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

Friday 3rd February 2023

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

BETWEEN:

(1) ALLERGAN PLC ("Allergan")

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

(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, 3 February 2023

(9.30 am)

Closing Submissions by MR JOWELL (continued)

THE PRESIDENT: Mr Jowell, good morning.

MR JOWELL: I thank the Tribunal for permitting us this early start. Under the timetable, I have 45 minutes, so I will have to go at quite a trot.

I would like to focus my time this morning in responding on the question of the penalty on Allergan, but I of course also have in mind the Tribunal's question regarding economic value, which I will come to at the end of my submissions, if I may.

Before I turn to the proper approach to penalty, I would like to start by correcting certain misconceptions as to the facts that we fear may have crept in as a result of certain of the CMA's submissions.

These fall into three areas: first of all, the facts as to what Allergan knew when it purchased Auden about the historic facts that are said to underlie the infringements; secondly, there is what Allergan anticipated its profits and prices for hydrocortisone would be at the time of the purchase of Auden; and, thirdly, what then actually happens to prices under Allergan's period of ownership. I just wish to clear up

the position and make sure that this is all, as it were -- the Tribunal has a fair and complete picture.

Let me start, if I may, with the historic facts about what Allergan knew about the facts underlying the alleged agreements.

Now, the first agreement, the 20mg agreement, everyone is agreed that Allergan knew nothing at all about that; it is not alleged to have participated in that agreement, it ended before Allergan took over, and it has never been suggested that Allergan knew anything about it.

As to the 10mg agreement, it was contended in the written openings, you may recall, of the CMA, that the slides in the presentations shown by Actavis, the subsidiary, to Allergan, supposedly revealed what were called all the essential facts that underpinned the 10mg agreement. You will recall that we took issue with that submission, and you may recall the exchange that took place on Day 13, in which Professor Mason quite fairly put to me specifically whether the high percentage off tariff, if Allergan had focused upon it, amongst all the other material, might it have jumped off the page commercially. You will recall that my response was that it would not have done, in the sense that there was nothing in that figure that would have given rise to

a reasonable inference of an unwritten exclusionary agreement not to enter the market.

Now, I think that must now be uncontroversial, and I say that because Ms Demetriou KC -- rightly, in our submission -- accepted that, to establish an anti-competitive agreement of the form contended for by the CMA, there had to have been something that, as she put it, crossed the line between the parties; and she accepted that neither the written agreement itself, nor its implementation, would be enough to give rise to such an inference. You will recall that Ms Demetriou sought to find such sufficient communication crossing the line in the exchanges that took place in early 2014 between Mr Beighton and Mr Patel, in which Mr Beighton bluffed that if he did not receive the agreement, then he would enter the market, or might enter the market.

Now, I leave entirely to others to argue why that is not enough to derive the market exclusion agreement that Ms Demetriou seeks to infer from it. But the point that I observe, for the present purpose, is just a very simple one, and that is that, on any view, that exchange was not known to Allergan. It was not even known to Actavis, as Ms Ford will explain. But on no view can it be suggested, and it has not been suggested, that the existence of that communication across the line was

further communicated up to Allergan. So it follows that an essential fact -- in fact, the most essential fact -- underpinning the alleged 10mg agreement, was not known to Allergan and could not have been known to Allergan.

So those are the agreements.

Then what about the facts relevant to excessive pricing in the period prior to Allergan's ownership? What did Allergan know about the facts of pricing?

Well, the CMA has, understandably, been very keen to emphasise the disparity between what Auden were charging for the product in 2008 and what they were then charging by 2015. They pointed, and Mr Holmes pointed in particular, on several occasions, to the mountain or Matterhorn graph that one finds in the appendix to the Decision, and that shows an increase back from under £5 in 2008 and a more than tenfold increase up to 2015.

But what the CMA may have overlooked when it comes to my client, Allergan, is that whilst it is now possible for us to see the full evolution of prices all the way back to 2008, that was not something that was visible to Allergan when purchasing Auden in 2015. Put another way, Allergan could see only part of the mountain, and that part of the mountain that it could see were the prices from 2012, or perhaps 2011, but not the prices all the way back to 2008.

Now, time does not permit me to go back through all of the documents, but one can see that from the Project Apple presentation. Perhaps if I could just show you two pages of that. If we could go to {IR-A1.1/7/5} and you see the graph there of revenue development and you see it goes back to 2011.

If we could go to {IR-A1.1/7/14}, we see here prices going back to 2012. You can see here the price of hydrocortisone going from £32.75 in 2012 to £43.90 in 2015.

So Allergan could see that there had been significant price rises, in a sense. That is an increase of about a third, and it went up a further amount to, I think, £62 before they purchased Auden at the end of May. But what they did not see were the very dramatic price increases, historic price increases, that we can see now, when you can see the whole graph, going all the way back to 2008. They do not see the price rises back down from £5.

Now, the second point of correction, area of correction, I should make relates to what Allergan anticipated about prices and revenues from hydrocortisone when it bought Auden in 2016. We can see -- indeed, one can see this from the graph in front of you -- you can see the dramatic falls in --

significant falls anticipated in 2016 and 2017.

Now, Professor Bailey took you to a different part of the Project Apple presentations, and if I could just show you those. It is at {IR-H/922/15}. He said: well, the price was projected -- it is very similar to the one you have seen, an updated version, I think. He pointed to the fall from £43.90 to £32, and then the fall to £8.55 in 2017, and Professor Bailey's point was: well, most of the price drop was projected to occur in 2017, not in 2016, and he suggested that Allergan therefore anticipated continuing to reap lots and lots of profit from hydrocortisone sales in its first year and a half of ownership.

Well, that is not quite right. First of all, a 27% drop expected in 2016, which was the first full year of Allergan's ownership, was a very substantial drop, and an imminent drop. It was going to reverse all of the recent increases that had happened in the period from 2015.

But the second point to note is that the price charged by Auden/Actavis is only part of the picture when it comes to profits, and that is because there is also going on in 2016 the predicted erosion of market share of Auden. That is because cheaper products from other producers are coming in and replacing Auden's

product.

If one goes back to {IR-H/922/6}, one can see the combined effect of the fall in market -- predicted effect in the fall in prices and market share. Do you see, "Base case: [Profit and Loss] Projection", and you see the "Financial Summary" table, and you see hydrocortisone sales, they are anticipating profits of a little over 31 million in 2015, and then in their first full year of ownership those plummeted to 13 million, and then down to 4 million in 2017.

So, in fact, most of -- when you are looking at actually these slides as a whole, most of the erosion of profitability of hydrocortisone was anticipated to take place in the first year, the first full year, of Allergan's ownership. We say, as I will come on to, that that is a very important, surely, mitigating or attenuating factor that ought to have been taken into account by the CMA when considering the appropriate level of penalty. Of course, we go further, and as I have already submitted to you, we also say that means that, on the law, there was in fact no infringement at all.

So then let me come to the third area where I would like to clarify things, and that is what actually happened to prices after Allergan purchased Auden at the

end of May 2015.

Now, you may recall that Mr Holmes suggested that there was a massive increment during the early point of Allergan's ownership, and he referred, I think, on the last occasion to there having been savage price increases in the early period of Allergan's ownership. To substantiate that, he directed the Tribunal to the Matterhorn graph with the steep price rises in the first half of 2015. But, with respect, one does need to be careful when making assumptions based on graphs that do not have a very finely grained x-axis, and one has to bear in mind that Allergan only purchased Auden at the very end of 2015 -- the end of, forgive me, May 2015.

Now, the true facts of the evolution of prices of hydrocortisone under the period of Allergan's ownership of Auden are not, as we understood it, contested, and they are set out in our notice of application at paragraph 30, which I have already taken you to. Those facts are that in the initial nine-month period after Allergan purchased Auden, the prices went up from their lowest to their highest by some 15%.

Now, I accept that there is room for some rhetorical flourish, but I respectfully suggest that that is not a savage price increase, and nor is it really fair to pin it on Allergan, given that that was part of a price

increase that was already largely in train already at the time it purchased the company.

What is also true -- and one has to have the full picture -- is that in the final five-month period of Auden's ownership, prices then went down by more than that, by more than 15%, so that the prices charged by Actavis UK ended up below the prices charged at the time of Allergan's acquisition. Now, if a 15% increase in nine months is a savage increase, then a fall of more than 15% in five months must be an even more savage decrease.

More generally, I do observe that Mr Holmes described there as being a "gradual unwinding" of prices from March 2016. Well, that will be really for the Tribunal to judge, but if the slope on the right-hand side of the CMA's mountain is a gradual unwinding, then I would certainly not wish to go skiing with Mr Holmes. There is, in our submission, a precipitous fall in prices from March 2016 of around 90% in just six years -- forgive me, three years, just as Allergan had anticipated.

Mr Holmes also referred to the "concrete reality", as he put it, of the near-term cash cow which he claimed led to post-entry profits of nearly 90 million. But that is a bit unfair, because it refers to all the

profits for the entire post-entry period, including those profits that post-dated Allergan's period of ownership. The documents show that, going into the purchase, Allergan certainly did not anticipate profits from hydrocortisone on anything like that scale, as you can see from the Project Apple presentation that is still before you on the screen. It did not foresee the sorts of issues that are alleged to have arisen subsequently by reason of some possible stickiness of switching as a result of the apparent reluctance of the large chemists to prescribe skinny label products. That just does not feature in any of the presentations, and it was not anticipated.

So those are the key facts that we say require a bit of correction, and that we say the Tribunal should take into account.

Could I turn, then, to the proper approach to assessing the penalty.

Now, Mr Holmes stressed those parts of Lord Justice Green's judgment in *Phenytoin*, where he emphasises that the present type of appeal takes as its focal point the Decision itself and is not a complete de novo hearing. Professor Bailey, for his part, stressed that the Tribunal can afford the CMA some margin of appreciation. That is all correct as far as

it goes, but it is also important, in our submission, not to lose sight of the fact, as Lord Justice Green also emphasised in *Phenytoin*, that this is a true appeal on the merits in which the Tribunal must make its own appraisal of the right outcome, including the right outcome in relation to penalty.

Now, the CMA is an administrative agency and it is tasked with the difficult -- it is in the difficult position of being both the policeman and prosecutor, and also judge and jury, and it is perfectly understandable that it may, on occasion, lose perspective, in particular when it comes to the imposition of penalties. It is therefore a key role of this Tribunal, as the case law has repeatedly emphasised, to independently and rigorously appraise the proportionality of the penalty. It is an important check and balance in the system.

So, put another way, we would say that the Tribunal should uphold a fine of this magnitude, of £111 million, on Allergan for a period of just 14 months for a purely derivative liability for an infringement if, and only if, that represents the Tribunal's own at least approximate assessment of an appropriate level of fine. If it does not, then the Tribunal should not endorse the CMA's conclusions on the basis of misplaced deference.

So coming, then, to the meat of it.

You will recall the focus of our oral submissions on penalty was on the enormous uplifts that occur at stage 4 of the calculation for so-called specific deterrence, and you will recall that our principal point was the unfairness of those dramatic increases of £17.5 million for the agreement infringement and £67.5 million in relation to the 10mg excessive pricing infringement, increasing the penalty some tenfold.

The only meaningful justification given at that stage was the need for specific deterrence on Allergan, and the problem with that was that Allergan was not alleged to have participated in the infringement, and we submitted it had no culpability in relation to them because it was unaware of the facts giving rise to them and could not reasonably have been expected to detect those facts. So what, we asked rhetorically, was the CMA legitimately deterring? I am sure you will recall that we invoked the authority of Lord Bingham citing Jeremy Bentham's dog for the common law principle against imposing punishments on parties for deterrence, where they themselves have no prior culpability.

We listened carefully to the CMA's response to this point. Professor Bailey understandably made his submissions in a composite manner, but extracting from his submissions so far as relevant to Allergan, we

understood him to have two main responses. The one response was that Allergan, because it was part of the same undertaking as Auden, was deemed to know what its subsidiary knew and was deemed to infringe where its subsidiary had infringed. Connected to that, he said that there was no rule that the larger parent company had to be fined the same amount as the subsidiary.

Professor Bailey's other response was to contend that Allergan knew or should have known considerably more than we suggested it knew, and he asserted, in effect, although perhaps he did not put it directly, that Allergan was at fault, at least in relation to excessive pricing.

So let me deal with the first argument, the deeming argument.

For that point, Professor Bailey took you to the case of *Bolloré*, which is in {M/87}, and to paragraphs 51 and 52 {M/87/8}. I do not think we need to go back to them. But that confirms a principle which we do not dispute: that where a parent company exercises decisive influence, it is deemed to have committed the infringement that its subsidiary committed and, as such, may be held liable to the same extent as its subsidiary.

But that principle only goes so far. What that principle does not mean is that one can then use it to

justify a further massive uplift on the parent alone for specific deterrence, and no case was cited for that proposition; indeed, it was not clear to us that Professor Bailey was actually seeking to go quite that far.

THE PRESIDENT: So you say that the decisive influence test enables the making of a finding, but does not tell you anything about its level?

MR JOWELL: That is it, absolutely. That is exactly right. Save, perhaps, that it allows you to fine the parent the same amount, potentially, as it is effectively jointly and severally liable for the fine that is imposed on the subsidiary.

But if you wish to go above that, then we say you have to have regard to the individual circumstances of the parent company, and it is certainly not the case that *Bolloré* establishes that the parent company itself knowingly committed the infringement and that it is somehow to be fined on the fictional basis that it, itself, committed the infringement. In other words, you do not create a sort of Frankenstein's monster, an entity with the mind and culpability of the infringing subsidiary but the body of the giant parent company, and then ask: well, what would be the fine that would deter that creature, because, of course,

Frankenstein never existed, and if Frankenstein never existed, then there is no basis for seeking sanctions sufficient to deter him.

So we say if the CMA wants to go beyond that and uplift the fine for specific deterrence, it has to find something, some factor, in the conduct, actions or inactions of the parent company that justifies a specific uplift as regards that company.

In fact, we say really no more and no less than what is said in the current edition of Professor Bailey's excellent textbook, of which he is the general editor, Bellamy and Child. If I could take you back to that, it is in {M/156.01/4}. You see the sentence at the foot of the page:

"In particular, in a situation where the liability of a parent company is derived purely from that of its subsidiary and in which no other factor individually reflects the conduct for which the parent company is held liable, the liability of that parent company cannot exceed that of its subsidiary."

Now, Professor Bailey took you later in his submissions to the decision in the *Paroxetine* Decision in *GlaxoSmithKline* to show that there was no hard and fast rule that the parent company can never be fined more than the subsidiary. We accept that, because there

will be some circumstances where, for example, the subsidiary hits its statutory cap. You can still fine the parent company above that.

Similarly, there is the position, as there was in *GlaxoSmithKline*, where there was an initial fine calculated on the subsidiary, GUK, which was then reduced on the grounds of proportionality, and the CMA declined to make the same deduction for Merck, the parent company, because it was so much larger. The Tribunal held that there was no such rule of law meaning that Merck had to benefit from that reduction on the subsidiary on the basis of proportionality.

Now, we, for our part, do not advance the contention that the fine on the parent can never be higher than the fine on the subsidiary, and we accept that it is lawful to impose different fines on the parent and the subsidiary where the fine on the subsidiary is specifically reduced for a particular reason that does not apply to the parent; or, indeed, where there are special circumstances that warrant a particular uplift of the fine on the parent company. But what is notable is that the CMA has not identified any special circumstances, we say, to justify the massive uplift specifically imposed on the parent company in this case for specific deterrence. The only thing it relies on is

its size, and we say that cannot be enough; one has to have regard to both the specific offender and also the role of that specific offender in the specific offence.

Indeed, what is quite interesting is, if you go to the CMA's opening submissions -- and if we could just go to that. If we go to {IR-L/6/82}.

If we could go down to paragraph ...

THE PRESIDENT: Fire alarm. Do not all rush for the door. It is a test.

(Pause)

I think that is it, Mr Jowell.

MR JOWELL: Thank you.

If we see 236, they assert:

"... the CMA did have regard to the principle that a penalty needs to be specific to the offender and offence at Steps 3 and 4, steps when it considered the circumstances of the individual infringer on which each penalty was imposed."

Well, we agree that it should have had consideration to that principle at step 4, but, when it came down to it, the only consideration that it seems to have had regard to was the size of Allergan, or, more specifically, the size of AbbVie, which is the current parent company which has now taken over, and there is no fair assessment in the Decision anywhere of the many

attenuating and mitigating circumstances of Allergan's position.

One sees the importance of taking into effect not only size and scale of the undertaking, but also the culpability of the particular entity in the *Eden Brown* judgment, as I have already taken you to at paragraphs 91 to 99.

That then takes us to Professor Bailey's second argument, and we say that his allegations of culpability on the part of Allergan are, we say, completely unjustified.

First of all, one area that Professor Bailey did not touch upon was the alleged 10mg agreement. For the reasons I have already stated, the position there must now be clear. There is no way that Allergan, as I said, knew about the communications crossing the line before it bought the company, and that being the case, there is just no basis at all for this 17.4 million additional penalty for specific deterrence in respect of that.

As regards the alleged excessive pricing infringements, the Tribunal should ask itself, we suggest, two questions: first of all, was Allergan in any way at fault or culpable in relation to the excessive pricing infringements? If it was not, we say there should be no uplift for specific deterrence. The

second question the Tribunal should then ask itself is: if it was to some degree at fault, is an uplift of £67 million proportionate to reflect the extent of that fault, given all the circumstances during its period of ownership?

Now, I have already shown you the rather limited information that Allergan knew about historic prices, and what it perceived about the imminent decline in prices and profitability of hydrocortisone going into the transaction. I suggested to you in opening that a diligent lawyer advising Allergan would not reasonably have identified an excessive pricing abuse, particularly in light of the *Napp* case law.

Professor Bailey eloquently, if I may say so, putting the case for the CMA sought to suggest that a diligent lawyer advising Allergan ought to have probed further, and he suggested a series of further questions that he said that the diligent lawyer ought to have asked: how long, he said, has this profitable pricing for hydrocortisone been going on? When was the product first sold? Has there been lots of R&D in this product? When, historically, did its patents expire? What were the prices in 2008 by comparison to 2015?

Professor Bailey described these as practical questions.

Well, I would accept they are the sort of questions

that one might ask if you are advising a regulator conducting an inquiry into excessive pricing, or perhaps if you had been put on notice of an allegation by the regulator of excessive pricing. But that is not what we are considering here. That is not, if you like, the reasonable man test that we are considering here. We are considering: what is the information that would have been obtained by a reasonable acquirer performing due diligence in respect of the acquisition of a company, a company that sold a range of different products?

I am afraid I have to suggest that, in that context, these detailed questions are not practical; they are actually rather unworldly, because neither the purchaser, still less their lawyer, in the real world would have the luxury of digging into the distant history of the pricing of just one product of the target company, or, indeed, the investments, or lack of investments, made historically into the product many years earlier, still less precisely the details of when that product came off patent in 1970, or unearthing any of the other details that Professor Bailey suggested should have been unearthed.

We suggest that, in these sorts of circumstances, a lawyer, diligent lawyer, will typically rely on the information that it is presented by the company and by

its financial advisors, in this case PwC, and that information would include, as it did in this case, information about the pricing of the products in the last few years, and the information about what was predicted to be the pricing and profitability going forward. We say that when you look at that information, it did not highlight any obvious unfair pricing infringement in relation to hydrocortisone.

Professor Bailey also suggested that Allergan was on notice of complaints, albeit not from the Department of Health or the purchasers in the NHS, but because of articles in the press. We say it cannot seriously be suggested that a company should alter their commercial conduct in relation to articles in newspapers in circumstances where the regulator and the customer has made no complaint, or even any enquiry. In the case of the articles in the Daily Mail and the Sunday Mail, those were published five years earlier, long, long before Allergan bought the company, and there is no evidence that they were even known to it or shown to it.

It is also critical, in our submission, to take into account that although it is true that Allergan did not immediately and proactively reduce hydrocortisone prices -- we accept it did not do that -- what it did do was, almost immediately after taking over the company,

it took all of the products sold by Auden and it placed them into Scheme M. Now, Scheme M is a government-approved scheme that gives the Department of Health the clear power and the ability to interrogate and ultimately control the pricing in question.

Now, Mr Holmes took you through the Department of Health's statutory powers, and he said: well, they are only good on paper, no good in the real world. Ms Ford will address you on that point. The point we want to stress is that, whatever weaknesses there may or may not have been in the general statutory scheme, they do not apply to Scheme M, which Mr Holmes dealt with only very shortly. This was a scheme that is specifically designed to ensure that the products within its ambit are to be supplied at a reasonable price, and it gives the Department of Health the power to request information on such matters as the cost of production of specific products, and then to request and require that the prices be reduced if it did not consider them to be reasonable.

Now, again, we are not here considering whether or not this amounts to sufficient buyer power to displace dominance. My point is simply this: that when it comes to assessing the propriety of any penalty, we surely have to take into account the fact that Allergan took

the product and placed it into Scheme M, under the supervision, therefore, of the Department of Health. Scheme M did have real teeth, because one sees that demonstrated in the case of *Teva* and the dramatic fall in the price of the *Phenytoin* tablets.

Now, Mr Holmes said: well, there is no evidence that Allergan or Auden knew about the *Teva* case, and he suggested that there were no other instances of the Department of Health using Scheme M to cause pricing adjustments. But, with respect, that entirely misses the point, because just as Allergan did not know whether Scheme M was used informally against *Teva*, so it equally did not know whether Scheme M had been informally invoked against *Teva* or, indeed, against anybody else. There is simply not a shred of evidence to suggest that either Allergan or Actavis considered Scheme M to be ineffective.

Mr Holmes also mentioned that Allergan could have left Scheme M. Well, we say that is just completely unwarranted speculation. There is no suggestion that Allergan ever threatened to leave, or evidence that it would be likely to do so, or that the Department of Health perceived that it would be likely to do so. That suggestion was not put to Allergan, either during the administrative phase or to Mr Stewart in

cross-examination.

As for the suggestion that Scheme M was ineffective because it had a dispute resolution mechanism, I mean, really, any price control system worth its salt will have a dispute resolution mechanism.

So, to conclude, we say that the CMA's assessment of specific deterrence gives no weight at all either to Allergan's anticipation of the imminent reduction in its prices for hydrocortisone by reason of competitive entry, or Allergan's act of placing the supervision of the pricing of the product into Scheme M. We say that, on any view, those are attenuating and mitigating circumstances that ought to have been taken into account in setting the fair and proportionate level of the fine. There is nothing in Allergan's own conduct that amounted to fault of sufficient magnitude that justifies an imposition of a fine amounting to 111 million.

Those are our submissions on penalty.

The final point I should come back to is economic value.

THE PRESIDENT: Yes.

MR JOWELL: The Tribunal's question, in summary, as I understood it, is: given that economic value is at least in part now an economic rather than a legal concept, is the Tribunal free to apply its own economic

understanding in relation to it, unconstrained by the application of that term in the previous case law?

We respectfully answer that by saying: only up to a point, and that is because although its precise content and evaluation is economic, the fundamental contours of its basic meaning are, nevertheless, defined by and in case law, and that case law instructs us that it is some form of economic measure of the value of the good or service in question to the particular purchaser, and that measure of a value to the purchaser cannot, in our submission, be measured by reducing it to, in effect, the difference between the average producer surplus or some other measure of producer surplus, and the most efficient producer surplus, as proposed in the Tribunal's note. That is because "producer surplus" is defined or arrives from cost: it is a supply side measure. It bears no real correlation to the extent of value placed on the product by the consumer, which is a demand side question. We say that that approach would be to treat "economic value" as a term with a different meaning to that lent to it in the existing case law. So, therefore, we do submit -- regrettably, perhaps -- that that is not, in our respectful submission, an avenue that is open to the Tribunal.

Since I have two or three minutes to spare, may

I take you back to one brief point on excessive pricing. I took you to one passage in Lord Justice Green's judgment in *Phenytoin*, where he surveyed the economic literature. I think if I could just take you back to that, because I do not think I took you to the entirety of the relevant passage. It is in {M/170/31}, please, and if we could go to paragraph 104. This is in the bit where Lord Justice Green is summarising the economic literature from the OECD document, and he says:

"These features served to distinguish the present case from other markets where patent expiry removed the principal obstacle to market entry."

It is the next bit that I rely upon:

"Where there are no material barriers to entry high prices can act as a magnet to entry which, in due course, drives prices down. Many markets are thus self-correcting. In the absence of entry barriers regulatory intervention can risk prolonging a monopoly situation by blocking efficient signals which would otherwise promote market entry. A belief in market forces 'is often bolstered by the (perceived high) likelihood of regulatory failure, a risk which is compounded in the case of price regulation'."

So we say there is really no basis for Mr Holmes' suggestion that Lord Justice Green had somehow

implicitly dropped or downplayed what we have called the second condition in *Napp*. On the contrary, he clearly endorsed it and, indeed, explained it, noting the point that we made that high prices can act as a beneficial magnet to new entry, allowing markets to self-correct, and that a regulatory intervention at that point can block those efficient signals.

Of course, entry was not in play on the facts of *Phenytoin* in relation to abuse, just as it was not in play in *Albion*, but the facts here are very different, at least as regards Allergan and Intas.

So we say that is an important limiting principle on excessive pricing, and it distinguishes the duration of dominance from the duration of abuse. The English case law is not an outlier, because one sees it actually also reflected in the Advocate General's opinion in *Latvian* banks, and indeed in the condition applied in that case that the excessively high prices should not only be significantly high, but they should also be persistently high, which is another way, we say, of making the same point.

Those are my submissions.

