IN THE COMPETITION APPEAL TRIBUNAL

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

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 22nd November-Friday 23rd December 2022

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

BETWEEN:

Appellants

(1) ALLERGAN PLC ("Allergan")

(2) ADVANZ PHARMA CORP. LIMITED & O'RS ("Advanz")

(3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED & O'Rs ("Cinven") (4)

(4) AUDEN McKENZIE (PHARMA DIVISION) LIMITED ("Auden/Actavis")

(5) INTAS PHARMACEUTICALS LIMITED & O'RS ("Intas")

AND

Respondents

COMPETITION AND MARKETS AUTHORITY ("The CMA")

A P P E A R AN C E S

Mark Brealey KC (On behalf of Advanz)

Daniel Jowell KC & Tim Johnston (On behalf of Allergan PLC)

Sarah Ford KC & Charlotte Thomas (On behalf of Auden/Actavis)

Robert O'Donoghue KC & Emma Mockford (On behalf of Cinven)

Robert Palmer KC, Laura Elizabeth John & Jack Williams (On behalf of Intas)

Marie Demetriou KC, Josh Holmes KC, Tristan Jones, Nikolaus Grubeck, Michael Armitage, Professor David Bailey & Daisy Mackersie (On behalf of the CMA)

Friday, 23 December 2022

(10.00 am)

Closing Submissions by MR BAILEY (continued)

THE PRESIDENT: Mr Bailey, good morning.

MR BAILEY: Good morning, sir, members of the Tribunal.

Just picking up on a point from yesterday, the discussion that you had with myself and counsel for Allergan about the discretion that an authority has whether or not to impose a fine on a parent company that is part of an undertaking.

Just to give you one authority, just so that you have that to hand. We do not need to go it to. It is *Team Relocations* at paragraph 159. That is at {M/99.1/24}. That simply just says what both counsel agreed was the position.

If I can turn then to my submissions this morning and give you a blueprint as to where from now to Christmas. I would like to start with.

THE PRESIDENT: That is not the most reassuring start, Mr Bailey.

MR BAILEY: I meant lunchtime, sir.

I would like to start, if I may, with a brief overview of the legal framework and the Tribunal's task when it comes to penalties.

Then I propose to address four main themes that have

emerged from the appellants' submissions and they are in turn: the first being Auden's and Actavis's submission that they have been unjustifiably fined four times over for what they say are very closely interrelated infringements.

The second theme is that according to the appellants, the state of the law was so uncertain and the conduct was so ambiguous that none of these infringements were intentional or negligent.

The third theme is that the assessment by the CMA of seriousness of step one was said to be excessive and out of kilter with previous decisions.

The fourth theme is what my learned friend for Allergan referred to as "the massive rachets" or the "upward adjustments" for specific deterrence and I will deal with a series of arguments related to how the CMA applied step 4.

There are of course a series of other criticisms made about the CMA's imposition of penalties and their calculation, but, for reasons of time, I will just simply rest on the written submissions we have made in that respect.

THE PRESIDENT: I am very grateful, Mr Bailey, because let me just give you an indication as to what will help us. Clearly penalty is in a sense hugely contingent upon

what we find in the anterior areas and the last thing we want is for you to go through every permutation and say if the Tribunal were to decide X, then the answer is Y.

So your broad thematic approach is, if I may say so, most likely to help us understand what are the factors that underlie the correctness, or otherwise, of the penalties reached and, obviously, we will then, in the light of the decision we make, look at those broad factors.

If there is anything, and I say this to reassure all the parties, that we feel has not been properly addressed when we get to that stage, we would of course invite further submissions, but I anticipate it is more a question of applying the general propositions that have been made by all of the parties to the specific outcomes that we find in the earlier parts of our putative decision.

MR BAILEY: I am grateful, sir. I am not going to try and second guess the Tribunal's ultimate conclusions and, of course, that may or may not affect the approach taken to penalty.

If we could start then, very briefly, if I may, with the legal framework and take you to one passage of a Tribunal judgment going back in time to *Napp* and that is at paragraph 502 at {M/24/138}.

I begin with this because this is where the Tribunal is setting out, in particular in the second sentence, that the policy objectives of the Act, that is the Competition Act, will not be achieved unless the Tribunal is prepared to uphold severe penalties for serious infringements.

We say that that is an important point to keep in mind and indeed actually even the previous sentence noted that:

"The sum imposed must be such as to constitute a serious and effective deterrent both to the undertaking concerned and to the other undertakings tempted to engage in similar conduct."

So that was the principle set out very early on by the Tribunal in the *Napp* case. But it is right to acknowledge that there have been two changes to the statutory framework since the Tribunal's decision in *Napp* and my learned friend for Intas took you to one of those sections, but I would like to take you to both, if I may.

The first is a change that occurred in April of 2014 and it is the section 36 (7) (a) of the Competition Act, which is at {M/16/34}.

We can see at the bottom of the page and this in my submission is an important amendment made by Parliament,

because it is saying in terms that when fixing a penalty, the CMA must have regard to the seriousness of the infringement concerned and the desirability of deterring both the undertaking that is penalised and also others from engaging in and then the conduct running contrary to the competition rules.

Now, the other change that was also made at the same time was made to section 38 (8) and that is at page 36 of this document, please. {M/16/36}. Unlike at the time of *Napp*, where the Tribunal was free if it wished to have regard to the guidance, now we see in subsection (8) there is now an obligation both on the CMA of course, but also on the Tribunal to have regard to the guidance for the time being in force under this section.

I come on later on this morning to address the point being made about whether we applied guidance that was not in force under this section. We say of course we did not. But the effect of these changes, in my submission, is that the Tribunal has to have regard to the guidance and if we may just briefly go to the guidance at {M/148/6} at paragraph 1.3 and 1.4. -- if we could just scroll down, please.

So this is the guidance. At 1.3 it is just simply restating the duty in 36 (7A) and then in 1.4 explaining, something I will come on to later, the two

aspects of deterrence, ie deterrence of those who committed the wrongdoing and deterrence of others from committing similar wrongdoing in the future and so we say that when the Tribunal comes to evaluate, if it does, the penalties in this case, we say that you should have regard to those policy objectives as set out in the guidance.

There is no challenge in these appeals to the lawfulness of this penalty guidance.

If I could turn then from that to the Tribunal's own approach to penalty appeals and this is well established. I am just going to highlight three principles that emerge from the Tribunal's case law and show you one judgment.

The judgment I would like to go to, please, is a recent one from last year in the *Roland v CMA* case. That is at {M/182/15}. If we could scroll down, please. Could we go over the page, {M/182/16}.

So at paragraph 34 we see here the Tribunal citing an earlier Tribunal decision in the *Construction* appeals chaired by Vivien Rose, now Lady Rose, and it sets out the role of the Tribunal and, essentially, members of the Tribunal, you have two tasks. The first is to adjudicate on the appellants' complaints about how we applied the penalties guidance and the second is then to

look at the matter in the round and only interfere if you consider the CMA decided a penalty that is i*Napp*ropriate.

Now, we say, and this is the second highlight I would like to take you to, that when carrying out those tasks it may be appropriate for the Tribunal to give some weight to an evaluative assessment made by the CMA, particularly where it has experience in this area.

Now, Intas in its Written Closings at paragraph 169(a), which is at {L/5.1/93} said this was an ambitious submission and indeed went as far as to say it had no basis in the case law.

I generally try and refrain from making ambitious submissions, still less those that have no basis, and if one can go down to paragraph 36 of the Tribunal's judgment in this case and if I could just invite you to read that and it will have to be -- if you maybe pull up the next page as well, please. (Pause).

THE PRESIDENT: Yes.

MR BAILEY: So I am not saying that this in anyway waters down or restricts your scrutiny of the merits. You have a full jurisdiction in this regard. But I am saying that where the CMA has direct experience of practices and we say if you look at footnote -- there is no need to go to them -- but 3686 of the Decision at

{IR-A/12/1030} and footnote 705 of the Defence at {A/6/151}, what they will show you is the CMA's case work on excessive pricing, on horizontal market sharing and also actually, broader than that, various submissions that have been made, for example, to the OECD on the dangers of excessive pricing in the pharmaceutical sector.

So we say with that experience in mind that should have properly informed the CMA's view of this need to deter in this particular case.

The third highlight is a short one, which is that penalties are an area where previous decisions have limited precedent value. As the former president, Mr Justice Barling, observed the maximum of each case turns on its facts is a particularly pertinent one.

The authority for that is *Kier* at paragraph 116. We do not need to turn it up. It is {M/81/41}.

That just sets the scene in terms of the legal framework and the Tribunal's task.

It has been said on various occasions that the penalties are extraordinary, excessive and at one point where things went into outer space. So if I may bring things down to earth and try and explain why we say they are appropriate. I would like to do that at the beginning with four sort of points to set the scene,

what sort of informed the CMA's approach.

The first of those is that we say that Auden, as a market incumbent, entered into not one but two agreements that on our case fought off a potential competitor. If the CMA is right about that, then in my submission there is no doubt that these agreements were inimical to what is expected from competing undertakings. You will recall that Mr Jones showed you on Wednesday, paragraph 34 of the European Court's judgment in Irish Beef where there is a very clear principle in the case law of undertakings determining their conduct independently and we say that this is flatly inconsistent with that and so if that is made out, we say a serious penalty is called for serious conduct.

That is the first point.

The second point is it is important not to lose sight of the reality that the appellants generated a huge amount of profit from these infringements. The market was not subject, on our case, to normal competition until 2021 and, on our estimates, Auden/Actavis reaped trading benefits of 270 million above cost-plus or 138 million above the £20 end price of the infringement.

So we say those figures should inform one's approach

to penalty. Just of course as there was a winner in all of this, there was a loser. The loser of course was the NHS whose spending went from 7.8 million in 2008 to as much as 83.8 million in 2016.

THE PRESIDENT: You are not though suggesting a restitutionary approach to the assessment of penalties. You are simply saying the gain over either the cost-plus level or the non-infringing £20 level is a factor to take into account in the heftiness of the penalty imposed.

MR BAILEY: Quite right, sir. One of the points that we make when we come on to step 4 is to say when one is setting a penalty, one must have regard to the gain or the benefit derived from the wrongdoing, because if one ignores it, basic economics of punishment and deterrence suggest that any rational business person will look at their options, including rationally the illegal options, and if they realise they are quids in because they can engage in the conduct, be fined, but actually end up better off, we say that would completely undermine the deterrent function of penalties.

But you are right, sir, we are not seeking to disgorge or have a restitutionary remedy. In fact, we have not actually calculated the actual profit derived from these infringements and I am going to come back to

that point a little later on, because one of the criticisms made of the CMA's approach is that we have elided public and private enforcement. As you know, sir, when it comes to private enforcement, the *Devenish* case and *BritNed* say that private enforcement is about compensation. It is not about restitution. Even if one could conceive of any restitutionary remedy in private enforcement, we say that is not the function of the penalties here. The penalties here are designed to deter. That is my submission.

But it has sometimes been said in the pleadings that somehow we Jacked up the fines because the NHS was the victim. Now, the NHS is rightly treasured by many in this country, but we are not penalising the appellants simply because the NHS was the end customer. What we are doing is we are penalising them because their conduct directly harmed the end customer, which in this case happened to be the CCGs and the NHS.

If I may just take you to one passage in a judgment of Lord Justice Green earlier this year. It is a very different case, but he makes a very clear point of principle in the *Trains* judgment and that is at {M/191/30}. You see that Lord Justice Green here is -- basically he is sketching out law in general terms both in relation to unfair prices, although, as my learned

friend for Intas explained, the particular issue in this case was actually about unfair terms and specifically a lack of transparency in publicising what are called "boundary fares".

But the point I rely on for this purpose is the first sentence:

"The law relating to abuse is concerned with consumer unfairness."

