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**IN THE COMPETITION**

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

**APPEAL**  
**TRIBUNAL**

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Tuesday 22<sup>nd</sup> November-Friday 23<sup>rd</sup> December 2022

Before:

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

BETWEEN:

**Appellants**

**(1) ALLERGAN PLC (“Allergan”)**

**(2) ADVANZ PHARMA CORP. LIMITED & O’RS (“Advanz”)**

**(3) CINVEN CAPITAL MANAGEMENT (V) GENERAL PARTNER LIMITED &  
O’Rs (“Cinven”) (4)**

**(4) AUDEN MCKENZIE (PHARMA DIVISION) LIMITED (“Auden/Actavis”)**

**(5) INTAS PHARMACEUTICALS LIMITED & O’RS (“Intas”)**

AND

**Respondents**

**COMPETITION AND MARKETS AUTHORITY (“The CMA”)**

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## **APPEARANCES**

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)

Wednesday, 30 November 2022

(10.00 am)

THE PRESIDENT: Good morning.

MR O'DONOGHUE: Sir, it is Dr Bennett to kick off today.

THE PRESIDENT: Excellent.

DR MATTHEW BENNETT (affirmed)

Examination-in-chief by MR O'DONOGHUE

THE PRESIDENT: Dr Bennett, good morning. Welcome to the tribunal.

MR O'DONOGHUE: Dr Bennett, you should have open in front of you two documents. The first one I want to look at is called "Hydrocortisone tablets: an economic assessment of the Decision."

If you turn to page -- it is internal page 49. Opus page {D3/1/52}. Can you confirm that that is your signature?

A. That is.

Q. Thank you. The second document you should have in front of you is entitled "Hydrocortisone Tablets. Response to CMA Defence" and, again, if you can turn to internal page 20, Opus page {D3/2/22} of that document, please?

A. Yes.

Q. Can you confirm that that is your signature --

A. That is my signature.

Q. -- on this document. Finally, you do not have a hard

1 copy, but this can be brought up. It is {IRG1/1/1},  
2 please. This is the joint expert statement. It should  
3 come up on the screen in front of you. If we can turn  
4 to page 53, please, of that document. Do you have that  
5 in front of you, Dr Bennett?

6 A. I do.

7 Q. Is that your signature on this joint expert statement?

8 A. It is.

9 Q. Do these two reports and the comments in the joint  
10 expert statement represent your true and complete  
11 professional opinion in these proceedings?

12 A. It does.

13 Q. Sir, I note that Dr Bennett asked if he could have  
14 a clean copy of the Decision. The CMA has no  
15 objections. If I could please hand it up?

16 THE PRESIDENT: Yes.

17 MR O'DONOGHUE: The corrected tables in the Decision in  
18 {K/60/1} are also included.

19 THE PRESIDENT: That is very helpful, Mr O'Donoghue, of  
20 course.

21 MR O'DONOGHUE: Just to confirm, you have a pad in front of  
22 you. Can you confirm to the tribunal what that  
23 contains?

24 A. It contains nothing. Just something I can jot notes on.

25 THE PRESIDENT: Understood.

1 MR O'DONOGHUE: If you wait there, there is a duo waiting  
2 with some questions.

3 Cross-examination by MR HOLMES

4 MR HOLMES: Good morning.

5 A. Good morning.

6 Q. Nice to see you again. The double act will consist of  
7 myself and Mr Jones and I will be dealing with market  
8 definition and he will be dealing with agreements, in  
9 the same way as with Mr Holt if you were able to watch  
10 his evidence yesterday.

11 A. Yes.

12 Q. Can we first just agree on the scope of your evidence on  
13 market definition. It is right, is it not, that you  
14 were asked by Cinven to assess only one aspect of the  
15 CMA's market definition and that is whether 10mg full  
16 label tablets are in the same product market as 10mg  
17 skinny label tablets?

18 A. That is correct.

19 Q. You do not take issue with the CMA's conclusions that  
20 other treatments for adrenal insufficiency, such as  
21 Plenadren, are in a different product market from  
22 Hydrocortisone tablets?

23 A. That is not something I looked at personally, but I do  
24 not see any issues with it myself.

25 Q. But you did consider the CMA's assessment of the other

1 treatments. Indeed, you say that the decision adopted  
2 an appropriately systematic and objective approach in  
3 reaching its conclusions about other treatments. Is  
4 that not right?

5 A. I did note the difference between the CMA's methodology  
6 in looking at Plenadren versus the skinny label.

7 Q. Yes, and we will come to consider the methodology  
8 shortly, but, just to be clear, you regarded the  
9 Decision's analysis of other treatments as -- and this  
10 is a quote I think from your first report -- based on  
11 "an appropriately systematic and objective approach".  
12 That is right, is it not?

13 A. That is correct.

14 Q. Just so that we can make sure that we are agreed on the  
15 underlying factual situation relevant to the full skinny  
16 issue, can I put some propositions to you to see whether  
17 they match your understanding of the facts. As a first  
18 proposition, can we agree that in the two years prior to  
19 skinny label launch the incumbent, Auden, raised its  
20 average selling price substantially by nearly double on  
21 a fairly constant trajectory from around £35 to £70?

22 A. I agree that it raised the price and I agree with the  
23 numbers. Whether it was a constant trajectory or not,  
24 I think there were periods where prices did not go up  
25 very much. There were also periods where prices went up

- 1 more steeply.
- 2 Q. Yes, but in the two years prior -- perhaps just so that  
3 we are able to see what I am talking about. If we could  
4 go in the Decision to {IR-A/12/147}.
- 5 A. Yes.
- 6 Q. So just focusing on the two-year period from January 14  
7 through to or from October sort of -- the end of 13/14  
8 through to mid 15. You can see the -- or indeed, sorry,  
9 early 16, you can see the fairly steep upward trajectory  
10 during that period and while there are some bumps and  
11 the speed is not entirely constant, it is a fairly rapid  
12 ascent, would you agree?
- 13 A. Sorry, can we just be clear, which period are you asking  
14 me to look at?
- 15 Q. Start at January 14 when Auden became aware of the  
16 effects of the orphan designation on marketing  
17 authorisation. Do you see the vertical line there?
- 18 A. I do.
- 19 Q. Then look through to October 15, which was the first  
20 independent entry, and there is a little wrinkle with  
21 a sort of a sharp ascent followed by a falling back,  
22 but, subject to that, would you agree that there is  
23 a fairly constant incline upwards during that period?
- 24 A. Yes, I agree that. It is relatively constant and of  
25 course that incline though is different to the incline

1           that you see previously.

2       Q.   Yes.  The second proposition is that when skinny label  
3           products were launched in 2015, there was substantial  
4           switching on the part of some pharmacies and wholesalers  
5           away from purchasing Auden's full label tablets in  
6           favour of buying skinny label tablets instead?

7       A.   I agree.

8       Q.   Third proposition.  As regards the speed and scale of  
9           the switching, within about 12 months, around 50% by  
10          volume of the demand previously met by Auden prior to  
11          entry had been won by the new skinny label entrants.  Do  
12          you agree with that?

13      A.   Yes, I agree with that as well.

14      Q.   Fourth.  Can we agree that the skinny label suppliers  
15          won business from the incumbent, Auden, by undercutting  
16          the prices charged by Auden?

17      A.   Yes, that appears to be the case.

18      Q.   Yes.  It might be worth just considering together for  
19          a moment figure 3.14 in the Decision.  to see what that  
20          shows.  It is at -- taking it in the corrected form,  
21          which I know you have been given, it is in  $\{K/60/2\}$ .  So  
22          this figure represents the average selling prices for  
23          10mg Hydrocortisone tablets following competitive entry  
24          in October 2015.

25                So on the left-hand side you see the monopoly period



1 we discussed before when prices are on a steady ascent  
2 and in October 2015 you have the entry of the first  
3 skinny label supplier, Alissa, and its pricing is shown  
4 by the sort of red/brown line which appears following  
5 the first dotted vertical line.

6 Between October 2015 and March 2016, Alissa was the  
7 only supplier besides Auden/Actavis in the market. So  
8 during that period can we agree that there is no  
9 indirect constraint arising from the drug tariff?

10 A. Of course there is always a constraint arising from the  
11 drug tariff and maybe we will come on to some of the  
12 changes that happened on the drug tariff later on, but  
13 during this period, I do not think there is an indirect  
14 constraint.

15 Q. There is no indirect constraint and that is because  
16 prices are effectively set by Auden as the Scheme M  
17 member which fed into the determination of the price.  
18 Is that right?

19 A. No, I do not think that is correct. My understanding is  
20 that Auden only entered into Scheme M later on in the  
21 period. So my understanding is Auden entered into  
22 Scheme M in April 16. That was when Auden was taken  
23 over by Actavis and, at that point, because Actavis was  
24 in Scheme M, it entered into Scheme M. Prior to  
25 Scheme M, it was AMCo who was the member that was in

1 Scheme M.

2 Q. Yes, indeed. AMCo was supplying the Auden product?

3 A. That is correct.

4 Q. Yes.

5 THE PRESIDENT: The point you are making, Dr Bennett, just  
6 to be clear, is that the position regarding the scheme  
7 was constant. It is just that there was a change of  
8 personality, legal personality, in terms of the legal  
9 entity that was party to the scheme. In other words, it  
10 is a point regarding the corporate history of the  
11 parties before us.

12 A. It is slightly more than that.

13 THE PRESIDENT: Right.

14 A. So what I am saying is you will see here, for example,  
15 in April 16 that there is a decrease in the drug tariff  
16 at April 16. Now, I have looked at that decrease and  
17 that decrease is nothing to do with the prices that AMCo  
18 was charging. So AMCo's full label price did not come  
19 down. It was simply because, at that period, Auden was  
20 purchased by Actavis and entered into the Scheme M and  
21 at which point the drug tariff became an average of  
22 Auden's price and AMCo's price. It is at that point --  
23 that is what caused that decrease. It is nothing to do  
24 with AMCo changing its price or skinny label. It is  
25 simply because Auden and AMCo now have entered into

1           Scheme M.

2           THE PRESIDENT: I understand.

3           MR HOLMES: That is helpful.

4           THE PRESIDENT: Mr Holmes, you are happy with the factual.

5           MR HOLMES: Absolutely, sir. That is useful. Just pausing  
6           during the Alissa only period, I think we can agree that  
7           just looking at the relationship between the prices that  
8           Auden is able to charge during that period and the drug  
9           tariff, the drug tariff is not pushing the price down  
10          via the indirect constraint mechanism that applied later  
11          in the period. Would you agree with that?

12          A. To be honest, I have not looked at whether during this  
13          specific period the drug tariff is binding, ie the  
14          margin is such that Auden McKenzie could not increase  
15          its price, but I am willing to agree that it is unlikely  
16          to be, given that it was only AMCo in the drug tariff.

17          Q. Yes, the indirect constraint works because when the drug  
18          tariff comes down, there is then pressure --

19          A. Correct.

20          Q. -- from the purchasing pharmacies and wholesalers to  
21          ensure their margin is kept intact. That is right, is  
22          it not?

23          A. Correct.

24          Q. So if the drug tariff is not coming down then there is  
25          no downward pressure resulting from the drug tariff on

- 1           Auden's price. That was the only point that --
- 2           A. No, I agree.
- 3           Q. Very good, thank you. If we could just see how -- so
- 4           Alissa there, we can see, keeping its prices static, is
- 5           undercutting Auden's price. That is right, is it not?
- 6           A. That is correct.
- 7           Q. We can see how that feeds through into the volumes from
- 8           another figure in the Decision. If we could just turn
- 9           to that. It is not one of the corrected ones, I think.
- 10          It is figure 4.1 which is on {A/12/299}. This
- 11          superimposes price trends on to volume trends and the
- 12          part of the price trend graph that we have just been
- 13          looking at is just following the October -- do you see
- 14          the October 2015 vertical line for the first 10mg
- 15          competitor entry? It is the third vertical.
- 16          A. I do.
- 17          Q. You can see the same pattern that we observed on the
- 18          previous graph, the dotted line during that initial
- 19          period, where it is plateauing, consists only of the
- 20          Alissa sales, Alissa pricing. You would agree?
- 21          A. Yes.
- 22          Q. You see that sort of stuttering trend in the price of
- 23          the incumbent, Auden, the dip and then the rise, yes?
- 24          A. I do.
- 25          Q. We can see that during that period, when we have agreed

1           that Alissa was undercutting Auden, Alissa starts to win  
2 volumes. You can see that from the bottom of the page  
3 from the bars. The dark grey is the supplies that are  
4 being made of Auden -- by Auden/Actavis, Auden at that  
5 time, and then the light grey are the supplies that  
6 Alissa at that time, the competitors, are beginning to  
7 win.

8           They show, do they not, that Alissa is picking up  
9 volumes immediately as a result of its more favourable  
10 pricing?

11       A. Yes, I agree.

12       Q. Would you agree that is price competition at work,  
13 customers switching to a cheaper product?

14       A. I agree that that is a degree of price competition  
15 working.

16       Q. Yes. It is a time when there is no indirect constraint,  
17 as we have discussed, operative by reason -- a downward  
18 constraint operative by reason of the drug tariff?

19       A. That is correct. However, I also, as I state in my  
20 report, note that this is at a time where prices are at  
21 an excessive level. They are at the very highest level  
22 and, therefore, the cellophane fallacy is likely to be  
23 an issue here, because if prices are close to the  
24 monopoly level, then switching away from this product is  
25 going to be significantly distorted versus relative to

1 at the competitive level. So I do not see this as  
2 a true test of what substitution would be at  
3 a competitive level.

4 Q. Yes, yes, I will come on to discuss the market  
5 definition with you.

6 A. Okay.

7 Q. What I am attempting to ascertain at the moment is that  
8 you agree this is a competitive interaction?

9 A. I agree.

10 Q. Yes, great. There is then a precipitous drop in the  
11 entrants' pricing in the dotted line in,  
12 I think, March 2016. Do you see that?

13 A. I do.

14 Q. That is when two further skinny label suppliers entered  
15 the market. That is right, is it not?

16 A. I understand that, yes.

17 Q. As you were saying before, those entrants, Resolution  
18 and Bristol -- well, I do not think you were. You were  
19 making a point about the membership. Neither of those  
20 entrants, Resolution and Bristol, were in Scheme M  
21 either, were they, on your understanding?

22 A. No, not directly, not at that point.

23 Q. So neither would have fed into the drug tariff?

24 A. Not at that point.

25 Q. The further entry leads to further price falls and

- 1 volume drops for full label. Do you agree?
- 2 A. Which period are we talking about?
- 3 Q. We are looking at that sudden -- the period immediately  
4 following the entry by Resolution and Bristol  
5 in March 2016. Do you see the price of the entrants  
6 plummets and there is a downward trend in parallel in  
7 the full label pricing shown by the solid red line. Do  
8 you agree?
- 9 A. No, I think this is probably where we disagree and the  
10 reason here is because, as I said, going from March  
11 to April 2016, this is where the drug tariff came down  
12 not related to skinny label, but because of the  
13 introduction of Auden into the drug tariff and, at that  
14 point, because the drug tariff is ratcheting down,  
15 I would expect that Auden will also have to reduce its  
16 price. So that is going to happen completely  
17 independently of whether skinny label enters or not.
- 18 Q. Yes. I do not think I need to debate that with you. We  
19 will come back to the factual position subsequently, if  
20 we may, but for now can we turn to a fifth proposition?
- 21 A. Sorry, can I just -- just because I know this came up  
22 yesterday as well.
- 23 Q. Yes.
- 24 A. The other big drop that we see, which is June 16, it is  
25 worth also stating that that drop that you see, and it

1 is a steep drop going from May to June 16 in the drug  
2 tariff, was, again, nothing to do with skinny label. It  
3 was because there was a margin survey by the Department  
4 of Health and every year the Department of Health  
5 undertakes a margin survey and it decided to take out --  
6 I cannot remember the exact number -- but some millions  
7 out of pharmacy profits and, therefore, ratcheted down  
8 the drug tariff.

9 So that decline in June is the ratcheting down of  
10 the drug tariff, because of the margin survey and then  
11 again that obviously is going to have an impact on  
12 Auden's prices, which is why, in my view, I see Auden's  
13 prices also coming down in order to meet that reduced  
14 drug tariff. But, again, that is separate from the  
15 question of skinny label and the interaction with skinny  
16 label.

17 Q. Yes. No, there are some wrinkles here, but I do not  
18 think we disagree, do we, but tell me if I am wrong  
19 about this, that there was an indirect constraint  
20 arising under the drug tariff as a result of the  
21 inclusion of skinny -- some skinny label sales following  
22 the entry of some Scheme M skinny label suppliers?

23 A. Only from October 16. That is my understanding. From  
24 October 16, that is when skinny label entered into the  
25 Scheme M drug tariff and that is the point at which you



1 start seeing -- October 16 is the first period and you  
2 can again see the drug tariff coming down between -- it  
3 is that -- if we look at 3.14 perhaps, it is the August  
4 to October 16.

5 PROFESSOR HOLMES: Do you mean figure 1.34?

6 A. Yes.

7 MR HOLMES: It was the previous figure we were looking at  
8 before we went to this one. {K/60/2}.

9 A. So if we look at the movement at October 16 in the drug  
10 tariff, it is at that point, that big decline that we  
11 see after it had kind of zigzagged up and then it is  
12 that second decline that we see, that is the  
13 introduction of skinny label into the drug tariff.

14 Q. Yes, and that is as a result of AMCo's entry  
15 in May 2016, is that right?

16 A. That is correct.

17 Q. Which has a lagging effect, because it is prior sales?

18 A. Correct, it is two periods or two quarters. The drug  
19 tariff changes two quarters after prices change.

20 Q. Yes. So there is no -- standing back from the detail,  
21 there is no dispute, is there, that at least from that  
22 point skinny label tablets had a constraint -- the entry  
23 of skinny label tablets had a constraining effect in  
24 part through the operation of the drug tariff?

25 A. So I would clarify and say it is the entry of skinny

1 label into the drug tariff that had a constraining  
2 effect. I would not agree that it was the entry of the  
3 skinny label, full stop. So that would not be  
4 sufficient in my view to have the effect that we are  
5 seeing. It is the entry of the skinny label into the  
6 drug tariff.

7 Q. Yes, indeed, but without entry of skinny label at all,  
8 there would not have been entry of skinny label into the  
9 drug tariff. So I think you accept, do you not, that  
10 the entry of skinny label led to falls in the price of  
11 full label Hydrocortisone?

12 A. Again, you may think it is a minor distinction, but  
13 I think it is an important distinction. It is the entry  
14 of skinny label into the drug tariff, not the entry of  
15 skinny label per se. So the entry of skinny label per  
16 se I do not think had a substantial impact on full label  
17 prices. But it is the entry of skinny label into the  
18 drug tariff via that regulatory constraint that had the  
19 impact on full label prices.

20 THE PRESIDENT: Dr Bennett, let me see if I can understand  
21 exactly where you are coming from. In a sense, what  
22 effect the introduction skinny label would have had  
23 without the drug tariff is a hypothetical counterfactual  
24 question which we cannot answer by reference to what  
25 actually happened. In other words, what I am asking you

1 is: is it your evidence, and this is a hypothetical  
2 question, that if there was no drug tariff, the  
3 introduction of skinny label as an alternative to full  
4 label would not have had an effect on full label  
5 pricing. That is a very difficult question, because  
6 postulating the elimination of the drug tariff is  
7 postulating a major change, but, in essence, is that  
8 what you are telling me?

9 A. I am saying that it would not have had a substantial  
10 effect and I think you can actually see this and you can  
11 get a handle on whether the skinny label in and of  
12 itself, absent the impact of the drug tariff, would have  
13 had an impact on full label. The reason why you can get  
14 a handle on that is because you are -- the constraint  
15 via the drug tariff works one way. So you cannot put  
16 your price above -- up, because then you'll lose  
17 pharmacies, because people will no longer buy from you.  
18 But you can have your price significantly below the drug  
19 tariff. So there is no constraint on reducing full  
20 label price.

21 If we go to figure 3.16 perhaps. This is at  
22  $\{K/60/4\}$ . What you see here is that despite there being  
23 a skinny label product, full label is charged at  
24 a substantial premium during the entire period.  
25 Remember, full label is able to come down and meet

1 the price of skinny label should it choose, but that is  
2 not what you see here. You only see full label coming  
3 down with the drug tariff. You do not see full label  
4 coming down at a faster rate as you actually do in 20mg  
5 where we have another full label competitor.

6 MR HOLMES: But --

7 THE PRESIDENT: Sorry, just, I do apologise, Mr Holmes if  
8 I am anticipating.

9 MR HOLMES: Not at all, no.

10 THE PRESIDENT: Just so I have this clear in my mind and let  
11 us move away from full label and skinny label and away  
12 from this market. But let us suppose we have two  
13 products in a market, widgets and blogets, which are  
14 entirely not substitutable to one another. There is no  
15 way that you are going to buy a bloget in substitution  
16 for a widget.

