IN THE COMPETITION APPEAL TRIBUNAL

Case No.: 1407, 1411, 1412, 1413, 1414/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

25 July 2022

Before:
Sir Marcus Smith
(The President)
Simon Holmes
Professor Robin Mason
(Sitting as a Tribunal in England and Wales)

BETWEEN:

ALLERGAN PLC AND OTHERS

Appellants

v

COMPETITION AND MARKETS AUTHORITY

Respondent

A P P E A R AN C E S

Tim Johnston (instructed by Addleshaw Goddard LLP appeared on behalf of Allergan plc)
Mark Brealey QC (Instructed by Morgan, Lewis & Bockius UK LLP appeared on behalf of Advanz Pharma Corp)
Max Schaefer and Emma Mockford (Instructed by Clifford Chance LLP appeared on behalf of the 'Cinven entities')
Sarah Ford QC and Charlotte Thomas (Instructed by Macfarlanes LLP appeared on behalf of Auden/Actavis-UK)
Robert Palmer QC and Laura Elizabeth John (Instructed by Linklaters LLP appeared on behalf of Intas Pharmaceuticals Limited)
David Bailey and Nikolaus Grubeck (appeared on behalf of the Competition and Markets Authority)

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Monday, 25th July 2022

(10.37 am)

THE PRESIDENT: Mr Brealey. Good morning.

MR BREALEY: Good morning. As per usual, I don't know whether the Tribunal has a preference for the order of the court. I am just standing up, because someone has to stand up.

THE PRESIDENT: It is helpful of you to raise that. We have read with great care the written submissions from the parties and what we thought we would do is set out what we provisionally think is the way to run the trial later this year and invite push back from the parties as to how outrageous they think our proposals are and how violently they disagree.

So, what I am going to propose is that no-one stand up, we talk about our thinking, rise for, say, half an hour to enable the parties to think about what is acceptable and what is not in what we are proposing, and then we have a focused set of submissions in the light of what we've said.

It is probably best to begin with the use of the time that we have for the hearing. Now everyone knows we have allocated three weeks plus two, with the two being time for writing judgments and the three being hearing times. That timing process very much depends on how successful or otherwise you think the ambulatory draft regime has been. My sense is that it is a kind of glass is half full/glass is half empty appraisal that we have here, in that it has been a helpful process, but we don't think that it justifies shaving two weeks off a five-week process, which was the time-frame that all of the parties considered was appropriate before the ambulatory draft hare was set running.

Given that this is a novel process, we think it would be a mistake to shorten, against the parties' general indications, a five-week trial into a three-week trial. We are not saying that for the future one cannot more aggressively manage trials, but the fact is this is the first time we have tried it and we don't want the wheels to come off in the course of week two.

So, what we've done is we have mapped out a timeframe for the trial, which is articulated on a five-week process rather than a three-week process.

Unpacking that further, we don't see any purpose in oral openings or indeed written openings. We think that is something that is dealt with by the ambulatory draft. The whole point of it is to unpack agreed and disagreed areas, and we don't think that written closing -- written openings will actually add anything. We are not going to say don't put them in. If you want to put them in, by all means do so, but you should be aware that the Tribunal's order of priority in terms of analysis and reading is going to be ambulatory drafts first, pleadings second, witness statements and expert reports third, and then a big gap, and then it will be written opening submissions. So that's how we intend to approach it.

So, it means that if we have non-sitting days Mondays, rather than Fridays, and that is simply to accommodate the other commitments that the Tribunal has on Mondays rather than Fridays, non-sitting days will be Mondays, we start on Tuesday, 22nd November with an hour's housekeeping and then we go straight into the witnesses of fact.

We think that we should be more rather than less generous in terms of how much time one gives to the unpacking of witnesses of fact. My experience at least is that when one timetables the evidence, what usually happens is that there is a rushing through the material, and we think that that should be avoided.

Given that we have five weeks, we think that the witnesses of fact should be heard

commencing Tuesday, 22nd November, for the whole of that week, that is to say to the end of Friday, 25th November, a non-sitting day 28th November, and we would have a final day of witnesses of fact on Tuesday the 29th.

Now, that gives five days of time for witnesses of fact. That's more I think than any party has suggested. If we don't need that time, then that's fine, but if we do, then it is there. So that is our sense of how we're going to do the first week and a half.

We then would move on to expert evidence, which would start on Wednesday, 30th November, and we think go through until the end of Wednesday, 7th December. So, it would be Wednesday, Thursday, Friday of week 2. Week 3, Monday, is a non-sitting day. We would then have Tuesday, 6th and Wednesday 7th for expert evidence. That is essentially five days, which again is longer than any party has expressed the desire to have. If we go short, that's fine, but the time is there if we need it. We would like to have the facility to spend time with the experts unpacking what they have to say, because what they say is important.

That leads us to the question of concurrent evidence or hot-tubbing. We are attracted by certain aspects of the hot-tubbing regime. On the other hand, we don't like the idea, at least in this case, of the Tribunal taking the lead in what is likely to be a series of quite controverted issues.

What we are going to propose, therefore, is that the experts attempt to attend every day where the other experts are giving evidence, and that they are cross-examined in the usual way on the four days that constitute the first four days that were allocated to expert evidence, and that we have the final day, which is Wednesday 7th December, at the moment, allocated to a hot-tubbing day, where the Tribunal essentially asks questions that it has arising out of the evidence that it has heard put to experts of the same discipline in a hot-tubbing regime, obviously with the parties following up with any questions they have, so that if we are concerned about certain

points that need to be further unpacked, that is done at the end of the process.

So, it is a slightly attenuated hot-tubbing regime that we are proposing, rather than a full-fledged, red-blooded hot-tubbing process, which we are not at the moment particularly attracted by.

That brings us, as I say, to the end of Wednesday, 7th December. We think that the 8th and 9th December should be devoted to either overrun, if that occurs -- we don't expect that to occur, but overrun, if necessary, but otherwise the preparation of written closing submissions, which will take place Thursday, Friday of week 3 and for the whole of week 4 with the written closings submitted at some point before then, that point to be debated.

So, Friday, 16th December will be appellants' closing. Monday, 19th December will be a non-sitting day. We will then have a further day of appellant's closing, Tuesday, 20th December, two days for the CMA to respond, 21st and 22nd December, and then replies Friday, 23rd December.

Again, those are fairly fluid dates, because we may have more, we may have less time, depending on how the evidence unpacks. But that is how we see the timetable, which we have considered, and we would be very keen to hear what the parties have to say about that.

Before we finish this rather protracted discussion or statement, we want to say something about ambulatory drafts.

The general consensus we think is that these are useful documents, which, subject to appropriate health warnings can be made public, and we are very grateful for the suggested draft wording, which we will look at from the parties.

We consider that most of the concerns that have been expressed regarding the ambulatory drafts have arisen in terms of length of trial, and I would like to think we have addressed that constructively in what I've already said. So, we are minded to

direct the public use of ambulatory drafts, but in the context of the five-week trial that I've described, and with a health warning that is along the lines of, but not quite perhaps exactly along the lines of what the parties have suggested in correspondence.

Obviously, we are not at this stage in a position to say this is the ambulatory draft that we are going to publish. It's not there yet.

I do want to end by saying one point about the disputed annexes. We are very grateful to the CMA for their response to the disputed annexes, which we have seen and read, but not read in great detail.

I think the problem with these annexes is that one needs to start by asking why are they there? The fact is that regulatory appeals involve a plethora of facts, most of which I suspect are contentious rather than uncontentious, but the reason one does not hear evidence on all of them is because they don't actually matter. They are contentious but immaterial.

One then has a sub-set of these facts, where they are contentious and highly material, and it is on those facts that one needs to hear evidence.

Now, I confess, if one takes, for instance, the dispensing practices which feature in one of the annexes -- I think it is annex 3 -- there may very well be a huge area of dispute as to precisely how Hydrocortisone tablets are dispensed by, let us say, Boots. Now, if that really matters, then we are going to have to hear evidence on it. If, on the other hand, there is underlying the reason this annex has been submitted a kind of broad-brush proposition as to dispensing practices which we need to be aware of, but which can be framed in a shorter way than the rather long annex 3, then that's the way the matter should be done.

So, what we would like the parties to think about is the extent to which this is a level of granularity that we don't need to get into. If we do need to get into it, obviously we

will. If that is the case, if dispensing practices are so critical to the overall outcome, then it seems to us that we are actually going to have to have evidence of dispensing practices in the court so that we can resolve matters.

Now no-one is proposing that, and we suspect that there is some importance in dispensing practices which we need to know about, but which isn't perhaps best addressed in the shape of a really detailed annex saying what everyone does.

So what we are going to invite the parties to think about in the course of the next few weeks is how far these controversial annexes actually need to be in the ambulatory draft and how far the issue is much more a formulation of the general proposition, which we are sure is disagreed between the parties, how far that needs to be articulated so that we can work out what actually is at issue between the parties and the extent to which it matters.

As I say, we are more than happy to hear from Boots and other pharmacists what they do, if that matters, but if it matters, that's what we should be doing. If it doesn't matter, then we don't need to hear from them and we deal with it in another way.

That I think is the essential question which has not been addressed in the controversial annexes, which have generated we would suggest rather more heat than light in this process.

So that is the only point we have to make as regards the essence of the ambulatory drafts and is in a sense a sort of self-standing point, independent of the trial timetable.

I have I think said quite enough. I will just check whether I have missed anything. What I am going to propose is that we rise for, let us say, half an hour, to enable the parties to work out exactly how vehemently they disagree with which bits of what I have said, and we will then hear submissions in relation to those points. So, we will rise until 11.30 and thank you very much.

(Short break)

THE PRESIDENT: Mr. Brealey, are you the designated spokesman?

MR BREALEY: I have not been designated anything, but if I can kick-off. I have chatted with a few people, and I think there may be some consensus. I think people are broadly happy, but they will make their own submissions.

From Advanz's perspective, we are content subject to one -- and I think this may be common amongst all appellants -- we are content with no openings, because we can see the sense in reading the Notices of Appeal, the Defence, insofar as they relate to the Notice of Appeal and then the Reply, because the Replies are actually quite important.

We do not object to the time allocated to witnesses of fact. I think some people may say it is too long. I don't know what the CMA will say about it. What I would suggest, though, is that the witnesses of fact -- maybe this should be done at the PTR or it can be done today -- if one goes back to Advanz's timetable, we set out the nine witnesses I think who are going to give evidence. I would suggest that the Advanz witnesses start, because they are the ones who are essentially dealing with the guts of whether there was a 10mg agreement. The other witnesses are more about corporate governance and penalties, so I would suggest the five witnesses of Advanz would start in week one. So that's just a suggestion, and then the others, the Allergan, one witness, Intas, three witnesses can come after.

We are content with the experts. We would suggest -- again this is a matter for the Tribunal -- that Dr Newton, who is our marketing expert, starts the process, for two reasons. First, that allows the hot-tubbing for the economists and, secondly, what she says may have some impact on their expert evidence because, as you know, she says, for example, the marketing blurb was contrary to the regulations and therefore do the experts have to take that into consideration, for example.

So, we would say that Newton logically goes first.

The only real point of disagreement is the amount of time allocated for the preparation of written closings, as opposed to delivering them. So, for example, we almost have six days for prep and the appellants have only got two days for closing.

THE PRESIDENT: Yes.

