one.

19 THE PRESIDENT: I understand.

20 MR BEARD: I do not want to lose sight of that. I accept
21 Ms Demetriou's point that this ends up meaning two
22 promotional deals in the after period are taken out.
23 I am sorry, to be fair to Ms Demetriou, she is not
24 saying they should be taken out. We say they should be
25 taken out because it is plain that if a cashback does

1 not result in a dropped premium on the agreed terms as
2 to what constitutes a wide MFN, those are not prohibited
3 because you are not changing the headline quotation on
4 the site.

5 So we say there is a vast amount of ambiguity that
6 has been engendered by the way in which these questions
7 have been asked and this is a concrete example of the
8 problem that arises, and it feeds through into the
9 promotional deals database and we are dealing with
10 relatively small numbers, pretty tiny numbers in some of
11 the cuts on promotional deals, and here we have it, that
12 at least two that are in the after period, and,
13 therefore, are supposed to be indicating this change in
14 competitive dynamics, actually should be out.

15 So you have my points both broad and specific on
16 this, I think.

17 If we could just go back to some other data issues,
18 so if we could go back to -- if we could go to 367
19 {B/64/123} of our closings, this is really just for your
20 notes, this is part of our closings from 365 to 367
21 where we deal with the time of agreement for deals not
22 being the right metric, not being the right basis to
23 consider these issues, and that is spelt out there.

24 Then if we go on to -- I have dealt with 368
25 {B/64/124}, which is dealing with the -- sorry, I have

1 dealt with some of 368 but we do need to briefly go to
2 {A/9/104} because I do not want to lose sight of the
3 further work that Ms Ralston did on the before and after
4 analysis where she also took into account the value of
5 deals and carried out analysis as to whether or not pre
6 or post the average daily value of promotional deals had
7 gone up or not.

8 What you see in that table is of course a situation
9 where, apart from the 19 month versus 19 month window,
10 in relation to all of the other windows, so where you
11 are comparing 12 months before, 12 months after,
12 9 months before, 9 months after, 6 months, 6 months and
13 so on, you get a negative effect. In other words, you
14 are not seeing any change in the -- upward change in the
15 value of average daily value of promotional deals being
16 done.

17 I have dealt with the criticisms that
18 Professor Baker levels at this for saying that is the
19 wrong measure, you should use the date of agreement, so
20 I am not going to go through that again.

21 He also says, well, 19 months, that is the relevant
22 period, because if you assume all of these spillover
23 effects, they might take a long time to unwind and
24 therefore you need to take this long period rather than
25 a shorter period, but with respect to Professor Baker,

1 there is just nothing in that point.

2 We have evidence that actually people could change
3 their position relatively rapidly, and that is not only
4 in terms of Ms Glasgow talking about being able to do
5 a deal in a day or two, but more generally how people
6 could change their position.

7 If you look at paragraph 375 on page {B/64/126} in
8 our closings, we had speculation from Professor Baker
9 that in the first few months after withdrawal of wide
10 MFNs these deals may not be representative because the
11 firms are figuring out what to do, but it was pure
12 speculation on his part. It is pure speculation in
13 circumstances where we know that insurers both with wide
14 MFNs and without wide MFNs promoted during the relevant
15 period, so they could figure out how you did these
16 things, and we know -- and there is clear evidence --
17 that PCWs have the capability of offering a promotional
18 deal readily, or at least relatively readily. They do
19 not need long periods to arrange these things, and that
20 these are very sophisticated entities that will think
21 hard about how they do pricing at any particular point.

22 Of course, as we emphasised, these will be the same
23 insurers that have been round the houses in relation to
24 motor insurance, and so in terms of thinking
25 strategically about these things, Professor Baker just

1 had no reason why it was you needed to take 19 months,
2 ie the longest period in order to carry out this
3 assessment.

4 The point we are making is we are not taking any
5 particular period. We are looking at a range of
6 periods. There is no reason to take the longest period
7 that he has taken for these purposes, and if you look at
8 any of the others, you are showing that there is not an
9 overall increase in the daily average value of the
10 promotional deals. It is another indicator that you are
11 not seeing some significant effect here. We are not
12 saying "only indicator", we are just saying "another
13 indicator" here.

14 With that in mind, if I could move on then to 377
15 {B/64/127} in our closings.

16 I will not go through this in any detail, but you
17 have a range of reasons why it is that you might have
18 a situation where people do not want to enter into
19 promotional deals, they do not have the same incentives.
20 I have already taken you to those pieces of evidence
21 that Ms Ralston cited about how actually a number of
22 people came back saying, well, they did not do a lot for
23 us, but we also know there is a real risk of
24 cannibalisation with promotional deals because of course
25 in the first instance they are intra-brand competition,

1 you are competing on one PCW against yourself on other
2 PCWs and against your direct channel, and in those
3 circumstances strategically it may not just be a good
4 idea for you to be engaging in these sorts of things, or
5 you may have other priorities, and so there may be
6 a whole range of good reasons why actually you do not
7 care about this stuff at all and why it is not in any
8 way near as significant as has been suggested.

9 Then the final thing that I need to go to -- I do
10 not want to lose sight of this, because there is
11 a danger that one loses sight. Ms Ralston actually did
12 econometric analysis of these promotional deals, and
13 just to pick that up, {A/5/180}, please.

14 You will see there at 9C.3 considering of
15 econometric analysis as the prevalence of promotional
16 deals. So rather than doing these very simplistic
17 headcount analyses that the CMA has been engaged in,
18 what Ms Ralston did was actually try to carry out some
19 econometric analysis in relation to it, and there is
20 a wonderful irony, the CMA say we have not got enough
21 data points in order to do econometrics here. Well, if
22 you have not got enough data points, it is not
23 suggesting that actually very much is going on here, but
24 let us leave that to one side. Ms Ralston controlled
25 for those issues and explained her position, and what

1 she does, if you go over the page {A/5/181} is carried
2 out an analysis which reaches the conclusion that when
3 you do the econometrics you do not identify any material
4 effect before and after in relation to promotional
5 deals, both in terms of number and value.

6 So promotional deals, which is the key plank of the
7 CMA's story about how you engender a change in
8 competition that was somehow stymied by wide MFNs, not
9 considered in context, when we look at the numbers they
10 are very small, when we look at the changes in numbers
11 we do not see significant changes in numbers, and
12 particularly when we look at the core, the wide MFN
13 HIPs' promotional deals -- actually we saw a number of
14 them were doing them during, a number were doing them
15 afterwards, but the overall change is not material, even
16 in relation to that small amount. You have a range of
17 reasons why they might not want to do these things, we
18 do not have any basis for considering that actually
19 there was a significant change here driven or rather
20 that during the course of the operation of the wide MFNs
21 during the relevant period there was some undermining of
22 competition and material effect in relation to
23 promotional deals.

24 Then we pick up at 385 {B/64/129} in our closing,
25 the further point that of course the CMA has not looked

1 at at all but the FCA did, which is what are promotional
2 deals and new business discounts actually doing in the
3 market, are they doing any good for the market, are they
4 doing any good for consumers, when you look at these
5 things in the round? We know the outcome of that. We
6 know the outcome is that the FCA have said new business
7 only discounts, which is what the PDs are that are at
8 issue here, they are only new business discounts, they
9 should not effectively be allowed to operate any
10 further.

11 Now of course that is in a broader context in
12 relation to price walking, we accept that, but they are
13 part of the problem in relation to that. I am sorry,
14 sir?

15 THE PRESIDENT: Indeed. What I am going to put to you is
16 what Dr Walker would say, which is, yes, this is
17 a problem, price walking is an issue. It is just not
18 a problem that we need to trouble ourselves about. It
19 is great that one has discounts being offered to first
20 time purchasers and we will handle, but not in the
21 context of this appeal, the price walking on renewals.
22 I raise it because that I think is what Dr Walker would
23 say, and I am inviting your response.

24 MR BEARD: I think the answer -- and I am sorry, I have just
25 been logged out, I am going to steal -- yes, I can see

1 it. (Pause)

2 As you put it, sir, the problem is price walking, we
3 do not need to trouble ourselves, it is great that one
4 has discounts being offered. Yes, I know, I see the
5 problem.

6 THE PRESIDENT: Provided one is regulating the renewal
7 market and killing off price walking, then what is not
8 to like?

9 MR BEARD: Well, what is not to like is the fact that you
10 cannot regulate the renewals market and the insurance
11 market without, as the FCA finds, killing off
12 promotional deals new business discounts. So the reason
13 I was just looking at the transcript is the key issue is
14 the FCA are saying, no, they are not great, that is the
15 point, they are not great, these promotional deals, and
16 there are two reasons in fact. The one is they
17 facilitate price walking, which is overall bad, so to
18 say this is an effective measure of competition is
19 somewhat perverse in the state of the FCA's findings,
20 but there is also that study that we referred to which
21 is saying this sort of discounting activity is actually
22 bad for consumers because they make bad choices in
23 relation to it.

24 Now, when you are asking yourself as a Tribunal has
25 there been an appreciable adverse effect on competition,

1 it will be something very, very strange about
2 concluding, yes, yes, there is an adverse effect on
3 competition in relation to a reduction in a form of
4 discounting that confuses consumers, on the basis of the
5 FCA study, and facilitates overall a problem in relation
6 to insurance pricing, and it is not like we are looking
7 at some kind of different market here, we are looking at
8 the same customers and their pricing over time in
9 relation to home insurance.

10 So that is the point that we are making here
11 additionally, and of course the major point is there is
12 just no consideration of this in the Decision at all.
13 That is the issue. This enquiry has been running with
14 the FCA since October 2018, and yet there is no
15 consideration of whether or not you should think about
16 promotional deals actually creating problems here.

17 THE PRESIDENT: Leaving on one side the second point you are
18 making, which is that promotional deals incentivise bad
19 choices, so let us park that, but focusing on your
20 primary point I think what you are saying is that if
21 there were effective regulation of price walking and
22 protection of the renewal business such that renewers
23 got as good a deal as new business, promotional deals
24 would effectively disappear in the shape that we see
25 them now. Is that your point?

1 MR BEARD: Yes, that is absolutely right. We know that as
2 well, I will just give you the reference, that actually
3 in MoneySupermarket's own end of year report, annual
4 report, in 2020, which is {F/715/10}, they actually say,
5 even before this has happened, before the conclusion of
6 the FCA report, they say, well, we expect that we are
7 not going to be able to do promotional deals once the
8 FCA's steps have been taken.

9 THE PRESIDENT: I am trying to work out -- and I am
10 certainly not going to be able to do it now; it is
11 something for the judgment, but I am trying to
12 articulate how this point needs to be, as it were,
13 categorised in terms of an effects analysis, because
14 I think what you are saying is that -- let us assume for
15 the sake of argument that wide MFNs have a material
16 effect on promotional deals, so contrary to your earlier
17 points.

18 MR BEARD: Yes, I take the hypothesis.

19 THE PRESIDENT: So we have an effect. You are not saying
20 that the effect of wide MFNs is beneficial, you are not
21 trying to justify that under 101(3), we know that. But
22 I think what you are saying is that this is not
23 a relevant effect for purposes of infringement even if
24 it is material because it is simply not
25 anti-competitive, it is a bad thing. If incidentally

1 that bad thing is suppressed by wide
2 most-favoured-nation clauses then that is great, you are
3 not putting it forward as a justification for wide
4 most-favoured-nation clauses but you are saying that in
5 terms of our spectacles of infringement we should not
6 regard it as a material effect, not because it is not
7 material in the sense of having an effect, but because
8 it is not material in broad competition terms.

9 MR BEARD: It is not adverse, I think is the easiest way to
10 couch it.

11 THE PRESIDENT: Yes.

12 MR BEARD: Because if you think about it, if you say, well,
13 these arrangements -- again, I am not talking about
14 these deals, but if you had a situation where the
15 accusation was you did something and you promoted
16 competition but obviously that is no basis for an
17 infringement.

18 THE PRESIDENT: Yes.

19 MR BEARD: When we talk about prevent, restrict or distort
20 competition what we are talking about is an adverse
21 effect on competition, so what we are saying here is,
22 okay, we do not accept any of your story about
23 a material effect on promotional deals, but if there
24 were to be one, what you have not shown is it is
25 actually adverse, it is the adversity that you have not

1 properly considered, because if there are in fact
2 problems created by promotional deals for these
3 customers who are buying in and then being price walked,
4 you just have not thought about the context of this.

5 So I think that is why I emphasise adversity here.
6 You need to have an adverse, a material adverse effect
7 on competition, rather than just some effect, because if
8 you are just talking about some effect you are not
9 infringing in those circumstances, we would say.

10 THE PRESIDENT: Yes, this is very helpful more I think to
11 ensure that Ms Demetriou can push back on this.

12 MR BEARD: Certainly.

13 THE PRESIDENT: I take your point that the flavour of the
14 debate is probably adverse versus not adverse. The
15 reason I think the point is difficult or at least
16 interesting is because there is a judgmental question in
17 terms of whether it is or whether it is not adverse.

18 Now, you quite properly take us to what the FCA says
19 about this. To what extent ought we to say that the
20 question of whether something is or whether something is
21 not desirable in terms of competition involves a degree
22 of, well, regulatory discretion in terms of the CMA
23 taking the view that we like price discounts to first
24 time buyers, we think, contrary to the FCA, that price
25 walking can be regulated in a different way, and

1 essentially if your wide most-favoured-nation clauses
2 are preventing discounts being given to first time
3 buyers of insurance products, then that is a bad thing
4 because we say so.

5 MR BEARD: Well, I think because "we say so" obviously it
6 may be seen as something of a redundancy because it does
7 not strengthen the Decision at all. I think the
8 question is to what extent is there a discretion in
9 making these assessments, and I see the point that
10 inevitably in deciding whether or not something is
11 adverse to competition there will be a degree of
12 discretion on the part of the CMA, but I make two
13 points. There is no --

14 THE PRESIDENT: Discretion or judgment --

15 MR BEARD: Yes, sorry, I am not --

16 THE PRESIDENT: It was my word.

17 MR BEARD: (Overspeaking) discretion and to disagree with
18 you in relation to judgment.

19 THE PRESIDENT: It was my word but probably not the right
20 word.

21 MR BEARD: That was not the issue I was taking. The point
22 I am making here is -- I mean, during the course of the
23 enquiry we said things like, look, when people put in
24 place promotional deals on one PCW they actually push
25 prices up elsewhere and this is in the context of price

1 walking more generally. Now, I should be clear, we did
2 not come forward with the contents of the FCA study and
3 we did not try and say, well, you can decide that the
4 whole price walking means that you cannot reach
5 a conclusion here. That was not the point we put.

6 We put the point that in order to decide whether or
7 not you have a problem with the promotional deals, you
8 do need to take into account these broader scenarios.

9 As it turns out, the FCA turns up and says,
10 actually, there is a real problem here, and so the point
11 we are making primarily is you, oh CMA, did not even
12 begin to exercise your judgment in relation to these
13 issues, because you did not focus on these points when
14 it was continuing, and I should say, of course the FCA
15 decision has come out subsequently, but there is no
16 suggestion that the conditions of competition that we
17 are talking about here were materially different,
18 because there was price walking going on in relation to
19 these issues.

20 So that is why we say, first and foremost, even if,
21 sir, you are right that there is a significant degree of
22 judgment, you needed to exercise that judgment, you
23 could not assume that lower new business prices were
24 necessarily adverse. You had to actually assess them in
25 the broader context, which is of course what the FCA has

1 done, exercising competition powers, it is not doing it
2 under its general market regulation powers, this is
3 using competition analysis.

4 So that is the first point, but then moving on from
5 that, had they exercised that judgment, there are still
6 parameters to that judgment, because if you have another
7 regulator saying, well, we have actually carried out
8 detailed analysis and we think it genuinely is adverse,
9 even if the CMA had exercised its judgment, we might
10 well be standing here going, "Well, actually, you got
11 that wrong", and even if there may be margins of
12 judgment and discretion in how you do it, the conflict
13 between the two means this Tribunal should prefer the
14 way the FCA has analysed it.

15 So I am not going to say no judgment, no discretion,
16 that would plainly be a wrong submission, but how do we
17 deal with this here? We are saying something is
18 missing, it has been evidenced by what the FCA have
19 done. In fact the FCA have gone further, because of
20 things like the study and their analysis, they have
21 spelled out why there is a systematic problem with new
22 business only discounts.

23 THE PRESIDENT: I understand. If I may -- and really to
24 enable Ms Demetriou to push back -- if I can repackage
25 what you are saying, I think you are saying that there

1 is no particular reason why the CMA might disagree with
2 the FCA in terms of this. Your point is that they have
3 not actually articulated that disagreement and so that
4 is a failing in terms of the assessment of the
5 anti-competitive effects, assuming they are such, of
6 suppressing promotional deals, and we do not really get
7 to the is the disagreement a reasonable one or not
8 because it has never been articulated in the Decision.

9 MR BEARD: Let me be fair to the CMA. We are not saying you
10 needed to articulate your disagreement with --

11 THE PRESIDENT: No, because they came later.

12 MR BEARD: -- because it came later.

13 THE PRESIDENT: I understand that.

14 MR BEARD: But with that qualification the broad point is
15 the FCA is looking at whether or not there are
16 potentially adverse effects from new business
17 discounting and the CMA just did not consider that,
18 notwithstanding us saying things like, well, look,
19 actually, overall, people are using these things to push
20 prices up and you have to think about the problems in
21 this market more broadly given price walking is going
22 on, in circumstances where we cannot possibly do the
23 sort of analysis that the FCA could do or indeed the CMA
24 could do in relation to these sorts of issues, so that
25 is the way to look at it.

1 Now, I stress again we only get to this if we work
2 on the basis that they have actually shown that there
3 was a material impact --

4 THE PRESIDENT: No, we are assuming that, absolutely.

5 MR BEARD: I do not want to lose sight of that in this
6 discussion, but it is a further reason why when we are
7 thinking about what the CMA has done here, it just has
8 not looked at things properly in the round. It is not
9 good enough to say, ah, well, this is a mechanism that
10 has been essentially undermined or stymied and therefore
11 in and of itself that is problematic, because of course
12 going back to the case law when you are talking about
13 effects, you are talking about effects on the parameters
14 of competition, and we are talking about adverse effects
15 on those parameters of competition like price, quality
16 and so on.

17 Unless the Tribunal has further questions in
18 relation to promotional deals matters, I was going to
19 move on to some of the specific evidential issues.

20 I obviously place the caveat that I tried in opening
21 to go through some of the evidential material.

22 Inevitably we are not going to be able to cover it all
23 now, so I am going to deal with some examples, pick out
24 certain issues, but also refer the Tribunal to some of
25 the materials that we have submitted.

1 For example, the table that is at the back of the
2 closing submissions where I am not pretending that it is
3 a comprehensive compilation of all potentially relevant
4 evidence. It is at {B/64/140} I believe.

5 What we have been trying to do here, without trying
6 to be comprehensive, is just looking at each of the
7 insurers by name, whether or not they had a wide MFN,
8 broadly what their share of sales was, and then if you
9 go to the far right-hand side that is actually the most
10 important element of this because this is the key part
11 of the CMA's case as to what mechanism of competition
12 was suppressed, we have evidence of interest in
13 promotional deals.

14 What we have done is we have categorised each
15 insurer by the terms of the extent of their appetite for
16 promotional deals during and after and whether or not
17 there is evidence that they changed their position,
18 because it is that change that is critical here.

19 In the middle, we have also done a similar thing in
20 relation to differential base pricing, albeit that the
21 CMA quite properly have not majored on differential base
22 pricing in relation to the way in which they set their
23 closings, and that is for the obvious reason that most
24 people that engaged in uniform pricing kept general
25 uniform pricing and those that did some differential

1 base pricing just kept going with it afterwards, and so
2 you have no indication of any change there.

3 It works through the various insurers, and I do
4 commend that as a useful point of reference given that
5 we are analysing the counterfactual here.

6 I will also point the Tribunal to various parts of
7 our written closing submissions. I am going to deal
8 with it in three parts. I am going to deal briefly with
9 the CMA's reliance on CTM's own materials. Then I will
10 deal with the HIPs, then the PCWs and then I will pick
11 various points up at the end.

12 If I could just pick up the CTM material, in our
13 submissions that one can find at page 82 in bundle B/64
14 beginning at paragraph 241 {B/64/81}.

15 If I can just start there, because the CMA has
16 placed a great deal of emphasis on this. So I provide
17 you the reference there.

18 Now if I could, I just want to go to the CMA's
19 closing submissions, and it is at paragraph 29 which
20 I think is in {B/65/16}.

21 What the CMA has sought to suggest is wide MFNs were
22 integral, they were our primary tool in relation to
23 price competition, in relation to home insurance and so
24 on.

25 None of it is true, and none of it is evidenced.

1 What is interesting is what they say are the key
2 documents. 29:

3 "The contemporaneous evidence shows that CTM was
4 acutely conscious of this at the time."

5 If we just go up to the preceding paragraph so we
6 can see the context:

7 "It is trite to say that CTM wanted best prices; of
8 course it did ... But the importance of [wide MFNs] in
9 that context was that they enabled CTM to achieve (at
10 least) price parity without competing on price, ie
11 without having to reduce its commissions; it could
12 simply rely on the contractual clauses. Once the [wide
13 MFNs] were removed, then CTM would have to compete to
14 achieve the same aim of best prices or price parity."

15 You see, in that paragraph, what is notable is that
16 the CMA does not talk about home insurance. It just
17 talks about these things in general terms, and then it
18 goes on in 29 to say:

19 "The contemporaneous evidence shows [this]."

20 Then we work our way through six document
21 references. I am just going to note a couple of things
22 in relation to each of them.

23 29.1, July 2014, so before the relevant period, and
24 it is a slide pack:

25 "Impact of [the] Ban on Wide MFN."

1 Now in 2014, what wide MFNs had been banned? Motor
2 insurance. So this slide pack pre-dates the relevant
3 period and was all about motor insurance.

4 If we go to 29.2 {B/65/17}:

5 "In July 2014, CTM prepared a slide pack,
6 'Relationship Management -- The way forward in 2014/15'.
7 Slide 8 states that 'Prohibition of wider MFNs will
8 potentially cause differential pricing across PCWs'."

9 Again, document 2014, entirely concerned with motor
10 insurance. The same is true then of the document at
11 29.3.

12 THE PRESIDENT: Was this document, I mean you may not be
13 able to answer...29.2 provided in the course of this
14 investigation, or was it provided in the course of other
15 enquiries?

16 MR BEARD: I will check with those behind me because they
17 will know. I think it was provided in the course of
18 this investigation. So I think the breadth of the
19 information requests or document requests was so broad
20 that they encompassed this sort of material.

21 THE PRESIDENT: Which is fair enough.

22 MR BEARD: We are not objecting at all.

23 THE PRESIDENT: I quite understand, because of course the
24 articulation of the relevant period follows the
25 investigation -- (overspeaking) --

1 MR BEARD: Absolutely. We are not taking any issue
2 (overspeaking). Indeed, I am going to come on to the
3 point that we did provide a vast amount of documentary
4 material and what is relied upon is all to do with motor
5 insurance.

6 Now, we had lots of documents which were concerned
7 with what we were doing in the motor insurance market.
8 What we do not see are documents internally expressing
9 concern, reliance upon, or the importance of wide MFNs
10 in home insurance.

11 Now, the CMA may say, well, you were not going to
12 express that because of course they had not been banned
13 in home insurance at this stage, but the point is to
14 rely on contemporaneous documents which are concerned
15 with a reaction in a different market where there was
16 much wider coverage in relation to wide MFNs and then
17 turn around and say, well, that shows that this was your
18 principal tool in home insurance just does not follow.
19 That is the key thing.

20 So they are holding all these documents against us
21 and they are not to do with home insurance.

22 29.4, June 2015, by which time the March PMI had
23 come in, about best prices:

24 "Partners have used the prohibition of wide MFNs to
25 try to drive down CPAs ..."

1 Yes, in motor insurance.

2 If we go over the page {B/65/18}, 29.5, this is
3 during the relevant period I should say, that is true,
4 but it is all about PMI, what is relied upon.

5 29.6, the DLG price test, August 17, so again,
6 during the relevant period, no discussion of issues to
7 do with home insurance, it is to do with PMI.

8 If I may, to assist the Tribunal in relation to
9 this, and to shortcut these submissions, could we just
10 go to {A/2.7/1}, please.

11 You will see this is annex 7 to our notice of
12 application, and this is headlined:

13 "The CMA's reliance on internal CTM documents
14 relating to PMI rather than home insurance."

15 If we go on to page {A/2.7/4} of this document,
16 there is a narrative, and then you will see there is
17 a table that then deals with the documents that have
18 been relied upon, and I can run through and explain how
19 each of the six documents I have referred to are dealt
20 with in this table, but essentially -- sorry, I should
21 say 29.2 in the list just provided is not in this table,
22 but all of the other documents are covered here and
23 explanations given in relation to these documents.

24 Let us be really clear. What is being said by the
25 CMA is: we can hold it against you that it was critical

1 to your pricing strategy that you had wide MFNs in place
2 in relation to home insurance and look at all this
3 evidence of it, and none of it is about home insurance.

4 We say, well, hang on a minute, we have said we do
5 not accept that wide MFNs were significant in relation
6 to home insurance, we do not accept that at all. We say
7 it was one tool that may have been used on occasion, but
8 it was not the key to our strategy in the slightest.

9 What we have emphasised throughout is that we wanted
10 best prices, and I will just touch on one other issue
11 here.

12 We have heard evidence, of course, that in fact
13 ComparetheMarket was in many circumstances in relation
14 to many risks the cheapest, not the equal cheapest, but
15 the cheapest in relation to risks being priced.

16 Now, if you are the cheapest in relation to risks
17 being priced you are not relying on wide MFNs at all
18 because you are going below price parity, and of course
19 we do not have a proper analysis of that issue in the
20 CMA's Decision at all.

21 We do have some examples in the back of Ms Ralston's
22 report where she has explained that actually you do not
23 see us just pricing continuously at parity and actually
24 a lot of the time we are significantly lower for certain
25 sorts of risks as compared with other PCWs, but we say

1 this CTM material is not showing that we were relying on
2 wide MFNs when it came to our overall pricing strategy.

3 With that -- I am so sorry, Ms Lucas?

4 MS LUCAS: Yes, I do have a question about that. The CMA
5 may say, I do not know, but they might, that it is fair
6 to assume that the position regarding wide MFNs in motor
7 insurance would be the same in home insurance and that
8 if you wanted to explain that the position was not the
9 same you could have tendered a witness to say so in this
10 appeal. I do not know what the answer to that would be.

11 MR BEARD: Well, we have in our submissions explained that
12 we were going after best prices and that the wide MFN
13 was simply a tool that we had, but it was not central to
14 our pricing strategy. So we have put that in in various
15 submissions. I will provide the references to you.

16 So in relation to that, and indeed that was said by
17 representatives of CTM at various meetings with the CMA
18 and we have transcripts of that as well, one of the
19 people involved was someone that -- a man called
20 [redacted] who made certain of those statements.

21 Unfortunately he was involved at the relevant time but
22 left the business and went off and worked elsewhere
23 subsequently. So we do not have him here to be able to
24 talk to these things, but we do have various points of
25 evidence in relation to those issues about what it was

1 that was important.

2 But there is a broader point here. If your best
3 evidence is in relation to a different market in
4 relation to these issues and you have had this huge
5 document trawl, it is not fair in those circumstances to
6 say one can draw a very broad inference in relation to
7 these materials.

8 We say we understand that when wide MFNs were
9 removed in relation to motor insurance it did cause
10 a range of consideration, but even in relation to motor
11 insurance it was not being said that that was the sort
12 of key strategic tool in all circumstances or indeed at
13 all. What was actually being said is we have got to
14 react to what is going on here because the conditions
15 have changed, but that was very different because that
16 was in relation to motor.

17 So you cannot just, even in relation to these
18 documents, take them as saying this was part of our
19 primary strategy, and, as I say, if you really wanted to
20 test this what you look at is whether or not we were
21 pricing more cheaply and that is a useful indication
22 that of course it is not part of your primary strategy.