17 So clearly the price of one is not really going to  
18 affect the price of another, because they are not  
19 substitutable -- but if one moves from an unregulated  
20 market into a regulated market such that one has got  
21 a pricing regime where the combined price of widgets and  
22 blogets in the market are fed in and you get  
23 a widget/bloget tariff which says the price for both is  
24 computed in a certain way, then the input of the bloget  
25 price will have an effect on the widget price, but only,

1           on this hypothesis, because of the regulation rather  
2           than because of any inherent substitutability between  
3           blogets and widgets?

4           A. That is correct, I agree.

5           THE PRESIDENT: That is what you are saying in your evidence  
6           here that it is -- there is no inference to be drawn  
7           from prices between full and skinny labels in terms of  
8           their substitutability. It is the drug tariff which is  
9           doing, as it were, the heavy lifting in terms of  
10          affecting the price between the two.

11          A. Yes, I think I am going one step further than that  
12          though, which is the fact that even though they could  
13          reduce their price, the full label price, towards skinny  
14          and they are not doing it, for me that is evidence that  
15          that substitution element is minimal and it is the drug  
16          tariff element which is driving prices.

17                 So I am saying it is not that we cannot say anything  
18          about the degree of substitution between skinny and  
19          full. The fact that there is a large gap between skinny  
20          and full over this period when full label could price  
21          down to skinny label is, in my view, evidence of full  
22          and skinny label not competing and it is the drug tariff  
23          that is driving these trends.

24          THE PRESIDENT: Thank you, Dr Bennett. I do apologise.

25          MR HOLMES: Not at all. No, it has been very helpful.

1           Just to pick up on a couple of points arising from  
2           that. First of all, looking at figure 3.16, to which  
3           you helpfully took us, we can agree, I think, that the  
4           indirect constraint mechanism at least means that the  
5           skinny label suppliers who were within Scheme M and the  
6           sales that they made resulted in a significant decline  
7           over time in the price of full label tablets?

8           A. Through the regulatory constraint, yes.

9           Q. Now, on the question of causality, can we go to consider  
10          proposition 20 in the joint experts table and see what  
11          you say there. I think it is consistent with your  
12          evidence, but I just -- the evidence you have just given  
13          but I want to make sure.

14          Proposition 20. That is {G1/1/15}. So you see the  
15          proposition:

16          "The entry of multiple suppliers from March 2016  
17          onwards of skinny label 10mg HT caused the reduction in  
18          price seen in both skinny and full label 10mg HT."

19          Then looking over at the middle of the experts'  
20          columns, which is yours, "Dr Bennett's position", you  
21          agree with qualifications:

22          "I agree that the price of full label 10mg HT only  
23          started to drop after the second skinny label supplier  
24          entered. However, it is unclear whether the reduction  
25          in the price of full label was caused by the mechanics

1 of the drug tariff mechanism, or substitution between  
2 skinny label and full label products."

3 So the point you are making there is there is  
4 a degree of uncertainty and I think you said that -- you  
5 described the potential impact of competition as  
6 "minimal" here, but you are not saying you can conclude  
7 that it is absent. You are saying that it is unclear  
8 which effects are at work, is that right?

9 A. Yes, I agree here I am saying it is unclear.

10 Subsequently, I have looked at this in more detail,  
11 because it was clearly an important element and there is  
12 this question of -- it is the chicken and egg scenario.  
13 So is it Auden that is driving the drug tariff price and  
14 so the reductions in Auden are driving a reduction in  
15 the drug tariff or is it the drug tariff that is driving  
16 the reduction in Auden's price? If it is the drug  
17 tariff that is driving the reduction in Auden's price,  
18 then that would appear to be more consistent with the  
19 drug tariff being the predominant effect.

20 We can use the fact that there is a lag, a two  
21 quarter lag, between current prices and the drug tariff.  
22 So if you thought the current prices are driving the  
23 drug tariff, you would expect to see the drug tariff  
24 following current prices two quarters later.

25 But if you thought that it was Auden following the

1 drug tariff, because the drug tariff is published before  
2 Auden decides its price in that period, then Auden would  
3 be following in that exact same period.

4 When you look at the drug tariff and Auden's prices,  
5 it is much more consistent with Auden pricing at the  
6 same time as the drug tariff. So it is more consistent  
7 with the drug tariff defining Auden's prices rather than  
8 the other way round. Sorry, if I am not clear on that.

9 PROFESSOR HOLMES: Do we have sufficient granularity in the  
10 data that we have seen. I think we may do in one of the  
11 charts we have just been looking at.

12 A. Unfortunately, I cannot remember all the charts off by  
13 heart, but there is a chart where we have -- it might be  
14 4.10, where we have the -- sorry, and I do not know the  
15 exact page in the -- that is the disadvantage of not  
16 being able to label the Decision.

17 MR HOLMES: We could take it perhaps from the reference to  
18 the K bundle at the bottom.

19 A. So {K/60/10} is 4.11, but I am not sure exactly what  
20 4.10 is in the Decision. So that is 20mg. It is the  
21 equivalent graph for 10mg.

22 MR HOLMES: Sir, I think it is {IR-A/12/344}.

23 A. Yes. So here you can see the drug tariff.

24 THE PRESIDENT: We are looking at figure 4.10.

25 A. That is correct. So figure 4.10 you can see the drug



1 tariff and you can see Auden's price. In my view,  
2 Auden's price is following the drug tariff pretty  
3 closely. So when the drug tariff moves, Auden's price  
4 is moving. For me that is consistent with the drug  
5 tariff being the binding constraint on Auden. It is the  
6 drug tariff that is driving Auden's price movements.  
7 Rather, if you expected Auden's prices to be defining  
8 the drug tariff and moving before it because it was, for  
9 example, responding to skinny label, then you would  
10 expect the drug tariff to be shifted back two quarters  
11 and so whenever you see a change in the Auden, you would  
12 see two quarters later a change in the drug tariff.

13 I do not think that is consistent with what we see  
14 here. What we see here is they are moving  
15 simultaneously and that suggests to me, that is  
16 consistent for me, with the drug tariff being the  
17 binding constraint on Auden and determining Auden and  
18 AMCo's prices.

19 MR HOLMES: But they are not an exact fit, are they?

20 A. No.

21 Q. We discussed that Alissa dip. It does look as though  
22 during the Alissa period prices went down following  
23 Alissa's launch. Would you agree?

24 A. I mean, obviously there are changes from month to month.  
25 So I think you are talking about the dip that we see

- 1           here in January 16, is that the one?
- 2       Q.   It is the point -- I think the point I was trying to  
3           make was you do not see an equivalent dip in the drug  
4           tariff.  So whatever is motivating that reduction, it is  
5           something other than a change in the drug tariff?
- 6       A.   No, and I should say that I am talking about  
7           from October 16 when the skinny label comes into the  
8           drug tariff.  So, obviously, before that you would not  
9           see an exact relationship because it is not in there.
- 10      Q.   But there is something then other than the drug tariff  
11           which is motivating that reversal in the upward trend  
12           that was seen prior?
- 13      A.   I mean, as I said, if we are talking about  
14           that January 16 dip, I am not sure, I mean, we do see  
15           dips in prior periods when there is no skinny label, so  
16           to attribute one dip to skinny label, it may be, but  
17           I am not sure that we can.
- 18      Q.   But I think -- you have accepted that there may be some  
19           competitive constraint here.  You are not going so far  
20           as to say that the --
- 21      A.   Correct.
- 22      Q.   -- that the drug tariff indirect constraint mechanism is  
23           the only one that could potentially be at work?
- 24      A.   I am saying there is -- there clearly was migration.  
25           There was clearly movement from full label to skinny

1 label. I think the question that we are trying to  
2 answer is: was that sufficient to create a constraint on  
3 full label?

4 Q. Certainly. I understand that. But you are accepting  
5 that there might be some pricing constraint upon Auden  
6 during the relevant period. It may have been one of the  
7 factors explaining movements in Auden's pricing?

8 A. I am not sure I am on the basis of the evidence. So,  
9 I do not think the evidence shows that skinny label is  
10 constraining the price of full label, because, as you  
11 can see here, full label is consistently priced  
12 substantially above skinny label.

13 In my view, the evidence is more consistent with  
14 Auden deciding that it does not want to compete with  
15 skinny label and is simply pricing to a different level.  
16 There is no price competition between skinny and full  
17 label.

18 Q. I appreciate that the data is a bit lumpy. It is hard  
19 to read too much into individual items. But if you were  
20 looking at a price reduction immediately following  
21 Alissa's entry, that is at least consistent with  
22 a competitive interaction on price during that period  
23 and with Alissa's entry winning volumes, forcing  
24 the price -- the Auden price down in contrast to the  
25 prior increases that you have seen over the two years

1           that preceded?

2           A. But, again, I think it is important to distinguish which  
3           price movements we are talking about, because if we are  
4           talking about the March/April one and the June/August  
5           one, then I have already explained that those are due  
6           to, first of all, Auden being -- entering into the  
7           Scheme M and that is why you see this decline in the  
8           drug tariff and that second decline is because of the  
9           margin survey. So, those two declines that we see  
10          in March/April and June/August in Auden's prices are  
11          consistent with the decline in the drug tariff which is  
12          nothing to do with skinny label.

13                 If we are just talking about the January 16, that  
14          little dip and then back up, it could be. I do not  
15          know. It seems a lot to be putting a lot of influence  
16          on one small dip which increased afterwards.

17          Q. Yes, but it could be?

18          A. It could be, but it seems to be attributing a lot of  
19          weight to a hiccup.

20          Q. But you accept that it is quite difficult to  
21          disentangle. It goes back to the point that I think the  
22          chairman put to you about the difficulty in the absence  
23          of a counterfactual indication of disentangling the  
24          effects at work here, the direct and the -- the  
25          potential direct and indirect constraints?

1       A. So, again, not really, because if there was strong  
2            competition from skinny, I would expect the evolution of  
3            full to be a lot similar to skinny, ie the full label  
4            price would be pricing at the level of skinny label  
5            because they would be competing with each other. The  
6            fact that throughout this entire period full label is  
7            able to charge substantially more than skinny label and,  
8            indeed, as I have shown elsewhere in my report,  
9            substantially above the competitive price of full label,  
10           is all consistent for me to consider that full label and  
11           skinny label are not in the same market and, therefore,  
12           they are not a sufficient constraint. The degree of  
13           competition is not sufficient.

14       Q. Can I just return to a factual question?

15       A. Please.

16       Q. Obviously, you are developing points, and this is no  
17           criticism of you, by reference to the operation of the  
18           drug tariff, which I think do not feature in any of the  
19           written materials that you have presented. Can you just  
20           confirm to me when you consider Auden joined the drug  
21           tariff?

22       A. So my understanding is that Auden joined the drug tariff  
23           in, I believe, it is March 16.

24       Q. Could we go to 3.180 in the Decision?

25       THE PRESIDENT: Just pausing there for a moment, Mr Holmes.

1 I suspect there is going to be a need to ensure that we  
2 have a common understanding of who joined which scheme  
3 when. The ambulatory draft, I think, has some details  
4 about the drug tariff and its operation, but I do not  
5 think it has all of the who joined what when detail that  
6 clearly we are going to need to have, because of course  
7 our expert economists are not able to give factual  
8 evidence. They comment on the facts as they are found.

9 So we are, I think, going to need the parties to  
10 ensure that there is complete agreement, not on the  
11 significance of the facts, there we expect disagreement,  
12 but on the factual base they are commenting on. I know  
13 you are going to take the witness to some points now to  
14 ensure that you and he are talking on the same factual  
15 premises.

16 MR HOLMES: Yes, it was really just to clarify whether we  
17 were proceeding on different factual footings.

18 THE PRESIDENT: Indeed.

19 MR HOLMES: I am not sure that it much matters for the  
20 underlying economic debate that we are engaged in. But  
21 I simply note that 3.180 in the Decision, which I think  
22 is based on section 26 responses received, notes that  
23 Accord-UK, which took over sales of Hydrocortisone  
24 tablets from AM Pharma from 1 September 2015 onwards,  
25 was a Scheme M member since its inception effective

1 from April 2005. That is 3.180 {A/12/92}. Do you have  
2 that?

3 A. I do.

4 Q. I am not sure that we can take matters much further  
5 today, but that does not appear to be consistent with  
6 your understanding of when Auden joined the drug tariff  
7 mechanism through Scheme M?

8 A. Yes, I was looking at the underlying data which the CMA  
9 has provided that makes up the drug tariff to see how it  
10 was changing.

11 Q. I see.

12 A. So --

13 Q. We might need to pick that up, because obviously that is  
14 not prefigured in any written evidence.

15 A. That is correct.

16 THE PRESIDENT: To be clear, Dr Bennett, you have looked at  
17 the precise manner in which from time to time the drug  
18 tariff was computed and you have looked at the input.

19 A. Correct.

20 THE PRESIDENT: You have seen -- drawn certain conclusions  
21 from that?

22 A. That is correct.

23 THE PRESIDENT: Again, it is not a criticism, but that  
24 working I think we need to have exposed rather than, as  
25 it were, implicit in the cross-examination, because it

1           may matter and if it does matter, then we need to  
2           understand, with as much granularity as you have  
3           examined, what is going on.

4           A. Of course.

5           THE PRESIDENT: Do you have, as it were, workings that can  
6           be produced? Would it assist you, Mr Holmes, to have  
7           those?

8           MR HOLMES: I think it would certainly be useful to  
9           understand the basis on which Mr Bennett is giving his  
10          evidence and, again, no criticism -- it is clear that  
11          his thinking -- he has done substantial work since even  
12          the joint expert statement and has reached particular  
13          conclusions based upon that, which have not been  
14          presented in an orderly fashion through his team so that  
15          we could understand and consider them.

16          Mr Bennett, I think during the course of  
17          cross-examination has accepted that it remains the case  
18          that the entry of skinny label suppliers who were in  
19          Scheme M did lead to price falls in the price of --  
20          although he will correct me if I have any of this wrong,  
21          in the price of full label tablets and, therefore, one  
22          of the mechanisms at work was an indirect constraint,  
23          which I think accords with the position in the Decision.  
24          There may be slight differences as to when exactly that  
25          indirect constraint kicked in and I respectfully agree



1 with you, sir, that it would be helpful to understand  
2 the basis on which Mr Bennett has formed the views that  
3 he has.

4 I am not sure that we can take matters much further  
5 today for the purposes of oral examination on that  
6 particular topic.

7 THE PRESIDENT: Mr O'Donoghue, ordinarily, I would give the  
8 warning to the witness that I give all witnesses not to  
9 speak about his evidence. It seems to me, but I raise  
10 it so that you can think about it -- it seems to me that  
11 this is something that I ought to invite Dr Bennett to  
12 speak with your team about so that the further thinking  
13 that Dr Bennett has articulated is expressed in a way  
14 that is capable of clearer examination. I mean,  
15 basically, we have a choice here. We can say, look,  
16 this has not been, for whatever reason, traversed in the  
17 expert evidence and I am just not going to hear it.  
18 That I am very much not inclined to do, unless it is  
19 unfair to the CMA and Mr Holmes is not making that point  
20 yet.

21 MR HOLMES: No, sir.

22 THE PRESIDENT: But it does need to be brought out. Is that  
23 something that, starting with you, you would be happy  
24 undertaking? How we handle it in terms of Dr Bennett  
25 coming back to the witness box or not is a matter that

1           we will have to debate. But taking things step by step,  
2           is that something that you could in pretty short order  
3           undertake with the witness, if I gave permission for the  
4           purdah to be breached in that regard?

5           MR O'DONOGHUE: Sir, I am sure we can. It is clear, sir,  
6           that there is a degree of cross-purposes. It would be  
7           much more efficient for all the cards to be on the table  
8           and we can cut through this. It may be in the end this  
9           is not actually much of a difference.

10          THE PRESIDENT: Maybe. We do not know. But the first thing  
11          is to find out.

12          MR O'DONOGHUE: Yes.

13          THE PRESIDENT: So you are happy, Mr Holmes.

14          MR HOLMES: Yes, sir, my proposal would be that we continue  
15          with the oral examination of Dr Bennett. We cover all  
16          of the topics we can today. Dr Bennett concludes his  
17          evidence for now so that purdah is lifted. He can then  
18          liaise with his team and they can provide a short note  
19          which crystallises these points. They may very well, as  
20          Mr O'Donoghue I think fairly recognises, make no real  
21          difference, but I quite see that the tribunal will want  
22          to understand the points being put and to ensure that we  
23          have had an opportunity to consider them and address  
24          them.

25                 If necessary, then Dr Bennett can be recalled and we

1 can discuss them again then or, otherwise, if we think  
2 they do not make any difference, we can deal with them  
3 by way of submission. Would that be convenient to the  
4 tribunal?

5 THE PRESIDENT: Yes, and what you are saying, I think,  
6 Mr Holmes, is that we should not rush our fences. We  
7 have enough time for the work to be done after  
8 Dr Bennett has left the witness box, which we hope is  
9 today.

10 MR HOLMES: Yes.

11 THE PRESIDENT: I do not want that to be taken the wrong  
12 way, but we do want to ensure we start Mr Bishop and so,  
13 therefore, we will deal with it that way rather than  
14 otherwise.

15 MR HOLMES: I would hope so, sir. I think it is quite  
16 a short point and it could be dealt with, if necessary,  
17 very crisply and I do -- my -- we will see, but my  
18 suspicion is that it is not something that will actually  
19 require further evidence, sorry, further oral evidence.  
20 It may well turn out to be something that is well within  
21 the parameters of the debate which is already in train  
22 between the parties.

23 THE PRESIDENT: Okay. That is very helpful, Mr Holmes. In  
24 that case, we will not take it any further. We will  
25 deal with it after you have left the witness box,

1 doctor. Good.

2 Were you moving on to something else, because I had  
3 a question or two about figure 4.10 which we had on the  
4 screen previously?

5 MR HOLMES: I also, I think, had a question on 4.10, if it  
6 is the one that I remember. So how would you prefer to  
7 proceed, sir? Do you want to ask --

8 THE PRESIDENT: Let us get the figure back up. Sorry.

9 PROFESSOR MASON: One issue that it would be particularly  
10 worthwhile, I think, considering in the discussion that  
11 you will have is what I felt to be a new argument that  
12 you introduced about -- and we will use economists speak  
13 as a shorthand -- lags and causality.

14 So I think that no doubt you had it in mind anyway,  
15 but that is an area that ought to be paid attention to.

16 A. Okay.

17 MR HOLMES: Just to be clear, I apprehend that that will be  
18 in any further short statement that were produced or  
19 report that were produced addressing this point.

20 PROFESSOR MASON: I would not wish to be prescriptive, but  
21 that is the sort of thing I had in mind, yes.

22 MR HOLMES: Thank you, understood.

23 THE PRESIDENT: In fact, that is going to be the subject of  
24 my question on diagram 4.10, so I suspect we are all  
25 galloping in the same direction, but let us get the

1 diagram up. Mr Holmes, I think you should ask your  
2 questions first and then we will row in behind if that  
3 is still necessary.

4 MR HOLMES: I think actually my question is more convenient  
5 by reference to figure 4.11, so why do you not proceed  
6 on your question on 4.10. It is in the Decision at  
7 {A/12/344}.

8 THE PRESIDENT: It is really a chicken and egg, which came  
9 first question, that you are debating with counsel and  
10 what you are saying is that the debate is: does the drug  
11 tariff inform the Auden price or does the Auden price  
12 inform the drug tariff?

13 A. Correct.

14 THE PRESIDENT: What you say is that because the drug tariff  
15 tracks, never perfectly, but tracks the full label  
16 tablet price for Auden/Actavis on this diagram without  
17 any kind of lag, that leads you to think that there is  
18 a greater influence of drug tariff on Auden price than  
19 vice versa.

20 A. That is correct.

21 THE PRESIDENT: Now, the gap between the solid red line  
22 representing the Auden/Actavis full tablet price and the  
23 broken red line representing the drug tariff price, that  
24 gap exists because there are additional costs which are  
25 incurred by the purchasers of the medicament which they

1           need to be able to recover when they sell it. Is that  
2           right?

3           A. That is my understanding.

4           THE PRESIDENT: So things like display, transport, that sort  
5           of thing?

6           A. That is the margin that is provided to the pharmacists  
7           in order to dispense the product.

8           THE PRESIDENT: So is the uniformity of the gap between the  
9           broken red line and the solid red line informed by those  
10          costs? In other words, if you brought the red line up,  
11          would that cause a squeeze such that it would no longer  
12          be economical to purchase Auden/Actavis medicaments  
13          because you would just make a loss?