I really do emphasise that and he explains why:

"Because when an undertaking is dominant it is, by definition, freed from the competitive shackles which otherwise would incentivise and discipline it to maximise consumer welfare and benefit."

So we say if that is a core function of the law relating to abuse in this jurisdiction, and he goes on then to explain some of the law relating to unfair prices and terms, then it is right to impose penalties that seek to punish and deter conduct that exploited consumers in an unfair way.

Now, the third headline is that we have tried to keep a sense of perspective. The appellants complain of the size of the fines and the size of the uplifts and, in my submission, not only does that reflect the gravity of what happened, but it does also actually reflect the size of the appellants.

To just take one example to illustrate what I mean. If we can go to {IR-A/12/1063}, please. So here at paragraph 10.272 you can see the CMA just setting out the current size of Allergan, which is now owned by AbbVie and what we see is that it generated global turnover of some 35.7 billion, so I doubled checked, that is nine zeros and its profits after tax were some 3.6 billion.

The reason I mention this, and I am going to come on to some case law to support this proposition later this morning, is that the step 3 penalty halfway through for Allergan on the 10mg abuse was 6.7 million. I mean, that is not even a spec. It is less than 0.1% of Allergan's total turnover, less than 1.1 of its profit after tax.

The risk, we say, is that if you impose a fine of that level, it would not be a blip on the accounts. It would not have any impact on the future behaviour of the undertaking and yet the whole point of this regime is to try and ensure that undertakings from the top down give attention to the risks of competition law.

Now, having just said that, we are not inviting the Tribunal to say, well, look, the sky is the limit and you should throw the book at them and impose any penalty of any size. We agree with counsel for Allergan and for

Intas that an important principle, as established by the Tribunal's case law, is the principle of proportionality. Indeed, that is also a feature of the penalty guidance.

We have been criticised for not having taken a step back in this case by reference to the Tribunal's case law which says that you need to look at the penalty in the round and strike a fair balance between culpability on the one hand, deterrence on the other.

If I may just stick with Allergan just for present purposes and go to paragraph 10.288, which is at {IR-A/12/1067}. We are going to see that this is actually the first of two steps back. So we did a step back for this particular infringement and then we did a second step back, which I will show you in a moment.

This is at the stage of step 4 for Allergan where the CMA has increased the fine to 74.3 million and this is just for the 10mg abuse.

What the CMA does, in line with what the Tribunal expected it to do and its guidance envisages, is to look at that proposed penalty as a proportion of various metrics of its size and financial position, not just turnover, because that is what the OFT did in *Construction* and that failed to appreciate the other metrics.

If we look here you can see the figures. In my submission, they speak for themselves. They are all, in terms of worldwide turnover, less than 1% and you can see the figures for tax and dividends.

Now, it is true, however, that Allergan was not just fined for the 10mg abuse. It was also fined for the 20mg abuse and also for part of the duration of the alleged 10mg agreement.

Now, that produced an aggregate penalty of 111 million. Now, the CMA then aggregated the penalties and then later in its Decision at paragraph 10.413, {IR-A/12/1098}, the CMA then took another step back and asked itself, okay, is that proportionate? You see that it says the total penalty on Allergan is just 0.3% of its worldwide turnover. Unless it is said against me that the passage there does not refer to other metrics, they are actually tucked away in footnote 3916 and so if you go to the bottom of the page you can see that there are the other metrics that the CMA took into account.

But it is right, I have to regrettably recall, that there is an error in footnote 3916. It refers to the aggregate penalty being 0.8% of profit after tax. That is incorrect. The correct figure is 2.4%. So I just invite the Tribunal to have regard to that as the correct figure.

So we say actually the CMA did fairly evaluate the overall fine imposed on each party and sought to achieve a balance between the severity of the conduct on the one hand and the need for deterrence on the other.

Now, with that, I would like to turn next to Ms Ford's submission to you in relation to the complaint made by Auden/Actavis that the CMA had fined the Auden appellants some 109 million, which is four times, they say, its statutory cap.

Unfortunately, we do not accept that characterisation of what has happened. We say that the Decision found four separate infringements and then it imposed four separate fines and it is well established case law that each fine is then subject to the statutory cap.

But --

THE PRESIDENT: Do you say, Mr Bailey, that you could have done it a different way though and instead of identifying four different infringements to be fined a single infringement or do you say there is an approach that the CMA was, perhaps not obliged, but should have followed as a matter of best practice in terms of splitting out the different infringements and assessing them individually?

MR BAILEY: We say two things. The first is we say that we

looked at the particular facts of these infringements, asked ourselves are they a single infringement, are they a separate infringement, and the first thing I am going to address you on is we say when you look at the criteria and the case law, they are separate infringements.

The second thing I am going to address you on is that even if one were prepared to say that the criteria for a single infringement are met, the authority in that situation is not obliged to find a single infringement.

This was a point that Lord Justice Newey made in the *Balmoral Tanks* case and I want to show you that as well. So there is no obligation on the authority, even if the criteria are met. That is how I am going to address you.

But the primary position is we say correctly we found separate infringements.

THE PRESIDENT: Yes, will you be coming to -- I think I had an exchange with Ms Ford again about the analogy which may or may not be apt between consecutive and concurrent sentences in the criminal law and one might say, look, you do approach these as separate infringements. You do a fining exercise as a whole, but you could, maybe, run them concurrently and so you only take, as it were, the highest fine for the infringement that is fined the

most.

MR BAILEY: I will come on to address that. We are wary of drawing analogies to very different areas of law and indeed in *Construction*, in Ms Rose's judgment in GF Tomlinson various analogies were made to the criminal offence of corporate manslaughter and, in that case, the Tribunal said, actually, we do not think you can find some unifying principle of justice that allows one to draw analogies there. So I think that would be my primary point on that.

But of course I think I would accept that when the Tribunal exercises its own jurisdiction, it is entitled to look at it and ask itself, well, actually is this a proportionate figure when one looks at what has happened?

What I would like to do, if I may, to start is to show you the criteria that the case law identifies for deciding is there one infringement or are there several separate infringements? We put that at paragraph 288 (b) of our written opening at {L/6/80}, but I would like to just go to the judgment, if I may. It is a judgment in *Trelleborg*. That is an appeal on marine hoses, which is at {M/96.1/1}. The point in this case was, indeed, the Commission found one infringement. The applicants argued there were two separate infringements.

If we go to page {M/96.1/10}, please. There is in my submission at paragraph 60, so if we can just scroll down a little bit, thank you very much. There is the criteria identified by the case law and perhaps if I could just ask you to read that paragraph.

THE PRESIDENT: Of course. (Pause). Yes, thank you.

MR BAILEY: So I am not inviting the Tribunal to use this as a box-ticking exercise. What I do say is that this lists a series of relevant considerations to be weighed and I also emphasise the repeated use of the word "identical nature". I am going to come back to that.

Before we move to this case and what the Decision found, could I ask you to have a quick look at another case. You have actually looked at it before several times for other points, but it is directly on point here and it is the *Servier* case which is -- I like this Decision -- a mammoth Decision, a mammoth judgment. If we could go to {M/154/11} and just pick up the story with what the Commission found. Scroll down to 71, please. You see here the court is just summarising what the Commission found in that case. So the applicants are *Servier* and *Servier* was found to have entered into five patent settlement agreements that had as their object the restriction of competition and each agreement was found to be a separate infringement.

Then on top of that, secondly, *Servier* was found to have abused a dominant position and that was partly by entering into the agreements and partly by buying up various scarce API technology. So in fact in the *Servier* case there are a total of six separate infringements. Indeed, one sees at paragraph 72 there were six separate fines. In both paragraph 72 and 73 that lists out the fines for the separate infringements.

Now, if we could fast forward to page {M/154/142} in this judgment, you will see the heading "Errors of law and of assessment in relation to the classification of separate infringements".

For whatever reason, the arguments of the parties have been deleted, but we have the findings of the court and of course that is what matters. What you can see though is that at paragraph 1254 it sets out the argument of the parties and it explains that whilst these were agreements on different dates with different parties with different scopes etc, *Servier* argued, somewhat similarly to Auden/Actavis, that the agreements were really a single infringement, because they concerned the same product at roughly the same time and they said the method was broadly the same, pay for delay.

Now, if we can go to paragraph 1272, which is at

page 145, please. {M/154/145}. We can see at 1272 the court is explaining in the last two lines the agreements constituted an infringement on their own.

Then in 1273 that the Commission could consider settlement agreements constituting a single and continuous infringement only if it was in a position to establish, in particular, that the agreements formed part of an overall plan.

In the next paragraph they explain that a finding of a single infringement presupposes the pursuit by all parties of at least one common objective.

If I just pause there. I have looked several times to see if Auden/Actavis are arguing that there was an overall plan, by which I mean an overall plan pursued by Auden, Waymade, AMCo such as to in some way establish this common objective.

I have not found one. Instead, what is said, for example, at paragraph 254 of their submissions for trial, {L/4/79}, is that they rely on the heavily interrelated nature of the conduct in question.

Insofar as it is said that the agreements and the abuses were generally distorting competition in the market, you put the two together and of course you have heard Mr Holmes on Wednesday explaining the mountain and he did explain, like the Decision does, that the

agreements facilitated the abuses.

The General Court makes an important point at paragraph 1277 about this and could I ask you to read that, please. (Pause).

So you can see a general reference. That will not do and the CMA would have been criticised, rightly in my submission, if it had sought to make a single infringement finding on the basis of such a general reference.

Now, I am not going to go through each of the subsequent paragraphs, but I would invite you to read them, please, from 1278-1282. But what they find on the facts of that case was that there was no common objective pursued by *Servier* and the generic companies and they actually note various differences between the timing and the content of the agreements.

So instead what the court does is it finds that the Commission was right to find each agreement was a separate infringement.

Now, Professor Holmes asked a question on Day 12 and you asked, sir, whether it would make any difference that the conduct engaged two different legal provisions. The best I can find that addresses that to some extent is at paragraph 1288 on {M/154/147}. This is a slightly separate point and could I ask you to read that

paragraph too, please. (Pause).

THE PRESIDENT: Yes, thank you.

MR BAILEY: So it is making clear that the concepts of infringing 101 and 102 of course are distinct and based on different criteria and the CMA is not aware of any case where a single fine has been imposed in respect of multiple infringements of articles 101 and 102. It is right that in *Paroxetine* the CMA imposed one fine in relation to the agreements, but a separate fine in relation to the abuse, although I acknowledge that that fine was then set aside on appeal.

Just for completeness, the court goes on to do a similar analysis in relation to niche and metrics at paragraphs 1296-1302. We do not need to go there now, but in seeing how the court approaches the issue, in my submission, that is actually instructive.

Could I turn now then to what the CMA did in the Decision and could we go, please, to {IR-A/12/1020} and this is paragraph 10.153, which leading counsel for Auden showed you.

This is in the part of the Decision that is making the finding that there were separate infringements.

The point made against me was these are just distinctions without a difference. It was put that they do not even begin to justify separate infringements.

My response is that they are relevant, they are material and they do provide sufficient grounds.

Could we take them in order. I am very grateful.

So I would like to take paragraphs (a) and (c) together. The point I would like to make is that the nature of the products are not identical and that may sound like a simple point, but it is one of the factors identified by the General Court in the *Trelleborg* case law. On its own that clearly is not enough, but I think there is a much more fundamental point at paragraph (b), because there what the CMA is saying is that the objectives of the infringing conduct were not identical. Auden/Actavis did not pursue a common objective with either Waymade or AMCo in relation to the exploitative abuse.

So we say that that is actually a critical point, but there is more, because at subparagraph (e) there is the point about the temporal scope of the agreements differing from one another and of course differing from the abuses.