23 THE PRESIDENT: That is very helpful. I think Ms Lucas is
24 making a broader point which probably is worth getting
25 your response on the record, which is you have made

1 a number of points regarding the CMA's failure to call
2 witnesses in respect of the material contained in, say,
3 the Section 26 responses.

4 MR BEARD: Yes.

5 THE PRESIDENT: We will make of those points what we do in
6 the judgment.

7 MR BEARD: Yes.

8 THE PRESIDENT: But the same point can be made against you
9 that there are, I am sure, a whole raft of
10 ComparetheMarket executives who can speak to the points
11 that you are making who the CMA could cross-examine, and
12 is it what is sauce for the goose is sauce for the
13 gander, or is it --

14 MR BEARD: There must be a degree of that. I know that they
15 have said that consistency is the hobgoblin of a small
16 mind, but I recognise the point can be made against me,
17 and that is why I go to these documents because we say
18 to proffer a witness in relation to documents concerning
19 motor insurance is not necessary in these circumstances
20 in any event because we say, look, you cannot just
21 extrapolate from documents concerned with an earlier
22 period in relation to a different market and infer that
23 these matters are equally important or are an indication
24 of equal importance and we go back to the burden of
25 proof in relation to these matters.

1 I will not get into the extent to which in fact
2 there are CTM executives who could actually speak to
3 these documents because that is a separate issue, but
4 I do not think that would be -- I think all I can say is
5 it would not be right for the Tribunal to assume that
6 that is in fact the case, and I do not think I can go
7 further than that.

8 I of course recognise that the CMA can say, well, if
9 it were the case that we had documents in relation to
10 home insurance that indicated that it was clear that
11 this was your critical strategy and you do not produce
12 someone to disabuse us of that, then I think there is
13 more force in the point that you make, but when you
14 produce documents that are not about home insurance and
15 then say, well, actually, you need to turn up and
16 justify why it is we cannot make broader inferences from
17 one market to the other, I think that is a very
18 different proposition in terms of overall litigation.

19 But I recognise the point can be made against us,
20 but we say in relation to this that is not a good point
21 to be made against us given the nature and terms of the
22 documents we are dealing with.

23 THE PRESIDENT: More generally it is one of the things that
24 goes into the mix.

25 MR BEARD: Well (a), it is one of the things that goes into

1 the mix but also I do not want to lose sight of the fact
2 and I am sure the Tribunal is not doing, it is for the
3 CMA to prove this. They had a vast amount of material,
4 we were in meetings with them, they asked us questions,
5 we have all that material. That is the material.

6 I mean, it is notable that the CMA does not turn up
7 referring to any of that transcript material and saying,
8 well, actually, here you are, this is what is critical,
9 because of course that transcript material does not say
10 anything of the sort.

11 THE PRESIDENT: Yes, thank you.

12 MR BEARD: If we could move on in our submissions, I would
13 like to pick it up if I may at around paragraph 170.
14 I am slightly conscious of time. Is now a good moment
15 to have a short break?

16 THE PRESIDENT: Yes, indeed. We did start early, so should
17 we resume at 11.10. Will that work?

18 MR BEARD: Yes.

19 THE PRESIDENT: That is 15 minutes. We can do two breaks of
20 10 minutes?

21 MR BEARD: I am concerned that I have a reasonable amount
22 still to get through both in relation to some of the
23 evidence and also some issues in relation to penalty
24 which I do not want to leave to a total hurtle. I am
25 also conscious that Ms Demetriou is going to want to be

1 on her feet as soon as possible today and I quite
2 understand that.

3 THE PRESIDENT: Let us start again at 11.05.

4 MR BEARD: I am grateful, thank you.

5 THE PRESIDENT: One thing I think we absolutely need to hear
6 from you on penalty because that has been the Martha of
7 the hearing so far but in terms of taking us through the
8 specific documents I think you can take it that we will
9 be doing quite a lot of work ourselves in looking at
10 these things, and inevitably both of you will have to be
11 pretty impressionistic in what you select and if you are
12 going to be exercising a scalpel to your submissions,
13 that is probably where you should employ it.

14 MR BEARD: I will do that. I have in mind that perhaps
15 I will probably go through one example in relation to
16 more detailed contemporaneous documents and then
17 otherwise make cross-references so that you have at
18 least one perspective on one and then I will deal with
19 it otherwise by cross-reference.

20 THE PRESIDENT: That is fine. Obviously you will take your
21 own course, but in terms of chasing things through --
22 (overspeaking) --

23 MR BEARD: Yes, except I cannot do that in relation to even
24 the 17 HIPs that the CMA contacted.

25 THE PRESIDENT: You can probably assure yourself that we

1 in, whether there is a change with the withdrawal of the
2 wide MFNs.

3 I am going to make a couple of points that the
4 Tribunal is very well aware of. First of all, as we
5 highlight at paragraph 170, before turning to the
6 evidence supplied by individual HIPs contacted by the
7 CMA, it is important always to have in mind that there
8 were 45 HIPs on ComparetheMarket but there were well
9 over 60 that were actually out there providing home
10 insurance business, and many are not listed on PCWs
11 at all.

12 This is not some kind of long tail. We are talking
13 about very big players like Direct Line red telephone,
14 like Aviva own brand, Hiscox, NFU and those sorts of
15 people.

16 So we must not lose sight of them when we are
17 thinking about the context and the relevance of the
18 allegations of effect here, because of course the CMA
19 focuses more and more on the 32 and then a subset of the
20 32. You need to start with the 60, then it is 45, and
21 of course 13 of the insurers on ComparetheMarket did not
22 have wide MFNs.

23 Now, they are smaller ones in general, and
24 a question was asked about -- the smaller ones but not
25 always small, and there was a question asked about why

1 it was, and we have made enquiries, but this slightly
2 goes back to the point that I was making elliptically
3 earlier about who knows what about relevant period, and
4 we are not in a position to say that there is any sort
5 of systematic issue. We think it came up in
6 negotiations. It depended on the people involved and
7 what was going on.

8 We cannot do more than that. What we can tell you
9 is that in the negotiations handbook that we have wide
10 MFNs are not even referred to as a relevant
11 consideration, so when people are sent into
12 negotiations, that is not something that the negotiation
13 handbook in any way emphasises. It does not even
14 mention it. But we just are not in the position to
15 assist the Tribunal, I am sorry.

16 But what we can say is nothing systematic, and
17 obviously the CMA had screeds and screeds and screeds of
18 documents from us, and I do not think anyone has
19 identified anything there.

20 THE PRESIDENT: Well, thank you.

21 MR BEARD: My point is you start with 60, you have 45, 13 of
22 those are not covered by the wide MFNs. This makes
23 a difference to how you analyse effects here. It makes
24 an important difference.

25 Then we get on to the 32. Obviously, 15 of those

1 were not contacted at all. Now, we had the discussion
2 the other day about what one can infer in relation to
3 the 15 from the other material, and we recognise that if
4 all the other material were absolutely clear and
5 pointing all in one direction in relation to these
6 issues then perhaps one can make inferences about people
7 you do not contact. We can see that. But as we say,
8 that is not the picture you get from the evidence
9 overall, and, therefore, it does matter that 15 were not
10 contacted.

11 Then when we get into the 17, this is picking it up
12 at paragraph 174 {B/64/57}, we have those where there is
13 no observable impact, and, as I say, unapologetically we
14 are looking at the evidence to see whether or not there
15 is evidence of observable impacts of the operation of
16 the wide MFNs, because that is what matters for your
17 counterfactual analysis here.

18 So I am just going to zoom through these if I may.

19 So picking up at paragraph 176 {B/64/58}, over the
20 page, I am not going to refer to names, I will use the
21 codes.

22 So Zurich, and just picking up the highlighted text:

23 "[Zurich] did not adjust its premiums at the time
24 that these commission amounts changed. MFN clauses did
25 not play a factor in Zurich not adjusting its premiums

1 at these times."

2 Then if we go down to paragraph 177 {B/64/58}, again
3 underlined, highlighted {B/64/59}:

4 "[Zurich's] approach regarding pricing by a PCW has
5 not changed over the Relevant Period. It has not been
6 affected by the decision of a PCW to introduce or remove
7 a Wide MFN, or replace it with a [Wide MFN]."

8 If we go to Ageas, again highlighted text in
9 paragraph 179, I am not going to read it out having
10 mentioned the name.

11 Nor am I going to read out the highlighted text in
12 180. If I may, I will just allow the Tribunal to do
13 that so I do not breach confidence.

14 THE PRESIDENT: Yes.

15 MR BEARD: If we could go over the page {B/64/60}, so you
16 could read the highlighted text in 180. Question 18.

17 THE PRESIDENT: (Pause) Yes.

18 MR BEARD: The next one, M&S Bank/HSBC, just picking up the
19 highlighted text:

20 "[M&S Bank/HSBC] does not consider the Wide MFN
21 clauses to have affected its commercial activity in
22 respect of the Home Insurance during the Relevant
23 Period."

24 These are very clear and direct statements from
25 these insurers. I know Ms Demetriou says, ah, well,

1 look at the contemporaneous material, but that is
2 putting all of this in context. These are people coming
3 back and explaining why it is that they do not see any
4 effect, and of course these are HIPs who, if they have
5 an appetite for doing things, are not small entities and
6 can well say that they would like to take advantage of
7 particular opportunities.

8 Indeed, if the wide MFNs were having such effects,
9 you would have thought you would have a cry from these
10 HIPs about the significance of it for them. You are
11 getting the opposite.

12 If we just go over the page {B/64/61}, still with
13 M&S Bank/HSBC, picking it up at 183:

14 "[M&S Bank/HSBC's] strategy for the negotiation of
15 Commissions, and the level of Commissions paid by [M&S
16 Bank/HSBC] to PCWs, in respect of Home Insurance have
17 not been affected by the presence or possible presence
18 of any Wide MFNs over the Relevant Period."

19 At the bottom of the page we are picking up Co-Op,
20 if we could just go over the page {B/64/62}, 185,
21 Co-Op -- sorry:

22 "... [the wide MFN or narrow MFN] has not affected
23 the premiums for Home Insurance as we do not have
24 a separate PCW product and therefore we have one pricing
25 strategy across both our PCW and Direct Channels."

1 In other words, we do not vary at all because we
2 just have a single portfolio pricing strategy, but that
3 is very clear and emphatic evidence that the existence
4 of the wide MFNs are having no impact on this entity.

5 Allianz is the next one:

6 "We can find no evidence of an impact of the Wide
7 MFNs on Commission levels in home insurance and there is
8 no evidence that our experience of Wide MFNs affected
9 our strategy with our PCWs as they were present in
10 almost all of our agreements. Having exited the market
11 in early 2016 we saw no material differences to
12 Commissions ..."

13 Then we go down, Liverpool Victoria (LV=). I just
14 would like to pick up the non-highlighted quote in
15 relation to Liverpool Victoria (LV=) because it may be
16 of interest in particular for Professor Ulph but more
17 generally for the counterfactual:

18 "The removal of a Wide MFN (and replacement with
19 narrow MFN) has not affected the premiums for Home
20 insurance set by [39]. This is because we do not have
21 an appetite at this time to offer cheaper prices ... on
22 other PCWs."

23 Then over the page {B/64/63}:

24 "... if narrow MFNs were not in place, we may then
25 seek to offer lower Sales prices for customers who

1 choose to purchase directly from us ..."

2 So they are saying no impact of wide MFNs, but
3 actually their concern is much more to do with narrow
4 MFNs here.

5 We then move down to various other HIPs who
6 preferred not to engage in promotional deals either
7 during the relevant period or afterwards.

8 So picking up with Autonet (Homenet) from
9 paragraph 189, you will see the highlighted text in
10 relation to the third of the quotes:

11 "[39's] pricing strategy, during the period
12 identified as well as more generally, has therefore not
13 been influenced by CTM's MFN's clause."

14 Then 190:

15 "Unsurprisingly, [39] [this is our text in 190]
16 reported no change to its pricing strategy since the
17 [wide MFN] was disapplied in its response ..."

18 It says:

19 "... there have not been any changes to pricing
20 strategy since November 2017."

21 Then we come to 33, you see 33 did not materially
22 change its pricing strategy. It actually changed its
23 whole business orientation, as you will see, if we go
24 over the page {B/64/64} at 192. Sorry to be whirling
25 through.

1 192, you will see it actually changed its business
2 structure, but still, even though it has changed its
3 business structure, you will see at 193 the underlined
4 quote.

5 Then finally we see in relation to Paragon
6 (Thamesbank Insurance) in the highlighted quotes.

7 "There has been no occasions where a promotional
8 deal was discussed/proposed but not taken forward."

9 At the bottom:

10 "There have been no changes to our aggregator
11 pricing strategy at all."

12 So there we have nine all very clear about how it
13 has no effect on them.

14 I am going to come and deal with some of the others,
15 but I am going to just divert, if I may, to just one
16 more detailed example that I said I would deal with.

17 I am going to pick Legal & General, and I am going
18 to try desperately hard to stay in public in relation to
19 Legal & General by trying not to refer to names or the
20 identity of the HIP.

21 If we could first of all have the Decision at
22 paragraph 8.106 {A/1/284}.

23 Now, I am not picking Legal & General arbitrarily.
24 I am picking Legal & General because this is the HIP
25 that in their submissions the CMA really do emphasise

1 very heavily and therefore we are taking essentially the
2 case at its highest in relation to, at least one of the
3 HIPs. I am sure Ms Demetriou will say they are all
4 terribly high, but we say that is not the case, but I am
5 not ducking dealing with the key allegation.

6 If we could have, it is {A/1/284}, I think.

7 8.106 says:

8 "CTM's wide MFN was also a factor in [Legal &
9 General's] decision not to enter into promotional deals
10 with CTM's rival PCWs."

11 Then:

12 "[Legal & General] stated that ' ... there were some
13 occasions where the presence of the Wide MFN in the
14 [CTM] agreement had been a contributing factor in ...
15 not proceeding ..."

16 That was one of the statements it made. As we will
17 come on to, when we come to look at this overall, what
18 it actually said was it made no material difference to
19 its pricing or strategy, but it mentioned a contributing
20 factor.

21 In their closing submissions essentially what the
22 CMA say is that there were four promotional deals that
23 Legal & General would have entered into that they were
24 effectively prevented from doing or undermined because
25 of the wide MFN, and the first one was in February 2017,

1 and then if we go over the page {A/1/285}, the next was
2 in August 2017. The following one was, as we understand
3 it, October 2017, and then the final one
4 was November 2017.

5 So that is what we understand to be the four
6 promotional deals that were effectively stymied by the
7 wide MFN.

8 Now, we think that that list is essentially derived
9 from a Section 26 submission made by Legal & General
10 which is at {F/317/28}. You see the question:

11 "Please explain whether there have been any
12 occasions in which either [Legal & General] or a PCW
13 have proposed an Exclusive Deal ..."

14 So this is an early Section 26.

15 "... but an Exclusive Deal was not agreed. If so,
16 please provide up to ten examples of such failed
17 negotiations and, in relation to each failed
18 negotiation, please explain the reasons ..."

19 I should say that some of the questions that were
20 asked clearly expected that there were going to be lots
21 and lots of instances. This is actually one of the
22 examples of the Section 26 notice from 2017 where there
23 are quite a few examples. Most of the others do not
24 have anything in response to this question 16, but let
25 us leave that.

1 It is all slightly out of order in date terms, but
2 you will see row 1, and there is a reference to the PCW
3 question, the date discussed, the type of offer, and
4 then the reasons for not proceeding, and you will see
5 the reasons for not proceeding there totally unrelated
6 to the wide MFN.

7 Not hugely surprising because of course we are
8 in December 2017 there, which is after the withdrawal of
9 the wide MFN. So it is just interesting -- of course
10 there are all sorts of reasons why HIPs do not want to
11 enter into promotional deals.

12 Then 2, and this is the last of the four that we
13 were referring to, same PCW, November 2017, PCW
14 approached 32 to work with them on a print above the
15 line campaign, and then reasons for not proceeding, the
16 first two are confidential, I am not quite sure why, PCW
17 needed a response by X date, and HIP was not able to
18 review.

19 Then HIP also had concerns, again I do not
20 understand why it is confidential, and then the presence
21 of the CTM wide MFN was also flagged as a risk, was also
22 flagged as a risk.

23 Then if we keep going -- and I am going to come back
24 to the relevant documents underlying this. So that is
25 one of the four. Then 3, PCW, April 2015, and the

1 reason given was the relevant person involved left, so
2 that is obviously not relevant.

3 Then the fourth one, {F/317/29}, that is July 2015,
4 the PCW had no appetite to enter into the deals. I will
5 come back to that, because one of the points we make
6 about Legal & General which is ignored in the analysis
7 in the Decision and ignored by the CMA in its closings,
8 was not only did it have a deal in 2015 running into
9 2016, it had actually approached PCWs in relation to
10 these matters all the time subject to the wide MFN.

11 Then 5, this is August/September, so this is another
12 of the four, PCW approached 32 to work with them on an
13 above the line campaign, and there you see the concerns
14 being expressed, and the indication:

15 "The risk of breaching the [CTM] Wide MFN was
16 raised."

17 Then number 6, this is February/March 2017, PCW
18 approached 32 and then this one just says:

19 "Wide MFN clause in [CTM] agreement."

20 So that seems like it is the strongest, and that is
21 one of the four examples that are cited by the CMA, and
22 then 7 is unrelated, it is to do with a different set of
23 reasons why it was not proceeded with.

24 I think that is the end of that table. Can we just
25 confirm that? Yes, so that is the end of the table.

1 What you have there are three of the supposed four
2 referred to by Legal & General. What I just want to
3 briefly do is look at the underlying documents in
4 relation to those three and indeed this notional fourth
5 that in fact does not exist.

6 Let us do it in date order. We will start
7 with February/March for 32, and we think the relevant
8 document here is {F/321/1}.

9 Here we have a situation where if you look at the
10 bottom, you will recall perhaps the name of the person
11 who sends the email at the bottom because we looked at
12 some of her emails in cross-examination, and so this
13 is February 2017:

14 "We've been approached by [X] who would like to run
15 an above the line marketing campaign with them to
16 include a provider exclusive offer such as 10% off or
17 a voucher ..."

18 So obviously we know that vouchers would not be
19 prohibited anyway.

20 "As you know we have a wide MFN clause in our
21 agreement with CTM, which [reads] as follows ..."

22 Then it is quoted:

23 "Please could I have your view on whether you see an
24 issue from a CTM contractual perspective of entering
25 into an exclusive price offer with [X]."

1 Then if we go back, you see:

2 "Hi ...

3 "I am not satisfied that we can operate the ...
4 proposition without breaching the CTM clause ... The
5 contractual defined terms in my opinion ensure that the
6 clause applies to all household contracts sold under
7 the ... brands and available directly from the website
8 or a different source ...

9 "The only option might be that MSM gives its own
10 discount/cashback, and this is operated by [X] at
11 source. So the price reduction given by [PCW] and not
12 [HIP]. I need to give this a bit more thought but
13 I feel it may be an option worth testing."

14 So there is an expression from that person
15 expressing concern about compliance of that offer with
16 the wide MFN. That is undoubtedly true. No doubt
17 about it, but we do not actually know what the final
18 reasoning was for rejecting it. We have seen what Legal
19 & General said in its table, but it is worth then going
20 to {F/284/1}. That was a February email, and it is
21 worth going to {F/284/1}, and I will refer to this as
22 the breakfast email because you will recall that the
23 writer of it was trying to catch up during someone
24 eating breakfast.

25 Then you will see at the bottom an email from the

1 PCW:

2 "Hello! Hope you're feeling better. One of the
3 things we were going to catch up about was the ATL
4 conversations and my suggestion for the mid May-mid June
5 slot. Did you find out whether you'll be able to work
6 to that timeline?

7 "Give me a shout ..."

8 Then:

9 "Apologies I was [backed up]... and just trying to
10 catch up now while [X] is eating breakfast!

11 "At the moment I'm still working on whether we could
12 do this contractually which is the major hurdle I need
13 to overcome, and would be the show-stopper for us if we
14 can't."

15 This is all part of the same discussion. So we had
16 the material that indicated there were concerns. Then
17 clearly there have been other discussions, and it is not
18 resolved whether or not there is a contractual problem
19 with it.

20 We know that the deal did not go ahead, so far as we
21 are aware, fine, but we do not actually have closure of
22 this loop.

23 Yes, it is absolutely true that Legal & General, in
24 its table, referred to the wide MFN as the cause, but on
25 the face of it, it is just not as clear as one might

1 expect, even in relation to that very emphatic example.

2 Let us just leave that one and move on to August.

3 This is the second of the notional four.

4 Can we pick it up at {F/320/5}, please.

5 This is, first of all, 1 August 2017, and it is from
6 someone within Legal & General to other people within
7 Legal & General:

8 "Please find attached a few slides detailing:

9 "(1) the cause, effect and implications of
10 [full-time employee] shortage ...

11 "(2) the proposed course of action to improve
12 capacity and minimise commercial and customer impact.

13 "(3) points that require a steer/decision from the
14 leadership team on ..."

15 Then if we could just scroll down {F/320/6}, we get
16 a bunch of stuff about business issues. If we could
17 scroll down again {F/320/7}:

18 "A steer/decision is required from leadership team
19 regarding:

20 "A) the opportunity to be part of [PCW] campaign in
21 September. This would require offering [PCW] customers
22 a discount. Although supportive in principle, Trading
23 have highlighted the following risks ..."

24 You will see there five risks that are adumbrated.
25 There is a reference in (iii), but it is only one of the

1 five, to the most-favoured-nation clause.

2 So supportive in principle, but there are a bunch of
3 risks.

4 If we go up the slides, sorry, if we could go back
5 up, I think it is page {F/320/3}, I have just lost it in
6 my notes, I apologise. If you could go to page
7 {F/320/2}, I am sorry, we need to introduce this email.

8 This is 2 August, same person:

9 "I'm on the train to Cardiff, fortuitously sat with
10 some colleagues."

11 "We've run through the pack and the following points
12 have been raised."

13 So they are then running through, and there is
14 a discussion about who is meeting who to discuss things,
15 and I am not going to run through all of them, but if we
16 scroll over the page, {F/320/3}, lots and lots of things
17 being discussed on the business issues and if we go over
18 again {F/320/4}, (8):

19 "Both [X and Y] agree that the [PCW] opportunity
20 isn't something we should pursue in [September] given
21 the risks we've raised. In light of this can we explore
22 introducing a rate increase in [September] please ..."

23 So what we see here is that a range of risks were
24 identified and the conclusion being given was, well,
25 given all those risks, let us not go ahead with it, but

1 there is no sense that the wide MFN was somehow the
2 driving force or the critical causative part of this,
3 and that of course reflects the idea that what had been
4 done was just this thing being flagged, but no sense
5 that this was actually changing the way in which overall
6 they thought about it, and insofar as it was being
7 raised, it certainly was not being emphasised as in any
8 way determinative.

9 I should just pick up that around this time, if we
10 could go to {F/713/1} just to join a couple of dots, you
11 will recall this was an email chain that was put in
12 cross-examination, and this was about enquiries being
13 made concerning potential cannibalisation of growth if
14 you ran a promotional deal, which was of course one of
15 the concerns that was raised, and it was raised in the
16 context of potentially raising issues in relation to
17 call centre capacity, which of course was one of the
18 issues amongst the risks that we have just seen.

19 The point we have here is that there were issues of
20 discussion, but the idea that you can conclude from this
21 documentation that the wide MFN was somehow effectively
22 preventing this deal going ahead or was critical to the
23 way that Legal & General thought about going for this
24 deal is just a huge leap from the documentary material
25 that you are seeing. You cannot safely conclude that.

1 If I could just deal with the third of the four,
2 the October 2017, interestingly in the Decision all that
3 is really referred to is the June briefing pack that
4 Ms Demetriou was so keen to take you to in opening.
5 That is at {F/324/1}, and you will recall this.

6 THE PRESIDENT: Yes.

7 MR BEARD: She put it was in preparation for a discussion
8 with the PCW, and the slide she most likes is at
9 {F/324/5}, just so that you have it. She emphasised all
10 sorts of bits of this, but I think there are a couple of
11 things that are very important.

12 This is not about any specific promotional deal so
13 far as we can see. So the idea that this is indicating
14 that Legal & General did not enter into a promotional
15 deal does not stack up.

16 It is interesting, of course, that the Section 26
17 notice that I referred you to did not refer to any
18 problem in relation to October 2017, but then more than
19 that of course this is a June document, and we have just
20 seen discussions going on from August.

21 In other words, you had this document but then you
22 did have discussions about a potential deal with this
23 PCW going on in August, the documents I have just taken
24 you to.

25 So the idea that these topics for discussion which

1 have been set out were determining how Legal & General
2 would deal with these strategies is just not tenable on
3 the face of contemporaneous documents, never mind
4 whether we get into all the ambiguities because these
5 documents have not been explained by a witness.

6 Then if I could just go to the November example, we
7 understand this November example, so this is the fourth
8 of the four in Decision 8.106, it is at {F/318/1}. You
9 see it a note saying:

10 "[PCW] above the line campaign."

11 Then if you look two paragraphs up above the
12 table -- sorry, if we just go -- you have a heading
13 saying "ComparetheMarket ... contract breach", and then
14 you have a discussion of those issues, and then it says,
15 "Next steps", because the top of the paper is suggesting
16 a deal, then you have this concern and then you have:

17 "Next steps.

18 "If the committee agrees the following activities
19 will be progressed with a view to an extraordinary
20 committee to make the final decision once the following
21 has been determined ..."

22 If we just go over the page {F/318/2}. Then there
23 are three matters, including, first, having a look at
24 the impact of running deals.

25 So it is absolutely true that in that document the

1 wide MFN breach is being flagged, but what you cannot
2 tell from this document is what the actual decision was
3 in relation to any promotional deal, and what the cause
4 of any decision in relation to any promotional deal was
5 here.

6 So we say, look, the problem you have is we see that
7 Legal & General is on occasion referring to these
8 matters, but you do not have a clear evidential picture
9 of the degree to which it mattered to Legal & General,
10 and that, as I say, is important in a situation where,
11 first of all, we know that Legal & General had entered
12 into a deal under the wide MFN back in 2015 that ran
13 through into 2016, so we know that during the currency
14 of the wide MFN it was not complying with it.

15 There are concerns being articulated, but they are
16 not stopping it having discussions in August 2017.

17 Of course, here we are dealing with documents
18 in November 2017, and of course this HIP received
19 a letter at the end of November 2017 saying, actually,
20 that wide MFN does not apply anymore, but what we do not
21 see is any material from the HIP in any of this saying,
22 actually, look, the coast is clear, we can head on now,
23 that deal that was being proposed we can really push on
24 with it. You have nothing like that.

25 If we could just go to document {F/319/1}, please.

1 This was just one of the emails I actually took
2 Ms Glasgow to.

3 This is from July 2015, and this is during the
4 currency of the wide MFN, you will recall that Legal &
5 General was saying, well, we might be interested in
6 doing some promotional deals, not significant, but we
7 might, and then the PCW coming back and saying,
8 actually, we are not interested in it.

9 So not only had they done a deal, but they were
10 expressing interest in it at the time of the wide MFN.
11 Later, in other instances, they expressed doubt, but we
12 do not know how significant that is, and that is why it
13 is important, because it is not that we just have those
14 contemporaneous emails, we have this other information,
15 but then of course we also have the subsequent material
16 from the HIP itself in response to Section 26 notices.

17 If we could go to paragraph 150 which will be
18 I think page 50 in our closing {B/64/50}:

19 "In the SO response to the CMA [HIP] said ...

20 "'[it] does not consider that, absent the wide MFN,
21 it would have had a greater incentive to enter into
22 promotional deals with other PCWs.

23 "'At most the Wide MFN had only constrained [X] on
24 the edges of its actions; it has had no material impact
25 on pricing, strategy or profitability."

1 "'The wide MFN has had little or no impact on PCW's
2 negotiation of commission rates."

3 If we go back earlier, its 2018 Section 26 response:

4 "Generally speaking, [X] is not aware of any change
5 in competition between PCWs as a result of the removal
6 of CTM's Wide MFN."