14          A. Obviously, this is straining into factual questions and  
15          areas outside of my expertise, but that is my  
16          understanding, yes.

17          THE PRESIDENT: Doctor, we can take it that both your and my  
18          understanding will be corrected by the parties on any  
19          question of fact, so we will proceed on that basis and  
20          we will both be told off if we have got it wrong.

21          A. Thank you.

22          MR HOLMES: I would never presume to tell the tribunal off,  
23          sir, on any topic.

24          THE PRESIDENT: So if that is right, the profit maximising  
25          vendor in Auden/Actavis's position will always want to

1 ensure that the gap between the red line and the hatched  
2 red line is so close as to maximise the revenue that you  
3 get through selling, which means that you have got to  
4 give enough margin for those buying it to themselves  
5 make a profit.

6 A. Unless you face competition from other products, in  
7 which case you have to reduce your price, regardless of  
8 the level of that gap, and that is exactly the point  
9 that I am making, because if you would have had  
10 competition from skinny label, I would have expected  
11 them to have reduced their price, even though they would  
12 have preferred to keep it very close to the dotted line  
13 as you indicated.

14 THE PRESIDENT: I understand. That is helpful. Just  
15 sticking to the chicken and egg or egg and chicken  
16 question. Do forgive the lack of clarity with which  
17 I am framing this, because the reason I am asking the  
18 question is because I do not think I have it completely  
19 clear in my mind, but is it a question that if we are  
20 satisfied that the drug tariff informs the Auden price,  
21 because it is in Auden's interests -- excluding the  
22 potential for competition, it is in Auden's interests to  
23 ensure that price is as high as possible, whilst  
24 maintaining its market, does that exclude the  
25 possibility of there, nevertheless, being an influence

1 of Auden's price on the drug tariff line?

2 In other words, is it binary? Is it drug tariff  
3 informs Auden price or Auden price informs drug tariff  
4 or is there the possibility of a mechanism that is, as  
5 it were, hidden behind the scenes, where there is,  
6 nevertheless, although the Auden price is for the  
7 reasons we have discussed tracking the drug tariff,  
8 nevertheless, the Auden price is still influencing the  
9 drug tariff or is that simply a possibility that is  
10 closed out by effectively logic?

11 A. So clearly the drug tariff will be influenced by Auden's  
12 price two quarters after Auden prices and so there will  
13 be a lagged influence. The implications on whether that  
14 has some degree of influence on the current price  
15 I think is unclear. I am -- sorry.

16 PROFESSOR MASON: Again, this sounds a little narrowly  
17 technical, but I think cuts through. Have you actually  
18 had the chance to perform the econometric analysis on  
19 the time series and the VAR analysis and all that kind  
20 of stuff?

21 A. No.

22 PROFESSOR MASON: At the moment, this is kind of a little  
23 more than eyeballing.

24 A. Correct.

25 PROFESSOR MASON: But it is a visual analyses.



1       A. Correct. This is something that -- given that it came  
2       up yesterday, it was something that I wanted to look at  
3       and all I have done is shifted the lines, two periods,  
4       to see what looks like it makes more sense. So I do not  
5       want to overstate that I have done a huge amount of work  
6       on this. All I am saying is that I have looked at what  
7       seems to be a closer fit visually, the two period lagged  
8       versus contemporaneous.

9       THE PRESIDENT: Yes, but what I think you have said, but  
10      please do correct me if I have got it wrong, is that if  
11      you see the ability in the market to increase your  
12      price, then you will aim to do that even if it means  
13      squeezing the margin in the contemporary sphere, because  
14      in the longer run if you maintain the upward trend of  
15      your price in arrears, the drug tariff will follow on an  
16      upward trend as well.

17     A. If you are not subject to any other constraints.

18     THE PRESIDENT: Indeed.

19     A. Correct.

20     THE PRESIDENT: I am grateful. Thank you very much, doctor,  
21      I apologise for taking you out of your way.

22     MR HOLMES: Thank you, sir.

23             If we could just go back for a moment to figure 4.1.  
24      I think it is really traversing ground we have already  
25      covered, but it is just to confirm the point.

1 {IR-A/12/299}, please. This was the figure which  
2 shows -- superimposes the price trends and the volume  
3 trends and we have agreed, I think, that there is  
4 a competitive substitution for those pharmacies that  
5 switch to the cheaper products that are on offer from  
6 the new entrant skinny label suppliers. That is  
7 correct, is it not?

8 A. So you use the phrase "competitive substitution" and  
9 perhaps that is a phrase and, again, I do not want this  
10 to be a semantics, but perhaps that is a phrase  
11 I disagree with, because I would say that there is  
12 substitution, there is migration, there is a movement  
13 away, but whether that is competitive in the sense that  
14 the two parties are competing and, in particular, is  
15 Auden competing with the skinny labels for those  
16 volumes? That is a separate question.

17 Q. I understand. So Auden -- there is a question about  
18 whether Auden may or may not be competing with the  
19 skinny suppliers to win the business?

20 A. Correct.

21 Q. But there is, nonetheless, just in ordinary language, is  
22 there not, a choice, a competitive choice which opens  
23 up, following skinny label entry from the perspective of  
24 the purchasing pharmacists and large numbers of  
25 pharmacies exercised that choice in favour of the

- 1 cheaper option that is available?
- 2 A. I agree.
- 3 Q. You see the scale of that volume substitution over time  
4 in this chart and you would agree, I think, from the  
5 light grey lines that a large portion of the demand  
6 previously served by Auden, prior to independent entry,  
7 is now served by the skinny label suppliers, around half  
8 of volumes. Would you agree?
- 9 A. I agree. By around December 17, I would say it is  
10 roughly 50% and it stays relatively constant at 50% over  
11 the entire time period.
- 12 Q. Yes. The final proposition of fact. Let me put the  
13 proposition and then we can discuss it. Auden and  
14 Actavis's documents prior to skinny label entry show  
15 that they understood that such entry would lead to this  
16 process of substitution resulting in a loss of a large  
17 part of Auden's customer base and in significant price  
18 reductions. Are you in a position to agree or disagree  
19 with that statement or have you not looked at any of the  
20 underlying documents?
- 21 A. I have looked at the underlying documents, but I would  
22 not profess to be an expert and have read every single  
23 underlying document.
- 24 Q. No, that is well understood.
- 25 A. I understand that, yes, that does seem to be consistent

1 with Auden's view from what I have seen. I understand  
2 also though that there is some dispute about whether  
3 AMCo believed that it was going to win significant  
4 volumes on skinny label or not.

5 Q. Of course I do not ask you to comment on that factual  
6 dispute. But I would like to show you just a handful of  
7 the contemporaneous documents.

8 A. Please.

9 Q. These may be ones you have already seen. They may not  
10 be. It is just to see really -- I would like to get  
11 your comments on them and to see whether we are on the  
12 same page. I apprehend we probably will be based on  
13 what you have just said.

14 The first is a communications proposals slide deck  
15 which was developed in support of Auden's  
16 Project Guardian. It is at {IR-H/441/3}. Are you aware  
17 of Project Guardian?

18 A. I am.

19 Q. So you know that it is an initiative designed -- it was  
20 an initiative designed to influence healthcare  
21 professionals and stakeholders against off-label  
22 dispensing in anticipation of AMCo launching a skinny  
23 label product. Is that a fair summary?

24 A. Yes, that is fair.

25 Q. Picking it up on page 1, so we can see this. You see

1 that this is a proposal to support Project Guardian and  
2 it is dated 16 April 2014 and it is prepared by a PR  
3 firm Salix.

4 Then turning to page 3, the background is explained.  
5 If we could look together at the first two bullets.  
6 They explain that:

7 "Auden is reacting to a potential threat to its  
8 market share of hydrocortisone 10mg tablets.

9 "The threat comes from new arrival, Amdipharm, [that  
10 is a skinny label version] whose product may be adopted  
11 as a cheaper alternative to the current market leader."

12 Now, can we agree that this suggests that Auden  
13 anticipated that it would lose a share of its market  
14 prior to entry to skinny label entrants, if they were to  
15 enter, and was concerned to protect itself against this  
16 potential source of competition?

17 A. I agree.

18 Q. The second document I would like to consider with you is  
19 a presentation prepared by Actavis regarding its  
20 potential acquisition of Auden. You are aware that  
21 Actavis bought Auden and, as you would expect, prior to  
22 that, it conducted due diligence and there was  
23 a negotiation over the terms of sale?

24 A. Yes.

25 Q. The document is at {IR-H/646/1}. So you see that this

1 is a document which dates from January 2015, the year in  
2 which competitive entry in fact occurred. I think  
3 Project Apple was the code name for the Auden  
4 acquisition, but I will be corrected if I am wrong about  
5 that.

6 If we could turn to slide 6 in the pack, you see  
7 that there is a discussion of Hydrocortisone {H/646/6}.  
8 Looking down the list of bullets, you see that.

9 "Hydrocortisone Tablets are the lead Auden product  
10 with an expected decline in contribution due to new  
11 generic entrants."

12 The second bullet explains that only Auden has the  
13 adrenal insufficiency in adults indication.

14 The next two bullets refer to other MAs without that  
15 indication after the Plenadren sub-bullet and then  
16 focusing on the final two bullets, you see there that:

17 "Actavis has modelled competitors entering in 2015  
18 without indication for adrenal insufficiency and being  
19 launched and dispensed off label."

20 In the final bullet, the forecasts are set out:

21 "Modelled share erosion of 60% and price erosion of  
22 90% over 3 years."

23 So, again, I think you would agree that this shows  
24 serious concern about the impact that this potential  
25 source of competition from skinny label tablets would

1 have on Auden's volumes and prices?

2 A. I agree. At that time in January 2015, this seems to be  
3 a reflection of Actavis's views.

4 Q. Yes. It turns out that this was a reasonably accurate  
5 prediction, judging by the market data we have looked  
6 at, share erosion of 60%, price erosion of 90% over  
7 three years. Certainly in --

8 A. Share erosion we see 50%, but 60% that is quite close  
9 and price erosion of 90%, again, via the drug tariff,  
10 yes, that seems to be reasonable.

11 Q. Finally, third, can we consider an internal Auden email.  
12 It is at {IR-H/653/1}. You see just looking at the top  
13 of the page -- if we could enlarge that for people like  
14 me whose eyes are failing -- you see that the date is  
15 22 January 2015. So that is around the time of the  
16 Actavis slide deck we just looked at.

17 It records the fact that Allergan reduced its offer  
18 for Auden by £220 million. You see in the second  
19 paragraph, the 520 million figure reduced to 300 million  
20 plus earn out, specifically because of the threat to  
21 Auden's market share that was perceived from off-label  
22 dispensing of skinny label tablets.

23 So if you look down the page at the fifth paragraph,  
24 you see an expert from Actavis, whose name is blanked  
25 out, expressed his opinion that the MHRA had no grounds

1 to stop MAs being granted for other indications apart  
2 from the treatment of adrenal insufficiency in adults.  
3 That is to say skinny label MAs.

4 In the sixth paragraph, you see reference to  
5 a marketing authorisation for Hydrocortisone 10mg being  
6 granted to Orion.

7 In the final sentence of the paragraph an Actavis  
8 person went so far as to say that:

9 "Actavis were no longer excited about the deal and  
10 Auden should find a new acquirer as Actavis were  
11 seriously concerned about the new Orion licence being  
12 used off label and the impact this would have on their  
13 investment if they acquired Auden."

14 Do you see that? Sorry, I took it quite fast.

15 A. I am not familiar with this email, but yes, I see what  
16 you are referring to. I have not read it in detail,  
17 but, yes, I see what you are referring to.

18 Q. Then the final paragraph you see the reduced price which  
19 represents a total and complete de-risking of  
20 Hydrocortisone for Actavis and only an earn out  
21 depending on their success to market Hydrocortisone  
22 tablets.

23 So, again, would you accept that the incumbent --  
24 based on this document, and I appreciate you have not  
25 had long with it, the incumbent and its purchaser, both



1 experienced operators in the market, viewed the advent  
2 of skinny label as likely to have a substantial impact  
3 on Auden's position in relation to Hydrocortisone  
4 tablets?

5 A. Yes, I agree, it was -- I think this is consistent with  
6 it having a substantial impact on the volumes that Auden  
7 provided.

8 Q. Yes. I am grateful.

9 Can we now turn, please, to consider how you analyse  
10 the developments in your report. We have covered some  
11 of this ground in the course of discussion, but can  
12 I return to a few of the themes?

13 A. Please.

14 Q. So you make a number of observations as to why these  
15 price and volume trends should not be viewed as  
16 conclusive for the purposes of market definition in this  
17 particular context. I would like to consider those with  
18 you now.

19 One of the points you make is that the initial  
20 substitution seen from full to skinny label tablets  
21 resulted from the launch of a new product and that such  
22 switching does not necessarily mean that there will be  
23 any ongoing competitive constraint on the old product.

24 I think you describe it as a one-off relocation of  
25 customer demand to a product that was not offered

1           before. Have I correctly captured the point in broad  
2           outline?

3       A. That is correct, alongside the issue around the  
4           cellophane fallacy, but perhaps we will come on to that  
5           separately, but it is those two combined effects that  
6           are having the impact.

7       Q. That is very helpful. They work together in fact?

8       A. Correct.

9       Q. You identify them as having a reinforcing effect on one  
10           another?

11      A. Correct.

12      Q. You would accept, I think, that there was an initial  
13           interaction between full and skinny tablets from the  
14           point of view of purchasers, the people making a choice.  
15           Skinny labels were launched. They were priced more  
16           favourably and they rapidly won the business  
17           of price-sensitive pharmacists. That is fair, is it  
18           not?

19      A. Yes, again, whether that is a fair interaction between  
20           skinny and full is a separate question. It is clear  
21           that the facts that you stated are true.

22      Q. Yes. Just to look at how you put it in your second  
23           report at {D3/2/10}. At the top of the page you say:  
24            "In the current case once some customers migrated  
25           from 10mg full label to skinny label, there was no

1 subsequent ongoing constraint posed by skinny label  
2 tablets on full label tablets or vice versa."

3 So, no ongoing constraint. But the switching to the  
4 cheaper product is competition at work, would you not  
5 agree? Pharmacies getting better prices because of  
6 a new version of a product which they were happy to  
7 substitute for Auden's more expensive offering, that is  
8 price competition, is it not?

9 A. Again, I think we are drawing a distinction here between  
10 competition in terms of Auden competing -- full label  
11 competing with skinny label versus skinny label coming  
12 in at a substantially lower price and people switching  
13 to skinny label and what I am saying is I do not see  
14 Auden competing with the skinny label providers.

15 Q. Yes, I understand. They did not compete is your point?

16 A. Correct.

17 Q. They did not reduce their prices responsively, that is  
18 what you say the evidence shows?

19 A. Correct.

20 Q. But there is a winning of the business as a result of  
21 a lower price being offered and a large volume of  
22 customers choosing the cheaper option. Can we agree on  
23 that description?

24 A. Yes, we can agree on that.

25 Q. Pharmacies getting better prices because of the new

1 version of a product which they were happy to substitute  
2 for Auden's more expensive offering?

3 A. So pharmacies were getting better prices for the skinny  
4 label product, but they were not getting better prices  
5 for the full label product.

6 Q. Yes. But those who were prepared to switch, who made  
7 the move, moved their volumes, got better prices in  
8 consequence?

9 A. Correct.

10 Q. Your second point is that the initial -- this initial  
11 shift was stoked by the high prices prevailing prior to  
12 entry, which may have led to switching between products  
13 that would not occur at competitive price levels. Is  
14 that a fair summary?

15 A. That is a fair summary.

16 Q. You explain that point in the second report at {D3/2/9}  
17 at paragraph 23 and 24. So at paragraph 23 you identify  
18 what you say are two problems with Professor Valletti's  
19 approach. First, you say that it ignores that skinny  
20 label entry happened when full label tablets were  
21 subject to excessive prices under the CMA's case. Then  
22 at paragraph 24 you say:

23 "It is intuitive that as the price of full label  
24 tablets under monopoly increases the benefit to  
25 customers of switching to a product where price is

1           determined through competition increases as well. This  
2           makes skinny label tablets a stronger competitive  
3           constraint on full label tablets at higher prices."

4           So just pausing there. Your point is that the  
5           initial switching was driven in part by the high prices  
6           prevailing prior to entry which made the skinny  
7           suppliers a stronger competitive constraint during the  
8           initial period following entry than they would be if  
9           prices were at competitive levels. Is that fair?

10          A. That is fair.

11          Q. This is because the high pricing increased the customer  
12           benefits obtainable from switching once a competitive  
13           alternative became available?

14          A. That is correct, relative to what would have happened at  
15           the competitive price.

16          Q. Yes, and, indeed, you considered that a good proxy for  
17           the competitive price is the price of the 20mg tablets  
18           in 2021, I think, which was around £1.99?

19          A. That is correct.

20          Q. So the price was very substantially above the  
21           competitive price at the time of entry. It stood around  
22           £70, I think.

23          A. Yes, and indeed was substantially -- the full label  
24           price was substantially above the competitive price for  
25           the entire period of which we have data for and that is

1 one of the reasons why I consider they are in a separate  
2 market, because, obviously, a monopolist, a single  
3 provider of full label, is able to price today  
4 substantially above the competitive price.

5 Q. Yes. In other words, following an initial migration and  
6 as prices of skinny tablets fell, Auden/Actavis was left  
7 as a monopolist in a re-drawn market now confined to  
8 full label tablets. Is that fair?

9 A. So, again, what I have not looked at is exactly what is  
10 the relevant market in the sense of is it two separate  
11 markets? Is there a separate market for skinny versus  
12 full in the sense -- sorry, what I have looked at is  
13 there a single market and does the evidence support  
14 there being a single market? What I have not opined on  
15 exactly is where do you delineate the two separate  
16 markets with regard to full and skinny.

17 Q. So are there any alternatives other than a full label  
18 market in terms of --

19 A. So there is a full label market in which only Auden is  
20 providing and although it is not something I have looked  
21 at in detail, I would say there is a skinny label market  
22 in which Auden is not competing.

23 Q. Yes. So I think you agree then that the logic of your  
24 position on market definition, this bifurcation, if you  
25 like, or this lack of an ongoing competitive constraint

1 is that you are left with a full label market in which  
2 Auden is insulated from competition and is able to  
3 price, as you said, well above the competitive price and  
4 in a monopoly position?

5 A. Yes, that is correct.

6 Q. I am grateful. We have discussed that prices of full  
7 label tablets have declined to a huge extent and have  
8 continued to decline and I think you accept that the  
9 entry of skinny label suppliers who were within the drug  
10 tariff led to those price reductions. Is that right as  
11 a contributing factor?

12 A. Sorry, can you repeat the question.

13 Q. Yes, of course. We have agreed, I think, that prices of  
14 full label tablets have declined to a huge extent?

15 A. Correct.

16 Q. Following entry by skinny label suppliers. I think you  
17 have accepted that it was the entry of skinny label  
18 suppliers who were members of the drug tariff which  
19 clearly led to price reductions. Is that right?

20 A. Again, just to be clear on this distinction, it is the  
21 entry of the skinny label suppliers into the drug tariff  
22 which created the reductions in the full label price.  
23 It is not the entry of skinny label suppliers per se.

24 Q. Well --

25 A. If they had not come into the drug tariff, then I would

1 not have expected to see the decline in the price of  
2 full label.

3 Q. But, to be clear, the suppliers in question were already  
4 members of Scheme M. What changed was that they  
5 launched skinny label tablets so that their sales were  
6 captured in their Scheme M data and, thereby, had an  
7 impact on the level of the drug tariff applicable to  
8 Hydrocortisone tablets. That is right, is it not?

9 A. I think we are saying the same thing. I am just drawing  
10 a distinction between entry of skinny label into the  
11 market and entry of skinny label into the drug tariff  
12 and I am saying it is the entry of skinny label into the  
13 drug tariff which caused the decline in full label, not  
14 entry into the market of skinny label, absent the drug  
15 tariff.

16 Q. But it was the entry of skinny label suppliers who were  
17 members of the drug tariff who had an impact on the drug  
18 tariff price. I think we are saying the same thing, but  
19 I just want to make sure?

20 A. We are saying the same thing.

21 Q. You do agree with that proposition, yes.

22 THE PRESIDENT: Yes, so we have agreement on that  
23 proposition, just to make sure the transcript is  
24 reflecting.

25 A. Well, I do not want to repeat what I keep on saying.



1 All I am saying is that I think there is a difference  
2 between the entry of skinny label, without it coming  
3 into the drug tariff, and the entry of skinny label into  
4 the drug tariff. I am saying the causality is running  
5 because the entry of skinny label came into the drug  
6 tariff and that caused the price declines. It is not  
7 the entry label -- the entry of skinny label, absent the  
8 drug tariff, and the impact of the drug tariff. That is  
9 the point I am trying to make.