THE PRESIDENT: Thank you very much.

MR JOWELL: May I take a moment to rearrange the furniture.

THE PRESIDENT: Of course.

(Pause)

Closing Submissions by MR PALMER

MR PALMER: Sir, I am grateful. The timetable allows me 90 minutes, not including any break that we take mid-morning, so we will see how we get along and when that convenient moment comes.

So I intend to follow the broad structure that I followed in my original submissions: that is to deal briefly with something on the Intas period and its significance, then dominance, abuse, and penalty in that order. There are just two quick points to make about the significance of the Intas period.

In short, you will recall, I submitted before that in circumstances where there has been a change in parent, and hence parental liability, coinciding with a time by which dramatic changes in the market have taken place, particular care must be taken by the CMA in analysing whether dominance, if it is established in respect of an earlier period, continues into and throughout that later period, and likewise abuse. Certainly that must be addressed in the Decision where, as here, that parent's case advanced to the CMA throughout the investigation was precisely that there were differences and there had been a relevant change, dominance had ceased, and to complain -- had been

complaining that, in the statements of objections, matters which had been relevant only to earlier periods, but which were no longer relevant during this period, had continued to be relied upon to establish dominance and abuse in respect of the Intas period, and were to be relied upon in respect of the seriousness of the penalty to be imposed in respect of that period.

Now, that is a point which the Tribunal will recall the President raised and expressly put to Mr Holmes for his reaction during the course of argument. That is, for your note, {Day18/64-70}. In my submission, Mr Holmes had no real answer to it. Instead, he repeated a series of propositions that are not, and have never, been in dispute. That the CMA must show that the alleged infringement lasted throughout the infringement period, including post-entry, in the aftermath of entry. He accepted this, yes, but he did not accept that entailed any special need to concentrate on the change in circumstances and the position in the Intas period. Yes, he said, a change in corporate control is not by itself significant to the competition analysis, and liability may be attributed on the basis of the decisive influence test. Again, this was never disputed by Intas.

But none of that meets the point. The analysis must

be undertaken with more care as to the specific period than in a case where there has been no change in ownership, because in that latter kind of case, precision as to the point at which dominance is lost does not matter very much. But in this case, for Intas, everything turns on that.

There was a second submission by Mr Holmes. He said: in any event, there was no temporal coincidence between the changes relied upon and the Intas period. He said market entry and the drug tariff kicking in to reflect Scheme M participants' entry all happened before the Intas period began. Well, of course those happened before. That is our point. They had happened by the time the Intas period had even begun. That is, again, another straw man that the CMA has continually emphasised, and with which we agree. A dominant position is consistent with some competition. It can take some time for competition to have the effect of depriving a domco from having a dominant position.

So our point is not that dominance was lost necessarily as soon as there was market entry or as soon as the drug tariff kicked in; our point is it had been lost by January 2017, and it is not necessary to say precisely at what stage earlier than that, if it existed, it was lost, but we can say with confidence

that it was lost by then. That moment of dominance being lost is to be assessed not by some arbitrary cut-off point of when prices reached £20, but on the basis of whether the competitive restraints to which those changes gave rise were sufficiently strong that Accord could not behave largely in disregard of them. We say that is a point that the CMA has never truly wrestled with and focused on the Intas period through that lens.

So, then, moving on to dominance.

I start with the general approach to dominance, as I did before, and again, the Tribunal will recall that the central submission I made was that the focus of inquiry in a dominance assessment is on the effectiveness, or otherwise, of the competitive constraints on a particular undertaking, such that it cannot act largely in disregard of that competition. I developed that submission by reference to *United Brands*, to *Hoffmann-La Roche*, *Michelin*, and the Commission's Enforcement Priorities guidelines, which have been cited, perfectly appropriately, by Professor Valletti.

I also put before the Tribunal an analysis of the evidence, which showed that Professor Valletti's inquiry, supporting the CMA's analysis, was incorrectly

focused not on the effectiveness of those constraints, but on the narrow question of whether the price at any given point, whether that be 7 January 2017 or 31 July 2018, or anywhere in between, and asked himself: is the price at this point, or any of these points, or throughout these points, above competitive levels, and has it been so up to this point for a significant period of time, and are significant sales being made at that level?

The correct test, I submitted, was not that, but that adopted by Mr Bishop, which was to focus on the effectiveness of the constraints which drive the process of competition over time, the relevant question being whether the undertaking in question is able at any given time to behave largely in disregard of competition. That approach, it was my submission, was consistent with and explained at *Hoffmann-La Roche* at paragraphs 70-71. For your note again, it is {M/5/69}, 70 being the paragraph making clear that some competition was consistent with the dominant position; 71 being the paragraph which made clear that where your prices are forced to be reduced by reason of your competitors' prices, that is not, in general, consistent with the dominant position.

I analysed Professor Valletti's and Mr Bishop's

evidence before the Tribunal to show that Mr Bishop's approach had been to acknowledge that competition does not only work when you get to the end point, it is the process, and it is at the time of the beginning of the Intas period that the competitive constraints provided by skinny label products was providing an effective process to erode any monopoly prices and take us towards the ultimate competitive equilibrium, to use Mr Bishop's words.

Now, Mr Holmes' response to all that, in my respectful submission, firstly does not engage sufficiently with the law; secondly, barely engages with the expert evidence that we spent three weeks hearing; and, thirdly, provided an important concession whose implications, it appears, the CMA does not recognise, namely that those same constraints which were in force during the Intas period, and which have continued -- the market structure has not changed ever since -- have led to competitive prices.

So starting on the law, Mr Holmes suggested that I was contending for a radical disjuncture between law and economics. Now, that is incorrect. What I was doing was relying on the expert economic evidence of Mr Bishop as to the sufficiency of the competitive constraints which had compelled Accord-UK to lower

prices from £70 to £2. The point advanced was that, applying the legal test, that was inconsistent with any notion that Accord-UK could act largely in disregard of its competitors or its customers.

Mr Holmes attempted to suggest that I was trying to divorce law from economics and it would be better if the two marched hand-in-hand. Of course the two march hand-in-hand; the question is how you apply the familiar *United Brands* test in practice. You had a difference of approach between two experts giving evidence to you, and, in my submission, Mr Holmes barely engaged with that expert evidence, because his next point was simply to suggest that I was disavowing the approach which Mr Bishop had accepted of focusing on price, on which both experts had agreed.

What he took you to -- and we will call this up so we can see it -- is the joint expert statement, which is at {G1/1/28}. You may recall we were taken to the bottom of that page, 45, and the proposition, which I think flows on to the next page, is:

"Dominance is a matter of degree, it does not imply a firm is free from all competitive constraints. Question for dominance is whether competitive constraints are strong enough to prevent a firm from pricing substantially above competitive levels."

If we go back to the previous page, Mr Holmes' point was that both experts gave their unqualified agreement to that proposition, Mr Holmes said.

But the difficulty with that, in my respectful submission, rather superficial approach, is that when you read the reports which underlie that joint expert statement, it is clear that the two experts mean two different things in giving their assent to that statement and agreeing.

Professor Valletti focuses on whether competitive constraints have already brought prices down to competitive levels during the Intas period, and says no, and applies his agreement to that proposition to assert that that adds up to dominance, the constraints not yet being sufficiently strong, he says.

Mr Bishop focuses on the process. He asks: are the constraints strong enough to mean, in effect, that the writing is on the wall, and prices must come down to a new competitive equilibrium through the process of competition? That is what he means by assenting to that proposition, as is entirely clear from the body of his report.

So it is, with respect, overly reductive of both experts' considered views and their evidence to glide over the difference as if it were not there and the

whole case can be reduced to that single-word box.

Indeed, Mr Holmes' submissions, I respectfully suggest, glided over the expert evidence more generally. In fact, beyond this reference, Mr Holmes provided scant reference to the expert economic evidence that the Tribunal had before it, there was no further reference to either Mr Bishop or Professor Valletti on this crucial issue re the nature and effect of competition. Professor~Valletti gave an incomplete account, which was inconsistent taken alone with all of Mr Bishop's evidence as to the significance of the competitive process, a point which Mr Holmes' submissions barely engage with.

The reason why he did not engage with that is not hard to discern, because what Mr Bishop identified was the real tension in the two sides of the CMA's case, firstly on market definition, and secondly on dominance. You will recall that the central dispute between Mr Bishop and Professor Valletti on that is, whilst Mr Bishop fully supported Professor Valletti's findings on market definition, the competitive constraints certainly being sufficiently strong to bring full and skinny into the same market. Where they differed is that Mr Bishop made clear that he thought that those conclusions on these facts in that respect meant also

that they were sufficiently strong to give rise to effective competition, not least given the reduction, £70 down to £2, over time.

But Mr Holmes has been riding two horses, somewhat unruly horses, and at times that has required him to be somewhat flexible. On the one hand, Mr Holmes has talked at length in the context of market definition about how much competition there was between full and skinny labels in the post-entry period, and how effective it was, including on an ongoing basis, such that skinnies are in the same market as full.

So Mr Holmes has relied on the fact that our prices continued to fall as evidence of that -- see {Day17/218:14-18} -- stating that the cellophane fallacy takes one nowhere when prices have continued to fall as a result of competitive constraints.

On the other hand, Mr Holmes has been trying to downplay the effectiveness of that competition, suggesting that there was an initial period of switching and then a settled period after that -- that is {Day18/81:15-25} -- in which Accord-UK knew, he says, no one else was going to switch and it could set its prices however it wanted, in effect.

Obviously, market definition and dominance are technically different questions, but, nonetheless, the

CMA is trying to have its cake and eat it here. Either there is ongoing effective competition or there is not. This was Mr Bishop's point about the answer to market definition and dominance in fact being inextricable on the facts of this particular case.

The market definition case is explicitly based on the fact that the drug tariff was inexorably driving down prices in a way that Accord-UK cannot resist, until by April 2021 -- {Day17/74:25}, the CMA now acknowledges and accepts that, by April 2021, there were conditions of effective competition, by when Intas' product was priced at £2.99.

At {Day20/152:23} onwards and over the page, he says:

"... we have competition now in the marketplace which after a lengthy period has produced prices that can be regarded as those applicable under conditions of normal and sufficiently effective competition ..."

An inevitable concession, and one made despite the fact that, even as at April 2021, as one can see from the graphs the Tribunal have seen on many occasions, there remains a premium for Accord-UK's prices over those of skinny label products.

But the CMA does not consider or acknowledge the implications of that concession. The competitive

constraints acting on Accord-UK in April 2021 are precisely the same as those in the Intas period of January 2017 to July 2018. Nothing has changed in terms of market structure or the market forces that are at work on our prices, save that, by 2021, some competitors are now exiting the market.

So the direct constraints and the indirect constraints which have been identified by the CMA correctly in the context of market definition are still the same: the direct constraints provided directly by skinny label products, the indirect constraint provided by the drug tariff, and no attempt was made to suggest a change in the market that would support Mr Holmes' point here. So this must mean that the market forces in the Intas period were effective. That is Mr Bishop's central point in a nutshell.

All that has happened is that the competitive process has worked through, and the market has self-corrected, precisely what, by the time of the Intas period, Accord-UK was entitled to allow to happen. The pricing outcome is now lower, but competition is no more or less effective today than it was in the Intas period.

Now, all this was highlighted by the submissions which Mr Holmes actually opened up on, describing what he termed the mountain and is now in fact going to

become the Matterhorn, and highlighting what he sought to portray as the lack of competitive response relied upon, {Day17/93:4} onwards, accepting that discipline was ultimately provided by market entry.

"... bearing in mind [he said] ... the length of time that the mountain graph covers before any independent entrant. It is eight years. This was not a market which was self-correcting on any reasonable time frame."

But, of course, by the time of the Intas period, there was only 18 months to run before prices reached a level which the CMA does not contend was excessive, and that was a result of independent market entry, and the market was self-correcting, and, of course, one bears in mind what Lord Justice Green says in *Phenytoin*, which Mr Jowell showed you a moment ago, paragraph 104. That is enough to distinguish the Intas period from any other, even taking the CMA's case at its highest.

Notably, in his submissions to the effect that this was a market that did not attract entry to self-correct, Mr Holmes relied upon the agreements made with Waymade and AMCo -- that is {Day17/93} -- and the fact that prices still rose after the first market entrant arrived in October 2017, that is {Day17/94}.

But the agreements ended seven months before the

Intas period began, by which time there were six market entrants, including AMCo, and a seventh, *Teva*, waiting in the wings to enter the following month, and prices had already entered the phase of inexorable reduction, with no market power to raise prices at all.

So there was a competitive response, and it is that response which is responsible for the steep price drops which followed, and which were responsible for taking prices down to that which the CMA now acknowledges can be regarded as those applicable under conditions of normal and sufficiently effective competition.

So what does Mr Holmes say about the post-entry period specifically? That is at {Day17/98} onwards. It is helpful, perhaps, to sum it up using the analogy which I think Professor Mason volunteered, which was the marble analogy, pushing the marble up to the top of the mountain, and one can understand how one would not expect a marble to roll itself up to the top of the mountain; something else has to get it there. But then the focus of the enquiry comes as to: well, what happens when the marble comes down the other side of the hill? That is where we respectfully suggest that the analogy may be prone to mislead, because Mr Holmes suggested and agreed to the proposition that the question then becomes one about the speed with which the marble comes down the

hill, or on what gradient it is coming down. But that is not an accurate analogy anymore when married to the requirements of the tests applicable under the law.

In fact, using the analogy at that point highlights what we say is the CMA's error: how can anyone say how fast the marble should roll down the hill? No regulator has that role on an ex ante basis, and it is not what ex post competition enforcement is about. The question, the relevant question, is whether the marble is able to resist moving to an appreciable extent. Does it in fact roll down the hill, or is it able to stop at obstacles and wait for a bit? If it is simply on a hill and is being worked on by the forces of gravity, and it cannot resist rolling down it, that is enough. However quickly it comes down, whatever the gradient of the hill, the point is that it is rolling down it inexorably. Gravity is working.

So, too, in our case. One's prices are coming down because they are being worked on by competition, and there is no ability to resist. There is no dominance. It is not about how quickly they fall; simply whether they are falling inexorably.

Mr Holmes accepted last week, in answer to the President's question, that prices may take quite a considerable period to fall, depending on the

circumstances. That is not in itself inconsistent with competition and the end of dominance. It just depends on the circumstances. That is at {Day20/112:17-23}.

THE PRESIDENT: It may be that the metaphor breaks down on both sides of the equation, because we all know that prices go up, and that is not necessarily an indicator of anything except prices going up. So even on the ascent of the marble up the slopes of the mountain, you have got to ask yourself: is it being pushed up by proper forces or being pushed up by improper forces?

I think what you are saying is that exactly the same question applies on the downward slope, in that there may be circumstances which have nothing to do with dominance that cause the marble to go down. The question is the extent to which a dominant position slows the otherwise rapid descent of the marble downwards and makes the descent different to what it would have been in the ordinary competitive case.

MR PALMER: Well, I do not even assent to that -- and, again, analogies are helpful to help us think about a problem, but they can also --

THE PRESIDENT: They can be very dangerous.

MR PALMER: They can be very dangerous too, and at some point we have to sort of divorce ourselves from the analogy and get back to the actual facts, the actual

law.

But the key point here is, on the basis -- which, of course, as you know, is something I do not accept, because I defer to those who go before me as to the earlier period. But taking the CMA's case at its highest, Mr Holmes, to be fair, spent some time in his Closing trying to exclude other reasons for the rise in prices in the first place. You will recall he went through various factors which might explain a rise in prices at a matter of theory, but says as a matter of practice they do not apply here. That was his case. So he reached the conclusion that only market power, the exercise of market power, could explain the rise to the top of the mountain.

But in those circumstances, my submission is only the loss of market power can explain the fall and the inability to resist the fall. That is the key point. If it is the exercise of market power which allows you to ascend and nothing else, and gives you the freedom to go up a mountain, if that is because you are equipped with market power in your backpack and crampons, if you are then stripped of those at the top, you will come tumbling down, and you will do so in an environment where you are suddenly, as not before, facing competition, and the rate at which you will fall will

depend on the gradient of that slope, which will be set by the circumstances of competition.

Our objection is the idea that the CMA has, which is that we can, ex post, analyse those and say the gradient ought to have been steeper than it was. We say: no, if you are powerless to resist and gravity has taken hold, and you literally do not have that freedom to start going back up even a little way, as was done before, then, by definition, that market power which was responsible for the ascent no longer exists.

THE PRESIDENT: So just to make sure that I understand exactly what you are saying, if you have a downward gradient, then that is a negative of dominance full stop, and the fact that you can slow the rate of descent, in other words maintain prices at higher than they would otherwise have been, even though they are still falling, that is a situation where there is no dominance?

MR PALMER: It is not that there is any downward gradient at all, because a number of factors could explain that; it is the fact that there is a downward gradient you are powerless to resist.

THE PRESIDENT: Yes, that is really what I am unpacking, because let us suppose that, absent dominance, the gradient is a 45-degree downward slope, a very rapid

slope down, but exercising your dominance, you cannot stop the move down towards competitive price, but you can delay it. So the gradient through the exercise of the dominance -- and I accept this is a very hard question to work out in practice, but let us stick to the hypothetical. If, through the exercise of the dominance, you are converting a slope of 45 degrees to a much shallower slope, is that a case of dominance?

MR PALMER: Well, there are two points. The first point is if -- when you say, you know, by comparison to what would have happened absent a dominant position, conditions of effective competition, if that were so, you would not be up a mountain in the first place, assuming the CMA is right that that is the only basis upon which this mountain can be explained, and so that is why it becomes an artificial comparison to say, well, what would have happened in conditions of effective competition, because you would not be there in the first place. So that is the first point.

The second point is: can you construct, nonetheless, some sort of counterfactual on an ex post basis by which you can compare your progress down the mountain? We say: no, you cannot do that. You know, if you had ex ante regulation forcing you down, you know, you could set a glide path and say: you must follow this. But to

say you did not come down the mountain quickly enough when you were in an environment facing six/seven competitors, competition was happening, those constraints are what is accepted to be responsible for driving the price down and you cannot resist it, then that is enough to say dominance has been lost, and dominance was lost when that took hold and you are powerless to resist. So that is the way I put it.

PROFESSOR MASON: Might I follow up just so I can clarify.

So you are putting to us, are you, that, as a matter of law, this is a qualitative point, and that we must not attempt to quantify the rate of change; it is just simply that there is a rate of change?

MR PALMER: Yes, because it, if you like, is a qualitative point a matter of law, because again, I am going back to what the test actually says, which is that you can act independently of those forces and you are not constrained by them, and that is impossible to reconcile with a position where you are forced to lower your prices.

But take a step back from that and take a slightly wider-view picture from a policy point of view. On this hypothesis that only market power is responsible for going up the mountain in the first place, that is the vice. That is the vice which the abuse of dominance

tort is designed to protect, and the policy point here is: well, if that had happened up to a certain point -- and the focus of this enquiry is not usually necessary, but this is the whole point about the Intas period -- the question being sharpened by a different parent company coming in at that point is where do you actually say the limits of that tort are? Do you have to say: it is your responsibility at that point, Newco, who has taken over, to ensure that the subsidiary immediately drops its prices or drops its prices on some predetermined gradient which is identified in advance in some kind of vacuum or independently of what competitive forces require you to do?

We say that is -- and I will come onto this when I get to the abuse section -- a wholly unworkable approach; a company in that position cannot know what it is required to do. In effect, what CMA is trying to do is to import an ex ante price control on an ex post basis, and that is illegitimate.

So from a qualitative point of view, from economic analysis, but also from a legal policy point of view, we say if the abusive exercise of market power is responsible for creating this mountain in the first place, then the gravamen of that is: it is that act of creating the market that is the seriousness of it. It

is not coming down off it, it is not relying on the competition which has by now emerged which you are powerless to resist and is forcing prices down to take its course to arrive at a new competitive equilibrium. There is no obligation to identify in advance what the destination has to be.

Hence the CMA's vagueness as to what it is. You will recall, they have taken an arbitrary cut-off point of £20, and they say, "well, we have allowed some headroom here because we cannot say in advance or even retrospectively exactly what the non-abusive price is", and yet it puts Intas in the position of being responsible for a failure to know in advance how quickly or to what endpoint or to what destination it is meant to arrive at, rather than allow those forces, which include the indirect constraint presented by the government-designed regulatory mechanism, which they express themselves to be happy with when asked, to take its course and to see where you land. That is Mr Bishop's evidence. You have to allow that process to happen, and failing to do so sends off -- again, going back to Lord Justice Green and *Phenytoin* -- the wrong market signals, can disincentivise market entry, and so forth. But at that point the wrong which is being done is over and the focus now is on the self-correcting

market, and when the constraints are strong enough to ensure that the market will self-correct, that is inconsistent with a finding of dominance. If I am wrong about that, it is inconsistent with a finding of abuse. That is the submission.

Now, I must make more progress if I am to finish on time, but Mr Holmes had three main -- I cannot deal with every point, time does not allow it, but I am going to identify what I would identify as being his three main points where he says there is some basis nonetheless to find dominance: the first relates to what I have called the no choice point; the second relates to the emphasis that Mr Holmes put on the price premium compared to skinny label products; and the third is that, despite the price premium, Accord-UK retained a high market share, and what the significance of that is.

So let me deal with the no choice points first of all. Of course, I call it that because that is the language in the Decision which is under appeal, the Decision consistently using the language that some *Pharma*cies, but not others, had no choice but to purchase full label products, and were "unable" to switch, such that they were "captive" customers of Accord-UK.

We did launch an attack on that reasoning, and the

CMA has provided a response to the annex which we produced to our Closing submissions, which was handed up on the last occasion, and that annex for the first time addresses many of the important documents which have always been in the CMA's possession, but do not feature in the Decision at all.

Despite the length of that document -- and we are entirely content for it to be read, as the CMA suggests, alongside our documents, so the Tribunal can see what each party says about various documents. Despite that, the result is that the Decision fails to adduce sufficiently clear, precise and consistent evidence of *Pharma*cists having no choice, being unable to switch and being captive, and indeed Mr Holmes' submissions in Closing, both in writing and orally, now marginalise that language, and he replaces it with new language, to which I will come in a moment, about the strength of certain customers' commitment to buying full label products.

The second point I make is that, on reviewing all that evidence, it is clear that the Decision is in fact wrong to have made its original findings. The evidence shows different customers making different decisions at different points in time, based on a range of different factors, including but not limited to their perception

of the regulatory position.

Thirdly, the Decision errs in failing to recognise that Accord-UK had no way of knowing which customers might -- entirely lawfully, in compliance with the regulatory regime -- change their mind, switch to skinnies, and when they might do so, which the evidence shows could be done at very short notice.

So I am not going to go through, the Tribunal will be glad to hear, no doubt, blow-by-blow the tables, any more than I did last time round, but I am just going to draw some themes which I say emerge from Mr Holmes' oral submissions as well as from the documents.

The first point to make is that the case now advanced constitutes a considerable rowing back from the approach set out in the Decision and what has been previously said. Contrary to what is said in the Decision about no choice and an inability to switch, the CMA is now forced, when assessing the underlying documents -- including this response table -- to effectively concede that there was no such requirement and, instead, they put it in terms of commitment.

So the CMA's response acknowledges that some customers consider themselves able to switch to skinny labels, while others did not. Different *Pharma*cies reached different positions. Different customers

reached different positions. Some *Pharma*cies considered that they could use the skinny label products and so forth.

What the CMA does not recognise is that there is no ex ante reason to put any individual *Pharma*cies in one camp or the other. It is always a matter of choice. It is always a matter of them weighing up the different factors and making trade-offs. That is not my language, as Mr Holmes suggested; that is Professor Valletti's language, the Tribunal will recall, which Mr Holmes studiously ignores in this context.

So the CMA's response has no response whatsoever to the submissions that all *Pharma*cies indeed did have a choice, and there is nothing distinct about Tescos on the one hand and Morrisons, for example, on the other, or between Day Lewis on one hand and Well on the other. They just made different choices in the same market, subject to the same rules, and with the same considerations in play.

But now Mr Holmes says -- amongst other places, at {Day20/7} -- that there was a solid block of customers whose behaviour showed -- I interpose: with hindsight -- that they were firmly committed to purchasing Accord's product, rather than skinny label product, and these are "the large multiples". I understood Mr Holmes in that

context to focus in Particular on Boots, Lloyds, Well and Rowlands.

We were produced with a new table in support of this submission which the Tribunal may recall, a new table headed, "CMA estimation of the additional costs to *Pharma*cies in purchasing full rather than skinny label tablets". That has now been uploaded to {IR-L/12/1}, and the Tribunal will recall this document, in particular {IR-L/12/2}, there is a table at the top of page 2, which Mr Holmes says shows the money left on the table. That is his phrase. He says: look, we can see the strength of the commitment because, overall, over a period of two years, effectively half of a *Pharma*cy's -- or nearly half of each *Pharma*cy's expenditure was attributable to the premium they were paying for the full label rather than the skinny label.

Now, first point: not a calculation that appears in the Decision, or which we have previously seen or previously had an opportunity to push back on, no witness to speak to this unsigned document. There are a number of flaws.

First flaw: what it does is assess the additional expenditure, and hence the additional revenue which would be available, Mr Holmes says, from switching to skinny over and above the existing margin that they are

getting below the drug tariff when purchasing full label tablets. So getting a margin for buying full label under the drug tariff. Mr Holmes says: look, if they had bought skinny there would be extra revenue for them, in effect, because they would have more room under the drug tariff, which, he says, is fixed, see his explanation at {Day20/26:11-19}.