7 In addition, this was one of the HIPs that did
8 actually meet with the CMA, this is June 2018, and the
9 representatives were very clear in stating in that
10 meeting no material impact on pricing, strategy or
11 profitability.

12 So the CMA had ample opportunity to clarify all of
13 this, and what it was getting from the HIP itself was,
14 no, none of this was material to us.

15 We say the contemporaneous documentary material is
16 inconclusive in relation to this because the CMA have
17 not followed it up. At its highest, we have one
18 incident in February/March 2017.

19 I should also add that of course we have the
20 evidence from a PCW in relation to these matters, and
21 that evidence from the PCW, which we pick up in
22 paragraph 156 {B/54/52}, where the key person involved
23 in the negotiations, of course we heard from a witness
24 who was not at the coalface of these negotiations who
25 said that on one occasion she had had a conversation

1 where she thought that the CTM-wide MFN had been
2 mentioned, but when the CMA actually asked the person at
3 the coalface of negotiations for this PCW, she referred
4 to the fact that the one email that had been referred to
5 as suggesting that there was some sort of impediment to
6 a promotional deal, that was very much the exception and
7 her interview material explains how she did not consider
8 these things significant.

9 I have called out that one because that is very
10 heavily emphasised by the CMA. The CMA will no doubt
11 argue about the interpretation. We can see that there
12 may be different views on that material. The point we
13 make is, any benefit of any doubt comes to us, and in
14 the context of an entity that had been doing
15 a promotional deal, says that it does not matter to it
16 that the wide MFNs exist, in those circumstances it is
17 very important that that material is entirely
18 inconclusive.

19 If we may then I will just go back and zip through
20 the remainder of the evidential points. I will have to
21 do this very quickly now.

22 If we could pick it up at paragraph 196 in our
23 submissions which should be at around page 65, I think
24 {B/64/65}.

25 Here we are dealing with One Call. It did two

1 promotional deals during the relevant period. As we set
2 out in 198 -- so it was not actually complying with the
3 wide MFN during the relevant period. It explains at 198
4 various reasons why other deals failed for various other
5 reasons, and so actually that HIP is not providing any
6 good evidence of a significant effect of the wide MFN,
7 but it is worth picking up, if we could go forward to
8 page {B/64/81} paragraph 240, it should be. Actually,
9 can we go back to page {B/64/80}, thank you. {B/64/79}.
10 This was one of the alleged six examples of enforcement,
11 and we have just dealt with them very briefly here.
12 There is more material on enforcement, I will just
13 provide the reference to you, which is in our annex 2 to
14 our notice of application, {A/2.2/1}, which we refer to
15 there.

16 You will see over on page {B/64/80} you will see the
17 position in relation to One Call is dealt with at the
18 bottom. What we say is, yes, there were queries raised
19 about pricing, but it all petered out, and so to treat
20 this as some sort of emphatic story of enforcement just
21 does not stack up.

22 That is also true, for example, if we just go over
23 the page {B/64/81} in particular of the HIP at (f),
24 which is Swinton, and indeed a number of the others are
25 overstating this notion of enforcement entirely.

1 If we could just go back to paragraph 201 on page
2 {B/64/66}, please.

3 THE PRESIDENT: Mr Beard, I have more than half an eye on
4 the clock and I think what I am going to do is I am
5 going to actually stop you on this. I would not
6 ordinarily do it, but I am conscious first that we do
7 need to hear from you on penalty and secondly, I think
8 I am going to try to apply a fairly hard guillotine that
9 you sit down probably before 1.00 simply because you
10 will want time tomorrow for a reply, and I absolutely do
11 not want Ms Demetriou to feel under any time pressure
12 herself.

13 I say it simply because we are going to be reading
14 this including chasing the references with particular
15 care, and I think the cost/benefit in terms of time is
16 just going to distract rather than otherwise.

17 So apologies, but --

18 MR BEARD: If the Tribunal is content I am very happy to
19 move on. We would note the points about coverage
20 because obviously there are arguments about coverage, we
21 deal with those in paragraphs 225 onwards {B/64/74}.

22 The headline point is a simple one, which is taking
23 some sort of monolithic approach to coverage is not the
24 right way of doing things. None of the case law
25 requires that in terms of analysis of the counterfactual

1 at all. We deal with that at 228 {B/64/75}.

2 We also deal with the cross-examination of
3 Ms Ralston at 229 where Ms Ralston was cross-examined on
4 how she carried out an effective coverage analysis, and
5 we very fairly, I hope, accept that Ms Ralston is not
6 the determinant of factual findings in relation to this
7 case.

8 What she did was she tried to carry out an analysis.
9 Ms Demetriou took her to various documents which plainly
10 Ms Ralston had not been looking at. It showed that
11 Ms Ralston's overall approach was not complete in this
12 sense but what she was endeavouring to do was point out
13 how systematically one might look at these issues to
14 suggest there was not complete coverage.

15 That is essentially a matter for the Tribunal to
16 undertake, but I think it is also important to bear in
17 mind that to some extent the irony of that
18 cross-examination was of course that the out-turn was
19 that these matters were mixed, as Ms Demetriou put it.

20 Well, matters being mixed are matters that do not
21 make out, we say, a sufficient discharge of the burden
22 of proof.

23 THE PRESIDENT: Mr Beard, if it helps, we obviously will
24 have to consider quite carefully the way it operates,
25 but what I think we will try to do is, particularly with

1 Ms Ralston's evidence, is actually to disaggregate the
2 quantitative evidence on which we will take a view
3 without, so far as possible, Ms Ralston's evidence and
4 the econometric stuff which is her evidence and which we
5 will want to weigh quite carefully.

6 There is obviously a degree of bleed across in the
7 sense that -- particularly on coverage, which you are
8 addressing, Ms Ralston felt, we understand why, obliged
9 to look at the whole picture when seeking to include and
10 exclude. We will nevertheless try to apply the same
11 bright line approach there and treat Ms Ralston's
12 evidence as really going to the econometrics so far as
13 possible.

14 MR BEARD: I think that is entirely sensible and right.

15 I think the important thing to bear in mind is that
16 Ms Ralston was very clear that the econometric analysis
17 and the analysis of comparative data or the contextual
18 numbers she provided, they were not dependent on
19 anything she had done in relation to coverage analysis.
20 What she said was that the material she was getting at
21 in relation to econometrics and context and so on were
22 consistent with actually there being a lower effective
23 coverage than was being asserted by the CMA, but none of
24 what she did in relation to the materials that you are
25 talking about depended on any of the coverage analysis.

1 So three quick other remarks on evidential matters.

2 First of all, just picking up paragraph 234 and
3 onwards in our submissions {B/64/78}, holding against us
4 the fact that we engage in price monitoring is not
5 a fair criticism because everyone is engaged in price
6 monitoring quite properly, that is very clear. It is
7 ubiquitous, essential and entirely proper.

8 The next point just to touch on, we have dealt with
9 at paragraphs 250 onwards {B/64/84}, the allegations
10 that refusing to remove, when there was still
11 consideration of whether or not these clauses were
12 valid, we say is not something that can properly be held
13 against us in these circumstances.

14 Then finally I will just make one remark in relation
15 to the heavy citation of Ms Glasgow in the closing
16 submissions from the CMA.

17 The assertion seems to be that they can just rely on
18 the witness statement as it stood. The Tribunal has
19 heard the cross-examination of her. She is not someone
20 that was in a position to corroborate widespread
21 compliance with the wide MFN. She was not at the
22 coalface. She was the wrong witness for that, and in
23 fact she was generally very helpful but much more in
24 relation to dynamics of competition and online issues.

25 She did have a vague recollection of the wide MFN

1 being referred to once in a conversation with her, but
2 that, frankly, is not significant, and when it comes to
3 the strategic issue she talks about I am just going to
4 emphasise two terms. One is quotability and the other
5 is any strategies heading towards price parity, those
6 matters are important in relation to these issues.

7 With that I will move on to penalty, if I may.

8 THE PRESIDENT: I am grateful.

9 MR BEARD: If we could pick it up in our submissions at 394
10 {B/64/132}, I have two grounds that I have to deal with,
11 but I can deal with this relatively swiftly, I think.

12 The first is whether or not any sort of penalty is
13 appropriate here applying the relevant case law tests.

14 We say plainly it is not. The case law test is set
15 out in 394 or the variant applying reference to the wide
16 MFNs.

17 It would have to be that BGL or CTM could not have
18 been unaware that its conduct had the effect of
19 appreciably restricting competition and so ought to have
20 known that.

21 We simply say that is not something that we could
22 not have been unaware of or ought to have known.

23 It is a case dealing with complex and novel issues.
24 We have touched on the ComparetheMarket documents that
25 have been referred to by the CMA. None of them, as

1 I say, are to do with home insurance. It is simply not
2 something of course that CTM was coy about, the
3 arrangements it had in relation to home insurance,
4 because it was engaged with the CMA throughout the DCT
5 study explaining why it was it thought that these things
6 were okay.

7 The idea in those circumstances that it was aware
8 that they were having an actual appreciable adverse
9 effect is just not tenable. We were not being coy,
10 there was nothing being hidden, and there is nothing in
11 any of the documents suggesting that somehow we were
12 aware of these issues in relation to home insurance
13 at all.

14 I have mentioned the fact that we did not even
15 include the wide MFN referred to in the negotiations
16 handbook. That is referred to in our NoA, {A/2/79}.

17 In the course of considering these issues in these
18 proceedings, of course what we hear are complicated and
19 difficult arguments about how it was that you might make
20 an assessment of a possible appreciable adverse effect,
21 as the CMA puts it, but of course it is only with the
22 benefit of the CMA's data gathering that we can actually
23 carry out any of this sort of assessment. It is not the
24 sort of assessment that we could carry out in relation
25 to all of these issues without data being gathered.

1 Obviously, we had the consumer intelligence data
2 set, but the idea that we should have been aware that
3 there would have been a change in retail prices or
4 a change in commissions, it is obviously outlandish in
5 circumstances where even the CMA has not come forward
6 and actually proffered evidence of that sort.

7 What it has done is relied on documents that only it
8 could gather.

9 To suggest that it was plainly foreseeable is just
10 not a sustainable position and relying on individualised
11 instances, as the CMA does, does not mean that we must
12 have foreseen these matters, and of course added to that
13 is the fact that none of these issues about how these
14 matters should be dealt with were clear in the context
15 of a broad market which we see the FCA investigating.

16 So it is not just a matter of looking narrowly at
17 the way in which the CMA considers these things, but
18 those concerns and discussions about how you have to see
19 this in a broader context become all the more important
20 when you are asking about was it foreseeable that there
21 would be an actual appreciable effect, adverse effect,
22 here.

23 As I say, and we have highlighted in paragraph 400
24 at page {B/64/133} the novelty here.

25 If we could turn to {B/39/3}, actually, can we go

1 back to page {B/39/1}, I am sorry, just so you can see
2 what it is.

3 Can we go back one page, I think it is the cover.
4 Oh no.

5 So this is the digital market study update paper,
6 the date is March 2017.

7 This is in the course of the digital market study
8 that was going on during 2016/2017:

9 "This paper provides an update on our market study
10 of digital comparison tools ... We are now six months
11 into the project, and are due to publish our final
12 report by ... September 2017.

13 "DCTs play a major role in a variety of markets, and
14 many consumers use them to shop around. They offer
15 substantial benefits in reducing hassle for people and
16 in increasing competition.

17 "For those benefits to be maximised, a number of
18 conditions need to be met: consumers need to be
19 confident enough and have enough trust to use DCTs; DCTs
20 ... need the ability to operate effectively; competition
21 needs to be effective; and regulation of DCTs needs to
22 be appropriate."

23 So trust is considered, competition is considered,
24 all of these things are being considered.

25 If we could then go on to page {B/39/5}, please,

1 here we see a rough summary of the benefits that DCTs
2 can offer. You will see at 1.16:

3 "... for [the] benefits to be maximised ...

4 "Consumers need to have enough confidence and
5 understanding ...

6 "DCTs need access to the right information to be
7 able to offer effective comparisons ...

8 "Competition needs to be effective ...

9 "Regulation ... needs to be appropriate ..."

10 All of these things are being considered.

11 If we go on to page {B/39/7}, you will see there the
12 subheading "Competition" just above 1.27 and if we could
13 go over the page {B/39/8}, paragraph 1.30:

14 "We are considering four types of practice which
15 might raise [might raise] competition concerns."

16 So this is March 2017. This is after the PMI
17 investigation. This is six months into a study by the
18 CMA and the CMA is not saying we recognise that there
19 are competition concerns by any particular class of MFN
20 in any particular sector. They might raise competition
21 concerns. The first category is wide MFNs; the second
22 category is narrow MFNs; the third is bidding
23 limitations; and the fourth is the effectively
24 non-resolicitation clauses.

25 Then if we jump on to page {B/39/97}, please,

1 picking it up at 7.49:

2 "In the PMI market investigation, the CMA found that
3 wide MFNs were not necessary to deliver any potential
4 pro-competitive benefits over and above those of narrow
5 MFNs, namely credibility and the prevention of
6 free-riding ... As part of this market study, one DCT
7 has maintained that wide MFNs enable DCTs to offer
8 a 'strong customer proposition' and that there is
9 a particularly strong case for wide MFNs being used to
10 instill consumer confidence in markets where DCTs are
11 underdeveloped. We are interested in exploring these
12 arguments, as well as arguments around the potential
13 harm from wide MFNs, in more depth in the next phase of
14 our study."

15 Now, it is no secret who the one DCT referred to
16 there is, but what was clear was we were expressing
17 these views completely openly about what our position
18 was in relation to it, and the CMA was perfectly
19 open-minded at this point, or so it appeared, saying,
20 look, we are exploring these issues, we do not know the
21 answer, we are looking at issues of potential harm,
22 which must translate into actual effects or potential
23 effects at that stage as well, and we will be looking at
24 it in more depth in the next phase of our study.

25 But at that point in March 2017 the idea that we

1 should have known, it was entirely foreseeable, we could
2 not have been unaware that here there were actual
3 adverse effects, is just not tenable. The CMA did not
4 know. It had lots of material, it had made lots of
5 enquiries. We did not know either.

6 I just want to go to another document {F/36/1},
7 please.

8 This is April 2017, and obviously we only found out
9 about this subsequently, but it is instructive.

10 It is a meeting with AA. Paragraph 4:

11 "The CMA explained that its intention was to deliver
12 an authoritative, evidence based review of the sector,
13 and that it still had some way to go. The update paper
14 only contained initial views and the CMA was keen to
15 hear thoughts on those. The CMA reassured [AA] that it
16 was keeping an open-mind on the issues in the update
17 paper and that it had not yet reached a final view."

18 Then it says:

19 "There is more history in relation to MFNs (because
20 of the previous work on PMI), but the CMA still had
21 a lot to hear on the issue."

22 So that is April 2017.

23 So we are dealing with a novel issue. It was
24 subject to enquiry where the CMA was not saying in March
25 or April 2017, it is obvious to us, or, you cannot be

1 unaware that there is a problem here, and of course it
2 was in a situation where there had been an investigation
3 into PMI, and what was being considered was: is this
4 different here?

5 In those circumstances, it was not fair or
6 appropriate for the CMA to conclude that after
7 a year-long DCT study which had followed on from a long
8 investigation in relation to an adjacent market,
9 a year-long DCT study, followed by a three-year
10 investigation in relation to this infringement, where
11 what is put forward on the basis of so-called
12 qualitative evidence is not something that we say is
13 good evidence of effects.

14 The idea that we cannot have been unaware of actual
15 appreciable effects is just not a tenable position, and
16 the fact that other PCWs had decided earlier to withdraw
17 wide MFNs does not tell whether or not we should have
18 been aware of adverse competitive effects at all.

19 Some of them did not operate wide MFNs to begin
20 with. Others withdrew them at different times. That is
21 not instructive as to what we should have known or been
22 unaware of.

23 In those circumstances, we say it is plain that the
24 relevant test is not met in relation to issues of
25 intention and negligence, and this is not a case where

1 it was appropriate for the CMA to impose a penalty in
2 those circumstances.

3 THE PRESIDENT: It is fair to say, Mr Beard, that the CMA's
4 position is that this was an intentional or
5 alternatively a negligent infringement.

6 MR BEARD: Yes.

7 THE PRESIDENT: Just to get your answer to this, what would
8 your response be if we were to approach this at an
9 altogether higher level of abstraction to say, look, we
10 have been hearing on the substance two weeks of
11 material, it obviously raises a whole series of
12 difficult questions, but you were aware from before the
13 relevant period that wide most-favoured-nation clauses
14 in general have been the subject of regulatory concern
15 and scrutiny, including but not limited to the question
16 of motor insurance. You have intentionally maintained
17 in your contracts wide most-favoured-nation clauses.
18 You are perfectly entitled and you have fought against
19 the CMA's contentions regarding effect, both in the
20 investigation and here, but if you lose here then this
21 is a case where you have intentionally maintained
22 a provision that does have the effect of restricting
23 competition, and the fact that you have lost,
24 hypothetically speaking, on the arguments means that,
25 although you subjectively believed that there was no

1 effect, the fact is you have lost and the penalty
2 follows because at that high level of abstraction the
3 provisions of the statute have been met.

4 MR BEARD: Well, two points. First of all, the test that
5 I articulated about not being unaware, could not have
6 been unaware and ought to have known, that is intention
7 and negligence.

8 THE PRESIDENT: Indeed.

9 MR BEARD: So the intention issue does not matter for those
10 purposes. Here we are dealing with a situation where of
11 course we are not denying that we intentionally kept
12 clauses in place because we thought it was entirely
13 appropriate to do so, but it is not sufficient in those
14 circumstances to say, okay, well, we have assessed you
15 have lost in those circumstances you get a penalty
16 because this further step of: could you have been
17 unaware, essentially, that you were going to lose, using
18 the high level of abstraction. I know that is
19 conflating two issues because there is a difference
20 between a finding of unlawfulness and the awareness of
21 the consequences, so just to preempt Ms Demetriou on
22 that, but just using your high level of abstraction, if
23 you test it that way, we could not have been unaware
24 that we were going so lose this, obviously is
25 a proposition that is not met in relation to this, after

1 just the process of going through this exercise.

2 But let us assume that actually you are saying,
3 well, you ran the risk. Again, that is not sufficient,
4 because it is not whether you are running a risk; it is
5 you could not have been unaware that there were actual
6 effects, and that is why this matters. Because we have
7 had so few effects cases, the Tribunal has not really
8 had to grapple with what this threshold means in effects
9 world, because of course in object world it becomes much
10 easier because you say, well, if you knew or were
11 negligent about operating that particular conduct,
12 because it is inherently of the sort that is beyond the
13 pale so far as competition law is concerned, in those
14 circumstances you are stuck, and then it becomes easy.

15 The difficulty is as soon as you include effects,
16 what is it that you actually need to have been
17 unaware -- could not have been unaware about about
18 effects? We say, look, when you are talking about
19 appreciable effects on competition in these
20 circumstances, given all that we are talking about, and
21 having to analyse, and look at, including material we
22 could not have had access to, what you end up doing is
23 the CMA simply saying, well, you did have the clause and
24 occasionally you mentioned it and we say that you
25 enforced it on occasion, and that is enough for an

1 overall appreciable effects analysis, and we say that is
2 just a vast extrapolation, and that is why we do
3 interpose between your putative loss, which obviously
4 I do not work with, your putative loss and the natural
5 following on to a penalty, because that is not, even at
6 that high level of abstraction, the way that things
7 should be dealt with.

8 THE PRESIDENT: Thank you.

9 MR BEARD: Sorry, I should pick up on the regulatory issues
10 as well.

11 The regulatory points have been raised elsewhere,
12 but of course the regulatory record is essentially
13 saying, look, we are not quite sure how we deal with
14 these things, so it is not that you have some kind of
15 case law, whether in Germany or the US or wherever else,
16 where you can say, well, yes, we have a real problem, it
17 is undoubtedly having effects. We have a whole range of
18 different markets, different situations. Regulators are
19 sometimes using different laws, and I think invariably
20 in those cases saying, "This is quite difficult", and in
21 the main what they end up doing is saying, "Okay,
22 commitments or prospective bans" if they think there is
23 a problem. They do not come along and say, "Okay, we
24 should have known and we are going to whack a great big
25 penalty on you", that is not what you are seeing here in

1 any of that regulatory activity.

2 So why it is, the fact that things are being
3 debated, does not mean that we were aware in relation to
4 this market or should have been aware -- because it is
5 in fact an objective test, we accept that; it is not
6 just our subjective -- it is an objective test that we
7 should have been aware that there were appreciable
8 adverse effects here. So the regulatory matters do not
9 actually assist the CMA because all they do is say, this
10 is all being debated, how it all works. The very fact
11 that we end up in the course of this having debates
12 about economic literature that says things like, well,
13 actually the narrow MFNs can create precisely the
14 outcomes of the wide MFNs, how on earth are we supposed
15 to -- even if you have executives within CTM who are
16 conversant with industrial economics literature and have
17 reviewed those sorts of things, how are they supposed to
18 be able to take anything away from it even if they
19 knew it?

20 Then it all comes back to, well, you had a clause,
21 and you mentioned it, and we say you enforced it on
22 occasions, but that is not dealing with the overall
23 story which of course, as Ms Demetriou would put it, is
24 their theory of harm about all of this and how it plays
25 out across the market.

1 That then really takes me to ground 8, I think,
2 unless I can assist further in relation to the intention
3 negligence threshold test.

4 THE PRESIDENT: Thank you.

5 MR BEARD: Here, if I may, I would like to redirect the
6 Tribunal back to the notice of appeal. So that is at
7 {A/2} starting I think at page {A/2/94}.

8 The reason I redirect there is because in many ways
9 a slightly fuller account is dealt with there than in
10 other pleadings, albeit we have referred to it from
11 paragraph 402 onwards in our closing submissions
12 {B/64/135}.

13 I should say in our closing submissions one of the
14 things we emphasise -- sorry, if I could just dance
15 around for a minute. Could we go to {B/64/135}.

16 I do just emphasise that we have included here case
17 law about the full jurisdiction of the Tribunal in
18 relation to these issues, because I think the CMA on
19 occasion drifts towards, well, we impose this fine, we
20 are the guardians of the guidance and you should really
21 defer to us.

22 We say -- we understand that obviously the Tribunal
23 must take account of what the CMA does in relation to
24 applying the guidance, but having heard all the evidence
25 in this case, having been able to consider these issues

1 in the round, the Tribunal is in a very, very different
2 position to appraise these matters and has full
3 jurisdiction and frankly should not defer to the CMA in
4 relation to what is one of the largest fines that has
5 ever been imposed in the UK in relation to allegedly
6 anti-competitive behaviour.

7 We say it is just wholly out of proportion. Before
8 we get into the details, it is just out of proportion to
9 what we are talking about here, given the levels of
10 uncertainty and novelty, the way in which we operated in
11 a candid and open way in relation to DCT in relation to
12 these matters, and of course what we have heard about
13 the FCA analysis here and the concerns about the broader
14 market.

15 These factors all point far away from any suggestion
16 that it is necessary and proportionate to impose
17 a penalty of that sort of level at all.

18 In the submissions we do highlight that of course
19 what the CMA does is it takes as the starting point the
20 relevant market share, all of the turnover that we have
21 in relation to the market as defined.

22 Now, we recognise that in cases and in guidance that
23 is the way that these matters have been approached. We
24 do understand that is the case, but on the other hand
25 what it does is it takes you to a starting point that

1 effectively amplifies the sense of importance of the
2 infringement that you are putatively identifying.

3 Therefore, because you start at that point, it is
4 something that again causes a disproportionality in the
5 way in which the penalty is calculated overall.

6 So we are not going to quibble about case law. What
7 we are concerned about is that when you start by
8 effectively using that case law that in a way amplifies
9 the impact of the infringement, that is something that
10 creates further problems down the line.

11 We have emphasised in particular here the concerns
12 we have about issues relating to novelty.

13 If you pick it up at {A/2/96}, you will see we have
14 articulated how the CMA has used the penalty guidance
15 applying the starting point methodology, how likely it
16 is for this type of infringement at issue by its nature
17 to harm competition and the extent or likelihood of harm
18 to competition in the specific relevant circumstances.

19 Those are key points that it relies upon, as is
20 general deterrence.

21 These are matters that are set out in the penalty
22 guidance, and for your notes the penalty guidance is
23 found at {B/42/8} in the bundle, but I do not think we
24 need to go there just for the moment because we have
25 extracted key elements in these submissions.

1 When we come to the nature of the alleged
2 infringement and whether or not it is the type of
3 infringement -- how likely is this type of infringement
4 by its nature to harm competition, we say that
5 essentially in considering these issues the CMA has
6 started from a position where it effectively treats wide
7 MFNs as very likely to harm competition in circumstances
8 where that just is not fairly borne out by literature,
9 particularly in circumstances where you are talking
10 about the incremental effect of wide MFNs, and that of
11 course crosses us over into the extent or likelihood of
12 harm to competition in the specific relevant
13 circumstances, because there of course you are looking
14 at the incremental effect of wide MFNs against
15 a background including narrow MFNs.

16 In those circumstances, to effectively have taken
17 the upper end of what they refer to as the mid-band,
18 because as the Tribunal will be familiar, the way in
19 which the guidance works is to take a range of up to 30%
20 of the relevant turnover and then decide in broad terms
21 how serious the infringement is. The highest level of
22 percentage of relevant turnover that is used as
23 a starting point will be for truly egregious cartel
24 behaviour where you have concealment, heavy policing,
25 massive output restrictions, where it is not only

1 obvious that this was entirely contrary to competition,
2 but was having egregious effects on the market as well.

3 You then have a mid-band which is between 10 and
4 20%, and we set out the penalty guidance as relevant at
5 paragraph 353 of the notice of application:

6 "The CMA will generally use a starting point between
7 21 and 30% of relevant turnover for the most serious
8 types of infringement ... those [which] are most likely
9 by their very nature to harm competition. In relation
10 to infringements of Chapter 1 prohibition and/or
11 Article 101, this includes cartel activities ...
12 inherently likely to cause significant harm ..."

13 Then:

14 "In relation to the infringements of Chapter 1
15 prohibition and/or Article 101, a starting point between
16 10 and 20% is more likely to be appropriate for certain,
17 let serious object infringements ..."

18 Because, of course, cartels are infringements by
19 object.

20 "... and for infringements by effect ..."

21 But of course what you are impliedly saying there is
22 the top end of that range, if it is going to cover
23 effects cases, will be only for the most serious sorts
24 of effects cases.

25 Now, it is not just that. There is a range going

1 down to zero, there is a lowest band, and effects cases
2 can fall within that as well.

3 What we say is, picking 18% almost at the top of
4 that band, suggesting this is one of the most serious
5 sorts of effects cases, is just departing from reality
6 in terms of what we are talking about here.

7 How it is the CMA can turn up and say: this is one
8 of the most serious type of effects cases, when it has
9 not even shown that there are actual impacts on market
10 prices or commissions overall because it just did not do
11 that analysis, is something that is miles beyond us. It
12 is simply not a tenable position.

13 It is driven by this sense that wide MFNs, they have
14 decided here, are inherently problematic. So they are
15 infected with this sense that they are some kind of
16 surrogate object infringement. Indeed, you see that
17 when they end up comparing them with resale price
18 maintenance, because resale price maintenance is
19 a vertical restriction that is treated as an object
20 case, at least in Europe and the UK if not the US now,
21 but by simply referring to that you get a window into
22 the way in which the CMA are looking at how you should
23 band the starting point.

24 We say that is plainly wrong, plainly inappropriate.
25 We think if you are imposing a penalty here it should be

1 nominal, but if it is not nominal, then because of the
2 novelty, because of the way that we have behaved and so
3 on, if it is not nominal it should be in the lowest
4 bracket or at the bottom end of this range at the very
5 most, because you do not have the justification for
6 setting it at the top end.