MR BREALEY: From Advanz's perspective, we would strongly urge the Tribunal to give the appellants an extra day, 15th December. I know parties may want even longer. I can't see that it really prejudices too many people, because if we are having so long for preparation, we just get less time for preparation, but we get more time for actually delivering them. Even with two days, the five appellants are not getting very much time.

THE PRESIDENT: Well, Mr Brealey, you are somewhat pushing at an open door on that front. Ms Ford will know that in another case we essentially dispensed with written closings to have them after the event so that there was actually limited time for preparation of oral closing submissions, which maximised the time available for presentation. I can see considerable benefit in that. The downside is, of course, that the Tribunal is less well-informed about the thrust of argument that occurs and which is unpacked in written submissions, and the other problem is that one leaves over almost a never-ending run of written submissions after the trial -- I can see Ms Ford is nodding about this -- in that one does not actually finish the case on 23rd December, one has got things trickling through afterwards.

This is very much a compromise of those matters, but for our part, if the parties feel they can deal with the preparation of written closings in less time, we would be keen to give the parties more time to make their submissions.

As you all know, this is quite an interventionist Tribunal when it comes to submissions, and we like to have the parties have more time than less. So, we will

see what the other parties say, but if you were to say let's add another day or even another two days --

MR BREALEY: Certainly, one day. So that would be Thursday, 15th. I think Mr Palmer is going to suggest -- he can speak for himself -- but I think 14th December. So that gives the appellants proper time in which to explain the issues to the Tribunal. We still have the weekend before that and we still technically start on Thursday the week before.

THE PRESIDENT: Indeed. I mean, the other thing we have not discussed, which is something that the parties usually forget about quite understandably is we actually do need time to read the closing submissions. In a sense we don't really want to impose page limits, because who knows what the parties will think is appropriate to address in closing, but if one assumes a couple hundred pages from each party, you have 1000 pages to read.

MR BREALEY: It is a very good point. In Liothyronine there is a day dedicated to reading, which I note is not in here. Really, we should have a day set aside for the Tribunal to read the written closings. That's probably not sufficient anyway, but at least it is a start.

THE PRESIDENT: This is the difficulty, because we are trying to synthesise an oral and a written process and they are actually quite inconsistent. The fact is if you were to put together 1000 pages of closing submissions, a day is not enough to read them and do justice to them.

MR BREALEY: That's a very, very good point. Let's assume for the sake of argument -- I don't know if this is right -- I am going to kick off with the written closing. I don't really want to -- I won't know what the CMA say if I have not had time to read it the day before.

THE PRESIDENT: Indeed.

MR BREALEY: So at least Wednesday, 14th December, should be a day for reading the written closings.

THE PRESIDENT: Right.

MR BREALEY: I think that would be my proposal, which is Wednesday, reading, and then there are three days for the appellants, that's 15th, 16th and 20th, but I will let others have their say, but that would be our ...

THE PRESIDENT: That's helpful. It may assist -- I think it will assist actually, because we have quite a congested week for week five on this basis. I think we can turn Monday, 19th December into a sitting day. So that can then be turned into a closing --

MR BREALEY: That does help then.

THE PRESIDENT: Which makes the reading day a little bit more feasible.

MR BREALEY: Yes.

THE PRESIDENT: So, one would have, on that basis, and obviously I want to hear from the other parties -- one would have 15th and 16th appellants' closing, 19th, the third day of appellants' closing, then two days for the CMA and then replies. So, three, two, one would be the thinking.

MR BREALEY: That leaves a day extra.

THE PRESIDENT: Yes, indeed. We have a bit of room for manoeuvre.

MR BREALEY: Which I am sure there will be need for. I think we are ...

THE PRESIDENT: Thank you. That's very helpful.

Ms Ford, you are on your feet, so you have the floor.

MS FORD: I am grateful, sir. We have particular concerns about the length of oral closings. If I might briefly remind the Tribunal of the nature of our appeal. We are the party against whom the most wide-ranging infringement findings have been made. We are the only entity which has been accused of unfair pricing for the

majority of the infringing period. That's one of the central allegations in the decision, and it is the allegation from which a large proportion of the fines flow, and that's directed largely at us.

We are alleged to have participated in both of the agreement infringements and we have been fined a total of £65.6 million, which is more than twice our statutory cap. It is also our conduct which is the basis of the huge fines which have then been imposed on Allergan.

As the Tribunal will be aware, these are some of the biggest fines the CMA has ever imposed.

Unsurprisingly, in that context, as a consequence of the wide-ranging nature of the infringement findings that we face, our appeal is extensive. It comprises eight separate grounds of appeal, and it raises important and complex points of law across a very broad spectrum of issues.

There are some very limited overlaps with the appeals being advanced by the other parties, but the vast majority of those eight grounds of appeal are independent, standalone points. This is an appeal on the merits, and fairness requires that we be given sufficient time to develop and advance the grounds of appeal that we have made.

Just turning to the Tribunal's proposal, the Tribunal has proposed to increase the overall time available from the three weeks to five weeks, but there's limited, if any, increase envisaged in the time for closings in the Tribunal's proposal. We are in a particularly striking position because, as the Tribunal will recall, we have not got either factual or expert witnesses, and so none of the very generous time that the Tribunal has allocated for factual and expert witnesses is time attributable to the hearing of our appeal, save to the extent that we have adopted some of the points being run by the other appellants.

That also means that although a generous time has been set aside for time to prepare written closings, again, as a party, we are unlikely to benefit from that, because we will not have even addressed the Tribunal up to that point. It is anticipated that the points that we make are unlikely to be hugely impacted by the witness evidence.

THE PRESIDENT: There is not much difference between your opening and your closing submissions.

MS FORD: Indeed, sir. That's exactly the point. Where we are left is that on the present proposal the appellants are being offered cumulatively two days of closings and a day to reply, which leaves us with only two hours in total to address the Tribunal on our entire appeal and then a further hour in reply. In our submission, that is clearly and patently not sufficient. It would go so far, in our submission, to amount to a denial of a fair trial. The notion that an appeal of the complexity and the length and the importance of the appeal that we are advancing could be dealt with in two hours in our submission is extraordinary and is simply not doable.

If there are 20 days available for these appeals to be heard, in our submission it makes no sense for us as the party with the most wide-ranging allegations to be offered only two or maybe three hours of that 20 day period in order to advance our appeal.

In terms of how long we say we need, we originally estimated that we would need a day to open, two days to close and half a day to reply. We recognise that hearing all the appeals together at the same hearing is likely to give rise to some efficiencies, but we say we still need a fair amount of time to develop our points properly. Our estimate is that we need two days to make our submissions on our eight grounds of appeal. Our preference would be that those two days would be at the same time, rather than small pockets of time spread about the appeal. We do need a fair

opportunity to develop the points that we make.

It did seem to us that there was time in the timetable that the Tribunal has set out that could accommodate that. We note, first of all, that there's been a greater time allocated for both witnesses of fact and expert witnesses than was requested by the CMA essentially, who are giving their estimate for the time they need to cross-examine. So, it seemed to us that was one possibility where time could be found to accommodate our appeal.

Alternatively, as the Tribunal has to some extent canvassed with Mr Brealey, there is currently an extremely generous allocation of time for preparation for written closing submissions which, as I have emphasised, does not necessarily benefit my client and the appeal we are running. So, we say there is potential space to accommodate potentially longer time for us.

Our submission, essentially, is that we do need -- fairness requires us to be given a sufficient amount of time to develop our appeal and we envisage that should be a period of two days.

THE PRESIDENT: In a sense you are asking quite a fundamental question about what the purpose of trials is. I think there is quite a strong case for saying that you should actually do everything on paper.

MS FORD: Sir, I think we would fundamentally disagree with that as a proposition. This is a regulatory appeal on the merits. We have advanced --

THE PRESIDENT: The point about trials is really to bring out contentious facts on which submissions are then made. Now, I am not saying we are going to cut you out of the oral process, but I think it is quite important that we put down a marker that we don't see an oral process that isn't, as it were, piggy-backing on the development of factual evidence being done on the papers as intrinsically unfair.

Now, I think we can accommodate you, but I don't think you or anyone should take

the Tribunal's interest in oral hearings as being fundamental to fairness, where the points are not, as it were, coloured by factual material.

Now I appreciate that you will have a lot to say about that. I don't think we need hear from you on that, because, in a sense, the fact that your position is not contingent upon or not hugely contingent upon the factual material means that you can be preparing your closing submissions far sooner. You therefore don't need the time in week 4 in preparation of closing submissions that other parties might need, and it may be that we can give you, as it were, two days that would involve other parties writing whilst you are submitting.

So it may be that I ought to hear from the other parties about the extent to which one could say -- we have two days of appellants' closing, let us say Friday 16th and Monday 19th, which would be everyone's closing submissions except for Auden/Actavis and then one had, let us say, a day or two days in advance of that, which would be 14th and/or 15th December, which would be your clients' closing submissions. I don't think that would prejudice the other applicants. It might cause the CMA some problems. I would want to hear from Mr Bailey on that front.

Are you saying two days is the essential amount?

MS FORD: Sir, we are. In the context of the scale of our appeal, the fines involved, the points we raise, we do say that two days is the fair amount for to us develop it.

I should perhaps record -- it may be, I have misunderstood the point you, sir, were making. We don't necessarily agree that the function of a hearing is solely to determine disputes of fact. We would make the points that a regulatory appeal is capable of being advanced purely on points of law, as indeed we do, and the opportunity to be heard in relation to those is an important part of a fair hearing in exactly the same way. It is not limited to determination of factual disputes.

THE PRESIDENT: Sure, but the fact is that a fair hearing can occur entirely on the

papers. My point is that you can't make that point when you are actually qualitatively assessing the evidence that you're getting from a witness. But what I was saying, and I am not inviting submissions on this, what I was saying was that we don't accept the premise that one can have a fair hearing of a regulatory appeal that must be done orally. We think that there is room for argument that you can have a fair appeal where there is no, as it were, factual dispute to be unpacked and no expert evidence to be heard, which can fairly be done entirely on the papers. But we are not inviting an argument about that, because we can I think accommodate you. But I wouldn't want the fact of that accommodation to be read as an acceptance on our part that one can't have a fair hearing of that sort of dispute entirely without an oral hearing.

MS FORD: I am grateful for the Tribunal's indication that you will be able to accommodate us in being heard. In the same spirit, I should put down a marker that we would disagree with the proposition that our appeal could fairly be heard purely on the papers. In our submission, we do need to have a fair opportunity to develop our points orally.

THE PRESIDENT: Fair enough. Thank you, Ms Ford.

I think before we hear from any of the other appellants, Mr Bailey, you have got the burden of responding to what is now likely to be a large number of -- I am so sorry -- it is not Mr Bailey.

MR GRUBECK: We remain of the view that the trial could probably be done fairly in the shorter time-frame than envisaged originally, but in light of the Tribunal's indication we are happy to go along with that and look at the longer time-frame. We have a few limited comments on that.

The first is we agree with what Mr Brealey and Ms Ford have said, that the provisional timetable makes quite extensive provisions for written closing submissions, and it is possible to shave some time there and allocate that for other

matters. We are not opposed to providing a bit more time for the appellants to make their closing submissions. We do emphasise the importance of parity. So, the CMA would ask that we are given the same amount of time to make oral submissions as the appellants, so as to allow us to properly respond to the matters raised therein. So, if the appellants are given three days for oral closings, we would ask for the same in response.