10 MR HOLMES: The point that I am seeking to make, to be  
11 clear -- we can distinguish. There were several skinny  
12 label entrants over time.

13 A. Correct.

14 Q. There were the skinny label entrants who were not  
15 members of the drug tariff. They launched products and  
16 your point is that they would not have a direct impact  
17 on the level of the drug tariff by reason of being  
18 members of Scheme M and their data counting towards  
19 Scheme M?

20 A. Correct.

21 Q. There were other skinny label suppliers who entered the  
22 market and as a result of their entering the market they  
23 provided Scheme M data and the level of the drug tariff  
24 fell. But it was their entry, it was the entry of that  
25 latter group into -- it was the commencement of supply

1 of skinny label tablets by that latter group which led  
2 to reductions in the drug tariff. That is correct, is  
3 it not?

4 A. That is correct, but only because they were in the drug  
5 tariff.

6 Q. Yes.

7 THE PRESIDENT: So just to be absolutely clear. If one had  
8 got only the entry of suppliers of skinny label product  
9 who did not through their entry in any way affect the  
10 drug tariff, then you would not expect there to be any  
11 change for that reason, at least, to the price of full  
12 label.

13 A. I am saying I would not expect there to be any  
14 significant changes. There may be some changes and I do  
15 not want to rule out the fact that there could have been  
16 some changes in price. But I am saying I would not  
17 expect there to be any significant changes in the price  
18 of full label.

19 THE PRESIDENT: But to say, to use the mantra all things  
20 being equal or excluding all other parameters, the mere  
21 effect of entry of such a competitor, of such an entity  
22 would not materially affect the full label price.

23 A. That is consistent with my other analyses that I have  
24 done and consistent with what I have -- yes, I agree.

25 PROFESSOR MASON: And therefore just so that I can be as

1 clear as I can be on what is being agreed, if we look at  
2 the transcript on page 54 and line 3 starting, the  
3 question that was put there is -- well the statement, we  
4 can put a question mark at the end:

5 "But it was the entry of skinny label suppliers who  
6 were members of the drug tariff who had an impact on the  
7 drug tariff price."

8 Is that a statement with which you agree?

9 A. Yes, I agree.

10 MR HOLMES: I am grateful. I think that confirms that there  
11 is no real dispute between us, but it is good to have  
12 clarified that.

13 Sir, I am conscious of the shorthand writer. We are  
14 very nearly done with Mr Bennett, at least on the market  
15 definition side, but would now be a convenient moment to  
16 take a short break?

17 THE PRESIDENT: Indeed, Mr Holmes. Thank you very much. We  
18 will resume at 20 to midday. Thank you very much.

19 (11.29 am)

20 (A short break)

21 (11.40 am)

22 MR HOLMES: Mr Bennett, could I briefly revisit a passage  
23 from the transcript earlier in relation to the new  
24 analysis that you have undertaken. It is at page 7 in  
25 lines 16-22. So page 7, today, lines 16-22. You say

1           there:

2                   "Auden only entered into Scheme M later on in the  
3           period. So my understanding is Auden entered into  
4           Scheme M in April 16."

5                   Do you see that?

6           A. Yes.

7           Q. Now, I think it is consistent in fact what you are  
8           saying with what is in the Decision, but I think it  
9           needs slightly teasing out?

10          A. Okay.

11          Q. If we could go to {IR-H/1118/1}. This is the -- and if  
12          we could go to page 2, please {H/1118/2}.

13          A. No, that is a wrong reference.

14          Q. So this is the data that was obtained from the  
15          Department of Health showing the calculation of the  
16          category M drug tariff reimbursement prices for  
17          Hydrocortisone 10mg tablets. Is this the data you were  
18          referring to?

19          A. Sorry, I do not have this up on my screen at the moment.

20          Q. So at the moment you should have a page with a heading  
21          "Hydrocortisone 10mg tablets Scheme M and Scheme W data  
22          and calculation of Category M Drug Tariff reimbursement  
23          prices".

24                   Is that not visible to you?

25          A. Yes, it is, but I do not see any actual data on the

- 1 page.
- 2 Q. We will come on to the data. If you go on then to  
3 page 4. {H/1118/4} and if you look at the October --  
4 I am sorry. We need to look at this in the confidential  
5 version, please. {IR-H/1118/4}. Is this the data you  
6 looked at, do you know, for the purposes of considering  
7 what led to changes in the drug tariff price?
- 8 A. The data I have looked at was not exactly in this form,  
9 but I think it derives from this data.
- 10 Q. Yes, I understand. If you look at October 2015 in the  
11 middle of the page, do you see there are three entries  
12 shown there, Kent, Mercury and Actavis?
- 13 A. Yes.
- 14 Q. Now, the Actavis data there in October 2015 is data from  
15 Auden, yes?
- 16 A. Yes.
- 17 Q. I think -- the reason why I say I think this is  
18 consistent with what we saw is that you said that Auden  
19 only entered the drug tariff in April 2016. We can see  
20 in fact they entered in October 2015, as per the passage  
21 in the Decision that I showed to you. I think the point  
22 you were making is that they started to impact --
- 23 A. Correct.
- 24 Q. -- upon the level of the drug tariff, given the  
25 six month lag --

1 A. Correct.

2 Q. -- with effect from April 2016?

3 A. Correct.

4 Q. I just wanted to make that clear.

5 A. Yes, that is correct.

6 Q. Very good. I am grateful.

7 Returning to the reductions --

8 PROFESSOR MASON: Mr Holmes, sorry to interrupt you. I am  
9 getting slightly distracted, and I think others may be  
10 as well, by something playing in the background.

11 (Pause).

12 MR HOLMES: So we were discussing before the break

13 ongoing -- the ongoing reductions in the price of the  
14 full label tablets. You attach primary significance,  
15 based on your review of the evidence, to the operation  
16 of the drug tariff as a constraint on the pricing of  
17 full label tablets which led to these very significant  
18 drops in full label pricing --

19 A. That is correct.

20 Q. -- once the skinny label suppliers within Scheme M  
21 started to contribute and their price competition in  
22 relation to the skinnies, then brought down the level of  
23 the drug tariff. That is right, is it not?

24 A. That is a fair summary, yes.

25 Q. You consider that there is only limited evidence that

1 the decrease in price was driven by direct constraints.

2 I think that is how you put it in the statement.

3 A. Yes, not sufficient to be found in the same relevant  
4 market.

5 Q. Yes. What I am not clear about is why you think it  
6 should matter for the purposes of market definition  
7 whether the price was constrained directly as a result  
8 of competition from skinny label suppliers acting on  
9 full label or through the operation of the indirect  
10 constraint whereby the skinny label competition  
11 constrained Auden/Actavis's pricing of the full label  
12 product.

13 Can you just explain the basis for that?

14 A. Yes. So, in my view, product market definition is all  
15 about whether products are substitutes for each other  
16 and whether, in response to a small change in price,  
17 people would be willing to switch to a different  
18 product. So, it is all about the fundamental degree of  
19 substitution.

20 What we are discussing here, this regulatory  
21 constraint, for me is not part of product market  
22 definition. It is an exogenous constraint outside of  
23 what we would normally think of within product market  
24 definition. So, for example, I could put in any random  
25 product, bananas, into that market definition into

1           that -- sorry -- into that drug tariff and if the price  
2           of bananas was competitive, it would drive the price of  
3           full label down. But I do not consider that bananas and  
4           full label tablets are substitutes.

5           Q. Is not that a slightly -- you will forgive me if I use  
6           the word absurd, but a slightly absurd example? Here we  
7           have products that are functionally identical. They are  
8           the same product in terms of their physical  
9           characteristics and they are linked by a regulatory  
10          mechanism so that the pricing of one form -- the tablets  
11          which are skinny label are confined in their  
12          indications, constrains the pricing of the full label  
13          indications as well? It is an unusual feature of this  
14          particular context, but these -- would it not be  
15          artificial to ignore that regulatory constraint on  
16          pricing in this context?

17          A. I am using an extreme example, the bananas example, just  
18          to show that a product which has no relevance and no  
19          relationship to full label could still have the same  
20          impact as we see on the price of full label and I am  
21          trying to -- because I am using that absurd example, the  
22          extreme example, I am just showing you that it is  
23          entirely separate from what I would consider as product  
24          substitution inherent competition between products,  
25          because customers are indifferent and willing to switch



1 back and forth given small price changes.

2 Q. Yes, I understand. I think that is very helpful. What  
3 it comes down to really is a view on your part that  
4 market definition is strictly confined to the  
5 hypothetical monopolist SSNIP framework and it should  
6 ignore the indirect regulatory constraint which in fact  
7 has a profound limiting effect on the price of full  
8 label tablets in this market -- in this context; is that  
9 right?

10 A. No, I do not think that is exactly right. So I do not  
11 think you only have to do market definition via the  
12 SSNIP test. I think there are other elements that you  
13 can look at. What I am saying though is I would expect  
14 all of those elements to be getting at fundamental  
15 substitution between products, are customers  
16 indifferent? Will customers switch back and forth when  
17 there are changes in price?

18 Q. Yes.

19 A. What I -- if I were to consider the regulatory  
20 constraint, I think it would be more appropriate to  
21 consider it, for example, in the dominance. So, is this  
22 exogenous regulatory constraint constraining prices?  
23 I do not feel like it is part of the market definition  
24 element.

25 Q. Yes. I wonder whether there is much value in our

1           debating that, because it becomes almost a philosophical  
2           question, does it not?

3           A. I will leave that for the court and other people to  
4           determine.

5           Q. Yes. But to be clear, I did not mean to suggest that  
6           your point was confined to formal SSNIP analysis. It  
7           was helpful to have the confirmation that a broader  
8           analysis within the hypothetical monopolist framework  
9           may be sufficient in your view, but the exercise of  
10          competitive substitution, as you understand it, is  
11          within the hypothetical monopolist framework, is it not?  
12          In other words, it is looking to see whether the price  
13          of one product is constrained by small but significant  
14          changes in the price of another product. Is that fair?

15          A. Again, I think the SSNIP is a very specific  
16          implementation of a broader test, which is when prices  
17          change, do we see changes in the quantity of another  
18          product? For me, that is a question of very just broad  
19          product substitution and you can get at that through  
20          a number of different ways. You could estimate it. You  
21          could estimate the demand equations etc. The SSNIP is  
22          one particular implementation of that broader question  
23          of, is there substitution? Do you see quantities  
24          shifting with changes in relative price?

25                 I guess that is what I am saying is the core of

1           whether a product is part of the same relevant market of  
2           another product or not.

3       Q.   Would you accept that insofar as there were some  
4           competitive interactions here, they would be quite  
5           difficult to disentangle from the parallel impact of the  
6           drug tariff mechanism on price?

7       A.   Again, no, not really.  Because the drug tariff only  
8           works one way.  You cannot price upwards, but you can  
9           price downwards.  I can always meet the price of skinny  
10          label as a full label supplier, if I choose.  Therefore,  
11          if full label was being constrained by skinny label,  
12          I would expect to see full label prices coming down much  
13          faster than what I am seeing in 10mg.  The fact that,  
14          consistently, full label prices are substantially above  
15          skinny label and secondly, the fact that even as full  
16          label prices start to come down relative to skinny  
17          label, volumes of skinny label and full label do not  
18          change, for me that is all consistent with the full  
19          label and skinny label not competing.  Therefore, that  
20          provides me with the ability to unentangle the two  
21          elements.

22      Q.   So you feel that you are confident that you can separate  
23           the two out and that there is no possibility of  
24           a competitive interaction during the period that we have  
25           considered?

1       A. Well, the analysis that I have undertaken looks at --  
2       regardless of what is driving the price changes between  
3       skinny and full label, is it having an impact on full  
4       label volumes? So it abstracts from what is causing  
5       that reduction, or that change in the relative prices,  
6       and simply looks at is that change in the relative  
7       prices driving significant changes in volumes? The fact  
8       that from, I think it was around October 2016, as you  
9       said, from that period, the relative share of skinny and  
10      full label is pretty constant, around 50%, but yet  
11      the price of full label is coming down much closer to  
12      skinny label with skinny label remaining relatively  
13      constant, so the price gap is declining. If there was  
14      the declining price gap, I would expect to see  
15      some degree of switching; for example, full labels  
16      becoming cheaper relative to skinny label and,  
17      therefore, I would expect to see, if there was  
18      competition between the two of them, volumes moving back  
19      to full label.

20             Now, that is not what I see. Volumes of full label  
21      and skinny label are pretty constant, even though the  
22      relative prices are changing over time and that allows  
23      me some degree of confidence -- I am going to say,  
24      actually, confidence -- that they are not part of the  
25      same relevant market.

1 Q. Yes, assuming that the indirect constraints are to be  
2 left out for the purposes of market definition?

3 A. Regardless of the indirect effect. So even with the  
4 indirect effect, the change in the price, the change in  
5 the relative prices, is not driving changes in quantity.

6 Q. No, no, you misunderstand.

7 A. Sorry.

8 Q. You misunderstand me. We are going back to the  
9 conceptual question of whether the indirect -- there is  
10 clearly an indirect constraint on the price of full  
11 label tablets. We have discussed that and we have  
12 agreed upon that.

13 A. Yes.

14 Q. We have seen that prices fell dramatically in the level  
15 of full label tablets over the period to 2019/2020, the  
16 final dates for which data are available in the  
17 Decision.

18 A. Yes.

19 Q. That is a constraint and you say that that constraint is  
20 not a relevant constraint for the purposes of market  
21 definition, because it does not go to substitution.

22 A. In my view, yes.

23 Q. I am saying that your conclusion about market definition  
24 rests on ignoring or discounting those indirect  
25 constraints on the basis that they do not derive from

1 substitution?

2 A. That is where I think we are disagreeing.

3 Q. Yes.

4 A. Because I am saying the analysis that I looked at with  
5 respect to relative prices and relative quantities does  
6 not differentiate between whether prices are changing  
7 because of -- those relative prices are changing because  
8 of competition or whether they are changing because of  
9 the drug tariff. They simply look at: are those changes  
10 in relative price driving a change in quantity?

11 So the fact that the changes in relative price are  
12 not driving changes in quantity means that, regardless  
13 of whether the price fall is becoming of the indirect  
14 effect or the direct effect, it does not matter. You  
15 are not seeing volumes change.

16 Q. Yes, but the volumes changing would be because of an  
17 ongoing competitive interaction between price and volume  
18 and switching because of the relative prices, no?

19 A. Correct.

20 Q. Exactly, and the point I am making is that prices  
21 clearly did fall. There is a constraint on price and  
22 the question is whether that should count for the  
23 purposes of market definition or not. We clearly  
24 disagree about that. The CMA considered that that was  
25 a relevant constraint to take into account for the

1 purposes of defining this market.

2 A. Sorry. I slightly lost the first part.

3 Q. No, of course. Let me take it in stages.

4 A. Please.

5 Q. The exercise that you have just described is going to  
6 see whether there is a competitive interaction, as you  
7 see it, between full and skinny labels?

8 A. Yes.

9 Q. That is the purpose of the exercise that you -- the  
10 analysis that you have conducted. Would you agree?

11 A. Yes, I agree.

12 Q. There is a constraint upon price which is operating in  
13 the market laying that to one side, laying to one side  
14 whether there is a competitive interaction. You would  
15 agree with that as well. The constraint of the drug  
16 tariff applies --

17 A. Yes.

18 Q. -- that carries across the competitive price interaction  
19 in relation to skinny to full label, regardless of  
20 whether there is also a direct competitive interaction  
21 between full and skinny. You would agree with that?

22 A. I agree. Via the drug tariff there is a constraint,  
23 I agree.

24 Q. The only point I am making to you is a very narrow  
25 one: your conclusions about market definition rest on

1 the position that that indirect constraint upon price is  
2 not the type of constraint that market definition for  
3 the purposes of competition law should be interested in.  
4 You should be looking for competitive interactions. Is  
5 that right?

6 A. But, again, that is ignoring the analysis that I did  
7 where I looked at regardless of where this price -- the  
8 falling prices are coming from, are the price changes  
9 sufficient to drive changes in volumes?

10 Q. Through substitution?

11 A. Through substitution.

12 Q. Through competitive substitution?

13 A. Correct.

14 Q. Yes, but --

15 A. Sorry. I am clearly misunderstanding.

16 Q. No, not at all. If the indirect constraint on price of  
17 full label tablets should be taken into account for the  
18 purposes of defining the market, irrespective of whether  
19 substitution was also in play, yes?

20 A. So irrespective of whether that had an impact on  
21 volumes.

22 Q. Yes, exactly.

23 A. Okay.

24 Q. Your point is -- your conclusions on market definition  
25 rest on the assumption that that is the case, that those



1 indirect constraints are not to be taken into account.  
2 That is right, is it not? For their independent impact  
3 on price.

4 I accept that your substitution analysis takes into  
5 account the reality of the price reductions that  
6 resulted from the drug tariff, but if the price  
7 reductions that the drug tariff brought about were  
8 themselves a constraint that should be counted for the  
9 purposes of market definition, they would supply an  
10 independent reason for defining a combined market.

11 The only point I am making is that you do not think  
12 they should be taken into account and that is part of  
13 the basis of your conclusions, is it not?

14 A. Can I just make sure I understand can question?

15 Q. Yes.

16 A. So is the question that if we only had evidence of both  
17 prices falling and we did not look at volume evidence  
18 and we did not look at how that affected quantities, if  
19 we just had those prices falling --

20 Q. By reason of the drug tariff?

21 A. -- by reason of the drug tariff, then would I consider  
22 that as evidence of them being in the same relevant  
23 market?

24 Q. Should they be treated as in the same relevant market?

25 A. I agree with you that I am saying they should not, given

1 the drug tariff.

2 Q. Because you are only interested in the constraints  
3 arising from the substitution, the competitive  
4 interaction leading to potential substitution?

5 A. Correct. If we were to ignore any of the analysis that  
6 I did on the combination of prices and volumes and only  
7 look at prices in isolation, then, yes.

8 Q. Yes, good. I think we are on the same page and we can  
9 leave that.

10 Can we now consider what the consequences would be  
11 if, contrary to the CMA's case, your market definition  
12 were adopted and the relevant product market post-entry  
13 of skinny label tablets were confined to full label  
14 tablets.

15 Now, I think we have agreed, as regards the analysis  
16 of market power, that a narrower market would make  
17 Auden/Actavis a monopolist and that the logic of such  
18 a narrowing is that it is not directly constrained by  
19 price competition from skinny suppliers. Is that  
20 correct?

21 A. Yes, that is correct.

22 Q. Subject to countervailing buyer power, that would only  
23 strengthen the CMA's conclusions as to Auden's  
24 continuing dominance, would you not agree, or is it  
25 something you feel you have not looked at?

1 A. Dominance, just to be very clear, is not an area I have  
2 looked at.

3 Q. Understood.

4 A. But I do see the logic of your statement.

5 Q. Yes, very good. You are aware that the CMA did look at  
6 countervailing buyer power and did consider that. I do  
7 not know if that is something that you have looked at?

8 A. It is not something that I have looked at to be honest.

9 Q. Very good. Now, turning to the analysis of the 10mg  
10 agreement. That topic is canvassed in the joint expert  
11 statement. If we could turn that up, please. It is at  
12 {IR-G1/1/28}. The relevant proposition is number 44.

13 It states that:

14 "Exact market definition does not matter to the  
15 assessments of the 10mg agreement."

16 You see that Professor Valletti agrees:

17 "Either Auden/Actavis was dominant and entered into  
18 an agreement to exclude a potential competitor (if full  
19 and skinny are in the same market) or Auden/Actavis was  
20 a monopolist in full label tablets market and the  
21 agreement delayed entry of constraint that put  
22 substantial downward pressure on prices and volumes of  
23 full label tablets (if separate full and skinny label  
24 markets). I tend to be more inclined toward the first  
25 explanation."

1           Now, looking across to the final column, we see that  
2           Mr Holt does not offer any views and I discussed that  
3           with him yesterday. Then you say in the penultimate  
4           column:

5           "Disagree. My understanding is that the market  
6           definition does make a difference as to whether they  
7           were considered actual or potential horizontal  
8           competitors, and therefore whether the agreement should  
9           be presumed to be anti-competitive."

10          Can I take it that what you are here expressing is  
11          not an economic view, but is instead referring to your  
12          understanding as to what the law requires for an  
13          agreement to be presumed anti-competitive?

14          A. In this statement, yes.

15          Q. I am grateful. Then I do not need to discuss the law  
16          with you and I will leave that there.

17          Subject to any questions the tribunal has on market  
18          definition, that is everything that I have on that  
19          topic.