Well, at any given moment in time the drug tariff is fixed, but the drug tariff changes, and when you are talking about the large multiples, such as Boots, Lloyds, Well and Rowlands, were they, hypothetically, to switch to skinny label tablets, then that would feed through into the calculation of the drug tariff. Now, there is a lag -- six months, not two years -- there is a lag of six months, and then the fact that those volumes had shifted would bring the drug tariff down, and there is no assessment in this table of the impact of the drug tariff.

Can I remind you of one document, which is a Boots document. It is at {IR-H/1256} at paragraph -- you can see it, it is a note of a call, the Tribunal has seen it on several occasions -- 2.5, which I think is on the next page {IR-H/1256/2}, where Boots is considering how much financial benefit there might be from using skinny label hydrocortisone tablets:

"... the potential financial benefit was small and would have been lost quickly."

They go on and explain in the next sentence:

"That was because of the cost from operational complexity and because it would not be possible to set up Boots' systems to flag the preferred product ..."

So what they're discussing there is not a full switch, but a partial switch to take volumes, and dual stock is what they are discussing. So that is why the benefit would be small. But the key words here, which at no point CMA have fixed on are, "and would have been lost quickly". Why? Because a switch by Boots brings down the drug tariff, and when you think -- to take Mr Holmes' thought experiment or this table's experiment -- what would happen if Boots switched all their volumes to skinny, as they would have been perfectly entitled to do, consistent with all regulation, that would have had an effect. There would have been a short-term benefit, but then the drug tariff would have come down, and you see no account for that in this table at all.

Nor -- next point -- is there any account in this table of discounts. Now, that is acknowledged, if we go back to the first page. That is again {IR-L/12/1}. In the third paragraph on that page, four lines down:

"The estimates do not take into account any discounts/rebates which may have been negotiated by the individual *Pharma*cies ..."

Such as, for example Boots, who we know has its own label arrangement for Almus and very significant volumes indeed. No account taken of that.

Next point, explicitly recognised not to be taken into account:

"... any potential margins charged by wholesalers ..."

Well, we have had no evidence about that so far, because this point has not been raised before. I am instructed that it is common for distributors to take a distribution margin of around 15-20%. I do not think you have any evidence of that before you because of the circumstances in which the point has arisen.

But what that means is that if you have got a vertically integrated *Pharma*cy, such as Boots, Lloyds, Rowlands, you cannot simply compare the skinny label price and the full label price, because within that undertaking you have the wholesaler arm, and for those who do have that distribution arm, you need to factor in the fact that, respectively, Alliance, AAH, Phoenix, would take a distribution margin based on the price of the product. So the higher the price, the greater the

margin, being typically a percentage. So if you have a 20% margin, obviously you are going to take 20% off the money left on the table, even after the corrections for discounts and the corrections for the fact that the drug tariff will, after six months, have reduced.

Now, fourthly, this table does not take account of -- it says, back on paragraph 3:

"... any other measures that may have affected *Pharma*cies' revenues."

Very broadly, something which is apt to capture the drug tariff point without spelling it out, but also apt to capture the fact that -- or perhaps not so apt to capture the fact that costs to *Pharma*cies of sourcing skinny, foregoing the value attached to the full label product, also need to be factored in. I am going to show you a document a bit later which is a perfect example of that. So the costs attached to switching to a smaller supplier, foregoing Accord's supplier's track record, its resilience, its ability to quickly supply an order, its ability to fill a gap for a spot purchase, the upside of only stocking one product, all of these are costs which are passed up if there is a switch to skinny. Again, this table takes no account of that whatsoever.

So the suggestion that there is two years' worth of

headline difference between prices at any given time and that can lead to a calculation of the strength of the commitment, as Mr Holmes put it, is illusory.

A further flaw, on {IR-L/12/2}, you can see that the last footnote on that page, just above the sources, explains that:

"A given *Pharma*cy's overall expenditure on hydrocortisone tablets has been estimated by taking the sum of (i) that *Pharma*cy's monthly purchase volumes of Auden/Actavis' full label tablets multiplied by Auden/Actavis' average selling prices for each of the months concerned ..."

So that is really bringing into focus that point about discounts and rebates, particularly with the larger suppliers, being entirely lost.

Now, that is why the Tribunal should approach this document with considerable caution, but note what use it was put to in Mr Holmes' submissions. It was specifically produced in answer to my submission that, far from being assured, Accord's position with these *Pharma*cies was precarious. Effectively he said: precarious, look at this, if this is not enough, if this £20 million between them is not enough to make them switch, what on earth is? That is a massive oversimplification of the position.

It has never been denied, of course, that there was a price advantage to switching to skinny from full. We say there is value attached to the full label product, amongst other things. But this is a massive overstatement and cannot be relied upon as the basis for some commitment which Mr Holmes derived from it.

Next general theme: the CMA is wrong to say that the actual regulatory position is irrelevant.

What the CMA's response says, for example, is that whether Boots' guidance or conclusions on the regulatory position were factually correct is not relevant; what mattered was what Boots did and its reasons for reaching that position, not what Boots might have done, if, it says on Intas' view, it has interpreted the regulatory position correctly, but also on the CMA's view. They say again about Lloyds, it is not relevant whether Lloyds' interpretation of the guidance is correct; what matters is what it did and why.

We say that is straightforwardly incorrect. The actual regulatory position is highly material and relevant. The fact that there was no regulatory barrier as a matter of fact means the Decision is wrong to claim that customers had no choice, or were unable to switch -- they could, and some did. Moreover, the key point here is that, from Accord's perspective, the fact

that customers could and did switch away meant that other customers could change their mind at any moment and switch away. They were not assured customers, as the Decision finds. It is wrong ex post facto to look simply at what customers did.

This reveals a fundamental deficiency with the Decision's findings. It is a non-sequitur to say that after a customer has chosen, voluntarily, to source its product from a particular supplier, it has or had no choice but to purchase from that supplier. On that logic, every supplier has a captive customer base, because every commercial contract can be said to restrict the freedom of the parties in some sense. That is not evidence of dominance.

So key to the strength of the constraint is the acknowledgment that Accord had no choice but to cut prices to retain their customers and maintain those margins, and prevent a revisiting of the Decision to buy from them.

In that context, again we come back to the fact that changes do happen, and when they happen, they can happen very fast. The prime example of that is Day Lewis. That is the next theme: that the CMA's response errs by suggesting that sudden shifts could not happen in the marketplace.

The CMA's response, you will see, claims that Intas uses evidence of a sudden shift in Day Lewis' understanding of the regulatory landscape in September 2016 to suggest that other *Pharma*cies could have changed their views rapidly. Instead, the CMA claims, evidence from Day Lewis does not show there was a sudden change in Day Lewis' understanding of the regulatory landscape, since the large increase in skinny label products dispensing in September 2016 was because Day Lewis needed to sell through its existing stock of full label tablets first, and it would have switched earlier if given the opportunity.

With respect, that fundamentally misses the point. It does not matter the precise date when the sudden change occurred. You can take the date back to when they started purchasing suddenly in bulk skinny label products, and you take the fact that that is in contrast to the position which you recall they took when AMCo asked them about it, when they were unwilling to buy skinny, and said they would not be interested. You had AMCo's evidence about that. So at some point there was a switch, and at some point they switched to purchasing almost exclusively skinny products, and once they had got rid of their stock of full label products, they dispensed pretty much exclusively skinny products.

That is the point. There is nothing here which the CMA can rely upon as in some way meaning that Accord-UK could rest assured that Boots, Lloyds, Well, Rowlands, would not do the same; no intrinsic reason to think of them as being assured.

Nothing better illustrates this than the document that Mr Holmes went to in his submissions from Well. If we can pull up that at {IR-H/992/1}. The Tribunal will recall it is an internal email of Well of December 2016, and what this document shows, the Tribunal will recall, to refresh their memory of what it was, it precisely shows the kind of revisiting of the issue, do we stick with full or do we switch to skinny given the price differential, that constrained Accord into constantly cutting its prices to keep that margin available. It shows a choice being made with regard to various considerations. It is no help to Mr Holmes, with respect, that the choice ultimately made was to stay with full label. It was clearly up for consideration, and there was no knockout blow for skinny.

To the contrary, having raised, in the top of the email, the ostensible but incorrect regulatory issue about unlicensed products, two points relied upon by Mr Holmes are, in fact, dealt with and dismissed in this email. If you read down a bit more carefully -- and

I will read some of the bits that Mr Holmes did not have time to read -- after the bit dealing with the large price difference and the bit about one product carrying all the indications and not the other, there is a heading "Points to consider", if we can focus on that. Thank you:

"Moving away from Actavis would mean we were knowingly dispensing a product off-license. We would need to send a comms out, advising our branches to in effect dispense an un-licensed product when a licensed alternative is available.

"- Would our branches be compliant?

"- Would our own branches report us?

"The price of the 'other' Hydrocortisones have dropped dramatically ... due to suppliers having volume they cannot sell. Would we still be able to source at £24.20 if we suddenly went into the market looking for over 4K packs a month."

So a concern as to whether skinny side suppliers would be able to supply the volume that they need.

The next sentence that Mr Holmes relied upon strongly follows directly on from that, relevant to large multiples:

"Neither Lloyds, Boots or Rowlands have moved away from the fully indicated product."

Which Mr Holmes says indicated an observation on regulatory compliance. It does not say anything of the sort. It is in the context of large multiples being concerned about how much they could source, noting that others had not gone down this road.

Then under "Commercials", talking about category M, pricing moving down:

"We know that *Teva* feed their ... prices in ... and they do not inform them that the product doesn't carry all the indications (if *Teva* do this, it is probable that other manufacturers also do)."

So acknowledging that, so far as they knew, probably skinnies were feeding into the drug tariff.

"... the belief is that the [drug tariff] moves down each quarter based on the market place pricing of all products available.

"In effect [there was not time to read this, apparently] the government/psnc are commercially endorsing the use of an un-licensed product, by taking into account the commercials of this product into scheme M."

That is the counterweight to the unlicensed product up above. That is why this is being considered, because it is not a clear knockout blow at all.

"We also believe that a number of independents use

the non-indicated Hydrocortisone Tabs, therefore it is probable that the profit made on the non-indicated product is taken in account in the margin survey, and counted for in the £800m."

So {IR-H/992/2}:

"Recommendation

"I believe the use or not ... is a clinical decision ..."

Not a regulatory obligation, not an ethical or professional obligation, but a clinical decision. This is from the purchasing manager, who is not equipped to make that decision, obviously.

"... but it should be noted ..."

Then references to how much money could be made if the clinical decision is that skinny can be made.

Now, that is not a reference to some regulatory obligation. The purchasing manager said: there's two types of hydrocortisone tablets, one is much cheaper than the other, I have been through the points to consider, it is a clinical decision. What that brings into focus is just how vulnerable and precarious Accord's position is, because all it takes, in fact, is for someone internally within Well to reach the very same conclusion the CMA have reached, looking at it, and have endorsed, which is: there is no clinical difference

between the two types of product whatsoever.

But that flies over the CMA's head. They see this as evidence that they treated themselves as bound to buy full label. It is simply not evidence of that. What it is, is weighing up various considerations and a decision being made. We do not have the actual decision. We have that. But that is what the CMA rely upon.

So Mr Holmes also sought to minimise the relevance in the context of Lloyds of the Celesio email at {IR-H/844/1}. The Tribunal saw that on a number of occasions. It is the one which says: no, we do not want the skinny label products at the moment -- it is a bit lower down than that -- but that may change if the price differential increases.

Now, it is now said by Mr Holmes that it is unclear, since this is a Celesio document, whether it is referring to Lloyds *Pharma*cies, rather than AHH, the wholesaler, and he says -- well, I can put the significance of this document no better than Mr Holmes did in his cross-examination of Mr Holt. I am going to refer you to -- I have not got time to go through it now, but {Day5/160:8} through to {Day5/165}, where the horse Mr Holmes was riding on at that point of the CMA's case was to strongly put to Mr Holt that it was clear from this email that what was being referred to was the

*Pharma*cies and not the wholesalers, and it was clear that what was being referred to in terms of the main change if the price differential grows was not restricted only to a partial switch, but also to a whole entire switch. That was the question. I have given you the reference so you can review those. That was the CMA's case being put by Mr Holmes.

What it is not open to him to do is to switch horse mid-ride and say this document means entirely the opposite and is not good evidence of Lloyds' position at all when dealing with the dominance case. What Mr Holmes' questions to Mr Holt reveal is that the CMA's interpretation of this document at that point was an effective concession that customers were free to choose and do trade-offs in precisely the way Professor Valletti described. Again, not something with which Mr Holmes engages.

Then Boots, to take the other big player, if we can have up {Day20/45} --

THE PRESIDENT: Mr Palmer, when you reach a convenient moment, we will take the break.

MR PALMER: Thank you, sir. Yes, I will just finish this point, if I may, and then we will do precisely that.

THE PRESIDENT: Of course.

MR PALMER: You can see what is said at line 12, and this is

based on the money on the table point:

"... [entirely] unclear what level of price differential and foregone profit would ever have led to Boots reconsidering the matter. We know that Actavis was charging five times its competitors' average prices by the end of the Intas period, and we saw from the hand-up that Boots was leaving millions of pounds of profit on the table. We say that that is a clear indication that Boots' demand was very far from precarious."

You have my point on the second of those points.

On the first of those points, of course, what they are concerned about is the absolute extent of their margin at that point. Not whether the price of skinny has dropped, thus increasing the relative difference, but the absolute margin and whether that margin is sufficient for their purposes.

So the logic does not hold. It confuses absolute with relative. It is wrong to say millions of pounds were left on the table, that is entirely unevidenced, and ignores the competitive responses which have been made by Accord in cutting prices so hard.

Down onto the next page {Day20/46}:

"... how would you explain the very significant price differential with consequent effects for Boots'

profit that Actavis retained over its rivals?"

Again, it is really the same point again, and if there were genuine concerns, one would expect to see evidence of Actavis considering this risk, but there is not one. We are taken to {IR-H/1111/3}. We needn't turn it up now. The point that was being made was Intas failed to produce any documents about negotiation in which it had been threatened that Boots would switch.

As we went through the Alliance documents in cross-examination with Professor Valletti, it is quite clear that Alliance themselves were saying: we do not keep documents about this, we do not have any documents either because we do not document our negotiations. So it is wrong for Mr Holmes to draw comfort from that.

So where that takes us is that in the response of all those big multiples, there is a precarious position. Lloyds are explicit, it came down to a clinical decision; Wells is explicit, it comes down to a clinical decision; Boots never reviewed it at all, despite the price differential, and were content because the margin was coming down. None of this allows a solid and sufficient evidential basis for Mr Holmes to be able to submit that this was a committed hard group of customers on which Accord could rely and treat as assured.

Sir, that would be a good break point.

THE PRESIDENT: Thank you very much, Mr Palmer.

It is 11.25. We will resume at 11.40.

(11.24 am)

(A short break)

(11.37 am)

THE PRESIDENT: Mr Palmer.

MR PALMER: I am slightly pushed. If Ms Ford is to have an hour before lunch, assuming that the Tribunal wishes to take lunch at 1.00, it would mean I have to finish by 12.00, so I will just press on.

THE PRESIDENT: We will run a few minutes into lunch, so you can go until 1.10.

MR PALMER: That is very kind. I am very grateful. Thank you.

So moving on now to the second main point advanced by Mr Holmes which turned on the price premium.

The key point -- the short point about that is, that it is a function of a differentiated market, and once it is acknowledged that no one is captive and everyone has a choice, some *Pharma*cies are free to choose to pay more for the premium product if they want it.

Now, Mr Holmes relies on the simple fact of the price premium, but that is, we say, quite at odds with his acceptance of the differentiated market which indeed

persists in April 2021 as well.

Mr Holmes seeks to sideline the point, though, by referring to it as stemming from what he called a quirk of the regulatory scheme. It is not a quirk; it is a deliberate feature of the regulatory scheme.

Regulation 141/2000 is at {M/17/1}, and on page 4 {M/17/4} you will see Article 8.1, which is the provision that means that where this orphan designation is granted, there will be a period of market exclusivity, and you can see that the operative words are really in the bottom half of that paragraph:

"... without prejudice to intellectual property law or any other provision of Community law, the Community and the Member States shall not, for a period of 10 years, accept another application for a marketing authorisation, or grant a marketing authorisation or accept an application to extend an existing marketing authorisation, for the same therapeutic indication, in respect of a similar medicinal product."

In other words, existing marketing authorisations are deliberately not touched, and you see that specifically explained in the recital, which is on page 2 {M/17/2}. It is recital 8, nine lines up from the bottom of that paragraph:

"... market exclusivity should however be limited to

the therapeutic indication for which orphan medicinal product designation has been obtained, without prejudice to existing intellectual property rights; in the interest of patients, the market exclusivity granted to an orphan medicinal product should not prevent the marketing of a similar medicinal product which could be of significant benefit ..."

So, again, it is without prejudice to existing products, including intellectual property rights, but not limited to that; any existing product with a marketing authorisation is deliberately also protected, and that means market exclusivity is conferred not only on the new product, in this case Plenadren, but as a matter of design, any existing products for the same indication.

That is not a quirk. That is a recognition of, in human rights terms, Article 1, protocol 1 rights, that licence being an asset. In EU terms, Article 17 of the Charter of Fundamental Rights of the EU, it would be contrary to those principles to deprive someone of an existing right to sell their product pursuant to an existing authorisation, and the legislation is careful not to do so.

So implicit in the scheme -- in the structural advantage, it was put, of the orphan designation -- is

that feature, it is not something which is in any way illegitimate, as Mr Holmes attempted to portray it. There is no acknowledgment that it was that which led to the market being differentiated and that, therefore, one would expect Accord's price legitimately to be differentiated, to be higher than other products which do not enjoy that protected market exclusivity.

So Mr Holmes said that differentiation alone could not explain the size of the premium in this case, and that was his next point which he falls back on, but that was not based on anything at all. There was no evidence, economic or otherwise, to say that a premium can only legitimately be a certain size. The only way to decide whether a premium is legitimate is by applying the test for whether it was abusive. You cannot say at the dominant stage that the premium being charged for a differentiated product is abusively high and therefore necessarily evidence of market power. That is circular.

So that takes us to the market shares point where, again, Mr Holmes cannot have it both ways. As I indicated in my previous submissions, both experts agreed that the role of the market share was to play a part in an assessment in the round as to whether there was dominance, and we engage and join issue on that basis. It is maybe an indicator, and it may be one

relevant consideration, as both experts agreed, and as Mr Holmes put it to Mr Bishop. If that is the basis upon which the CMA limits its case, then there is no objection to that principled approach of treating it as an indicator and one relevant consideration.

But Mr Holmes wants to go further. Although he says: oh, it is important you should understand the CMA does not put its case on this basis alone, the Decision does explicitly rely, and Mr Holmes' Opening and Closing submissions again did explicitly rely, on a legal presumption which can only be displaced in exceptional circumstances, and the relevance of that point must be that even if, on a rounded assessment, taking the market share as just one relevant consideration, you reached the conclusion that Accord is not dominant by the time of the Intas period, the mere fact that market shares exceeded 50%, whether measured by volume or value, somehow displaces that conclusion and legally requires the Tribunal to find Accord dominant, even if that is not the result of the rounded assessment, unless Accord can produce evidence of exceptional circumstances. We say that is a wholly wrong-headed approach. Market share is not a trump card and cannot be taken to be on the authorities.

Has there ever, Mr Holmes asked, been a case where

there has been such a large market share and yet the domco has been found not to be dominant? The difficulty with that submission is that the cases are not a random sample of markets where one operator has more than 50% market share; they are all cases where the competition authority has examined all the circumstances or a private litigation has found it well advised to bring a case based on abuse of dominance, and in all cases there has been examination of all circumstances, including but not limited to market share, and then there is a finding of dominance based on an overall assessment. That selection of cases does not mean you can derive from that some kind of universal truth that, save in exceptional circumstances, any market share over 50% leads to a presumption of dominance. That wasn't the economic evidence, and it is not the law either. Indeed, to the contrary.

See, for example, *National Grid v GEMA*, {M/69/21}, paragraphs 50-51. I will not spend time on that now, given the hour, but 89% market share was not found to raise even a presumption. The analysis of dominance depended on barriers to entry and the absence of countervailing buyer power. It was treated as no more than an indicator in paragraph 51.

Mr Holmes surprisingly sought to respond to our very

full analysis in writing by going to the recent CAT decision of *Churchill Gowns* which is at {M/190.1/1}, a case where there had been a stable market share -- at page 9 {M/190.1/9} -- of 75-80% by volume. The dominance analysis proceeds from page 20 {M/190.1/20}, and at paragraph 55, the Tribunal observes:

"While market share is not determinative, a share in excess of 50% is prima facie evidence of a dominant position."

It falls to Ede & Ravenscroft, the defendant in that case, to displace that inference, ie the evidential burden shifts to the defendant, alleged domco. It, in the context of private litigation, a private claim, must produce evidence to explain why it is not dominant. It has the burden to put that evidence before the Tribunal.

That is not the position in an enforcement case like this, following an investigation by the regulator. It is not simply an evidential burden where somehow, discrete from all of the other evidence which has been gathered in the investigation, Accord must produce some magical special exceptional circumstances of its own and put it before the Tribunal. The Tribunal is already in a position to survey all the evidence which the CMA had and to weigh it for itself. Questions turning on evidential burdens, as they do in private claims like

this, simply do not arise.

See at page 21 {M/190.1/21}, the foot of page 21, paragraphs 59 and onwards, the evidence that Ede & Ravenscroft produced was manifestly incapable of establishing that there was an effective competitive process. In short, they failed to discharge their evidential burden of showing there was any kind of competitive process sufficient to explain or overcome their explanation of the market share they enjoyed. Indeed, no observable competitive process had taken place, and it was that which led to a reasonable presumption that it was dominant. That is paragraph 67 on page 24 {M/190.1/24}.

This is not a case of a Tribunal imposing the sort of trump card approach for which Mr Holmes contends, and there is no discussion of authority, least of all any of the authorities to which we have referred in our skeleton. There is no application of a high threshold approach or search for exceptional circumstances. It is a decision on its facts, not a binding statement of principle to the effect for which the CMA now concerns, and the facts were very different. Those facts did not include inexorably falling prices which E&R was powerless to resist. It tells us nothing more.

Astrazeneca was the only other case that was

mentioned, reliance on a single statement from a case in isolation. Again, it has the same flaw. In fact, you will recall, if you look back at the transcript, the passage which Mr Holmes relied upon as referring to the trump card of a presumption, in fact, if you read on to the next paragraph, then refers to it as an indicator.

So these are nuanced decisions which need to be approached carefully. Mr Holmes submitted it was in some way significant or telling, I think was his word, that I went to academic commentary. But, in fact, the commentary I took you to was a very full analysis of the cases explaining why the references in cases to presumption did not have the popularly understood force upon which the CMA now relies, and there has been no answer to that case at all.

So the analysis does not stop at a market share presumption, you do need to undertake the balanced assessment which both experts undertake, once you realise a differential can be explained and is not in some way nefarious for the purposes of assessing dominance, that there is freedom to change as half the market did and others were free to do at any time, and that market share is not a trump card; in fact, the fact that a large market share was retained simply reflected the size of those four big multiples. Lose any one of

those, particularly someone like Boots or Lloyds, and the market share changes. So it was by virtue of Accord's competitive responses that it was able to keep those customers on board, and that is the answer to the dominance case.

Now, on abuse I am going to deal with four points briefly.

Mr Holmes began by pointing to the market, and focusing, understandably -- sorry, to the mountain and focusing, understandably, on the price rises. But, again, we refer to the fact that we had the power only to drop prices and were unable to resist to any appreciable extent, which must be the threshold which must be applied in terms of assessing the ability to withhold prices.

So the point comes back to this: the CMA says that the nature of the abuse during the Intas period, if it was dominant, lies in the fact that Accord-UK had the power to drop its prices faster than it did, but it did not do so. But, in my submission, Intas was entitled to let prices find their own equilibrium in consequence of the very constraints which have, indeed, brought them down to ones which the CMA now deems can be regarded as those applicable under conditions of normal and sufficiently effective competition, but which it, the

CMA, could not identify in advance, and did not attempt to identify in advance, hence the £20 headroom, just like Accord-UK: no position at all to identify that threshold of what the competitive equilibrium would be in advance.

That is still the difficulty with this wholly novel situation that Intas found itself in. It considered it was not only entitled but it was appropriate to let that competitive process work through, to self-correct, subject always to any tighter regulatory control by the Department of Health. It is a wholly novel position to be told now, ex post, that the rate at which prices dropped was not fast enough. There is no similar case of any kind because of the unusual sharpened focus of the inquiry which you, sir, have identified.

So the CMA fails to engage with the issue of how fast Accord should have dropped prices, other than to say prices should have been "more reflective of its costs", {Day18/126:1}. What on earth that means, we still do not know.

What was Accord to do during the Intas period on the CMA's theory? It, Accord, asked the Department of Health to intervene, and they felt prices were coming down acceptably. That is the correspondence I showed you, and there is no reference to that in Mr Holmes'

submissions at all in the correspondence between the Department of Health and Accord Healthcare.

The CMA never told Intas what they said would have been acceptable. There was no case to be referred to where lowering prices has been found to be abusive, or a case that tells you that you have to lower prices at a certain rate. How is anyone internally within Accord to make an informed decision, having taken a lead from the Department of Health, who were understood to be saying that competition was righting the market?

I even asked Professor Valletti what Accord should have done and he could not answer. At no point could anyone provide clarity or legal certainty of what Accord should have been expected to do if not allow prices to settle.