The second point in terms of the timetable we wanted to raise is that, as currently envisaged, the trial would finish at 5.00 pm on 23rd December. That causes people difficulty in terms of getting home in time for Christmas with international and national travel. So, if there is some saving to be done, if it were possible to finish the day before, that would be welcome, and certainly the CMA and I understand the appellants have indicated they too would be content to work the weekend for the preparation of written closings as required.

In terms of written opening submissions, we would simply invite the Tribunal to record that in its order. Written opening submissions are to be filed, if so advised, by 31st October for the appellants and 11th November for the CMA in response.

Finally, we have a point on the expert evidence. We agree with the proposed allocation of five days for the experts. We would, however, invite the Tribunal to focus on the issues, rather than just the strict time-frame, in how these are divided up. So, in our view it is not the most effective approach to have four days of straight cross-examination followed by one day of hot tub. We would suggest that perhaps the Tribunal may wish to start with market definition and dominance, and on that a hot tub is likely to be a very helpful way of handling matters, because it avoids the proposition having to be put over and over again to the different experts, and that was used with great effect in Paroxetine. We submit it would also be an effective tool here.

We could then follow with cross-examination of the respective experts on the issues of abuse and issue of agreements with short follow-up hot tubs as required by the Tribunal on each of those, and we have no objection to Dr Newton being cross-examined either at the start or at the end of that process.

That is the comments we have at the moment.

THE PRESIDENT: Thank you. That is very helpful. Let me just look at how the timetable is appearing in light of Ms Ford's and your submissions. So, let's see if we can -- starting from the end date. We have the end date as Thursday, 22nd. We do see the sense in that. So, let's try and accommodate that end date.

We then have the replies. Notwithstanding what Ms Ford has said about needing half a day, I think we are minded to say that it will be a day for replies. We take the view that the law of diminishing returns sets in when one gets to reply submissions. We have no issue particularly with having limited written submissions after the trial, if it is necessary to unpack points that have taken parties by surprise. So, we will work on the basis of one day of replies.

That then means the CMA's closing will be at least 20th and 21st December, but if we are going for parity, then that would mean a further day, I think. So, let's say we allocated the whole week of week five to the CMA's closing, that's Monday, Tuesday, Wednesday, replies on the Thursday, we are dramatically cutting back the preparation of closings, because what I think we would have is as well as sacrificing our non-sitting day of the 19th, we would be having I think four days of closing in week 4.

So, we would have Ms Ford's clients starting on Tuesday, 13th, and finishing on Wednesday, 14th, and then we would have the rest of the appellants, excluding Ms Ford's clients, working on the Thursday and the Friday.

Now, that is dramatically cutting back the gap between the end of the evidence and

the beginning of the closing submissions. I don't think we have a particular problem with that. There is the question of when we actually read the stuff you produce, which we can come to, but let's get the broad, as it were tectonic plates of what's happening when sorted out first.

So, I think, looking at it, we have got the last two weeks looking like this. Week 4, Tuesday, Wednesday, Ms Ford. Thursday, the other appellants, excluding Ms Ford. Week five, Monday, Tuesday, Wednesday, CMA closing. Thursday, replies. Friday, hopefully we all can vanish for Christmas.

Now, does that work from the CMA's point of view, given that you are going to be receiving whatever Ms Ford produces quite late?

MR GRUBECK: Two comments on that. The first is there may be scope to save a further day on the witnesses of fact, which none of the parties expected to take longer than four days. They are currently scheduled for five days under the Tribunal's provisional timetable. That may be an opportunity to save one further day.

In terms of the preparation of the written closing submissions, the CMA would be content for those to be done on 8th, 9th, the weekend of 10th and 11th, and for the submissions to be submitted on the 12th.

In terms of Ms Ford's submissions, they are not specifically tied to that window. They could, for instance, be allocated in part as opening submissions and part as closing submissions. We simply reiterate the point on parity, that, of course, we will need the time to respond.

THE PRESIDENT: That's fair enough. We are not attracted to bifurcating Ms Ford into opening and closing. I think one shot is better than two, because Ms Ford just won't know what to address when. I think you can take it that -- I mean, in another case we would be pushing Ms Ford rather harder on whether she really needed two days, but if we have the time, given the points Ms Ford has made, we are keen to

accommodate.

So, if we say Monday, 12th December is the Tribunal's reading day for closing submissions, we then jump straight into the Auden/Actavis Ms Ford closings for Tuesday and Wednesday. We then have the remainder of the appellants' closings Thursday, Friday. We then have three days -- and I am afraid you are not going to get four -- you are going to get three days closing. If we have to, we will sit longer days and make it up there, but I frankly think there is going to be a degree of overlap between the appellants' points, such that three days ought to be enough.

Then we have the day for replies, which we intend to regard as genuine reply questions. We understand that the parties are not going to magically reach agreement in the course of hearing each other's closing submissions. The point about replies is to inform the Tribunal about matters where the position may have been misunderstood rather than to make the same points again.

We are not attracted by the idea of cutting back the time for witnesses of fact simply because we think that there are enough areas of really important dispute that we want the option to go slow if that is called for. Whilst it may mean that one would have more time for preparation of closings if, as the parties think, we will go short, we don't want to fix that into the time-frame. We would like to have the option to take our time if that is necessary.

So, does that work for you, Mr Grubeck?

MR GRUBECK: From our perspective that works, yes. Thank you.

THE PRESIDENT: Ms Ford, you have got your two days. Do you have any other points?

MS FORD: We did have some observations on the separate question of the annexes, but I perceive that might be better dealt with --

THE PRESIDENT: Let's deal with the annexes separately. Thank you very much

for raising it. Okay.

Mr Brealey, just before we hear from the others, do you have any issues with that? I think everyone is happy with your suggestion as to when the witnesses are called. Let me be clear that we are saying nothing about the structuring of the factual or the expert witnesses. We think that the parties should be given the opportunity to think about how the factual and the expert times should be structured, and we are certainly receptive to the idea that certain points by the experts might be more appropriately conducted in a hot-tubbing way, but we don't think that is a matter for determination today. I think we want to get the tectonic plates of the trial sorted out and the parties can then think about how strongly they want to push for, let us say, hot-tubbing on particular issues or listing of witnesses in a particular order after today.

I think the parties know that different Tribunals take different views about the benefits of concurrent evidence. One has a spectrum of views, and it may be that Mr Justice Roth is at one end and I am at the other, in terms of how we regard the benefits of this process. I only say that we are obviously open to the parties' suggestions as to how concurrent evidence is dealt with. It is just that I think my subjective view is that I place greater weight on the benefits of cross-examination than others and that is not to say one view is better than the other. It is just how individuals see things, but we suggest we leave that over.

Do you have any other points about timetable before I hear from the others?

MR BREALEY: No, not at all. I anticipate that Wednesday, 7th December may be devoted to closing, but that's the way it may just pan out. We are quite content with what the CMA have agreed with you, sir.

THE PRESIDENT: I am very grateful, Mr Brealey. Yes, indeed.

MR JOHNSTON: Sir, if I can start at the end, you just asked the CMA if it works for

them. It does for them. Unfortunately, the timetable that was just canvassed does not work for Allergan. I can address you on that relatively briefly. I rose when Ms Ford finished, because many of her submissions apply equally to Allergan in this sense, which is that we haven't called any expert evidence at all. We have called one witness of fact, whose statement is relatively brief. I don't anticipate, though I don't wish to suggest they wouldn't want to at all, that the CMA would cross-examine him at great length. I am perfectly content to be corrected on that point, but, as you put it to Ms Ford, sir, the reality is that our closing is a submission that we could make effectively at the point of opening.

The reason for that is not because there are not really substantial disputes as to the law and as to the facts between my client and the CMA, but I think it might be helpful to distinguish between different kinds of factual disputes, if I can put it in very simple terms. There is a kind of factual dispute which is resolved by cross-examination, which is a dispute over, if I can put it in very colloquial terms what happened, was it A or B?

THE PRESIDENT: Yes.

MR JOHNSTON: There is a very different kind of factual dispute, which is what is the proper characterisation of the facts. To take a good example from my client's Notice of Appeal, you will recall that one of our grounds of appeal is that during a particular period of time my client had undertaken to sell the relevant subsidiaries. They entered into a binding series of commitments. There was a hold separate period with the Commission. There is no dispute between the CMA and my client as to what those commitments were. There is no dispute between the CMA and my client as to what were the terms of the amendment to the contract for the hold separate manager, which is said by the CMA to be significant, but there's a very lively dispute between us, firstly, as to what the law says. I am speaking on behalf of

Mr Jowell here, who will be addressing you at the time, but I anticipate that Mr Jowell will probably want to open up in relation to that point, six, eight authorities possibly. There is a lively dispute as to the law. But then the dispute is as to how these facts should be properly characterised and how they apply to the legal test, which is at least in part itself in dispute. If I were to take this out as a tranche and isolate it, that individual ground of appeal, certainly in ordinary circumstances that would be a day and a half of submissions. The parties would have to address the court on the law, they would have to address the court on the facts and how that should be construed and what the outcome should be.

You will apprehend immediately my concern, which is while there is not a did this happen or did that not happen, was X said on a telephone call on this day dispute on the facts, there is a lively dispute on the facts. And even taking that point on its own, and the reason I isolate that point for two reasons, firstly, because it is a point that is unique to my client, of course. Nobody else raises the point. It doesn't apply to them.

Secondly, it's a point of really significant quantum. My client's total global fine is £109 million in relation to a 15-month period of ownership, and a very significant proportion of that period of ownership is covered by this hold separate arrangement. So, we are talking about a question of fact and law in respect of which tens of millions of pounds will turn.

Sir, I isolate that because there is very significant quantum riding on it. If we are asking ourselves what is fair, then that's a part of the picture at least, albeit not determinative.

Also, as I say, that's just one bespoke, as it were, complicated legal and factual point.

So, I suppose when looking at the context of what arises on this appeal, we also

have grounds of appeal in relation to abuse. We also have a ground of appeal, obviously, of course, in relation to penalty, and a smaller, and I accept this, ground of appeal in relation to dominance, where there is a higher degree of overlap obviously in that respect, in relation to some of the other submissions that other parties have made.

But, sir, what we have before this Tribunal is an appeal, a full appeal, on the merits, and that is necessary in law, because in the absence of a full appeal on the merits, the scenario where the CMA is the investigator, as you know, and then makes findings as to whether or not there's been a quasi-criminal infringement, and then imposes a penalty, that can't be lawful without a full appeal on the merits. That's the necessary Article 6 protection for my clients. sir, I don't presume to tell you what you know --

THE PRESIDENT: You don't need to tell us that. Look at the point you made about opening or closing on six or eight chunky authorities. Frankly, that is best done on papers. We are far better assisted in being told what to read, think about them, rather than having an advocate say "And here's another authority. Please read between letters A to F on page 332". We read through it very quickly. We don't have any time to think about it, and you move on to the next point. It actually is not helpful to the parties. It is actually not fair to the Tribunal, that sort of process.

We invariably take these points away and think about them after the event. The extent to which oral advocacy helps on that particular point, well, frankly it is minimal. So, we think that to the extent that you are needing a day and a half to address the law, you ought to be doing that as part of submissions that come in before the trial begins so we can read and think about rather than have them unpacked in closing.