The Decision is long and detailed. If it would help, when you are wanting to know where do I find the duration of the different infringements, they are set out in one paragraph at 7.2 at {IR-A/12/827}. That will be an easy place to see what they say.

Then the final point in subparagraph (f) is that the 10mg and the 20mg agreements were somewhat different as between themselves. Of course they differed in terms of time and of course the payment mechanism was somewhat different as well.

This is common ground between Auden and the CMA that there was a buy-back mechanism under the 20mg agreement as opposed to the allocation of fixed volumes at discounted price under the 10mg agreement.

So we say if you look at those factors in the round, they do provide objective grounds for the CMA to find separate infringements.

I accept, of course, the CMA does say the conduct is interrelated. It says that throughout the Decision and it is undeniable that the agreements eliminated potential competition and the consequence of that was that Auden retained a dominant position and the ability to charge the prices it did.

My submission is the fact that the conduct is interrelated is not a sufficient, still less a mandatory, requirement for saying there is one infringement.

Now, the other thing I should highlight is the CMA was alive to the need to be proportionate here, because we cannot just start using sledge hammers to crack nuts.

It is Christmas time so it is nutcrackers for nuts. What the CMA did seek to do was that it sought to avoid double counting. You will find that, sir, at paragraph 10.155 of the Decision at {IR-A/12/1021}.

Specifically what the CMA explains in this section is that it sought only to uplift once in relation to the benefit that arose either for the 10mg or the 20mg, so you did not have double counting between the abuse and the agreement. Moreover, it only sought to specifically deter once for the same type of infringement, so it was trying to avoid double counting.

Now, I said to you, sir, earlier there is an alternative submission here, which is that if the Tribunal were inclined to find a single infringement, then in my submission the Tribunal would be entitled or not obliged to have to apply it and invoke it.

I would just like to show you a couple of paragraphs from Lord Justice Newey's judgment in *Balmoral Tanks*. That is at {M/156.1/17}. This is a Chapter I case involving an exchange of information, but the point in my submission is applicable here. Could I just ask you to read paragraphs 31 and 32, please.

THE PRESIDENT: Yes, of course. (Pause). Yes, thank you.

MR BAILEY: So it is an argument made by the CMA. It does not actually get decided in that case. I have to accept

that of course. It is just that Lord Justice Hallett felt it had a good deal of attraction and in my submission it evidently does..

The last thing just to say on this issue is that we were no way seeking to undermine the statutory cap. It is well established that the cap applies to each fine and one can see that in the authority that is cited at footnote 3656 at {IR-A/12/1020}, but we do not need to go to that. I do not think that is in dispute.

I am going to move on, if I may, to my next topic, which is on intention and negligence. The test if one starts with the Act at section 36 (3) of the Act, which is {M/16/34}, the CMA may impose a penalty on an undertaking only if the CMA is satisfied that the infringement has been committed intension or negligently.

Those terms have been considered by the Tribunal in a number of cases dating back to *Napp*, but last year the Tribunal, chaired by Mr Justice Roth, clarified, in my submission correctly and concisely, at paragraph 121 of the *Paroxetine* judgment. If I could just show you that. That is at {M/183/40}, please.

THE PRESIDENT: Shall we read that.

MR BAILEY: Actually, sir, it is just the opening sentence really which just sets out the question. (Pause).

THE PRESIDENT: Yes.

MR BAILEY: Auden/Actavis, Allergan and Intas all make the argument that the law was uncertain at the time of the abuses, setting price cases are rare, the legal test was only clarified it is said by the Court of Appeal and they went as far as to say for the CMA to suggest otherwise is a complete rewriting of legal history.

This point, I should just flag for your attention, comes up not only in relation to intention/negligence. It also pops up in relation to seriousness at step 1. It also pops up in relation to mitigation at step 3, but I am going to deal with it in one go.

I am going to make one point on intention/negligence, which is the one that the Tribunal makes which is that one does not need to know about the law and whether you are breaking the law. An argument was made in *Paroxetine* itself about how they could not know that their agreements would somehow be caught by competition law and the Tribunal's response is the one that you have seen. In fact, it says it again at paragraph 125, where it says you do not need to have precedence in competition law in order to be guilty of an intention or negligent infringement.

But the point is being made that actually the uncertainty is so profound that I really should address

it head on. The way I would like to do that, if I may, is to address the Q&A. I do not know if you recall last Thursday, sir, counsel for Allergan posed a hypothetical about how a UK qualified lawyer in around 2015 or 2016 what she or she would have asked if they had been asked to advise on the pricing of hydrocortisone and, similarly, counsel for Intas said the principle of legal certainty is an important one and if the CMA are right, there has been a novel radical development in the law.

If we could wind the clock back to 2015/2016. I am going to go through, if I may, the question and answers that were given by counsel for Allergan and just add my own penny's worth for what it is worth.

So he started by saying that there were two key cases that any lawyer worth their salt would look at. They were the *Napp* and *Attheraces* and you were shown those in detail.

THE PRESIDENT: Yes.

MR BAILEY: I hesitate to add one authority, but I hope a reasonable lawyer would also have considered the Tribunal's 90-page judgment in the *Albion Water* case, which was delivered in 2008, and paragraphs 211-226 specifically headed "Preliminary observations on unfair pricing and economic value". It is {M/64/69-98}. I am not going to go to it now, but it seems to me one does

have to hope that a reasonable lawyer would not have ignored the Tribunal's own case law on this topic, not least because it applied the *United Brands* test in that case.

Before I get to the imaginary scenario of lawyer and client, I would like to draw the Tribunal's attention to what business thought at the time, because of course the point really is business would talk to their in-house lawyers, perhaps their external lawyers, but is the position such that they were completely at sea? They had no idea where this was coming from?

So what I would like to do is just show you, you have seen this before, but very briefly the compliance manual that AMCo had that Mr Beighton circulated to all employees in March 2013. To be clear, this is just for illustrative purposes. I just want to show you what an undertaking could work out for itself at the time.

You will recall Mr Sully's evidence on {Day1/14:1} where he said he took a template from a law firm and then he specifically said he tweaked it to make it pharmaceutical appropriate and that in my submission is important. So it is not as if this was just plucked out and used. It was adapted so we were told.

If we can go, please, to the manual. It is at {IR-H/186.2/2}. We start at page 2, just so you can

orientate where we are. There is Mr Beighton and this is the policy which has been issued to all of the employees and you can see a clear statement of all the potential sanctions that could be imposed if one fails to comply.

If we can go to page {IR-H/186.2/7}, what the guideline does, as many compliance manuals do, is it gives various examples, a non-exhaustive list, but examples nonetheless, which are said to be restrictive of competition and constitute a serious competition law infringement.

If we go to {IR-H/186.2/9} we can see amongst this list market or customer sharing and of course the CMA's case is that that is exactly what AMCo and Auden/Actavis engaged in.

But I would like to move on if, I may, to page 10, where there is a little sentence above the next list that:

"A company with market power in relation to a particular product is subject to special rules designed to protect customers [exactly what Lord Justice Green said] from exploitation and to ensure that competition is not further diminished."

Then on page 11 we get the in-house view at the time, 2013. If we can go down, please, to the row

excessive pricing and I just ask you to read that. {IR-H/186.2/11}.

THE PRESIDENT: Yes, of course. (Pause). Thank you.

MR BAILEY: So this manual has been adapted to the pharmaceutical sector. It is acknowledging -- by the way we established in *Liothyronine* that the word "riot" is meant to be "not". Yes, indeed.

It is acknowledging that there is such a thing as excessively high prices. Of course I acknowledge, and I think it is common ground, that they can be difficult to establish, but then it goes on to say:

"It can be determined either by reference to competitive benchmarks or [and I say this is important] assessing whether the price bears a reasonable relation to the production costs of the product".

It is not saying portfolio pricing, it is not even saying economic value. But the simple point is that this shows that a business at that time could reasonably work out what it could and could not do.

But what I would like to do now, if I may, is go through the Q&A, because it was suggested that the CMA has become completely unreal and fantastical and I am trying not to go out of this world. So could we go to {Day 13/99:1}. I would then just like to go through the questions and answers.

So if we can pick it up at line 21. You see that the first question that would be asked inspired by *Napp* is:

"Are you expecting competitive entry, competitive pricing within a reasonable period?"

I am sorry. Could we just scroll down. Then you can see the answer there is:

"Well, yes, 90% price reduction in three years and that would probably be in itself enough to say very little chance of an infringement."

You had my submissions yesterday on this 90% price erosion point, but of course I would say also that it completely ignores where Actavis's prices were at that time and it completely ignores the disparity between that price and cost and that price and what Auden itself was charging for the same product in April 2008.

The other thing of course, as I said yesterday, is that Auden/Actavis was not expecting prices to collapse overnight. Actually, it was expecting the main price drop to occur in 2017. So I somewhat differ in terms of the conclusion reached at that preliminary stage.

But I do agree with counsel for Allergan that he was right to suggest that a lawyer would probe a bit further and ask some practical questions. We go on and one sees at line 6 and 7 that the first of the practical

questions was to ask:

"How long has this profitable pricing for hydrocortisone been going on?"

The answer given is that they would say many years.

To be slightly more precise, Auden was the sole supplier charging these prices for 7 to 8 years.

Before I go on with the Q&A, I would suggest, if I may, that a diligent lawyer might also have asked a few further practical questions. Can you tell me a bit more about this product? When was it first sold? 1955. Has there been lots of R&D in this product as we normally see in the pharmaceutical sector? None whatsoever. Is it still under patent? No, they expired in the 1970s.

Then the lawyer might have also asked: have prices always been around this level? No, no, the prices in 2016 they are 1,500% more than the prices in 2008. Then the lawyer might have pressed on this profitable pricing point and you will recall the PwC report showing that at the time hydrocortisone was generating nearly half, 46%, of Auden's gross profit.

So all I am saying really is that that is food for thought for the lawyer.

If we go back to the Q&A and pick it up now at line 10 and 11, the next question was whether the Department

of Health knew about it. It was said of course they did. They published the drug tariff and the NHS paid the reimbursement prices.

But again here, a reasonable lawyer might have probed this a bit more and asked: well, did the NHS have any choice to purchase and fund the hydrocortisone tablets that were dispensed? The answer of course between 2008 and July 2015 for 20mg and October 2015 for 10mg is no. The only game in town was Auden.

But even if were to look forwards, so that is the historical position, look forwards now, and what is the business expecting, well it was never expecting that all pharmacies and wholesalers would switch in droves to the cheap or skinny label product and that is precisely because of the orphan designation. As we have seen in the evidence, different pharmacies and wholesalers had different risk appetites in that respect.

So the short point I am making is that entry, when it arrives, is not instantly going to deliver effective competition.

If we resume the thread of Allergan's questions at line 13-14, has the Department of Health ever complained? No, not once. We have not had a single complaint from the DH. No complaint from the CMA. But a moment's reflection would have, I hope, told the

lawyer one does not need the CMA to complain in order for conduct to be anti-competitive.

As for the Department of Health, as Mr Holmes showed you yesterday morning, its statutory powers on paper were not really any good to it in the real world. They certainly made no difference to the pricing that was adopted by Auden/Actavis.

So you just cannot pass the buck to the DH.

But the next question that the lawyer may ask: has there been any investigation? Any request for justification? It was said there was nothing, not a peep.

That is not quite right, because Mr Holmes showed you yesterday the Daily Mail and the Sunday Mail publishing articles accusing Auden of profiteering and the Tribunal will recall that in my cross-examination of Mr Stewart there was also The Times journalist asking about the same aspect of: how can you justify these sky-high prices?

So it is not as if no one was raising alarm bells about Auden's hydrocortisone tablet pricing.

But then we go on. We see that the high net profitability of hydrocortisone and that compares to the other products in the profit portfolio. It is said actually they are very similar, very similar net

margins.