7 So you start off with this sort of amplified
8 turnover effect, which is part of the case law, and then
9 you impose this very, very high percentage on it, so you
10 end up getting as a starting point very significant
11 numbers very quickly, and, as I say, that is just
12 departing from a sensible and proportionate approach to
13 penalty in these circumstances.

14 Just dealing with the specific relevant
15 circumstances, of course here is a case where the CMA is
16 not coming along and saying, well, actually, we have not
17 got any evidence of the particular impact on consumers,
18 no evidence of that, and that again is important in
19 terms of the relevant circumstances.

20 Dr Walker was so emphatic about, "It is all to do
21 with commissions", but then there is not the analysis of
22 how pass on of commissions might work if they are in
23 fact augmented, and, as I took you to and as I will come
24 back to in a moment of course what we see is the plots
25 in relation to commissions that go beyond the relevant

1 period do not suggest that there was any impact on
2 commissions at all even before we get into the technical
3 econometrics.

4 In those circumstances, if the commissions are not
5 changing, on what basis is it said that there is some
6 broader impact here at all?

7 So we say again that is missed in this analysis. It
8 is important, and in those circumstances goes to reduce
9 the seriousness and starting point in relation to the
10 penalty.

11 Then we have general deterrence. Well, general
12 deterrence, just to be clear, is about deterring the
13 world, not just deterring us.

14 We are dealing with a novel case where there has
15 been a wide-ranging discussion about how these matters
16 are to be treated. Whatever is said at the end of this
17 sort of process will be looked upon carefully by
18 platforms, by people thinking about how these issues are
19 to be considered.

20 There is no sense that there is a necessity to
21 impose a greater penalty here on us in order to deter
22 other people in relation to these matters, and the
23 reason I raise it is because in relation to general
24 deterrence it is often referred to as a basis for
25 maintaining these high starting points, and that is

1 effectively precisely what we see if we go on to 360
2 {A/2/98}:

3 "The CMA considers that the high starting point of
4 18% is also justified by the need for general
5 deterrence ..."

6 So we say, no. No. You have the wrong starting
7 point. You have a disproportionate approach to the
8 starting point percentage. That is flawed, and you do
9 not have a basis in general deterrence for maintaining
10 that alternatively.

11 Indeed, the suggestion that "the persistence of
12 these practices in online commerce in the past,
13 notwithstanding the considerable scrutiny of the
14 negative effects of wide MFN clauses by the CMA and
15 other competition authorities reinforces the need," now,
16 with respect, that reasoning is just perverse, because
17 what we saw, for example, in the DCT study, was the CMA
18 trying to grapple with whether or not there are serious
19 problems here. I have just taken you to that material
20 in the context of ground 7.

21 In those circumstances, to be saying, ah, well, this
22 is effectively something that has persisted over time
23 and it has been terribly clear that it should not have
24 happened, that is just not a tenable position to adopt.

25 In fact what the regulatory position shows is a lack

1 of clarity, a lack of certainty, about how to treat
2 these wide MFNs, and, therefore, the idea that you need
3 to deter people when they did not know how they should
4 be treated is just wrong and false, and in those
5 circumstances again you do not have a justification for
6 the level of penalty that you are imposing here.

7 In terms of those elements of the starting point the
8 CMA have, frankly, gone very badly wrong and it has not
9 taken into account, even if you were to make an eventual
10 finding, the nature and extent of the evidence here or
11 the context properly in relation to these issues and, as
12 I say, referring to RPM is a very dangerous but
13 indicative signal as to how the CMA has thought about
14 these things.

15 Then we come to excessive duration. I am not going
16 to repeat the points I made in the context of ground 7.
17 What the CMA has essentially said is, well, this started
18 in December 2015, the relevant period, ended in November
19 2017, we should therefore multiply it by two because it
20 has crossed two years.

21 Now, we say that is just not fair in these
22 circumstances. We recognise that in other cases where
23 you have something like a cartel running across
24 two years you say, okay, well, you multiply the starting
25 point by two, we can see that, but in circumstances

1 where, as I have indicated, there was an investigation
2 and enquiry going on, which we were engaging with, the
3 CMA said they were approaching with an open mind, to
4 multiply the period of infringement is quite wrong.

5 In those circumstances, actually what you should be
6 doing, even if you say, well, that was not sufficient to
7 mean that no penalty should be imposed under ground 7,
8 it should nonetheless be taken into account in terms of
9 the discretion whether or not to extend duration because
10 these are effectively exceptional circumstances. We
11 were being told in March 2017 that the position is not
12 clear. That is six months before we withdraw the
13 clause. Therefore to multiply in those circumstances is
14 quite inappropriate and unfair.

15 We recognise that this is not a matter that is
16 specifically dealt with in any guidance. We quite
17 understand that, but here is an issue where the Tribunal
18 needs to consider these matters in the round and the
19 duration in the circumstances is excessive.

20 Also, as I noted at the outset talking about this,
21 none of this takes into account the point that we have
22 raised in relation to the particular mechanism that the
23 CMA focuses on, these promotional deals, and the
24 treatment of those by the FCA when one is thinking about
25 the proportionality of penalty in the round. It is just

1 ignored, and I do not just mean the FCA output but the
2 considerations that underpin it.

3 Then of course we go to issues to do with mitigating
4 factors. Here I pick this up at 9.3, so page {A/2/99}.

5 The CMA applied a 5% discount only to take account
6 of BGL's decision to disapply the clauses on
7 30 November 2017.

8 Just bear in mind what had happened was the DCT
9 study had been published and within two months we had
10 taken those wide MFNs away, and that is why we emphasise
11 the DCT study so heavily.

12 We engaged with it, we thought we were being dealt
13 with with an open mind. When it came out and said
14 actually we are not happy with the operation of these
15 wide MFNs more generally, and we have done things like
16 econometric analysis in relation to them, at that point
17 we went, okay, we will withdraw them, and that is why
18 our engagement with DCT is so important, because once we
19 heard that the DCT had reached conclusions overall about
20 concerns in relation to wide MFNs, we did withdraw them.
21 That goes to all the points I have already made, but it
22 also should go to a significant mitigating factor.

23 We were not being tin-eared, we were listening to
24 what regulators were saying here, and we acted quickly,
25 and yet we only get a 5% discount for that.

1 We say you should feed that into the whole
2 proportionality exercise, but in particular we say when
3 you are talking about these huge starting points, a 5%
4 mitigation is quite inadequate in those circumstances.

5 We should also note that we have come forward with
6 commitments saying, look, we will get rid of them even
7 sooner, so in October, and the CMA said, no, we are not
8 interested in that, notwithstanding that, as I have
9 already mentioned in other regulatory contexts, that is
10 precisely the sort of thing that has been undertaken in
11 relation to online clauses and platform clauses in
12 particular, but then we look at the other mitigating
13 factors that effectively the CMA fails to consider
14 properly or at all.

15 Even if you were to reach some conclusion that there
16 was an appreciable adverse effect, which we say we just
17 do not see the basis for, the nature and scale of that
18 effect is very, very limited we say, and the other point
19 to bear in mind is that you just do not have evidence
20 that actually prices to consumers, as I say, have in any
21 way gone up because of this conduct. There is no
22 evidence. There is not even really an allegation of
23 that having happened.

24 There are specific references to specific
25 promotional deals meaning that particular prices came

1 down on particular PCWs, but an overall market effect,
2 that just has to be inferred and we do not have evidence
3 of that, and, therefore, we say that is wrong.

4 Indeed, there is one interesting case of enforcement
5 in relation to one of the HIPs. My recollection is it
6 is 19, where there was a suggestion that there had been
7 a promotional deal and that CTM came along and said,
8 "Hang on a minute, we have spotted that you have got
9 much lower prices, oh HIP, on a different PCW and we
10 really do not like that", and this was I think
11 in May 2017.

12 The outcome of that was not that the promotional
13 deal got removed. It was that a discount was then given
14 to CTM.

15 Now of course that is held against us as being some
16 kind of draconian enforcement. We do not accept that at
17 all and we have set out our evidential position in
18 relation to it.

19 When you are thinking about effects, what you have
20 there is a situation where consumers then on two PCWs
21 had these lower prices being applied, and yet that ends
22 up being held against us.

23 In those circumstances we say limited, at most,
24 effects, we say none. We say we were, as I have
25 indicated, entitled not to treat the wide MFNs as

1 somehow illegal pending the completion of the DCT study.
2 We acted reasonably in doing so. We continued acting in
3 good faith and co-operating with the CMA's
4 investigation.

5 This was not a circumstance where either during the
6 DCT study or during this investigation, there was
7 a process of teeth being pulled from CTM or obstruction.
8 We proffered the relevant individuals to meet with the
9 CMA so they were available to ask questions. That
10 included [redacted] before he left the business.

11 We have provided vast amounts of material covering
12 a whole range of issues, going back over many years,
13 including in relation to motor insurance because we were
14 asked about it. There was not obstruction. There was
15 full co-operation. There was full engagement. Yet
16 again, that is not being recognised properly in the way
17 in which the penalty is being set.

18 Our overall conclusion in relation to penalty is
19 that the CMA has got into a mindset of wide MFNs being
20 horribly problematic and has looked at the issues of
21 penalty wearing those glasses, looking at it from that
22 perspective, and in doing so has simply lost sight of
23 the proper proportionality of approach to penalty here.
24 We say no or a nominal penalty would at most be
25 appropriate, but if it is to be more than that, which we

1 say is quite wrong in all of the circumstances, then
2 this would be a case where the actual penalty that is
3 being imposed is wholly disproportionate and should be
4 fully revisited by the Tribunal.

5 That takes me to the end of ground 8, unless I can
6 be of further assistance to the Tribunal on those
7 matters.

8 I am then left with -- in fact I did not sweep up
9 questions 13 onwards, so just briefly, if it would
10 assist the Tribunal, I was going to run through I hope
11 not too quickly some of the answers to 13 to 20 just so
12 that they are on the transcript, if that would be
13 useful.

14 THE PRESIDENT: No, that would be helpful.

15 MR BEARD: But obviously subject to any questions that the
16 Tribunal has.

17 So picking it up at 13:

18 "To what extent is the perceived or alleged
19 anti-competitive object of an agreement or provision
20 said to constitute a restriction on competition relevant
21 to determining whether or not that agreement or
22 provision has an anti-competitive effect? In such
23 a case, to what extent (if at all) is it relevant to
24 consider pro-competitive 'objects'?"

25 Now, obviously there is an extent to which this

1 question is dealing with a different world in the sense
2 that this is not an object case, the CMA are not
3 pursuing it as an object case.

4 THE PRESIDENT: No, it is not. But what provoked the
5 question were certain statements which -- and you made
6 the point yourself -- might be consistent with an object
7 case, and that is why I think we have put the question
8 in there, because it does seem to us that there is
9 a theoretical basis for the effects case which would sit
10 as comfortably, one might say, in an objects argument.

11 MR BEARD: We are not going to say that economic theory is
12 irrelevant to the way in which you consider evidence.
13 Of course we do not do that. So insofar as economic
14 theory can say, well, these sorts of clauses can have
15 adverse effects it would be wrong to ignore that, but
16 I think the economic theory is much more nuanced in the
17 way that it approaches these matters, particularly when
18 we are talking about the incremental impact of wide
19 most-favoured-nation clauses, and in those circumstances
20 I think one needs to be very cautious about adopting
21 a surrogate object approach in an effects case in
22 circumstances where doing so may jaundice the way in
23 which you look at the evidence, and of course in those
24 circumstances lead you into error in terms of giving the
25 benefit of the doubt.

1 Now, in saying all of that, I am not moving away
2 from what is accepted case law that evidence of intent
3 can be relevant to the assessment of the likelihood of
4 effect or any of those sorts of points, but I think
5 there is a danger, and it is a danger I think that the
6 CMA over all the Decision exhibits of seeing this as an
7 object case and then squeezing evidence to fit into
8 that, and that is the real problem with it. It is not
9 that you ignore the theory that may tell you how you get
10 problems in relation to it; it is that if you buy into
11 that theory too hard too soon, when you come to actually
12 doing the effects analysis you end up looking at it with
13 a jaundiced eye which is plainly wrong and contrary to
14 the proper burden.

15 So I think there is a real danger with trying to
16 import object concepts into this because of the way it
17 can damage your perspective of an evidential assessment,
18 but, as I say, that does not mean one ignores the
19 economic theory.

20 I should say that obviously we have been through the
21 case law which talks about the imperative of looking at
22 actual effects, and, therefore, that is why wearing
23 a tint of object in your glasses can be dangerous in
24 these circumstances, we say.

25 14:

1 "When considering network effects, is there
2 a rebuttable presumption of compliance? What is the
3 correct approach ...?"

4 Well, again, we would be concerned about the idea
5 that the only rebuttable presumption being imposed in
6 relation to any evidence, because that is not the
7 territory we are in here. This is not like a cartel
8 case where because of the object nature of it, if you
9 join in, then unless you specifically publicly distance
10 yourself, you are presumed to be participating in the
11 object infringement itself.

12 We are not in that territory at all. That is not
13 the way this works because you are in effects territory,
14 and, therefore, we would be concerned about the use of
15 rebuttable presumptions.

16 We do recognise, of course, that if there were to be
17 a series of agreements and someone turns up and does not
18 say anything about whether or not they are being
19 operated effectively or complied with and so on, that it
20 might be perfectly proper for the Tribunal to infer that
21 actually they were being complied with properly in those
22 circumstances. One could have an argument about the
23 strength of the inference one can draw there, but if you
24 have nothing coming back and there is a dearth of
25 evidence then you may have to make a call on it, but

1 I would be circumspect about it because of course the
2 problem with drawing that inference is how is that
3 consistent with overall the burden being on the
4 regulator, because what it may mean is the regulator has
5 just not done enough to show that in fact they were
6 being complied with.

7 So 15:

8 "In terms of assessing anti-competitive effects ...

9 "(1) In terms of assessing 'appreciability' ..."

10 There is this reference to the 3% pass through.

11 I dealt with that quite extensively. It is not common
12 ground, it is not even the CMA's case that that is
13 actually what happens. That is quite fundamental and
14 important, not just for this litigation but for more
15 generally how we deal with these issues and it is also
16 very important for the SSNIP test, so I hope I probably
17 dealt with that sufficiently yesterday:

18 So (2):

19 "To what extent does the CMA's Decision rest on a
20 tacit assumption that narrow most-favoured-nation
21 clauses are not anti-competitive?"

22 I dealt with this, again, yesterday. We are not
23 clear exactly what the CMA's position is on it.
24 Dr Walker's position was lawfulness does not matter, and
25 I have touched on things like Paroxetine and we can deal

1 with that.

2 (3):

3 "To what extent can it be said that the econometric
4 analysis relied upon by the ComparetheMarket is
5 evidentially valueless as opposed to of potentially
6 variable weight ...?"

7 Then there are a couple of further questions.

8 The position we take is it is plainly not
9 evidentially valueless. Indeed, we think it is highly
10 meaningful and the way the CMA has approached this is
11 quite flawed.

12 In those circumstances we do not say you just ignore
13 qualitative evidence, but we do say it is a very potent
14 ingredient to be stirred into the pot. Indeed, we would
15 say that is where the beef lies in relation to this
16 particular pot stirring, and the CMA, when it is talking
17 about effects, to have failed to consider those matters
18 has really erred fundamentally, but I have dealt with
19 that question quite quickly, there are some elements to
20 it. Is there a further question?

21 THE PRESIDENT: No, I think in a sense you are right, this
22 is the nub of the case, and the reason it is in the list
23 of questions, but I think you have addressed it, is
24 really how we treat the evidence in our judgment. Do
25 we -- it seems to us we probably need to at the outset

1 work out whether one can properly relegate it to, we are
2 just not going to look at this, or without in any way
3 saying anything about weight, treat it as part of the
4 pattern of evidence that one needs to look at and
5 evaluate, "as it were, issue by issue what weight needs
6 to be given to it.

7 MR BEARD: Yes.

8 THE PRESIDENT: But the purpose of the question is does it
9 just go at the outset into the bin, and you say it is
10 valueless and therefore we do not need to consider it in
11 a more granular way. Your position is very clear, but
12 I suspect the CMA's position will be equally clear but
13 just not in the same direction. But it is important
14 that it is addressed.

15 MR BEARD: Yes.

16 THE PRESIDENT: I think you have done so.

17 MR BEARD: You have our submissions on valuelessness very
18 clearly.

19 I think the way we have put it is we see, when you
20 are talking about effects case, and you can do this sort
21 of econometric analysis, so you are looking across the
22 whole market, and you are not just focusing on anecdote,
23 it is particularly powerful and particularly important.

24 We do also say that we recognise that there is sort
25 of a reflective equilibrium that one reaches in relation

1 to different components of evidence where one looks
2 backwards and forwards at how it all fits together, we
3 entirely see that as well.

4 "What relevance if, any, should the Tribunal ascribe
5 to the CMA's previous use of econometric analysis in
6 respect of the private motor insurance market?"

7 I think I have probably covered that one.

8 (5):

9 "To what extent ought the Tribunal to take into
10 account the fact that -- apart from Ms Glasgow -- no
11 witnesses capable of speaking to the market were adduced
12 (by either side) ..."

13 Well, we have set out our position in closings on
14 the law on witnesses. That is at paragraphs 124 to 136,
15 just for your notes {B/64/43}.

16 It is for the CMA to prove its case. It is
17 imperative in those circumstances where there are
18 ambiguities, that we are able to clarify them.
19 Otherwise we get the benefit of the doubt. Yes, we can
20 understand that issues can be raised on both sides, but
21 this is not symmetric in these circumstances.

22 "In opening, ComparetheMarket suggested that 'cover
23 pricing' decisions of the Tribunal -- where the OFT ...
24 had the ability to require evidence to be called, and
25 did not do so -- applied here. To what extent is this

1 a precise analogy ...?"

2 I think I have dealt with that one fully.

3 THE PRESIDENT: You have dealt with that.

4 MR BEARD: "How far, if at all, is it relevant that certain
5 lacunae may exist in the facts found in the Decision."

6 For example:

7 "It appears to be an open question ... whether price
8 comparison websites asked materially similar questions
9 of those seeking a quotation ..."

10 Let us take it in stages. First of all, gaps in the
11 Decision, they may be very significant, and we say the
12 gaps in the Decision that one sees on the qualitative
13 evidence and the clarity of the qualitative evidence are
14 very significant, but it does depend on what lacuna one
15 is talking about.

16 In relation to the particular issue that is being
17 raised there about whether or not there are material
18 differences in question sets between PCWs that can
19 result in pricing differences for the same HIP, we have
20 dealt with that in the sense that from our point of
21 view, if you are asking yourself how does it matter in
22 terms of an appreciable effect, it does not matter
23 whether or not it was an intentional ignoring of the
24 wide MFN or simply sidestepping these issues by means of
25 different question sets because you are getting

1 different prices, and so I am not sure that that is
2 critical in terms of lacuna at this point given how we
3 are approaching matters, but we will wait to hear what
4 Ms Demetriou says on those issues.

5 "It appears to be an open question ... whether the
6 prevalence of narrow most-favoured-nation clauses was
7 such as to replicate the effect or minimise the
8 impact..."

9 Again, I think I have dealt with that in touching on
10 the Johansen & Vergé paper and the significance of this,
11 but the key point is you have to feed it in to the
12 counterfactual analysis so that you are ensuring you are
13 doing an incremental assessment.

14 Then we go on to evidential points:

15 "What is the evidential position as regards the
16 levels of commission payments charged by CTM
17 and ... other PCWs ... during and after the Relevant
18 Period?"

19 If we can call up the chart at {F/724/1}, I think
20 this was the material that I was referring to
21 previously. So we see that.

22 We know that the compound annual growth rate is
23 actually -- it looks flatter than that, it is
24 effectively less than 1% a year, but the key question
25 is, is there any material variation, particularly in

1 relation to the CTM commission rate, and we say, no,
2 none at all.

3 It is worth bearing in mind, just for your notes,
4 Decision paragraph 9.5, at {A/1/322}, the CMA relied on
5 an expectation that negative effects on the level of
6 PCWs' commission fees can be expected with a reasonable
7 degree of probability.

8 So it was assuming that wide MFNs would have had
9 a negative effect on commission fees, ie they would have
10 gone up, but that that would mean that the withdrawal of
11 the MFNs would have meant they go down.

12 You are not seeing that, and of course it is our
13 MFNs, CTM's MFNs, that are critical there, and it is
14 very, very striking that the CMA had this data and it is
15 plain that they did not consider it.

16 The fact that Dr Walker quite candidly said, "No,
17 no, no, I have not looked at any commission material
18 beyond 2017", we say is quite a remarkable admission in
19 the circumstances, where that is the central proposition
20 that Dr Walker in particular was saying was critical
21 here.

22 17:

23 "Which of the Promotional Deals promoted on PCWs ...
24 during and ... after the Relevant Period involved a PCW
25 taking a reduction in commission?"

1 We have not done a full audit of the table that was
2 provided in appendix 1 of the CMA's closings, but that
3 does indicate zero or no commission change on the basis
4 of it. We have already criticised it for other reasons,
5 but I think without doing an audit that at least is
6 supposedly indicating those matters.

7 18. Why did some HIPs have narrow MFNs and not
8 wide. I have dealt with that one. Sorry, I cannot
9 progress matters further:

10 "Which HIPs (or brands) listed on PCWs are subject
11 to narrow most-favoured-nation clauses and ... which ...
12 to PCWs?"

13 We think this material is probably available in the
14 CMA's data set, but I do not think it has actually been
15 provided to the Tribunal yet, and, therefore, it may be
16 something we can discuss with the CMA about providing
17 that.

18 THE PRESIDENT: Yes, I think so far as these questions go to
19 specific factual questions, what I think we will do is
20 to the extent that we need to go looking and are finding
21 it is taking a long time, we will revert to the parties
22 and ask, after we have finished, for assistance and I am
23 quite sure it will be provided with the usual helpful
24 way in which the parties have assisted us so far.

25 MR BEARD: 20 then probably falls into that category as

1 well. 21:

2 "What does the evidence tell us about the extent of
3 spending by both covered and uncovered HIPs on ... TV
4 and online advertising?"

5 Could we just call up {F/731/1}.

6 We have the data in relation to the PCWs. I think,
7 as I explained when I talked to that table, and it was
8 an issue raised by Professor Ulph, I do not think we
9 have the data in relation to HIPs. We would not
10 obviously in any way be able to obtain that data, but we
11 are not aware that the CMA has done so.

12 We have made our submissions on the significance of
13 those spends by PCWs and by HIPs in relation to online,
14 particularly, and how that is particularly important,
15 and I will not repeat those, but I think in terms of
16 data we may not be able to take matters further unless the
17 CMA has done something that we are not aware of.

18 Then there is a further question:

19 "Has either party assessed the cost structures
20 applicable to direct channels and the extent to which
21 direct channels would be required to increase marketing
22 and advertising costs", etc.

23 I think although it is a question directed to both
24 parties I think it is pretty obvious that CTM is not
25 going to be in a position to get that sort of material.

1 We can see why, given the chains of questioning, that
2 might be of interest, but obviously that is a matter for
3 the CMA and we do not, as Ms Ralston recognised, have
4 this sort of statutory powers to be able to do those
5 sorts of things.

6 So in those circumstances I am not sure I can take
7 it much further in relation to question 21.

8 Unless I can assist the Tribunal further in relation
9 to any matters, those are the closing submissions of the
10 appellant in this matter.

11 THE PRESIDENT: Well, thank you very much, Mr Beard. I do
12 not think we do have any questions. We are very
13 grateful.

14 Ms Demetriou, I think we will start fresh at 1.45 to
15 give a little bit more time.

16 We will give you a similar indication that at the
17 outset, just so you can manage your time, we absolutely
18 understand the importance of the qualitative data that
19 you refer to in your submissions and of course
20 elsewhere.

21 For our part, we will be reading these submissions
22 with great care. You do not, unless you want to, need
23 to take us to that material because we know it is
24 important and we will look at it.

25 So we found the first part of your submissions

1 extremely helpful, but do not feel obliged to take us to
2 it unless you want to. I am not going to say what you
3 can and cannot say, but there are obviously questions in
4 which we are likely to be more assisted by your
5 submissions because they are difficult in a different
6 way.

7 The quantitative [sic] evidence I think is difficult
8 because we need to get a grip of what it says, and that
9 is I think a matter of cold towels and reading rather
10 than hearing you say what the documents tell us.

11 So I hope that is a helpful indication.

12 MS DEMETRIOU: Very helpful.

13 THE PRESIDENT: Just to give you the opportunity to maximise
14 the use of your time.

15 MS DEMETRIOU: Thank you very much.

16 THE PRESIDENT: As I say, we will start again at 1.45, and
17 we can go a little later than 4.30 if that assists
18 because I do not want anyone to feel that they have not
19 had the opportunity to take us to what they want to take
20 us to in oral closing.

21 MS DEMETRIOU: Thank you, sir, shall we see how we get on.

22 I just wonder whether if we do need to add more time in
23 whether it might be possible to start a little earlier
24 tomorrow rather than sit late given that we started
25 early today.

1 THE PRESIDENT: I do understand, and that is of course
2 a very helpful submission for those who are assisting us
3 in running this. We will give some thought to that over
4 the short adjournment but I cannot see that that will be
5 a problem.

6 MS DEMETRIOU: Perhaps we could take stock later on in the
7 afternoon.

8 THE PRESIDENT: Indeed. That is what we will do, so thank
9 you very much.

10 Sorry, Mr Beard?

11 MR BEARD: It is just one of those transcript quirks,
12 I think line 22, page 128, I think you meant qualitative
13 rather than quantitative.

14 THE PRESIDENT: I keep misspeaking, so do please feel free
15 to auto correct my errors.

16 MR BEARD: When you read these transcripts back, it is very,
17 very hard to correct that sort of thing or ask whether
18 or not it should be corrected later. So sorry to
19 interrupt.

20 THE PRESIDENT: I am very grateful. Thank you. 1.45, thank
21 you very much.

22 (12.58 pm)

23 (The luncheon adjournment)

24 (1.46 pm)

25 THE PRESIDENT: Ms Demetriou.

1 Closing submissions by MS DEMETRIOU

2 MS DEMETRIOU: May it please the Tribunal, I am going to
3 start by giving the Tribunal a very short overview of
4 what we say is the right way to approach this case, and
5 I am going to do this in summary form so that the
6 Tribunal has it in mind when I then respond to each of
7 the main issues raised by the appeal.

8 What we say is that there is a bedrock of evidence
9 in this case which forms the basis for the CMA's
10 Decision.

11 We see it set out in the Decision, and we have
12 highlighted it in our written closing submissions, and
13 we say that this shows that the wide MFNs have had an
14 effect, an adverse effect, on the parameter of
15 competition which is price.

16 Now Mr Beard is right to say that that is not just
17 qualitative evidence because it also comprises data, but
18 I think we have been referring to it by way of shorthand
19 as "qualitative evidence", but that is not to overlook
20 the fact that it comprises data as well as accounts of
21 what market behaviour was at the relevant time.

22 Now, what we say -- and I am going to return to that
23 evidence, but mindful of course of the chairman's
24 remarks to me before lunch, which are that of course the
25 Tribunal will read the relevant documents and form its

1 own view -- but, as I say, we say that those documents
2 clearly demonstrate that price competition by
3 significant market participants was constrained by the
4 wide MFNs, and the documents of course include
5 contemporaneous documents of HIPs and rival price
6 comparison websites from the time, at the time when they
7 were seeking for example to negotiate promotional deals,
8 and we also have accounts given to the CMA through
9 primarily responses to Section 26 notices which explain
10 ex post the position of the business.

11 Now, one point which I am sure the Tribunal is aware
12 of is when you see in the Decision footnote saying
13 "Section 26 response" some of those footnotes are to
14 contemporaneous documents contained in the response
15 because the response will be: an account plus will
16 append documents.

17 So sometimes the fact that a footnote says
18 "Section 26 response" may not mean that it is not
19 a contemporaneous document, if I can put it that way.

20 Of course, we also say that the CMA has identified
21 an effect of the wide MFNs on promotional deals and has
22 shown that promotional deals increased after the
23 relevant period post disapplication of the wide MFNs.