We would obviously expect you to refer to the points in closing, but we would want that to be done extremely briefly, and we don't think that that is inconsistent with

fairness. Indeed, we think that it is a better process than loading everything into oral submissions on than point, because, speaking entirely for myself, but I think it is a common point for judges, we need time to chew over controversial points. I mean, if they are no-brainers, you don't need to address us on them. If they are controversial then we need to think about them, and that's the virtue of the written process.

MR JOHNSTON: Sir, I am very grateful for that indication. Let me be slightly more precise. Perhaps I was not clear earlier on a couple of points.

Firstly, Allergan is not proposing to address the court on authorities exclusively for a day and a half.

THE PRESIDENT: No. You mentioned a day and a half, and you mentioned legal submissions as being part of that.

MR JOHNSTON: Yes. I suppose the thought experiment I was undertaking, sir, was that, were this a matter to go to the Court of Appeal, and it is the kind of point that might be suitable for the Court of Appeal -- it raises a novel point of law and fact -- almost certainly the Court of Appeal would not seek to hear it in a day. That's the gravamen of the submission.

I am very grateful for the indication that the Tribunal is going to read written openings carefully. That's very helpful and very reassuring. I suppose there's a question of balance, sir, and that's in this respect, that I am mindful of what you say as to the extent to which hearing the parties in oral submissions, whether it is as to facts or as to the law, and maybe this is a sort of trade unionist special pleading from the part of the bar, sir, but certainly my submission is two-fold, firstly, that from the perspective of a party, from the perspective of my client as a global multinational, housed in the United States, liable to a £109 million fine, the idea that they would be addressing the court for two and a half hours as to that £109 million, that would be the totality of

their contribution to the trial, save that their witness would be called and the witness would be cross-examined, albeit, as I say, I don't anticipate that would be particularly lengthy, but that their closing submissions, which would be the first time Mr Jowell would be addressing this court in any respect as to our case would be for two and a half hours, sir. That is from the perspective of our client not sufficient, given the gravity of what has been joined and given the size of the sanction.

With respect, to put down a marker here, Ms Ford put down the idea that questions of fact and law, such as arise on my client's appeal, could be dealt with consistent with a full appeal on the merits exclusively on the papers isn't something that my client would accept, sir.

Can I at least make a suggestion as to the timetable?

THE PRESIDENT: Well, by all means, because we are receptive to proposals that work in the time-frame. If the parties have a view about how the time can be used appropriately, which works for them and works for us, then we are not going to push back. But I think you need to be aware, and Ms Ford also needs to be aware, that we have I think quite a significant mismatch in terms of what the parties think a fair hearing is and what the Tribunal thinks a fair hearing is.

Both Ms Ford and you, Mr Johnston, are leaving entirely out of account the very significant weight that we place on the hard work that all of the parties have done to the ambulatory draft. The whole point of the ambulatory draft process, which we think the parties are not sufficiently factoring in, is that it enables the Tribunal to understand the factual and the legal points that are in dispute, and if those points have been insufficiently unpacked in the ambulatory draft as it stands, then it is not for want of trying on the Tribunal's part. We think the parties have been doing their best to identify both the points of agreement and the articulation of the points of disagreement in the ambulatory draft process. That in our view has an effect on the

way in which the five-week process is being run.

Now, we have conceded a five-week process at the outset simply because the ambulatory draft regime is being tried for the first time and we don't want it to go wrong. But I think there's a certain misunderstanding which we need to correct, that we do regard the process as one that enables a proper shortcutting of the time that is available. So do give me your solution, but I think be aware that we may need to go back to the allocation of amount of time for closing if it doesn't work.

MR JOHNSTON: Sir, so you are clear, my submission, in the light of the ambulatory draft, is not that I am suggesting that there needs to be longer than five weeks, sir. It is really a question of the weight and inevitably, given the nature of my client's appeal, they place a particular premium on the opportunity to address the Tribunal in circumstances where they are not calling factual or expert evidence. That's why I rose immediately after --

THE PRESIDENT: I understand that.

MR JOHNSTON: I am not suggesting that five weeks is not capable in principle of accommodating a fair trial. I am mindful that I am stepping on Mr Palmer's toes, because this was a suggestion that he canvassed briefly with me outside. So, he can poke me if I am expressing this wrong or getting the timings wrong.

Certainly, we canvassed it and I think it is consistent with what Mr Grubeck was saying at least at the start, that we would finish the witnesses of fact in the first week. If I work all the way through it, sir, and then maybe come back and tell me where you don't think it works.

THE PRESIDENT: Yes.

MR JOHNSTON: Then we would look to finish the experts in the second week. My recollection is certainly, as to the witnesses of fact, that's consistent with what all the parties said they needed beforehand, but I can be corrected on that.

THE PRESIDENT: We have experts finishing Wednesday, the 7th.

MR JOHNSTON: Yes, sir. My suggestion is that were we to finish the witnesses of facts on Friday, 25th, and the experts were to begin on Tuesday, the 29th, then the experts could be finished on Friday 2nd or Monday 5th.

I am cautious to make too many submissions on this because I am not calling an expert. I think I am accurately reflecting the discussion I had with Mr Palmer. He has not poked me yet, so if I press on.

What that would enable us to do is to file written closings at the beginning of the third week and then begin the oral closings in that third week, whether on the morning of the 7th or the morning of the 8th, thereby building in more time for the parties to address the Tribunal.

Now, there obviously can be a discussion about precisely when the experts finish. I am cautious on that point. I am not calling an expert, so I don't want to tell you when the experts can or can't be done by. I am conscious that nobody has suggested the witnesses of fact would need more than four days. I make the suggestion, sir, because, as I say, my client -- but I know we are not the only party -- does place a particular premium on being able to address the Tribunal as to the facts and as to the law. Against that backdrop, consistent with paring back to some extent, which I think is already agreed and has already been discussed -- it is a question of precisely how much -- the time for preparing written closings. As I say, from my client's perspective, that's something we would almost have on the stocks at the beginning of the trial. Candidly, nothing very much or certainly not a huge amount is going to change over the course of the trial itself. Then that would leave slightly less time for that and more time consistent with Ms Ford's submission, maybe perhaps particularly for those of us whose case is not primarily advanced by way of factual evidence, to address the Tribunal.

Now, sir, I can tell you what I think my irreducible minimum is. I can be confident -- we can all tell you what our irreducible minimum is, and we may not have enough time. Before I stood up, I was going to tell you that my irreducible minimum was a day and a half. I recognise that, as it stands, the time available to me is half a day plus a short amount of time in reply. It really is my submission that half a day is not sufficient.

Just by way of backdrop, as well as all of the substantive infringements, you are also going to have to hear submissions on penalty. Penalty appeals are frequently listed for three or four days in this Tribunal. I looked back at all the cover pricing cases from ten years ago to see how long they were listed. Again, they were listed on their own, each individual appellant for two days, even though there were groups of Tribunals sitting together to hear them who saw things across the piece.

You will understand entirely why, from an appellant's perspective, significant time to address the Tribunal on penalties is extremely significant. It is crucial that they are able to explain why they think there should be no fine at all, or the fine is disproportionate, or why the CMA has erred in law and/or assessment at various steps of a complicated process.

I don't make this submission to throw my hands in the air and say "Despair, despair, it is going to be impossible", but merely to identify there are complicated issues that the Tribunal is going to want assistance on orally as well as in writing.

So, sir, that's my submission. I am looking at Mr Palmer to check whether or not I have suggested the timetable that I think was originally his proposal, I have reflected it accurately. Perhaps the best thing for me to do is pass over to him, unless I can assist you any further, sir? As I say, my plea is simply that two and a half hours is not going to be adequate, and indeed is not going to be fair, were it to be two and a half hours, given the gravity of the matters that arise.

THE PRESIDENT: Thank you. Mr Palmer?

MR PALMER: Thank you, sir. As you and your colleagues know, I appear for Intas. Intas is again in a unique position as an appellant. The first way in which it is unique is it was not involved or allegedly involved in any of the agreements. It came on to the scene, if you like, at the beginning of 2017, and by then the agreements or alleged agreements had long since passed. So, anything concerning the agreements does not concern us at all. We are looking only at the alleged processing abuse. On that we take no point on market definition. There are other appellants who argue that the market definition is too wide. There are other appellants who argue that the market definition is too narrow.

The CMA, rather like Goldilocks, says "We have got it just right, in the middle". None of that directly concerns us.

Our period of ownership begins only after there was market entry by the generics. Again, we are unique in that. So, prices were falling when we took ownership and they continued to fall and only fell during our period of ownership, inexorably, we say.

Now, that raises an issue which is not raised by any other appeal relevant to both dominance and abuse. You will not be hearing those arguments from any other appellant. I'll just make one thing clear now -- I am not seeking to get into those arguments, but just making clear that there are discrete arguments in Intas' appeal which do not arise in the same way or at all in the other appeals, and much of what is being advanced to the Tribunal by other appellants in relation to the agreements, in relation to market definition does not concern us at all.

The issues that do concern us we say introduce quite a novel situation. We see no precedent for a situation where an undertaking has been found to be dominant and/or abusive in those circumstances where prices are only ever dropping.

We say there's a lot to unpack there, a lot to advance. It is in part dependent on the expert evidence from Mr Bishop, which we are adducing. But the factual evidence that we adduce is of actually very limited compass. We know from the timetable it is noted there are nine witnesses of fact. That needs some context and texture around it. There are five witnesses of fact called by Advanz in support of Advanz's case that as a matter of fact there was no 10mg agreement. That's a matter for them and not for us. That's a weighty, meaty factual dispute. Five witnesses.

There is one witness for Allergan, who you have heard is much shorter compass.

Our three witnesses, one of them is a solicitor, Nicole Kar, who simply sets out in her witness statement a procedural chronology. We don't anticipate that is going to be remotely controversial. It is just about the chronology of the investigation. One witness who deals with one discrete point relevant to penalty only. It concerns a 5% uplift or discount, as the case may be, on penalty. It is an important point, because when you are fined £44 million, 5% is still worth a lot of money. So, we want to make that point, but we don't anticipate, in terms of proportionality, and the use of the Tribunal's time it will occupy very long.

We have one witness who again is here to give evidence as to corporate governance, the circumstances in which Intas took over the undertaking in question, the due diligence that was undertaken and so forth, relevant to knowledge of dominance and abuse and so forth, but again in narrow compass relative to the whole appeal.

So not an awful lot of time we anticipate is going to be taken up over those witnesses. Most of the time on factual evidence will be taken up, we anticipate, in relation to Advanz's five witnesses.

So, where that takes us in terms of implications for the timetable is this. We say no party suggested to the Tribunal that cross-examination by the CMA of those

witnesses would take longer than four days. We say that is, in fact, ample. There is no cross-examination from any appellant. It is only the CMA which is going to cross-examine, and it is their own time estimate of four days, with which we agree, which they advance. We say although, of course, generosity of timescales from the Tribunal is normally welcome, this is, as you have been hearing from the various appellants actually, even within five weeks, is quite a condensed intense trial, and rather than be generous there, we would ask that generosity be given further down the timetable, further down the timeline, in terms of closing submissions.

If the Tribunal were, on reflection, receptive to that, it could mean that the factual evidence was dealt with entirely in week one.

So far as the expert evidence is concerned, we, like the CMA, advance an estimate of four days for that. Now, the Tribunal know that there was some discussion as to how much should be hot tub, how much should be cross-examination. We have heard what you said about that. Our estimate was put forward on the basis that there would be some combination of cross-examination and hot tub and four days was adequate to deal with that.