Here again, I hope the lawyer would be wary about reading too much in to similar net margins when she or she does not know what the product profile is, what the market context is. So one just cannot make that sort of observation.

Indeed, the Tribunal in *Albion* at paragraph 257 said the fact there are similar pricing practices does not mean the price that you are looking at is not unfair. It is {M/64/84}.

To conclude on page 100 at line 24, it was noted that *Attheraces* says there is economic value to be attributed on the purchaser's side. Is this an important product for the purchaser? The answer is would be: oh, of course. It is life-saving. It is essential.

Again, a moment's reflection, and the lawyer would have said: hang on, in the *Attheraces* the Court of Appeal said economic value cannot be whatever it will fetch on the markets. One might be quite cautious about leaping to the conclusion that just because a patient values the drug does not mean the supplier can charge any price it can get away with.

Indeed, he or she would also think in the real world there are many life-saving medicines, for example

penicillin, that are available at cheap prices precisely because of generic competition.

Now, I have gone through this thought experiment in some detail, partly as a sort of compliment that it is a really good Q&A for the Tribunal to think about, but also to show you, I hope, that it is not an open and shut case against infringement. This really is not akin to Jeremy Bentham's dog law. It is not an unsuspecting dog being kicked without warning and without realising what it has done wrong.

In my submission, where the law lawyer should have come out is that you had a sole supplier for 7 to 8 years that drove up prices for a 6-year-old product, there was no competition, there was no regulation, two newspapers had accused it of profiteering. The position was sufficiently clear for it to reasonably foresee that the prices could well fall within the Chapter II prohibition.

Now, of course counsel for Intas say, well, that is all well and good, but that is history so far as it is concerned. What about entry? What about the ineluctable price drops? The lawyer would know that entry does not mean that effective competition arises at the click of a fingers. They would know that Accord-UK held on to the market share by value at all times more

than 70%. They would know that the prices were falling from very high levels and, indeed, I would suggest the lawyer would also want to know more about the expected level of prices and the expected level of profits. This is not the market system, as you referred to, sir, working well for consumers.

Now, of course Auden in its submissions referred to the benchmarking against *Plenadren* and that was a claim made by Mr Patel and Mr Barnard in interview in 2016. Mr Holmes is going to address you in the new year on *Plenadren* and whether it is a comparator. The short point I wish to make is that it is an innovative drug. It is still under patent. It is used by a minuscule proportion of eligible patients and it is not a suitable yardstick for determining a fair price. But on top of that, Mr Patel and Mr Barnard were not able to identify a single contemporaneous document that backed up their claim of benchmarking.

I am going to move on if I may to uncertainty, but now in relation to the 10mg agreement. This is a shorter point, you will be glad to hear. It is run by Advanz and Allergan and Auden and Cinven and they all basically say: on the face of the written supply agreement, there was nothing to show this was obviously problematic.

Of course, the Tribunal will reach its own views on the facts, but our case is both sides absolutely understood that Auden/Actavis wanted something in return for supplying AMCo, otherwise it would be too good to be true. The thing that they got out of the deal was AMCo not entering the market independently. Indeed, that is why, we say, that AMCo suspended its Aesica project on the very day that it signed the second written supply agreement. That point is made at paragraph 95 of our Written Closings.

But counsel for Cinven suggested that there is a high degree of novelty in this regard and that actually applying pay for delay principles to what is, in his submission, an ordinary supply agreement was to take a quantum leap in the law.

Now, in my submission, the Cinven analysis is much more straightforward and orthodox than that. As Mr Jones showed you on Wednesday, our case is simply that the 10mg agreement aimed to exclude AMCo from independently entering the market and that that is not a ground-breaking finding, at least so far as the law is concerned, and, therefore, the novelty point really is, in my respectful submission, unconvincing.

But in Closings, Cinven tried to tie this point back to a point about the law and potential competition and

that somehow that was unclear, because the Tribunal made a reference for a preliminary ruling in the *Paroxetine* case. Now, in my submission, that really is not a fair reading of the Tribunal's judgment in *Paroxetine*, because the Tribunal found in its first judgment in 2018 that the generic companies were potential competitors. The reason why they made the reference was because, unusually, they were subject to interim injunctions pursuant to patent proceedings. That point was novel. That is not applicable in this case at all. So far as the law on potential competition goes, well, the law actually, and one can see it in the judgment of the court in *Paroxetine* at {M/168/10}, it just cites the well known test from the *Delimitis* case going back to 1991. So the point really was not unclear at all. You can see that at paragraph 36.

So we say that there really is not any degree of novelty on the 10mg agreement side of the case and absolutely the same for the 20mg agreement.

But Cinven make a different point and so do Advanz about the fact that AMCo took legal advice from Pinsent Masons in both January 2014 and then again in June and so I want to sort of deal with that point, if I may.

We say there are two reasons why legal advice does

not assist; one is a matter of law, one is a matter of fact. As a matter of law we say a mistake of law does not prevent a finding of an intention on negligent infringement. The Grand Chamber of the court said that at *Schenker* at 38, which is at {M/98/9}, but Cinven have come back and said, hold on, that case was different, because that case was about a freight forwarding cartel in Austria and the only advice sought from the lawyers was about a quirky de minimis exception under Austrian law, whereas here AMCo was genuinely trying to find out whether the conduct was anti-competitive.

But we say that those facts do not in any way qualify the very clear principle that the court laid down.

If I can make that good by taking you to a passage of Lady Justice Rose, as she then was, in the *Ping* case. It is at paragraph 117. {M/167/35}. You can see what that paragraph is doing is just sketching out the law on imposition of penalty and it is really the last sentence where, in my submission, it is a very clear statement of principle.

THE PRESIDENT: Yes.

MR BAILEY: The second point, as a matter of fact, the legal advice was patently wrong, if I may say so. We explained at paragraph 82 of our Written Closings at

{L/7/40} that the orphan designation is clearly not akin to an IP right. So there was a clear mistake just in terms of understanding the regulatory regime at the time. In any event, AMCo knew at the time that it was a potential competitor. Regardless of the finding the Tribunal makes on common understanding, there really is no doubt that AMCo had a marketing authorisation, that it was taking steps to develop its own product, that it was leveraging the threat of its own entry to seek higher volumes and so by the time that Pinsent Masons give advice, it should candidly, in my submission, have told Pinsent Masons: yes, we are a potential competitor.

Indeed, Mr Beighton accepted that at {Day2/158:1}, that indeed they were a potential competitor.

If I can address one further issue, sir, and then perhaps we could have a mid-morning break.

THE PRESIDENT: Of course.

MR BAILEY: I am going to turn to a criticism that Intas makes now for its part in relation to intention/negligence. In essence, it makes three points. The first of those is that we have failed to have regard to the market dynamics at work, the market entry that had occurred, and the ineluctable price drops, which they say negate intention/negligence.

The second is Dr Burt and his evidence and the third

is Intas's awareness of the CMA's investigation, which Intas said tells you nothing and I would like to address those three points in turn, if I may.

In response to the first point, I mean, of course it is accepted that entry had occurred and it is accepted that prices were moving downwards. In my submission, there are always two sides to every story and if I can deal first of all with dominance and then I will deal with abuse.

So on dominance, if we can go to paragraph 10.24, which is at {IR-A/12/974}. So 10.24 sets out the finding made by the CMA that Auden/Actavis knew or should have known that it was the sole -- that is not relevant for Intas -- but subsequently major supplier of hydrocortisone tablets and it was the dominant undertaking in the relevant markets.

The point made against me is that the rest of this section, so 10.25 and following, sets out examples of evidence, but does not deal with the position during the Intas period.

If we can go to footnote 3514, please, at the bottom of the page, if I just ask you to read that footnote, please. (Pause).

THE PRESIDENT: Yes.

MR BAILEY: I accept that in paragraph 10.25 we are not

setting out an exhaustive list of evidence supporting the finding in 10.24. Indeed, as explained in footnote 3514, we cross-refer in this very long and detailed Decision to the section 4.C of the decision where findings are made in relation to dominance.

What we did in the Defence at paragraph 431, {A/6/162} was to sort of identify in one place the facts that we say the undertaking knew or ought to have known during the Intas period. You can see it. It is now on the screen.

If I just identify three facts for present purposes. We say that Accord-UK knew at all times during the Intas period that it had a high market share by value of 70%. Indeed, it rose by value to 87% at the end of the Intas period. That is paragraphs 4.249 and 4.250 of the Decision.

We say the flip side is also true. It must have known that skinny label entrants had come on to the market, but, collectively, that had only won 30% of the market.

The other thing that in my submission is relevant here is that even if one takes Intas's arguments about changing attitudes towards dispensing skinny label on board, Accord-UK must have known that its full label prices were not subject to effective competitive

pressure, at least from the likes of Boots and Lloyds, because they only wished to dispense the full label product and they continued to do so. One can see clearly the disparity between full label dispensing and skinny label dispensing, including during the Intas period, at table 3.8, which is at {IR-A/12/135}.

So we do say that one has to read the Decision as a whole and we sought to bring the points together by references to the Decision. Of course in an ideal world we would have set all of that out in the Decision in one place, but making a long Decision even longer perhaps is not welcome to any reader.

We also say that one does not have to be too elaborate about this. In the *Napp* case, intention/negligence was found both by the Director General and by the Tribunal in a single paragraph. I anticipate that Intas will say: hold on, you are ignoring Dr Burt and his evidence and the value of Accord-UK's brand and product range and services and so on. Of course Mr Holmes is going to address the Tribunal on his evidence and deal with abuse in the new year, but the short point is that those very general matters about Accord-UK's service do not, in my submission, affect the economic value of the tablets.

But leading counsel for Intas also referred to

Dr Burt and the various aspects of his evidence where he disagrees. His opinion is the CMA are wrong about dominance, wrong about excessive pricing, basically just wrong about everything.

It is true we have not cross-examined Dr Burt, so we have to accept his evidence is true, but in my submission it is important not to elide two things. On the one hand, we have to accept that Dr Burt genuinely and honestly believed that his company did nothing wrong. But what I say we do not have to accept is that that is somehow decisive on the issue of intention and negligence. After all, the undertaking is not synonymous with Dr Burt. So there are facts, we say, that the undertaking cannot have been unaware of and that establishes intention and negligence.

In that regard, we also do invite the Tribunal to have regard to Intas's awareness of the investigation and this is a point that is made at paragraph 10.25 of the Decision, which is at {IR-A/12/975}, please.

Can you go to {IR-A/12/976}. It is at subparagraph (g). It is a long paragraph. There is no need to read it. It just simply says they were aware of the investigation.

Now, Intas said in Closing that somehow we were saying that this fixed them with constructive knowledge

of an actual infringement. That is at {Day15/168:1}. That is not what we are saying. We are not saying, and we do not need to say, that they knew of an actual infringement, because intention/negligence is not about the law. We saw that in *Paroxetine*.

But we do say that it is relevant when assessing an undertaking in a state of awareness that, as Ms Kar explains in her witness statement at paragraphs 12 and 15 at {IR-B5/3/4}, Intas received not one but two statements of objections; one in December 2016 as a matter of courtesy and another one in August 2017.

We say at the very latest, August 2017, but actually in fact earlier. But they cannot have been unaware of what the competition authority and its provisional view that the undertaking was dominant and its prices were unfair. If one looks at the SO they set out the absolute and relative market shares, the orphan designation barrier to expansion, and indeed of course the CMA's provisional findings of excessive pricing and unfair pricing.

So I am not saying this means that being aware of an investigation or having an SO establishes intention/negligence. Nor am I saying in any way that this establishes an infringement. That clearly would be wrong. The undertakings have their rights to defence.

But I am saying that when one looks at the awareness of the undertaking and the facts and matters which are set out in those statements of objection they are relevant in this regard.