24 I will come on to this towards the end of my
25 submissions. BGL of course seek to chop and change the

1 data in relation to promotional deals, but one thing
2 that they do -- and this is notable throughout their
3 submissions -- is that they are very careful only to
4 look at the data relating to the covered MFNs rather
5 than the market-wide data. We say that is because the
6 market-wide data is much clearer in the CMA's favour.

7 Yesterday, the chairman asked Mr Beard a question
8 about whether or not -- I think you asked whether it was
9 sufficient for the CMA to show that the wide MFNs had an
10 effect on a parameter of competition price behaviour or
11 whether we needed to go on and demonstrate that there
12 was an effect on prices paid by consumers.

13 Sir, our position on that question is that of course
14 subject to the question of appreciability that it is
15 sufficient to demonstrate an effect on price
16 competition. So the CMA, if it has demonstrated an
17 appreciable effect on price competition, on the
18 structure of price competition, that is sufficient.

19 We dealt with that in our opening submissions, and
20 we took you to the GSK case and the Socrates case in
21 that context.

22 Really what they say is that Article 101 protects
23 the structure of the market, protects competition itself
24 as a process, and not only the interests of consumers.
25 So that is what we say about that.

1 In any event, sir, the CMA has inferred that there
2 was an appreciable effect on retail prices as
3 a consequence of the effect on pricing competition that
4 has been revealed by the documents.

5 In relation to the documents, and, as I say, I am
6 going to come back to the documents briefly in light of
7 the Tribunal's comments, but may I just show you at this
8 stage two documents. It is really to go back to
9 something that Mr Beard was saying in relation to Legal
10 & General.

11 You will recall that he said at best these
12 contemporaneous documents show that the wide MFNs may
13 have had an impact on a February 2017 deal but that
14 there was no link otherwise between the wide MFNs and
15 any other particular deal, because you will recall that
16 the CMA relied on four.

17 Now, let us look at, please, document {F/234/5}.
18 That must be a wrong reference. If you just bear with
19 me a moment, please.

20 I think it is {F/324/5}, I am sorry. You will
21 recall that this is the slide pack that Mr Beard took
22 you to that was produced in advance. If we go to page
23 {F/324/1} we can see -- the front page will be familiar
24 to you, and so it was produced in June 2017 ahead of
25 a meeting between Legal & General and MoneySupermarket,

1 and if we go to slide 5, {F/324/5}, which Mr Beard took
2 you to, which is the slide you will remember he said
3 I am very keen on, and I am, I am very keen on this
4 slide. He said, look at this, there is absolutely no
5 link between what is said here and any particular
6 promotional deal, but he did not take you in this slide
7 to the last paragraph.

8 Let us have a look at that last paragraph:

9 "Ahead of the CMA decision, should we decide to
10 provide cheaper rates to non-CTM customers, we
11 ultimately risk CTM switching us off. We have spoken to
12 MSM about pencilling us in for the ... slot in
13 October 2017, once the CMA decision has been made.
14 However, they cannot hold this for us unless we are 100%
15 confident that we will do the offer even if the CMA
16 rules don't change and we could up in breach with CTM."

17 So Mr Beard is wrong, this does link, even if it
18 were right, and we say it is not, that the -- even if it
19 were right that looking at the evidence what you have
20 got to do is disregard it unless you can show a precise
21 link with a promotional deal, which we say is far too
22 narrow a prism through which to look at the evidence,
23 but even if that were right, this document passes that
24 test.

25 Now, let us look at another document.

1 THE PRESIDENT: Just pausing there, it goes, I think, to
2 a point that I am sure you will be coming to that
3 Mr Beard has made much of, which is weight in the
4 context of not having a witness to speak to this.

5 MS DEMETRIOU: Yes.

6 THE PRESIDENT: One of the points one could make in respect
7 of this document is that it is written in the context of
8 a clear understanding that wide MFNs are under
9 investigation and an expectation that these clauses will
10 in this market also in due course be banned, and one
11 wonders how far this document has been written with sort
12 of half an eye on a change in regulatory regime and
13 whether that is something which one might want to ask
14 questions of whoever wrote this document.

15 I mean, I pick it as an example, but these are
16 questions which we simply cannot answer or ask.

17 MS DEMETRIOU: Sir, let me address that if I may in two
18 stages.

19 The first thing that I say is that of course what
20 the Tribunal will need to do is decide for itself how to
21 interpret these documents in their context, and that
22 means looking at all of the surrounding documents, and
23 so the second document I was going to show you, it is
24 just one more, but if I can show you because it
25 illustrates the point. If we go to {F/318/1}, again

1 a document that Mr Beard took the Tribunal to, so
2 {F/318/1}, we see here at the top that MoneySupermarket
3 has approached this HIP with a proposal for a campaign
4 in January 2018, so we see that at the beginning.

5 Then we see at the end:

6 "Following the launch ..."

7 We see a reference to the DCT investigation, and we
8 see that this HIP has challenged CTM on this clause on
9 a number of occasions, now awaiting the outcome of the
10 investigation, that the view is that it is still
11 applicable, and the worst case scenario is that CTM
12 could terminate their agreement with us which represents
13 a very high proportion of their sales.

14 So it is a clear recognition on the one hand that
15 this is under review by the CMA, but secondly, we say,
16 a clear recognition that this is a constraint because it
17 is not a toothless thing, this clause. Ultimately, CTM
18 could delist and deprive this significant HIP of a large
19 proportion of their business.

20 So, sir, the first stage of my answer to your
21 question is that the Tribunal needs to consider all of
22 these documents in context alongside the other documents
23 in the case, and in relation to Legal & General, the CMA
24 has not acted selectively as Mr Beard is keen to
25 suggest. Indeed, when you go to the Decision, as I know

1 you have been to it and you will go back to it when you
2 are considering this, you will see that the CMA has
3 directly grappled with the fact that statements in
4 submissions and indeed in a meeting with the CMA after
5 the event downplayed and gave a different picture of the
6 importance of the WMFN, and the Tribunal, like the --
7 the CMA took a view about that, so the CMA's view was,
8 well, we recognise this tension, so they fronted up to
9 it, we recognise the tension, but what we need to do is
10 reach a view and the CMA essentially preferred the
11 contemporaneous documents.

12 The Tribunal will have to decide whether it agrees
13 with the CMA. Obviously that is the key question we say
14 in this appeal, not only in relation to Legal & General
15 but in relation to the other HIPs and also the other
16 evidence from CTM itself and from the price comparison
17 website rivals of CTM.

18 In a similar way, the CMA has concluded that CTM
19 placed great weight on its wide MFN clauses and enforced
20 those clauses, and the CMA says, well, it is implausible
21 for CTM now to say, well, these were of no effect. Of
22 course they were of effect, we can see in their
23 contemporaneous documents they thought they were of
24 effect, and that is something that the Tribunal will
25 have to look at the documents, see them in context and

1 reach a view as to whether the CMA was correct.

2 Now, sir, in relation to --

3 PROF ULPH: Ms Demetriou, sorry, can I just ask a question
4 at this point?

5 MS DEMETRIOU: Yes.

6 PROF ULPH: If I look at that sentence about the worst case
7 scenario, in any decision situation you have to think of
8 a range of scenarios and there will be a worst case
9 scenario. That will not necessarily be the factor that
10 drives one's ultimate decision. So, for example, if
11 I were thinking of going out into St Andrews this
12 afternoon the worst case scenario is I get knocked down
13 by a car and killed, that does not stop me going out
14 into St Andrews. So the mere fact that somebody has
15 identified a worst case does not necessarily take you
16 through evidence about how that has affected their
17 behaviour. You have to think about what is the
18 probability that this worst case could happen? What are
19 the other scenarios that could emerge.

20 So is your argument that these are the factors that
21 we would have to weigh up in judging this evidence?

22 MS DEMETRIOU: Sir, precisely so. Sir, if I may just adopt
23 the rather alarming analogy that you drew, the point
24 that you put to me is that there is a risk you may go
25 out in St Andrews and you think there is a risk that

1 you may be knocked down by a car, but you still go out
2 anyway, and so when you are analysing as it were -- if
3 a court were then analysing whether that risk influenced
4 you then the court would reasonably conclude that it had
5 not influenced you very much because you had actually
6 gone out despite this risk playing in your mind.

7 Now, that is what we say the Tribunal needs to do
8 here, as the CMA did.

9 So this deal was not concluded, and the
10 February 2017 deal was not concluded because of the wide
11 MFN, and we can see that in the document.

12 So, sir, yes, I agree with you in principle,
13 absolutely, the Tribunal needs to be looking at the
14 documents, questioning them and assessing them in
15 context and asking exactly the kind of question that you
16 pose, but the answer will depend on context and will
17 depend on what the document says and will depend on what
18 inferences can reasonably be made.

19 Going back to the chairman's question and the second
20 stage, which is Mr Beard's alarmist view that unless we
21 call witnesses in respect of each of the Section 26
22 responses, somehow we cannot rely on this evidence, we
23 say that it is actually -- and this is a forensic point,
24 but it is true. This point has suddenly gained a huge
25 amount of currency in this trial. It really did not

1 appear in their notice of appeal. I am not taking
2 a pleading point. What I am saying is that we think it
3 is reflective of the lack of confidence that BGL have in
4 their case on the documents that they are now saying,
5 oh, well, it is very unfair because you have not called
6 witnesses, and what we do say is that it is important,
7 it is very important to be precise as to the complaint
8 Mr Beard is making.

9 Now, BGL are not saying that this evidence is
10 inadmissible. They have said the opposite. It is
11 admissible. So it is admissible evidence for the
12 Tribunal to consider.

13 Mr Beard is not inviting the Tribunal to draw
14 adverse inferences from a failure to call witnesses. He
15 made that clear, it is clear in their written
16 submissions. If he were going to do that he would have
17 had to have done a lot more work. He would have had to
18 have identified the adverse inference and explain why it
19 should be drawn.

20 There is a generalised, if I can put it that way,
21 complaint of what he calls unfairness because they say
22 they have not been able to test evidence, but it is very
23 important, in our submission, to identify precisely
24 where that complaint goes.

25 Now, there are of course rules of civil procedure

1 which ensure fairness in litigation, and those include,
2 in this case, that the CMA needs to prove its case on
3 a balance of probabilities. We accept that. Aside from
4 the oral evidence of Ms Glasgow in this case, the CMA is
5 relying on the documents. That is what it is doing. So
6 the question for the Tribunal, as I have said, will be:
7 do these documents in the round, do they show -- is the
8 CMA correct to say that they show on the balance of
9 probabilities an appreciable effect on price
10 competition? If they do, the CMA succeeds. If they do
11 not, BGL succeeds. That is really the question in this
12 case.

13 Now, if in respect of a particular document the
14 Tribunal thinks there is an ambiguity, well, the
15 Tribunal will need to do its best to resolve that
16 ambiguity by reference to the surrounding documents, as
17 I have said, but in doing so, and if it thinks it cannot
18 resolve the ambiguity, well, then no doubt that is
19 a point that will count against the CMA. I do not demur
20 from that point.

21 If in fact you take the view looking at this
22 evidence in the round that Legal & General were not at
23 all influenced or it were ambiguous that they were
24 influenced by their wide MFN then that is a point which
25 is unhelpful for the CMA, I understand that, and I fully

1 accept that point, but in approaching this the Tribunal
2 should bear in mind, we say, three things.

3 First of all, one needs to give quite careful
4 thought to who is this phantom witness that would come
5 and explain Legal & General's position in relation to
6 each of these documents? When Legal & General provided
7 Section 26 responses, these are corporate responses
8 drawing on information from the whole of the corporation
9 in response to questions that have been asked by the
10 CMA. These documents have all, no doubt, been drafted
11 by different people, so there is a very real question as
12 to how a witness could possibly help the Tribunal. It
13 is all very well for Mr Beard to say unfairness, cannot
14 test, but one has to think very carefully. Let me put
15 it this way: this is not a case of he said/she said. So
16 it is not a case where there is a debate, that you have
17 one person's account of what happened in a meeting, and
18 there is a conflicting account, and the CMA is coming to
19 the Tribunal saying, well, we rely on this witness
20 statement of the account.

21 In those circumstances, I can quite see that the
22 appellant would be able to say, well, you cannot just
23 rely on the witness statement, if it is all about the
24 witness' testimony, then you need to tender the witness,
25 but we are very, very far from that position.

1 We are in a situation where we are looking at an
2 accumulation of corporate information and documents, and
3 really, where does this all this go? If it were right
4 that it is unfair for the CMA to rely on all of this
5 material that it has gathered and to rely on all these
6 Section 26 responses without calling witnesses, there
7 would never be an infringement decision like this. It
8 would be simply impossible to present a defence before
9 the Tribunal calling any number of witnesses.

10 THE PRESIDENT: Well, Ms Demetriou, I do not want you to
11 proceed on, as it were, a misapprehension of how we have
12 understood the points that Mr Beard is making, it may be
13 that we have misunderstood the point that he is making,
14 but we, I think, can see the force in your point that to
15 adduce hundreds of witnesses to speak to each document,
16 even if that were possible, would make the process
17 unworkable.

18 MS DEMETRIOU: Yes.

19 THE PRESIDENT: But there is, one might think, a middle
20 ground of having someone who is a genuine expert in the
21 market because they are a party to the marketing and
22 pricing strategies in one of these HIPs or PCWs or both
23 who can say, "Look, I have been in this market for
24 a decade, my experience is that we were constrained in
25 some way from doing our promotional deals because wide

1 most-favoured-nation clauses meant that we had to offer
2 it to everyone because we abide by our contracts, and
3 that is my commercial experience. I cannot point to any
4 particular instance, but this was something which
5 informed our thought", and tender that witness for
6 cross-examination to say, "Well, no, you are gaming the
7 system, you want to achieve this end for other reasons",
8 and we would then have something which -- obviously it
9 would depend on the nature of the witness, but something
10 which would have real heft in the sense that one would
11 be able to actually explore how the market worked.

12 Now, that would not be speaking to a particular
13 document, but it would be, let us say, speaking to
14 a particular HIP or particular price comparison website,
15 and I must say I think that is how I took Mr Beard's
16 point about no witnesses, and let us be clear, Ms Lucas'
17 point expressed this morning about the same being true
18 of ComparetheMarket does seem to me to have some force
19 in that where one is saying we were anxious to have the
20 lowest price on our website, and this was our strategy
21 and wide most-favoured-nation clauses were part of that,
22 again, that is something which would colour the very
23 interesting facts that we are dealing with in a quite
24 significant way, and I think that is how we see --
25 speaking for myself, and only provisionally -- but that

1 is how we see the significance of non-expert factual
2 evidence.

3 MS DEMETRIOU: Sir, let me try and address that if I may.

4 I entirely understand the point, but I think, in my
5 respectful submission, one has to be a little bit
6 careful about first of all identifying what is actually
7 the area of dispute on the documents.

8 Now, the ground has shifted as far as this is
9 concerned because what we had initially, we have had
10 three attempts at it by BGL. First of all, we have the
11 attempt in their notice of appeal which takes a very
12 binary approach which the Tribunal indicated during
13 openings was not appropriate, and Mr Beard has rowed
14 back from.

15 Secondly, we have the effective coverage assessment
16 of Ms Ralston that takes up 70 pages of her first report
17 but which has now been abandoned effectively; and now
18 what we have is a third attempt in their closing
19 submissions in this table appended to them, again to go
20 through the documents and showing consistencies in the
21 documents.

22 So, sir, the nature of the dispute is about whether
23 the documents show that individual HIPs were influenced
24 by the wide MFNs, and in my respectful submission, there
25 is not very much that one witness who has experience in

1 the market could say about those documents because the
2 essence of my learned friend's points are, well, look at
3 these documents, they are not consistent with what Legal
4 & General told the CMA. They are not advancing a case
5 that promotional deals did not happen in the market.
6 Yes, they advance a case that they were not very
7 significant, but there is no root and branch attack on
8 the CMA's careful factual findings about how this market
9 operated.

10 Instead, what they are doing is seeking to make
11 points and point to discrepancies in the documents and
12 so, sir, my response is that is why one has to be very
13 careful in relation to the submission made by Mr Beard
14 because one has to ask, well, what would this witness
15 say? Would the witness be able to explain -- so on
16 Legal & General Mr Beard's client relies on what they
17 said in their submissions for example in response to the
18 SO, to the CMA. They say that is very different to what
19 the CMA is taking from these contemporaneous documents.
20 Well, in my respectful submission, sir, somebody from
21 another HIP or somebody who had experience in the past
22 of the industry would not be able to resolve that
23 inconsistency for the Tribunal, and, sir, if actually
24 BGL wanted to come here and say the CMA has reached the
25 wrong conclusion, of course they could have approached

1 any of these witnesses and called them to say the
2 inference that you have drawn is wrong.

3 So there is no property in a witness, of course
4 there is not, so there is no unfairness point. So that
5 is why we say it is all very well -- and Mr Beard of
6 course was very emphatic about all of this, and it is
7 what he leads with in his closing submissions, but we
8 say it is very important to really nail down what
9 a witness would be doing and who is this witness, so
10 what sort of person would you be calling, because what
11 the courts have said -- and we see this reflected in the
12 new Tribunal Practice Direction -- is that the courts
13 deprecate calling witnesses to simply narrate documents,
14 and so on the key issue for the Tribunal which is in
15 relation to -- they are very granular points, I am
16 afraid, but in relation to these documents what do they
17 show on the balance of probabilities? Do they show that
18 Legal & General was influenced by the wide MFN or has
19 the CMA got it wrong on the balance of probabilities?
20 That question, we say, not much light would be shed on
21 that question by having a generalist, if I can put it
22 that way, giving evidence because it really is
23 a granular question, and that is why I say that we have
24 to approach Mr Beard's *cri de coeur*, as it were, with
25 a pinch of salt, or look at it very carefully.

1 THE PRESIDENT: Ms Demetriou, before you go on, I am
2 back-tracking a bit to Professor Ulph's unfortunate but
3 I find rather helpful St Andrews example, and you made
4 the point that if, despite his worst case scenario, the
5 professor did take his walk in the streets of St Andrews
6 and braved the risk, that would be -- I think you put it
7 that that would be an indication against, as it were,
8 the risk being a material one, or an appreciable one,
9 but I am wondering if that is right.

10 MS DEMETRIOU: It may not be. I may have been too quick to
11 have --

12 THE PRESIDENT: The reason I am suggesting this is, clearly
13 one has to go out for certain purposes, you would be an
14 extremely strange person if you did not go out at all,
15 but you would say, I anticipate, given what you have
16 submitted, that if the professor altered his behaviour
17 in that he went out less frequently, he did not go for
18 a morning stroll in the park because he was worried
19 about the risk, but he goes out to get food and see the
20 doctor, now you would have then metrics of the
21 professor's exit from his house and it might be rather
22 difficult to measure the metrics of the walks not taken.

23 MS DEMETRIOU: Yes.

24 THE PRESIDENT: But I think you are saying that the walks
25 not taken are, to move over to the competition, they are

1 relevant, but they are affecting -- moving to our
2 competition world, they are affecting competition in
3 a way.

4 So the change in behaviour is the thing that
5 matters. Of course, if you can show that because of his
6 concern about the risk of running over he does not go
7 out at all, that is great, and particularly if you can
8 show over time that changed, that is great, but your
9 case does not turn on that.

10 MS DEMETRIOU: No, it does not.

11 THE PRESIDENT: Obviously if we find that, that is great,
12 but you are saying these materials, if we take the view
13 that there has been an adjustment of conduct, albeit one
14 that you cannot measure, you get home.

15 MS DEMETRIOU: That is right.

16 THE PRESIDENT: Obviously a fortiori if you can show it, but
17 we are talking about the more extreme case in the other
18 direction.

19 MS DEMETRIOU: Sir, yes, thank you. That is exactly what we
20 say, and so I was rather too quick to put it in such
21 black and white terms, but that is exactly what we say,
22 and at the risk of taking this particular analogy too
23 far --

24 THE PRESIDENT: Sorry, Professor, we do apologise.

25 MS DEMETRIOU: -- of course in this case we say that one

1 is -- at all times the CMA was tasked comparing the real
2 world in the relevant period with the counterfactual
3 world in that period of no wide MFNs, and of course the
4 CMA takes the view and has concluded that in that
5 counterfactual world of no wide MFNs there would have
6 been enhanced price competition, and so this comes back
7 to a point -- and I am not going to stretch the analogy
8 by going back to St Andrews, but it goes back to the
9 point I made in opening which is that one does not only
10 look at observable changes, so an email which says, "We
11 cannot enter" -- we have that in respect of this HIP,
12 but one is not only looking at that because even for
13 HIPs which at the time did not operate any differential
14 pricing strategy, so for those HIPs, they were not
15 operating a differential pricing strategy in a world in
16 which there were wide MFNs and there was less price
17 competition, but if you think about the counterfactual
18 world where there is more price competition, then a HIP
19 which was very happy not to enter into promotional deals
20 may have been forced to enter into a promotional deal in
21 response to what others were doing, in response to the
22 increased competition.

23 So it is a very nuanced analysis, and the CMA as the
24 expert regulator, of course there is a full merits
25 appeal, I am not making a point about that, but the CMA

1 has had to take account of those types of -- those very
2 nuanced points when one is conducting a hypothetical
3 counterfactual analysis.

4 So, sir, yes, I agree with what you have said, and
5 one can take it further.

6 THE PRESIDENT: Thank you. Before I forget, and it is not
7 for now, but I wonder if you could provide us, or it may
8 be Mr Beard would be better, you have mentioned
9 delisting as a worst case scenario. I think it would be
10 helpful if we just had the reference to CTM's terms of
11 business so we can see what the worst case scenario
12 would be in the event of a breach of the wide
13 most-favoured-nation clause. Thank you.

14 MS DEMETRIOU: Sir, so, yes, I am still on my overview which
15 has become a longer overview, but anyway, it is very
16 helpful, if I may say so, that we are having this debate
17 up front.

18 Now, BGL of course seek to rely on their econometric
19 evidence, and our response to this -- and I am going to
20 obviously come back to this in more detail, but our
21 response is that Ms Ralston's econometric analyses do
22 not assist one way or the other with the question of
23 whether there is an appreciable adverse effect on
24 competition.

25 Now, as Mr Beard said yesterday, and this is common

1 ground, they cannot -- those analyses cannot prove that
2 there is no effect.

3 It is true that they do not rule out a zero effect,
4 so they do not rule out the null hypothesis of zero, but
5 they also do not rule out a positive effect, and so the
6 CMA's position is that this evidence is not helpful one
7 way or the other. It was not helpful to the CMA, so the
8 CMA could not say, well, let us take these results and
9 they bolster our case. Plainly they do not, but equally
10 it is not helpful to -- the opposite case, it is not
11 helpful to a hypothesis, it is not helpful to an
12 argument that there was no effect, because they do not
13 exclude an effect, and that is what the CMA --

14 PROF ULPH: Ms Demetriou, I am just intrigued by the
15 question about proving no effect.

16 Can you point us to some kind of test that could be
17 done to prove there was no effect?

18 MS DEMETRIOU: Do you mean an econometric test?

19 PROF ULPH: I am not saying it has to be econometric. I am
20 just saying your argument is that BGL have not proved
21 there was no effect. That would be a powerful argument
22 if you could point to some test that could have been
23 done to prove no effect and BGL just has not done that
24 test.

25 So my question is just: what test do you have in

1 mind that could have been done to prove no effect, that
2 BGL failed to do?

3 MS DEMETRIOU: Professor, I do not say that there is a test
4 that they could have done to prove no effect. My point
5 is a slightly different point which is that in
6 determining whether the CMA was right to find on the
7 balance of probabilities that there is an appreciable
8 effect, BGL has adduced the econometric analysis.

9 Now, that, we say, is not helpful in this case.
10 I am going to come back to it in more detail and it
11 might be better for us to wait in terms of the steps of
12 my argument to when I get to that point, but in
13 a nutshell what we say is that it does not exclude
14 a zero effect but it equally does not exclude a positive
15 effect, and so the question is, what does the Tribunal
16 make of that, and we say that what the Tribunal makes of
17 that is that it does not actually help in relation to
18 the issue that the Tribunal has to decide and so the
19 Tribunal has to look at all of the other evidence in the
20 case. That is our position in relation to this.

21 THE PRESIDENT: Ms Demetriou, I think I accept what you say
22 that it is not a slam dunk either way, if I can put it
23 much more extremely than you are putting it, but what
24 I think troubles me a little is the suggestion that it
25 says or tells us nothing because the fact that zero is

1 towards the centre of the higher probability curve does
2 tell us that the effect is not large.

3 Now, obviously that is not a complete answer to the
4 CMA's case, but it does not mean to say it is
5 irrelevant. The fact is we are in an area where the
6 econometrics suggests -- and tell me if you disagree
7 with that -- that if there was an effect it was a small
8 one.

9 Now, it seems to me that that is something which
10 colours the way in which we need to see and approach the
11 evidence that the CMA does rely on because we are
12 talking about something which is by definition small, if
13 you are right. That is why I am putting to you the
14 question that we have on our list: can it be right that
15 we simply take this evidence and do not consider it
16 alongside the other material? Whether it has great
17 weight, that is a different question, but it is the
18 failure to incorporate it in the body, in the essence of
19 the Decision, that I think I am asking you about.

20 MS DEMETRIOU: Sir, I understand. Let me go on before
21 I deal with --

22 THE PRESIDENT: No, of course, I do not want to take you out
23 of order.

24 MS DEMETRIOU: I am going to deal now with econometrics.

25 I was going to deal with things in a slightly different

1 order and deal with market definition first, but I think
2 it may be helpful to make my submissions on econometrics
3 first since we are having this debate now, if that is
4 acceptable.

5 THE PRESIDENT: Of course. Well, thank you.

6 MS DEMETRIOU: I think just to unpick a little the point,
7 sir, that you were just putting to me. You put to me
8 that the effect is small. I would caveat that a little
9 bit by saying that it is obviously context specific, one
10 has to look at the context in which it is said to be
11 small. So, for example, we have made the points, we
12 have made the points in our closing submissions and
13 Professor Baker made the points about the promotional
14 deals analysis, so even if you do not go to the end of
15 the -- even if you do not go to the very end, the
16 right-hand side of the X axis, which is the largest
17 coefficient in the confidence interval, we still see
18 that -- for example, we saw in the bell curve in
19 relation to promotional deals that 0.51, you will recall
20 that, is just as likely as zero, and so --

21 PROF ULPH: Ms Demetriou, I just want to make a point about
22 econometrics. You are actually absolutely right 0.51 is
23 just as likely as zero, and that is because both of them
24 have a probability of zero. If we were dealing with
25 a situation where you are tossing a coin or rolling

1 a dice or drawing a card from a pack of cards, there is
2 a finite number of alternatives that are available, so
3 it makes complete sense to say what is the probability
4 of this particular alternative, and that is not what you
5 are doing with econometrics. What you are trying to do
6 is you are trying to determine the degree of association
7 between one factor and another factor, in this case what
8 is the degree of association between the presence of
9 a wide MFN and, say, prices or commissions or the number
10 of promotional deals done, and in principle that degree
11 of association can be any number between minus infinity
12 and plus infinity, so you have an infinite number of
13 possibilities, so the probability of any one possibility
14 is precisely zero, so the likelihood that it is zero is
15 zero, the probability that it is 25 is zero, the
16 probability that 3,824, these are all zero
17 probabilities.

18 All you can talk about sensibly is what is the
19 probability that the true value is less than or equal to
20 some number. So you can ask the question what is the
21 probability that it is less than or equal to zero, what
22 is the probability that it is less than or equal to 10,
23 those are well-defined statements you can make, and what
24 the confidence interval gives you is what is the
25 probability that it lies between the lower bound and the

1 upper bound of that confidence interval, and what we say
2 is with 95% probability it lies between the lower bound
3 and the upper bound, but the point is you still do not
4 know where it is. You still do not know, even having
5 done the econometrics, what the true value is. You have
6 a central estimate of that true value, and you have
7 a huge range of other possibilities, and all you have
8 done is you have narrowed things down a bit to say you
9 have got a central estimate and we think with 95%
10 probability, not with certainty, but just with 95%
11 probability that it lies between this lower number and
12 that higher number. That is what you have learned from
13 doing econometrics and it is just wrong to say that the
14 probability of zero is the same as the probability of
15 0.51 implying that those probabilities are positive.