So, we would suggest that, in fact, the expert evidence can be done with in week two, but even if I am wrong about that, and you take one more day, the fifth day, that means you can conclude the evidence on Tuesday, 6th December.

In the skeleton arguments, no party suggested to the Tribunal that longer than two days would be required to prepare closing submissions. That reflects the fact that it is only really Advanz who has to build in the results of an intense factual cross-examination and that sort of dispute, which I can understand. Maybe they can proceed on a slightly different timetable than anybody else. We will certainly be seeking to build in the results of cross-examination and hot-tubbing of the experts into our closing submissions, to say how the results of that exercise do or don't affect

our submissions. But we only asked for two days originally.

Auden, who might appropriately, we would say, go first, in fact, on closing submissions, would be ready to run without any prep time for those closing submissions because they are entirely unaffected by those factual and expert matters. So, you could have a slightly different timetable where, in effect, we get cracking after a couple days' break for closing submission, where Auden kick-off with their closing submissions. There is still time at the weekend for written closing submissions to be completed, to be submitted on Monday morning by, say, 10.00 am, to allow a day of reading for the Tribunal in respect of those closing submissions.

If such an approach were taken, it is perfectly possible to expand the amount of time available for oral closing submissions to six days, which would be two days for Auden, as Ms Ford has submitted, and one day for everybody else.

The CMA say they require parity. We say that is, in fact, unrealistic. Let me just by analogy take a step back and just look at the Notice of Appeal, the pleadings that you have, and what the CMA's response to it was. What they have not done is provide five separate defences, five separate arguments in respect of five different appeals. They have produced a joined up approach, if I can put it that way, a consolidated Defence addressing themselves to various themes which emerge from the different appeals in that way. By doing that they have managed to be substantially more concise than if they were to deal with each appeal entirely separately. We say there is absolutely no reason why they can't take the same approach in their closing submissions, both written and oral.

In circumstances where there are common themes across the different appeals, they can deal with it in that way, and they can say why the porridge is not too hot, why the porridge is not too cold, why it is just right in the middle and so forth, embracing all

those market definition arguments, to take that example, at once, as they have done in their consolidated defence.

If you were to have six days of oral closing, four days for the CMA of closing and their reply, managing the evidence as I have suggested, you thereby accommodate every party's best estimate of the length of time for the factual evidence, every party's best estimate for the expert evidence and every party's desiderata for the amount of time to address the Tribunal in closing.

That would be my submission, sir, not that the Tribunal should automatically follow what the parties say, but looking at issues, unpacking them, actually identifying how much common ground there is or is not -- you have heard about the different issues and different approach of Ms Ford. We say our case is very different. You just heard from Mr Johnston about the discrete issues that Allergan's appeal raised. You have not yet heard from Cinven. No doubt they will press the Cinven point, I don't know. By taking such an approach, the Tribunal is actually, now that the five week time estimate is being adopted, able to accommodate this in a way that is fair and full and respects every party's desire to address the Tribunal fully on the points raised, which in our case can't simply be done in writing in advance, but does involve a synthesis of that factual evidence, expert evidence and novel legal submission.

We would wish to be able to answer the Tribunal's questions on that. We would wish, as you said, sir, traditionally an interventionist Tribunal, we would wish to be able to meet your concerns, make our best arguments in response to whatever points have struck the Tribunal. That's something which only sufficient time in oral closing can do. That is why we urge it upon the Tribunal in that shape and in that form.

THE PRESIDENT: Yes. Thank you.

MR SCHAEFER: Sir, I will try to keep this simple, because I have got a bit lost in

some of the detail of the last few proposals. We would, all else equal, have been quite content with the tweaked version of the timetable that you discussed with Mr Brealey. That would have given us half a day for oral closings, which is what we asked for. We recognise that other parties seek more. Trying to follow what has been said about that, I think the concern for us would be that one ends up with a situation where there's very little time for the preparation of written closing submissions, where we at least will have a great deal to deal with on the back of the factual witness evidence. So, it would be very hard for the Cinven appellants to go very quickly from the close of expert evidence into closing submissions.

One proposal that I understood you, sir, to have floated, which I think was also what Mr Palmer was saying, is given there are two parties who have either no or very little investment in the factual and expert stages, one could, as it were, bifurcate it and go straight from the closing of expert evidence into the oral closing submissions of those parties that don't care about what just happened, leaving those parties that do to have more time to prepare and file their written closing submissions. That I realise may make things a little more difficult, a little more complicated in terms of the CMA's approach, but if it could be worked out, I submit that would be the simplest way to deal with it for everybody.

A couple of other brief points. On the question of opening submissions, the CMA has reiterated its request for the deadline of 11th November. For the reasons that nearly all of the appellants have set out in their skeletons, we do suggest that the 7th would be sufficient for that. We also do invite the Tribunal to vary the default page limit, although it will be optional, for those (inaudible) 20 pages is highly unlikely to be sufficient. Beyond that -- I believe that's it.

THE PRESIDENT: Thank you. What we are going to do is we will rise for five minutes just to work out precisely how we are going to disoblige the parties and

we will come back at 12.50 to tell you exactly what we are going to do. Thank you.

(Short break)

THE PRESIDENT: So, we have discussed the submissions that the parties made about trial structure and what we think should happen is this. We would like to have written closing submissions by Allergan and Auden/Actavis by close of business, that's to say 4.00 pm on 7th November 2022.

We would like, somewhat perversely, the CMA's opening submissions, if so advised, by 11th November 2022, and we would like everyone else's, including the CMA's closing submissions, by 4.00 pm on Friday, 9th December 2022, with closing submissions orally starting on the following Tuesday, 13th December. So that is the structure of written submissions that we are going to direct.

If any other party wishes to put in written submissions before the trial, they are, of course, at liberty to do so, but I hope the parties have heard what we have said about the weight we are attaching to that. We consider that to the extent that work is done on submissions, that is probably better directed either to the ambulatory draft or to the closing submissions, but we are certainly not going to close out the parties from submitting what they consider would be helpful for the Tribunal to read.

We are not going to impose any page limits in respect of the submissions. We know that the parties understand that we will find shorter submissions easier to read, but this is a complicated case. As a number of parties have said, this is an area where submissions are important, and for that reason we don't think that page limits are appropriate in this case, but less is always more.

In terms of the trial itself, we have heard what the parties say, or some of the parties say, about cutting back the time for witnesses of fact and experts. We are not going to do that. We are going to stick to the timings that we articulated, and the reason we are doing that is because certainly our experience is that one is always pressed

for time with the factual and expert evidence. This case may be an exception, but what I don't want to have happen is for either the Tribunal or the CMA or any of the other parties to feel that they are needing to move more quickly over terrain which could be unpacked more slowly by reason of the trial timetable.

We say that confident that we can accommodate the parties' desire for very full closing submissions.

Turning to those, oral closings will begin after the non-sitting day on Monday, 12th December. So, we will start on Tuesday, 13th. We are going to allocate five calendar days to appellant closing submissions. So that's the Tuesday, Wednesday, Thursday, Friday of week four and Monday of week five.

We are going to indicate that we consider that Auden/Actavis should have two ordinary court days, and I want to underline ordinary court days, to make their closing submissions, and that Allergan should have one ordinary court day to make their closing submissions. By "court day" we mean 10.30 to 4.15, one hour break for the short adjournment for lunch and two ten-minute breaks, one in the morning, one in the afternoon. That is the time that Allergan and Auden/Actavis can bank on to make their submissions. We are going to be entirely open to stretching the court days in order to accommodate the needs of the other parties, and we will consider that as the need arises later on. But I don't want any party, apart from the two that I have mentioned, to feel that they are going to be short-changed in terms of needing to hear from them. We will cut our cloth as appropriate, and it may be, if the parties are right and we are wrong, that we have actually got more time to play for if the witnesses of fact or the experts go short.

So, we are entirely open to revisiting this process, but we don't want to close out the option of asking significant detailed questions of either the witnesses of fact or the experts.

So that brings us to the close of Monday, 19th December. We will then have three days for the CMA to respond. We think that that is an appropriate like for like. I appreciate that five is not the equivalent of three, nor three the equivalent of five, but subject to again stretching those, we consider that there is enough overlap between the appellants' cases for three days to be more than sufficient for the CMA to address us.

Again, we will stretch those days as appropriate if the circumstances require.

I am afraid that means that replies will be on Friday, 23rd December. I am not quite cancelling Christmas, but I don't think we can accommodate preparation time, reading time and the amount of time that the parties want for closing submissions without going the full length of the term, and I am afraid that is what we are directing. Again, if matters prove to move more quickly, we may be able to finish sooner, but that is the timetable that we are directing today, subject to later adjustment.

Now, I see the time. We I think have got at least the annexes to the ambulatory draft to discuss. We will rise until 2 o'clock unless there is anything else. Mr Brealey?

MR BREALEY: There's one very short point, if I may. May I ask the Tribunal to direct, in light of what the Tribunal has just said, that the experts hold themselves available to give evidence, if necessary, on Tuesday, 29th November so that if the factual evidence does go short, we can then actually use that time to make progress?

THE PRESIDENT: Well, I think that is a point well made, Mr Brealey. We would like that to happen and more to the point we would like the experts to ensure that they are available or that their non-availability is articulated very soon for the entire period between 29th November to 7th December, because there is the question of how we allocate hot-tubbing time and I wouldn't want that process to be prejudiced by the non-availability of a certain expert. So, I am very grateful to you for raising that point,

Mr Brealey.

MR JOHNSTON: As Mr Brealey has just indicated, a very brief point which you probably anticipate. To the extent that Mr Stewart is cross-examined, sir, if there are very brief submissions to make as to that in written closings on 9th December -- sir, they may not be necessary at all, but just to put down a marker, subject to what the CMA says, my client may wish to put something in in writing at that point. As I say, it will be terse and addressed to that point only.

THE PRESIDENT: Let me be clear that we are really trying to set out the tectonic plates of how this case is going to be run rather than granularity.

MR JOHNSTON: I am grateful, sir.

THE PRESIDENT: This may be an unwise thing to say, but we consider that, generally speaking, hearing more from the parties rather than less is better. So, to the extent that anyone is saying that they need to put in something more, which is not consistent or not provided for in the timetable, we will be pretty receptive to that sort of thing.

MR JOHNSTON: Sir. That's a very helpful indication. I'm grateful.

MR BREALEY: Very last thing. Dr Newton is the regulatory expert, and she doesn't really need to be there when all the economists are there. I think that's uncontroversial.

THE PRESIDENT: If that's uncontroversial, so be it. Really what I want to avoid is the sort of car crash where one has a solution, but it doesn't work because an expert is entirely understandably booked elsewhere.

Thank you. We will resume then at 2 o'clock. Thank you all very much.

(1.10 pm)

(Lunch break)

(2.00 pm)

THE PRESIDENT: Yes.

MR GRUBECK: We have had the opportunity to reflect over the short adjournment on the latest indication of the timetable that the Tribunal gave. There is one fundamental concern that we would like to raise in respect of that.

THE PRESIDENT: Yes.

MR GRUBECK: On the timetable, the appellants are afforded twice the amount of time for their oral closing submissions.

THE PRESIDENT: 5 versus 3.