I should just say to the Tribunal that at the moment those statements of objection so far as I am aware are not on Opus. If it would be helpful to the Tribunal to have them, at least just available, then I am sure the CMA would be very happy to upload them. Ms Kar refers to them in her witness statement.

THE PRESIDENT: Provided it is a minimal burden then yes.

MR BAILEY: It is a minimal burden, sir.

MR PALMER: We have repeatedly asked for that to happen and the CMA has repeatedly refused to upload them so we welcome that.

MR O'DONOGHUE: As have we.

MR BAILEY: I apologise for the belatedness but it is Christmas so let us put it on Opus.

THE PRESIDENT: We will have them uploaded.

MR BAILEY: One further point in relation to intention/negligence on abuse. This is picked up at 10.28 of the Decision at {IR-A/12/977}. The finding is at 10.27 that they could not have been unaware of the unfairness of their prices.

Just going through a few of these points. The first

at subparagraph (a) is -- admittedly the first part is not relevant to Intas because that is referring to the price increases prior to Intas's acquisition but the second part is relevant in my submission, that there had been no change in production costs or investment in R&D and that the product itself was very old and long off patent. Those are points that are relevant throughout the infringement.

Moreover, if one then goes, if I may take it slightly out of order to subparagraph (c) you will see there that we say Auden/Actavis of course knew what its costs were and of course knew what its prices were. Indeed, Mr Wilson and Mr Kelly, they were the ones running this business. That is set out at 10.196-10.197 at {IR-A/12/1037}. So they also knew that aspect; they knew the product; they knew the costs, and they knew the prices.

Then what we have at 10.28(b) is that they must have known that the prices had no reasonable connection to any reasonable measure of cost-plus any reasonable measure of a rate of return.

To put some flesh on the bones on that. What we did in our Written Closing at paragraph 369, which is at {L/7/155} is to give you some examples of the disparity, of the complete disconnect between prices on the one

hand during the Intas period that the ASP was 1,500% above cost-plus or six times the level that Auden itself had been charging in April 2008. Mr Holmes showed you some of those findings and they can be found in the Decision too at paragraph 4.277 which is at {IR-A/12/401}.

So we say that when one looks at the essential facts underpinning the unfairness of the prices it is just not right to say that Intas in some way was in blissful ignorance. It could not have been unaware of what we say were unfair prices.

If that would be a convenient moment, sir.

THE PRESIDENT: Of course. It is quarter past, 20 past, we will resume at half past 11. Thank you very much.

(11.19 am)

(A short break)

(11.30 am)

MR JOWELL: Mr Chairman, forgive me, we have gratefully been given to intercede. Just to mention something I thought I should before we go further, which is and I know this will not be a popular thing to say, but I thought I should say it, which is that Mr Bailey has raised a number of new points or new ways of putting their arguments that I am going to have to address both in relation to penalty and in relation to -- and also in

relation to the hold-separate period. We have not even heard yet from Mr Holmes in relation to abuse and I think I can fairly say that it is not going to be possible for me to confine my submissions in reply to do justice to those submissions in an hour.

So, for my part, I think I am going to need at least two hours in reply in order to do justice and I say that really by way of -- it is really a compliment, not a criticism that these points are being raised, but there are a whole series of mixing and matching that is going on between what Auden knew, what Allergan knew, for example, that will need to be unpicked, I am afraid.

THE PRESIDENT: You are saying two days will not be enough.

MR JOWELL: Well, we have five of us. I do not know how others are considering. It may be it is possible, if others do not consider that there is more time needed, it might be possible to start early and finish late.

THE PRESIDENT: Look, thank you for raising it.

MR JOWELL: I just thought --

THE PRESIDENT: That is important. We will have to have discussions, but I do not think today, about what is sauce for the goose being sauce for the gander. We have given Mr Holmes and the CMA additional leeway for reasons that have been articulated by Mr Holmes. We are clearly not going to guillotine in a way that we have

not to the CMA the reply submissions. On the other hand, they are reply submissions, not originating submissions.

So we are, first of all, going to leave it to the parties to work out how much they need and we will have a debate about how far we can accommodate the parties once those needs have been articulated.

MR JOWELL: I am very grateful for that. I just thought I should make the point.

THE PRESIDENT: Mr Palmer is your point the same.

MR PALMER: Just to register that we have the same concern.

THE PRESIDENT: Okay, Mr Bailey.

MR BAILEY: I am grateful.

Sir, members of the Tribunal, I am going to move to the next theme of my submissions and that is step 1. This is the step that deals with the seriousness of the infringements and, as the Tribunal will no doubt recall, the CMA looked at all the factors set out in its guidance and concluded that a starting point percentage of 30% was appropriate in this instance. That is at paragraphs 10.172, 10.176, {IR-A/12/1027}.

There has been a cornucopia of complaints the starting point is excessive, so I am going to address just four core complaints. They are in turn, 30% starting point should be reserved for hardcore cartels.

Second, 30% starting point is out of step with other cases, in particular in the pharmaceutical sector. Third, Cinven's objection to the Decision finding that the 10mg agreement led to increased price and, fourth, the complaint made by several appellants that the CMA should have used multiple starting points.

If I turn then to the question of whether the 30%, the maximum starting point, should be reserved only for hardcore cartels. That was a point made at {Day13/155:1}.

We will start with the common ground. It is common ground between the parties that cartels are one of the most serious infringements and they typically do warrant a high starting point, but it does not follow, in my submission, that no other type of conduct can ever be subject to a 30% starting point. I mean, if that were the case, that would mean that any transgression of Chapter II could never attract the highest starting point. In my submission, there is no need to be that dogmatic.

If we go to paragraph 2.6 of the penalty guidance, {M/148/13}. This is the part of the guidance that is explaining step 1 and, as we set out in our Written Closing, there are sort of three layers to the step 1 analysis and this is the first of those or three stages.

Here, you will see in the first bullet the CMA explaining that generally it will use a starting point between 21 and 30% for the most serious types of infringement and then it does, as my learned friend for Intas acknowledged, it referred to excessive pricing as being an example of inherently serious conduct because of its exploitative effect.

Counsel for Allergan, very fairly in my submission accepted and indeed correctly accepted, that excessive pricing is just as serious in terms of its effects as a cartel. That is how economists would look at it. Indeed, in some ways I might go further and say it is actually more serious, because it does directly and necessarily harm the end customer, whereas cartels do not always achieve their objective, perhaps due to cheating.

But counsel for Allergan went on to say, but you should not ignore the practical and the legal difficulties of ascertaining whether a price is excessive. I agree with him that it is not an easy task. Indeed, that is something the Tribunal itself said at paragraph 392 of its judgment in *Napp*, {M/24/108}. But in my submission, and perhaps you will not be surprised to hear me say this, this was not a borderline case. One was not agonising over the fine

line between profit maximisation and excessive pricing. There is really nothing close at all about prices that have increased by 1,500% relative to the prices that Auden itself charged in April 2008.

Indeed, we have drawn the Tribunal's attention to table 5.3 at {IR-A/12/426}, which shows a comparison between Auden's prices and various real world prices, all of which, in my submission, show that these are serious.

The question then is: should you not still reserve headroom for cartels? In my submission, one does not need to do that, in particular because of the second stage in the analysis at step 1. If we go back to {M/148/13}, please, and the second stage at the bottom of the page at 2.8. This is where I hope the CMA and the appellants agree that it is important to keep one's eye on the facts of the particular case and there may be an adjustment up or down, depending on the specific circumstances.

Now, of course cartels are not always going to be right at the 30% starting point. They are in some cases, but the case that Mr Jones showed you on Wednesday, the Irish Beef case, is perhaps an example of one that would not be, not least because the Irish Government positively encouraged the beef producers to

adopt those arrangements.

If you wanted a UK example of the same point, in *Nortriptyline*, which is referred to in Auden's written submissions, that was a horizontal market sharing agreement, so typically serious, but it affected only one customer that accounted for about one sixth of the market and so in that case the CMA applied a 25% starting point.

So of course one cannot generalise and just say, well, all cartels are always going to be at the 30% starting point.

Equally, when it comes to unfair pricing, we say of course here it runs counter to competition laws' purpose to protect consumers from exploitation. That is what Lord Justice Green said and it directly harms the welfare of consumers. Where there is such detriment, it should be within the CMA's margin of appreciation to be able to say that this is sufficiently serious to be among the most serious restrictions of competition. So that is why we put it at the top end of the scale.

I should just add, but I am not going to go through it now, that the CMA did in its Decision go through each of the factors in the guidance, looking at the nature of the product, looking at the nature of the market, looking at the harm to customers, and that informed its

judgment.

The next objection, however, was that the starting point is out of kilter with previous decisions. I have already addressed this somewhat in my opening remarks on the law, but it is a point that the Tribunal has made on several occasions. If we go to *Eden Brown*, please, at paragraph 78, {M/82/30}. The short point is, well, those previous decisions are not binding. They are not precedents. Learned counsel for Intas said there has to be broad consistency in the approach and of course I accept that. But if one wants broad consistency, one can look at the *Phenytoin* Decision in 2016, the *Liothyronine* Decision last year, this Decision, the *Phenytoin* Decision earlier this year. Those are four decisions and in each of them the CMA, broadly consistently, has applied a 30% starting point.

Now, of course the *Phenytoin* Decision in 2016 was set aside, so one has to just accept that. But my point is that the CMA's approach has not been inconsistent. I also accept, of course, that each of the Decision I have just referred to are under appeal to this Tribunal and so it may well of course be the case the Tribunal disagrees, but the CMA's view is that excessive pricing is inimical to the proper function of competition law and so it deserves to be regarded as

sufficiently serious.

But if the Tribunal were not persuaded by that, we have addressed the various previous decisions in paragraph 362 of our Written Closing at {L/7/152} just to show you that the starting points in those cases did indeed turn, as one would expect, on the particular facts and circumstances.

If I could turn then to Cinven's complaint that the CMA has improperly relied on higher prices as a result of the 10mg agreement and that it has failed to carry out a suitable counterfactual analysis for the prices that AMCo would have charged, absent the alleged agreement.

Now, we gave an answer in our written submissions which was that you do not need to carry out a counterfactual analysis for an object infringement. Mr Jones showed you the *Lundbeck* case that made good that proposition. We say if you do not need to it do for an object infringement, you should not have to do more work in relation to penalty.

But there are two further answers, we say, to that complaint. The first is, if we look at {IR-A/12/1031}, please, in the Decision. In paragraph (b) what the CMA is saying here is specific to the agreements and their seriousness and it is a long paragraph, but the point is

that it was inherently damaging to the competitive process. So we did not need to make points about increased price. The anti-competitive vice is that the competitive process was damaged.

But there is a second point to make, which is that really all we were doing in this part of the Decision was making an observation about what actually happened. The observation is that the 10mg agreement delayed AMCo's entry and that in turn enabled Auden to charge the unfair prices that it did and they went up at least prior to entry.

So we say you do not need to get into a counterfactual and work out exactly how much market prices would have been different. We say that this is an adequate and reasoned basis upon which to have regard to higher prices.

The final point on step 1 is the invitation by Auden/Actavis, and I think also by Intas, that the Tribunal should use multiple starting point percentages to reflect the ebb and flow of the infringements over time.

In response, we say two things. First, we say that step 1 really does not envisage that there would be multiple starting points. Rather, what the guidance envisages is that you look at each infringement in the

round and then you work out what here the Tribunal thinks of its gravity and the factors that inform that are set out in paragraphs 2.4-2.10 of the guidance.

The second point we make is that when the appellants have sought to identify a sort of jumping off point for where a new step 1 starting point should be applied. Auden suggested the 29 May 2015, that is where Allergan acquired the infringing business and, of course, Intas suggested the 9 January 2017, when they acquired the infringing business.