Of course it can always be said: well, you can take your own advice, you are responsible for your own conduct, but it is in that context that Accord decided -- respectably, in my submission, and responsibly -- that the appropriate response, having engaged with the Department for Health, was to allow competition to work through. The constraints were in place, a new competitive equilibrium was to be found.

I, of course, adopt Mr Jowell's submissions on that, I do not need to repeat any of that, but I do submit

that, of course, a fortiori, in terms of the application of that approach, we are one stage further on and in an even better position, because competition actually had already entered, there had been market entry, it was already happening, it was established, the constraints were bringing prices down to what turns out to be effective levels and unable to resist them.

So it is not just that *Napp* works in our favour; it is also the other cases which we refer to in our written submissions about the self-correcting market.

Can I just show you one. It is the *Albion Water II* case at {M/64/69} at paragraph 212. I would just ask the Tribunal to read that paragraph. (Pause)

In the absence of any simple rule, and in the presence of self-correction, that, we say, Accord is entitled to rely upon to do so cannot be condemned as being in some way abusive.

It was said that the Department of Health might not have been monitoring prices. This could have been happening below the radar. But, again, by the time of the Intas period, they expressly confirmed that they were monitoring prices. They said that in their letter of January 2018, and that they had been since April 2016, and the prices were systematically decreasing. So we know what was in the Department of

Health's mind during this period.

The next point on abuse is the point about imposing prices. We can do that very swiftly indeed. Once it is acknowledged that there is a choice as to whether or not to buy the full label product, it simply is not -- it does not make any sense to say that a price is being imposed. There is a choice. There is a price offered to the market. It is at a premium to other bio-equivalent products. It is up to a purchaser to decide whether or not they want to accept that product at that price. That is not imposing a price on anyone. That is the language of unavoidable trading partners and so forth. We are simply not in that territory. So we continue to rely on that point.

The last point, briefly, on abuse, is that of economic value. Again, we adopt what Mr Jowell has said on that, but also draw your attention to our note, again, which we submitted on the question of economic value. That has now been uploaded to {IR-L/5.3/1}, and we draw your attention, again, to paragraphs 10-12, which are on {IR-L/5.3/4}. No need to take time over them now. But again, we agree with Mr Jowell that the authorities establish that economic value is a demand side concept, and a first and necessary step is to identify what it is that users and customers value, what

characteristics do they weigh in the balance when deciding to purchase a particular product. Then there is a second step to identify what it would be reasonable for them to pay for those valued characteristics. That is what is said in the authorities, in *Flynn Pharma* and *Phenytoin*. That is distinct from saying: well, anything they're prepared to pay reflects economic value. It is not that, it is objective, but it is based on what they value, and then it is what is reasonable for them to pay for those valued characteristics.

Application of that approach, which we say is binding, is inconsistent with any concept that economic value is something that cannot push the lawful price up, as was suggested in the course of argument, {Day20/117}. We say that would be wrong. It very much is something which can push the price up if there is demand for the product because it has characteristics which customers value and are prepared to pay more for and do so on a reasonable basis.

So that is our response on abuse in a nutshell.

That takes me, lastly, to penalty, which, again, I can deal with briefly, and certainly in the 10 minutes extra which you have allowed me, for which I am grateful, because very little of what Professor Bailey said was directed in Intas' direction. There was very

little engagement with our grounds of appeal. Indeed, in some of our central grounds of appeal, there is still no answer at all, either in writing or orally.

Let me start with, if you like, the big-ticket point, which is one of proportionality.

Professor Bailey began with what he said was -- he said: let us look, for example, at Allergan, and not at Intas, but that was a bit of a dodge of our submissions because, as we showed in the annex to our submissions, which I will remind you -- we need not go to it now -- is at {IR-L/5/69}, our Annex 5, shows that any assessment of proportionality of an Intas fine is starkly out of kilter with that of Allergan. What they were asked to pay was an order of magnitude -- what we were asked to pay is an order of magnitude greater as a proportion of our worldwide turnover and worldwide profit. No attempt has been made in answer to our submission to explain the disparity.

Because of time, I am going to give you some references now, if I may, and invite the Tribunal to go to them.

Professor Bailey went to paragraph 10.288, which is at {IR-A/12/1066}, to show you the figures on Allergan, but not 10.291, which is on {IR-A/12/1068}, which has the corresponding figures for Intas, and I would ask you

just to look at them and to make the comparison.

He went to footnote 3916, to paragraph 10.413, which is at {IR-A/12/1098}, that included making a correction there to the figure for profit after tax in Allergan's case of 2.4%, but not to footnote 3917 and to paragraph 10.415, which you will find on {IR-A/12/1099}, which has the corresponding figures for Intas which, again, show an order of magnitude greater at that point for all infringements for which Accord-UK is found liable, but not Intas by extension. But you can see the Intas involvement by looking at that which is then apportioned to A4. Still making that adjustment, we are, from a proportionality point of view, singled out and punished exceptionally heavily.

The submission that was made by Professor Bailey in relation to Allergan was that this penalty imposed on it as a proportion of its total turnover and as a proportion of its profit after tax was a blip, not even a speck, at less than 0.1% of Allergan's total turnover, and less than 1.1% of its profit after tax. Well, we have heard and support Mr Jowell's criticism of that approach. But on the CMA's part, there is an acceptance -- this is my point -- that these are relevant metrics for the assessment of proportionality. Having made that acceptance, there is no explanation at

all as to the wildly disproportionate effect of the increase on Intas.

Again, footnote 3845 to paragraph 10.292 compares to Allergan, but simply begs the question as to why 29% of our average annual profit is the appropriate figure for a penalty, when 5% would reflect the financial benefit over £20, the only legitimate benchmark that there could be. There is still no answer to our criticisms on that point. Nor is there an answer to our criticisms on the point about intention versus negligence about whether there is any jurisdiction to impose a penalty at all.

Again, the Q&A that a reasonable person could adopt might include questions like -- a lawyer advising Intas might have considered like: can you resist these price reductions? Is the market self-correcting? What is the economic value of your product? As we set out in our Written Closing, there was every reason for well advised businesspeople in the position of Intas to believe that any dominance that might have been held had been lost, any abuse that might once have been engaged in had ceased.

Professor Bailey continued to assert that: well, we were aware of the investigation, and that imported some degree of negligence, but had to concede that the mere presence of an investigation cannot be taken as

a finding of infringement, least of all when that period is limited at the time to September 2016, and so pre-dates the changes, including the kicking into effect of the drug tariff, which led Intas to arrive at its view.

Then when you get to the steps of the calculation, on step 1 on seriousness, as to why there is no separate evaluation of Intas' position in terms of the seriousness of its breach in, ex hypothesi, failing to reduce prices quickly enough, rather than putting them up in the first place, again he just repeated the mantra that step 1 is about the infringement as a whole, and referred to prices having increased by 1,500%. No doing of ours during the Intas period. No engagement with our point that it is not a requirement to treat the infringement period as a whole for this purpose, or that if you do treat it as a whole, you still need to reflect the circumstances in the Intas period in your fixing of the penalty applicable to the Intas period.

To that extent -- this is the key submission which we have always made from the beginning, but which has never been addressed -- we say if these points do not come into the equation at step 1 on seriousness, then they must come into the equation at step 3, mitigation. But they are not even considered. They do not feature,

and that is a point we have raised again and again throughout, and there is still no response to that point, and Professor Bailey did not address it.

As to step 4, on specific deterrence, Professor Bailey did not shy away from the fact that the size of our fine really came down to its assessment of the size of Intas. He accepted that the case law is all clear that size and deterrence has to be balanced properly against the degree of culpability. That is on {Day19/13:22} to {Day19/14}. But he made no attempt to defend the way in which the CMA had actually struck that balance in the case of Intas. No engagement at all with the amount of uplift applied to Intas -- 400%, you will remember, on deterrence grounds -- this is only an example of what the CMA did in respect of Allergan, which proportionately was very substantially lower.

So there was no real engagement with our case on penalty, no real answer on proportionality, and we say that if we are wrong on everything on dominance and abuse, the same factors that I have relied upon to seek to persuade you that we were not dominant or were not abusive should come into play in consideration of whether there was any negligence, and secondly should come into play as proportionality considerations, mitigation and seriousness, balancing with the degree of

culpability in this novel territory that Intas found itself in.

I am grateful for the extra 10 minutes. Those are my submissions.

THE PRESIDENT: I am grateful to you, Mr Palmer, thank you very much.

Ms Ford.

Closing Submissions by MS FORD

MS FORD: Sir, the Tribunal will recall we handed up a reply note just before Christmas so I hope, in the light of that, we can take our oral submissions relatively quickly. For the Tribunal's note, it is at {IR-L/4.3}.

Starting with excessive pricing and our ground of appeal on market definition, Mr Holmes repeatedly made the submission that nothing turns on market definition because it does not change the dominance assessment. So I take a brief moment to emphasise why we say it does matter.

At the highest level of generality, market definition is the starting point for the assessment of competition in any market, and so if it starts from an erroneous approach, then that infects the analysis at every subsequent stage of the assessment.

More specifically, market definition impacts the CMA's approach to comparators because, not least, one of

the reasons the CMA purports to disregard Plenadren as a comparator is because it says there is no evidence it was priced in conditions of effective competition. If it were in the same market, then that objection at least cannot stand.

Finally, market definition impacts fines, because one of the factors that is relied upon to justify fining Auden/Actavis four times over is the fact that 10mg and 20mg immediate release hydrocortisone tablets are in different markets, and of course they were found to be in the same market for a considerable period of the infringement's pre-competitive entry, and post-entry. The only pertinent difference appears to be that Waymade had a 20mg full label indication, and we struggle to see why that's a relevant difference in circumstances where the CMA has found that full and skinny labels are in the same market.

But, in any event, we say that this failure to appreciate that market definition does matter in these respects, that it does have important repercussions in other areas of the Decision, is itself somewhat concerning, because it suggests a failure to take into account relevant matters in considering the approach to market definition.

Specifically on Plenadren in the context of market

definition, Mr Holmes took the Tribunal to paragraphs 3.133(a) of the Decision, if we could just turn that up, it is {IR-A/12/78}. This paragraph makes two points. The first is that:

"... there are in practice few clinical advantages associated with taking Plenadren instead of hydrocortisone tablets other than for those patients that Plenadren is targeted at (ie those who have severe compliance problems) as the biological rhythm can be obtained by taking immediate-release hydrocortisone tablets two to three times a day."

In other words, the first point this paragraph is making is that the products are, essentially, clinically substitutable.

It then goes on to make a second point, and that is that {IR-A/12/79}:

"Patients switching from hydrocortisone tablets to Plenadren also require closer monitoring as the amount of hydrocortisone absorbed systematically from Plenadren is about 20% less than from immediate-release hydrocortisone tablets, potentially leading to under-substitution."

I do emphasise the reference in this paragraph to switching, because the problem that is identified in this paragraph arises in a very limited context. It is

concerned with patients who are switching from immediate release hydrocortisone to Plenadren, and the concern is that there might be under-substitution, in the sense that you have to get the dosage right if you are moving from one to the other. What is not being set out in this paragraph is a general clinical disadvantage. It wouldn't apply if someone was prescribed Plenadren directly. The reason I emphasise this is because there was a tendency to refer in the CMA's submissions in very general terms to clinical disadvantages, in a way that might give the impression that those clinical disadvantages might be a material reason why Plenadren was not frequently prescribed.

Just to give the Tribunal the references to the transcript where we say that was the case, it is {Day17/135:3} and {Day17/159:7} as examples.

We say that that would materially overstate what is, in the Decision, a very specific finding about a problem that arises in limited circumstances, and circumstances of switching from hydrocortisone to Plenadren. The Decision contains no finding to the effect that Plenadren has any general clinical disadvantage compared with immediate-release hydrocortisone tablets.

Once that is recognised, what we are left with is a product which contains the same active ingredient as

immediate release hydrocortisone tablets. It can be assumed to be least as effective as immediate release hydrocortisone tablets, if not superior, but it is common ground that it was not routinely prescribed because it was so expensive. Mr Holmes' submission is that was a classic example of choices being made on the demand side ruling out Plenadren because it is too pricey.

But we say the key question for the Tribunal, the key question of principle under this ground of appeal, is: does it make any sense to elevate considerations of price over considerations of functional substitutability in that way, when the question this Tribunal is being asked is whether immediate release hydrocortisone is excessively priced or not?

Sir, you at one point raised a thought experiment, which was to assume that full label and skinny label products were priced the same and to ask: well, what would be the effect of a SNIP test in those circumstances? If one applies that thought experiment to Plenadren, and one assumes that Plenadren and immediate release hydrocortisone tablets were priced the same, in our submission there is no doubt whatsoever that there would be competitive interaction between them because they are functionally substitutable. So in the

particular circumstances of this case, we say it is that function interchangeability which ought to have led Plenadren to be included in the same market.

I am moving on --

THE PRESIDENT: Is it a permissible thought experiment? I mean, conventionally speaking, one applies SNIPs to the price that one has in the market. Now, of course, you are saying ditch the price altogether and look to the functional equivalents, which is quite a departure. Does the creation of a level playing field simply go too far in your direction and just, effectively, create function as the key test over and above price, which then becomes essentially a fiction?

MS FORD: In my submission, it is a permissible thought experiment, and the Tribunal will recall I spent some time looking at the authorities which deal with the approach to market definition in the particular context of *Pharma*ceutical markets, and those authorities do indicate, and do essentially warn, that one must be careful not to place too much emphasis on price over functional substitutability in the particular context of *Pharma*ceutical markets. So I do say that the authorities support that sort of exercise.

In the particular circumstances of this case, the other support that one gets for looking at it in this

way, is the point that the Tribunal itself made in the context of *Phenytoin*, which is that when one is looking at market definition, one needs to keep in mind the purpose for which one is doing it, and when the purpose is to ask whether a particular product is excessively priced, in my submission it makes no sense to disregard as a comparator or to exclude from the market altogether a product because it is priced higher than your focal product.

So for those two reasons, in my submission, it is a very informative thought experiment.

THE PRESIDENT: But do you say --

MS FORD: I am told it is *Paroxetine*, not *Phenytoin*, where the Tribunal said that.

THE PRESIDENT: Functional equivalence in a sense is giving a great deal of weight to the science side. Does it give enough weight to, well, what one might say really matters, which is the views of the ultimate consumer, the patient? In what way can one, in a functional equivalence test, factor in what might be the preferences of the person actually taking the medicine?

MS FORD: Sir, the use of the term "science side" in some respects really risks obscuring what we are saying, because these are products which are essentially substitutable from the perspective --

THE PRESIDENT: Well, of course they are, but they are also different, in the sense that one is immediate release, requiring you to take pills several times during the course of the day; the other is delayed release, which means that you do not have to take them as often. Now, there are advantages and disadvantages on both sides, some evident to a layman, or layperson, some not so evident.

The reason I am raising the functional equivalence test and the, as it were, excessive weight on the science is, yes, they are substitutable, because they are the same thing, and that obviously is why it is a difficult question when one has got prices that discourage their use.

So taking away the prices, what I am asking is: is one losing a little too much in terms of the sort of decision one would expect the patient to be making by just concentrating on the chemical composition and the equivalence of the drugs themselves?

MS FORD: Well, sir, if one takes away the prices, as you indicate, we have the finding that I have just shown you in the Decision that this is a product which is either equally effective or potentially more effective, although the Tribunal will recall that I have submissions in the context of Plenadren as a comparator

that the distinction between them is not sufficient to exclude Plenadren as a comparator, for the reasons set out in the Decision.

THE PRESIDENT: No.

MS FORD: Insofar as it is either equally or more effective, one would expect that the patient would be equally content with Plenadren and/or would wish to prioritise Plenadren over immediate-release hydrocortisone. One then asks: well, why is that not happening? Why are we not seeing that? Again, it is common ground that the reason we are not seeing that is precisely because that potentially equal or more favourable option is priced too high to permit that switching to take place, and indeed the clinical commissioning groups have precluded these two being directly compared at that level because they say it is priced too high to include them on the formularies.

One does have to, in my submission, bear in mind that that is the reason why we are not seeing the sort of switching that one would normally expect to see in applying the market definition test, and that is an extremely relevant factor when one considers whether they should be in the market or not.

Turning on to the question of countervailing buyer power.

The Tribunal will recall that in the Decision there were two limbs to the CMA's position: there was a legal argument that there was an absolute bar as a matter of law in taking into account regulatory powers as countervailing buyer power, and then there was a factual argument that the powers were not effective in practice.

The CMA does not appear to be maintaining its position that it took in the Decision that there is an absolute legal bar to taking into account regulatory powers, certainly Mr Holmes said nothing about it, and so we are left with the assertion that there is no constraint in practice.

The Tribunal will recall that there are two relevant periods for the purpose of my appeal on countervailing buyer power: the Auden period, for which the applicable power is section 262 of the NHS Act 2006, and then there is the Actavis period for which the relevant power is Scheme M.

For the Auden period, Mr Holmes' submission was that the applicable powers were toothless, and that was essentially because of the absence of information-gathering powers to tip off the Department of Health that there was something wrong. He even went so far as to say -- {Day18/61:1-3} -- that there was simply not the legal apparatus in place for the

Department to regulate hydrocortisone tablet prices. Now, that is a surprising submission to make in circumstances where it is common ground that the requisite power in question was available to the Department of Health in this case, and so there is an important distinction between the circumstances of this case and when the Tribunal considered a similar question in *Flynn & Pfizer*, where the legal position was unclear. There is no lack of clarity in this case.

In our submission, even absent information-gathering powers, if Auden/Actavis' hydrocortisone tablets were as excessively priced as the CMA claims they were, one would expect that to come to the Department of Health's attention. Mr Holmes spent some time addressing the Tribunal on stories in the Daily Mail about Auden's pricing, dating back to 2010. If the Daily Mail is publishing stories about it, how could it be said, I ask rhetorically, that this pricing was "under the radar", to adopt Mr Holmes' terminology, from the perspective of the Department of Health?

More fundamentally, it is a surprising submission that powers which have been expressly conferred by Parliament on the Department of Health in order to achieve a particular outcome are not worth the paper they were written on. There is, here, an undisputed

black and white statutory power to control prices, and, absent evidence to the contrary, in our submission, the Tribunal should proceed on the basis that such an extant statutory power is effective, and there is no evidence before this Tribunal to contradict that position.

Mr Holmes did make submissions to the effect that it was a power which was ineffective and toothless, but they involved hinting about what might be motivating the Department of Health in a way which was wholly unsupported by any evidence. That, in our submission, is an illegitimate approach. We say that, in the absence of any concrete evidence from the Department of Health, the CMA is fixed with the position that there is an extant statutory power which can be used to control prices.

In relation to the Actavis Scheme M period, Mr Holmes was obliged to concede that the scheme does contain information-gathering powers. But what he focused on instead was an attempt to cast doubt on their efficacy by speculating that the dispute resolution powers under Scheme M might somehow be ineffective, or that Actavis might choose to leave Scheme M in order to avoid the consequences of the scheme.

Echoing Mr Jowell's submissions on this, again, there is no evidential basis whatsoever for that

speculation. It is particularly lacking in foundation to suggest that Actavis might leave Scheme M. There is no evidence whatsoever in support of that. So we say there is no basis to assume that there is anything other than an effective power to control prices during the Actavis period.

Indeed, the sole evidence the Tribunal does have is that which was given by Mr Beighton, which the CMA accepts is accurate as to its contents, which shows that when the Department of Health did threaten to use its powers, *Teva* immediately lowered its prices. We have cited that in paragraph 19(a) of our supplementary written submissions.

Finally, there is a tendency on the part of the CMA to point to the familiar mountain pricing chart, and to say clearly there is no countervailing buyer power here operating as a constraint on Auden's pricing. I simply wish to underline how very dangerous that sort of reasoning is, because at the market definition stage, we are told: look at this pricing, clearly there are no competitive constraints. Then when we come to assess countervailing buyer power, we are told again: look at this pricing, obviously there is no countervailing buyer power. Then at the abuse stage, lo and behold, the pricing in question is found to be excessive, relying on

essentially the same point about the extent of the increase in prices. We ask the Tribunal to resist an approach which permits a prior assumption about prices being too high to drive the entire process.

Turning on to excessive pricing, and to make a short point about the practice of portfolio pricing, the Tribunal will recall that we identified this as a contextual factor, which makes it particularly important to look further than a purely cost-plus analysis, because portfolio-wide pricing strategies are legitimate and common in the *Pharma*ceutical sector.

Some attempt was made before Christmas to suggest that there was no factual basis for the point that we are making in this regard, and it was said: well, Auden debranded hydrocortisone precisely in order to avoid portfolio pricing, in the sense of a constraint on the pricing of the portfolio of a branded product, or a portfolio comprising branded products. But, of course, that does not mean that it was not then part of a portfolio of generic drugs which are sold to wholesalers and *Pharma*cies, and its profitability will, self-evidently, contribute to the profitability of that generic portfolio as a whole.

The CMA does not actually dispute that Auden's portfolio as a whole was in fact loss-making for

a period of time. Just to show the Tribunal that, it is {A/12/498}, paragraph 5.279.

Although you see in the first sentence the statement that:

"... the claim that Auden was loss-making on products other than hydrocortisone tablets is not supported by the evidence."

What we then see is a finding of fact by the CMA that:

"Auden incurred operating losses of £22.7 million up to 31 March 2012 on products other than hydrocortisone tablets."

That is a finding of fact, and just to address submissions Mr Holmes made about the fact that we should have particularised the scope of the portfolio that we are talking about when making the submission, presumably the CMA understood the scope of the portfolio when it made this factual finding.

What the CMA does in the remainder of this paragraph is to go on to claim that these losses were in some way avoidable, and so it quibbles about whether the portfolio was necessarily loss-making or whether, with hindsight, if things had been done differently, it could have been resolved by other means. But there is, in essence, no dispute that it was, in fact, loss-making.

Then the point that we make is simple maths, because if, as the CMA has found, the portfolio was in fact loss-making once hydrocortisone tablets are taken out, then clearly what Auden must, in fact, have been doing was using the profits from hydrocortisone to subsidise its other products. So those other products were being sold to the NHS at loss-making prices, and the NHS was getting a good deal for them. That is the contextual factor that we say needs to be taken into account when one is assessing excessive pricing.

Mr Holmes returned to this point last week, after Christmas, and he made a slightly separate submission, which was that there was no evidence of any cross-subsidy having been agreed with the NHS. He said: well, where is any understanding on the part of the NHS that they were getting a bargain on some products in return for higher prices on others? We say to that that is just importing excessive complexity into what is really a very basic and intuitive point. We say when you are looking at whether pricing is unfair, you need to take into account the commercial reality of pricing practices in this industry.

So that is portfolio pricing.

On the test for excessive pricing we have some comments on the Tribunal's note to supplement some of

those that we have already made in our written reply note, first on the question of what is meant by "economic value". In many respects, what we say echoes the points that have already been made by Mr Jowell for Allergan.

At paragraph 5 of the Tribunal's note, the Tribunal asks whether "economic value" means the price that would obtain in a competitive market, to which we say in *Flynn Pharma*, the Court of Appeal said that a proxy for economic value is what consumers are prepared to pay for a good or a service in an effectively competitive market, and the difference between the Court of Appeal's formulation, what consumers are prepared to pay, and the Tribunal's formulation, the competitive price, is an important one, because, as others have already submitted, what this concept is trying to get at is the demand side of the equation. It is trying to get at what a consumer is prepared to pay in a competitive market, and the two formulations, in our submission, are not necessarily the same.

It is clear, in our submission, both from *Flynn Pharma* and also from the Court of Appeal in *Attheraces*, which is another case that Mr Jowell took you through in some detail, that a supplier is permitted to price its goods or services in a way that goes beyond

costs plus, and which includes the economic value that the consumer ascribes to the good or service. It is perfectly permissible for the supplier to do that.

To utilise some of the terminology that the Tribunal has used in its note, the concept of consumer surplus, the supplier is permitted to capture some of the consumer surplus. It is entitled to do that, and a price which does that is not an unlawful or excessive price.

THE PRESIDENT: That much is, I think, clear. The question is how far competitive constraints in a competitive market, not a perfectly competitive market, erode that ability. So obviously you can pitch for as much as you can get. That is fundamental. But it is a question of the controls that exist independent of buyer value that one needs to think about factoring in.

The fact is, if the buyer does not value the product, you are not going to sell it at any price, so obviously buyer value is a necessary element to pricing high. But it is the other factors at play that we are, I think, focusing on in the note, which apply with greater force in the competitive market -- I mean, they apply with extreme force in the perfectly competitive market, but they apply with greater force in competitive markets than in a market which is in some way

non-competitive, either due to dominance or due to collusion. That is really the factor that our note is trying to eliminate, because the whole point of this exercise, as we see it, is to get to a price that would be the price if one removed the abuse of dominance, or the collusion, possibly, in a cartel case, and that is the aim of the test.

So how markets work generally is what ought to drive the exercise.

MS FORD: Sir, yes, and that perhaps brings us to the core of where we perhaps part company with the approach taken in the note, in particular paragraph 9 of the Tribunal's note, which says that in a competitive market the effect will necessarily be to maximise the consumer surplus, and then paragraph 10 says an excessive price is materially higher than a price in a competitive market.

The concern we have is that this assumption that price in an ordinarily competitive market will necessarily maximise consumer surplus, in the sense of the price actually paid by the consumer at any given time, that, in our submission, is not consistent with the case law, because the case law tells us that it is perfectly permissible and it is not abusive and it is not excessive to price in such a way that extracts some of that consumer surplus and does not maximise the

consumer surplus.