20          THE PRESIDENT: Yes, thank you, Mr Holmes.

21          A couple of points, I think. I have a slightly  
22          reluctant opening area, but I think it might be helpful.  
23          Moving a little bit down the philosophic area that you  
24          quite deliberately eschewed, would you agree that market  
25          definition and how one goes about it is, to a greater or

1           lesser extent, informed by the nature of the market that  
2           is being analysed?

3           A. Yes, I agree with that.

4           THE PRESIDENT: I mean, to take an extreme example and I am  
5           not sure one could even call this a market, but take  
6           a command economy, where you have effectively no price  
7           data at all, and actually quantity data is not helpful,  
8           because you are dictating what is produced and in what  
9           amount. If as part of your Stalinist five year plan as  
10          to what to produce in five years' time you wanted to  
11          work out how many widgets to produce, you might very  
12          well want to know about the substitute products for  
13          widgets. You might want to see whether you could get  
14          something which was as good for less.

15          A. Yes.

16          THE PRESIDENT: Now, in order to do that, you would need to  
17          evolve an entirely new methodology. You would not be  
18          able to look at price. You would not be able to look at  
19          quantity. You would have to do something else.

20          A. Yes, but I -- it is a kind of Catch 22 here, because you  
21          are presupposing that there is no ability to get at the  
22          underlying demand and substitutability behind these  
23          goods. But before I started to overlay any  
24          institutional elements on top of my decision, I would  
25          still want to try and tease out what people's

1 preferences are, whether they would substitute, what the  
2 underlying relationship between these products are. At  
3 that point, you may then want to overlay other exogenous  
4 elements, but, in any view, that is a separate overlay  
5 from the fundamental: are these products competing  
6 against each other?

7 THE PRESIDENT: Indeed, you might, for example, run a metric  
8 related to length of queues outside certain particular  
9 shops to determine who is queuing for what particular  
10 good as a measure for demand.

11 A. Or run a survey, for example, which we often do in  
12 mergers and these type of cases.

13 THE PRESIDENT: But the point I am grasping towards, and  
14 I think you are agreeing, is that in this extremely  
15 extreme example the tools that you would use to assess  
16 substitutability would have to be significantly  
17 rethought.

18 A. I think that is where we disagree again, because I am  
19 saying we can use, and I have used, fairly standard  
20 tools in order to look at whether skinny and full label  
21 are part of the same relevant market, even given this  
22 exogenous regulatory constraint. So, for example, the  
23 fact that the price of full label is substantially  
24 higher and consistently substantially higher than any  
25 benchmark of full label 10mg, and we are not talking 5

1 to 10% here, we are talking 100, 200 per cent, that  
2 shows that a monopolist is able to price substantially  
3 higher than the competitive level and, in my view, that  
4 is the definition of a separate market.

5 Similarly, I have also looked at where --  
6 independent of what is driving the relative price  
7 changes, are those relative price changes driving  
8 changes in quantity over time? Again, my finding there  
9 is even with the drug tariff perhaps being the driver of  
10 the changes, I do not see significant changes in volumes  
11 such that I would warrant them being in the same  
12 relevant market.

13 So, for me, both of those techniques, if you like,  
14 are pretty standard. They are not something outside of  
15 the normal toolbox. Looking at how prices change  
16 volumes, that is fairly standard. I do not think you  
17 need to adopt completely new techniques.

18 THE PRESIDENT: That is a very helpful answer. In a sense,  
19 Dr Bennett, you are answering in advance a question that  
20 I had sort of three stages down the line and it is  
21 exactly the answer that I expected, but if you do not  
22 mind, I am going to rewind a bit and ask the questions  
23 that you have anticipated.

24 A. Of course.

25 THE PRESIDENT: Because what I am trying to get a feel for

1 is the degree of confidence with which you are  
2 articulating these answers and, more importantly, the  
3 questions that we when deciding this matter may need to  
4 unpack in this case, which we would not in others.

5 I was quite deliberately putting to you an extreme  
6 example and we were, I think, agreeing that the  
7 questions that we are debating about substitutability  
8 and demand and supply would remain relevant if you  
9 wanted your five year plan to work effectively?

10 A. Yes.

11 THE PRESIDENT: You might not care, but let us assume our  
12 Stalinist planner wants to match supply with demand. If  
13 that was your objective, you would need to develop tools  
14 which would be intending to reach the same objective,  
15 but they would not be the SSNIP. A SSNIP would be, in  
16 my hypothesis, a fundamental pointless thing, because in  
17 my hypothesis there are no such things as prices. Goods  
18 are simply allocated and produced according to central  
19 diktat.

20 A. I agree. If you do not have pricing data, for example,  
21 then you are going to be hard put to try and look at how  
22 volumes change with price. You are going to have to  
23 rely on other methodologies, such as surveys, for  
24 example, that may give you some sort of insight.

25 THE PRESIDENT: Now, of course, the position we are



1 discussing here is not a command economy. What it is is  
2 a significant regulatory overlay, if I can call it that,  
3 on our standard mixed economy approach to things. So,  
4 of course, we have regulation in even a normal mixed  
5 economy market. What we have got here are a series of  
6 additional forms of regulation, because we are talking  
7 about pharmaceutical medicaments and there is good  
8 reason for seeking additional controls.

9 Would you agree, given these additional regulatory  
10 overlays, that we need to be particularly careful in  
11 terms of applying the conventional tools that we would  
12 in an ordinary case to this? I am not saying we should  
13 not. What I am saying is: is there an anterior stage in  
14 the analysis which one must consider, namely how far is,  
15 let us say, a SSNIP or variant on that, something that  
16 is the right tool for the job in this particular case?  
17 Is that a question we ought to be asking ourselves with  
18 particular care here?

19 A. I think so, but I would also say you need to be  
20 considering which way these regulatory influences may be  
21 pushing and if you are still finding -- suppose, as my  
22 argument is, that in my view these regulatory  
23 constraints are likely to be pushing the price, for  
24 example, of Auden down lower than it would have been  
25 absent them, if you still find that there is

1 a significant difference between the competitive price  
2 of the Auden 10mg product and the price that it is  
3 actually charging, even with that constraint, then,  
4 again, absent that constraint, it would only be greater.

5 So that gives me confidence that even with this  
6 additional constraint, I am not finding -- I am finding  
7 that a monopolist can price at a significant premium.  
8 That gives me confidence, if you like, in my finding  
9 that they are separate markets. So I think you need to  
10 think about which way -- what influence the constraint  
11 is having and how that may influence the result of  
12 whatever analysis you are doing.

13 THE PRESIDENT: This is why I suggested that your answer  
14 a few questions ago was getting to my endpoint, because  
15 if I can encapsulate what I think you are saying, and do  
16 correct me if I am summarising it wrongly, what you are  
17 saying is: yes, we do need to consider the usefulness of  
18 the tools, because of the additional regulatory matters  
19 that we have talked about, but that is something you  
20 have done and you are satisfied, in your expert opinion,  
21 that having asked that question, you are appropriately  
22 using tools to deal with the questions that arise in  
23 this rather different context to the usual one.

24 A. That is correct.

25 PROFESSOR MASON: An open question from me, although I think

1 I can anticipate how you might respond. What are your  
2 views as to what effect, if any, the issue of orphan  
3 designation has on market definition?

4 A. Sir, I think it is a key role. It is what  
5 differentiates the two products and it is what,  
6 essentially, may lead to there being separate markets.  
7 Now, I am not saying that differentiation always leads  
8 to separate markets. Sometimes you can have  
9 differentiation and they will be in the same market, but  
10 in the analysis that I have undertaken, it is clear that  
11 this level of differentiation between the full label and  
12 the skinny label is sufficient to warrant them being in  
13 the separate markets.

14 PROFESSOR MASON: Okay, so in that sense, it is not an issue  
15 purely of demand side substitutability.

16 A. No, I think it is demand side substitutability. It is  
17 purely demand side substitutability. So when I see  
18 the price of full declining and the price of skinny  
19 label is relatively stable, this is towards the end of  
20 the period -- actually, I think it is 3.16, if we --  
21 yes, if we go to  $\{K/60/4\}$ , please.

22 So you can see after the end -- after July 18, after  
23 the unfair pricing abuse ends, so that is where I would  
24 say there was not any cellophane fallacy, you see  
25 the price of skinny is relatively constant and the price

1 of full label is substantially higher, but it is  
2 declining. So that gap between the two is declining so  
3 that you would expect full label should be becoming more  
4 attractive to customers, given that the gap is  
5 declining.

6 However, in the same period, I do not see any  
7 significant changes in volumes between skinny and full  
8 label. In other words, if they were substitutes,  
9 I would expect to see volumes of full label increasing  
10 during this period as the relative price of full label  
11 becomes cheaper. That is not what I see. So I believe  
12 that is due to demand side substitution or a lack of  
13 demand side substitution to answer your question.

14 PROFESSOR MASON: But that lack being a product of the  
15 orphan designation?

16 A. Correct.

17 PROFESSOR MASON: The orphan designation, as I understand  
18 it, is still in place throughout the entirety of the  
19 time period that you are showing us in this figure?

20 A. That is my understanding, yes. I do not recall exactly  
21 what date the orphan designation finishes. I think it  
22 was some time in 2021, but I do not remember the exact  
23 date.

24 PROFESSOR MASON: Towards the end of 2021.

25 A. November 2021, so it is past this period, yes.

1 PROFESSOR MASON: Therefore, what you have just said,  
2 I think -- I cannot think it through immediately -- but  
3 does need to reflect the fact that orphan designation is  
4 in place throughout the entirety of this.

5 A. Correct.

6 PROFESSOR MASON: Okay, thank you.

7 THE PRESIDENT: Mr Holmes, anything arising out of that?

8 MR HOLMES: Nothing arising out of that, sir.

9 THE PRESIDENT: Very good. We are now going to effect  
10 a swap, are we, to Mr Jones?

11 MR HOLMES: That is right, sir. So I am going to swap  
12 places with him.

13 Cross-examination by MR JONES

14 MR JONES: Good afternoon, Dr Bennett. As you know, I am  
15 going to be asking you some questions about section B of  
16 your report, which is the economic assessment of the  
17 10mg agreement.

18 To be clear, I want to start by considering the  
19 economic consequences of this particular agreement that  
20 we are concerned with, assuming of course that it was  
21 indeed entered into. So this particular agreement  
22 compared to the counterfactual.

23 The reason I am emphasising that at the outset, you  
24 may appreciate, is that you also in your report touch on  
25 some wider issues about the benefits of permitting this

1 kind of agreement in a more general sense. I just want  
2 to make clear that I do intend to come on to those wider  
3 issues, but I want to start by looking, as I say, at the  
4 consequence of this particular agreement compared to the  
5 appropriate counterfactual.

6 Let us be clear, first of all, what we mean by the  
7 10mg agreement. Could you turn, please, in the Decision  
8 to {A/12/16}. We are in the summary section of the  
9 Decision and if you look, please, at paragraph 1.29 and  
10 I will pick it up from:

11 "In October 2012 ... in response to the competitive  
12 threat posed by that licence, Auden again agreed to  
13 supply Waymade with a fixed volume of 10mg tablets each  
14 month at a 97% discount compared to the Auden's other  
15 customers. The discounted volume of packs Waymade was  
16 given in October 2012 was worth £70,000 at market rate.  
17 In exchange, Waymade agreed to stay out of the market  
18 with its own 10mg Hydrocortisone tablets."

19 Of course that developed slightly. You can see that  
20 in 1.30, but I do not think the development particularly  
21 matters for my purposes.

22 What I want to put to you is that that being the  
23 basic finding, when we come to assess the economic  
24 consequences of the 10mg agreement, it is important to  
25 factor in the relevant characteristics of that

1 agreement. I am going to put three of them to you in  
2 turn and just make sure that we are factoring these in.  
3 These are part of the agreement that we are looking at.

4 First, that Auden would supply a fixed volume of  
5 tablets each month. Would you agree with that?

6 A. I understand that there has been some dispute about  
7 whether it was fixed or not, but my understanding is,  
8 according to the evidence, it looks like when they  
9 attempted to get greater volumes, they could not and  
10 they could only get the volumes that were stated, the  
11 2000, the 6,000 and the 12,000 and were unable to  
12 increase it.

13 Q. To be clear, when we conduct the assessment that I think  
14 you have conducted in section B, we are assuming -- we  
15 are calling it the factual -- that the Decision as found  
16 by the CMA in fact happened. Do you agree with that?

17 A. Yes, so all of my analysis assumes that the volumes were  
18 fixed.

19 Q. That is right, because we see that in 1.29. So that is  
20 the first one. Auden would supply a fixed volume each  
21 month.

22 Secondly, that those tablets would be sold at  
23 a discount from the price paid by Auden's other  
24 customers. Do you agree with that?

25 A. So here is where I think I would take a different view

1 from the CMA. So the CMA is saying it is provided at  
2 a discount compared to Auden's other customers. I would  
3 say it is provided at the same price, or very similar  
4 price, with respect to what AMCo's outside option was.  
5 That is, AMCo could have gone, according to the CMA, to  
6 a third party and purchased volumes and the volumes --  
7 the price that Auden was offering was comparable to  
8 the price that AMCo could have gone to that third party.  
9 That is what I think the relevant comparison is. That  
10 is not a 97% discount, but I agree with you that it is  
11 a 97% discount relative to the retail price. I think  
12 where I am disagreeing is whether that is the right  
13 benchmark.

14 Q. Just to be clear, I am not asking whether it is the  
15 right benchmark. I am just at the moment establishing  
16 what the agreement was and I thought this was  
17 a reasonably simple point from 1.29. Just as a matter  
18 of fact, it is just that the tablets would be sold at  
19 a discount compared to the price paid by Auden's other  
20 customers. I accept that you would think another  
21 comparison is also relevant, but that second feature is  
22 just a feature of what was found as a matter of fact.  
23 Would you accept that?

24 THE PRESIDENT: Maybe it is the use of the word "discount"  
25 that is an issue.



1 MR JONES: It may be, sir.

2 THE PRESIDENT: Can we encapsulate an agreed statement that  
3 avoids the use of the term "discount".

4 A. I am happy to say that it was a 97% discount relative to  
5 the retail price or to the price that they were selling  
6 to pharmacies.

7 MR JONES: Yes, precisely, thank you. Then, thirdly, and,  
8 again, I am just describing the feature of the agreement  
9 as found, that in exchange AMCo agreed to stay out of  
10 the market with its own 10mg tablets.

11 A. Again, that -- my understanding is that goes to the  
12 heart of the dispute.

13 THE PRESIDENT: Indeed, and let me make clear that nothing  
14 that you can say, Dr Bennett, on this in terms of the  
15 facts is going to make any difference. So this is, as  
16 you rightly say, central to one aspect of this appeal.  
17 We have heard evidence. We will take it away and we  
18 will consider it. So what you are doing is you are  
19 doing no more than agreeing with counsel that this is  
20 what the CMA has found. You are not giving any  
21 imprimatur, if I may say so, to that being correct or  
22 otherwise.

23 A. Okay. I am happy to agree that that is what the CMA has  
24 found.

25 MR JONES: Yes, it is a third important feature of the

1           alleged agreement. I am happy to call it "an alleged  
2           agreement", but when we are looking at the economic  
3           consequences of the alleged agreement, we need to know  
4           what the features are and the point I am simply putting  
5           to you is that that is the third important feature of  
6           the alleged agreement.

7           A. So, as I said, I am happy to agree that is the third  
8           important feature that the CMA has found.

9           Q. Yes, precisely thank you.

10           Then, on the other hand, when we consider the  
11           economic consequences of the counterfactual, and maybe  
12           I will just pause. I do not mean to be tendentious when  
13           I say counterfactual. I am just using what I understood  
14           to be the normal approach in economics that one takes  
15           the starting point, the factual I am calling it, but an  
16           alleged factual here and then one compares it just  
17           logically to what we can call the counterfactual and for  
18           that we need to imagine a world in which there was no  
19           10mg agreement. Would you agree with that?

20           A. That is correct.

21           Q. Just to be clear, that means the following two things  
22           for the counterfactual: firstly, in the counterfactual,  
23           Auden is not supplying any tablets to AMCo; is that  
24           right?

25           A. Yes, that is correct.

- 1 Q. Then, secondly, in the counterfactual, AMCo has not  
2 agreed to stay out of the market with its own 10mg  
3 tablets. Is that right?
- 4 A. So here, again, there are two potential counterfactuals.  
5 There is the counterfactual in which Waymade has not  
6 agreed to stay out of the market, because it could not  
7 have entered itself and then there is a separate  
8 counterfactual which says, well, suppose Waymade could  
9 have entered, what would have been the effects of that?  
10 So I think there are actually two -- given that it is  
11 unclear or rather it is in dispute whether Waymade and  
12 AMCo had the ability to enter, I would want to look at  
13 both what happens if they had not had the ability to  
14 enter, what is the impact, as well as if they had had  
15 the ability to enter, what is the impact? That is what  
16 I have done.
- 17 Q. Yes, I understand, but both of those counterfactuals  
18 have in common that AMCo has not agreed to stay out of  
19 the market with its own 10mg tablets?
- 20 A. So actually in my analysis of my report, I do assume,  
21 even if there was an agreement to stay out of the  
22 market, what would the impact of that be?
- 23 Q. Yes, I know, Dr Bennett. I am going to come on to that.  
24 I am just trying to establish that you agree that the  
25 feature which I am putting to you is a feature of both

1 of the counterfactuals which you just identified. In  
2 other words, it is an important feature of either of the  
3 two that you mentioned that AMCo has not agreed to stay  
4 out of the market with its own 10mg tablets?

5 A. Apologies. So is it an important feature of my analysis  
6 or is it an important feature of the market in an  
7 abstract form? I guess, I am trying to understand what  
8 you are meaning.

9 Q. It is an important feature of the counterfactual.

10 A. It is a feature of the counterfactual, but, of course,  
11 you can relax that feature of the counterfactual as  
12 well.

13 Q. Yes. Would you also agree with me that it is  
14 a significant part of the economic context here both for  
15 considering the factual and the counterfactual that  
16 overall demand in this market is fixed?

17 A. I would agree that it is one important characteristic.

18 Q. Could I turn next then to an economic assessment just in  
19 broad terms of the counterfactual. You have called them  
20 two counterfactuals. I am going to refer to it as one,  
21 but, Dr Bennett, if you think there is a difference in  
22 answer in any of my questions, then by all means draw  
23 that out.

24 But at the high level, and the reason I am putting  
25 them as one, is that we can say in the counterfactual

1 AMCo might enter the market with its own 10mg tablets.

2 Do you agree with that?

3 A. Sorry. Again, is that a question of fact or is that  
4 a question of what is the correct counterfactual?

5 Q. It is a question of what the facts would be in the  
6 counterfactual and the fact would be that AMCo might  
7 enter the market, because it has not agreed not to.

8 A. Again, you can model this as -- there are different ways  
9 you can model it. You could model it as a continuum,  
10 such that on one extreme they would not with certainty  
11 of one. In one extreme, they would with certainty of one  
12 and there could be some uncertainty in the middle area.  
13 Yes, that is one way you could model it and that is also  
14 one of the ways I have looked at it.

15 Q. Thank you. If AMCo did enter the market, it would have  
16 an incentive to try to grow its market share by  
17 competing with Auden on price. Would you agree with  
18 that?

19 A. Again, that depends upon the facts and the extent to  
20 which full and skinny are competing and, of course, if  
21 AMCo had a different product, then, yes, it would  
22 compete to some degree, but at some point it might be --  
23 it would be limited by the amount of people willing to  
24 take up that skinny label product.

25 Q. Yes. So I think -- that is very fair. As I understand

1           your report, you would say the extent to which -- and  
2           this may be just what you have just said to us -- AMCo  
3           would be able to compete would be constrained by the  
4           volumes that AMCo could compete for?

5           A. Correct.

6           Q. Thank you.

7           A. That might be due to getting hold of the product, if  
8           there were problems of production, but it might also be  
9           because the size of the market for skinny label is  
10          limited and, therefore, there are a limited number of  
11          people who are willing to buy the product. So it can be  
12          a function of either of those two things.

13          Q. Yes. My next topic then is the economic assessment of  
14          the agreement, the 10mg agreement. I am going to spend  
15          a bit of time ensuring that I have understood your  
16          approach to this, because I think there are several  
17          interlocking points, as I read your report, and I think  
18          it is important to have them clearly set out.

19                 As I understand it, you build up your analysis in  
20          stages. Could we look at the first stage, please,  
21          picking it up in the joint expert report, which is  
22          {G1/1/37} proposition 74. You will see there that the  
23          proposition is this:

24                         "Entry with a fixed volume against a monopolist  
25          incumbent is not analogous to lump-sum cash payments

1           because it provides higher consumer welfare relative to  
2           no entry assuming no price coordination, as the entrant  
3           would have an incentive to undercut the incumbent which  
4           lowers prices on average."