We say that neither of those two points actually provides justification for a separate starting point. For reasons of time, I am just going to refer you to paragraphs 368 and 369 of our Written Closings at {L/7/154-155} where we try to address each of those two dates and why we say you should not salami slice the starting point percentage.

So that is what I want to say on step 1.

I am then going to move then to step 4 and there is quite a bit to stay say on this. This is where the appellants have described the uplifts as being sort of extraordinary and excessive and going into outer space. So what I would like to do here, if I may, is I am going to begin by explaining why does specific deterrence matter, why is it so important, then turn to explain how

it is relevant under the penalty guidance, then summarise what the CMA did in the Decision and then respond to as many of the appellants' criticisms as I can in the time available.

So if I can start then with specific deterrence and why it is important. The Tribunal has already seen section 36 (7A) which requires the CMA to look at the desirability of deterring the undertaking on whom the penalty is imposed.

In my submission, the desirability of deterring the undertaking which is penalised has to be considered within the scheme and policy of the Competition Act. Lord Justice Pill in the *Safeway v Twigger* case explained that and it might be worth just turning that up. It is at {M/80.05/13}, please. This was a case in which Safeway was seeking to recover the amount of a penalty that had been imposed on it from its employees and from its directors and the Court of Appeal said no, you cannot do that, because you are relying on your own wrongdoing.

Lord Justice Pill agrees with Lord Justice Longmore, but if we pick it up at paragraph 44 and the opening sentence there:

"The policy of the Act is to protect the public and does so by imposing obligations on the undertaking

specifically."

If I can ask you to read the second half of paragraph 46, picking it up at the words "policy was considered important", please.

THE PRESIDENT: Yes. (Pause). Yes.

MR BAILEY: You can see there that the Court of Appeal are emphasising the need for effective preventative measures that deter the infringing undertaking.

That as a general matter, but let us look at what the penalty guidance says about this at 2.21. That is {M/148/18}, please. If we just go up actually the page to show you we are in step 4 now. Paragraph 2.20 says in step 4 what one is doing is one is considering possible adjustments, upwards or downwards, for two matters, specific deterrence and proportionality.

2.20 sets out the various indicators that I have already shown you that the CMA looks at when thinking about whether the penalty should be adjusted.

But it is at 2.21 that we see specific deterrence being discussed and, in particular, the CMA identifies in the opening sentence the specific size and financial position of the undertaking. It also says "and any other relevant circumstances of the case". I am going to come back to that, because that is relevant to the question of double counting the impact of the

infringement.

Then it goes on to say that, generally, one would expect an increase where there is either an undertaking with a significant proportion of turnover outside the relevant market. That is squarely relevant to Allergan and to Cinven. Then it also says that:

"Where the CMA has evidence that the infringing undertaking has made or is likely to make an economic or financial benefit from the infringement that is above the level of penalty reached at the end of step 3".

Then if we just perhaps while we are in the guidance look at the entirety of it. So at paragraph 2.23 you will see that then what is envisaged {M/148/19} is that the CMA must ensure that the uplift does not cause the penalty to become disproportionate or excessive, again having regard to the size and financial position and the nature of the infringement. Again, that is another point that is relevant to the double counting criticism, because the guidance, approved by the Secretary of State to which the CMA must have regard, says in terms that the nature of the infringement is relevant at step 4.

Then at paragraph 2.24 we see this is the step back. This is where the CMA has to look at the overall penalty in the round and ask itself if it is neither disproportionate nor excessive. You can see there is

a long list in the final sentence of various factors which are said to be relevant.

If one looks then, what is the analysis at step 4. We say, first of all, it is focused on the undertaking, as it stands at the Decision. It is clearly a multifactorial assessment. There are various factors that need to be taken into account and of course the Tribunal may decide they pull in different directions. Of course, that means that one is having to exercise judgment here as to what is required.

There is unlikely to be a single universally correct figure in that respect. One has to look at it in the round.

The Tribunal itself recognised what I have just said in its judgment in *McCann* when Mr Justice Morgan was sitting in the chair. That is at {M/126/117} at paragraphs 312 and 314. I do not think we need to turn them up. They just simply confirm the point that these are matters of evaluation and judgment and they do not lend themselves to detailed elaboration.

So what did the CMA do in the Decision? It is a very careful and detailed analysis, but in broad terms what the CMA did was to sort of proceed at step 4 in three stages. The first, one can see this at paragraph 10.256 of the Decision, is where it sought to

apportion the step 3 penalty. I do not think we need to turn it up. All that happened was that what the CMA did was it divided the step 3 penalty and apportioned it to when each company owned the infringing subsidiaries. It was doing that to evaluate whether the penalties would be appropriate and proportionate for the alleged infringements and this is the principle from *Areva* that my learned friend from Intas referred to.

At stage 2, and this is the multifactorial assessment, there are actually a number of factors that the CMA took into account. I would like to briefly address you on four of them, if I may, at stage 2.

The first of those is the minimum financial benefit. If we can go, please, to {IR-A/12/1016}. We can see at 10.142 what the CMA is doing here is explaining essentially the policy I have already outlined, that penalties are not meant to be painless and that if an undertaking ends up quids in, then the penalty is not going to achieve its purpose. So that is why the CMA is saying the penalty must materially exceed the profit from the alleged infringement.

I am going to come on later to deal with the draft guidance objection, if I may.

The second factor that the CMA took into account perhaps is an important one, but it is an important one

and that is the sheer size of these undertakings and I showed you the size of Allergan earlier, but we say the larger the undertaking the greater the impact it will have on the market and, therefore, the larger the penalty has to be if it is going to achieve that deterrent effect.

The Tribunal has recognised that in paragraph 98 of its judgment in *Eden Brown* at {M/82/36}, but so too has the General Court fortunate and, if I may, I would like to just show you that because I think it is quite instructive. This is in the vitamins Cartel case, the *BASF* judgment and it is {M/47.1/75}, please.

This was a case where there was a discovery in the US of eight worldwide cartels of various vitamins. They were separate cartels so there were separate fines imposed and *BASF* had been subject to 100% uplift and that is noted at paragraph 15 of the judgment. What I would like to show the Tribunal, if I may, is paragraphs 233-235 and it is under the heading "Relevances of taking into account the size and overall resource of undertakings for the purposes of ensuring the deterrent effect." If I could ask you to read those paragraphs.

THE PRESIDENT: Yes, thank you. (Pause). Yes, thank you.

MR BAILEY: So just for completeness, the 100% uplift was

upheld in that particular case at paragraph 262.

The third factor that informed the CMA's analysis of step 4 is the real risk that a penalty will not be effective if it is comparatively small when a company generates most of its turnover outside the relevant market. That was a point the Tribunal itself made in *Eden Brown* at paragraph 92, which is at {M/82/34}. As I say, that applies particularly to Allergan and to Cinven.

Now, the fourth point is the nature and impact of the allegedly infringing conduct. I have said a couple of times already, this was not double counting. I say that for two reasons actually. The first is that paragraphs 2.23 and 2.24 of the penalties guidance refer to the nature and impact of the infringing conduct. So it was what the guidance envisaged. The second is that it was actually considered by the Tribunal itself in the *McCann* judgment. I would like to go to that, if I may. It is at {M/126/119}. That appears to be an incorrect reference.

In which case, what I will simply do is to say that what the Tribunal finds at paragraph 318, which is the correct paragraph, is that in that case the harm caused by the cartel was something that was relevant to the application of step 4 and, therefore, could legitimately

be taken into account. That is the simple point.

I said there were three stages, so we apportion the penalty at stage 1. We then did this multifactorial analysis at stage 2. Stage 3 was the step back as urged by the Tribunal in the *Construction* appeals to ask itself whether the proposed step 4 penalty was disproportionate or excessive. I can give the Tribunal the references perhaps afterwards, because there were numerous places in the Decision where the step back takes place, but the short point is that the CMA did ask itself for each of the appellant undertakings whether the proposed penalty, according to various metrics of financial position and strength, were neither disproportionate or excessive.

So that is how the CMA approached it. Now, the appellants have challenged the uplifts for specific deterrence on a number of grounds and I am going to try and deal with seven of them. So let me just to tell you what they are.

The first is that the uplift at step 4 is impermissible, because in part it was based on financial benefit. It is the financial benefit point.

The second is the uplift is misguided, because it ignores what is said by this Tribunal in the *Phenytoin* judgment at paragraph 461 and specifically ignores

the Department of Health's powers.

The third is Allergan says it does not need to be deterred because it did not do anything wrong. So I obviously need to address that point.

The fourth is Auden says it does not need to be deterred, because it did not instigate the behaviour and did not retain the benefits.

The fifth is Cinven objects to the CMA characterising its transfer of value to AMCo as if it were a financial benefit from the 10mg agreement.

The sixth is Allergan and Cinven have argued their fines cannot be larger than their former subsidiaries.

Seventhly, and I will deal with that one briefly, the criticism that the step 4 adjustments render nugatory the analysis that has applied from steps 1 to 3.

So if I can start with financial benefit. Even under this head there are a number of arguments that are raised against the adjustments that were made by the CMA. Many of them are addressed head on in annex F to the Decision, which is at {IR-A/13/80}. For present purposes, I am going to focus on three core complaints. The first of those, and it was mentioned by counsel I think for Cinven and also for Intas, is that the CMA had applied the wrong guidance, that the draft of 2021

was being applied rather than that in force at the time of the Decision. Indeed, Auden/Actavis also make this point in their written submissions.

So we say that that is simply incorrect. If we go to {IR-A/12/1056}, please. At 10.252 what is being set out here and the references are to the penalty guidance that was in force in April 2018. So the CMA was directing itself to the guidance. But of course what will be said against me is that, well, actually you say that, but in fact you were doing something different. I think the point that is being made is that the guidance says that the CMA may take account of evidence that an infringer has made or is likely to make gains and what the CMA has done in the Decision is gone further than that and it said, well, we are going to take account of it, but we have actually also sought to explain why it is so important in this particular case. We did that by explaining the rationale and I have covered that already, that wrongdoers should not profit from their wrongdoing, otherwise the penalties will be ineffective.

In my submission, that is sound policy. It was practicable in this case, because we had the data that allowed us to estimate the minimum financial benefit. If one looks, as I say, at the economics of deterrence,

the way this will only work is if businesses appreciate that they will not end up better off once they have infringed and once they have been penalised.

So there is no inconsistency. All we were doing is explaining in the Decision, paragraph 10.142, that the fines need to materially exceed the minimum direct benefits.

This is an important point. If we can go to table 10.7 at {IR-A/12/1059}, please. So here is a table setting out the various periods of the ownership of the author of the infringement, the step 3 penalty that had been reached and then you have the minimum financial benefit which was calculated as the difference between the infringing price and the £20 enforcement price that the CMA decided was a priority. That is in the fourth column. Then if you go to the fifth column, you can see the difference above cost-plus.

The reason why we say this is so important, if you just look just at the first row, which is Accord-UK which is the 2008 to 2015 period and you compare the difference, you can see that the minimum financial benefit was almost twice what the step 3 penalty was.

So we say if the CMA, or indeed the Tribunal, were to leave the penalty where it was at step 3, then it would have clearly been profitable to have committed the

alleged infringement.

Now, of course I accept, I have just given you one example and I have chosen the top one, the other examples there are a smaller differences. If I take Intas, for example, that is clearly not as dramatic as the one I picked where clearly the difference is 12.5 million to 8.9 million. But of course this is only one factor. But it clearly is important in the case of Accord-UK and obviously played a slightly lesser role when it came to Intas, but there are other factors that are relevant as well.