16 What you do is -- I am sorry.

17 MS DEMETRIOU: Sorry, I did not mean to cut across you.

18 PROF ULPH: Carry on.

19 MS DEMETRIOU: I am very hesitant to get into a debate
20 with -- I mean, if you have told me I am wrong about
21 something, I am sure you are right. I am not an
22 econometrician. All I was seeking to do was to make,
23 I think, a more modest point in response to the
24 chairman's question which is that Ms Ralston -- it may
25 be that this is not quite the right way of expressing

1 it, but Ms Ralston certainly accepted in
2 cross-examination that the 0.51 point is at the same
3 height, if I can put it that way, of the bell curve, and
4 so I am sure that you are right, Professor, that one
5 does not speak in terms of probabilities, but she
6 accepted in cross-examination that it is of the same
7 likelihood as zero, and the more modest point that I was
8 seeking to make in response to the chairman's question
9 is that when one is talking about small amounts, 0.51
10 translates -- and again, this is common ground; this was
11 not disputed -- to a 9.4% increase in promotional deals.

12 So one has to be very careful when you are looking
13 at the figures about saying, well, that is a small
14 figure, but, sir, the second point -- and so, Professor,
15 I am not seeking to -- if I have it wrong about how
16 precisely I have expressed myself then I apologise, but
17 I was really seeking to make a slightly different point
18 in response to the chairman's question.

19 THE PRESIDENT: No, and that point, I think, is well made.

20 If I can reformulate it and see if the professor will
21 agree, I put to you that what we got from Ms Ralston's
22 analysis was that the effect was a small one. I do not
23 want to be taken as saying that is our conclusion, and
24 of course we are going to have to take into account all
25 of the critiques that were made by the CMA's witnesses

1 on this analysis, but the more fundamental point is
2 whether that assessment is something that needs to be,
3 as I put earlier, woven into the fabric of the decision
4 so that you have the complete picture in which to view
5 your qualitative evidence which of course you say is
6 decisive, but the fact is we are talking about weaving
7 together strands of evidence into a tapestry which
8 hopefully will point in a single direction or very
9 firmly in the direction that is the case, and my point
10 really is, as one of the straws in the wind, it is not
11 the econometrics one.

12 MS DEMETRIOU: Sir, of course it is correct that the
13 Tribunal has to consider it, so of course that is
14 correct, so we are not saying shut your mind to it. The
15 CMA did not shut its mind to it either. I am going to
16 show you that. But what we do say is that, yes, one can
17 look at it this way in response to your question, sir.
18 You say, well, this has shown a small effect and we can
19 argue about what is small, but it is true that it is not
20 a huge effect, and Ms Ralston accepted that it is harder
21 in econometrics to show a small effect, so it is harder
22 reliably to show a small effect, and so it may well be
23 that when you are looking at the evidence, the
24 qualitative evidence, that you may say to yourself,
25 well, we can see from the econometrics that we are not

1 expecting this effect to be huge, so when we are
2 assessing the evidence, we should be doing it with that
3 in mind. We are not expecting a raft of evidence all
4 going in one direction, but of course we say that that
5 is nonetheless an appreciable effect, so I think to that
6 extent I accept what you are saying, sir, but in terms
7 of ultimately the question before the Tribunal which is,
8 was the CMA correct to find an appreciable effect, then
9 we say that actually on that question this directly, if
10 I can put it that way, directly on that question, the
11 results do not help because they are too imprecise and
12 I will come back to explain precisely what I mean by
13 that. So that is in a nutshell our answer.

14 Sir, there is a difference between a damages case
15 like BritNed, for example, where one has already
16 established an infringement and the parties are arguing
17 about quantification and you have a different type of
18 econometric analysis typically which is there to
19 quantify the effect rather than test a null hypothesis,
20 and one there is looking at all of the evidence in the
21 round, and you can see that one expert says it is a 25%
22 overcharge and the other expert says it is a 1%
23 overcharge and one is looking at the details of the
24 model and assessing all of the evidence in the round,
25 but this is a different type of econometric analysis.

1 This is testing a null hypothesis of zero, and, sir, if
2 I may say so, I am not going to take you to it now, but
3 in our closing submissions we did rely on a paper that
4 is in the bundle, by Leamer and two other authors, which
5 really does touch on this, the difference between
6 analyses which seek to quantify an effect and those
7 which test a null hypothesis, and the risk of getting
8 a type 2 error which is failing to exclude a null
9 hypothesis of zero where one in fact exists, and what
10 the authors say in that paper, which we do respectfully
11 say is compelling, is that usually econometrics is used
12 to quantify effects rather than test whether or not
13 there is one in the first place, and if you see from the
14 qualitative evidence what those authors, they are
15 American authors, call the evidence of record, so the
16 testimonies and the documents, if you can tell from that
17 that there is an effect then normally you do not go on
18 and test a null hypothesis of zero because you have what
19 you need for from the qualitative evidence, and really
20 the point of econometrics in those cases is to quantify
21 the effect which is of course what we say does not need
22 to happen in this case because we are just establishing
23 an infringement, we are not in a damages case.

24 So that is what we say broadly, and, sir, if we look
25 at -- so I did want to deal with the point that Mr Beard

1 has made repeatedly. He has said repeatedly that the
2 CMA has failed to take account of econometrics in this
3 case, and it is a related point to the point that you
4 have just put to me, and we say that that argument is
5 perplexing because the CMA has not ignored econometrics
6 in this case. Shortly after the investigation opened,
7 BGL provided the CMA with the first of its econometric
8 analyses, and there have been quite a few, and, as the
9 Tribunal has seen, it then provided the CMA with others,
10 and the CMA carefully considered all of these analyses.
11 It did not ignore them. It assessed them.

12 If we look at the Decision, if we could turn up
13 annex R to the Decision and go to {A/1/766}, please. In
14 fact if we start, please, at {A/1/745}.

15 THE PRESIDENT: Yes, it is annex R, is it not?

16 MS DEMETRIOU: You see annex R. This is the annex which
17 assesses the analyses submitted by Oxera.

18 If we could turn now to page {A/1/764}, I just want
19 to show you two paragraphs.

20 So R.59 at the top of the page, and what this is
21 describing is the CMA conducting a sensitivity analysis
22 on one of Oxera's econometric analyses, and what the CMA
23 is saying there is that that leads to opposite findings
24 to those reported by Oxera, and so it is saying that:

25 "... by controlling for time-varying brand and

1 PCW-specific unobserved factors, the analysis suggests
2 that the removal of [the] wide MFNs had the positive and
3 statistically significant effect of reducing prices
4 which would be consistent with the CMA's case. The CMA
5 has however decided not to rely on these findings due to
6 their limited robustness and the fundamental issues
7 described above (see ... R.III.(b))."

8 We do not need to go back to them, but they include
9 the spillovers point. Well, let us maybe just have
10 a quick look at it. It starts on page {A/1/755}. That
11 is the section dealing with lack of robustness of
12 overriding principles. If we go to R.35 on {A/1/756},
13 we have the key point made at 35(a) about the spillover
14 effects and how a difference-in-differences -- how the
15 difference-in-differences approach cannot adequately
16 precisely estimate the effect given spillovers.

17 Then also if we can go to page {A/1/766}, we see
18 another robustness -- another sensitivity analysis that
19 the CMA has conducted. So:

20 "... differently from Oxera, the CMA has used
21 a logarithmic transformation of the variables for its
22 sensitivity analysis in order to allow for non-linear
23 relationships between dependent and independent
24 variables. Following this change, the coefficient of
25 the (removal of the) wide MFN becomes statistically

1 significant ... This finding which -- if relied upon --
2 would be supportive of the CMA's case, appears robust
3 across several alternative specifications."

4 So far from not engaging with the econometrics, the
5 CMA really very carefully assessed Oxera's models and
6 conducted its own sensitivity analyses, and moreover
7 found that when it had done so, they gave rise to some
8 results which were statistically significant in support
9 of the CMA's case, in support of the CMA's case, but it
10 did not then say, well, we are going to rely on these
11 because it is helpful to our case. No, the CMA said we
12 cannot rely on them because they are not robust in the
13 present case because of the deficiencies we have
14 identified in relation to spillovers.

15 So, sir, we say it is just simply not right, and it
16 is very perplexing to be facing a submission that the
17 CMA closed its mind to econometrics. It really quite
18 obviously did not close its mind to econometrics. It
19 reviewed and considered and conducted sensitivity
20 analyses on Oxera's results but reached the considered
21 view that the findings were not robust, even when they
22 turned out in support of the CMA's overall findings,
23 were not robust for the reasons that we have explained.

24 Now, sir, imprecision and precision.

25 Now, yesterday Mr Beard did not seem to have

1 grasped, if I can respectfully say so, what we mean by
2 imprecision because, in his response to our submissions,
3 our closing submissions, on imprecision, he seemed to
4 think it was a criticism of Ms Ralston's methodology,
5 and his response on precision was to say, well,
6 Ms Ralston has used well-recognised statistical methods
7 and should not be criticised. That is not our point
8 at all.

9 Our point is that the results do not show
10 a statistically significant result, and that is because,
11 of course, what is meant by that is that zero, the
12 hypothesis being tested, is in the confidence interval.
13 So that is what we mean by imprecise and, as I have
14 said, why is that important? Well, it is important
15 because, for the reason I gave at the outset, which is
16 that whilst the results cannot reject zero as
17 a possibility, neither can they reject a positive
18 effect.

19 THE PRESIDENT: Nor a negative effect?

20 MS DEMETRIOU: I am so sorry?

21 THE PRESIDENT: Nor a negative effect?

22 MS DEMETRIOU: Nor a negative effect. So in those
23 circumstances, given that they are not statistically
24 significant, given that they are imprecise and they
25 cannot reject effects from negative through to positive,

1 then we say that there is very little weight that can be
2 placed on them for the question that the Tribunal was
3 asking itself, which is, was the CMA wrong to conclude
4 on the balance of probabilities by reference to the
5 other evidence that there is an effect?

6 THE PRESIDENT: Ms Demetriou, you would have exactly the
7 same imprecision if zero was not in the range.

8 MS DEMETRIOU: No, you would not, sir, because imprecision
9 means that zero is in the range. That is what is meant
10 by imprecision. So imprecision means that zero is in
11 the confidence interval. So to have found
12 a statistically significant effect one would have to
13 have the confidence interval to the right of zero on the
14 X axis. That is exactly what is meant by imprecision.

15 THE PRESIDENT: Yes, but you would still have the range.

16 MS DEMETRIOU: Yes, but in those --

17 THE PRESIDENT: It would matter less because if you had this
18 curve, this bell curve, shifted to the right by an order
19 of magnitude, you would be able to say, look, there is
20 an effect, it is jolly large, I cannot tell you how
21 large it is because I have the same range of effects,
22 but because they are all effects, this is highly
23 supportive of our case.

24 So the problem you have is that the curve is going
25 over the zero point, zero is not in the centre, but it

1 is equivocal because it is pointing both ways. The
2 point of that is does it not show, subject to all of the
3 more granular criticisms you make of Ms Ralston's
4 approach, does it not show at least on the appellant's
5 case that the effect on an econometric basis pace
6 Ms Ralston is small if anything?

7 MS DEMETRIOU: Sir, no. It does not show that. Subject to
8 the point that if one is -- one may be able to
9 characterise the positive effects within the confidence
10 interval as small, I do not know, that has to be seen in
11 context, as I say, but, no, our response, it is
12 precisely the point you are putting to me, sir, which is
13 because it embraces, because the confidence interval
14 embraces all of these figures from negative to positive,
15 one simply cannot use it to decide whether or not there
16 is an effect because it does not exclude a positive
17 effect. Neither does it exclude zero, neither does it
18 exclude a negative effect. So what is the Tribunal
19 supposed to do with that? Well, what the Tribunal is
20 supposed to do with it is look at the other evidence in
21 the case. That is our position.

22 THE PRESIDENT: That we are agreed on, but the issue I think
23 is of course you have quite rightly taken us to annex R,
24 but would it be a fair characterisation of the CMA's
25 approach to the econometric evidence that it has been

1 entirely negative, and let me explain what I mean by
2 that. It has been, as it were, responsive to the
3 positive evidence that has been put in. In other words,
4 you have been knocking down the constructs that the
5 appellants have put in play rather than doing your own
6 work and saying this is what it shows.

7 MS DEMETRIOU: No, I do not think that is fair because the
8 econometrics were put in at a very early stage, or some
9 of them were put in at a very early stage of the
10 investigation, so really when the investigation had just
11 opened, and of course BGL is a large company represented
12 by very able legal representatives and economists, so
13 they can be taken to be -- so before the CMA has even
14 really progressed its investigation it puts forward its
15 analysis, its econometric analysis, or one of them, and
16 the CMA then does what it has to do and is supposed to
17 do, which is examine that analysis, but it did not stop
18 there, and you have seen that from annex R. It took the
19 analysis and said, well, can we actually make some
20 changes to improve it, and it found that actually it
21 could produce a statistically significant result but
22 having thought about it all, for the reasons it gives in
23 annex R, it decided that it was not robust enough in the
24 circumstances of this case, which we will come to.

25 So I do not think it is fair to say that the CMA

1 engaged in a wholly destructive exercise. It was
2 seeking to conduct robustness and sensitivity checks on
3 this.

4 Now, if what you are putting to me is, well, should
5 not the CMA have gone off and done something totally
6 independent? Well, no, I say that is unrealistic. It
7 was faced with the best shot, as it were, the first shot
8 in any event, of this very well resourced company, and
9 it considered it, and it does not think that there is
10 some different analysis, completely different analysis,
11 that it could have done that would have been better.

12 So that is really the position of the CMA in
13 relation to that. It has not turned its face away from
14 it. It has grappled with it, but there are good reasons
15 for thinking it is not robust.

16 So what you have, again, just --

17 THE PRESIDENT: I am just wondering if the professor had
18 a question? I think I may have cut him off.

19 MS DEMETRIOU: I am sorry.

20 THE PRESIDENT: No, not you; me. Professor, did you have
21 a point?

22 PROF ULPH: It was more an observation on the points that
23 you were making. I think there is a danger here of
24 confusing two issues. One is the issue of precision
25 which is how wide is the confidence interval, and the

1 other is a question of statistical significance which,
2 as you say, is a question of whether or not zero lies in
3 the confidence interval.

4 One of the factors that drives precision is the
5 number of data points you have in your sample. Broadly
6 speaking, the more data points you have in your sample
7 the tighter and tighter become the confidence intervals,
8 so you get a really, really sharp curve around the
9 central estimate and the confidence interval is very,
10 very small, so the width of that confidence interval is
11 a measure of the degree of precision.

12 There is a secondary question of, is zero in that
13 confidence interval? Obviously the less precise your
14 estimates are the wider and wider that confidence
15 interval is, the more likely it will be that for any
16 given central estimate it will be statistically
17 insignificant, but you can have positive estimates which
18 are very, very precise because you happen to have a very
19 large data set and you can determine with a lot of
20 precision that variable, certainly with 95% probability,
21 you can say it is positive.

22 You still do not know what the true value is, but
23 you can say with 95% probability it is positive. Here
24 you cannot say that, and all the evidence says that you
25 cannot reject the hypothesis of no effect. That is what

1 it means to be statistically insignificant. The issue
2 of whether it is small or large is a separate question,
3 and that does relate again to the degree of precision.

4 MS DEMETRIOU: Professor, yes, I think I would be foolhardy
5 to in any event, but I think I do actually agree with
6 what you have said, so I am not demurring from any of
7 that, but what we say of course is that here, for the
8 reasons that the professor has given, you have
9 a confidence interval that embraces zero, so you do not
10 have a statistically significant result in other words,
11 and although zero is not rejected, all the other points
12 in that confidence interval are also not rejected, and
13 that fundamentally is why we say that when it comes to
14 the nuts and bolts of this case which are answering the
15 fundamental question of whether the CMA erred in finding
16 on a balance of probability that there was an effect,
17 that really the main area that the Tribunal is going to
18 derive assistance from is the other evidence in the case
19 because if one just looks at these results, it is true
20 you cannot reject zero but you cannot reject a positive
21 result or a negative result either, and so that is our
22 essential point.

23 Just going back to the relative pricing analysis and
24 just to pause here, and it is a point we have made in
25 our written closing submissions, to remind the Tribunal

1 that we say of course that that analysis is not
2 informative because of its very premise, maybe we should
3 turn that up in our written closing so I can remind the
4 Tribunal of that. That is at paragraph 342 which is at
5 {B/65/158}. At {B/65/157} I was going to say something
6 about the relative pricing analysis, but I did not want
7 this point to be forgotten, which is that -- of course
8 what the relative pricing analysis does, which
9 Ms Ralston says is her main approach, its premise is
10 that if the removal of the wide MFNs had an adverse
11 effect on competition, it would necessarily result in
12 a reduction in the proportion of risks priced more
13 expensively on CTM than on other PCWs after removal, and
14 we say that that assumption is not reflective of the
15 CMA's theory of harm in this case, because the CMA's
16 position is that the proportion of risks priced more
17 expensively on CTM after removal would not necessarily
18 increase because it would all depend on how CTM itself
19 reacted.

20 So the premise that it would increase rather assumes
21 that CTM itself is not going to do anything, it is not
22 going to respond to competition in the market from
23 others, and we say that it is likely that CTM would have
24 responded to increased competition in the market and so
25 in those circumstances whether or not the proportion of

1 risks it priced after removal of the wide MFNs increased
2 or stayed the same or reduced would all depend on how
3 that competition flushed out.

4 So it is a very important threshold point. We say
5 that the way it is set up is just not informative
6 because it assumes a theory of harm on the part of the
7 CMA that really forms no part of the CMA's theory of
8 harm. So I do not want that point to get lost. It is
9 really fundamental, but the point I was going to make in
10 the context that I was talking about previously is that
11 of course -- it goes back to, sir, a point you put to me
12 about size, and the point estimate in that case is
13 0.027, and one has to interrogate what that means in the
14 world. What it means is a 2.7% increase in the risks
15 priced more expensively on ComparetheMarket. So again,
16 I make the point that something which looks small, and
17 is small in the sense of course it is not 80%, is
18 nonetheless not insignificant.

19 THE PRESIDENT: I think we would be helped -- and again not
20 now, but if the parties could translate the point
21 estimates into, as it were, real money, that would,
22 I think, assist us, it certainly would assist the
23 non-economists amongst us to visualise the nature of the
24 range.

25 MS DEMETRIOU: Sir, in fact Professor Baker did that in his

1 report.

2 THE PRESIDENT: Did he?

3 MS DEMETRIOU: I did put the figures to -- shall we have
4 a look at it so I can show you where it is? Is that
5 helpful?

6 THE PRESIDENT: By all means.

7 MS DEMETRIOU: We are in {A/7}. Let me find the reference.

8 If we look for example at {A/7/47} -- I may have misled
9 you. I am looking at this, and I think that what we
10 need to do -- what he has done is in relation to the
11 very outside edge of the confidence interval he has
12 given some percentage figures, but I think what we can
13 come back and do is translate the point estimate into
14 sort of real world terms, as it were, and I hope that
15 that can all be done by agreement.

16 THE PRESIDENT: Yes, well, I would very much hope so. It is
17 simply when you point in relation to the PD bell curve
18 you said that the 0.51 estimate translated into 9.8%,
19 and I think --

20 MS DEMETRIOU: 9.4%.

21 THE PRESIDENT: 9.4%, I beg your pardon, but that sort of
22 translation perhaps done in reference to the diagrams
23 will I think assist us to put a degree of consequence to
24 the figures.

25 MR BEARD: Ms Ralston is behind and is obviously listening

1 to what you are saying, sir, and we will do that and
2 liaise with the CMA in relation to it.

3 THE PRESIDENT: That would be very helpful, thank you.

4 MS DEMETRIOU: I think you have my point now, I think we
5 have explored through this discussion. You have my
6 point about the results not really being informative
7 either way in terms of whether there is an effect or
8 not, because they are simply not rejecting the
9 hypothesis, it is not rejecting the hypothesis of zero,
10 but equally other results cannot be excluded, so they do
11 not move the dial.

12 I was going to turn to spillovers to look at
13 spillovers, because this is obviously a key reason why
14 the CMA did not consider that econometrics were robust
15 or that the econometric analysis here that it was
16 looking at and testing itself was not robust, and there
17 is an important conceptual point to start with, if
18 I may, and it relates to an observation made by
19 Professor Ulph during the course of yesterday.

20 Now, of course, this is a competitive market.
21 Everybody agrees that there is lots of competition on
22 price, and if the CMA is right that the WMFNs
23 constrained covered HIPs such that removal of the wide
24 MFNs meant that they were more able to engage in price
25 competition, then it is inevitable, in the CMA's

1 submission, that non-covered HIPs would have responded,
2 and this is really a point that Professor Ulph yesterday
3 was distinguishing between non-covered HIPs moving
4 first, as it were, and non-covered HIPs responding, and
5 of course both are forms of spillover effect, but I just
6 want to focus on the second type which is response.

7 What we say is that it is in fact utterly
8 implausible that non-covered HIPs would have just sat
9 back and watched the covered HIPs engage in more price
10 competition and watch their market shares being eroded
11 by their competitors, and Ms Ralston accepts that there
12 is plenty of price competition in the market and that
13 covered and non-covered HIPs respond to each other, and
14 she also accepts -- and this is important. She accepts
15 that if there is an effect on covered HIPs, so if there
16 is a direct primary effect on the treatment group, then
17 spillover effects are likely.

18 So her point is not that you do not get spillovers
19 if there is an effect on the covered group. She says
20 that there is no effect on the treatment group at all,
21 and that is because she thinks that any effect would
22 completely unravel.

23 Could we just look at again our closing submissions
24 on this point. If we could go to {B/65/161}, please.
25 Very, very unfortunately when we drafted this, we did

1 not put a page number on the first sheet so it means my
2 hard copy does not match the bundle copy, so I apologise
3 to the EPE operator, it is on the bundle 161, and it is
4 paragraph 350.

5 We make the point there that Ms Ralston does not
6 dispute that if there is a primary effect, if I can put
7 it that way, if the wide MFNs had an effect on covered
8 HIPs, there would be spillover effects. We say there
9 what she said in her evidence, and as she also put it,
10 "as competitors, there will be limits to the extent to
11 which they can resist competitive pressure," and her
12 position, of course, is there is no primary effect
13 because of the unravelling argument.

14 To summarise on this point, on this conceptual
15 point, it is common ground that if there is a primary
16 effect, so if the wide MFNs had an effect on price
17 competition by the covered HIPs that there will be
18 spillover effects on the non-covered HIPs. That is
19 common ground.

20 So the question for the Tribunal really becomes
21 a simpler binary question in a way. The question for
22 the Tribunal is: was there a primary effect at all? Was
23 there a primary effect? Does the evidence show that
24 some of the covered HIPs were affected, price
25 competition by them was affected, or did any effect

1 completely unravel so that it is undetectable, as
2 Ms Ralston says? If there is a primary effect, then we
3 say that there will be spillover effects.

4 What we say is that the evidence, so the evidence
5 considered by the CMA, amply shows, establishes, that
6 there is an effect on the covered HIPs, and we have seen
7 for example that some of the covered HIPs took account
8 of the wide MFNs in their pricing behaviour, turned down
9 promotional deals and so on, and that is utterly
10 inconsistent with complete unravelling of the effects of
11 the wide MFNs.

12 We can come back to this, and I will do it shortly
13 in view of the comments of the chairman, but we have
14 covered it in our closing submissions, and you have seen
15 the type of evidence on which the CMA relies to say, of
16 course there were effects, you have these HIPs that were
17 subject to the wide MFNs, saying in terms, and turning
18 down promotional deals in terms, because they were
19 influenced by the wide MFNs. So that is inconsistent
20 with the argument that there is complete unravelling of
21 effects. You just would not see that.

22 Of course, there is also evidence which I will come
23 on to when I look at the promotional deals data, of
24 effects, there is direct evidence of effects on
25 non-covered HIPs, because we see that they concluded

1 more promotional deals after the relevant period than
2 during the relevant period.

3 Mr Beard's submissions yesterday proceeded on
4 a wrong premise because he said, well, in order for the
5 CMA to show spillover effects they have to show direct
6 evidence, there has to be direct observable evidence in
7 relation to the non-covered HIPs. We think we have that
8 evidence, we know we have that evidence, but the premise
9 for his submission is wrong because once we have shown
10 that there is evidence in relation to the covered HIPs
11 and we have shown a primary effect, then it is common
12 ground that the non-covered HIPs would react and that
13 there would be spillover effects.

14 So that is the conceptual point. The next question
15 is, well, what is the impact of spillovers if they
16 exist, as the CMA say that they do? Again, this is
17 common ground, happily; this is an issue that is common
18 ground. They will bias the coefficients downwards. So
19 both sides agree that if there are spillovers the
20 coefficients will be biased downwards, and this bit is
21 not common ground because Mr Beard said the contrary
22 yesterday, but we say that that is true whether the
23 spillover effects are of the same magnitude as the
24 primary effect or whether they are smaller. Either way,
25 they are going to bias the coefficients downwards, and

1 Mr Beard's submission that somehow they have to be
2 exactly coextensive is just wrong and we do not
3 understand it.

4 MR BEARD: I am sorry, just to be clear, that is not the
5 submission. We accept if spillovers exist then they
6 will bias downwards, just to be really clear, what I was
7 talking about was how you tested whether Ms Ralston's
8 analysis was wrong and compared it with DCT's, and that
9 is when you get into the issue about whether the
10 spillovers are the same. So I do not think in fact
11 there is a difference between us. If they are small,
12 they still bias downwards.

13 MS DEMETRIOU: That is very helpful, thank you. Thanks to
14 Mr Beard for clarifying that. So we are in happy
15 agreement on this point, even if they are small they
16 bias the coefficients downwards.

17 Professor Ulph said yesterday to Mr Beard that it is
18 necessary to distinguish two elements: the impact of
19 spillovers on the coefficients on the one hand and then
20 the impact on statistical significance and he put to
21 Mr Beard that you have to distinguish those two things
22 if I understood him correctly, and we say that those are
23 indeed, we agree that those are two -- conceptually two
24 different points, but we submit that the two issues
25 whilst conceptually separate are very closely linked,

1 and that is because biasing the coefficients downwards
2 will pull the results closer to zero.

3 So in other words what you have is the confidence
4 interval shifting left, and what that means is that that
5 has an obvious effect on statistical significance
6 because it makes it more likely that the confidence
7 interval will include zero and the results will not
8 therefore be statistically significant.

9 So in other words, the existence of spillover
10 effects will bias coefficients downwards as compared to
11 what they would have been had there been no spillover
12 effects, and what that means, because they are biased
13 downwards, is that the whole of the confidence interval
14 shifts left across -- I am sure I am not putting this as
15 an economist would, but it is how I visualise it --
16 shifts left on the X axis, and it makes it more likely
17 that zero will form part of the confidence interval,
18 and, therefore, that you do not get a statistically
19 significant result.

20 So we agree with Professor Ulph that --

21 PROF ULPH: Ms Demetriou, can I just clarify my point? My
22 point is that you have to distinguish between the effect
23 on the estimates of the coefficients and the effect on
24 the degree of precision of the estimate in the
25 coefficient, so how wide that confidence interval is.

1 THE PRESIDENT: Ms Demetriou.

2 MS DEMETRIOU: I am going to come back to Professor Ulph's
3 distinction and I can happily say that we agree with the
4 distinction, Professor Ulph, and if I can just show you
5 on the transcript in fact where Professor Baker picked
6 up on the same distinction, so transcript {Day10/163:1}.