5           Dr Bennett, the reason I say that you take this in  
6           stages, your analysis of the consequences, is because  
7           what this particular proposition is considering, 74, is  
8           essentially just one part of what becomes the 10mg  
9           agreement. What you are considering here in your first  
10          stage is the economic consequences of a fixed volume  
11          supply agreement. Is that right?

12         A. That is correct. So what I am assuming here, just to be  
13         very clear, is I am assuming: suppose that there is not  
14         the possibility of the entrant going to a third party,  
15         and it is just simply I can either enter by buying from  
16         the incumbent or not enter at all, does entry via buying  
17         a fixed volume from the incumbent generate benefits?  
18         So, that is what I am looking at. So if I cannot go to  
19         a third party and all I can do is buy from the incumbent  
20         and all I can get is a fixed quantity, does that  
21         generate a benefit to customers or not?

22         Q. Yes, and if we go look at your first paragraph there,  
23         Dr Bennett's position, you say:

24                 "Entry with a fixed volume against a monopolist  
25                 incumbent is analogous to the situation where the

1 potential entrant is capacity constrained. Having  
2 another firm competing, even if it were for a limited  
3 portion of the market, generates more competition than  
4 the situation where the incumbent is the only supplier  
5 in the market. For the fixed volume that the potential  
6 entrant can supply, there is competition between two  
7 suppliers and this puts downward pressure on prices (in  
8 the absence of price coordination). This increases  
9 consumer welfare relative to no entry."

10 So to apply this to the parties in our case, what  
11 I think you are saying there is that if we simply had,  
12 as you say, a supply agreement in which AMCo is given  
13 fixed volumes by Auden, there would be competition for  
14 the sale of those fixed volumes. Is that right?

15 A. That is correct.

16 Q. Just to be clear how this would work, you accept,  
17 I think, that there would not be competition on price,  
18 or at least not much competition on price perhaps you  
19 would say, if all that Auden was doing was ordering  
20 enough product to satisfy overall demand in the market  
21 and then supplying some of that to AMCo. Is that right?

22 A. Yes, if Auden was independently only buying a certain  
23 amount, a fixed amount, and had no ability to flex that  
24 amount and did not flex that amount, then yes, but  
25 I would also not consider that as rational so --



1 Q. We will come on to rationality. As at the moment, as  
2 I say, I am just trying to understand the stages in your  
3 analysis.

4 A. This is just a very simple explanation of a very old and  
5 standard economic model of Edgeworth capacity  
6 constraints. So when you have the two firms and they  
7 are competing with capacity constraints, you do find  
8 a reduction in price. That reduction in price is not as  
9 great as it would have been if there had been no  
10 capacity constraints and the level of capacity  
11 constraints dictates how far price reduces. So that is  
12 just a simple explanation of this.

13 Q. That is right. You take this in stages in your report,  
14 which I found very helpful and that is why I am taking  
15 it in stages now, because it does seem to be a sensible  
16 way of building it up.

17 THE PRESIDENT: Just to be absolutely clear so it is on the  
18 record. I think I understand you are both proceeding on  
19 this basis, but when one is looking at a counterfactual  
20 to an alleged factual, the counterfactual removes the  
21 offending provision and the offending provision that  
22 you, Mr Jones, have removed is the agreement not to  
23 enter into the market, which forms part of your alleged  
24 factual agreement. That is right, is it not?

25 MR JONES: Sir, that is certainly right. I think I would

1           accept that it goes as a package. I do not know if this  
2           is anticipating your next question, but you would also  
3           remove the supply from Auden, I think.

4       THE PRESIDENT: Yes, that was my question. In other words,  
5           there would be, not that it is an infringing provision  
6           supplying at a significant discount, but it is the price  
7           that is the benefit that is received by AMCo on this  
8           hypothesis for the promise not to enter into the market.  
9           So the two are linked to that extent.

10       MR JONES: That is right.

11       THE PRESIDENT: So you put a line through both.

12       MR JONES: Absolutely.

13       THE PRESIDENT: You are then -- are you then proceeding on  
14           the basis that in your counterfactual there is no supply  
15           from Auden to AMCo?

16       MR JONES: That is right.

17       THE PRESIDENT: Right, okay.

18       MR JONES: Dr Bennett, I think you agreed with me on that  
19           earlier on as well.

20       A. I did.

21       Q. We are on the same page on that particular point. We  
22           just established there would not be competition on price  
23           if all that Auden was doing was ordering enough product  
24           to satisfy overall demand and giving some to AMCo.  
25           I take your point about rationality and we are going to

1           come back to that, Dr Bennett.

2           I think it is helpful here to just look at your  
3           report paragraph 96 which, is {D3/1/31}. If you look  
4           there, please, at paragraph 96 you explain:

5           "This becomes clearer if one assumes that, before  
6           the wholesale supply agreement, the incumbent is pricing  
7           at the monopoly level. Once the entrant has been  
8           provided with its fixed quantity under the wholesale  
9           supply agreement, it has an incentive to undercut the  
10          incumbent slightly to sell its fixed quantity and  
11          therefore make a profit. Under this scenario, the  
12          incumbent would sell the remaining units at the monopoly  
13          price and the entrant would sell the rest at slightly  
14          lower than the monopoly price."

15          Then I think this is the important point you were  
16          just making:

17          "However, the 6,000 sales would still be highly  
18          profitable for the incumbent, even at a slightly lower  
19          price. Therefore, the incumbent could do better by  
20          setting a price slightly below the monopoly level to  
21          recapture the 6,000 sales made by the entrant. In  
22          response, the entrant would want to make sure its price  
23          on these sales was lower than the incumbent's in order  
24          to cap them, since selling the 6,000 packs would still  
25          be profitable."

1           So the competitive dynamic, as you would see it,  
2           under this supply agreement is that the incumbent here,  
3           Auden, would have an incentive to increase its own  
4           volumes to compete for sales of the fixed volumes that  
5           it had sold to AMCo?

6           A. Potentially, yes. I mean, it will not necessarily do  
7           that, because it will depend upon what the final  
8           equilibrium is. Obviously, if the equilibrium is in  
9           this situation the entrant wins that business, then the  
10          outcome that you will see is that volumes do not change.

11          Q. Yes, I understand. I think then, bringing it back to  
12          the full terms of the 10mg agreement, and as I said, you  
13          take this in stages, but my understanding of your  
14          approach is that you would say, well, then, the next  
15          step would be, having established what would happen  
16          under just a straight supply agreement, even if we  
17          factor in the other important feature of the 10mg  
18          agreement, in particular, the agreement by AMCo not to  
19          enter independently, you layer that on top, as it were,  
20          you would still be left with this dynamic, whereby Auden  
21          would supply AMCo, but then have an incentive,  
22          potentially, to produce extra volumes to compete for  
23          sales. Have I understood that correctly?

24          A. Yes, that is correct.

25          Q. Then one of course needs to do a comparison between the

1 counterfactual and the factual. Now, can I have a look,  
2 please, at {G1/1/47}. You will see proposition 90 there  
3 is this:

4 "Consumers will only be worse off if -- "

5 You are talking here about under the alleged  
6 agreement?

7 A. Yes.

8 Q. "Consumers will only be worse off under the alleged  
9 agreement if AMCo could have entered with a more  
10 competitive supply, (ie with more supply capacity with  
11 supply cost that is lower or equal) under independent  
12 entry than under the 10mg agreement."

13 You see that is the proposition?

14 A. Yes, I do.

15 Q. You say that:

16 "If the agreement allowed AMCo to enter with a more  
17 competitive supply capacity than under independent  
18 entry, AMCo could be able to contest a larger share of  
19 the market with the agreement than under independent  
20 entry. In this situation consumers would be better off  
21 under the agreement as AMCo is able to challenge  
22 Auden/Activis for a greater proportion of market  
23 volumes."

24 Then you give a helpful example:

25 "If AMCo could have entered independently with only

1           5,000 packs per month, but the agreement allowed it to  
2           enter with 10,000 packs per month, it is intuitive to  
3           see that the agreement allowed AMCo to break Auden's  
4           monopoly over a larger share of the market, making  
5           consumers better off."

6           In broad terms, you say if AMCo's supply capacity is  
7           more competitive under the agreement compared to the  
8           counterfactual, that will lead to consumers being better  
9           off. That is the basic point?

10          A. Yes, that is correct.

11          Q. I think you also make the opposite point. Can we look  
12          at that, please. It is in {D3/2/19}. This is your  
13          second report, which you may have in front of you.

14          A. Mm-hm.

15          Q. I just wanted to look at paragraph 56, which I think is  
16          making the opposite point:

17                 "The price would have been higher under the alleged  
18                 10mg agreement relative to independent entry if and only  
19                 if AMCo's average supply capacity under the alleged 10mg  
20                 agreement was more competitive than under independent  
21                 entry."

22                 So you say that if AMCo's supply capacity is more  
23                 competitive under independent entry than the agreement,  
24                 that would lead to higher prices; is that right?

25          A. Sorry. Can you repeat the question?

1 Q. Yes, if AMCo's supply capacity is more competitive under  
2 the counterfactual --

3 A. Independent entry.

4 Q. -- which I called independent entry?

5 A. Yes.

6 Q. Then the agreement would lead to higher prices than one  
7 would see in the counterfactual of independent entry?

8 A. Yes, that is correct.

9 Q. I think elsewhere you characterise that as an  
10 anti-competitive outcome. I just want to look at that,  
11 please. It is on page 34. Sorry, it is actually  
12 {D3/1/34}. It is paragraph 108, please.

13 A. Just to clarify on that paragraph here, what I am  
14 talking about is expectation. So suppose you found  
15 documents that said: we think we can get 20,000 volumes  
16 independently. We can only get 5,000 from Auden, but we  
17 are going to go with Auden for 5,000. That is an  
18 agreement which I think is unlikely to lead to benefits  
19 to consumers relative to the counterfactual, because,  
20 obviously, they were expecting to get 20,000 in one  
21 situation and 5,000 in another situation.

22 Now, of course the skinny and the full label further  
23 complicates things a little bit, but if it was all of  
24 the same product and they simply said: let us go for the  
25 much worse offer, then, yes, that would be an agreement

1           that I do not think would benefit competition.

2       Q.   Yes, exactly, thank you.

3           The point I was just going to put to you is --  
4           exactly, you consider that anti-competitive. I think we  
5           see that at paragraph 108 here. Yes, it will have an  
6           anti-competitive effect. That is describing, I think,  
7           the same situation and you are describing it there as an  
8           anti-competitive outcome.

9       A.   Yes.

10      Q.   This is just a small point of clarification, but you  
11         will see that in that particular paragraph you are just  
12         referring to volumes. In some of the other references  
13         that we have looked at you have talked about competitive  
14         supply capacity generally and you have made clear that  
15         that encompasses not just volumes, but also the price of  
16         supply.

17      A.   Mm-hm.

18      Q.   Strictly speaking -- I accept that. I am not  
19         challenging that at all -- but I think that we can  
20         perhaps agree here that where we know the costs in the  
21         two scenarios are broadly comparable and we also know  
22         that prices are many tens of multiples of costs, what is  
23         really driving these different outcomes in your model is  
24         the different volumes in the different scenarios. Is  
25         that right?



1 A. That is correct.

2 Q. Again, in broad terms, you say that if AMCo would get  
3 higher volumes under the agreement compared to the  
4 counterfactual then you would say the agreement is  
5 competitive. Whereas if it would have got higher  
6 volumes under the counterfactual then the agreement  
7 would be characterised as anti-competitive?

8 A. Yes, so if AMCo expected -- and I think that is an  
9 important point -- if its expectations were at the time  
10 of the agreement to get higher volumes independently,  
11 then that would result in lower consumer welfare versus  
12 what it could get through the agreement.

13 Q. I am definitely going to come on to talk about  
14 expectations and information asymmetries and so on.  
15 Just in terms of the basic economics of what we have  
16 been talking about when we compare the factual with the  
17 counterfactual. We know what the volumes are in the  
18 factual, because they are in the agreement. There would  
19 be a question, I suppose, if one were to do an analysis,  
20 an effects based analysis, which of course has not been  
21 done by the CMA here, but there would be a question  
22 about what the volumes would be in the counterfactual on  
23 your approach, but that would require you to actually  
24 look at what the volumes are, not what AMCo's  
25 predictions of what the volumes were?

1           A. I think you would want to look at what AMCo's forecast  
2           of volumes are, in my view, because, of course, there is  
3           significant uncertainty and the best predictor of  
4           whether AMCo is entering into this agreement on the  
5           basis of generating anti-competitive harm or not is  
6           going to be its forecast, what does it view volumes  
7           will -- could have been if it did not go to Auden.

8           Q. Yes, if you wanted to know, as I think you were just  
9           suggesting, as it were, why AMCo entered and did AMCo  
10          think this was going to be anti-competitive, then  
11          I agree with what you have just said. But if all you  
12          were asking yourself was: what were the actual impacts  
13          of this agreement, you might be very interested in  
14          AMCo's predictions, because they might help you decide  
15          what the impact was, but what you would actually need to  
16          determine for yourself, looking at all the evidence in  
17          the round, is what volumes it could in fact have  
18          obtained in the counterfactual?

19          A. So that is where I think we probably disagree. The  
20          reason I disagree is there is some degree of uncertainty  
21          in what may play out in the actual. For example,  
22          suppose that I think that I can get 10,000 units  
23          independently and I think that I can sell 10,000 units,  
24          but, actually, it only pans out that I can sell 5,000.  
25          I could also sell 15,000, but I could sell 5,000 and

1           there is some range there, but 10,000 is my best view.

2           Now, if we only ever looked at it ex-post and all we  
3           said is, ah whenever we see that it is greater than  
4           10,000, therefore, I am going to assume this is  
5           anti-competitive, because it turned out to be greater  
6           than 10,000, that is going to basically mean that when  
7           you are making estimates you will not enter into  
8           potentially pro-competitive agreements, because you have  
9           cut the distribution at 10,000. You are taking an  
10          ex-post view on information that you may not have  
11          ex-ante. Ex-post it may be that it came out to be  
12          5,000, but you are suddenly telling people, okay, you  
13          cannot enter into that, because there was a possibility  
14          of it being more than 10,000 and I think that is  
15          problematic. You should look at people's view of what  
16          their best expectation is.

17         Q. I understand. I understand. So I think this perhaps  
18          does go then to the broader point that I hinted at at  
19          the start, which is the broader benefits of these  
20          agreements and I think your broader concern that the  
21          CMA's approach, in a sense, has these wider  
22          ramifications, you have just described one of them, of  
23          putting people off agreements which might in fact turn  
24          out to be competitive.

25                 So I am certainly going to come back to that?

1 A. I am just not able to tell ex-ante whether the volumes  
2 are going to be 15,000 or 5,000.

3 Q. Yes, so AMCo might think it is competitive. It might  
4 turn out to be anti-competitive and you would say, well,  
5 you should not punish them for that. I understand that  
6 and we will come back to that.

7 But if we are looking at what the actual competitive  
8 impact is and we are looking post facto, the process  
9 that we would need to go through is the process I have  
10 described, I think, which is you would actually need to  
11 make an estimate yourself post facto of what volumes  
12 AMCo would have sold in the counterfactual?

13 A. Again, I think that is probably where we differ.  
14 I would not consider that as the relevant  
15 counterfactual. For me, the relevant counterfactual  
16 would be what was AMCo's expectations of the volumes  
17 that it would be able to sell independently? The reason  
18 why is because, and this goes to the fundamental, in my  
19 view, difference between these wholesale pricing or  
20 wholesale supply agreements versus a lump sum is AMCo's  
21 incentives are aligned with consumers' incentives or  
22 customers incentives. AMCo wants to get as large  
23 a volume as possible at a cheaper price.

24 Therefore, I do not think there is any reason to  
25 suspect or to presume that AMCo's forecasts are biased

1 or do not reflect what it considered at the time.

2 I think to then say, well, your forecast did not pan  
3 out. They panned out a different way, in my view, would  
4 be holding a company to a standard which is pretty much  
5 impossible, because by definition there is a range of  
6 uncertainty as to what those forecasts could have panned  
7 out to be.

8 Q. Dr Bennett, can I make clear, firstly, that I am still  
9 asking you questions on the premise that your analysis  
10 of this is correct in the sense that it is correct to  
11 think that there would be competition on volumes. So my  
12 questions proceed on that premise. I am going to  
13 examine that premise later on of course, but just  
14 sticking with the premise for the moment.

15 I think what you just explained is that AMCo, if  
16 that is right as a premise, is only going to enter into  
17 this kind of agreement rationally if it thinks it will  
18 result in a more competitive supply capacity for AMCo  
19 than the counterfactual?

20 A. Yes, more competitive or equal.

21 Q. More or equal yes.

22 A. In these models you have an inequality and you can have  
23 it as equal, an epsilon difference.

24 Q. So another way of putting that is, as I think you have  
25 just said, AMCo only enters into this in circumstances

1           where if AMCo's predictions are right it would have  
2           a competitive impact?

3           A.   Correct.

4           Q.   But does it not follow then from that what you are  
5           actually saying is that whenever we see an agreement of  
6           this kind in your view it should be permitted because  
7           the person in AMCo's position always would have  
8           predicted a competitive outcome?

9           A.   So unless you have reason to believe that there may be  
10          other elements to the agreement, for example, that they  
11          have an additional agreement not to compete on price  
12          downstream, so if there was an additional agreement not  
13          to compete on price downstream, then obviously those  
14          forecasts will be tinged by that agreement.  But if  
15          there is no other element to it, if you have simply got,  
16          I see a wholesale supply agreement and I am just trying  
17          to -- that is all the evidence that I have, then, yes.

18          Q.   But you have also accepted, and I think it has been  
19          implicit in some of your answers, and we will unpick  
20          this a bit more after lunch, that sometimes in fact  
21          these agreements do not lead to the outcome that the  
22          person in AMCo's position might have expected.  It may  
23          or may not turn out to be more competitive than the  
24          counterfactual.

25                 But again, is not the implication of what you are

1 now saying that notwithstanding that these agreements  
2 will sometimes have a competitive effect on your  
3 approach and sometimes an anti-competitive approach,  
4 they should all be permitted because you are focusing  
5 exclusively on AMCo's view of things which, as we have  
6 established, will always be a pro-competitive view if  
7 your model is right?

8 A. Yes. I am saying that if you only have a wholesale  
9 supply agreement, then AMCo will only accept that  
10 agreement when it gives better -- that it has an  
11 expectation of getting higher volumes relative to an  
12 independent third party and those higher volumes will  
13 always lead to benefits to consumers in terms of  
14 expectations, yes.

15 Ex-post, we have a range of outcomes that may emerge  
16 and I am saying there is a real issue with only looking  
17 at one end of those outcomes to determine whether the  
18 agreement is anti-competitive versus the other potential  
19 end of the outcomes.

20 Q. I apologise, we will pause in a moment. You started  
21 your answer there by saying these words "if you only  
22 have a wholesale supply agreement". But just to be  
23 absolutely clear, of course what we have been discussing  
24 is not a situation where you only have a wholesale  
25 supply agreement, and I do not think you were departing

1 from this, but we have been discussing a situation where  
2 you have a supply agreement plus the agreement by AMCo  
3 not to enter independently. So can I just clarify that  
4 we are on the same page about that. What you have been  
5 saying about AMCo's expectations applies in that  
6 situation as well?

7 A. Yes. So I am saying there is never going to be -- you  
8 do not need -- you are not going to have an explicit  
9 agreement not to enter. AMCo, if it is getting more  
10 volumes or equal volumes to what it expected it could  
11 get and it could sell independently then obviously it  
12 does not have an incentive to get additional volumes or  
13 go independently because it is already getting exactly  
14 what it needs from the incumbent.

15 Now, if at some point AMCo changes its views and  
16 says, actually I no longer think I can sell 5,000,  
17 I think I can sell 10,000, because the market has  
18 evolved or because it has a different view about how the  
19 market has changed, then I would expect AMCo to come  
20 back and say, actually either they give me a further  
21 5,000 or I will go and get an independent supply.

22 Q. I understand.

23 Sir, that is a convenient moment.

24 THE PRESIDENT: Thank you very much. We will rise until  
25 2 o'clock. Thank you.



1 (1.05 pm)

2 (Luncheon Adjournment)

3 (2.00 pm)

4 MR JONES: Dr Bennett, I am still on the very general theme  
5 of understanding your approach and unpicking that to  
6 make sure that we have all understood it.

7 Before lunch, we were discussing why, on your  
8 approach, AMCo would enter into the 10mg agreement and  
9 I think you were explaining, in broad terms, it would  
10 only do so if it expected the agreement to give it  
11 access to higher volumes than it would get under the  
12 independent entry counterfactual and you were also  
13 explaining that you would characterise that as  
14 competitive. Is that right?