The next objection to financial benefit is a point that you, sir, canvassed with me earlier this morning and it was the idea that we are eliding private and public enforcement. I think we have dealt with that, but just to recap. We say as a matter of principle, private action for the damages are there to compensate for loss and that is what you, sir, and the Court of Appeal in *BritNed* had held at {M/164.1/22} at 55 and we also know from *Devenish* that private actions are not there to disgorge profits as a general proposition.

That is quite different, we say, from financial penalties which are absolutely imposed to punish and to deter. That is the point of principle.

There is also a practical point, which is made at

paragraphs 8 and 9 of annex F, which is {IR-A/12/82} which is that really -- I have to use a sort of Donald Rumsfeld point -- there is a series of known unknowns here. We do not know if the DH is going to bring an action and if it does, when it does and for how much and we certainly do not know if it will be successful or not. So in my submission, it would not be satisfactory to rely on some future prospect of private litigation in order to reduce fines that otherwise need to have a deterrent effect.

The third point was a point raised by leading counsel for Auden in Closing where we are accused of yet another example of double counting as between step 1 and step 4. I hope that that is based on a misapprehension.

If I can take you back briefly to step 1 at paragraph 10.172 (e). That is at {IR-A/12/1029}, please. The point that is made in the second sentence of paragraph (e) is that:

"Unfairly high pricing, by definition [that is quite important] tends to directly create significant excess profits for undertakings which engage in such conduct. Since the potential gains from such conduct are so great, and so certain, the CMA considers that a high starting point is appropriate in order to ensure that other dominant firms are deterred from engaging in such

conduct in the future."

Now, that is a statement, is a general statement, is a general observation about the propensity of excessive pricing to be richly rewarding and so there is a need to deter others from feeling tempted to do the same. It is not a point about Auden/Actavis specifically. We are not there saying anything about Auden and what it did and whether it was super profitable and so we are not at that stage absolutely looking at the infringing undertaking. Quite apart from anything, this is about general deterrence. So it is meant to be sending a clear signal to other undertakings in accordance with the CMA's duty under section 36 (7A).

So in my submission, there is no overlap. It is actually just two distinct objectives of deterrence: here general deterrence to others and at step 4, when we look at financial benefit, that is where we look specifically at the infringing undertaking and so there really is not any double counting.

If I can turn then to the second objection and this various esteemed counsel have referred you to the comment made by the Tribunal in the *Phenytoin* case in 2018. I know you have been taken to it before, sir. I will put it on the screen just so you can see it and then I will address you on what I say about it.

THE PRESIDENT: Yes.

MR BAILEY: So it is at {M/170/144}. I hope I can make the point. It is paragraph 4.61 of the *Phenytoin* judgment of the Tribunal. The point is simply this: that the Tribunal specifically said that had they upheld the CMA's findings on abuse, which of course they did not, they would have likely have regarded the very substantial uplift for deterrence applied to Pfizer, which in that case was 400%, on its face to be difficult to justify, not required by the CMA's guidance and if they had needed to come to a decision then they would given the appropriate uplift close scrutiny, particularly having regard to the new price control powers of the DH. That is the gist of the paragraph that is relied upon. Leading counsel for Auden said this was a shot across the bows which has been ignored by the CMA.

So I make four points about that, if I may. The first is of course that this is purely obiter, because it is just an observation, to be treated with respect, but it is not a binding comment.

The second is the comments is directed at a different company on different facts and, in particular, the CMA in *Phenytoin* did not estimate the financial benefit from Pfizer's abuse. So there was no

comparison available to the Tribunal for it to see the minimum financial benefit on the one hand and the step 3 penalty figures on the other. Of course, that is available to this Tribunal.

The third point is I respectfully agree with the Tribunal that the guidance does not require the uplift for deterrence, but paragraph 2.21 at {M/14/18} does envisage, does contemplate that there can be such an uplift for the reasons the CMA gave in its Decision.

But the fourth point is an important one and it has been raised by all of the appellants and it is the price control powers of the DH. Here, what is being said, in that last part of the Tribunal's judgment, is that the prospect of future price regulation, that that somehow negates the need for an uplift for specific deterrence.

I actually have a number of points to make about that, because if the Tribunal had in mind, and it is a very short passing remark, that the mere possibility of future price regulation means that you do not adjust for specific deterrence then, respectfully and regretfully, we disagree with that.

We set out our position at paragraph 83 of annex F to the Decision, which is at {IR-A/13/103}. If I could just walk you through perhaps a little bit what we say about the DH powers.

The first thing we say when it comes to the agreements they are irrelevant. So in that sense if we are going to impose fines to deter for agreements, these powers do not apply.

The second thing we say is there is a degree of real uncertainty about the future use of these powers.

THE PRESIDENT: To what extent does this overlap with the points Mr Holmes was making about these powers not being negativing of dominance?

MR BAILEY: They certainly do overlap and I am certainly not saying, I hope, anything that is inconsistent with what Mr Holmes said to you yesterday.

THE PRESIDENT: No.

MR BAILEY: I suppose I am addressing you on the very specific point about whether these powers prevent penalties for deterrence. I think what Mr Holmes was saying was about whether these powers negate dominance. There is an overlap of course.

THE PRESIDENT: No, of course he was addressing dominance, not penalty, but what I am wondering is he made the point, and we will look at the provisions to see how far we accept it, but he was saying that these were effectively toothless regimes that, for instance, necessary subordinate legislation had not been put in place and that the relevant provisions in the NHS Act,

when you read them as a whole and looked at them in context, meant there was effectively no price control regime that was effective at all and the only point I am making is we can see those points as being equally valid to the penalty question and I suppose what I am saying is --

MR BAILEY: That --

THE PRESIDENT: -- what more have you got to say than what Mr Holmes said?

MR BAILEY: That is a very fair question, if I may say so, sir. Mr Holmes was addressing you on the position during the infringement.

THE PRESIDENT: Sure.

MR BAILEY: I am addressing you on the question looking to the future, because we are proposing penalties and I think that is what the Tribunal had in mind in *Phenytoin*. It was saying the new price controls powers, which if *Phenytoin* is right, came in in 2017 and that actually post-dated the *Phenytoin* Decision. So the point the Tribunal was making is when you are making a forward-looking assessment of the need for a penalty to deter in the future, what do these powers say? Whereas I think what Mr Holmes was addressing you on when we look back to 2008, and I think he identified three periods, and the powers changed over time, did

that negate dominance in that way?

In that sense there is a difference.

THE PRESIDENT: Yes.

MR BAILEY: So I think it is important for me to --

THE PRESIDENT: This may reflect my need to read further into this, but has there been a significant beefing up of the section 261/262 powers under the NHS Act?

MR BAILEY: When Mr Holmes addressed you maybe in the third period, when he talked to you about the Health Service Medical Supply Costs Act and I think he from memory explained that it amended section 262 to make clear that it applies to the regulation of unbranded generic products and there was some doubt about that in earlier periods, that is the legislation that the Tribunal was referring to in *Phenytoin*. So Mr Holmes has referred you to it in this case. That is because it is relevant to the tail-end of the infringement in 2018 and all I was really doing was then taking those --

THE PRESIDENT: Fleshing out.

MR BAILEY: -- fleshing out that point.

THE PRESIDENT: No, the fleshing out of the statute by statutory instrument, has that occurred?

MR BAILEY: Yes, sir. So there has been some fleshing out but not complete fleshing out and I think Mr Holmes showed you yesterday that there had been statutory

instruments brought into force for information gathering powers and also for financial penalties to be imposed and they happen -- I am doing this from memory -- but from April 2018 and then I think in July 2018. So as I say, right at the very end offer the infringement.

Now, what I say is that those of course now are in place and so when you are making your assessment here in 2023 those powers exist, but there is a further continuing uncertainty, which is that the Department of Health said in 2018 that what they were going to do was publicly consult on how they would apply the reserve power under section 262. They said that in a document which is at {IR-H/1141.1/34}. So far as the CMA is aware, that consultation has still not happened and the Decision provides an update from 2018 in footnote 324 of annex F which is at {IR-A/13/103}. So what the DH said they were going to do is they were going to consult on how these powers were going to be used and then one would assume, once they had the responses, they would then make that clear, so the sector knew when and how they were going to apply the powers.

The situation as we understand it is that has not yet happened.

THE PRESIDENT: So the one example I think we have got is the Teva example where these provisions were used as

a stick to induce a change in approach and that was something which Mr Jowell raised to articulate and Mr Holmes accepted. But I think apart from that there was no instance either where these powers had been threatened or, more importantly, used. I understood Mr Holmes -- it may be wrong -- I understood him to be talking about in general terms rather than within a specific time bracket. I mean, do you have any instances where there has been enforcement in more recent times to add to the nil return that Mr Holmes gave us in his submissions?

MR BAILEY: No, sir. Mr Holmes is entirely correct about that point. The only occasion on which the CMA is aware of informal intervention by the Department where it was said that there was a threat to use regulatory powers is indeed that meeting in 2008, yes.

The point we are making really on penalty and deterrence is that given the uncertainty about the use of the powers, they have not even consulted on them, they have never used them, the fact that it would take some time to use them, because they have to consult with the BGMA, for example, that it would be really unsatisfactory to not then have a deterrent achieving penalty based upon the future prospect of those powers being used when in circumstances you say they have not

been used very effectively.

There is a further point, if I may, that applies particularly to Cinven, because of course specific deterrence is not just limited to the pharmaceutical sector. We know from various of its annual reviews which are in Opus, for example, in 2012 at {IR-H/1168/3} that Cinven did not just operate in the pharmaceutical sector. It was operating in financial services, and technology and media and telecom and the point being is that when the Tribunal comes to look at specific deterrence, it is not just the behaviour in generic pharmaceuticals that matters, it is also the behaviour in all activities of the undertaking that is penalised.

Just to explain what is on the slide, sir, what is on the slides here is the Department of Health document where it explained that it was intending to consult on the powers given to it under the 2017 Act.

We say the regulatory powers really do not usurp the need for specific deterrence.

If I can then turn to the third complaint and that is that Allergan says it does not need to be deterred. This point was made at {Day13/107:1}. The point was being made that Allergan Plc is not alleged itself to have done anything that it was just in New Jersey. It did not know about anything and you were invited to

condemn the CMA's use of what Jeremy Bentham referred to as dog law. It was an obviously fallacy in the CMA's analysis.

We say there is no fallacy. Allergan has not been metaphorically kicked as if it was a misbehaving canine. The correct position is that it was penalised and its fine was adjusted because it was part of the undertaking. It takes me back to the note that we have handed up, which I understand in terms of the law is common ground.

But actually can I make good this point by taking you to another authority. It is the one in {M/87/1} in the carbonless paper cartel. The reason this is quite interesting is because you had an offending subsidiary in this case, Copigraph and the applicant, Bolloré, had sold Copigraph on to another company, AWA, but the Commission held Bolloré -- I am sure I am not pronouncing its name correctly, but if you just indulge me -- they had held Bolloré liable in its capacity as a parent company.

If we go to {M/87/5}, please, we see arguments being made at paragraph 31 that the commission was in breach of various principles, the principle of legal certainty, the principle that offences and penalties must have a basis in law and then at the end of 31:

"Last, that the penalty imposed on the applicant in its capacity as a parent company breaches the principle that penalties must be applied only to the offender."

That was the principle that counsel for Intas took you to.

Now what the court then does, and I am not going to go through it now, but at paragraphs 37-41 is rehearse the case law on attributing liability to parent companies.

If you can go to page {M/87/8}, please, we see the argument about penalties being applied only to the offender being addressed head on.

This is at paragraph 51. In particular, we can see that the court says:

"It is sufficient to observe that that argument ignores the basis of the liability of the parent company, which is not strict liability incurred on behalf of another but liability for its own misconduct and personal in nature."

Indeed, the court goes on in paragraph 52, where it says towards the end of that paragraph:

"Even if the parent company does not participate directly in the infringement, it exercises ... a decisive influence over the subsidiaries which have participated in it. It follows that, in that

context..."