So we do not take issue with the notion that, in general terms, what one is trying to do is to get at the price that will pertain in the competitive market, but we say that the case law tells us very clearly that one cannot assume that, in a competitive market, the competitive price necessarily maximises consumer surplus.

There is a good reason for that, in our submission. It is the very fact that producers might be able to achieve a higher producer surplus, either by cutting their costs or by differentiating their products, that incentivises them to enter the market and to compete, and that is what drives the competitive process.

That, in our submission, is the point that is being made, both by Lord Justice Green in paragraph 104, that Mr Jowell showed you this morning, and equally in the paragraph from *Albion* Water that Mr Palmer took you to, 212. They are both making the point that it is the potential to obtain a producer surplus which drives and incentivises the competitive process.

THE PRESIDENT: Well, certainly I think one would accept that it is part of the story, and equally one would accept that in a real market, as opposed to a perfectly competitive market, there is not going to be a necessary

tracking of price running at just above cost, and that is, of course, the outcome in the case of perfect competition. But you clearly have got in a competitive market the ability of suppliers to differentiate themselves.

Now, I am quite sure that the price of, let us say, a Hermes tie -- and, by the way, this is not one -- is going to be significantly above the cost of producing it. Now, why is that? It has got to be something to do with the creation of something which impels enough of the buying market to splash out a large amount of money when they can get something for a tenth of the price from The Tie Shop, or The Tie Rack.

Now, that is how markets work, and I do not see any issue with that, but you do need to factor in the uniqueness, if you like, of the Hermes tie as impelling someone to spend more. Sometimes the differentiation arises out of an intellectual property right, and then one does get difficult questions of dominance, but it does not necessarily have to; you simply may have a brand that is better for reasons to do with service or quality of products, and one therefore extracts more money.

Now, whether that is minimising consumer value or maximising it I think is a much harder question.

MS FORD: Sir, that is exactly the point, in the sense that the motivation for the producer of a high-end tie, whether that tie is better quality or has a brand that consumers desire, what drives them, the incentive for them to do that, is the potential that, in doing so, that enables them to obtain a greater proportion of the producer surplus and thereby, correspondingly, to minimise the consumer surplus. But that is not a problem, that is a positive benefit, because it incentivises the innovation on the part of the producer, and the consumer in the competitive market is prepared to pay because they value those qualities.

So it is not simply a question of the distinction between real competition and perfect competition. It is not an imperfection. It is a positive benefit which drives the competitive process. If one seeks to craft a solution which gets rid of that benefit by assuming that one maximises the consumer surplus, then one takes away what is driving that competitive process.

THE PRESIDENT: Well, it may be that a gloss to the note, if we put it out there to enable discussion, rather than to represent any kind of final view, it may be that there is, in fact, no direct equivalence between an increase in producer surplus and a decrease in consumer surplus. The Hermes tie, for instance, you are producing

a surplus on the supplier side because you have got more than just your return on cost to bring it to the market, but it could be that the value to the buyer is actually being increased because they are getting a ritzy product that they can wave about and say: look at my wonderful Hermes tie.

MS FORD: Sir, that must be right, and in my submission, because that is right, that is why it is not right to assume that the competitive market -- that the desirable outcome is to minimise the producer surplus and maximise the consumer surplus. That is essentially where we take issue with the assumptions which underpin the note.

But it does bring me on to the second point that we wanted to make, which is an observation about the role of comparators in that exercise, because, of course, the Tribunal's note is dealing with this at a relatively abstract theoretical model and does not then look at the role of comparators in that process. The benefit of including comparators is that they do help to grapple with the difficulties of quantifying these abstract concepts like consumer value and economic value, because one can look across and one can say: well, what is charged or what can be charged for a bioequivalent form of hydrocortisone, and what can be charged, for example, for an injectable form of hydrocortisone? That helps to

ascribe concrete values to these otherwise relatively abstract concepts.

THE PRESIDENT: No, and nothing that we say in the note should be taken as excluding the methodology, such as it is, in *United Brands*. Clearly comparators matter.

You are focusing on comparators that are on the same temporal plane. Do you have a problem with comparators on a different temporal plane; in other words looking at the price of the same product as charged in the past and in the future when one is considering a point of time in the middle? Is that a valid comparator to take into account? Obviously circumstances in any given case will affect the value of particular comparators, but looking at it as a point of principle, is that something that we should be thinking about as well?

MS FORD: As a matter of principle, we do not say that one cannot look at temporal comparators. The criticism that we advance of the CMA's approach -- and this is important, because Mr Holmes made a submission that we had not properly grappled with the CMA's chosen comparator. The criticism we advance of that is that it is extraordinarily limited, because what the CMA has done is conclude that the only relevant comparator for the purposes of immediate-release hydrocortisone tablets is immediate-release hydrocortisone tablets at a later

point in time, and we say that is an inadequate and inefficient approach to comparators, and it is wrong as a matter of principle to exclude Plenadren and hydrocortistab as informative comparators in that exercise.

Most striking as to Plenadren, Mr Holmes reminded the Tribunal of the sorts of differences which were cited in the Decision to justify disregarding Plenadren as a comparator, and they were things like the differences in prescribing and sales volumes; the fact that it was not recommended by CCGs; the fact that it is used to treat less than 1% of adult patients. We know there is a reason for all of those things, and that reason is because Plenadren was more expensive, and in our submission what Mr Holmes did not address at all is the fundamental illogicality of disregarding Plenadren on that basis, because it was too expensive. We say that the CMA really has failed to grapple with that illogicality in its approach to comparators.

Sir, I am moving on to look at the 10mg agreement.

It has been well canvassed, and it is common ground, that in order to succeed on its case on the 10mg agreement, the CMA has to establish something more than unilateral conduct, and it must show an understanding not to enter the market which crosses the line in terms

of representing a common understanding shared by both sides.

In an exchange with the Tribunal, Ms Demetriou gave an example of how the CMA might discharge that burden. I wonder if we can turn that up. It is transcript {Day16/38:11}. Just to remind the Tribunal, the way it was put, starting from line 11, she says:

"Let us say, I am going to come to the evidence later, but let us say there had been an express discussion between Mr Patel and Mr McEwan and Mr McEwan had said, right, you have been supplying us with the 10mg product at £34 per pack for the last year and a half, which was the case. We have now got our MA, so we could enter the market with this product. So I am looking for a very substantial discount. In fact, I now want supply at £1 per pack. Mr Patel says, well, why would I supply you at £1 a pack? Mr McEwan says, well, because otherwise I will enter the market with my own product, but if you supply me I will not."

That, in Ms Demetriou's submission, is an example of an agreement which crosses the line. So it is intended to be an illustrative example of the way in which the CMA says it might discharge its burden in respect of the 10mg agreement.

There are, in our submission, three important

assumptions which underlie this proposition which we say are not borne out.

The first is that it assumes that the only reason that Mr Patel would be prepared to offer Mr McEwan supply at £1 a pack is because Mr McEwan is undertaking not to enter the market with his own product, and you can see that when, in this scenario, in Ms Demetriou's example, Mr Patel says, "Why should I supply you at £1 a pack?", to which Mr McEwan says, "Otherwise I will enter, because if you supply me, I will not enter with my own product".

In our submission, there is no basis for that assumption, because Mr Patel might equally say, "I see that you now have a choice. You can either source your supply from me or you can source from your own CMO, Aesica. It is in my interests," said Mr Patel, "to seek to retain these volumes rather than to lose them altogether, so I am prepared to compete with the price that you get from Aesica, and on that basis I will offer you £1 a pack." Let us be clear, that does not involve any implicit or inherent assumption that Mr McEwan would not enter with his own product.

So Ms Demetriou made the submission that what is meant by protecting Auden's volumes in this context must be some sort of understanding that Waymade or AMCo would

not enter. But in our submission, it does not mean that at all. It means that the volumes are protected because they continue to be sourced from Auden, rather than Aesica, on a CMO basis, because Auden has successfully competed with Aesica to serve as Waymade's CMO. So the volumes continue to go through Auden's CMO, Tiofarma.

THE PRESIDENT: I think, Ms Ford, looking at the transcript here, if one deletes the example of £1 per pack and substitutes a request for supply that is much closer to the £34 per pack being hypothesised, say the argument is, "Look, I would like it at £29 a pack", the debate about an implied understanding of not entering the market sort of vanishes, because all you are doing is playing hardball to get the best deal out of the market conditions. You can obtain a source one way, you are trying to obtain another source another at a cheaper price. So the traction in this case is the oddity of the £1.

Now, if that is right, then the enquiry swivels away from: what is the implied understanding, to: is it, or is it not, an odd price? Now, we have heard Mr Beighton's evidence on that, but we have also heard the evidence that you are referring to now, which is that you need to view it through the prism of what price you can get the alternative supply at, and if you can

get it for £1.10, then £1 does not look as odd.

So does it simply boil down to that? We need to understand all of the factual matters which drive the conversation which may or may not have taken place along these lines.

MS FORD: Sir, it is important to recall as well that Auden does not know what supply price AMCo can get, and so, in effect, it is even stronger than that, because Auden is understanding -- AMCo is saying, "I have my own source", and Auden is understanding that, in order to maintain its volumes in the sense of continuing to pass them through Tiofarma it must compete with the alternative source, and that is the basis on which the price is being offered.

THE PRESIDENT: Of course, I accept that, and that comes quite close to an exchange we had, well, long ago, regarding what is communicated when one is negotiating. You are absolutely right: in my example, if someone is going back saying: look, I will accept supply from you at £29 a pack, that is saying a great deal about alternative sources of supply to that particular person without them saying anything more than £29. It is for both sides to understand what that tells them. That is the point about negotiation: you do not put all your cards on the table, but you have to put some cards on

the table, and those cards tell the other side something about where you are coming from.

MS FORD: That must be right; and, of course, as we did debate some time ago, that is the case with any agreement. So that fact on its own --

THE PRESIDENT: Well, it is the case with any negotiation.

MS FORD: Indeed.

THE PRESIDENT: Yes. But that, again, is something which we need to throw into the mix when we are considering the circumstances of this particular transaction.

MS FORD: Sir, yes. One must throw into the mix the fact that there is an alternative explanation for what is going on here. To be clear, we do not agree that it is right to say that the purpose of Auden trying to compete in that way is to disincentivise independent entry. So the way in which Ms Demetriou put it was that this all narrows down to a very narrow point between us about whether or not that occurs unilaterally or by means of a common understanding.

It is certainly true that I made the submission, and I maintain the submission, that, insofar as it might be anticipated that the practical consequence of competing with Aesica might be to make independent entry less commercially attractive, then that is a unilateral anticipation and so it is not unlawful. But that does

not mean it is the intended purpose of the exercise. The purpose is to maintain the manufacturing volumes through a legitimate process of competition with Aesica.

If that alternative plausible explanation is the right one, then the whole pay for delay theory falls away at that point, because Auden is not transferring margins to Waymade or AMCo that it could itself have earned at full price; it is realistically recognising the likelihood that it will lose volumes in any event, and it is competing with Aesica to try and retain them on a CMO basis.

That is, in our submission, the first assumption which underlies this way in which the CMA puts its case and which we say is not borne out.

The second assumption is that if a competitor threatens to enter the market with their own product, then that is the equivalent of saying that if you do supply us we will not enter. That is the factual basis on which Ms Demetriou is positing, in this scenario, Mr McEwan saying: otherwise I will enter the market with my own product, but if you supply me, I will not. So the submission that was made was that it is the other side of the coin, or it is the only way that a threat to enter the market will be understood, that if Auden do supply on those terms, then AMCo is undertaking not to

enter. That is the factual way in which the CMA is trying to show this sort of understanding that crosses the line.

In our submission, it is a matter of real concern that all you have to do in order to turn a lawful supply agreement into a potential commitment not to enter an unlawful agreement, all you have to do is indicate your intention to enter the market. Because it is said: well, the other side of the coin of that is a common understanding that if you receive supply then you will not enter. That is a dangerously low threshold to apply, and it is a threshold which is likely to be met in relation to any supply agreement.

We do not accept that it is the obvious other side of the coin, and we do not accept that this is the only way in which a threat to enter could be understood. It could equally be understood as saying: if you offer us these terms, then you will get the business rather than Aesica, and you can retain your manufacturing volumes; if you do not, then Aesica gets the business, you lose your manufacturing volumes. But in that scenario, there is no undertaking not to enter, and it is not an obvious and inevitable other side of the coin of a threat to enter the market.

Then the third premise which underpins this

characterisation is that it is worthwhile from Auden's perspective for it to forego significant margins in supplying Waymade or AMCo. It is said: well, it makes commercial sense because Auden is trying to avoid an even less favourable outcome, which is that AMCo enters and prices fall across the market. We say that premise is also flawed, because the Tribunal has Mr Beighton's evidence that he would not have deliberately precipitated a death spiral, and it is not in a generic entrant's interests to do so, and if entry would not necessarily have precipitated this sort of price drop in this way, then why give away margins, as the CMA claims Mr Patel is prepared to do?

So, for all these reasons, we say that the case that there was some unwritten common understanding is extremely weak and there is a plausible alternative explanation for what was going on here.

When we come to the question about the duration of any 10mg agreement, and the continuation of any common understanding into the Actavis period, the basis for any common understanding becomes even weaker. Bear in mind that Ms Demetriou's factual case is that there were threats by Mr Beighton that he was going to enter the market and the theory that the other side of the coin of that is an undertaking not to enter; but there is no

evidence of that sort at all during the Actavis period. All there is, and all the CMA rely on to say that Mr Wilson of Actavis acquired a shared understanding of what was going on, was an awareness of the terms of the supply agreement, and in particular a supply at a discount and the fact that AMCo's alternative was to get their product manufactured elsewhere. It is said that, on that basis alone, Mr Wilson's understanding must be assumed to be the same as his predecessor's.

THE PRESIDENT: We are now back into another interesting debate which we had, which I am not inviting us to revisit, because I know where the battle lines are drawn, about the precise legal vehicle in which one drives to work out whether, assuming the existence of the side agreement at point one, whether that assists at point ten, when the actors who reached the agreement have vanished at some point between point one and point ten. You say you cannot, without some sort of conversation or transfer of knowledge, attribute it to the later actors. I put to you, you know, other means whereby one might attribute, but that is something you are going to have to grapple with.

MS FORD: Sir, yes. You will have seen we have sought to address that in our reply note, so I do not propose to traverse it any further today.

THE PRESIDENT: Yes. No, I am not inviting it at all, although it does, I think, trigger a thought that we would be grateful if the parties could just provide us with a list of the notes that have been handed up. I know they are all on Opus, but I suspect -- I have been trying to look, but my machine is not bringing them up -- I suspect they may be all over the place. But we would like to have everything in, over and above the formal Opening and Closing submissions, that has been brought up by everyone in one list, so that when we are re-reading stuff we do not miss anything.

MS FORD: Sir, we can certainly do that. No problem at all.

THE PRESIDENT: That, to prevent Homer nodding, would be very helpful.

MS FORD: The Tribunal has my submission that it is an unsustainable leap to say that an appreciation of these matters amounts to an understanding that there was an undertaking not to enter the market. Ms Demetriou did try to refer to three additional documents which she said supported that position. I would just like to address those very briefly.

The first is an Allergan document, {H/790/39}. The point that was made in respect of this document was essentially that there was no mention of AMCo entering with its own products. But our submission is that what

these slides are doing is fairly reflecting the situation at the time, which is that AMCo was receiving a supply from Auden. In our submission, it is another unsustainable leap to say that that reflects an understanding of any commitment not to enter.

The next document was {H/809/5}, towards the bottom of the page, please. The Tribunal will see there the heading "Hydrocortisone tablets", and reliance was placed on the entry in the "Decided" column, which says:

"Can pull AMCo supply now there are more players in market."

In our submission, that is an observation which equally makes sense if what Auden were doing were trying to maintain volumes, because, of course, other players are now coming in and so their volumes are going to go down anyway. So that takes matters no further.

Then {H/720/1}, please. The Tribunal will recall that reliance was placed on the top email, where it says:

"According to Amit Actavis will continue his strategy."

But if we look at the third email in this chain, it is clear that the context of this is the fact that the focus product does not have the AI indication. So the focus product was a skinny label product. That is the

focus of this observation about Actavis continuing its strategy: it is to do with skinny label/full label, not terms of supply to AMCo. So, again, we say does not lend any support to the position in the Actavis period.

So we say that the material that CMA relies on to suggest that Mr Wilson shared any common understanding simply does not show that at all. I pick up here what Ms Demetriou said about drawing an adverse inference from the absence of Mr Wilson. Mr Wilson was not mentioned in the CMA's letter concerning adverse inferences, and he did not feature at all in the debate on the possibility of summoning witnesses. The relevant paragraphs of the CMA's Closing -- it is paragraphs 34-37 -- they focused on the position of Mr McEwan and Mr Patel.

So, in our submission, there is no proper notice being given of seeking to invite the Tribunal to draw adverse inferences in respect of Mr Wilson. The Tribunal will have well in mind that Mr Wilson's position is very different from that of Mr McEwan and Mr Patel: he was not involved in the negotiation of either of the supply agreements; he simply inherited the agreement for a short period of time before it came to an end. It is the CMA which seeks to rely on Mr Wilson's evidence for the proposition that any common

understanding extended beyond the acquisition of Auden by Allergan, and that is the Decision in paragraph 6.762 and 6.766, and I took the Tribunal through that. The Tribunal has our submission that there is nothing in it.

We challenge the CMA's assessment and appreciation of that evidence because we say it is clearly not enough. But that does not require us to call Mr Wilson; that is a matter of whether or not the CMA has discharged its burden to show a common understanding during the Actavis period.

So we strongly resist this belated suggestion that an adverse inference is appropriate in the context of Mr Wilson.

The next argument for the CMA now seems to be: in any event, we do not need to show an ongoing common understanding; it is enough that there was such a common understanding at the outset. That is not the position that the CMA took in its Decision; in its Decision, it recognised that, in order for the infringement to continue, it is necessary for the common understanding to continue.

To show the Tribunal that, it is Decision paragraph 7.7, {A/12/828}, please. The first line of that paragraph, 7.7:

" ... the CMA has found two anticompetitive

agreements each lasting for as long as the common understanding existed between the relevant parties."

In our submission, the CMA is quite right to recognise that an ongoing common understanding is essential to the infringement which is being alleged; and, if there is no common understanding present, then the core element which renders this conduct unlawful on the CMA's case has fallen away. That is the definitional element which makes this agreement problematic, and, absent that, it is nothing more than supply at a low price, and that is positively pro-competitive and in consumers' interests. We say the CMA was quite right to recognise in the Decision it needs to show that that common understanding persisted.

Sir, the Tribunal asked me to address the concept of similar fact evidence, in particular in the context of paragraph 3.5 of the Decision. We have dealt with this as well in the reply note, but the test for admissibility of similar fact evidence in civil proceedings is whether the evidence is relevant as being potentially probative of an issue in the case; and, if relevant, the court has to then ask whether there are good grounds to decline to admit the evidence in the exercise of its case management powers. We have cited a case in our note called *O'Brien* and the commentary in

the White Book and in Phipson on *Evidence* for that.

In the present case, we accept that the evidence in the Decision as to the 20mg agreement and as to Mr Patel's conduct is relevant, in the very limited sense that it forms part of the factual findings the CMA had made in the decision, and therefore may form part of the basis on which the CMA reached its Decision.

We are conscious that this is not a situation where the Tribunal is being asked in a case management context at an early stage whether to exclude certain evidence from the scope of the proceedings. So, in many respects, the debate about admissibility is going to be a somewhat arid debate. But we do say that the factors that the case law indicates will be relevant to the exercise of the court's discretion are equally pertinent to why we say the evidence in this case should be accorded very limited weight.

One of the bases on which similar fact evidence might not be admitted is its propensity to cause unfair prejudice. That is *O'Brien* at paragraphs 11 and 55, and that is included in the bundle. That risk, the risk of unfair prejudice, is a factor which, in our submission, the Tribunal should be bearing well in mind, and it is important in determining the very limited weight to be accorded to this category of evidence as against all of

the other detailed material that is before this Tribunal.

The authorities also recognise that care must be taken not to allow the admission of similar fact evidence to distort the trial and to distract attention with collateral matters. Again, that comes from *O'Brien* at paragraphs 11 and 56.

The Tribunal will have well in mind that the Decision contains the barest of outlines of Mr Patel's conduct in relation to other investigations, and it is self-evidently neither practicable nor desirable for the trial of these proceedings to be diverted into exploring in any detail those matters. Clearly, there is no time to accommodate that sort of exercise. For that reason, again, in our submission, that points to according minimal weight to that material in these proceedings.

So, sir, that is the way in which, in our submission, the Tribunal should approach similar fact evidence in this context.

I am coming on to deal extremely briefly with penalties. We made a lot of detailed points on penalties, all of which we maintain. I make only one point in reply. The Tribunal will recall that we made an overarching criticism of the CMA's approach that it was not appropriate to fine Actavis what amounted to

four times over in respect of what was essentially the same course of conduct. Professor Bailey sought to address that criticism by referring to authorities on the concept of single and continuous infringements, and saying that the CMA was justified in finding four separate infringements in the circumstances of this case.

But the short point is, that does not mean it is appropriate to apply four separate fines. As the Tribunal is aware, an authority might rely on a concept of single and continuous infringement to enable it to go back further in temporal terms and to investigate conduct which, if it was treated as a standalone infringement, might be outside or out of time; or it might rely on a single and continuous infringement for administrative ease, in the sense that it does not have to identify and substantiate every individual element of the conduct as being an individual infringement, and so it can hold cartel participants liable for the entire course of conduct.

But for those reasons, it is a concept which is defined deliberately very narrowly in the authorities. The short point is that just because conduct constitutes separate infringements does not answer the question whether it is fair or proportionate to then proceed to

apply separate fines.

The Tribunal will recall we drew attention to the fining approach in *Flynn & Pfizer*, and there, there were four separate infringements but only one fine. In *Servier*, which was a case that Professor Bailey relied on, the Commission again decided to find separate infringements, but it then applied what it described as a "downward correction factor" to avoid a potentially disproportionate outcome due to the parallel imposition of multiple fines. That is paragraph 1262 in the authority. That was a case in which the total fines did not exceed the statutory cap, but nevertheless this downward correction factor was applied.

So a finding of multiple infringements does not justify separate fines, and nor does it answer the question whether the total amount of the cumulative penalties are fair and proportionate.

Professor Bailey did rightly accept that the CMA and the Tribunal have to look at the overall penalty figure and decide whether it is proportionate irrespective of whether the CMA has found separate infringements or a single infringement, but, in our submission, he did not seek to justify the overall proportionality of the fine in this case. The Tribunal has our submissions that the levels of penalties imposed on Auden/Actavis

are neither fair nor proportionate.

The approach of slicing and dicing interrelated conduct and imposing multiple penalties wrongly circumvents the protection that is supposed to be accorded by the statutory cap, and results in the imposition of an excessive and disproportionate burden. In our submission, submissions directed at the concept of a single and continuous infringement just fail to grapple with that overarching criticism.

Sir, unless I can assist further, those are our reply submissions.

THE PRESIDENT: Ms Ford, thank you very much. You stuck to the minute of your hour, and we are much obliged. We will resume at 2 o'clock. I take it there is no problem about a 10-minute break in the afternoon if we do start at 2 o'clock?

MS FORD: I am sorry, sir, I did not hear that.

THE PRESIDENT: There will not be a problem about having a 10-minute break for the shorthand writer in the afternoon. You have factored that into your timings?

MS FORD: My understanding is that that can be accommodated.

THE PRESIDENT: I am very grateful. 2 o'clock it shall be, then. Thank you.

(1.11 pm)

(The short adjournment)

(2.03 pm)

THE PRESIDENT: Mr Brealey.

Closing Submissions by MR BREALEY

MR BREALEY: Now for something completely different.

Hopefully there will be handed up to you, sir -- I think it is best -- unusually, I will go through it. It is a reply {IR-L/14}. Can I just tell you what is in it.

THE PRESIDENT: Yes.

MR BREALEY: So you see from paragraph 1 we want to close on three issues: there is the confusion about the agreement, there is Project Guardian and how the CMA responded to that, and then the real-world facts on market definition and potential competition.

So just to flag the documents. So on page 2 we have the written single branding agreement. We will look at no sham or dishonesty. Shifting case I will go through very quickly. On the top of page 6 is important, because that is the genuine contemporaneous statements, we say, and Mr O'Donoghue will go through some of these in more detail, so we are trying to dovetail. But I do set out in this document the emails we say contain the genuine statements.

Then on page 12 we deal with the CMA's -- what I have described as the tortuous interpretation of the

Second Written Agreement, and there are two interpretations that we say do not make any sense. So that starts at page 13 and 15.

We then, at 17, conclude on clause 2.2, which is the Second Written Agreement.

Then on page 19 I want to come back to Project Guardian, because we do say that is the antithesis of the alleged promise, and deal with Ms Demetriou's what she called "cheeky request" that the Tribunal read the Decision, and I will look at the paragraphs in the Decision. That relates, paragraph 49, to what the CMA call the "nuances" -- this is page 21, paragraph 49 -- surrounding Project Guardian, which was Auden's attempt to stifle Advanz's market entry.

Then on page 25, I will deal with the third issue, which is essentially the test for potential competition, and looking at this -- an object infringement in the light of the real-world conditions as we find them.

So there are three issues I need to respond to. I have put it in writing because essentially I have only got 20 minutes per issue. It is quite a lot to get through.