7 You can see the answer there, and I am asking
8 about -- I asked him in re-examination I think this was
9 about the impact of spillovers, and he said that:

10 "... the entire confidence interval is shifted in
11 the direction of zero so ... we might find, if you
12 remember on the bell curve, the extreme point that
13 I say, well, look, this includes ... economically
14 significant effects as big as the one that was marked
15 with the red circle there, but if there is a bias in
16 estimating the effect in the first place, the whole
17 confidence interval gets shifted most likely, and it
18 could go in the direction of making that upper bound low
19 although [and this is the point] actually what happened
20 also depends on what happens to standard errors, so that
21 is a little more complicated ..."

22 So, Professor, we agree that it is common ground
23 and -- I think it is common ground anyway -- that the
24 effect of spillovers means that the confidence interval
25 shifts towards zero, so it is less likely -- it is not

1 agreed. Anyway, I agree with Professor Ulph that if
2 there are spillover effects, the confidence interval
3 shifts towards zero so it is less likely to result in
4 a -- to yield a statistically significant result, but
5 there is a separate point that Professor Ulph made which
6 is what is the impact on the confidence interval itself,
7 so does it mean the confidence interval gets bigger or
8 smaller?

9 That is a separate point which I am not relying on
10 for these purposes. I do not think anyone has made
11 submissions on for these purposes of spillover effects,
12 but we agree it is a separate point. Of course the
13 Tribunal has my general point that we say that the
14 confidence interval here is broad because it encompasses
15 negative to positive results, so it is not a tight
16 confidence interval, but on the specific point raised by
17 Professor Ulph, yes, we agree with the distinction, but
18 in relation to this point the one that we are relying on
19 is the fact that the confidence interval gets shifted
20 towards zero and so is less likely to yield
21 a statistically significant result.

22 Now of course, as I have shown the Tribunal in
23 annex R to the Decision, these are not points being made
24 for the first time by the CMA in this appeal because
25 there were points that the CMA made in the Decision in

1 response to Oxera's analyses and you have seen that even
2 in relation to the CMA's own sensitivity checks it was
3 unwilling to rely on them even though they looked
4 positive because of these issues with spillovers and
5 robustness.

6 That takes me to DCT on which Mr Beard places, it is
7 fair to say, a lot of forensic weight.

8 He first sought to make the point that the CMA did
9 not mention its commissions, DCT commissions regression,
10 in the Decision.

11 Now, in a sense, that criticism is rather unfair
12 because BGL did not make the submission during the
13 investigation that it is now making in this appeal, so
14 it did not say to the CMA that weight should be placed
15 on the Oxera commissions analyses because a commissions
16 analysis was also carried out in DCT. On the contrary,
17 in the investigation, the thrust of its submissions was
18 to distinguish everything that happened in relation to
19 private motor insurance, but it is true, so far as it
20 goes, that the Decision does not refer to those
21 regressions.

22 We say -- and this is really the short point in
23 response -- that it is plain on its face -- and this
24 does not involve anyone giving evidence in closing
25 submissions -- it is plain on its face -- and indeed,

1 Mr Beard made the point in his own cross-examination of
2 Professor Baker -- that the analysis in DCT did yield
3 statistically significant results of a positive effect.

4 In other words, zero was not in the confidence
5 interval in that case, and that meant that unlike the
6 results in the present case, those results were indeed
7 supportive of an adverse effect on competition and so
8 were relevant to the analysis, and as I have said, had
9 Ms Ralston's analysis also yielded a statistically
10 significant result then they too would have been
11 relevant, but that is really the key distinction between
12 the two sets of regressions. There are differences in
13 how the regressions were carried out and so on, but we
14 do not have evidence in relation to those, and really
15 the point that is important is that in that case even
16 though there was likely to have been bias downwards
17 because of spillover effects, the result was still
18 statistically significant and so it was supportive of an
19 effect, and in this case we do not have that.

20 Now, Ms Ralston says that there cannot have been
21 spillovers because her five tests would have picked them
22 up. The first point to make is of course that her view
23 is inconsistent with the bedrock of evidence in this
24 case on which the CMA relied which shows that there was
25 an effect, a primary effect, on the covered HIPs, and

1 again, you have seen the nature of that evidence in our
2 closing submissions, and it is set out at length in the
3 Decision.

4 The second point to make is that none of
5 Ms Ralston's --

6 PROF ULPH: Ms Demetriou, I think there is a distinction to
7 be made here between the issue of whether or not there
8 are spillovers and the issue of whether or not, if you
9 control for them properly, they change your results.
10 I think it is a mischaracterisation of what Ms Ralston
11 said to say that she thought there were no spillovers.
12 I think in her econometrics she was trying to conduct
13 tests which are alive to the possibility of spillovers
14 and was trying to find out whether that changed her
15 conclusions that she got from her original analysis.

16 MS DEMETRIOU: Professor, I am afraid I have to depart
17 company with you on this point because what we say is
18 none of her tests depart from her basic
19 difference-in-differences methodology which proceeds on
20 the very assumption that there are no spillover effects
21 because the control group that she is using, the
22 non-covered HIPs, are assumed for the purpose of the
23 difference-in-differences methodology to not respond to
24 the primary effect. That is the assumption.

25 All of her five tests involve either zooming in on

1 the difference-in-differences results or somehow
2 changing the treatment group or the control group, but
3 they do not change the fundamental nature of the
4 analysis that she is undertaking.

5 So we do not see this as Ms Ralston controlling in
6 any way for spillover effects. What we say is that what
7 she has done by these five tests is chopped and changed
8 or zoomed in on or changed various elements of the
9 difference-in-differences approach, but it is still
10 a difference-in-differences approach which assumes no
11 responses by the control group, and we also say that
12 these tests all require very specific assumptions to be
13 made about likely competitive responses, and these
14 specific assumptions just do not reflect the real world,
15 and we have covered them in detail in our written
16 closing so I am not going to go through it in detail
17 now, but if I can just state in summary what we say --

18 THE PRESIDENT: Before we do that, I just want to make sure
19 that I have articulated what you say about Ms Ralston's
20 analysis of spillovers and I say it really to invite
21 Professor Ulph to correct me so that we have a clear
22 baseline of what it is you are submitting, but I think
23 what you are saying is that Ms Ralston has done her
24 analysis. She says that the analysis holds good and
25 that is despite the potentiality of spillovers, and what

1 she has done to make that analysis good is she has run
2 her various cross-checks to determine that that is the
3 case. In other words, she has sought to exclude the
4 criticism that is made that spillovers make her results
5 unreliable, but your point is that those efforts are
6 insufficient to remove the concern that is expressed
7 that spillovers remain a factor that makes her analysis
8 something that we should put less weight on than she
9 would urge us to.

10 MS DEMETRIOU: Yes, so what we say is that she has not
11 conducted some other type of analysis, so the
12 fundamental problem is that the
13 difference-in-differences analysis involves comparing
14 the treatment group with the control group which is
15 assumed not to respond. So the whole premise of this is
16 that the treatment group -- sorry, the control group,
17 the non-covered HIPs, do not respond to competitive
18 efforts by the covered HIPs in response to removal of
19 the wide MFNs, and that is how it proceeds, and what she
20 has done with her five tests is she has essentially done
21 the same difference-in-differences analysis, so it rests
22 on the same premise of the control group not being
23 affected, but she has tried to look at it in different
24 ways and she has said, well, this will somehow overcome
25 the downward bias problem, and we say it just does not,

1 and in summary the reason that we say it does not, so
2 what test 1 does, test 1, if you remember, is the leads
3 test, and what she is doing is zooming in on the results
4 of -- sorry, the lags test, rather. She is zooming in
5 on the results of her analysis, but it is the same
6 analysis, and she is looking at it month by month, and
7 she is saying -- her test 1 assumes that non-covered
8 HIPs would not respond in the same month, and we say,
9 well, that is not a plausible assumption.

10 So none of these tests are directed actually to the
11 problem. They all suffer from the deficiency that the
12 actual methodology, the difference-in-differences
13 methodology is premised on there being no effect, no
14 spillover effect.

15 Then test 2 assumes that non-covered HIPs would
16 respond in a three-month period and then completely
17 reverse its change, and so if you have a non-covered HIP
18 that responds by way, for example, of reducing its base
19 retail price in response to price competition, then in
20 order for spillovers to be revealed by her test they
21 would actually have to bump their price back up again at
22 the end of the three-month period and we say that is not
23 plausible.

24 Then test 3 simply re-performs the
25 difference-in-differences with two HIPs, but we say,

1 well, that again suffers from the same problem. So it
2 is exactly the same difference-in-differences test, but
3 in fact by having fewer data points what you are doing
4 is you are reducing the precision because you have fewer
5 data points.

6 Then test 4 involves the assumption that some
7 non-covered HIPs would respond to competition but others
8 would not, and we say that that is not a plausible
9 assumption.

10 Test 5 involves another assumption which we say is
11 completely implausible and contrary to the CMA's theory
12 of harm, and that is the assumption that commissions
13 paid by both covered and non-covered HIPs to CTM's
14 rivals would be unchanged, and we say, well, that is
15 exactly contrary to the CMA's theory of harm which is
16 that MoneySupermarket and so on were stopped from doing
17 promotional deals and so on with the HIPs, and so we say
18 that that just does not work.

19 What you end up with is a position where, despite
20 these five tests you have this fundamental problem of
21 spillovers which, as Professor Baker noted, and as
22 Professor Ulph has described, shifts the whole
23 confidence interval to the left and makes it more likely
24 that you are not going to get a statistically
25 significant result, which of course matters because if

1 you have a statistically significant positive result,
2 like in DCT, then those are results that the Tribunal
3 might well say, well, that is a helpful thing for the
4 CMA's case, that supports the qualitative evidence, but
5 we are not in that world, and spillovers is a very big
6 part of that story.

7 Sir, members of the Tribunal, the next point is
8 common trends, and I can deal with this quite quickly.
9 We have dealt with it in our written closings.

10 Again, it is not a new point, and I just give you
11 the reference without turning it up, but it was referred
12 to in the Decision at R.46 which is {A/1/760}. We do
13 not need to go to it.

14 Again, it is common ground that the common trends
15 assumption has to hold if the regression analyses are to
16 be meaningful. We all agree that that is the case.

17 You will recall that yesterday Mr Beard chose to
18 make his submissions on common trends by reference to
19 the study that he is keen on carried out by the Nobel
20 prize winner David Card, and his
21 difference-in-differences analysis of the effect of
22 a minimum wage increase on employment at fast-food
23 restaurants in New Jersey. That is how he -- that is
24 the prism through which he looked at common trends, and
25 he notes, or rather BGL notes at paragraph 307 of their

1 written closing submissions {B/64/102} that the study
2 used fast-food restaurants in Pennsylvania, where
3 minimum wage had not increased, as the control group for
4 the purposes of estimating the impact of the minimum
5 wage increase at the New Jersey restaurants.

6 Of course, just pausing, we say that you can see why
7 spillovers were not an issue -- why spillovers were not
8 an issue in that study because if you look at a map you
9 can see that there are geographical features that mean,
10 apart from anything else, that mean that employees would
11 be unlikely to flock from one side of this big river to
12 the other, but anyway, I am looking at this for the
13 purposes of common trends at the moment.

14 If we go in fact to BGL's closing submissions at
15 paragraph 341, so I think that is going to be
16 {B/64/116}. I think Mr Beard's document suffers from
17 the same defect as mine.

18 MR BEARD: Unfortunately, it does. Indeed I think mine
19 might be worse, because it varies between two pages
20 difference and three, I am sorry.

21 MS DEMETRIOU: That is the right page, thank you.

22 So we see at 341:

23 "As explained by Ms Ralston, empirical tests are not
24 determinative of the common trends assumption. Indeed
25 the minimum wage study mentioned above does not conduct

1 an empirical test for the suitability of the control
2 group. Their choice of Pennsylvania as a control group
3 is on the basis that 'seasonal patterns of employment
4 are similar in New Jersey and eastern Pennsylvania' and
5 that the New Jersey economy is 'closely linked to nearby
6 states'."

7 Then what he said in closing submissions, if we just
8 get this up, so at transcript Day 11, and we see at 14
9 through to 24, {Day11/153:14 - 24}, we see around
10 line 20, {Day11/153:20}, he says:

11 "... it is interesting that there was no concern
12 about issues of common trends [in that case] even though
13 that might have been expected to be a significant
14 issue ..."

15 Well, we had a look at that, and in fact precisely
16 such issues have been raised about that study, and we
17 see this from a leading econometrics textbook by
18 Joshua Angrist who, coincidentally, was the joint winner
19 of the Nobel prize for economics alongside David Card,
20 and if we look at {F/632/187}, we can see towards the
21 bottom of the page that this -- so the key -- so it
22 summarises the results and notes that these are the
23 opposite of what economic theory might predict. We see
24 that just above the start of the paragraph beginning,
25 "How convincing ..."

1 Then what is said in that next paragraph, it says
2 that:

3 "The key identifying assumption here is that
4 employment trends would be the same in both states in
5 the absence of treatment."

6 So there is an assumption that the common trends
7 assumption holds.

8 Then if we look in the same document at the next
9 page {F/632/188}, this says that the common trends
10 assumption can be investigated by using data on multiple
11 periods, and it refers to an updated study by the same
12 authors in 2000, and then we see:

13 "Like the original Card and Krueger survey, the
14 administrative data show a slight decline in
15 employment ... in Pennsylvania, and little change ...
16 over the same period. However, the data also reveal
17 fairly substantial year-to-year employment variation in
18 other periods. These swings often seem to differ
19 substantially in the two states. In particular, while
20 employment levels in New Jersey and Pennsylvania were
21 similar at the end of 1991, employment in Pennsylvania
22 fell relative to employment in New Jersey over the next
23 three years ... So Pennsylvania may not provide a very
24 good measure of counterfactual employment rates in New
25 Jersey in the absence of a policy change, and vice

1 versa."

2 So what is being said here is that there are
3 differing employment trends in the two states. In other
4 words, there is a concern about whether the common
5 trends assumption holds, which means that the authors
6 are saying that Pennsylvania may not in fact for that
7 reason provide a very good measure of counterfactual
8 employment rates in New Jersey.

9 So we say that far from showing that the common
10 trends assumption somehow is unimportant or does not
11 matter, the Card study shows why it is so important and
12 why you need to test for whether it holds, rather than
13 just assuming that it holds.

14 If it does not hold, then you can get results that
15 do not actually reflect the true effect of the treatment
16 that you are investigating at all.

17 Now, of course, in the present case, Ms Ralston does
18 test for the common trends assumption, and she carries
19 out a leads test to see whether it holds, and those
20 tests which Professor Baker has also performed -- oh, we
21 have lost Professor Ulph.

22 THE PRESIDENT: You are quite right. Let us see if we can
23 summon him back. (Pause)

24 We will rise until we have sorted it out and we will
25 get someone in. Thank you.

1 (3.44 pm)

2 (A short break)

3 (3.47 pm)

4 MS DEMETRIOU: Sir, I was just finishing off on common
5 trends. We say that Ms Ralston and then Professor Baker
6 carried out -- well, Ms Ralston carried out leads tests
7 and we have seen Professor Baker, what he says about
8 those, and there is no dispute as to what the data
9 shows, so there are myriads of specific instances where
10 the covered and the non-covered HIPs' prices are
11 different, priced differently in statistically
12 significant ways in earlier periods, even on
13 Ms Ralston's symmetric approach.

14 Really, the response to that is not, well, that is
15 not what the data shows. The response is, well, they
16 fall back on saying, well, there are good reasons to
17 think the two groups would react in a similar way, and
18 we say that that is not really good enough because the
19 results of Ms Ralston's own leads do suggest otherwise,
20 and it is also inconsistent with the general approach
21 that BGL are taking in this case which is to say, well,
22 you need to test for everything. Well, here, this has
23 been tested for. The results are not inconvenient, so
24 they fall back on, well, there is no other evidence to
25 support it.

1 Anyway, it is another reason why, as the CMA found
2 in the Decision, the econometrics in this case are not
3 robust.

4 I just want to finish on econometrics by returning
5 to a question that Professor Ulph put to me at the
6 beginning where I was making the point, which is common
7 ground, that Ms Ralston's analyses do not prove that
8 there is zero effect, and Professor Ulph asked me, well,
9 how would you go about proving a negative, and I think
10 the point that was being put to me was, well,
11 can I point to some test that they could have done that
12 would support a case of zero effect if we are saying
13 this does not, and I just want to give a slightly more
14 nuanced answer to the one I gave.

15 So we do rely -- I did not take you to, but we have
16 taken you to, in our written closings, the Leamer
17 article and we would ask the Tribunal to have a look at
18 that. We have pointed you to the bits which we say are
19 informative, but in answer to Professor Ulph's question,
20 I think that if this were a case where the analyses
21 showed zero, very close to the point estimate, and
22 a very tight confidence interval, then things would be
23 different in terms of weight, but we are not in that
24 world.

25 The confidence interval is not tight at all. It is

1 very wide, and when we look at, for example, promotions
2 and we start looking along the confidence interval, then
3 there are percentages like 20%, 30% increase in
4 promotions. So these confidence intervals are broad,
5 and that is why we say that in this case -- that is one
6 of the reasons why we say in this case, we are not
7 saying in every case that results like this, testing
8 a null hypothesis cannot be informative, but we are
9 saying in this case they are not informative because of
10 the wide confidence interval. I just wanted to return
11 to that point.

12 That is what I was going to say about econometrics.
13 I can now deal with market definition. I have reversed
14 the order. Is it convenient for me to go to market
15 definition now?

16 THE PRESIDENT: Of course, thank you.

17 MS DEMETRIOU: I am going to start with the conceptual
18 points about market definition, and the first conceptual
19 point is one or two SSNIPs, if I can put it that way,
20 and the scope of debate on this issue is relatively
21 narrow in our submission.

22 BGL is not saying that the CMA has failed to examine
23 constraints on the consumer side of the platform. Of
24 course the CMA has done that. Indeed, that analysis
25 occupies most of the chapter of the Decision on market

1 definition. That is precisely what the CMA is doing
2 there. It has applied its SSNIP to commissions and it
3 is looking at assessing constraints on the consumer side
4 of the platform: would consumers divert to direct
5 channels in response to that SSNIP, but BGL says that
6 that SSNIP in relation to the hypothetical monopolist
7 PCWs' charge to HIPs, they say that that is not the only
8 SSNIP that the CMA should have performed. It should
9 also have tested a SSNIP in respect of the hypothetical
10 monopolist's charge to consumers.

11 Now, of course, PCWs do not charge to consumers, and
12 so BGL says, well, in that case the CMA should either
13 have tested a degradation, an SSNDQ, in relation, for
14 example, to marketing expenditure, or should have tested
15 what would happen if PCWs start imposing charges to
16 consumers, and the CMA's answer to this in one
17 sentence -- and I am going to then unpick it, but it is
18 a one-sentence answer -- is that the additional SSNIP
19 was not necessary in this case because it was not
20 relevant to understanding the relevant competitive
21 constraints in this case, so the relevant competitive
22 constraints.

23 I want to take this in stages.

24 The first stage is that it is common ground that
25 market definition is not an abstract exercise, but is

1 conducted for a purpose. So one has to start by asking,
2 well, what is the purpose that we are conducting market
3 definition for? The purpose of market definition is to
4 identify the competitive constraints relating to the
5 competition concern being examined, and Dr Niels says
6 this, and we have set his evidence out, we have referred
7 to his evidence, in our closing submissions, if we could
8 pick it up at page {B/65/99}, paragraph 200 --

9 THE PRESIDENT: Well, yes, I think that is common ground,
10 but it may be that the difficult question is what
11 everyone means by identifying the competitive
12 constraints because my understanding -- and I will
13 articulate it now so that you can tell me I am wrong --
14 my understanding is that the point or one of the points
15 of market definition is that you work out what happens
16 if -- well, no. You work out what alternatives let us
17 say a consumer in this case has to the product in
18 question.

19 MS DEMETRIOU: Yes.

20 THE PRESIDENT: You are trying to ask yourself whether there
21 are or are not alternatives.

22 MS DEMETRIOU: Yes.

23 THE PRESIDENT: One way of doing it -- and it is just one
24 way of doing it -- is to hypothesise the increase in
25 price in the relevant product and to see what happens to

1 the demand when that happens.

2 MS DEMETRIOU: Yes.

3 THE PRESIDENT: If the demand is having to stay put, if it
4 is inelastic, then you have very few competitive
5 constraints. If, on the other hand, you increase
6 a price and everyone flocks somewhere else then you have
7 got a real competitive constraint, and that is all it
8 does. There is no particular magic in it.

9 MS DEMETRIOU: Yes.

10 THE PRESIDENT: So if that is what you mean by competitive
11 constraint then we are ad idem, but all one is doing,
12 I think, is identifying the terrain in which the theory
13 of harm is to be assessed, and I think that is where
14 I think there is a disagreement because in a way that
15 I confess I am not quite clear yet there is in the CMA's
16 case, I think, a nexus or a link between the market
17 definition exercise and the theory of harm, and in
18 a sense obviously there is a link because there is
19 a process, but what I think you are saying is that the
20 harm that is being looked for in some way affects the
21 exercise of market definition, and I think that is where
22 we would be assisted by your submissions.

23 MS DEMETRIOU: Yes, I am going to take that in stages, but
24 I agree with you entirely that that is the area of
25 debate that the Tribunal has to grapple with, and I also

1 agree that when one is looking at constraints from
2 consumers one is precisely doing, sir, what you have
3 said, which is looking at what they would do if some
4 relevant price, either a relevant price went up or some
5 service was degraded to them.

6 So one is looking at would they divert away to
7 competitor -- are there outside constraints that can
8 prevent that market power being exercised. That is the
9 nature of the exercise, and the area of debate -- I am
10 going to take it in stages, but just to identify the
11 area of debate. Of course, those constraints might
12 materialise in different ways or will inevitably
13 materialise in different ways depending on what it is
14 that you are testing that consumers are responding to,
15 if I can put it that way, the type of market power that
16 you are positing.

17 So, for example, let me take Paroxetine as an
18 example because my learned friend did not demur with how
19 the Tribunal had dealt with market definition in
20 Paroxetine. It is helpful, I think, because there the
21 debate was -- so the appellant, GSK in that case, was
22 arguing for a wider market definition and it said that
23 its drug, Seroxat, was part of a wider market with other
24 SSRI anti-depressants, and they produced evidence
25 showing that those other SSRIs, so Prozac and so on, are

1 interchangeably from the perspective of doctors
2 prescribing and that, indeed, the drugs companies
3 themselves competed vigorously in marketing with each
4 other, so there was lots of evidence of the type
5 Mr Beard refers to and Ms Glasgow referred to of
6 competition between those different drugs manufacturers,
7 but the market, the CMA define the market more narrowly
8 as being a market for the generic version of GSK's drug
9 Seroxat, which is Paroxetine.

10 The Tribunal upheld that market definition agreeing
11 with the CMA's expert, and the reason that it upheld it
12 was precisely because it was saying, well, we are not
13 interested in the landscape generally. So, for example,
14 it may well be that if GSK had spent less on advertising
15 its product with doctors, there would have been
16 constraints preventing that happening because other
17 people, other drug manufacturers, are competing
18 vigorously, and that would have been a constraint, but
19 that was not relevant to the case which was all about
20 staying off generic entry.

21 So the point was, in that case the Tribunal adopted
22 a definition of the market, upheld a definition of the
23 market, which had regard to the competition concern at
24 issue rather than generally trying to discern what
25 constraints there might be in the landscape.

1 So, sir, if I can take our argument in stages --

2 THE PRESIDENT: Just pausing there, though, in one sense --

3 but I do not think it is a very helpful sense,

4 I entirely accept that the market you look at needs to

5 be informed by the harm that you are investigating.

6 MS DEMETRIOU: Yes.

7 THE PRESIDENT: I said in an unhelpful sense, let me give

8 you an example. Suppose you are concerned about

9 a competition abuse in the market for baked beans. It

10 would be pretty stupid to start investigating the market

11 for cough mixture in order to work out what the nature

12 of the abuse was in baked beans, so there is a certain

13 common sense as to where you look.

14 MS DEMETRIOU: Of course.

15 THE PRESIDENT: But it becomes much harder if you are, let

16 us say, looking at an abuse in the aspirin market and

17 you might have a very hard question working out whether

18 aspirin is the only product and it is the rival aspirin

19 products that are only relevant or whether you need to

20 look at paracetamol. That is something which you can

21 only answer by considering, in some rational way, what

22 the consumer alternatives are. If I put the price of

23 aspirin up, will people flock to paracetamol or not?

24 That is a question which is much harder, and that is the

25 true market definition question. You are not talking

1 about baked beans and cough mixture. You are talking
2 about things which are difficult to differentiate.

3 Now, the question is, when you are in the
4 paracetamol/aspirin debate where it is not clear, why
5 does it matter when you are trying to define the market
6 what harm it is that you are investigating?

7 MS DEMETRIOU: Because, sir, what you are doing is trying
8 to -- you are looking at a competition concern and so
9 here -- and I know -- I am going to move away from
10 talking about theory of harm because Mr Beard did not
11 like that expression and he tried to say that it is
12 putting the cart before the horse and so on. So I am
13 going to use his language and explain the point, and his
14 language is that you look at the agreement and the
15 conduct, and the agreement here is the wide MFN.

16 Now, what does that agreement do? The wide MFN
17 stops HIPs from pricing more cheaply on CTM's rivals,
18 stops them setting lower retail prices on CTM's rivals.
19 That is what the wide MFN does. So what it is doing is
20 constraining retail prices. That is the thing that we
21 are looking at. That is the conduct, as it were, or the
22 agreement we are looking at.

23 Now, what the CMA wanted to investigate is whether
24 this allows the PCW -- so CTM -- to exercise market
25 power. That is the issue that it is investigating. So

1 when it conducts the hypothetical monopolist test, it is
2 looking at whether the hypothetical monopolist PCW can
3 exercise market power. So one asks, market power in
4 relation to what? Well, market power connected of
5 course to the wide MFN, and what the wide MFN is all
6 about is retail prices, constraining retail prices on
7 PCW websites.

8 Now, we know that the PCWs do not set retail prices,
9 so how could they exercise market power in relation to
10 retail prices? Well, the primary way they do that is
11 through commissions. So the SSNIP was applied to
12 commissions which is the price they can control.

13 So it was tied very closely to the agreement under
14 scrutiny.

15 Now, conversely -- and so what the CMA did is
16 precisely, sir, what you are saying in your paracetamol
17 and aspirin example. There is a lot of analysis, very
18 careful analysis, in the relevant chapter of the
19 Decision about precisely the question of whether
20 consumers in response to the hypothetical monopolist PCW
21 doing what it can control vis-a-vis retail prices, which
22 is changing the commission, so sustaining a SSNIP in
23 commission fees, that feeds through to retail prices,
24 and precisely what the CMA has analysed is whether
25 consumers, how they would react to that, so how price

1 sensitive they are, what their other options are, they
2 looked at survey evidence and so on, and looked at the
3 direct channels of the HIPs.

4 So that is exactly what the CMA did. No dispute
5 about that. It is common ground that is what the CMA
6 did. I appreciate there are other down the line gripes
7 about how the CMA did it, but no dispute that that is
8 what the CMA did.

9 Now, what is being said is that the CMA also should
10 have tested whether or not, for example, a SSNIP
11 vis-a-vis consumers, let us say a degradation of --
12 a diminution in spending on advertising vis-a-vis
13 consumers would have resulted in consumers fleeing and
14 going elsewhere to the direct channels. But, sir, that
15 is not informative of the competition concerns resulting
16 from the wide MFNs because -- let us imagine for
17 a moment that that exercise had been done and that the
18 CMA had found that in fact there were constraints
19 preventing that. So let us say a SSNIP had been
20 conducted, as BGL say it should have been, and so what
21 is posited is a 5 to 10% reduction in advertising spend,
22 and in fact let us say the result of that is that you
23 have consumers fleeing in droves to the direct channels.
24 THE PRESIDENT: Right, okay, well, let us hypothesise that.
25 It does not matter how you test for it, but that is

1 the --

2 MS DEMETRIOU: If that is correct, so let us say that that
3 is what had been found, that is not capable of reversing
4 or negating or neutralising the fact that in relation to
5 the commission fee SSNIP, that exercise of market power
6 has not been constrained, because it is testing
7 something different, and it is testing something which
8 is not a competition concern in this case.