MR GRUBECK: Five plus one day in reply, so in total six days for the CMA. We are concerned that creates a forensic imbalance that leads to a fundamental unfairness. Under rule 4 of the rules, there's a requirement to put the parties on an equal footing. We are dealing with 23 grounds of appeal. We appreciate there are some efficiencies in addressing those, but nothing that would warrant truncating the CMA's time to respond to half of that of appellants. Simply put, we need to be afforded enough time to engage with these grounds of appeal at a similar level of granularity as the appellants are given to set them out.

Ms Ford, for example, has two days. It stands to reason that a similar amount of time is required to properly address the points raised in those. That is heightened by what is now a very short period of time to prepare written closing submissions. The expert evidence finishes on 7th December, with written closings due two days later on Friday. It stands to reason in that context there will be a particular focus on the oral closing submissions. In that context, the CMA says in order to have equality and to have fairness, it is necessary that we be afforded at least an extra day, but certainly something much more equal to what is currently envisaged.

THE PRESIDENT: Okay.

MR GRUBECK: If I may add, we are, of course, conscious that this is all being done

as we go along, and it is a complex timetabling exercise. We are not opposed, now that it has been decided there will be a five-week trial, if the exact parameters of how much time is afforded to whom at which point in that trial, that can still be considered in light of the finalised ambulatory draft process, the finalised joint expert statement at the pre-trial review. So, if it is not finalised today, we are not opposed to that, but we just wanted to put this concern on record.

THE PRESIDENT: Well, that's very helpful. We are not going to change the timetable that we have indicated. Obviously, what is front and centre in our minds at all times is the question of fairness, and this Tribunal is not in the business of running things in an unfair way. So, we will keep a very close eye on what is needed right up to the time when closings begin. If it should prove to be the case that we have got it wrong, and actually one has five days of closing submissions from the appellants which are so densely packed and so requiring of unpacking by the CMA in more than three days, then those days at that time will be made available. It will mean pushing the case into the New Year, but that is what we will do.

We don't consider the time-frame to be on the face of it unfair. I am bound to say we think we have probably erred on the side of giving the appellants a little bit too much time, but it was because of the force of Ms Ford's submissions that this was really the only time that her clients would, in fact, be able to move their case before the court that did have significant influence on our thinking, because justice needs to be seen to be done as well as done. But we are not persuaded by that fact that three days -- and we make clear these are going to be three long days, if required -- is insufficient, but our door is always open to revisit that, if necessary, quite aggressively.

You also should bear in mind that you will be getting the Allergan and Auden/Actavis closing submissions well before the trial, in fact, begins. So, there will not be very

much by way of rabbits being pulled from the hats by Ms Ford or indeed Mr Johnston when the hearing ends, because it will all have been factored in. So, for those reasons, although we will keep our eye on things, we are going to stick with the timetable that we indicated this morning, but thank you for raising the point.

Who is going to speak on annexes 3 and 4? Mr Brealey, you are --

MR BREALEY: I was not necessarily going to speak, but I will start off.

THE PRESIDENT: Very good.

MR BREALEY: I am not quite sure what the position is really. From our perspective, if I just take a step back, I think things are progressing by the looks of it. We have had Intas' response to some of the annexes. We have had the CMA's response to some of the annexes. In order to put this in context, could I just refer you to the Decision and our Notice of Appeal. We might as well have a look at some documents.

THE PRESIDENT: Yes, of course.

MR BREALEY: In the decision, which is bundle 4, tab 77, page 134, and what I would like to do is just highlight why much of this should not be contentious.

THE PRESIDENT: 1434?

MR BREALEY: It is bundle 4, the decision. It is 134 of the bundle, which looks like 134 of the decision, paragraph 3.280.

THE PRESIDENT: Do you have the pdf page number. 141? So, I have got a page which starts with the small paragraph (d):

"Morrison's purchasing decision."

MR BREALEY: Is it possible to get to paragraph 3.280. We will have to get this sorted out before the trial.

THE PRESIDENT: We will certainly have to do that, yes. 3.280.

MR BREALEY: If one is looking at Morrison's purchasing decision, one is going

back four pages. The heading of the page is "Pharmacy".

THE PRESIDENT: I have got it. Thank you. Yes, I have it.

MR BREALEY: Obviously we will not go through this, but this is in the decision. This is the CMA's reference to the pharmacy and wholesaler evidence about dispensing decisions after skinny label entry, the child's version.

THE PRESIDENT: Yes.

MR BREALEY: We see here, foot of the page, the ten largest pharmacies' account, and then over the page you get it set out, and then at paragraph 3.282 there's a reference which we will see time and time again to, despite them being bioequivalent, there was real difficulty in selling it. I don't want to ignore -- 391, footnote, note of a call between the CMA and Day Lewis.

THE PRESIDENT: Yes.

MR BREALEY: We go over the page to (a), (b), (c), (d), (e), (f), (g), (h). We have reference to Asda, Boots, Lloyd's, Morrison's, Rowlands, Sainsbury's, Superdrug, and we see the reference to this is what you would expect, section 26 notices or courts.

THE PRESIDENT: Yes.

MR BREALEY: What we did -- we can put that away, but that is essentially the pharmacy evidence in the decision. All that Advanz did, if we go to -- this is essentially how the annexes kicked off -- if one goes to bundle 2A. I do have an IR number for this. Bundle 2A, and it is IR A1.2/4/1.

THE PRESIDENT: Do you have a pdf number as well?

MR BREALEY: Again, I don't have -- we are all going to have to be from the same hymn sheet. It is bundle 2A, tab 30.

THE PRESIDENT: Yes. Thank you.

MR BREALEY: So, this is annex 4, which is really now annex 3 to the ambulatory

draft. So, all we did was the decision refers to pharmacy and wholesale evidence. Those are the paragraphs. This annex gives more detail of the relevant evidence, and it is evidence. You floated, sir, there should be maybe a witness statement from Boots, but this section 26 response does constitute evidence.

So, part 1, we set out from the case file what Boots said to the CMA. Then we set out what Lloyd's said to the CMA and that's -- if there were any submissions, so be it. It is the Notice of Appeal. We are setting out the evidence. That is essentially all that should be in the ambulatory draft. So, we have never really seen a problem with if a response has been omitted, if we haven't got all the responses, but it does give the Tribunal a context, colour and the details to the statements in the Decision which says that 60% of the market by value was de facto incontestable.

Now, people can make submissions on this evidence as they wish at trial, but this was the purpose of the ambulatory draft, to lay the cards on the table and as much evidence as is agreed to, or not. Now, as I understand it from the Intas response to the latest version of the ambulatory draft and the one we got from the CMA on Friday, there has been some engagement on this.

Clearly, Intas and the CMA do not like us referring to the skinny, the child's version, and they strip that out. We can debate about that. But they have added more responses in. We say it should not be that controversial. Whether it stays in our annexes or it finds its way into an ambulatory draft which people seem to be agreeing on, we don't really see much of a problem.

THE PRESIDENT: Yes. I mean, the problem is not whether it should or shouldn't appear in the ambulatory draft. The problem is that the parties are obviously having some difficulty in agreeing it, and to be clear, we don't have a problem per se with parties disagreeing about the evidence. I mean, that's the point of an on merits appeal that such disagreements are articulated, brought before the Tribunal and

resolved. So, if this is a case of genuine dispute, then we need to find a time in the timetable to sort it out.

It seems to us, looking at the annex which you created, which originally appeared in the body of the ambulatory draft, that whereas what one derived from the granular data was controversial, the data itself appeared to us not to be. So, we took the view - let's cut it out of the body of the draft, throw it into an annex where you can say "Look, these facts and matters are agreed, but what they signify, well, that's a matter for debate, and that's how these things should be done". What one shouldn't have is an unarticulated dispute on the facts which then obscures the significant debate about what the facts mean at trial, because it really leads to a completely wasted time and the potential for a very wrong outcome, if we have got people making submissions about what one derived from certain facts when, like whack-a-mole, the dispute on the granularity says, well, you can't talk about the general proposition, because we disagree with the following three bits.

That is what either needs to be closed down by the parties agreeing, or to be clear, it needs to be there front and centre in the trial timetable so that we can decide it.

For our part, we don't see a proper middle ground. The problem with regulatory appeals, as opposed to your ordinary civil action, is that the pleadings serve that function. You have a very clear articulation of what is and what is not in dispute, and you therefore know what evidence to bring in. When you've got a decision running to many hundreds of pages, articulating no doubt many thousands of facts, you can't do it and don't do it. It may be most of the facts are uncontroversial. But my experience of appeals is that one can get controversies arising out of the most surprising areas, where you think there's common ground, and suddenly, in the course of argument, someone says "Well, I didn't understand this fact to be so", and before you know it you are into an area of factual engagement without the material to resolve it. That is

one of the purposes behind the ambulatory draft regime.

So, really, the reason we have raised it is not because we want to resolve this problem, but we do want to articulate it, in that if it can't be agreed, and we are not wanting the parties to agree things that can't be agreed, if it can't be agreed, though, we need to know where the factual dispute lies and how, in the course of the hearing, we are going to resolve that.

It would be entirely unsatisfactory for there to be, as it were, two rival annexes on this point, let us say, where there are disputes on the facts which no-one addresses us on during the course of the hearing, which we then resolve when writing our judgment, because we have to, which might have a bearing on the outcome. That is the converse of a just process.

MR BREALEY: That I understand. If one goes back to the old annex 4 -- we don't have to do it -- it is basically setting out the evidence. I am drawing a distinction between fact and evidence. What the annex 4 was designed to do was to set out the evidence that had been submitted to the CMA in support of a relevant fact, and then a submission X, Y and Z.

As I understand how the parties are getting together, they are stripping out from our annex certain kinds of submissions and then you have just got the evidence. We don't see a problem with that because I am looking at the CMA's version from Friday. It seems to be that they want to keep it quite deadpan, and it is just limited to the evidence.

THE PRESIDENT: Right.

MR BREALEY: Now if that is the case, that surely will assist the Tribunal, because if one is going to argue about whether the market is contestable or not, you then do have the evidence that has been given to the CMA on the file in the ambulatory draft, which will constitute valuable information as to whether it was contested or not.

THE PRESIDENT: No-one I think is disputing the value of this material. I think what we are discussing is how it can, in a process that is inevitably time-limited, fairly unpack what is significant. It may be what has been done in other parts of the ambulatory draft should be done here, namely one creates a clip of the relevant evidence, highlights the bits that we should read on this point, and makes lucidly clear what the clip of documents is going to, so we can then read the highlighted parts with that point in mind, and avoid the inevitable problem which gives rise -- because no doubt each side is thinking the other side is so clever that they are putting a cunning spin on the synthesis of the material that will decisively swing the Tribunal's views one way or the other.

MR BREALEY: It is our job.

THE PRESIDENT: It is your job. But we are pretty alive to spin.

MR BREALEY: Yes, I agree.

THE PRESIDENT: Frankly, we are much more interested in the facts and the submission from the facts.

MR BREALEY: And the evidence.

THE PRESIDENT: Indeed.

MR BREALEY: That's why I rose, because a lot of this is just section 26 evidence, and then it is for the parties to draw their own conclusions, which they can now. They have five weeks in which to do it. But it occurred to us it either stays in annex 4 to the Notice of Appeal for Advanz, and then we deal with it as we need to deal with it. If it is to be found in the ambulatory draft, the parties seem to be getting together and it is, as I say, more deadpan now. It is far more limited to who said what, and when, rather than -- I mean, I can take any paragraph. We say something -- this is our Notice of Appeal -- we said something and then we supported it by reference to the evidence.