So, without further ado, can I start on paragraph 2. I know that you know this, sir: clause 2.2 of the Second Written Agreement provides for a term of two years, and

it is important just to remind ourselves of this because of the CMA's submissions on interpretation. So in clause 2.2, term of two years. Auden would supply AMCo with its 10mg hydrocortisone; AMCo would not sell a competing product, including its own; and then AMCo could on three months' notice enter the market with its own product. Those terms are standard in most single branding exclusive purchase agreements, and we set out there where you can find them.

Paragraph 3. Advanz has submitted throughout that the CMA has been unclear how the CMA squares the alleged unlawful agreement with the lawful written agreements. There has been a lack of clarity in two main respects:

First, on the CMA's case, the Second Written Agreement appeared not properly to recall the bargain between Auden and Advanz, with the consequence that the side agreement would have misled the external lawyers, and many within Advanz.

Second, the CMA failed to articulate the substantive difference between the obligations in the alleged unlawful agreement and those in the lawful single branding agreements.

So in short -- paragraph 4 -- there has been a considerable confusion, we say, (a) about the unlawful written agreement and how it was communicated between

the parties, so how it was communicated; and (b) about the substantive obligations in the unlawful agreement. We say that the CMA's Closing really perpetuates the confusion, and so we respond to the two main issues that arose on the CMA's closing on the issue of agreement: first, the CMA's acceptance that there was no dishonesty in negotiating the terms of the two written agreements; and, second, we say, the CMA's tortuous interpretation of the written terms, especially clause 2.2.

So moving to paragraph 5, I do not need to go through that. I have set out all the passages where Ms Demetriou disavowed any dishonesty, disavowed the notion the two written agreements were a sham; they were not fictitious, nor dishonestly put together. So I know that the Tribunal has that evidence, but we have set it all out so it is there for the record.

So paragraph 6. The CMA's case, as it was put in Closing, is, we say, consistent with the evidence given by Mr Sully at paragraph 97 of his witness statement, when he says:

"... there was no such unwritten agreement. I did not mislead the external solicitors or deal with them on a false premise and I did not make false representations to my colleagues, the Board or our owners."

The consistency between his evidence and the CMA's

Closing arises because of the acceptance there was no hidden term or dishonest side agreement.

Now, there are two consequences that flow from the CMA's acceptance -- this is paragraph 7 -- that the Second Written Agreement was neither a sham nor dishonestly put together. First, there is undoubtedly some sort of shift in the CMA's case. But, second -- and this is the important point and I just want to deal with this -- the acceptance means that the statements made by Advanz's employees at the time were genuine, they were bona fide, and the CMA must accept at face value the statements made in the contemporaneous documents.

We have set out at paragraphs 8, 9 and 10 why we say there has been a shift in the case. Obviously the CMA alleged -- yes.

THE PRESIDENT: Just on this, in a sense, how much does it matter that the CMA has shifted its case, in that what we are looking at is not really what the CMA says now, but how it defends the Decision that it has taken? My thinking is that whatever the CMA says now really needs to be tied back to the evidence and workings of the Decision, because that is the matter that is under challenge.

So, in the normal course a shift to move to a more

aggressive position will not, be allowed because the regulator must defend their Decision. But, equally, is the converse true: that if there has been a concession that is adopting, as it were, a less aggressive posture than in the Decision, does that constrain the approach we take to looking at what is, at the end of the day, the justification of the outcome of the Decision?

MR BREALEY: Well, clearly the Decision is what you appeal against, and that is why we said these were not sham agreements. They now say, "Well, when we said sham, we do not really mean it". Okay, so I say, and as we say in the relevant paragraph here, well, that adds to the confusion. It could well be that it is so confused that, on that basis, the appeal is allowed, because they are departing from the allegation of sham that they squarely put in the Decision. What I am trying to do in the next section is deal with what the CMA say was always there, but I am not sure it was, but they say it was always there, which is this notion of a tacit agreement.

THE PRESIDENT: Mr Brealey, let me be clear: you absolutely do need to deal with the various permutations. That is clear. It is more what the Tribunal is looking at when it goes back to consider your grounds of appeal and reviews those in the light of what is said in the

Decision and what is said by the CMA about the Decision.

What I am putting to you is that our focus, I think, is going to be much more on the Decision than what the CMA says about the Decision they have taken after the event.

MR BREALEY: They said it was a sham. We then in our Notice of Appeal said: well, if it was a sham, that meant a lot of people were making dishonest statements, the communications with the external lawyers were a sham, and that is not right, they were genuine. To which the CMA, to a certain extent in the defence, at least, say, "Well, when we said sham, we did not mean any fabrication".

So it is a bit of a chameleon-type concept. I mean, we get Ms Demetriou saying "premise" and "tacit agreement", but there is no "side agreement". Well, where does that take us? That is why I am focusing in on how she tried to fit in the tacit agreement to the terms of clause 2.2, which we say just does not make sense.

THE PRESIDENT: Yes.

MR BREALEY: But clearly the bottom line is, we say, if you look at the Decision, they had the case, we have dealt with it, and because it is so confused that should be a ground for allowing the appeal, and that is

essentially what we say in paragraphs 8, 9 and 10: that if you are imposing a quasi-criminal penalty for adopting an unlawful agreement, and you say that the written agreement is a sham, but then you say it is not a sham -- in the defence essentially they say it is a side agreement, but then in Closing they say it is not a side agreement. They say it is a tacit agreement, a premise, but what is the difference between that and a side agreement? Really, we struggle, still, to understand what their case is. If one is struggling to understand what their case is on this notion of agreement, they are certainly not meeting a threshold of strong and compelling evidence that the company entered into an unlawful agreement that merits a quasi-criminal fine.

So it is -- and I think Mr O'Donoghue is going to take the Tribunal to some of these documents -- I would urge the -- and I know the Tribunal will look at it, but in the next section, page 6 onwards, we look at the genuine contemporaneous statements that were made leading up to the Second Written Agreement, because -- this is paragraph 11 -- it is important because the contemporaneous evidence shows the relevant mindset at the relevant time, and it means that the rationale for this Second Written Agreement given by Advanz, and

recorded by the external solicitors, is genuine.

So can I just quickly kick off, because I have only got 20 minutes before Mr O'Donoghue.

So we deal first with the email of 28 February. This is paragraph 13. I look at the text. If we can just go to almost the end:

"We have moved forwards on getting our own registered source of hydrocortisone and should be ready to launch in the next few months. However, our product will not have the key 'adrenal insufficiency' indication that is protected by the Orphan Drug status of Auden's product, and so Auden has begun to write to *Pharma*cies to warn them that our product is inferior and should not be used for this indication."

Then he says, "In the circumstances ..."

Paragraph 14. "Following the call, Pinsent Masons gave an initial view that because of the orphan drug status 'AMCo and Auden would not be considered as competitors in relation to this specific indication for the 10mg of hydrocortisone."

Now, what I have tried to do with every email, I have tried to set out what we say the Tribunal can draw from them. So we say the following facts and matters can be drawn from the genuine and bona fide statements contained in this email between Advanz and

its external competition lawyers.

So it shows that Advanz was getting ready to launch -- that is the first bullet -- and that Auden knew that Advanz was preparing to launch.

It shows -- second bullet -- the rationale for the second 10mg supply agreement, namely the lack of the adult indication. That was the key indication.

It shows -- and this is a theme that I impress -- a desire by Advanz to be competition law compliant, because one of the issues to be discussed is whether the supply agreement would be a horizontal agreement or a vertical one, and based on perceived restricted access to the market, the advice -- the preliminary advice, I accept -- is that Auden and Advanz would not be competitors.

Going over the page, it shows that Advanz believed that it was not a competitor.

This is quite an important one, because it is relevant to Project Guardian: it shows that Advanz was not the party seeking a new supply agreement. Indeed, Advanz had terminated the previous supply agreement, and a fresh offer of supply had originated from Auden.

So they are the facts and matters we get from that email.

Then there is an email of 30 May:

"... the offer is that Auden will sell us the product at £1 ... There would be no ability of Auden to influence our price."

So what do we draw from that email? First, the cost of goods was visibly openly discussed with the internal solicitors. Second, competition law was again discussed in addition to the previous issue of potential competitors. So they are looking at potential competitors and they are looking at resale price maintenance. We say it is implausible that Advanz would be withholding from the solicitors an infringement of competition law, a market sharing agreement, when the purpose of the discussion is to ensure: there is no infringement, are we potential competitors, there is no resale price maintenance. One is looking at the likelihood -- if these are genuine statements, which the CMA says they are, is it likely that Advanz is seeking competition law advice on resale price maintenance, potential competitors, but somehow secretly agreeing an unlawful market sharing agreement?

The email of 6 June. The email starts with Pinsent Masons -- we have been through this, but this is a very, very important document.

Paragraph 19. "The solicitor at Pinsent Masons recorded the terms that were agreed on the call." So

the solicitor was on the call between Advanz and Auden.

"The following terms were agreed [that is agreed between Advanz and Auden] in principle:

"• 2 year duration.

"• AMCo would source 10mg hydrocortisone exclusively from Auden for this period ... AMCo could not be stopped from developing its own 10mg hydrocortisone ..."

Going on, at the bottom:

"Of key concern for AMCo was Auden's ability to prevent AMCo from launching its own 10mg ... and ensuring continuity of supply ..."

Then the exchange essentially says that she is on the phone, and if one goes over the page, five lines down, her presence on the call was a safeguard. So Advanz was asking the external solicitors to be on the call with Auden as a safeguard to ensure compliance with competition law.

So what do we get from that? First, the intention of Mr Sully and Mr Beighton was to be competition law compliant; second, the primary reason for AMCo entering into the agreement was the orphan designation; and, third, the bona fide negotiations that took place with Auden in the presence of the competition law specialist would result in an agreement that there could be no restriction on AMCo launching its own product.

The email of 18 June is important. Again, it arises because of certain issues that were outstanding in light of the discussions with external lawyers. £1.78 cost of goods was discussed.

I will read this quote. This is about the non-compete clause:

"They are trying to be very cute around the non-compete and, I suspect, trying to tie up our ability to compete to acquire other competing products or to give 3 months' notice and sell our own Aesica version ... I really don't like this, nor trust them. So I am going to propose that instead of their overly-complicated (and therefore risky to us) wording, we go with a simple clear English summary of what the non-compete should say ..."

Now, the following facts can be drawn from this genuine exchange between the two men who gave evidence that there was no unlawful market sharing agreement: first, the level of Auden's cost of goods to AMCo was visible to the external lawyers; second, the exchange between Mr Sully and Mr Beighton on the non-compete restriction affirms an express right by AMCo to enter, and that right should not be unduly restrictive. Mr Sully did not like the perceived attempt by Auden to restrict AMCo's right to enter. He regarded it as

risky, that is to say not to AMCo's benefit. The mindset, we say, is not one of an unlawful market sharing agreement.

Third, Mr Sully informed Mr Beighton -- and this is not for the first time, because of other documents -- that he does not trust Auden. We say that is hardly a basis for a tacit promise. The purpose of the exchange is that everything should be recorded in writing -- so the wording in writing -- and that would be the complete bargain between Advanz and Auden. So all of this is leading up to the submission that what is being negotiated is leading to the complete bargain in the Second Written Agreement.

Lastly -- and Mr O'Donoghue, as I say, will go through some of this -- the minutes of the meeting of 31 July 2014. This is to the board. This is Mr Sully to the board:

"Mr Sully advised that it was extremely irritating that, due to the Orphan Drug status of the product ... the product ... developed by the Company did not ... include the key ... indication on its licence ... As a result, it was inferior ... so a supply agreement had been made by Amdipharm ... in order to stay in the market while it considered its options. Mr Sully explained that given the sensitive nature of such an

agreement external legal advice from Pinsent Masons had been obtained in relation to the supply agreement. Further, a Chinese wall was in place to ensure that the Commercial departments of each company were not in contact in relation to the supply agreement."

So what do we get from that?

First, Mr Sully considered it was extremely irritating that the lack of the adult indication had led to Advanz not supplying it. This shows that Advanz wanted to enter the market with its own product. The supply agreement with Auden was therefore made with some reluctance. That is what we get from the genuine statement it is "extremely irritating".

Second, the lack of the adult indication is again given as the rationale for entering the supply agreement in order to stay in the market.

Third, the statement that Chinese walls had been implemented once again highlights the culture of compliance.

So we say that is very important context. They are genuine statements, made internally, and with the external solicitors.

Now, how does the CMA try and get round this? The concession in Closing -- this is paragraph 26 -- that there was no dishonest side agreement and that the

Second Written Agreement was not a sham intended to disguise an unlawful side agreement forces the CMA, we say, to distort the plain meaning of the Second Written Agreement, and in particular clause 2.2. In effect, as the CMA has disavowed there being a side agreement, the CMA tries to fit the unlawful market sharing agreement into the lawful single branding agreement, and we will see how they try and do this in a minute.

The CMA seems to base the market sharing on a premise or on some tacit agreement, but, again, I fail to see how that is different from a side agreement. But in any event, it squarely raises the issue as to the difference between the two-year non-compete restriction in clause 2.2, and the alleged tacit understanding that Advanz would not enter the market.

Paragraph 28, "the CMA responds with a tortuous and erroneous interpretation of the Second Written Agreement in order to fit its tacit understanding, or 'premise', into the illegal agreement."

The CMA in Closing stated two things: first, it submitted that clause 2.2 does not contain a two-year non-compete restriction at all, and therefore the promise not to enter does add something; secondly, it submitted the reservation of the right to enter insisted upon by Advanz is not the same as a promise not to

enter. All very convoluted but wrong.

In the next paragraphs we show why they are wrong. At paragraph 30, we put it in in bold, this is Ms Demetriou submitting what clause 2.2 says. She says:

"... I am quoting now, 'a two year non-compete clause'. So they say the clause is a two year non-compete clause and their argument on that basis is that the CMA has not found the terms of the agreement to be unlawful and so they say, well, if a two year non-compete agreement is not unlawful, how can the common understanding be unlawful and in fact what does the common understanding add to the two year non-compete clause?"

So that was the argument that we always put.

She says:

"So the first point we make is that this is not a two-year non-compete clause at all. There is nothing here which says AMCo cannot compete on the market for two years. It is a requirement to give notice if it does bring its own product on to the market."

We have given three reasons why that makes no sense whatsoever, and I will take these briefly, because I am sure Mr O'Donoghue is going to deal with this as well. But the first reason is the submission is completely at odds with the plain reading of the clause; second, at

paragraph 34, it is all the more remarkable because it is completely at odds with how competition authorities scrutinise single-branding agreements, and they have done so for decades; and paragraph 36, third, and this is -- the [CMA] accepts that both the lawful single branding agreement and the unlawful market sharing agreement contain the same right to develop a competing product and to enter the market by giving three months' notice.

Sir, I am taking this very quickly but those are the three reasons why we say this makes no sense whatsoever.

We then, at 37, turn to the CMA's second submission: the alleged consistency between the non-compete in the lawful agreement and the non-compete in the unlawful agreement. So, again, at 37, we set out what they say.

If I go to page 16, we just have to go to the last paragraph of the quote, where Ms Demetriou submitted:

"If AMCo did enter the market, the understanding was that supply would cease. But, again, there is a difference between clause 2.2, what it says on its face ... because clause 2.2 does not say that AMCo will forego independent entry. It allows for the possibility of independent market entry, but it is neutral on whether or not it will happen."

So the difference between promising not to enter and

reserving the right to enter. That is what she submitted.

We say, with respect, that makes no sense either for two reasons. The first reason is at 39. Again, the submission is wholly at odds with the CMA's acceptance that clause 2.2 was not a sham for a dishonest side agreement. The whole purpose of the carve-out in clause 2.2 concerning the ability to enter was to allow AMCo to exercise that right if it so wished. To accept that AMCo insisted genuinely on the right to enter, and then maintain that Mr Beighton tacitly agreed or there was a premise that AMCo would not exercise its right, means that Mr Beighton was being economical with the truth, a fact that is disavowed by the CMA as regards the statements leading up to the second agreement. We say Pinsent Masons would have reviewed this interpretation with some incredulity as it assisted in drafting the clause with the express aim that Auden could not stop Advanz from entering. Furthermore, the Advanz board of directors and other senior personnel would expect AMCo to consider exercising the right if appropriate. But under this unlawful promise, Mr Beighton would not exercise that right. So we say it makes no sense.

Secondly, the CMA's submission conveniently

overlooked the non-compete obligation in clause 2.2, and fails to deal with Advanz's fundamental submission, which is that clause 2.2 does impose a two-year non-compete obligation if there is a supply of hydrocortisone.

So, given the time, we conclude on 2.2 with the bright line point, we say, that everything is pointing to the bargain that was reached, and that is reflected in the Second Written Agreement which the CMA say is lawful.

43 and 44, if the Tribunal accepts that the Second Written Agreement is the bargain that was reached, on this basis the CMA's subsequent submissions about Mr Beighton's bluff and reducing uncertainty take the CMA no further. This is because the bluff by Mr Beighton is equally consistent with him attempting to get the best possible terms in the Second Written Agreement, which the CMA accepts is lawful. Similarly, whether or not the Second Written Agreement reduced uncertainty is of no avail because the Second Written Agreement would lawfully reduce any uncertainty.

Just before I move on to Project Guardian, footnote 37, on the issue of bluff, it should be noted that the offer to supply initiated from Auden. The bluff was not about the supply, as such, but about the

terms of supply.

If I can just give the Tribunal -- I have not put this in the -- but if I can just give the Tribunal the note. So it was about the terms of supply. So {Day16/103:14}, there the bluff was: we want a June delivery date. {Day16/116:21}, the bluff was about additional volume. But what I am submitting there is that the CMA really did overstate the case when it came to the bluff.

Moving on to Project Guardian, paragraph 45, we started our Closing submissions with an examination of Project Guardian. We submitted that Auden's Project Guardian constituted the antithesis of a promise by Advanz to Auden that it would not enter with its own product. The evidence shows, quite clearly, that Advanz was intending to enter with its own product. Auden knew this, and Auden went to great lengths to stifle entry. None of this is consistent with a common understanding that Advanz would not enter with its own product. Project Guardian is a further example of a lack of evidence to support the alleged market agreement.

At 46 we deal with how Ms Demetriou dealt with Project Guardian. She made, with greatest respect to her, an unfounded allegation that we had not grappled at all with Project Guardian. It is unfounded because we

did grapple with it and, really, it is the CMA who failed to grapple with it -- this is paragraph 46 -- because it made the "cheeky request" that the Tribunal read the relevant passage in the Decision.

The bright line point is, the last sentence of 46:

"The CMA hides behind a statement that there are 'nuances' to Project Guardian. But the alleged nuances are not grounded in the evidence and do not in fact exist."

Paragraph 47 is not new. All we are doing there is reminding the Tribunal of the evidence on Project Guardian that we refer to in Closing. These are all the consultants, and sending out the template letters to all the *Pharma*cies, et cetera, et cetera, because of the threat of the new arrival.

That takes me to paragraph 48. The CMA's case against Advanz is that it promised Auden that it would not enter with its own product. That is the allegation. Advanz never made such a promise. It inherited a loose supply agreement and it said it had a right to enter with its own product. It had a right to enter with its own product. The supply agreement with Auden did not prevent Advanz from developing its own product and entering the market with it.

The exam question is whether the Project Guardian

evidence supports the CMA's case or Advanz's case, and we say that, on any rational interpretation of the evidence, the evidence supports our case. The Project Guardian evidence proves that Advanz was exercising the right it said it had.

Now, the CMA -- paragraph 49 -- in Closing skirted over the Project Guardian evidence by referring to seven paragraphs of the Decision that are said to respond to the evidence. I have mentioned those. I do not have time to go through them, but they are 6.822 to 6.828.

I will just deal with paragraph 50. At 6.824 the CMA says that the supply relationship -- this is why they say -- this is the nuance of why Project Guardian does not assist us at all. They say the supply relationship was deteriorating in late 2013/early 2014, but Auden wanted Advanz to buy its 10mg business, and that Auden was threatening to take action to protect its product by persuading *Pharma*cies not to dispense the Advanz product. So this is the alleged nuance.

We respond to this as follows:

First, the deterioration in relations is equally consistent with Auden realising that AMCo would be launching its own product, hence the threat that Advanz's product would not be dispensed.

Second, it is unclear why a deterioration in

relations supports the CMA's case in any event. The fact that Auden wanted Advanz to buy the 10mg hydrocortisone business does not support a promise not to enter. Indeed, it tends to disprove it, because if Auden had the security of a promise, it would not need Advanz to buy the business.

Third -- and I ask the Tribunal to note the third bullet point -- as Advanz showed in Closing, it was Advanz that terminated the first written agreement because Advanz did not like Auden and it thought it had its own product almost ready to launch.

We have set out the evidence there. So there is an email dated 1 January:

"This supply deal is not going to happen (in my opinion) and I'm not sure we want it to happen from what I hear from Rob."

Rob Sully's email dated 14 January to Jane Hill. He says:

"I have been discussing with Guy and I share his thoughts that we should quietly back out of all this mess. We had hoped to be able to secure continued supply of hydrocortisone until our product hits the market, but I don't like the way that things are progressing and I don't much like what I hear about Amit."

So it is worth repeating. He says:

"We had hoped to be able to secure continued supply of hydrocortisone until our product hits the market, but I don't like the way that things are progressing and I don't much like what I hear about Amit."

That is hardly a basis for a continued promise not to enter the market.

Then the last, 24 January:

"Brian tells me that he has agreed with Auden that we will document the agreement to date, and will bring it to a close. This means that we achieve the clarity that Pinsent's have advised, plus we end the arrangement as we get ready to launch our own hydrocortisone from Aesica."

This paragraph is not a nuance at all, and nor are the other paragraphs for the reasons we say in paragraphs 51 and 52.

Paragraph 53 essentially concerns the point about conduct. If you are trying to have a tacit agreement or you are inferring agreement, as the CMA say, subsequent conduct is actually quite relevant.

At paragraph 54, we actually set out the conduct -- 54 to 58 -- which we say is inconsistent with the CMA's allegation.

Paragraph 59 -- I will finish with this on

Project Guardian. It is important, there is not one slip by anyone in the many thousands of emails and documents obtained by the CMA and placed on the case file that expressly reference the alleged market sharing agreement. There is not one mention of any continuous promise not to enter. This is so notwithstanding there would be plenty of opportunity if such a promise had been made. There could be something on the file highlighting a complaint by Auden that Advanz was preparing to enter in breach of the promise -- why Project Guardian if there was a continuous promise not to enter and for which Advanz was being paid? -- there could be communication with Advanz highlighting the inconsistency of its intended launch with the promise to Auden not to enter. There is none. By contrast, the evidence as to the parties' conduct points convincingly to no such unlawful promise being made.

So that is Project Guardian and conduct inconsistent with the promise.

I now turn to, "Potential competitors; market definition; object", because this is something that I, with the greatest respect, thought was also quite confusing in the CMA's Closing submissions.

So paragraph 61. Throughout its closing, the CMA repeated that Auden and Advanz were competitors, and

that Advanz had not appealed the CMA's finding to this effect. That is not accurate. The CMA accurately described the position once in Closing when dealing with the Pinsent Masons advice to Advanz on the question of the Second Written Agreement. The CMA stated:

"Just relating to the Pinsent's advice, it is neither here nor there. So Pinsent's got the wrong end of the stick on potential competition. That was the advice they gave. But the question is an objective one for the Tribunal. In fact, the Tribunal does not even need to be troubled by it, because, as I say, it is not a question that is appealed in these proceedings, so it is accepted ..."

Here are the important words:

"... subject to the point about market definition."

Paragraph 62. So "it is important to bear in mind the test for showing a potential competitor. An actual competitor means an undertaking that is active on the same relevant market. A potential competitor means an undertaking that would, on realistic grounds, and not just as a matter of theoretical possibility, be likely within a short period of time to make the necessary investment to enter the relevant market."

63. "There are, therefore, two separate considerations: first, the capacity to enter with

a product -- as the case law says: are there real, concrete possibilities? -- and, second, entry into the relevant market. They are not the same, and the relevant product and geographic market is defined in the normal way by applying the concepts of demand substitution, et cetera." We say in closing, with the greatest respect, they did not properly explain this.

Now, as to the first condition, it is true, Advanz did not challenge that it had the capacity to enter the market within the meaning of the *Lundbeck* judgment. We know there were problems, but it is a key part of Advanz's case that it made the requisite investments and sought actively to develop the product with Aesica. So there were real concrete possibilities within the meaning of *Lundbeck*. However, as to the second condition, Advanz has challenged that its product, licensed for limited use in children, is not in the same product market as Auden's product for adults.

The relevant market therefore matters because it determines whether realistically Auden and Advanz are to be regarded as potential competitors, and I emphasise this: what does "potential competitor" mean? Competing between themselves. I will return to this in a minute, but it is important that this is described as a horizontal agreement, potential competitors. What

does that mean? Competing amongst themselves.

So I turn to the market definition.

As Advanz described in Closing, there are two overarching facts that prove that the adult's version and the child's version are in two different markets. The first fact is there are clearly two distinct groups of purchasers. The second fact is there are clearly two distinct groups of suppliers. In short, the market became bifurcated not only in terms of customers, but also in terms of suppliers. On any view, these facts are cogent evidence of two separate markets. In fact, it is pretty difficult to find a case that could not say these are two separate markets.

So turning first to the purchasers.

The first fact relates to the bifurcation of the purchasers. The CMA acknowledged in the Decision that in early 2014, Project Guardian:

"... made the question of the extent of the contestable market, already the subject of considerable discussion with AMCo, acute."

There was also a general perception in May 2014 by suppliers that market entry would be very difficult, if not impossible. As Waymade stated internally, it says:

"Our understanding is that it would be very difficult if not impossible for another generic to enter

the market due to the protection afforded by Orphan status. Interestingly, John Beighton confirmed that this was his understanding too."