It says the liability is not strict. Instead:

"The parent company is penalised for the infringement which it is deemed to have committed itself."

So my submission is that at least between May and March, May 2015 and March 2016, where Allergan and the CMA agree that Allergan Plc is part of the same undertaking as AM Pharma and Actavis, during that period Allergan Plc is deemed to have committed the infringement itself. Therefore, it is not open to my learned friend to make the submission that we were willing to wound, but afraid to strike. There is no wounding or striking. It is just simple. It is that the undertaking infringed, Allergan Plc is part of that undertaking and we say, therefore, it is personally liable.

Now, my learned friend for Cinven made a sort of "me too" submission about this on {Day15/40:1} and said all we did, Cinven, was we owned a company for a few years. Now, that submission makes it sound as though they are just a passive financial investor. With the greatest of respect, that is manifestly wrong. The CMA went to great lengths in the Decision. One of the reasons why the Decision is quite long is there is a long section

that you will never probably ever read on the attribution of liability to Cinven. It is pages 912-966. Now, that finding has not been appealed so Cinven was part of the same undertaking as AMCo for the same reason as Allergan is deemed to have committed the infringement.

In my submission, that is very important when dealing with penalty, as much as it is for liability.

I have an eye on the clock.

THE PRESIDENT: No, not at all.

MR BAILEY: But I can assure the Tribunal I will definitely be done by 1 o'clock.

So the fourth complaint is that Auden/Actavis says, well, we do not need to be deterred and the first thing they say is, well we did not instigate this behaviour. It is a somewhat facetious response to say so what? But we say the instigation is something that is relevant as an aggravating factor at step 3, but the absence of instigation is not, in my submission, a factor that precludes or neutralises the need for specific deterrence, provided it is justified on other grounds. I say of course it is justified by the financial benefit, the size of the undertaking, the serious nature of this infringement.

The other point that Actavis makes is that they did

not receive the financial benefits. It was said it was paid to shareholders and to the vendors of Auden McKenzie. Again, I mean, I am afraid so what? There is no principle or precedent for saying that penalties should be attenuated because the funds happen to be passed on to shareholders. Those really do not negate the need for deterrence.

The fifth objection is said to be a category error on the part of the CMA where Cinven objects to the CMA's characterisation of Auden's payments to AMCo as being a financial benefit of the 10mg agreement. Cinven insists the benefit can only be measured by a comparison of the profits AMCo would have made in the counterfactual world against the benefits of the 10mg agreement in the real world. That is at {Day15/39:1}.

The answer to this is that the amount of the value that we say was transferred from Auden to AMCo, the huge profit sacrifice that was made by Auden, shows what the parties considered to be the benefits from non-entry. That was the economic significance of the infringement.

As we say, we do not need to speculate about a world that never was where AMCo actually did enter and did seek to compete prior to 2016. But we also say that that point I have just made is consistent with what the General Court found in a different appeal in the *Servier*

case. I would like to just show you one passage of that judgment just to show you why we say we have not made a category error. It is at annex F, {IR-A/13/86}, please.

This quotes from a judgment of the General Court in the *Unichem* appeal, a generic appeal in the *Servier* case. Could I just ask you to read the passage at paragraph 22, please.

THE PRESIDENT: Yes, of course. (Pause). Yes, thank you.

MR BAILEY: The General Court is expressing that in quite strong terms and we say the same comment applies to Cinven's point in this case.

So the sixth argument is that the fine imposed on Allergan and Cinven was larger than its former subsidiaries. Support for that proposition is said to be the principle that the liability of a parent cannot exceed that of its subsidiary where the parent's liability derives from the excise of decisive influence over the subsidiary.

I think in the abstract that sounds quite an attractive point, but the point was also run in the *Paroxetine* case. If I may, I would just like to show you the argument and then how the Tribunal dealt with it. It is at {M/183/68}, please. Paragraph 195 we have Merck, one of the appellants in that case, and it was

arguing that its fine of some 5.8 million exceeded the fine on its former subsidiary, GUK, which -- you do not need to go there -- the previous page tells us it was 2.7 million. So there was a much higher fine on the parent.

They said, look, this infringes the very principle invoked again by the appellants in this case. So then one looks at what Mr Justice Roth and his colleagues said at 196, and he points out that, yes, there is such a principle in terms of liability. So what the CMA cannot do is it cannot assign a higher seriousness percentage at step 1 or a higher multiplier for duration at step 2 for the parent as opposed to the subsidiary. Just to be clear, the CMA did not do that in this case. So we have adhered to that aspect of the principle.

Then the Tribunal goes on to say, but that principle is quite different from the question of assessing the proportionality of the penalty under step 4, having regard to the size, and the financial position of each of the companies at the time of the Decision. When the former subsidiary is no longer under the same ownership, it is particularly important that this assessment is carried out separately for each. That is what the CMA did in that case. That is what the CMA did in this case.

We say it is correct in principle, and indeed there is even further authority that supports what the Tribunal found in that case cited at paragraph 10.398 of the Decision which is at {IR-A/12/1095}.

The final objection, sir, is that well, the adjustments that the CMA made at step 4 effectively meant well, why did you bothering doing steps 1, 2 and 3? Our response to that is that the guidance expressly considers that it is permissible to make an upward or a downward adjustment. Of course the Tribunal can do the same thing.

The starting point was the figure at step 3. In our Written Closings we sought to set out for you the step 3 penalties and sought to explain why we say that those would have been inadequate for deterrence. So it does eclipse or render nugatory what was done before, rather steps 1 to 3 inform the step 4 analysis.

You will probably be pleased to hear that in conclusion then, we say that this is a case that involves serious infringements of competition law. On the one hand, you have an incumbent monopolist, Auden, for a long time a monopolist, that used the supply of its product on too good to be true terms to bar the competitor. On the other hand, one has the same monopolist increasing a price of a 60-year-old drug by

over 10,000% compared to the previous owner's prices and 1,500% over Auden's own entry prices. The winner in all this was the undertaking, and I explained to you how much trading benefits it received, and the loser of course was the NHS that had to foot the bill.

So we say the fines were set at a level to reflect the seriousness of what had happened and to serve as a stark warning to any undertaking that might otherwise be tempted to share markets or indulge in excessive pricing.

Unless I can assist the Tribunal any further those are the submissions of the CMA this side of Christmas. Just to also say sincere appreciation to the transcriber and the Tribunal's staff throughout the proceedings for their support and understanding.

THE PRESIDENT: Thank you, Mr Bailey, and we would like to reiterate what you just said about the staff and support and can I extend my thanks to all of you for sterling efforts. I see we have a number of -- Ms Ford.

MR BREALEY: Can I also thank everybody as well and wish on behalf of everyone a merry Christmas. I am sure Ms Ford is going to say something. Before she does can I thank the CMA for the present they left me by the tree which I am wearing today. There was a sting in the tail because it says "A gift from Santa which we expect you

to model on Friday". Friday was of course my reply which never happened, but thank you to everybody for my present.

THE PRESIDENT: Ms Ford.

MS FORD: Sir, by way of additional festive gift we have produced a short note on some of the matters that have come up over the course of Closings. We will of course address them orally in due course but we felt that given the work had been done it might make sense to hand it over now in an anticipation that the Tribunal wished to be reading over the Christmas period.

THE PRESIDENT: Thank you.

MS FORD: Does the Tribunal prefer A4 or A5.

THE PRESIDENT: In this case A4 would be more helpful for me.

PROFESSOR MASON: And electronic as soon as possible.

MS FORD: We can certainly upload it to Opus.

THE PRESIDENT: That would be very helpful as well.

(Handed)

MR BAILEY: Sir, just bits of housekeeping. You asked yesterday, sir, about the patent position in relation to *Plenadren*.

THE PRESIDENT: Yes.

MR BAILEY: I am told --

THE PRESIDENT: Mr Holmes did answer that --

MR BAILEY: He did answer it.

THE PRESIDENT: -- but you may have something more to say.

MR BAILEY: So therefore on Opus, just references, really.

THE PRESIDENT: I am grateful.

MR BAILEY: {H/993.2/1}, {H/1052.1/1}, {H/1200.2/1}. So those are the patents for *Plenadren*.

Then you also asked, sir, about the patent of pricing of *Plenadren* over time and that is at {IR-H/155.2/1}, {IR-H/891.1/1}, {IR-H/1247.1/1}.

Then my learned friend for Allergan helpfully provided some of the economic literature that had been presented, I think in part to the Court of Appeal in the *Phenytoin* case and the CMA is seeking to adduce a few additional bits of festive reading for you, and that apparently is also happening.

THE PRESIDENT: Thank you. We certainly are more than happy for our economic understanding to be broadened, not of course Professor Mason's, his is broad enough already, but speaking for the rest of the Tribunal, that would be very helpful.

We will adjourn until the new year, dates to be sorted out. We would like the parties to in the first instance ascertain how much time they need. It is obviously the case that two days is easier to arrange than three, particularly given the difficulties that we

have on diary. Three nonconsecutive days really does look bad in terms of continuity and keeping up with the submissions. Two is not ideal but obviously better. We would be prepared to sit longer days if that would assist the parties to achieve their objective of getting through the material that they need to get through orally in two rather than three days, but we are conscious that the point that Mr Holmes made that at the end of long days the reward for advocates' efforts is perhaps less than it is at the beginning. It is less true of Tribunals than it is of witnesses but there is probably some force in that. But we are prepared to sit longer if that can be achieved in terms of squeezing more into less.

I do not think, unless the parties want to say anything about that, I do not think there is anything more that can usefully be said now but I will obviously hear anyone who wants to say something on that.

MR BREALEY: No, can I just clarify because it is quite important.

THE PRESIDENT: Of course.

MR BREALEY: There is trouble in the diaries for yourselves and also for us. We are going to go away and then we write to the Tribunal saying. I think we only need one hour each so we will say how much time we need and then

maybe what our availability is as well.

THE PRESIDENT: That I think would be very helpful. What I think we need to do about availability is focus on the absolutely essential people for each given party who need to be around because if we go for a day where the whole team is available we will be pushing this off for far longer than it ought to be pushed off.

But that would be helpful and we will for our part begin the process of working out what days we can manage and it may be helpful if we start pushing that back to the parties so that they know what our position is.

MR BREALEY: Fantastic, yes.

THE PRESIDENT: Mr Palmer, of course.

MR PALMER: I think it is reasonably clear from what you just said but I think we can anticipate that we will not be resuming in early January. It will be late January perhaps I do not know.

THE PRESIDENT: The difficulties are that both Professor Mason's diary and my diary are that January is very full. We will look at dates in January but I would be personally quite surprised if there was any date in January. It will certainly not be before 20 January. But we are very conscious that delay in concluding the hearing is highly undesirable, and we want to close the record as quickly as I am sure the parties do. So we

have that very well in mind.

I mentioned the period January, February to March on the basis of a very real understanding of the problems on this side in terms of diary and I gave the month March very much through gritted teeth. It is something that I really do not want to have happen and I know that the parties will say exactly the same thing.

MR PALMER: It is a very helpful indication for which I am grateful and so we will submit dates really for not before 20 January realistically.

MR BREALEY: So March from a few people's side is going to be in trouble because of Trucks.

THE PRESIDENT: We will do our best. Clearly for it to go beyond the end of March would be unacceptable.

MR BREALEY: Trucks starts on March 13.

THE PRESIDENT: So we have a window there. We will find a solution.

MR BREALEY: I am grateful. Thank you.

THE PRESIDENT: Thank you all very much. Thank you again for all your efforts, everyone, and I wish you a Merry Christmas and a Happy New Year. Thank you.

(12.43 pm)

(The hearing adjourned until a date to be confirmed)