15 A. That is correct.

16 Q. I want to turn next then to why Auden would enter the  
17 agreement. I think your analysis here would be the  
18 other side of the coin. In other words, Auden will be  
19 predicting that the agreement will give AMCo lower  
20 volumes than it would get in the independent entry  
21 counterfactual. Is that right?

22 A. No, that is not precisely correct. So Auden will be  
23 predicting that it is faced with the choice of losing  
24 these volumes one way or the other, so it is going to  
25 lose these volumes at the retail level, because AMCo is

1 going to enter, either independently through  
2 a third-party product or through the Auden product. So,  
3 therefore, Auden will be willing to offer AMCo a deal  
4 such that it is indifferent between those two scenarios.  
5 Because it would -- and I think it would rather  
6 maintain, for example, the wholesale volumes and a small  
7 wholesale margin in cannibalising itself, if you like,  
8 than be cannibalised by a third party and have the third  
9 party have those wholesale margins.

10 So, in my view, that is the tradeoff that Auden is  
11 making and the outcome of that tradeoff is Auden will be  
12 willing to offer a volume up to the point at which it  
13 believes AMCo could get that volume independently,  
14 because, obviously, if it gives it a lower volume, then  
15 AMCo is not going to go with Auden. It will go with the  
16 independent.

17 Q. Yes, I think I understand that, but, Dr Bennett, you are  
18 emphasising, I think, that point at the very edge of  
19 what Auden might do. So you are emphasising that there  
20 will become a point when Auden is indifferent. But just  
21 standing back from that particular point, Auden's  
22 prediction here is going to be that this agreement will  
23 lead to an outcome, which has either the same  
24 competitive outcome as you would see in independent  
25 entry or a less competitive outcome than you would see

1 in independent entry. That is right, is it not?

2 A. So Auden, just like AMCo, will have different views  
3 about the amount of volume that AMCo can get  
4 independently and it will form a view of those and it  
5 will be willing to offer a volume up until that level.  
6 Obviously, it will not be willing to offer more volume  
7 than they could get independently, because that would  
8 make Auden in a worse off situation and AMCo would go  
9 independent, but I think the outcome of this, this  
10 equilibrium gain, is that Auden will see itself  
11 essentially as competing against Aesica in order to  
12 offer the volumes to AMCo and, therefore, will offer at  
13 least as great volumes as it thinks that AMCo can get  
14 from the independent.

15 Q. Yes, but again, Dr Bennett, you are coming back to that  
16 point and you are placing some emphasis on the point  
17 that it might be the same. If we just think back to  
18 when we were discussing AMCo's predictions -- I think  
19 you made the same point that AMCo would with predicting  
20 that it would get the same or more volumes under the  
21 agreement, but you placed quite a lot of emphasis on  
22 more, because that was the hook for then saying it would  
23 be pro-competitive. Whereas now we are having the  
24 discussion about Auden and it really is the flip side of  
25 the coin, which is same or less --

1 A. Correct.

2 Q. It just that here you are placing quite strong emphasis  
3 on "the same", but it is the same or less, is it not?

4 A. So whether -- so in a perfect information game where  
5 everybody knows exactly what everybody can do etc,  
6 I would expect the outcome to be for both Auden and AMCo  
7 to be identical. They offer the same amount as they  
8 could get independently. Once you put in uncertainty,  
9 I agree that Auden will only want to offer something,  
10 volumes, which is lower than or equal to what it expects  
11 AMCo can sell independently and AMCo will only be  
12 willing to accept an offer which is equal to or greater  
13 than it can accept it can get from a third party.

14 Now, if they both have the same expectations, the  
15 outcome that you are going to get is right in the middle  
16 where everything is equal to each other. But you can  
17 get outcomes, I agree, where Auden believes that AMCo  
18 may be able to sell greater quantities and, hence, will  
19 be willing to offer greater quantities than AMCo thinks  
20 it can sell.

21 Q. Yes, but I think -- I am going to come on to the  
22 different expectations, information asymmetries, in  
23 a bit more detail, but the point I am just starting  
24 with, I thought a simpler one, which is we established  
25 that AMCo's expectations will always be -- and, again,

1 AMCo's expectations, so not saying whether they are  
2 right or not -- but its expectations will always be  
3 aligned with an outcome which is the same or more  
4 competitive?

5 A. Correct.

6 Q. Auden's expectations will always be aligned with an  
7 outcome which is the same or less competitive?

8 A. Again, if you are assuming there is no benefit to Auden  
9 from selling that wholesale volume, so of course Auden  
10 wants to retain the wholesale volume, because it will  
11 retain a wholesale margin to the extent that there is  
12 one.

13 Q. Sorry to interrupt. Let us assume that, because that is  
14 really a matter of a few thousand pounds in the scheme  
15 of things. So let us just abstract that away just for  
16 simplicity then what I put to you is correct, is it not?

17 A. Yes.

18 Q. I think what you then emphasise in the report, in fact,  
19 in the joint report. Could we have a look at this,  
20 please, {G1/1/47}. If we look at proposition 92, this  
21 is the point which has arisen a couple of times. It is  
22 the asymmetric information point:

23 "Asymmetric information between the entrant and  
24 incumbent could lead to the incumbent providing a more  
25 competitive offer than the entrant is capable of

1 independently."

2 You will see there you said you agree. You have  
3 shown it formally in a model:

4 "If the incumbent overestimates the potential  
5 entrant's likelihood of success, it may be willing to  
6 offer a supply agreement on more generous terms than the  
7 potential entrant could achieve independently.

8 "For example, if the incumbent believes the  
9 potential entrant can enter independently with 10,000  
10 packs a month, it would prefer to offer a supply  
11 agreement of 9,000 packs a month than face competition  
12 for 10,000. If in reality the entrant could have  
13 achieved only 8,000 ... the 9,000 packs ... would be  
14 pro-competitive as it facilitates entry to  
15 a greater degree than under independent entry."

16 I think you explain elsewhere that whilst this would  
17 be pro-competitive in the terms that you have explained  
18 there, it would be a bad outcome for Auden, is that  
19 right?

20 A. Well, ex-post that may be a bad -- sorry, can you repeat  
21 again?

22 Q. Yes, I did mean ex-post, just to be clear. So it would  
23 turn out to be a bad agreement for Auden. I mean, Auden  
24 would have made a prediction which would turn out to be  
25 wrong?

1 A. Correct.

2 Q. It would have been better for Auden not to have entered  
3 the agreement?

4 A. Correct.

5 Q. Let us have a quick look at that in your report, please,  
6 {D3/2/19}. It is at the bottom of the page there:

7 "As I have discussed in section 5 of my previous  
8 report, when these beliefs are such that the incumbent  
9 is more optimistic about the entry prospects of the  
10 potential entrant and this entrant itself, it will be  
11 rational for the incumbent to offer an earlier entry  
12 date, or a more competitive supply capacity to the  
13 entrant than the entrant could independently achieve.  
14 If the true prospects of the entrant are also less  
15 favourable than those the incumbent believes, the  
16 supply agreement leads to lower prices and lower profits  
17 for the incumbent than those that would occur with  
18 independent entry in the counterfactual."

19 A. Correct.

20 Q. However, enter into the supply agreement ex-ante would  
21 still be considered by the incumbent as more profitable  
22 than the outcomes under independent entry.

23 Dr Bennett, is this not where your analysis ends  
24 up: you end up saying we should allow firms -- incumbent  
25 firms, like Auden, to shoot for an anti-competitive

1 outcome, because there is a chance that their  
2 predictions are wrong and it might turn out that it is  
3 competitive?

4 A. So I do not see that this is shooting for an  
5 anti-competitive outcome. I think that is your  
6 assumption that this is shooting for an anti-competitive  
7 outcome. If Auden is faced by the possibility that it  
8 is either going to have entry due to a third party  
9 providing independently AMCo with volumes versus the  
10 same entry with it providing those volumes, then I do  
11 not see that as shooting for an anti-competitive  
12 outcome. That is just simply saying: I am going to be  
13 cannibalised. One way or the other, I am going to be  
14 cannibalised. Therefore, it is better for me to  
15 cannibalise myself and retain some of the wholesale  
16 margins etc rather than cannibalised by a third party.  
17 The outcome is exactly the same.

18 Q. It is shooting for an outcome which I think we have  
19 established will just as a matter of analysis, your own  
20 analysis, either be at the margin the same in  
21 competition terms as independent entry or less  
22 competitive. That is the outcome that it is shooting  
23 for. It may not think of it in those terms, but, when  
24 you look at it as an economist, I think that is what you  
25 have explained to us. That is how you would



1           characterise the outcome which Auden is, I put it,  
2           shooting for?

3       A.   Yes, I agree.

4       Q.   So far I have been unpacking your own approach and  
5           I want to turn next to --

6       A.   Sorry. Can I just make one last clarification, because  
7           I think it is quite important?

8       Q.   Yes.

9       A.   If Auden was shooting for an outcome that was  
10           significantly less competitive -- you have to look at  
11           both sides and you have to put both sides together, both  
12           incentives, both AMCo's incentives and Auden's  
13           incentives. If Auden was shooting for a competitive --  
14           for an anti-competitive outcome that has significantly  
15           lower volumes than AMCo could have got independently,  
16           then the outcome I would expect to see is no agreement.  
17           AMCo would have just gone to the independent. So that  
18           puts a kind of guard, if you like, on this shooting for  
19           anti-competitive outcome. Auden can only shoot for an  
20           outcome that it thinks AMCo will be willing to take,  
21           given its outside option. So I think that is an  
22           important clarification.

23      Q.   Clearly, there will come a point where they will not be  
24           able to agree because AMCo --

25      A.   Yes.

- 1 Q. -- will have better information about its outside  
2 options?
- 3 A. I would expect an anti-competitive agreement. So one  
4 where Auden goes for too low quantity, AMCo actually has  
5 its outside option as a high quantity, you would not see  
6 an agreement.
- 7 Q. Hang on. Let us take this in stages. I think this is  
8 an important point. You are not saying you would never  
9 see an agreement such as this in which Auden's  
10 predictions are correct. You are not saying that, are  
11 you?
- 12 A. Sorry. Just to be clear, Auden's predictions on?
- 13 Q. Auden's prediction that the agreement will lead to AMCo  
14 having lower volumes than it would have under  
15 independent entry? I mean there is an -- one of them is  
16 going to be right, Auden or AMCo. You are not saying  
17 that Auden is always going to be wrong?
- 18 A. So maybe we should use some numbers to make this  
19 clearer. So suppose that -- and just make sure  
20 I understand. You are saying Auden thinks that there  
21 could be -- that the correct volume is 5,000 or is the  
22 correct volume 15,000? So I think what you are saying  
23 is Auden thinks that the correct volume is 15,000, but  
24 it offers 10,000. Is that what you are thinking.
- 25 Q. We may now be talking at cross-purposes. If you start

1 from the beginning, because I am not sure what you mean,  
2 Dr Bennett, when you say the correct volumes. Maybe if  
3 you set out an example and maybe we can engage with  
4 that.

5 A. Okay. So suppose that Auden believes that AMCo can get  
6 15,000 volumes independently.

7 Q. Yes.

8 A. Now, of course Auden would love for AMCo to accept  
9 10,000 volumes, but my point is AMCo will never accept  
10 10,000 volumes, because it can get 15,000 independently.  
11 So Auden has to give at least 15,000 volumes, make an  
12 offer of at least 15,000 volumes, to AMCo.

13 Now, it may be that Auden believes that whilst AMCo  
14 can get 15,000, the actual demand is 20,000. Is that  
15 the situation you are talking about?

16 Q. Well, yes, because I thought we had established --  
17 I think that is the situation.

18 A. Okay.

19 Q. Let us just take it in stages. I think that we have  
20 established earlier on in this discussion that Auden  
21 would only enter into this agreement if Auden thought  
22 that the agreement was going to give AMCo fewer volumes  
23 than AMCo would get under independent entry. I think we  
24 have had a discussion about that.

25 A. Fewer or equal.

- 1 Q. Yes, fewer or equal?
- 2 A. Yes.
- 3 Q. So Auden is only going to enter into the agreement if  
4 that is its prediction, yes?
- 5 A. Correct, so if Auden believes that AMCo or that this --  
6 let us say the skinny label demand was going to be  
7 20,000, it would be willing to offer a volume up to  
8 20,000 to AMCo.
- 9 Q. Yes. AMCo has to have a different expectation or  
10 identical, but let us just put aside the identical one  
11 for a moment. For this to work, AMCo has to have  
12 a different expectation and its expectation will be that  
13 it is getting more volumes under the agreement than  
14 under independent entry?
- 15 A. Correct, for that reason.
- 16 Q. One of them is going to turn out, ultimately, to have  
17 made the right judgment call on your approach, yes?
- 18 A. Yes.
- 19 Q. If Auden has made the right judgment call, then that is  
20 what we would call an anti-competitive outcome and,  
21 again, I am putting aside the point in the middle, but  
22 I think that is what we have established. If Auden has  
23 made the right judgment call, it is anti-competitive?
- 24 A. What -- I am reluctant to call it anti-competitive,  
25 because that seems to be a question for the law rather

1           than for myself. What I can say --

2           THE PRESIDENT: I do not think Mr Jones -- you will correct  
3           me if I am wrong -- is using the term "anti-competitive"  
4           as an infringement of competition law. I think you are  
5           using it in the sense that the consumer, the welfare  
6           outcome, is less good than it otherwise might be.

7           MR JONES: That is right, sir, and I am using it  
8           deliberately because it is used in your report, we  
9           looked at it, to describe this very outcome.

10          THE PRESIDENT: Sure.

11          A. But, again, I think it comes back to our discussion that  
12          we were having earlier which, is ex-ante versus ex-post.  
13          Ex-post that may well have resulted in lower welfare  
14          than it would have if AMCo had taken the independent,  
15          but ex-ante at the time there is no anti-competitive  
16          intention. There is no --

17          MR JONES: Yes, maybe we do not need to go round the houses  
18          on that again. Just to put this to you: I know that is  
19          what you said earlier about AMCo's intention, because  
20          you said AMCo never has an anti-competitive intention.  
21          The opposite is true, is it not? Auden always has an  
22          anti-competitive intention.

23          A. Auden would always like to see a lower volume on the  
24          market than AMCo could go independently, of course, yes.  
25          Whether it can achieve that depends upon its views of

1           what AMCo's expectations are.

2           Q. Yes, absolutely. But whether AMCo can achieve it is  
3           also an open question. Both of them go into this not  
4           knowing who is going to be right, but the oddity of your  
5           position is that you have two parties with opposing  
6           predictions, one competitive, one anti-competitive. We  
7           can look back and look at the facts as they unfold, but  
8           where you take that to is to say well you should always  
9           treat them as competitive?

10          A. But I think --we see this in every market. So if I am  
11          an upstream supplier and a downstream supplier, the  
12          upstream always wants there to be a higher price and the  
13          downstream purchaser always wants there to be a lower  
14          price. That is just part of the negotiation. That is  
15          just part of the way the competition between upstream  
16          and downstream works.

17          Q. All right. I think we have been over this ground  
18          a couple of times. I'll go back to trying to turn to  
19          the CMA's criticisms of the underlying proposition that  
20          they would compete on volumes in the way that you have  
21          suggested.

22          A. Please.

23          Q. Which has been a premise underlying, I think, our  
24          discussions up to now.

25                 Could we go back to the starting point of the

1 agreement. You will recall that what AMCo is giving in  
2 return for receiving product under the CMA's findings is  
3 that AMCo agrees to forego independent entry. Do you  
4 recall that?

5 A. I do and I recall that that is the CMA's conclusion and  
6 I think maybe here can I just clarify something I said  
7 at the very end, just before we went into lunch. I just  
8 wanted to clarify how I think this interacts, this  
9 agreement not to enter interacts with whether or not you  
10 see an explicit agreement not to enter.

11 So I would only expect to see an anti-competitive  
12 agreement not to enter if there was also some sort of  
13 explicit agreement not to enter. Let me unpack that.

14 So suppose that Auden was offering AMCo 10,000  
15 units, but AMCo could actually supply 15,000 or get  
16 15,000 units through the third party independent. Any  
17 agreement not to enter there is just simply not going to  
18 be credible. You are not going to be able to commit in  
19 economic terms to not entering independently. If you  
20 take -- if AMCo was to take the 10,000 units from  
21 Auden McKenzie, it would then have a very strong  
22 incentive to break the agreement and buy the additional  
23 5,000, because that would make it strictly better off.  
24 It could not commit not to buy those additional 5,000,  
25 unless you saw something in the agreement that said some

1 sort of binding agreement to ensure that they do not  
2 have that incentive to break it and buy the additional  
3 volume, ie some sort of penalty clause or an explicit  
4 reason why they cannot go and buy additional volumes.

5 So that is -- I just wanted to clarify that just to  
6 make sure that I was not misunderstood before the break.

7 Q. Yes, I mean, I am going to put these questions on the  
8 basis of the agreement as found, which, as I think we  
9 just touched on, was that what AMCo gives in return is  
10 that it agrees to forego independent entry. Would you  
11 accept that.

12 Dr Bennett, let me put it another way.

13 A. I guess I am struggling, because I understood that that  
14 was a factual premise that is disputed.

15 Q. Yes, it is. Absolutely, it is. It is part of the  
16 alleged agreement.

17 A. Yes, I agree that is part of the alleged agreement.

18 Q. I just want to look at the economic consequences of that  
19 with you.

20 A. Okay.

21 Q. Now, from AMCo's perspective, when AMCo evaluates  
22 whether or not to enter into this agreement, it will be  
23 weighing the profits it would expect to receive under  
24 the agreement with the profits it would expect to  
25 receive under independent entry. Is that right?



- 1 A. I agree.
- 2 Q. It would only enter the agreement if it thought it would  
3 obtain greater profits than under independent entry?
- 4 A. I agree.
- 5 Q. Let us switch then to Auden's perspective. Auden wants  
6 AMCo to enter the agreement, yes?
- 7 A. Correct.
- 8 Q. It obviously does not want to transfer more value to  
9 AMCo than is necessary, but it does want to transfer  
10 enough value for AMCo to accept the agreement. Would  
11 you accept that?
- 12 A. Yes, I accept Auden wants AMCo, not necessarily to enter  
13 into the agreement. Auden wants AMCo to enter an  
14 agreement if it is better for Auden than it not  
15 entering. I mean, it is not going to enter into any  
16 agreement.
- 17 Q. No, of course, of course. We know this is not a one-off  
18 event. The agreement continues month by month. So if  
19 this agreement is to be stable, Auden wants to ensure  
20 that AMCo obtains sufficient profit each month for it to  
21 prefer the agreement over independent entry, adding the  
22 proviso you just gave, which is providing of course that  
23 this is still profitable also for Auden. But that is  
24 right, is it not?
- 25 A. Yes, I agree.

1 Q. Now, I want to suggest to you next that there are two  
2 possible ways for Auden to transfer value to AMCo and  
3 I just want to talk through the implications of each of  
4 them please. The first way for Auden to transfer value  
5 to AMCo would be what I am going to call the no compete  
6 option. This is where Auden supplies a fixed volume,  
7 but does not compete for sales of those volumes. If we  
8 just work that through. If Auden did that, I think you  
9 would agree that prices would remain at or near the  
10 monopoly level. Is that right?

11 A. So, again, unless there was some sort of explicit  
12 agreement not to compete, I do not think Auden could  
13 credibly commit for no -- to not compete. So.

14 Q. Hang on, I am not suggesting --

15 A. I do not think there could be an implicit agreement, let  
16 me put it that way.

17 Q. That is not what I am suggesting to you. I just want to  
18 work through the economics of this. Auden supplies  
19 a fixed volume and does not -- let us not worry for now  
20 why they do not compete, but just does not compete for  
21 sales of those volumes. I just want to go through that.

22 A. Unilaterally decides not to?

23 Q. Unilaterally decides not to. Would you agree that  
24 prices there would remain at or near monopoly level?

25 A. Obviously, AMCo would have to provide some level of

1 discount relative to Auden in order to entice Auden's  
2 customers across but, yes, it would be very close to the  
3 monopoly level.

4 Q. So AMCo would receive near monopoly profits on its fixed  
5 volume and Auden would receive near monopoly profits on  
6 the rest of the market, yes?

7 A. Yes, that is correct.

8 Q. Now, the second way for Auden to transfer value to AMCo  
9 would be your suggestion, which I am going to call the  
10 compete option.

11 A. Can I just make one statement on that first element. Of  
12 course, Auden could do that if AMCo entered  
13 independently as well. So if AMCo entered  
14 independently, it could do the exact same thing. It  
15 could say, I am simply not going to compete  
16 unilaterally. I will keep my price at the monopoly  
17 level. AMCo will price just below it and you will have  
18 exactly the same outcome, so for me it has nothing to do  
19 with the agreement.