If the ambulatory draft is just going to give the Tribunal a checklist of the evidence on pharmacy responses, which in the light of the Court of Appeal and the Tribunal in Phenytoin is clearly quite critical in a case of this kind, so be it. We believe it is quite valuable.

THE PRESIDENT: Mr Brealey, we are not at this stage in the business of working out what is or is not of value. If you say it is something we need to look at, then absolutely we must do so. What we are debating is the manner in which most efficiently and most fairly this material can be brought before the Tribunal. Sometimes a synthesis is the best way of doing it, but sometimes a synthesis is itself so controversial that you either have to have two or none.

MR BREALEY: Yes.

THE PRESIDENT: In that sort of case a co-location of documents, which are directed to a particular purpose so that we can read all of the documents in one go on that point and then raise questions that we might have or at least hear submissions on the material, is the best way forward.

Now, we have picked annex 4 as the example, but this applies to any number of points. What I don't want us to be left with is for you, in closing, to say "X is clearly the case", whatever X might be, and we say "well, why do you say that, Mr Brealey?" and you say "well, if you look at the totality of the evidence in the decision, that is the inevitable conclusion, because we are going to be saying there is several thousand footnotes in this". Are you expecting us to pop through each one of them and work out whether it relates to the point you are making or not?

That's just not a fair or efficient way of doing it. So what we are trying to do is get a vehicle that ensures that we have, well before the hearing starts, well before you are making your submissions or anyone else, the wherewithal to understand that which is uncontroverted and that which is controverted not because it is disputed as

evidence, but because its significance is disputed and then, of course, where the evidence itself is controverted, we need to hear witnesses and we will look at the documents with that in mind.

That's why we have raised it, because we felt that the process wasn't quite working as we expected, because what we seem to be seeing was a series of factual disputes on this annex and elsewhere which wasn't budgeted for in the dispute resolution process that we have been spending the morning discussing, and that is something which shouldn't I think be happening in order to get a satisfactory outcome.

So, it is no criticism at all of your clients. It is much more an articulation of a problem which the ambulatory draft regime has given rise to, but which would arise in any event probably when we were writing the judgment, and that is not when this sort of question should be rearing its head. It should be there well before that.

MR BREALEY: I am not sure I can say much more.

THE PRESIDENT: No.

MR BREALEY: All I can do is repeat that we set out the evidence. Clearly Intas and Auden will have different submissions on the pharmacy responsive evidence than we will, but the long and short of it is the evidence to the CMA is on the case file.

THE PRESIDENT: Yes.

MR BREALEY: So, if it is in a handy place, whether it is our annex 4 or in the ambulatory draft, in my submission, will only assist the Tribunal if it has the totality of the pharmacy evidence in front of it.

THE PRESIDENT: Yes. Mr Bailey, you see where we are coming from.

MR BAILEY: I do, sir.

THE PRESIDENT: We don't want to waste anyone's time on costs, and we don't

want to duck issues that need to be decided. To the contrary, we want them floating on the surface so that we can ask what questions we wish. So, the real question I think, but you will obviously address me on how the CMA sees it, the real question is whether one lists the references and provides the documents for us to read, or whether there is enough agreement to enable a shorter formulation to save us reading the document. That I think is the basic choice on this sort of problem, but over to you.

MR BAILEY: Sir, we don't agree with the way in which Advanz describes its annexes, either to its Notice of Appeal or to the ambulatory draft 3 as simply as my learned friend put it, basically setting out the evidence. One can see that from the mark-up that we provided on Friday. Virtually every row has a heavy mark-up.

The purpose of the mark-ups was essentially to let the documents speak for themselves, to remove us from controversy, in line with what the Tribunal envisaged for the ambulatory drafts. Where there are facts and evidence, we have quoted that, and we would say that's hopefully an area where the parties could agree.

The objection that the CMA has had is that very often the narrative or the synthesis that the appellants have put for understandable reasons is one which the CMA respectfully disagreed with.

What we have tried to do, in light of your letter of 15th July, was revisit the annexes, and together the Intas appellants have similarly done the same. We hope the version we circulated on Friday moves closer to the aspiration that the Tribunal had for this material.

As my learned friend said just now, he described it as deadpan. I would describe it as neutral and dispassionate, effectively, that the documents set out the views of the pharmacies and the wholesalers, and that neither the CMA nor the appellants are then paraphrasing or putting particular points of emphasis on that. That will be

a matter for submission.

So, we had sort of three suggestions for how this could be taken forward. The first is that in line with the iterative process it would now be for Intas, Advanz and any other party to look at the mark-up that we have prepared and see to what extent that may be agreed. We live in hope that may be possible, particularly in light of my learned friend's indication just now.

The second is we are more than willing, within the time-frame set out by Clifford Chance, to put our edits together with the Intas edits so we produce effectively a cumulative mark-up of the Advanz originals annexes.

We have not done that so far because we are apprehensive that it will become unstable and unwieldy, but that's a sort of second route forward.

The third, which really arose from your remarks this morning, sir, where you asked the standalone question of "Does it matter?", our answer to that is that what matters is what the pharmacies and wholesalers did in practice. My learned friend took you to the decision. It's a very detailed document, but there is a table in that decision which sets out the data, which I think all of us would agree means what they say and show about who switched away from the (inaudible) product and who decided, for whatever reason -- it is a matter for submissions -- as to sticking to the product.

We would suggest a third way forward might be that the CMA could articulate the propositions that we say are relevant and material in a crisp fashion, a short document, but do so in a way that does not input any partisan presentation, just simply sets out for off-label dispensing and similarly for the responses to the orphan designation what are the foundations upon which all parties ought to be able to agree.

We would stay clear therefore of controversial matters. That's another way one could deal with this. We are really in the Tribunal's hands in terms of what you would

find helpful. My understanding is you would find helpful if we could agree, and it may well be that if the appellants were to look at that and tell us to what extent they agree our amendments, then perhaps those annexes can be common ground.

THE PRESIDENT: We will come back, Mr Brealey, obviously to you. I will respond to your point after I have heard from Mr Palmer.

MR PALMER: Sir, I think we are gradually coming to some sort of consensus. I very much hope we are. Certainly, I can agree with Mr Brealey that where we should be ending up is with annexes to the ambulatory draft which set out in neutral fashion the relevant evidence which goes to the issues with which they deal. Setting out that evidence in neutral fashion for each and every party to be able to make what submissions they want to on the basis of it is a valuable exercise which will bring all the relevant material for the Tribunal or anyone into one place.

The issues which have arisen to date and led us to this point have never been about what is described as contested facts. There is not, in fact, any argument over this evidence. What was contested was that Advanz's approach to drafting that annex was effectively to incorporate its Notice of Appeal annex, in so doing incorporating its submissions and its partial selection of the evidence and indeed its partial quotation of the documents which it had selected. That's what we objected to. We said "No, strip out the submission. The CMA have done that job as well. Strip out the submissions. Balance the document so nothing is cherry picked and it is all in one place and then we can all make our submissions from there."

Now, if that is where we end up, which is what we, for Intas, very much hope we can end up with, then there is no issue. The Tribunal can have a valuable document and we can all use it in the ways we choose in order to deploy our submissions.

Of the options which Mr Bailey set out just now, I think what came closest to an acceptable way forward was his second option, what he called the cumulative

approach, which was having started with Mr Brealey's document, the CMA have gone through that, stripped that submission, balanced it out. What they have not yet done is incorporated the additional material which we have identified in our draft circulated a day before the CMA's, in fact, and to bring that material, that evidence into the picture as well. That could usefully be done, and then you would have one document with all the evidence of all the parties, CMA, Advanz, Intas, anyone else who wants to chip in, put before the Tribunal. If that is the exercise, then that can be done. There need be no dispute on the facts for the Tribunal to resolve. The only matter for the Tribunal to resolve is what do you draw from all of that material? Do you draw, as the CMA say, that half the market had no choice but to buy the product or do you draw, as we say, that everyone had the same choice, which is why half the market moved away and half didn't, and they didn't do so, those who didn't, because they attached value to the product. That is the dispute to which it all goes to.

The third option which Mr Bailey outlined just now -- I am not sure I fully understood that -- he said what matters is what pharmacies and wholesalers did in practice. We can have a shorter document focusing on that. That I would resist, because the value of all these documents you have in the annex before you is that they set out the reasons why each pharmacy, each wholesaler made the choices they did, what they were weighing in the balance in order to make those choices, to what they attached importance, to what they didn't attach importance. It is not enough to say: "Let's look at what they did". You need to look at those reasons to understand whether the CMA can actually support their suggestion that half the market had no choice, thus rendering half the market captive in Auden's hands and therefore lending support to their argument about dominance, all of which is in dispute.

So, you need those reasons there in order for the Tribunal to arrive at its conclusions and what can be inferred from these documents, what conclusions can be drawn.

None of that is going to entail calling additional evidence from Boots or anyone else. You have the evidence. The question is what should be made of it within the framework of competition law.

I hope that assists. We just want a balanced document setting forth the evidence. If that's where we end up, then we for one have absolutely no difficulty at all.

THE PRESIDENT: Thank you. Mr Brealey.

MR BREALEY: Save that I object to the fact that we are being too partisan, I endorse wholeheartedly what Mr Palmer has just said. If everybody is agreed it is a more neutral, balanced document, and that's the iterative process at the end of the day, what the Tribunal wanted from the ambulatory draft, we are happy with it.

THE PRESIDENT: Well, thank you.

MR BREALEY: But I do disagree with the third proposition of Mr Bailey.

THE PRESIDENT: I am not going to direct that. Look, this is an example, only an example of the problems that arise when seeking to resolve on the merits a regulatory appeal. If this was a judicial review, it probably wouldn't matter. If this was a full trial where the evidence was being formally tested in the witness box or set out by way of a Civil Evidence Act notice, again the problem would not arise. The Tribunal would have the material, the evidence and it would then work out what that evidence led to in terms of factual findings and it would then feed those factual findings into the decision in order to reach an overall outcome.

What the ambulatory draft process has done is highlight these issues before they crop up at a trial. That is to our way of thinking a good thing. What we don't want is for each and every area of disputed fact to turn into a cottage industry where enormous amount of costs are spent in seeking to articulate a neutral outcome. We don't want agreement purchased either at the price of sweeping the dispute under the carpet or at the price of enormous cost.

Now, it may be that this process has gone so far down the route of spending lots of money that we are so close to getting an agreed document which will save us reading the underlying material. For our part, provided we have got the material that we need to read, complete and in one place, so that on any given point, we can read it, then we are very happy to do that. What we can't do is have the proposition being articulated first, which is inevitably going to be controversial, and then for the parties to say "of course we are right. Look at the evidence". Well, that's the point. We need to be looking at the evidence before the proposition is argued about so we can say "Well, hang on a minute. This particular paragraph in this particular section of 26 response says this, and that doesn't fit with what you are arguing".

That is the reason we need to know.