So that is their view of what -- they have discussed this with John Beighton, that is a contemporaneous statement, and that contemporaneous statement is consistent with the evidence given by Jane Hill to the CMA by Mr Beighton and Mr Sully in these proceedings.

Paragraph 68. The lack of a contestable market is all consistent, as we know, with the CMA's own description of the market:

"The orphan designation therefore rendered a significance portion ... de facto incontestable for skinny label tablet suppliers ... with an assured customer base."

Paragraph 69, we have just set out some of the statements made by Mr Holmes which support the assured customer base.

Paragraph 70 I do not think we have mentioned before to a great extent. The extent to which the market was de facto incontestable was described by the CMA in its Decision: 60% by value. Now, the point is that when examining a supply agreement in the context of the relevant market, it is standard practice to calculate the market share by reference to value and not volume.

We see there at footnote 65 the Commission Guidelines on Vertical Restraints, and this is nothing new to the CMA. The CMA in Closing also emphasised the proposition that value-based market shares are a better metric than volume data, and that is footnote 66 - Mr Holmes' submission.

So value-based data is better than volume data. That is how competition authorities calculate market power, market shares, define the market.

In his report, Mr Holt calculated Auden's actual market share by value, which exceeded 60%. He calculated -- and this is quite important -- the contestable part of the wider hydrocortisone market, 28% in 2016; 23% in 2017; and 18% in 2018. So the CMA's expert Professor Valletti in cross-examination did not dispute these figures, that in 2018 Advanz would have access to 18% of the market.

Now, that is clear evidence of a lack of demand side substitution, and, as Mr Holmes said in Closing:

"Demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of a particular product, in particular, in relation to their pricing decision."

We say, in paragraph 72 -- and this is the bright line point -- the extent of the de facto

incontestability is relevant to market definition, and also to whether Auden and Advanz are regarded as potential competitors, because we say it is hopeless for the CMA to say that Advanz was a potential competitor of Auden in respect of the 70% plus share by value that was de facto incontestable. You cannot say that it is de facto incontestable and then say that Advanz is a potential competitor for that 70% of the market.

So I turn, now, to the second fact, which relates to the portion that is said by the CMA to be contestable. That is the 18-28%.

Now, the second fact is there are clearly two distinct groups of suppliers. The first group comprises suppliers of the child's version that focused almost entirely on the price-sensitive group of independent *Pharma*cies, and which competed amongst themselves for a small, contestable portion. That is accepted by the CMA and its expert, Professor Valletti, in paragraph 67 of his report.

The second group comprises Auden, the supplier of the adult and children's product that focused almost entirely on the non-price sensitive group, and was able to charge them a substantial premium. Again, this is the CMA's own case, and it is the evidence of its expert, Professor Valletti, at paragraph 74 of its

report. In other words, the CMA has come to the Tribunal saying that Auden effectively withdrew from the portion of the market represented by the small, independent *Pharma*cies. That is why we say there is a bifurcation in terms of purchasers and suppliers. Again, we say it is hopeless for the CMA to say that Advanz was a potential competitor to Auden, even for the price-sensitive independents, because Auden withdrew from competing with the suppliers.

Now, paragraph 76. So what are the CMA's reasons in Closing on market definition for potential competition? So in Closing the CMA stated:

"There is undeniably an indirect constraint at work. Everyone agrees that the drug tariff did have an impact on the prices and volumes of full label tablets ... There is likely also [and I emphasise that word] some direct constraint at work."

"Some direct constraint at work". Advanz submits that the CMA places too much emphasis on the direct constraint, and the indirect restraint is not a market definition tool in any event, but one ought to test whether they are potential competitors.

Dealing with the first direct constraint. As to the impact of the direct constraint, the economists were obviously divided, but in Closing the CMA merely

referred to "some" constraint. Importantly, however, the direct constraint, if it existed, only operated in substance for one year after entry. Now, this one year was not really mentioned in Closing. After the first year, the bifurcation into two groups of customers and suppliers arose and remained broadly static. There was little, if any, demand substitution from then on, because, as the CMA accepts, Auden retained its assured customer base, and I have put the quotes in footnote 71. The submission is:

"Actavis had observed a significant initial decline in its market share as the independent *Pharma*cies largely switched to buying skinny label products. But it had then seen its market share stabilise as the large *Pharma*cies kept their custom with it, despite the relative price differential between full and skinny label, increasing over that period."

So there was little, if any, demand side substitution from then on because, as the CMA accepts, Auden retained its assured customer base, and Auden withdrew from the price-sensitive portion.

So this unknown direct constraint -- unknown because it is unclear whether it had any impact -- was -- and this is the bright line point -- short-lived. The market should not be defined by reference to a direct

constraint that really only lasted one year. What happens after this first year is more informative for the purpose of market definition, and it provides better information as to whether Auden and Advanz were potential competitors on the relevant market.

Paragraph 79. This approach, not taking a snapshot of the market, is consistent with the CMA's submissions in *Flynn & Pfizer*, which were accepted by the Tribunal. The Tribunal said:

"We do not think it sensible ... to have a different definition of the relevant market for such short period different parts of the relevant period ... Some degree of substitutability ... is not sufficient in itself to regard the products as forming part of the relevant market."

In summary, taking the evidence of demand side substitution in the round, and even accepting the CMA's case that there was some direct constraint, the bifurcation of the market leads to there being two separate markets.

Lastly, the degree of switching in the first year should be treated with some caution as the CMA -- that is the OFT Guidelines on Market Definition -- made clear. The guidelines made reference to what has been called the "Cellophane fallacy", which the CMA in

Closing said goes nowhere. However, it does go somewhere, because this is the practical advice given by the authority and, indeed, endorsed by the Tribunal in *Aberdeen Journals* which the CMA merely noted in passing in Closing.

But the short point is that when prices fall from such a high level, switching patterns may not be such a reliable guide to substitution in a more competitive market. So the relevance is that it places in context the direct constraint that effectively lasted one year. There was a sudden rush and then the market stabilised and bifurcated. So, in other words, it provides a further reason why the direct constraint should not be given undue weight.

I turn, then, lastly, to the indirect regulatory constraint.

So the existence of Professor Valletti's indirect regulatory constraint, we say, does not trump the overwhelming evidence that the market was bifurcated. This is for two reasons:

First, the indirect constraint simply reduced the drug tariff price for the adult's version and the child's version. It did not affect competition between Advanz and Auden as they both served different portions of the market. In other words, the drug tariff did not

alter the competitive dynamics between Auden and Advanz; they were selling their product to different customers. The indirect restraint does not show that Auden and Advanz were competitors, that is to say competing between themselves.

Secondly, as we submitted in Closing, the indirect constraint is not really a constraint for the purposes of market definition. The CMA confuses, with the greatest respect, market definition and market power. I made that submission before and it is at paragraph 83.

In paragraph 84, the CMA in Closing submitted, as regards the 10mg and the 20mg, that little substitution on the demand side -- this is the submission made as regards 10mg and 20mg -- would ordinarily weigh strongly against defining them as falling within the same market. In other words, demand side substitution is the most probative tool for defining a market and ascertaining whether two companies are potential competitors. If the CMA's logic is applied to the child's version and the adult's version, the conclusion would be that there are two markets and, in any event, Auden and Advanz are not potential competitors.

Now, in five, six, seven minutes, I will just deal with no object, because similar considerations apply.

So paragraph 85. Even if the market is not divided

between the adult's and child's version of 10mg hydrocortisone tablets because, for example, Professor Valletti's approach to indirect regulatory constraint is accepted, the real-world facts do not change. In Advanz's submission, the real-world conditions of the market do not support an object infringement which is not analogous to the pay for delay cases upon which the CMA places so much reliance.

In the present case, in the light of the real-world facts, it cannot be assumed -- this is paragraph 86 -- with the requisite degree of certainty that the alleged promise not to enter independently until the market conditions are right -- whatever that may mean -- by its very nature distorts competition. Remember, this is particularly so because the CMA accepts that an exclusive purchasing obligation, coupled with an obligation not to compete, did not have as its object the distortion of competition.

So paragraph 87. We have summarised the law on object infringement, and it is noteworthy that the CMA did not really properly respond to this. It is well established that the concept of restriction by object must be interpreted restrictively; that it is limited to restrictions that by their very nature distort competition; and, importantly, it is necessary to

consider the nature of the goods as well as the real conditions and structure of the market in question. Now, this is well established case law. See *Generics* and Lady Justice Rose, as she was then, in *Ping*.

So bright line point: you have to look at the real conditions and structure of the market to determine whether the agreement by its very nature constitutes harm to the market.

Now, we say -- paragraph 88 -- in Closing, the CMA effectively brushed aside the real-world conditions that form the context to determine whether the alleged promise by its very nature was sufficiently harmful to competition.

Now, to recap, the real-world conditions were as follows:

First, over 70% of the market was de facto uncontestable by value, and Advanz could not compete against Auden for this assured customer base.

Second, Auden, as the supplier of the adult's and child's 10mg hydrocortisone product, preserved its assured customer base and effectively withdrew from the contestable portion, Professor Valletti's evidence. So the supply agreement did not distort competition between Auden and Advanz on this portion.

Moreover, thirdly, for the 18-28% of the contestable

portion, Advanz could not legally market its child's product for use in adults. There was, therefore, a legal impediment to persuading price-sensitive *Pharma*cies to purchase the child's version.

Fourth, there are many in the *Pharma*ceutical industry who have ethical issues with dispensing off-label, including Mr Beighton.

Now, how did the CMA deal with these basic facts?

As to the first point, the CMA in Closing, we say, brushed aside the fact that over two-thirds of the market could not be accessed. It could not see any "conundrum", simply observing that Advanz did not need to have access to the full market in order to have a competitive impact. However, the extent to which the relevant market is contestable is clearly relevant to an object infringement as a matter of law, and the CMA, when one looks at the submissions, appears rightly to concede that Advanz could not have as its object the distortion of competition on the portion of the market on which it could not compete.

So, again, we submit that the CMA cannot so easily brush aside this fact in an object case. The agreement does not by its very nature cause harm to that part of the market, and in any event it continued to give Advanz a foothold in the wider market.

Now, paragraph 90. The CMA's focus in Closing was on that part of the market which is contestable. However, the CMA did not mention the second real-world fact that Auden withdrew from that portion to avoid a fall in prices; it did not mention the third fact, the legal restriction on marketing the child's version; and the CMA wholly downplayed the ethical aspect of the case which, on the CMA's own case, was a key reason why the major *Pharma*cies decided not to purchase the child's 10mg hydrocortisone.

If one just looks at footnote 84, we cited a submission by Mr Holmes, where he stated:

"... there were a number of *Pharma*cies, it really is an unavoidable fact, who felt they needed to buy full label tablets rather than the skinny label tablets because they did not consider that they should dispense off-label. It is simply impossible to get away from that on the factual record."

So the ethical issue is on the factual record according to the CMA.

So paragraph 91. It is important -- and this is a bright line point, sir -- to note that, in reality, the harm that is said to arise relates to the reduction in price of 10mg tablets occasioned by the drug tariff. It is not a harm that is said to occur as a result of

distortion of competition between Advanz and Auden. This is why the CMA submitted that Advanz did not need to have access to the full market.

However -- and this is the bright line point -- that alleged harm, the alleged harm occasioned by the drug tariff, we say is hardly the sort of harm that can be said by its very nature to flow from the agreement, let alone one that the CMA has experience of. That is the test for object infringements.

The CMA, in Closing, describe this as the same dynamic as we see in the pay for delay cases. We say, given the four real-world facts that I have mentioned, it is not the same dynamic at all. We are really looking at the extent to which this market was contestable.

So, in conclusion, we say the consequence is that the CMA could not classify this as an object case. In the light of the real-world facts, any condemnation of the supply agreement which reserved a right to develop and enter independently necessitated an effects-based analysis.

Those are my submissions. I think I have almost done it in an hour.

THE PRESIDENT: Mr Brealey, thank you very much.

MR O'DONOGHUE: Sir, I will comfortably finish in an hour.

I am in your hands as to whether you want me to start or whether we have a clean run with the break now.

THE PRESIDENT: Which would you prefer? You don't mind?

MR O'DONOGHUE: The only thing I was going to say, at least speaking for myself, is it is extremely hot.

THE PRESIDENT: It is extremely hot.

MR O'DONOGHUE: Could anything be done to ...

THE PRESIDENT: We will rise now and see whether we can get the air conditioning turned up.

So we will resume at 3.10, and hopefully it will be a bit cooler.

(3.04 pm)

(A short break)

(3.19 pm)

THE PRESIDENT: Mr O'Donoghue, it will get colder. I am told that we inadvertently had it on heat for a few minutes, which is why the temperature rose.

MR O'DONOGHUE: Sir, if I'm wilting, for once it is not the questions.

THE PRESIDENT: Yes. So I hope the temperature will fall, but we are doing what we can.

MR O'DONOGHUE: I am grateful, sir.

THE PRESIDENT: At least the temperature is off, rather than on.

MR O'DONOGHUE: Going down the Matterhorn.

THE PRESIDENT: Yes. Thank you.

Closing Submissions by MR O'DONOGHUE

MR O'DONOGHUE: Sir, in reply, I want to focus exclusively on ground 1, the written agreements. Psychologists and social media have identified the phenomenon of FOMO, which is fear of missing out. We are suffering from FOMO. We have a written note on the other grounds which I am not proposing to go through, and which has been uploaded on Opus.

So focusing on the agreement, I want to come back obviously to what Ms Demetriou said in her oral Closings, and I want to focus on two points in particular: first, on what the CMA said in response to the central points we have made and Mr Brealey has made, that it is never made clear how, if at all, the unwritten agreement it alleges comprises the so-called 10mg written agreement differs from the unwritten agreements. This is plainly fundamental since it is common ground that the written agreements, at least in their isolated written terms, are not restrictions by object. So the CMA's case only logically works if there is something different in an unwritten agreement. We say the CMA's attempts in Closings to fit that square peg into a round hole simply do not work. That is the first point.

The second topic I want to address is some of the CMA's points around the subject of subjective mental consensus that it must establish, and the Tribunal will recall a discussion around whether that question is objective or subjective, what needs to be shown, and in particular in relation to the untruthfulness of the witnesses, the Tribunal heard.

We say that the unavoidable implication of the CMA's case is that the witnesses before the Tribunal, if the CMA is correct, were not telling the truth, but there is no good basis for such a finding. That is why we say the CMA has fallen back on the dog whistle of untruthfulness, but we say that will not do in this case, having seen the witnesses themselves.

So starting with my first topic. Mr Brealey touched on this, but it is good to see it in the gospel.

If we can go back to my Written Closings, it is at {IR-L/3.1/5}. I just want to pick up where we were at before Christmas, which seems like not just a different lifetime at this stage, but a different avatar, just to recall where the battle lines were drawn. So these are my Written Closings, and it is at 6(1) and 6(2). So these are the fundamental objections we put forward in Closings.

So, first, under (1), the written agreements are not

object:

"... it becomes critical to understand in what respect(s) the alleged 10mg Agreement differs from these lawful agreements, and in particular what extra element(s) 'tip' the 10mg Agreement into the anticompetitive agreement by object category."

Then (2):

"... the Second Written Agreement had a two-year term and provided that AMCo was obliged to purchase all its requirements for hydrocortisone from Auden, unless and until it gave 3 months' notice that it was entering the market ... ([which we call] a rolling exclusive purchasing agreement or 'Rolling EPA')."

Now, in her Closings, Ms Demetriou said: well, she found the points we were making there quite difficult to follow, and I am afraid to say the lack of comprehension is mutual. I am going to show you what I think is the source of the confusion.

You will remember that Ms Demetriou in relation to 6(2) said that we were making two points that were, she said, diametrically opposed, or at least inconsistent with each other, and in any event both were wrong, and I am going to show you why all of that is wrong.

So just to recall the two points. The first point she drew out of 6(2) of our Closings is that we

characterise clause 2.2 of the Second Written Agreement as a two-year non-compete, and she says that is incorrect. Now, we say we are quite right to do so, and I am going to show you why that is so.

The second point she drew out of 6(2), we say that clause 6.2 preserves AMCo's right of entry, and that is inconsistent with the idea that it had, by the time or previously, agreed not to enter the market. She is also right that we do say that, but she is wrong to say that there is any inconsistency there.

Now, just to quickly look at the contract again, Mr Brealey had a paraphrased version of the clause, but it is important, I think, to look at the original text. So it is at {IR-H/528/5-6}, if we can put those up side-by-side, please, because the clause spans two pages.

I do not know, members of the Tribunal, if that is legible.

THE PRESIDENT: No, it is.

MR O'DONOGHUE: It is quite straightforward, but it is important to see the text. There are two parts. So the first sentence:

"Amdipharm shall procure all its requirements in the Territory for hydrocortisone ... from Auden on an exclusive basis and shall not, directly or

indirectly, distribute, supply or sell, in the Territory any other hydrocortisone product(s) ..."

So that is the first part. So there is, we say, plain and simple, an obligation on AMCo to purchase exclusively from Auden all of its requirements in the territory. It is, on its own express terms, an exclusive purchasing agreement. But, in addition, AMCo shall not distribute, supply or sell in the territory any other hydrocortisone products, so there is a second component to that. It is a full exclusive purchasing obligation, so they cannot sell or supply a competing hydrocortisone product other than Auden's. Now, that is, we say, plainly a non-compete: AMCo cannot sell a competing product, and that is precisely what this clause is doing.

Now, we can see from the definition of the term, about two-thirds of the way down on the same page, on page 5, that it is a two-year term from the effective date. So it is, on the face of it, as a starting point, a two-year non-compete which AMCo signed up to in the first part of clause 2.2. Now, again, no objection is taken to that, at least in terms of this clause.

If we then go over the page, there is a second part, the carve-out. It starts with "However", so one can immediately see there is a carve-out from the exclusive

purchasing obligation and the non-compete in the first part, and it is telling you that the non-compete in the first sentence is subject to the carve-out in the second part. That goes on to say, as you can see, that nothing prevents AMCo from applying for a marketing authorisation for manufacturing and supplying hydrocortisone in the territory provided, of course, it gives three months' notice.

So what you have is a carve-out from the general and overarching non-compete, which specifically preserves AMCo's ability to enter with its own product on three months' notice.

So, we say, on the face of the contract, our characterisation of these terms is absolutely bang on the money, and there is no contradiction in how we characterise the clause. It is inherent, and we say plain, in the provisions we see: it is a two-year non-compete with a right to enter with a short notice period with its own product.

Now, the Tribunal will recall that in my oral Closings before Christmas, I took you through quite carefully the contemporaneous documents that this clause in particular -- this clause actually above all -- was the subject of pretty tough negotiations, and the dynamic was Auden was, all else equal, trying to broaden

its right to restrict AMCo's ability, and AMCo was fighting hard to maximise its ability to enter independently with its own product.

The Tribunal will also recall that was not adventitious, that AMCo at that stage had a number of irons in the fire in terms of development opportunities, not just Aesica, and it was keen to understand the extent to which these opportunities could be explored, and of course it was keen to bottom out, to the extent it could, the question of the orphan designation and what practical impact that had on its ability to compete. So there were very good reasons why clause 2.2 from AMCo's perspective was the subject of hard-fought negotiations, and why they sought to maximise as much as possible their ability to enter independently. So this was a critical clause.

The Tribunal may recall there was an email from Pinsents summarising on 6 June -- we do not need to turn to it -- clause 2.2 and the maximisation of ability to enter independently was described as a "key concern". So this was very, very important.

Now, I want to show you secondly -- so that is the contractual provision. That is why it is there. That is the genesis.

Now, it is also important, we say, to note that in

the contemporaneous documents around this clause, there is extensive reference to this clause expressly as being a non-compete clause. If I can just show you a couple of documents.

The first one is {IR-H/509/2}, please. The Tribunal will see under -- so this is an email of 15 June 2014 from Mr Sully to Mr Clark and Ms Hill of AMCo, and you will see under 1:

"... are you ok with the non-compete that is set out in clause 2.2 ..."

Then he goes on to summarise what it means:

"It ... means that we cannot sell any other products during the 2-year term of this Agreement which compete with Auden's ... unless we first give ... 3 months notice (and Auden can terminate supply to us on 3 months notice if we say we are going to do so)."

So internally, contemporaneously, clause 2.2 is being described as a non-compete, and the description of its basic terms is exactly as I have outlined as we see in the text of clause 2.2 itself.

The next document is {IR-H/517/1}, please. Mr Brealey referred to this document orally, but we did not actually bring it up, and it is the second half under the second bullet, the point about, "They are trying to be very cute". So they say:

"They are trying to be very cute [again] around the non-compete ..."

Mr Sully goes on to propose his own -- what he called a simple clear English summary of what the non-compete should say.

Then at the top of the page, Mr Beighton says:

"I'm fine with it Rob."

So contemporaneously at the time of the Second Written Agreement, this is being described left, right and centre within AMCo as a non-compete, and being explained in exactly the way as which one would naturally read clause 2.2.

Now, the second point is that the CMA itself has on multiple occasions described clause 2.2 as a non-compete. We can go to the supplemental statement of objections. It is {IR-H/1206.05/203}, please, and if we scroll down to 3.555:

"The attached draft contained a non-compete provision ..."

Then if we can go on to {IR-H/1206.05/521}, at 6.408, in the second sentence, "shows that this non-compete expressed", and so on. I ask the Tribunal to note "common understanding".

Then {IR-H/1206.05/532}, 6.449, the second line, "agreeing to a non-compete clause". We do not need to

turn it up, I will give you another couple of references: 6.597 {IR-H/1206.05/567} and 6.600 {IR-H/1206.05/568}. In fact, in the supplemental statement of objections, there are literally dozens of references to this clause as a non-compete.

So as Mr Brealey indicated, Ms Demetriou's response in Closings -- and I must say it is the first time we have heard this -- was that, in fact, clause 2.2 was not a non-compete, but we do not understand, based on the clause itself, based on its plain terms, based on its contemporaneous description, and indeed based on the CMA's own characterisation in the SSO, how it can be said that this is not a non-compete provision. In many ways, the fact that Ms Demetriou is forced to make this point for the first time in Closings -- I am content to deal with it head-on, but the fact that she is forced to make the point for the first time in Closings is itself, we say, quite revealing.

So Ms Demetriou's first point is: well, this is not a non-compete at all, which Mr Brealey has dealt with. If we can then go to why she says this and what consequence she draws from this. It is on {Day16/26:10}, please. If we start at line 10, she says it does not get off the ground because it is not a non-compete provision at all. We have dealt with

that. That is plainly wrong.

Then she says, line 16:

"... [that] answers the appellants' point and also answers its question, its question being: well what does the agreement found by the CMA add to the terms of the supply agreement? In fact, there is clear water between the two, because the clear water is that although there was no contractual restriction in the agreement on independent competition from AMCo, provided it gave notice, the parties shared, and this is the CMA's finding, the parties shared an unwritten common understanding that AMCo would in fact not enter the market independently in return for the supply."

So that is the difference. That is the answer to the appellants' question. Well, in my submission, that is no answer at all, for the reasons I have showed you. If anything, we say it underlines exactly the point we have been making from the very outset of this case in our Notice of Appeal, which is there is a real confusion at the heart of the CMA's case when it comes to explaining: what does it define as the 10mg agreement, and how, if at all, does it differ from the written agreements?

It is plain as a pikestaff, we say, that there is a non-compete in the written agreements, and it is

subject to the three-month notice period we have seen. But, crucially, the CMA does not suggest that the written terms of the Second Written Agreement, or, indeed, the first, give rise to a restriction by object. Now, we say that concession that the written agreements, at least in isolation, are not restrictions by object, is a fatal concession.

Now, sir, you asked Mr Brealey: well, is it appropriate for the CMA to sidle up in Closing and say, "We are not making that case"? To what extent are they stuck with the Decision? Now, of course, in a very real sense, they are stuck with the Decision, because that is their case and what we are appealing. Now, Ms Demetriou, of course, is a skillful advocate, and a skillful advocate will make concessions on bad points that the advocate does not want to bang his or her head against the wall on. But at the very least what I am entitled to is two things: one, to say in a real sense they are stuck with the Decision; and, second -- and this is the point I want to develop now -- which is to follow through with the logical conclusions of the concessions that the CMA has made, which I am also entitled to rely upon.

Now, we say the concession which has been made in relation to the written agreements -- and if I am right

on the non-compete -- is fatal in at least four ways.

THE PRESIDENT: Mr O'Donoghue, just to explore what you just said about being able to rely on the concession -- and just to be clear, obviously you are -- the question is really: what does that mean? Normally when one has a concession made in the course of litigation, it is something which limits the case that is being put by one party or the other.

MR O'DONOGHUE: Indeed.

THE PRESIDENT: Generally speaking, what the Tribunal does is limit its decision to within the confines of that which is in dispute between the parties. So in ordinary bilateral civil litigation, the position is very clear.

MR O'DONOGHUE: Yes.

THE PRESIDENT: Do you say the position is exactly the same where there is an appeal of a Decision, or is the concession something that obviously needs to be taken into account, if only to understand what the CMA is saying their Decision actually is all about, or does it actually constrain what the decision says?

MR O'DONOGHUE: Well, sir, my starting point is, in law, the Notice of Appeal can only be directed against the Decision. At the risk of stating the obvious, I cannot appeal in a Notice of Appeal a concession which emerges for the first time in Closing.

THE PRESIDENT: Well, of course, that is absolutely right.

MR O'DONOGHUE: That is blindingly obvious. That is the starting point.