9 So to put it another way, the CMA is investigating
10 the competition concern, to use Dr Niels' words, I want
11 to come back to Dr Niels in a minute, his evidence, the
12 competition concern that the CMA is investigating is
13 a reduction of competition on retail prices and on
14 commission fees, so let us put it broadly, resulting
15 from the wide MFNs.

16 THE PRESIDENT: At the end of the day, the harm, and the
17 mechanism by which it is transmitted may be something we
18 have to consider more closely, but the harm that you are
19 postulating is that consumers get a worse deal. That at
20 the end of the day is what you are postulating, is it
21 not?

22 MS DEMETRIOU: Sir, I do not want to interrupt you, but the
23 critical bit is how do they get a worse deal? They get
24 it through the wide MFN via the PCW. That is the harm
25 that is being considered.

1 PROF ULPH: Ms Demetriou, can I just say that you are saying
2 that in this particular case the only way in which
3 competition constraints on consumers can arise is via
4 the impact of commissions changing retail prices. Is
5 that the essence of your case?

6 MS DEMETRIOU: That is the essence of my case because what
7 is being tested is the effect of the wide MFNs -- it is
8 whether -- what is being tested is whether a PCW, the
9 hypothetical monopolist PCW, can exercise market power
10 via the wide MFN, that is the competition concern, to
11 result in a worse deal for consumers in terms of prices,
12 and we know that the PCW does not set the retail price
13 and so how do the wide MFNs -- what is the mechanism
14 through which the wide MFNs would enable the
15 hypothetical monopolist PCW to exercise market power in
16 that way? Well, it is through commission fees.

17 So to put it another way, the competition concern is
18 nothing to do with spending less on advertising, that is
19 not what the CMA has investigated.

20 There could well be a separate exercise of market
21 power that a hypothetical monopolist PCW could sustain.
22 There might be another competition case or maybe the CMA
23 could also have investigated whether the hypothetical
24 monopolist PCW could diminish its offering to consumers.
25 That was the kind of issue that was at stake in Google

1 Android where the competition concern was -- it was
2 a market foreclosure case, and the competition concern
3 there was that there would be an adverse effect on
4 consumers because of reduced innovation and so on.

5 So had the CMA been concerned about that kind of
6 competition issue, then it would have been informative
7 to have tested an SSNDQ to test for constraints, but
8 that was not the competition concern being investigated
9 in this case.

10 So to put it another way, the SSNDQ could only have
11 revealed some other exercise, additional exercise, of
12 market power. It could not have actually revealed that
13 there were constraints relevant to the exercise of
14 market power that is the competition concern arising
15 from the wide MFNs.

16 THE PRESIDENT: Do you mind if I try and unpack that
17 a little bit, Ms Demetriou?

18 MS DEMETRIOU: Of course.

19 THE PRESIDENT: There are, I think, two tenets to your
20 position: first of all, that there is harm to consumers,
21 and by "consumers", to be clear, we are meaning the
22 purchasers of home insurance policies, but critically
23 the second pillar is harm to consumers through the wide
24 MFNs.

25 MS DEMETRIOU: Yes, I would say that there is an effect --

1 rather than putting it in terms of harm to consumers,
2 there is an effect on -- the wide MFNs impact upon
3 retail prices to consumers.

4 THE PRESIDENT: Yes, and let us be clear, I have fully on
5 board your point that there may not necessarily be an
6 effect on prices because you are talking about the
7 structure of competition being harmed.

8 MS DEMETRIOU: Yes.

9 THE PRESIDENT: If I talk about harm to consumers and effect
10 on prices, you can take it as read that I have your
11 point there.

12 MS DEMETRIOU: Yes.

13 THE PRESIDENT: But let us try and keep it as simple as
14 possible. I am going to say harm to consumers, because
15 it is a nice easy thing to say, but we know what we are
16 talking about, but through wide MFNs and because of the
17 harm through wide MFNs you only look on one side, you
18 apply the SSNIP to the HIP side and you then look to see
19 how that harm is transmitted into the market.

20 MS DEMETRIOU: I do not like the words, if I may say so,
21 "only apply the SSNIP on one side", because what you are
22 doing is you are applying the SSNIP to the price
23 controlled by the hypothetical monopolist, but you are
24 testing the constraints on the consumer side as well, so
25 you are looking very much, you are testing --

1 THE PRESIDENT: That is where I think it may be my concern
2 lies. So do excuse me for interrupting your
3 interruption to me, but let me set out my store and you
4 can go to town on why it is wrong.

5 MS DEMETRIOU: Thank you.

6 THE PRESIDENT: So looking at the harm to consumers, we are
7 talking about two things. Now, it may be they are just
8 potentialities, but the two things are fewer promotional
9 deals, because you are constrained through the wide MFNs
10 from offering promotional deals on one PCW because if
11 you have wide MFNs you have to also offer it to
12 ComparetheMarket at the very least.

13 Secondly, you have the lower premiums or
14 potentiality for lower premiums, and that works by
15 greater negotiation on commissions which results in not
16 the 5 to 10% SSNIP that you are hypothesising on the HIP
17 side but it results in the 1.8 to 3.4% higher level in
18 the quoted premiums, I think that is roughly the figure.

19 So those are the two broad harms to consumers that
20 we are thinking about. Would that be fair?

21 MS DEMETRIOU: Yes. I mean, I do not think it is necessary
22 at this stage to distinguish them, because one is at the
23 sort of outset of investigations. You are doing market
24 definition at the beginning, and before you have even
25 started investigating promotional deals and so on what

1 one is looking at is essentially, what does the wide MFN
2 do? Well, it has an impact on retail prices charged to
3 consumers, because what it is saying is that the HIP
4 cannot charge lower prices on other price comparison
5 websites.

6 So at this stage you are not even having to split up
7 the different harms to consumers. You are just looking
8 at retail prices to consumers, because that is what the
9 wide MFN does.

10 THE PRESIDENT: I think it is perhaps helpful to just focus
11 on what you have found.

12 MS DEMETRIOU: Okay.

13 THE PRESIDENT: Because my point is, do you not need to know
14 how the consumers, the purchasers of HIPs, are going to
15 react to a less attractive offering on price comparison
16 websites? In other words, why is it not relevant to ask
17 if there is a higher price offered to purchasers of home
18 insurance through price comparison websites, where will
19 they go? Because is that not in itself a constraint on
20 how both PCWs and HIPs will operate on their side of the
21 market? If they see -- and we do not know what the
22 position is because the analysis has not really been
23 traversed, but if they see that a better deal can be
24 obtained through the direct channels, will they not go
25 there, and, if they do -- and who knows, but let us

1 assume they go in droves elsewhere -- is that not in
2 itself a constraint that you ought to be able to factor
3 in when considering the very harm you are considering?

4 MS DEMETRIOU: Sir, yes, but that is what the CMA has done.

5 That is precisely what it has done.

6 THE PRESIDENT: Right.

7 MS DEMETRIOU: You put to me: do you not need to see what
8 would happen if a higher price is offered to consumers
9 on the price comparison website, where would they go?
10 Yes, absolutely you need to see that, and that is what
11 the CMA's analysis does.

12 So what the CMA's analysis does is it looks at the
13 higher price to consumers resulting from the exercise of
14 market power by the price comparison website, so it
15 performs the SSNIP on commissions. It says, well, that
16 is going to be passed through to consumers, and it
17 precisely analyses -- it goes on for pages and pages,
18 this is the bulk of the analysis in chapter 5, it
19 precisely analyses whether consumers would divert to
20 other channels. That is what the analysis largely is in
21 the market definition section.

22 So that is what the CMA has done, precisely what you
23 have just put to me, sir.

24 The reason why it has done it through a SSNIP on
25 commissions is because that is the price that the price

1 comparison website controls. So when you asked me the
2 question: the harm that you are looking at is a higher
3 retail price and you are looking at what price
4 comparison websites could do to manipulate that higher
5 retail price as a result of the wide MFNs, which is the
6 correct question, what they can do is they can raise
7 commission fees, and that will have an effect on retail
8 prices.

9 Now, what you do not have to test is what they would
10 do, what consumers would do if price comparison websites
11 suddenly decided to spend 10% less on advertising,
12 because that is just not relevant to the wide MFN that
13 you are looking at.

14 PROF ULPH: Ms Demetriou, may I make another point. So then
15 an issue would arise which is that a lot depends on your
16 theory of how wide MFNs are exercising their effect on
17 the market. So you are essentially building in a lot of
18 assumptions about how the wide MFN exercises the effect
19 in order to determine how the test of market definition
20 is conducted. So you are not just starting, it is wide
21 MFNs we are concerned about, you are saying it is wide
22 MFNs and the fact that in our story about how they
23 exercise harm, or how they exercise their effects, they
24 exercise their effects through these channels, and that
25 is constraining the way in which you do your test of

1 (inaudible) market definition. So how would you respond
2 to that? It still raises the concern that the theory of
3 harm arises is somehow coming in before you do the
4 market definition test rather than afterwards.

5 MS DEMETRIOU: Well, Professor, to that I would say that it
6 is not, because what we are doing is we are just -- what
7 the CMA has done is just looked at the clauses. So it
8 has looked at the clauses. Perhaps we can go to the
9 Decision. If we go to {A/1/81}, the CMA here does not
10 talk about theory of harm. What it does at 5.22, it
11 says the investigation -- it looks -- as Mr Beard would
12 like, it looks at the agreement. It says:

13 "As the agreements under investigation are wide
14 MFNs -- which place contractual restrictions on the
15 retail prices quoted by home insurance providers on
16 PCWs ..."

17 So the retail prices are really the starting point
18 when identifying competitive constraints, and then it
19 goes on to say, well, PCWs do not set retail prices, and
20 they are not likely to start charging customers
21 directly, so we are not actually concerned that these
22 wide MFNs are going to result in PCWs, the hypothetical
23 monopolist charging a consumer directly.

24 So what do they do? Well, they can affect retail
25 prices through commissions, because that is the price

1 that they control. So, Professor, we would respectfully
2 say that it does not -- we are not making lots of
3 assumptions about effects or what the outcome is, but
4 what the CMA has done, and what it has to do, in our
5 respectful submission, is identify at the outset what is
6 the competition concern that we are worried about.

7 So to that extent, Professor, you are right, it has
8 to identify what the competition concern is that it is
9 investigating, and the competition concern is nothing to
10 do with a degradation of marketing expenditure, and so
11 there may be constraints that prevent that, there may
12 well be, but that does not actually shed light on how
13 retail prices may rise as a result of the wide MFNs and
14 an exercise of market power through the PCWs.

15 So that is really the nub of it, and that is why
16 I drew the analogy with the Paroxetine case because in
17 that case, as I say, there was lots of evidence that had
18 GSK reduced its marketing expenditure it would have been
19 constrained by competitor SSRI drugs, but that was not
20 relevant because it was not relevant to the competition
21 concern at issue.

22 To that extent then I agree that one has to be
23 thinking a little bit about what the competition concern
24 is that you are looking at because, returning to your
25 question, sir, there could be different constraints for

1 different exercises of market power, so the answer is
2 not necessarily the same.

3 So just as here, the CMA found that if the
4 hypothetical monopolist PCW exercises market power by
5 raising commission fees, that would not be subject to
6 competitive constraints from the direct channel, so that
7 is what they found. They looked at all of that.

8 That answer may be different in relation to
9 different competition concerns, and actually whether it
10 is different in relation to different competition
11 concerns is not terribly informative for this case.
12 That is really what is meant by not defining the market
13 in the abstract and that is why the Tribunal in
14 Paroxetine rejected the idea that you look at this wider
15 market because you could identify constraints in
16 relation to particular types of exercise of market
17 power.

18 THE PRESIDENT: I think the concern I have is that you are
19 not properly testing the consequences to the HIPs of
20 a change in price in the insured purchasing market
21 because you are -- and it may be for perfectly good
22 reasons, you are watering down the SSNIP on the insured
23 side of the market, first of all by postulating a lower
24 increase than is normal, and secondly by hypothesising
25 the existence of narrow most-favoured-nation clauses as

1 a means of ensuring that there is in fact no difference
2 between the prices quoted on comparison websites and the
3 prices quoted on direct channels.

4 I am not saying that you are wrong. These may be
5 perfectly sensible approaches to analysing the market.
6 What I am saying, I think, is that it is important to
7 understand the context in which consumers will move from
8 one product, the price comparison service, to the other,
9 the direct purchase, because if you do not work out what
10 makes them move you run the risk of asking the wrong
11 question.

12 So we are talking today on the basis that narrow
13 most-favoured-nation clauses are not a problem at all,
14 and maybe that is right. The problem is you are
15 inserting them into your SSNIP on the insured side of
16 the market and using that as a means of saying there is
17 an inelasticity in the demand for price comparison
18 services because there is no incentive to shift because
19 the prices on the direct channels stay the same.

20 That, as I say, may be right, but what you are doing
21 is you are cutting away a portion of relevant questions,
22 or at least what seem to me to be relevant questions,
23 which ought to be asked because you might get
24 a different view of the market, and it may be that this
25 case is actually not about wide most-favoured-nation

1 clauses but about narrow most-favoured-nation clauses
2 because they are sitting there unquestioned.

3 They may be absolutely fine, but if you say the
4 villain of the piece is the wide most-favoured-nation
5 clause and therefore we are going to postulate
6 acceptable narrow most-favoured-nation clauses, you are
7 allowing the harm that you are testing to drive the
8 market that you are defining, and that seems to me, to
9 be blunt, to put the cart before the horse.

10 I am not saying you are wrong, but what I am saying
11 is there are a series of questions that have not been
12 asked.

13 MS DEMETRIOU: Sir, you have made two points, as it were,
14 together, and I understand that they are related points,
15 but can I try and deal with them separately.

16 THE PRESIDENT: Of course.

17 MS DEMETRIOU: The second point you made was about narrow
18 MFNs, I am going to come to that. The first point you
19 made is you are concerned that the SSNIP may be
20 a watered-down version because it is passing on to the
21 retail prices the commission fee increase, so you end up
22 with a 3 to 4% increase in retail prices rather than the
23 5 to 10% increase. I think that is your first concern.

24 In relation to that, sir, we say that it is not
25 a problem because one has to ask this. We are concerned

1 here with exercise of market power, we are testing
2 whether the hypothetical monopolist can exercise market
3 power. That is the purpose of this exercise.

4 The hypothetical monopolist cannot exercise market
5 power by raising retail prices because it does not set
6 them, it cannot do that directly. So the hypothetical
7 monopolist, it is the HIPs that set retail prices, so
8 the wide MFNs, which is what is being investigated, they
9 do not enable the hypothetical monopolist PCW directly
10 to raise retail prices, that is just truism and common
11 ground.

12 What they do do in terms of the market power of the
13 hypothetical monopolist is they allow the hypothetical
14 monopolist to raise commission fees. That is what they
15 permit.

16 So when one is looking at exercise of market power
17 by the hypothetical monopolist that is enabled by the
18 wide MFN, that is really what you have to examine, and
19 so the CMA has examined what would happen if the
20 hypothetical monopolist sought to raise retail prices by
21 5 to 10%, and the CMA has looked, first of all, on the
22 HIP side at whether HIPs -- whether there would be
23 diversion on that side, and then they have looked at
24 consumers if you assume that all of that has been passed
25 through to consumers in the form of retail prices.

1 But what you do not have to do, because it is not an
2 issue in this case, because the price comparison
3 websites cannot set retail prices, the wide MFN does not
4 enable a direct exercise of market power in that way, so
5 the only way that that can happen as far as the
6 hypothetical monopolist PCW is concerned, is through the
7 commission fees.

8 Then the CMA really did look very closely at the
9 diversion questions that you are looking at on the
10 consumer end, and so that is why we say it is not
11 a watering down, and can I just take you, because I was
12 going to take it in stages, and a lot of it has been
13 overtaken by events.

14 THE PRESIDENT: We have been interruptive, I am sorry.

15 MS DEMETRIOU: It might just be helpful to look at -- sorry,
16 I misspoke, so Mr Lask has told me that I misspoke and
17 said we looked at whether the hypothetical monopolist
18 could raise retail prices by 5 to 10%; of course I meant
19 commissions. I just say that for the transcript.

20 THE PRESIDENT: Yes.

21 MS DEMETRIOU: Could we just turn up our written closings
22 please at paragraph 201, so I think it is {B/65/99}.

23 What we see is that there is, sir, quite a lot of
24 common ground in terms of approach on this point because
25 Dr Niels does not say -- he does not say it is always

1 necessary to carry out a direct SSNIP on both sides, he
2 does not say that. In fact he says the opposite. He
3 says whether or not it is necessary depends on the
4 competition concern. That is what he says in his first
5 report.

6 When I put to him the question of how the SSNDQ
7 might be thought to shed light on the competition
8 concern in this case he did not have a good answer. He
9 really did not. He said, there is no direct link. Can
10 we see this if we go to page {B/65/101}, paragraph 206.
11 I said to him.

12 "Question: ... do you agree that the second SSNIP
13 is not going to tell us whether the theory of harm [I am
14 going to delete now mentally the words "theory of harm"
15 and put "competition concern"], whether the [competition
16 concern] which comprises the increase in commission fees
17 can take place?

18 "Answer: It is a good question. I am just thinking
19 aloud. I do agree, that it is absolutely right, that
20 competition on advertising and marketing would not
21 constrain an increase in commission, on the basis of the
22 premise."

23 So what he is saying is that if you tested consumer
24 diversion in the event of a degradation on marketing
25 spend, any constraints you identify there would not

1 constrain this separate exercise of market power which
2 is the commission fee one, and he says again, I asked
3 him the question again and he said:

4 "Answer: Yes, I would say not directly."

5 He goes on to say:

6 "There could be indirect links ..."

7 But he never said what they were, and really we say
8 it is really completely speculative to say that there is
9 some abstract indirect link which has not been
10 articulated by anyone in these proceedings which might
11 mean that it is necessary to carry out an SSNDQ on the
12 consumer side.

13 So nobody has articulated what this link is which
14 might show us how constraints which might prevent
15 a degradation of marketing expenditure could constrain
16 the commission fee increase that really is what the wide
17 MFNs enable the hypothetical monopolist to do.

18 Sir, that is what we say in relation to the first of
19 your points. I am going to go on to talk about narrow
20 MFNs. It may be that we leave that particular pleasure
21 for the morning, looking at the time. I do not know
22 what you would like to do.

23 THE PRESIDENT: Yes, I think we need our wits about us when
24 we come to look at those, so now is a good time.

25 PROF ULPH: Sorry, could I ask a follow-up question?

1 THE PRESIDENT: Sorry, yes.

2 PROF ULPH: Supposing the CMA had come up with an
3 articulation of harm which said the (inaudible) of
4 competition between PCWs and -- between PCWs and direct
5 providers would lead PCWs to spend less on advertising,
6 because it was less necessary to do that because the
7 whole environment was less competitive, would the CMA
8 then have felt the need to test the effects of
9 advertising on consumer behaviour?

10 MS DEMETRIOU: Professor, absolutely, yes. If the CMA were
11 concerned that the wide MFNs could harm consumers by
12 leading to a decrease in expenditure, then absolutely --

13 PROF ULPH: No, not harm consumers, harm competition. We
14 are not talking about the effect on consumers here. We
15 are just saying supposing your theory of harm was that
16 one channel -- one of the manifestations of lesser
17 competition that has been generated by the wide MFNs
18 would be less spending on advertising, would the CMA
19 then have felt the need to test that?

20 MS DEMETRIOU: Professor, yes, of course. In that
21 situation, then the SSNDQ would have been precisely what
22 the CMA would have done, but it was not investigating
23 that. I am not facing a complaint that the CMA has
24 investigated too little. I can imagine that if this
25 were an appeal, if there were a judicial review by one

1 of ComparetheMarket's competitors and, say,
2 MoneySupermarket applied for judicial review of the
3 CMA's actions saying, well, what you should have done
4 is -- you were wrong not to pursue this other avenue in
5 the investigation which consists of harming consumers
6 through reduced spending in advertisements, and then we
7 would be talking about the necessity for an SSNDQ.

8 But here we are not facing a complaint that the CMA
9 has failed to investigate another potential competitive
10 harm. So the question here is whether the competition
11 concern which the CMA has investigated, what is the
12 appropriate market definition for that competition
13 concern?

14 Now, the CMA might, in any case, choose to
15 investigate lots of different competition concerns. It
16 depends on what their concern is, how they define the
17 market, and to sort of anticipate a thought that people
18 might be having, that is not putting the cart before the
19 horse because we are not defining the market by
20 reference to some preconceived idea. The CMA is
21 identifying a concern that it wishes to explore, here
22 the concern being the effect on commission fees and
23 retail prices through the wide MFNs and then is asking
24 itself what are the possible constraints that could stop
25 the hypothetical monopolist exercising that kind of

1 market power, but I do absolutely, Professor, agree with
2 you that had the CMA identified another, an additional
3 concern, that comprised degrading advertising
4 expenditure, then it would have had to have carried out
5 that further SSNIP, yes, no doubt that would have been
6 the proper way to proceed.

7 PROF ULPH: Okay, thank you, that has been very helpful.

8 THE PRESIDENT: Before we discuss when we resume tomorrow
9 morning, I hesitate to give out additional homework, but
10 I think this is actually quite important for the
11 decision we are going to have to reach.

12 Question 1 of our questions asked the extent to
13 which the parties agreed with the approach to
14 ascertaining whether there was a by effect infringement
15 of Article 101(1) and I referred, for better or worse,
16 to the Sainsbury's v MasterCard formulation,
17 paragraph 105.

18 Mr Beard has said he likes it, he is happy with it
19 as a test, and I think it would be helpful to know, and
20 I am sure you would have answered this question, helpful
21 to know what the CMA's view of that test is.

22 The reason I raise it now is because looking at that
23 formulation, it is pretty clear that that test
24 articulated in 105 is a test directed to a non-two-sided
25 market. I appreciate that Sainsbury's v MasterCard

1 concerned a two-sided market, but I can tell you,
2 because I wrote it, that what was in my mind was the
3 exercise in a conventional situation, and I think what
4 would be of assistance is for both parties, if they
5 can -- and you may not be able to do it overnight, but
6 for both parties to frame the test or approach that
7 should apply when one has a multi-sided market, and what
8 I want to stress is I do not think we will be helped by
9 "The test ought to be this in this particular case".
10 What I am looking for is something that is more abstract
11 than that to serve as a guide so that tribunals know
12 what they are supposed to be looking for, because
13 I think that may be the problem, or one of the problems,
14 that is concerning us at least, that we actually are
15 left with a situation where in the case of two-sided
16 markets one has an answer that is very much the size of
17 the Lord Chancellor's foot in terms of how one
18 approaches things. You know, you say, oh, well, we
19 define this bit of the market in this case, that bit of
20 the market in another case, and it all depends, as
21 Dr Niels very fairly put it, it all depends on the
22 nature of the linkage between the markets, what we
23 define and what we do not define. I think I am being
24 a little bit oversimplistic in my statement of what
25 Dr Niels was saying. He is much more granular than

1 that.

2 But we do not, I think, have a process where you
3 work out what it is you have to satisfy yourself in, and
4 I want to be absolutely clear, I do not think there is
5 such a process defined in our case law. Mr Beard, of
6 course, has taken us to the Commission's work on
7 two-sided markets and that does seem to me to be very
8 useful in articulating the problem, but speaking for
9 myself I am keen to have our ducks lined up in a row so
10 that we can work out whether what in this specific case
11 has been done by the CMA is right or wrong. So that is
12 something which I think we would find extraordinarily
13 helpful.

14 I think it is a very difficult job, I may be wrong
15 about that, but I think it would be a very helpful
16 approach if we could, as it were, subcontract that part
17 of our judgment out to the parties to work out what the
18 answer is.

19 MS DEMETRIOU: Sir, we will certainly give that some thought
20 and do what we can to assist.

21 THE PRESIDENT: Of course, if it comes back later on then we
22 are more than happy because I do think this is
23 a difficult issue. I appreciate of course that you are
24 saying that what has happened in this case is absolutely
25 right, and we will listen very carefully to the argument

1 on that point, but it cannot be right that it is simply
2 "it depends" on each specific case. I think everyone is
3 entitled to a degree of certainty as to how one
4 approaches these questions in the future so one at least
5 has a bit of certainty going forward.

6 MS DEMETRIOU: Sir, I apprehend, I will come back to you,
7 and I obviously need to discuss with my clients, but
8 I do apprehend that to some extent it will be very
9 difficult to lay down a sort of blueprint because
10 obviously the CMA's position is -- you obviously have
11 the conceptual framework of the SSNIP test which is
12 often used, it does not have to be used in every case,
13 but is often used as a conceptual framework and that, as
14 Dr Niels says, enables the right questions to be asked,
15 but when you are deciding, for example, what parameter
16 the SSNIP should apply to or parameters, then we do say
17 that that depends on the competition concern at hand.

18 So it may well be that our answer is not -- in
19 a sense it goes to the heart of -- it may be that there
20 is no blueprint in a sense, but it will, I think,
21 inevitably depend on the facts of each case. But we
22 will do what we can to assist. We understand the
23 question.

24 THE PRESIDENT: Fair enough. Then, I think, if it depends
25 on the facts of the case, you have to articulate what

1 those facts are. In other words, you have to identify
2 how one incorporates or what facts one is looking for in
3 order to work out -- now, it may be that your case
4 is that you have to start with the harm one is looking
5 at in order to inform the investigation. It may be that
6 is the answer.

7 MS DEMETRIOU: Yes.

8 THE PRESIDENT: But moving away from two-sided markets and
9 going back to the happier world of a single interface,
10 I do not think that is the way it works. I think one
11 does it in the way we articulated it in Sainsbury's
12 which is one starts with the market definition and then
13 one looks at the theory of harm, but that was, as
14 I say -- paragraph 105 was not focused on difficulties
15 of two-sided markets.

16 MS DEMETRIOU: Well, sir, can I just say one thing about
17 that.

18 I think in Sainsbury's, if I remember correctly,
19 before you get to theory of harm, when you are on market
20 definition, I think that says in terms that you are
21 looking at market definition in relation to the effect
22 of the particular agreement, and so that in a sense is
23 what we are saying when we say competition concern.

24 I mean, I do not think that it is very different.

25 THE PRESIDENT: It may not be. One of the things that you

1 will be addressing, but I suggest we leave it for
2 tomorrow, is whether you agree or disagree with
3 Sainsbury's v MasterCard.

4 MS DEMETRIOU: I will address that tomorrow.

5 THE PRESIDENT: The fact is Mr Beard is in agreement, and
6 you may very well be also, but I do not think the test
7 articulated at 105 incorporates in any way, shape or
8 form the sort of question that we are debating now, and
9 that is a failure of paragraph 105, but it is one that
10 probably did not matter in Sainsbury's, I think it does
11 matter here.

12 MS DEMETRIOU: Sir, thank you. We will take that away with
13 us. We understand and we will do our best.

14 THE PRESIDENT: Well, thank you. It will be helpful to have
15 it tomorrow but, please, take the time you need.

16 MS DEMETRIOU: Thank you.

17 THE PRESIDENT: Of course the same applies, the invitation
18 is also to Mr Beard.

19 MR BEARD: Thank you.

20 THE PRESIDENT: What time would it assist if we started
21 tomorrow? We have been very disruptive of your
22 submissions, Ms Demetriou.

23 MS DEMETRIOU: No, not at all. You have obviated large
24 tracts of my submissions by the questions you have
25 asked, so it has not taken up any more time. I am

1 wondering if we could maybe start at, say, 10.00 and
2 I think that if that would be okay, then that -- I think
3 that would be easier in terms of making sure that
4 Mr Beard has enough time for reply and so on.

5 THE PRESIDENT: Indeed. As I say, we do not want you to be
6 under any excessive constraints, so 10.00 it is.

7 MS DEMETRIOU: Thank you.

8 THE PRESIDENT: Thank you both very much. We will resume at
9 that time.

10 (4.47 pm)

11 (The hearing adjourned until 10.00 am on
12 Friday, 19 November 2021)

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