I strongly suspect that trying to synthesise things in most areas where there is a controversy is just not going to help and that the list of documents approach is the better way forward, but at the end of the day this is something where the parties are going to have to help the Tribunal make these sorts of appeals properly manageable. We are ready and willing and able to read a considerable amount of material, but what we can't do is go through the entire record, in an unorganised way, and try to work out what evidence goes to what points. That is not our job, and it is not one we can do, given the size of the record. So, I don't know if we can make it any clearer than that. We are not going to direct any particular course, because that would be I think to seek to impose agreement where none may be possible, but we do need this resolved before the hearing starts, not just on the annex 4 point but on all of these points where there is disagreement about interpretation, about significance.

We need to be aware of what the evidence is so that we can look at it, so that we are then in a position actually meaningfully to respond to what the parties are saying by way of submission. Frankly, we expect documents in the pleadings to be slanted.

Obviously, they are, because you are putting a case. That's not what should occur at the hearing. At the hearing both sides have the opportunity to put forward what evidence they think the Tribunal should see. The oddity about regulatory appeals is that you don't do that. You don't have a witness in the box speaking to every single fact, nor do you have a containable documentary record which has every point.

So it may be that you simply put in a CEA notice on the point and say: "Look, on this point the parties require the Tribunal to read the following highlighted documents" and leave it at that.

I hope that's clear enough. By all means agree the annex if you can do so in the course of less than a day, but don't spend more time than that, because I do think that the costs would be indefensibly incurred, and just give us the list.

That applies not just to this but take the documents we need to read in order to understand what exactly were the agreements between the parties. Again, that's something where there will, of course, be a witness supplementing the documentary record, but we ought to be up to speed on the documentary record before the witness ever comes into the witness box.

Again, I am quite sure that what was agreed can be characterised in multiple different ways, and we expect that. We expect to have submissions, but we do need to read the material that the factual witnesses in this case will be speaking to, and what you in due course will be submitting, because if we have a situation where, when we are writing the judgment we come across a document and think "Hello, this is very interesting. I wonder why we didn't see this before", that is precisely the sort of thing that shouldn't happen, and in ordinary trials does not, but in this sort of case, because there are so many facts and so many of them are susceptible of agreement, it's a real problem.

I have said enough. Unless anyone has a view that this is not a practically possible

way of going forward, then shout. Otherwise, we will move on to whatever else is on the agenda.

MR SCHAEFER: I am not standing up because I doubt it being a practical way to move forward, but to raise a rather boring timing point. It sounds as if the parties are going to go away and thrash this stuff out. At the moment, as I understand it, we are all due to be filing our comments on AD3 on the 29th, this Friday, and that's not going to be long enough. Mr Bailey has indicated, helpfully, that he is content with the timing we suggested inter partes, which I think was 12th August, but I am not sure what other's positions are. We will need some extension from the Tribunal in any event.

THE PRESIDENT: No, that's an entirely fair point, Mr Schaefer. Thank you for raising it. We only want to control the ambulatory timetable process to keep the parties in line to produce something that is going to be ultimately a helpful rather than unhelpful document. We don't want to ruin people's summers and we don't want excessive costs to be incurred.

If the parties think and if they don't think it is possible, they should say, but if they think we have given enough of a steer whereby a helpful document along the lines that we have described can be produced by, let us say, mid-September, then we would be happy -- just checking that we would be happy -- we would be happy with that sort of approach, because at the end of the day this is a process that is intended to assist the parties assist us in deciding what are the key points. What we want is the bits that are unimportant or agreed there so that we can note them, and we want, more importantly, the bits which are significant and contentious, those we want front and centre in our minds, come the trial in November. Does that address time concerns?

MR BREALEY: I think we know where we are. That is very helpful.

Mid-September, if we can agree this pharmacy evidence, so it be. If we can't, we can't. We take on board the lists of documents. I think that's where we are, and we will take it away.

THE PRESIDENT: Very good. Well, thank you, Mr Schaefer, for raising that point. Is there anything else we need to debate before we have a pre-trial review next term?

MR BAILEY: Sir, Advanz did raise in their skeleton about the position of the CMA in relation to the other annexes to its Notice of Appeal. I don't know whether my learned friend is pursuing that the CMA should be required to plead back to those --

MR BREALEY: I think we know where we are. We are not pursuing that. I think we will try to deal with the pharmacy evidence. We will not pursue that the CMA has to respond to annex 1. We will try to do that another way.

Just so the CMA know, we will have to write to the CMA about Dr Newton. The Tribunal have seen that we put an expert report in the Notice of Appeal. The Defence has never responded to it. They've not put any evidence of their own on the marketing restrictions and yet they have said what she says is controversial. At some point we will have to know why the CMA says what she says is controversial, because we do not know. I think that is an important point that has to be sorted out before the trial.

So, in a nutshell it is that she has said that some of the -- that a flyer by a third-party supplier, Alisa, did not comply with the regulations. We said that in the Notice of Appeal. The Defence doesn't deal with it, doesn't adduce any evidence to gainsay what she said and yet we are told in the recent correspondence that it is controversial, although it has not been contested.

I think it is only fair to us and to her she is told what the contrary position is at some point, but we can do that through correspondence.

THE PRESIDENT: Since it has been raised, we may as well work out what the nature of the problem is. I think you have really made two points, Mr Brealey. One is that what goes for the annex formally known as annex 4 goes for other similar annexes, and we want, as we said, materials that assist us in understanding what we need to understand.

MR BREALEY: We'll definitely do that.

THE PRESIDENT: That's clear.

The position regarding Dr Newton, we operate a card on table approach here, but I should hear from the CMA first before I say anymore.

MR BAILEY: Sir, we are very happy to put our cards on the table. We didn't think it was the function of the Defence as such to gainsay the evidence of an expert, nor was it incumbent on the CMA to call its own expert. It is always the right of a party to cross-examine. What we objected to in Advanz's skeleton was the novel suggestion that we should use the ambulatory draft process to give advance notice of matters that the CMA may wish to put in cross-examination, but on your point about cards on the table, the CMA is perfectly happy to write a letter to Advanz's legal representatives setting out the broad propositions or contentions that are in Dr Newton's report to which we object, and so that, therefore, she is aware of the CMA's stance.

I should add that our position on the implications of the orphan designation is dealt with in detail in section 3(d) of the Decision. So, it is not as if the CMA's position has not already been articulated at some length, but if it would help, the CMA is very happy to set that out in a letter so that Advanz and their expert know where we stand.

THE PRESIDENT: We are not, at least not in this set of appeals, in the business of re-writing the procedural rules. My understanding of how it works is that if you wish

to cross-examine a witness that is put in by another party, be they fact or expert, you don't give advance notice of the cross-examination and you can take what points as you wish.

That is subject to two limitations. One is that if you are relying upon evidence to gainsay what the witness is saying, then that evidence must be either adduced formally or only becomes evidence if it is put to the witness and accepted by him or her; in other words, if the witness says, "I disagree with this and don't accept it", that's an answer you have to live with and you can't say, "Oh, but look at this evidence or this material. You must disbelieve the expert". You have to have evidence on which we can rely. Simply putting documents doesn't make them evidence. So that's the first qualification.

The second is that we like to operate as efficient a process as possible and having experts in particular who are taken by surprise by documents slows them down in the witness box, because they have to read what is being put to them and think about it, and they will be given time to do that when one has a timetable for trial. That often grates with the efficient conduct of the trial.

So, it does seem to us that it is useful if the lines of attack on the expert are articulated, but only because we want the process to run as smoothly as possible.

So, if that assists in terms of writing a letter or perhaps producing a cross-examination bundle that can be reviewed by the expert a few days before she gives evidence, that would be useful, but I don't think it is appropriate for us to direct that there be any disclosure of line of attack unless the CMA thinks it would assist the proper conduct of this appeal.

MR BAILEY: I am grateful for the indication, sir, and the two qualifications are well understood. I think in terms of -- it is not the CMA's intention to ambush the experts, but equally the CMA doesn't want to serve up on a dish so the expert has many days

to ruminate on particular points, but, as I say, we can bear in mind the words you have just indicated and set out our position so that Advanz and Dr Newton know where we stand.

MR BREALEY: If a party in an appeal puts forward a positive case that something is unlawful -- and it is actually quite an important point -- and the CMA just stays silent -- if it was to deny it was unlawful, you would say "Well, why?" If it just stays silent -- we are not really asking for the line of cross-examination. We are just seeking clarification. If you are contesting it, if you are saying it is lawful, why is it lawful? One would expect that, I think.

THE PRESIDENT: This really is -- I am going to leave this in the hands of the CMA to consider.

MR BREALEY: Yes.

THE PRESIDENT: I think both protagonists to this particular debate need to be aware of the price they pay for the evidence they don't adduce. So, if there is, as you say, a positive case articulated in the evidence of Dr Newton, of course that can be challenged, but if Dr Newton resists the temptation to sell your case down the river and sticks with her evidence, then that is the only positive case in town and there is not another witness or another body of evidence where we have to weigh the two against each other. So, it is not ships passing in the night.

MR BREALEY: No.

THE PRESIDENT: It is Dr Newton's propositions that will be accepted if her evidence stands, whereas if there were a CMA expert gainsaying that, we would have to work out whose opinion we preferred and what reasons there were.

So that's the choice you have got, and the CMA clearly has made its choice, and obviously we even with that choice having been made want as transparent a process as is possible, but we are not going to force the CMA to articulate the attack it wants

to run, subject to the constraints that I have articulated.

MR BREALEY: Yes. We need to know in broad terms why they say it is lawful.

MR PALMER: I hesitate to interrupt. I am not central to this dispute, but it does touch on part of our case as well. I don't think we can understand the Tribunal to be indicating that evidence is required to demonstrate what is or is not lawful. That is a matter of law, not a matter of evidence. Mr Brealey is effectively -- he says he wants to know what the case is. That's one thing. To say the CMA or any other party must adduce evidence as to what the law is, is quite another.

THE PRESIDENT: Well, Mr Palmer, I am not going to get into this. What I was analogising this question to, and I am speaking from a very low level of knowledge at the moment, take the dispute that one often gets as to whether a particular agreement is compliant with the Consumer Credit Act. Now one has all kinds of legal parameters which render contracts lawful or unlawful, and you are absolutely right. There are points of law which emerge out of the relevant legislation which are points of law, but one has got at the same time questions of mixed law and fact which go to whether the agreement in this case is lawful or not, whether it is a Consumer Credit Act case, which can have evidence of fact which go to the question of lawfulness.

Now I have no idea whether this is a case like that or not. I have no desire to decide whether it is that case or not. You can take it that we will be ourselves deciding questions of law. We will be doing so by reference to what the law is, not what experts tell us the law is, but equally if it's a question of fact, then we will weigh the matter by reference to the factual material that is before the court. Whether Dr Newton is teaching us the law or telling us the facts, well, we will find out in November.

Silence. Excellent. Is there anything more on the agenda that we need to

articulate?

MR BREALEY: No.

THE PRESIDENT: No. Well, we are very grateful to all of the parties. We need to specify a particular date for the next iteration of the ambulatory draft. We said mid-September. Let me just see what -- shall we say Friday, 16th September? We can put it later. I don't think we should put it any earlier. Is that a date that works? Again, good.

What we will do is -- we are not going to make an order; I don't think that's necessary -- we will set out what we understand we have directed by reference to trial timetable, so everyone knows where we stand. We have had a lot of discussion about how the trial will look from 21st November. It is probably best that we set out in a letter what we think we have said so that the parties can correct us if we have misspoken. Unless there is anything more, thank you all very much. We will --

MR BREALEY: On behalf of everybody have a lovely summer.

(3.05 pm)

(Court adjourned)