So the Decision is consequential in that it sets out the authority's position and is binding on the authority to that extent. So I am entitled to rely on that, and I do.

Now, Ms Demetriou has made a number of concessions: one is in relation to dishonesty, which I will come to; one is in relation to the sham agreement, which I will also come to; and we have this new case in Closing that it is not really a non-compete, and this point about the recital, which is certainly not mentioned in the Decision.

But what I am certainly entitled to do is to say: well, if she is making these concessions, which she is, loud and clear, I am entitled to hold the CMA's feet to the flames and say: well, if that is right, the logical consequence of that concession, when one maps it onto the evidence we have heard and the contemporaneous documents, is the following. So I say at the very least I am entitled to do that. I am certainly not making the point -- and I do not expect Mr Brealey is making the point either -- a sort of pointy-headed point of: well, they are not entitled to make a concession in any shape

or form because of the Decision.

But it is quite problematic to have these concessions on the hoof, particularly of course in circumstances where from the very outset we have been saying: look, we do not understand what the Decision is saying.

THE PRESIDENT: Well, that is absolutely right, Mr O'Donoghue, and what is more, in the course of your notices of appeal and your opening submissions, you have been saying the case in the Decision, as far as the 10mg agreement is concerned, you understand to involve certain allegations on dishonesty, which you refute.

MR O'DONOGHUE: Yes.

THE PRESIDENT: Dishonesty is a very good example of the difficulties that I think we are finding ourselves in, because we have got on the transcript a statement saying, from the CMA's own counsel: this is not a dishonesty case.

MR O'DONOGHUE: Yes.

THE PRESIDENT: Whereas certainly you regarded it as a bad dishonesty case at the beginning.

MR O'DONOGHUE: Sir, I am going to come to that.

THE PRESIDENT: Right. Okay.

MR O'DONOGHUE: I think one needs to be quite careful of the word "dishonesty". It is obviously common ground that

dishonesty is not an ingredient of the offence.

THE PRESIDENT: No, of course not.

MR O'DONOGHUE: So we can take that off the table.

THE PRESIDENT: We can.

MR O'DONOGHUE: But the point I will be making, and I will develop this very shortly, and I am going to make this in spades: if the CMA is right, including post-concession, on what it now says, it must follow that some of the witnesses from whom we heard, if the CMA's case is to be upheld, were not telling the truth.

THE PRESIDENT: Mr O'Donoghue, you are quite right in touching upon the debate that we had with Ms Demetriou some weeks ago where we had exactly this discussion. We said dishonesty can operate on two levels: first of all, were witnesses telling untruths in the witness box, one area; but, more fundamentally, were they being dishonest in terms of creating a sham agreement which was not reflected in the terms of the written agreement.

MR O'DONOGHUE: A paper trail.

THE PRESIDENT: Exactly, papering the file, and doing something different. Which is coming quite close to dishonesty.

Now, let me say, I quite accept that dishonesty is not a part of the tort or the wrong that we are looking at here, of course it is not. But nor is it

inconsistent with it, and when one starts unpacking anti-competitive infringements, well, very often dishonesty is part of the package, and that is what, quite rightly, you and Mr Brealey have been pushing back on in your Notice of Appeal. What is troubling me is that we have got a significant number of mixed messages. We have obviously got to work out what the Decision says, and quite rightly you have said it is not clear. You have said that, again, from the get-go.

But, overlaying that, we have not got the CMA saying: oh, the Decision is absolutely clear and Mr O'Donoghue is talking nonsense when he does not understand the case, and the dishonesty case is this; we have got the very opposite. We have got --

MR O'DONOGHUE: They have run away from it.

THE PRESIDENT: We have got a case -- yes, they have run away from it. We have got a situation where they are saying: oh, it is actually an anti-competitive agreement you have almost slid into unintentionally.

MR O'DONOGHUE: Well, at one stage the suggestion was it was so long ago they might not remember very well. I mean, it was desperate stuff.

Sir, to be clear, one could look at this through a number of different lenses. One could say because this is a quasi-criminal charge in which rights of

defence were engaged, that the absence of clarity and specificity as to what is the 10mg agreement is a fundamental defect in the charge sheet, and we can stop there.

THE PRESIDENT: Yes.

MR O'DONOGHUE: One could look at the evidence and say: well, looking at the evidence in the round it is, we say, plain that what was agreed is exactly as is reflected in writing; and, as a matter of fact, that is the agreement.

One could have a more nuanced case, which is: well, there is, looking at the evidence in the round, there is evidence going in different directions. Some is consistent with the written agreement. Some might be, on one view, consistent with an unwritten promise. But the same (inaudible) has not discharged its burden of proof. So that may be a third way of looking at this.

But the submission I am making, again loud and clear, is not that this is a close call -- and I am going to show you this next. But the way in which the CMA put its case, particularly on the Second Written Agreement, was actually put on all fours with the terms of the written agreement only.

So, in fact, the failure is much more fundamental: the case as put to the witnesses did not actually

comprise the unwritten promise. When push came to shove, and when we go to the contemporaneous documents I will show you this, what was put to the witnesses is: that is consistent with the contracts, is it not? We say if that is the high-water mark of the case, then it does not even get off the ground.

Now, wrapped up in those sort of four permutations -- I do not have to go as far as saying dishonesty, but I will make the point, and I do make the point, that on the CMA's case, it must be the case that certainly one, if not two, individuals did not give truthful evidence. One cannot make the concession, pull the punch on someone who is not telling the truth, and let the dog whistle ring out. I am going to come to that and explain how that works in terms of the evidence.

But we say any way one looks at this case, there is a fundamental problem which has never been grappled with. That is why we are quite surprised, and it is quite revealing, that in Closings for the first time we get this case on the recital which has never been mentioned in the Decision: an attempt to square the circle or put the square peg into the round hole. We say it is quite striking that in Closings for the first times these attempts have to be made. But any way one

looks at this, there is a fundamental problem with the 10mg agreement case.

Now, just to tease out the issues and map it onto the evidence, to the untruthfulness point, at the very least there is a fundamental problem on duration. The CMA's case can only be that the 10mg agreement was for a longer duration than three months, because otherwise how does it differ from the written agreement? Of course no attempt was made to make good that case with the witnesses.

Now, Ms Demetriou in a way doubled down. She said repeatedly in Closings that she does not need to specify any duration, and she does not need to deal with duration. If I can just show you that, it is at {Day 16/5:9-10}. So she makes -- she says:

"... we say the CMA has not particularised the duration and does not have to ..."

So she makes a virtue of the fact that they have not said anything about duration. But in this case the CMA plainly must grapple with duration, because if you accept that a two-year term non-compete with a three-month notice period is not an object restriction -- so that is the written agreement -- then you must logically prove something longer, or otherwise different, to make good your case. Because you cannot

concede that clause 2.2 is fine, but there is something else which is not fine, without telling us what is the difference. So that is the first problem on duration.

Now, I quite accept in other cases it may be that you do not need to specify duration, for example, price fixing. Now, I do know, parenthetically, that the public authority would need to specify the duration of the infringement, otherwise the Decision would be defective for that reason as well.

But certainly in a case like this, where you have a written clause which is a two-year term of a non-compete with a three-month carve-out, you have to deal with duration, and this airbrushing we see in Closing simply will not work.

Now, the second fatality, we say, of the concessions which have been made is it causes a fundamental problem in terms of the evidence the CMA relies upon. Because you will recall from Ms Demetriou's Closing submissions that the high-water mark of her case in terms of contemporaneous documents were the emails and other documents that immediately post-date the Second Written Agreement in the summer of 2014. You will recall the emails from Mr Belk suspending the Aesica problem at that stage temporarily, and so on.

Now, I made the point in Closings, well, that does

not help the CMA because each and every one of those documents is consistent with the written contract and clause 2.2.

Now, if we can go back to what Ms Demetriou said, it is at {Day 16/168:1}, please, and it is at the top, line 1. So she says "his closing submission", "his" being me:

"... that the reference to not releasing the Aesica product for contractual reasons is a reference to the second written ... agreement and the three months' notice clause. But of course that clause did not preclude AMCo from commercialising its own product or from selling it. It just had to give notice if it did."

But, as we saw, that is simply incorrect: the clause does prevent AMCo from selling a competing product. It is a non-compete. It is, of course, subject to the three-month carve-out and, again, none of that is objected to.

But the emails that I rely on, and paradoxically Ms Demetriou also relies on, they were exactly contemporaneous with the period of the Second Written Agreement -- they are dated in late June and early July -- and at that date it is common ground AMCo was contractually prevented by clause 2.2 from selling their own product. They had to give at least three

months' notice. So these emails, we say, are manifestly consistent with the terms of the written agreements.

Now, that is why we say in relation to these documents in particular: well, what is the CMA's case? If it does not object to clause 2.2, what does it say AMCo should have done at this stage? At this stage it is common ground that AMCo could not, for contractual reasons -- they had to give notice -- enter. What exactly is the CMA's case?

Now, to come back to the point I made five minutes ago, in fact the problem is much more acute, because Ms Demetriou, when she cross-examined Mr Beighton, she did not put her case in relation to these critical documents that she relies on and I rely on as being the implementation of an unwritten agreement. It was put, fair and square, as the implementation of the consequence of the written agreement.

Now, I just want to show you very quickly where she put this to Mr Beighton. This is all on {Day 3/71:19}. So she says:

"That was because AMCo had decided to suspend the Aesica project, had it not, because it had signed the supply agreement ...?"

So she is linking cross-examination, the suspension of the Aesica product, to the written contract.

Then on {Day 3/89:4-8}, again, Ms Demetriou:

"So your staff are recognising, are they not, that they cannot sell this product because of the exclusive supply deal you have got with Auden, yes?

"Yes."

Again, a clear reference to the written contract, and note the reference to the exclusive supply deal which has since been disavowed.

Then at {Day3/90:15-18}:

"The contractual reasons could only have been a reference, could it not, to the agreement with Auden; that is right?"

"Yes."

Then finally, {Day3/92:2-4}:

"So they are saying it cannot be sold because of the deal with Auden, yes?"

"Yes, that is what they're saying."

So we see multiple examples where Ms Demetriou is herself putting to the key AMCo witness that the reason why at this stage AMCo was not able to launch the Aesica product was because of the Second Written Agreement, and, in particular, clause 2.2. We say that is hopeless in circumstances where clause 2.2 is not objected to.

Now, we say the point actually cuts more deeply, because it is often quite unclear to the witness which

agreement has been put by the CMA. The last example we saw maybe on one view is an example of that. This is a point I am perfectly entitled to make, because we have made this from the very outset. You will recall that Mr Brealey, at the outset of Ms Demetriou's cross-examination, stood up and objected to the lack of specificity as to whether the unwritten agreement would have been put to the witness or the written agreement. The Tribunal intervened I think more than once. Yet we see as one progresses through the cross-examination that time and time again either only the written agreement has been put to the witness, which is hopeless, or, at the very best, something which is consistent with an unwritten or written agreement has been put to the witness. We say this is quite unfair, and Ms Demetriou had more than fair warning that this was not a correct way to put her case, and it is quite unfair on the lay witnesses to proceed in this way.

We say the fact that the contemporaneous documents for 2014 strongly support our case is not just significant for the period in question. In truth, if one looks at the CMA's Written Closings and the Decision, these are really the only contemporaneous documents the CMA cites in the Decision to support the existence of a promise not to enter the market, and the

CMA cites nothing equivalent for the other periods.

You will also see, in my submission, what one sees from the emails immediately post-dating the Second Written Agreement is that these measures whereby the Aesica product at that stage cannot be launched, that is something new. You will recall the Chinese walls; that various measures were taken structurally within AMCo to ensure that these changes were effected. So the second thing, in my submission, one gets from these contemporaneous documents is that there was something new occurring within AMCo, and we say that is completely inconsistent with the idea of the pre-existing longstanding promise not to enter the market.

As I said in Closings, in many ways the proof of this pudding is in the eating: when AMCo eventually entered, it was not because Auden had suddenly stopped supplying it, it was because it saw a change in the market in terms of customers' attitude to the skinny label products. We say that the unravelling of the Second Written Agreement is entirely consistent with my case and inconsistent with an unwritten promise. Because Ms Demetriou's case -- it is what Mr Brealey called a "pie-crust promise", which I must confess I had not heard about until --

MR BREALEY: It comes from Mary Poppins.

MR O'DONOGHUE: Well, there you go. But the promise was said to be that, so long as Auden was willing to supply, AMCo would be unwilling to enter. We say when one looks at what actually happened, that is not the case, because AMCo actually entered not because Auden had stopped supplying it and was unwilling to supply it, but because the market had changed.

This is exactly the practical sense in which clause 2.2 was intended: AMCo had multiple irons in the fire; it was adopting a wait-and-see approach; clause 2.2 gave it an option and some security of supply from Auden in the interim. We say that, in many ways, the way in which the Second Written Agreement came to an end and the way in which AMCo entered tells you quite a lot of what was actually agreed.

Two final points before I then turn briefly to the question of dishonesty, for want of a better word, and then I will conclude. The third way in which we say the CMA's concessions are fatal to its case go to the question of crossing the line between AMCo and Auden. Now, it seemed at times that what Ms Demetriou was saying -- that this is the sort of first opening shot; the leveraging, or the bluffing, as Mr Brealey referred to it -- that it does not actually matter what you document in the written agreements or in the contracts,

and we say that is wrong. You cannot simply cherry-pick from one moment in time in a commercial negotiation a single instance in an ongoing contractual discussion and say that this shows you what was agreed and that you can then ignore the rest of the contemporaneous material for the remainder of the negotiations, and, of course, critically, ignore what is set out there in black and white in writing.

We say this applies in particular to clause 2.2, because, as I said at the outset, it was the one clause above all on which AMCo fought tooth and nail to maximise its freedom to enter the market. It was probably the single biggest issue on the AMCo side.

So we say one cannot simply cherry-pick a single email at a mid-point in the negotiations. We say the Second Written Agreement shows you exactly what was actually agreed, and that there was nothing else, and, again, that was not objected to.

The final point, before I move on to dishonesty and then wrap up: we say one cannot simply sidestep the question of sham agreements. Now, we have heard what the CMA has now said in Closings about this: they do not say certainly the whole agreement was a sham, or indeed, it seems, any of the written agreement at this stage. But in any event, as I made clear in my oral submission

before Christmas, the question of a sham agreement can at least be approached on a clause-by-clause basis, and the central clause, we say, is 2.2 of the Second Written Agreement and 3.2 of the first written agreement.

Now, we say it is actually quite a simple question: it is whether these clauses in the written agreements reflect the true intention of the parties or not. We say the CMA cannot duck that point, because the written clauses are plainly inconsistent with the 10mg unwritten agreement it posits. The CMA puts forward an apparently enduring indefinite agreement not to enter for as long as Auden are willing to supply AMCo. We say either this is the genuine and faithful expression of the parties' intention, as the CMA itself found in the statement of objection -- as you will recall, I showed you that before Christmas -- or it is not. We say there simply is no halfway house in this respect.

Now, Ms Demetriou made the rather bizarre point in Closings that the Decision only mentions sham four times. We do not understand how that helps the CMA. It is a parody of the Basil Fawlty defence: I only mentioned it four times but I think I got away with it. But in any case, being less facetious, the key point is that, if the CMA's case is right, these particular clauses in the written agreements and the hard-fought

negotiations that led to them must be a sham, in the sense that they do not reflect what was actually agreed. We say there is no basis for that. It was not a case actually put to any witness, which it should have been if that is the CMA's case now in Closings.

Finally, sir, on the question of the subjective or mental elements, I can take you --

THE PRESIDENT: "Sham" must mean something, because the CMA have said that the agreement as written is not anti-competitive. They have moved on from what they said in the statement of objections.

MR O'DONOGHUE: Yes.

THE PRESIDENT: So that cannot be the basis of the Decision.

MR O'DONOGHUE: No.

THE PRESIDENT: So it follows, if there is to be an infringement, that the actual agreement, that which was agreed, is something other than the written agreement.

MR O'DONOGHUE: It has to be, because the written agreement is lawful.

THE PRESIDENT: Which would render the word "sham" entirely apposite. Whether it is right or not is a different question. But just working on what the allegation is, that is what you are saying: you are saying sham, it may not be an entire sham, but the true agreement is, in

some material respect, different from the written agreement.

Now, of course, I understand you are saying it is not.

MR O'DONOGHUE: Yes.

THE PRESIDENT: But you have got to push back against something, and what we are really talking about is what that something is.

MR O'DONOGHUE: Yes. At the very least, clause 2.2 of the Second Written Agreement and clause 3.2 of the first written agreement, they must not reflect what was agreed. But, in a sense, I do not need to go that far. I mean, that is sort of icing on my cake, I say. But if there is a two-year non-compete subject to the three-month carve-out and that is lawful, well what, then, is unlawful? In a sense, the case is as simple as that. If you do not object to those terms, there has to be something different to that which is objectionable. As you say, sir, that can only be something unwritten, and that is not really a case that was pursued at all.

It must be the case that quite a large body of documentation which leads up to and post-dates the Second Written Agreement is confected, or does not reflect; is, at best, incomplete. I am going to tease that out by reference to a handful of documents just to

make good that point.

I am moving on, sir, to the question of subjective -- the mental element of the dishonesty, for want of a better word.

THE PRESIDENT: Yes.

MR O'DONOGHUE: Now, as I said, sir, I think there is broad agreement at the level of principle on a couple of points. First, the Decision is based only on the existence of an agreement, there is no concerted practice case, which we say is a point which is not without significance. But, in any event, the concept of agreement obviously focuses on a concurrence of wills between at least two parties, and the form in which that concurrence is expressed is unimportant so long as it constitutes the faithful expression of the parties' intention.

So whilst it is not necessary to show that the parties were aware that they were infringing competition law, it is necessary to show a subjective or mental element that what the public authority says was agreed was in fact agreed. It is also common ground that there is no express requirement to also show dishonesty as a separate ingredient of the infringement, so I think we can take that off the table.

Now, in this case, we also think or hope it is

common ground that the CMA needs to show that AMCo agreed with Auden in return for the price offered by Auden that AMCo would not enter the market with its own 10mg hydrocortisone product. The Tribunal has my point that I have made for them once: that this runs into a fundamental roadblock, given that the CMA does not object to the terms of the written agreements, and, if I am right on that, we say it is the end of the case.

But we do go further -- I do not need to go further, in my submission, but we do actually go further -- and say that the CMA's case also fails, and is deeply problematic, because it only works if the witness evidence the Tribunal heard was untruthful, and we say there is no basis at all for that submission.

Now, starting with Mr Beighton, we say there are four points to be borne in mind in relation to him. First, on the co-issue of not agreeing to enter the market in return for the supply terms offered by Auden, Mr Beighton was emphatic that not only did he not agree to this, but it would have made no sense at all for him to do so, given what he called the measly quantities offered by Auden. He made that point repeatedly: there was no promise to enter the market; it would not have made any sense. Now, if the CMA's case is correct, those denials must be untruthful.

Second, Mr Beighton was clear that he did not know what was on Auden's mind when Mr Patel offered the supply terms that he did. If we can quickly look at that, because again it is pretty emphatic stuff. It is {Day2/167:17}, please. He says that:

"So the whole premise of this case just does not make sense ... why would I accept any delay to my product for this measly amount of stock? ... What is in his head I really do not know ..."

Then {Day2/174:20}, he says:

"When you say that is in Auden's minds, but I did not know anything about it, I mean, that cannot be right, can it, Mr Beighton?"

So it was actually put to him that he did know. He said:

"It is absolutely right. I have no idea what was in that man's mind."

So, sir, his evidence was he did not look the gift horse in the mouth, so the saying is true.

Now, again, the CMA's case has to be that that evidence was untrue, because Mr Beighton cannot logically have formed a mental or subjective consensus with Mr Patel of Auden if he did not know why Auden was offering the particular supply terms that it did.

The third point is that Mr Beighton was clear that

AMCo never stopped wanting to enter the market with its own product. Again on {Day3/58:17}:

" ... we never stopped wanting to come into the market ..." and so on.

Of course, he was the CEO, and he would have had to authorise the six or so developmental projects that we discussed before Christmas in AMCo's pursuing its efforts to enter. So when he says "We never stopped wanting to enter", on the CMA's case that must also be untrue.

The Tribunal, of course, will recall the evidence of Mr Middleton and Ms Lifton that AMCo was continuously pushing Aesica, and the project did not proceed in a way that was out of the ordinary compared to other projects and that evidence also cannot be reconciled with the CMA's case that AMCo agreed not to enter the market. Their evidence was that the efforts to bring the Aesica product to market were genuine and were diligent in terms of time and effort.

Finally, of course, and in many ways most crucially, we had the important interactions between Mr Sully and Mr Beighton around clause 2.2 in particular. Now, the Tribunal has my basic point that Mr Sully, on instructions from Mr Beighton, fought tooth and nail to maximise the scope of clause 2.2 from AMCo's

perspective. This was a battle fought by Mr Sully with the external lawyer from Auden. The CMA has, for understandable reasons, now shied away from saying that Mr Sully, at least, either agreed that AMCo would not enter the market or that he was aware of any such agreement. You will recall that Mr Sully denied this on several occasions, again in very, very emphatic terms, so we can understand why the CMA is pulling its punches in relation to Mr Sully.

But, again, the CMA has ignored the implications that this failure to put that case to Mr Sully has for its case in relation to Mr Beighton. Mr Sully was in constant contact with Mr Beighton around the time of the Second Written Agreement, and he was fighting hard with Auden and its lawyer again to maximise the scope of AMCo's ability to enter. Basically, he needed Mr Beighton's sign-off to receive the authorisation and to put forward different versions of clause 2.2.

Again, we saw these documents, but we need just quickly to look at those. It is {IR-H/509/2}, please. You will see, sir, at 2, 3 and 4, there are multiple items highlighted where John -- Mr Beighton -- was being asked to make a decision in relation to critical aspects of the negotiation.

Then {IR-H/517/1}, please, at the top of it:

"I'm fine with it Rob."

So Mr Beighton was effectively the decision-maker and each of the iterations of clause 2.2 in the other clauses has to be effectively signed off by him.

Now, we say this is quite important, because Mr Sully has been delegated to fight tooth and nail in maximising AMCo's freedom to enter. He is reporting back to Mr Beighton at each critical juncture and then going back to Auden, having received the approval to push for a better clause from AMCo's perspective, and these were the decisions made by Mr Beighton on the Second Written Agreement.

Now, as Mr Brealey showed you, if we can go, there is an AMCo board meeting, it is {IR-C2/2/241-242}. Mr Brealey showed you this. So this is Mr Sully reporting to the AMCo board on the terms of the Second Written Agreement and the context.

So this is being reported both to the board of AMCo, which comprises not only, obviously, Mr Beighton, but also people from my client, the ultimate parent company. So this is an important meeting and an important report being made by Mr Sully.

One can read the description, but, on the CMA's case, this must all be basically a charade on Mr Beighton's part, because when we see the emails of

him signing off Mr Sully's negotiations, giving him instructions to go back to AMCo, and when we see Mr Sully reporting on the Second Written Agreement to the AMCo board, of which Mr Beighton was attending, far from Mr Beighton wanting Mr Sully to maximise the scope for AMCo to enter the market, in fact he wanted the opposite, or, at the very least, he had, by this stage, on the CMA's case, agreed the opposite.

So, on the CMA's case, Mr Sully is being played like a banjo; he is being treated like a patsy. He is negotiating hard, engaging with AMCo and its external lawyers, reporting back to the board of AMCo, as we see, on what he was up to and what has been agreed; and, according to the CMA, that is the furthest thing from the truth. In effect, the opposite has been agreed.

Now, of course, this was never put to Mr Beighton, but the CMA cannot pull its punches and then ignore the implications of an allegation of untruthfulness not being put. The dog whistle has been blown by the CMA. They cannot then act all bewildered or innocent when the dogs show up.

Now, Ms Demetriou was dismissive of the possibility that the allegations in this case might be career-ending. We say, with respect, she is wrong to be dismissive. We have already seen in the Decision in the

case of Mr Patel the CMA now routinely pursues director disqualification orders in cases like this. Even if, for some reason, it did not do so against Mr Beighton, it is hard to see how Mr Beighton could occupy a senior executive position in the future if he personally was responsible for what the CMA considers to be a cartel-like market exclusion agreement.

We know from his evidence that Mr Sully now works as a consultant. If, as the logical conclusion of the correctness of the CMA's case is that he was being used as a patsy by senior executives, it is not hard to see how that might affect his consultancy career.

As Mr Jowell put to the Tribunal before Christmas in a different context, the CMA wants to wound without being willing to strike. So we say that if it is not alleged -- and it is not alleged -- that Mr Beighton's evidence was untrue in the respects I have just outlined, then that is a further reason, quite apart from the first topic I addressed the Tribunal on, why the 10mg agreement cannot stand. The logical consequence of the CMA's concessions has not been put to the witnesses before this Tribunal, and, if the CMA is right, it must follow that certainly Mr Beighton's evidence was untrue in multiple, critical respects. Again, a point not put.

Sir, those are my submissions in reply.

THE PRESIDENT: Thank you very much.

That concludes the case, unless anyone wants to jump up and say anything more.

We will obviously reserve our judgment. We will hand something down as soon as we can, but it is obviously going to be a fairly substantial judgment.

Speaking on behalf of the three of us, we are extremely grateful to the parties, their legal teams and the advocates for the amount of work and the hugely helpful submissions we have received over the course of the past few months. We are very grateful. I think it is appropriate we put that on the record now before you have anything to complain about in the judgment.

So thank you all very much. We will adjourn until hand-down. Thank you.

(4.16 pm)

(The hearing concluded)