20 Q. We are going to come on to that. Just to be clear, the  
21 proposition that you have just put, it could do that,  
22 but I agree with you, which I think was implicit in what  
23 you were just saying, that would be irrational.

24 A. But it would have been irrational to do with the  
25 agreement as well.

- 1 Q. That is what we will come on to.
- 2 A. Okay.
- 3 Q. I just want to establish that first does not compete  
4 situation. Now, I am looking at the compete option.  
5 This is where Auden supplies a fixed volume that then  
6 competes over sales of those volumes. Now, if Auden did  
7 that, assuming the volumes that AMCo is given are the  
8 same as the volumes under the no compete option, so  
9 keeping volumes fixed, the outcome is that AMCo would  
10 receive less profit under the compete option than under  
11 the no compete option. Do you agree with that?
- 12 A. Sorry. I am keeping lots of things in my head at the  
13 same time. Can you repeat the question?
- 14 Q. I am glad I am not the only one who has had some  
15 challenges on that front. Yes, we are in the compete  
16 option so Auden supplies a fixed volume and then  
17 competes for sales of those volumes. My point is  
18 this: if Auden did that, and assuming that the volumes  
19 that AMCo is given here are the same as under the no  
20 compete option, then AMCo would receive less profit  
21 under the compete option than under the no compete  
22 option. Do you agree?
- 23 A. Yes, I agree and, again, I would make the same statement  
24 that AMCo could achieve exactly the same outcome by  
25 doing the same thing and buying from an independent

1 party.

2 Q. Yes, I do not disagree with that at all.

3 The only way to give AMCo the same profits under the  
4 compete option as AMCo would make under the no compete  
5 option would be to supply it with higher volumes. Do  
6 you agree?

7 A. Sorry, the only -- maybe I can look at the transcript,  
8 because I am finding it difficult to follow.

9 Q. By all means. Please do, because it is easier I think  
10 to see it written down. (Pause).

11 A. Yes, I agree.

12 Q. As we have discussed, under the compete option there is  
13 price competition, so prices would fall. You agree with  
14 that?

15 A. Yes.

16 Q. So to transfer the same value to AMCo under the compete  
17 option as it would transfer under the no compete option,  
18 Auden would have to lose more market share and it would  
19 receive lower prices for its sales. Do you agree?

20 A. To be honest, I would have to think about this quite  
21 carefully, because this is not something that I have  
22 ever seen articulated in the Decision and it has always  
23 been one of my questions.

24 Q. Do have a think. It is on the transcript. (Pause).

25 A. Subject to thinking about this more, yes, I agree.

1 Q. I mean, the simple point is that if Auden is actually  
2 trying to transfer value to AMCo each month, so we are  
3 not just in a supply agreement, we are in a situation  
4 where Auden is trying to transfer value to AMCo each  
5 month, it would always be rational for Auden to do that  
6 by giving AMCo a fixed volume and not competing with it  
7 for the sale of that volume. That is the point that  
8 I am putting to you.

9 A. I understand the point, but I am not sure it is correct  
10 and given this is a very new point that I have not seen  
11 articulated anywhere in the Decision, it is not the  
12 easiest thing to work out in my head on the stand.

13 I think you are assuming here that you can credibly  
14 commit again to not providing those volumes, to holding  
15 your price constant and not competing.

16 Q. Could you just explain, before we go on, why am  
17 I assuming that? I am simply talking about what is  
18 rational from Auden's point of view.

19 A. Because if you go back to what we discussed earlier,  
20 Auden will always have an incentive to cut the price and  
21 gain the volumes that AMCo are currently supplying, the  
22 10,000. Now you are saying to me that that would  
23 increase -- you are saying to me that that would increase its  
24 transfer. I understand that. But of course, yes, it  
25 may increase the transfer, but it massively increases

1           its profits.

2           Now you are asking me to work out which one of those  
3           is greater on the fly and, I am sorry, I am unable to do  
4           that, but I think it is far from clear that you will  
5           always have the incentive to not compete relative to  
6           compete and make a profit, a margin on those product  
7           profits.

8        Q. You say that it is a complicated point and I accept that  
9           in some ways we need to break it down. There is  
10          a really simple proposition under it though, which is  
11          the profits that these parties draw from the market as  
12          a whole, so Auden and AMCo, are always going to be  
13          higher overall if they can price at the monopoly level.  
14          That being so, if Auden is trying to transfer value to  
15          AMCo, it is always going to be rational for it to do  
16          that in a way which maintains prices at the monopoly  
17          level. That is just basic, is it not?

18       A. I disagree that it is as simple as you are making out,  
19          as you are putting to me, and the reason why, as far as  
20          I can see it, is that, obviously, if you do not compete  
21          on price, you are minimising the transfer that you have  
22          to make because you are maximising the value, but if you  
23          do compete on price, Auden is going to be gaining  
24          additional margin from being able to sell those volumes  
25          and, I apologise, I cannot determine which of those

1 comes out as a clear optimal outcome.

2 Q. Can I give you this simple analogy. It is a bit of  
3 a silly analogy and I apologise in advance, but it  
4 helped me to think about it.

5 I want to help my son make £100 from his cake stall  
6 at the school Christmas fair next weekend. I help him  
7 bake 100 cakes, so far so good?

8 A. Okay.

9 Q. But if, as I have said, I actually want to help him make  
10 £100, it would be pretty odd, would it not, for me to  
11 rush off and bake another 100 cakes to sell on my own  
12 cake stall at a lower price?

13 A. That depends. If your object is not your son's  
14 happiness, it is simply to make as much money as  
15 possible, then, yes, it could well be optimal to do  
16 that. You are going to compete with your son, because  
17 the margin that -- let us suppose that each of those  
18 cakes cost £1, the margin that you are going to make on  
19 that cake is £99.

20 Q. Dr Bennett, that is why I emphasised --

21 A. You are assuming that -- you are making an assumption  
22 that the object is to help your son. Whereas my  
23 assumption is the objective is to maximise profit.

24 Q. I understand that and I am not suggesting that Auden  
25 does not want to maximise profit. I am suggesting that



1           it wants to do it in the most rational way by keeping  
2           profits at the monopoly level.

3           Can I put the point to you like this: if a supplier  
4           is indifferent about the profits made by the person that  
5           they are supplying, whether that is Auden supplying AMCo  
6           or me supplying my son with cakes, if you are  
7           indifferent about their profits, then you can see that  
8           it would make absolute sense to compete with them for  
9           sales. But as soon as you factor in that the supplier  
10          actually wants to transfer value to that person, me to  
11          my son, Auden to AMCo, it simply would not make sense to  
12          do that by supplying them and then competing for sales.  
13          That is the point.

14         A. Again, I am -- I have to confess I am really struggling  
15          here, because all of this is new. None of this appears  
16          in the Decision or in Professor Valletti's paper. So it  
17          is a much more complicated story than I have heard  
18          previously and, to be honest, I am not able to work out  
19          on the fly which way these incentives go. It is  
20          something -- if this came up at an earlier date, this  
21          would be something I could model and have a look and see  
22          which of these countervailing elements dominate. Do you  
23          have to have commitment etc, but I just -- I am sorry.  
24          I am unable to commit to a view at this point in time.

25         Q. All right. I will move on then to --

1 THE PRESIDENT: Just before you do, slightly related to  
2 this. Can we pull back in the transcript to page 131  
3 and you see the answer you give in line 12 if we put  
4 that answer up. So here you are saying there are two  
5 possibilities. One is not competing on price and then  
6 the second you say:

7 "But if you do compete on price, Auden is going to  
8 be gaining additional margin from being able to sell  
9 those volumes."

10 A. Correct.

11 THE PRESIDENT: So, in other words, if they reduce their  
12 price away from the price that would otherwise pertain,  
13 if they reduce their price, they will sell more.

14 A. Correct.

15 THE PRESIDENT: Does that not assume that the competitor  
16 will not also reduce their prices?

17 A. Obviously, the competitor may reduce their price as well  
18 and that is where you get competition.

19 THE PRESIDENT: Well, yes, so what you get is a downward  
20 spiral so that the prices sit just above cost.

21 A. Not in this instance, because in this instance -- sorry,  
22 it is a little bit more complicated, because there is  
23 capacity. I can only sell a limited amount. I cannot  
24 sell to the whole market so I cannot compete for the  
25 whole market as AMCo. I can only compete for a portion

1 of the market. So the price will go down to a level  
2 under which at some point Auden will say, I have no  
3 desire to compete in this market any more, I will just  
4 let AMCo take it at that lower price.

5 THE PRESIDENT: But you cannot say, because it is going to  
6 be acutely fact-dependent how far the spiral down will  
7 go. In other words, how many times Auden will be  
8 undercut by AMCo and itself then have to undercut AMCo  
9 and the process goes on. You are right, people will  
10 stop at some point and it may be that it stops at  
11 a point before you hit just above cost, well, fine, but  
12 that does not actually answer my question which  
13 is: surely you are maximising your value if you maintain  
14 the price?

15 A. (Pause). Sorry, are we talking about Auden or AMCo?

16 THE PRESIDENT: What I am talking about is that I do not  
17 quite follow why it is that these are two alternatives.  
18 It seems to me that if you are getting to a situation  
19 where you have provided a limited quantity, Auden to  
20 AMCo, and the market is itself limited to a number of  
21 units saleable per month, AMCo may well try to sell  
22 their however many units it is. They may be able to do  
23 so at exactly the same price, in which case no problem.  
24 They may be able to do it only at a marginally lower  
25 price.

1 A. Yes.

2 THE PRESIDENT: Now, if you get to a situation where that is  
3 the consequence, in other words, AMCo are selling their  
4 one-tenth of X of product and you are selling  
5 nine-tenths of X of product and they are doing it  
6 marginally less, why would you reduce your price to  
7 compete, because you are hitting your revenues. Every  
8 reduction in price per unit affects you nine times to  
9 the extent that any reduction in unit affects AMCo.

10 So it may be that you have certain special cases  
11 where actually it does make sense to compete, but the  
12 general case, surely, is to keep the prices as  
13 identified in the first alternative?

14 A. So, I would say it is the opposite in the sense that the  
15 general assumption is that they will compete because  
16 what you are saying could apply in any circumstance.  
17 So, for example, the exact same situation that you are  
18 talking about could also apply if AMCo had got 10,000  
19 units from an independent source. So you could  
20 postulate, well, why would AMCo have any incentive to  
21 undercut Auden or Auden have any incentive to compete on  
22 those 10,000 as well?

23 So what I am saying is if you assume that there is  
24 no competition, that is nothing to do with the  
25 agreement. That is just you are assuming that there is

1 no incentive to compete, independent of whether they get  
2 it from a third party or whether they get it from the  
3 agreement. The agreement is not changing that.

4 Normally -- in some sense, you are assuming some  
5 sort of tacit incentive not to compete intensely.  
6 Normally, we do not make those assumptions, because, on  
7 a unilateral basis, you will have an incentive to reduce  
8 your price, unless you have got some sort of tacit  
9 coordination game in mind, but if you have got a tacit  
10 coordination game in mind, then that would equally apply  
11 through independent entry as well.

12 THE PRESIDENT: Except, to take your ex-post/ex-ante point,  
13 I will not know, if I am Auden, how much you have bought  
14 from a third party supplier or how much you are entitled  
15 to buy from a third party supplier.

16 A. Correct.

17 THE PRESIDENT: Whereas I do know if I am myself supplying.

18 A. Yes, that is correct.

19 THE PRESIDENT: So I can compute pretty precisely. If I am  
20 the counterparty providing AMCo with product, I can work  
21 out that a one penny reduction in AMCo's product is  
22 going to be leveraged to 9 times the reduction in  
23 revenue on my part, assuming I am providing them with  
24 10% of the total market. I will not know that if AMCo  
25 are obtaining the material from a third party, because

1 I will not necessarily know, I may do, but I will not  
2 necessarily know that actually AMCo can only buy 5,000  
3 as opposed to 55,000.

4 A. But you will have some sort of expectation about how  
5 much AMCo could have bought, especially if you have just  
6 negotiated with AMCo, the agreement has broken down and  
7 AMCo has gone to an independent. You will know at that  
8 point that they could have bought at least 10,000 that  
9 you were offering. It must be more that they have gone  
10 off and bought. So you still have some understanding.

11 These games, they get very complicated based on  
12 expectations and I think this would be something that  
13 would have been helpful to come out earlier, because  
14 then it could have been modelled and looked at in a bit  
15 more detail.

16 THE PRESIDENT: Well --

17 A. But the point is, because they are quite complicated,  
18 and I guess this is my main point, it is far from  
19 a foregone assumption that they will be anti-competitive  
20 or there will be -- and I do not want to say object in  
21 terms of legally -- but the object in terms of the  
22 reason why we are doing it is to be anti-competitive.

23 THE PRESIDENT: Dr Bennett, were you in court when we had an  
24 interesting exchange with Mr Beighton about how much he  
25 would supply into the market if AMCo had a supply? Were

1           you present then?

2           A. I was not in the court, but I did read the transcript  
3           subsequently.

4           THE PRESIDENT: Right, just to recap from memory what we  
5           said. I was making a very similar point to the one I am  
6           making to you to Mr Beighton. What I was saying was,  
7           well, if you have got the ability to supply product --  
8           we are assuming a market of 77,000 units per month,  
9           which is not going to increase, no matter how low the  
10          price goes, so 77,000 is what you get.

11          My question to him was: why would there not be  
12          a race to the bottom? He said, well, there would not  
13          be, because we would limit our supply to half the  
14          market. In other words, we would sell at, he said, 10  
15          to 15% below Auden's price and we would make sure that  
16          Auden did not undercut us by limiting our supply and  
17          without communicating to them expecting them to  
18          understand that and, therefore, keep the price at  
19          a monopoly level.

20          Is that not precisely the situation we are actually  
21          discussing here where we are debating maximising value  
22          through maintaining price or maximising value through  
23          maintaining quantity and what what Mr Beighton's line  
24          was, was that you absolutely want to maintain price by  
25          limiting quantity. I am wondering if that is not the

1           answer to the conundrum that we are debating now.

2           A.   So I am not sure I can comment on what Mr Beighton said.

3           THE PRESIDENT:  No, I did not expect you to do that, but

4           I am putting to you --

5           A.   I can only say what the economic theory would predict.

6           I guess the one comment I would make is I had

7           understood -- and, again, I was not in court, I only

8           read the transcript -- that Mr Beighton was talking

9           about independent entry and so he was talking about what

10          would happen if he entered independently.

11          THE PRESIDENT:  That is entirely fair.  But does that make

12          a difference to our --

13          A.   I guess it comes back down to -- my point is what we are

14          trying to do here is isolate the effect of the agreement

15          and if Mr Beighton is saying competition will be soft if

16          I enter independently or versus with the agreement, then

17          it is not clear that the agreement is having any effect.

18          The agreement is -- it is just -- competition will be

19          soft independently.

20          THE PRESIDENT:  I do not want to get back to the debate that

21          has already been rehearsed about what exactly the

22          alleged agreement is and what the counterfactual is.

23          What I am really only trying to get a handle on is this

24          difficulty that you are having as between profit

25          maximisation through maintaining price and profit



1 maximisation through maximising volume of sales.

2 That is why I am putting to you Mr Beighton's  
3 instance, because it seems to me that was a good example  
4 of someone who, speaking now entirely hypothetically,  
5 had the ability to supply all 77,000 units in the  
6 market, but would not do so but would limit supply to  
7 half that on the basis that that would ensure the prices  
8 remained at the high end that Auden were charging,  
9 rather than racing to the bottom.

10 The way he stopped the race to the bottom was  
11 a combination of limiting supply and expecting that to  
12 be spotted on the other side.

13 My point is, is that not going to be a fairly cogent  
14 factor in the hypothetical here as to what Auden would  
15 do with its price?

16 A. I am struggling to give a view just because I can say  
17 what is predicted from economic theory. If you overlay  
18 the fact that competition will not be intense,  
19 regardless of whether they enter independently or not,  
20 I would -- again, I would have to think about what  
21 happened, what the agreement is doing in that respect.  
22 At the extreme, if you believe there was no competition,  
23 they would just coordinate once someone came in,  
24 regardless of whether they entered independently or not.  
25 Then, obviously, the agreement has no effect, because

1           there is coordination regardless.

2           So clearly the type of competition that you have  
3           will have some impact. I am just trying to get a grip  
4           on will it have an impact in both states of the world  
5           and, therefore, what implications does that have?

6       THE PRESIDENT: Thank you, Dr Bennett.

7       A. Apologies. I cannot.

8       THE PRESIDENT: No, let me be clear. The answer from an  
9           expert saying: I cannot tell what the answer is, is in  
10          itself a valuable answer. Let me make that absolutely  
11          clear, because it articulates the difficulties that we  
12          are moving into. So I am very grateful that you are  
13          delimiting the extent to which you can help the court,  
14          because you are trying to help the court and if there is  
15          a question that you cannot answer, then that is  
16          something I absolutely respect. So let me say thank you  
17          for not trying to, as it were, hoof it and come up with  
18          something which you do not think would stand the test of  
19          subsequent scrutiny.

20          So your answers are very helpful, even if you may  
21          not think so.

22       A. Thank you.

23       THE PRESIDENT: Thank you.

24       PROFESSOR MASON: At the risk of prolonging, just bear with  
25          me, because this might be a scenario where some

1 agreement might break out.

2 Imagine a situation where Auden has a capacity  
3 constraint, so this is part of the picture that you  
4 painted previously, Dr Bennett, and let us say, since,  
5 since the president mentioned the figure, that capacity  
6 constraint is 77,000 units a month, and that capacity  
7 constraint is there in the short to medium term. Let us  
8 not worry too much about the long-term.

9 Then you have the situation of supplying 10,000  
10 units a month to Waymade, AMCo. Could you just talk  
11 through then the economic incentives that present there  
12 and, in particular, the one to focus on just to check  
13 your understanding of the situation is that once you  
14 sell 10,000 units, you have 67,000 units left yourself,  
15 which is binding because you have the capacity  
16 constraint of 77,000 which you have exhausted?

17 A. Yes. In that scenario, I would say because Auden has  
18 a binding capacity constraint at 77,000, once it has  
19 given -- I cannot remember exactly which number you  
20 said -- 10,000.

21 PROFESSOR MASON: I said 10,000.

22 A. Once it has given 10,000 units to the AMCo, it can only  
23 sell 67,000 and if we consider that the demand is  
24 77,000, by definition it will not be able to compete on  
25 the 10,000 units to AMco and, therefore, that is going

1 to be a worse outcome than if AMCo took that 10,000  
2 independently.

3 But that requires a binding constraint on Auden such  
4 that it is not able to buy more than the 77,000 in  
5 total.

6 PROFESSOR MASON: Thank you. In the neighbourhood of that  
7 scenario, would the same considerations apply, but  
8 eventually you would become so distant from that the  
9 calculation breaks down?

10 A. Could you expand a little, please, on what you mean by  
11 in the neighbourhood of that scenario?

12 PROFESSOR MASON: So perhaps the 77,000 is not precisely  
13 binding. You can increase capacity by a small amount.

14 A. Okay.

15 PROFESSOR MASON: A finite amount, which we could place an  
16 upper bound on exactly how far you could go and so  
17 defining neighbourhood in that sense, how much  
18 additional capacity you could flex to before you reach  
19 your ceiling.

20 A. In that situation, I could imagine it will have some  
21 impact. I do not think it is going to be a binary 10.  
22 It is probably going to have some sort of relationship,  
23 but it will of course reduce the ability. Suppose they  
24 could only add on another 5,000 rather than the entire  
25 10,000, then, obviously, they are going to be

1           constrained and can only compete on the additional 5,000  
2           rather than the additional 10,000. So, yes, it will  
3           have an effect. So as long as there is a constraint on  
4           being able to not increase Auden's volumes, then, yes,  
5           that will soften competition. I agree.

6           PROFESSOR MASON: Okay, thank you.

7           THE PRESIDENT: Sorry about the interruption.

8           MR JONES: Not at all and in fact some of those questions  
9           were helpful in teeing up the next topic, which I am  
10          going to, which is certainty.

11          When the parties enter the agreement, if the parties  
12          enter the agreement, they know, do they not, that under  
13          the agreement AMCo will just get the fixed volumes  
14          provided for in the agreement?

15          A. Yes, I agree that, up until the point where there is  
16          some change in the market situation such that you would  
17          want to renegotiate that agreement but, yes.

18          Q. Whereas in the counterfactual of independent entry, they  
19          can each make a prediction, but it is right, is it not,  
20          that neither of them really knows for sure what would  
21          happen?

22          A. That is correct.

23          Q. So whatever else this agreement does, it lowers the  
24          uncertainty that would be associated with competitive  
25          independent entry?

1 A. That is correct and --

2 Q. I do not want to cut you off. I will carry on.

3 A. I was just going to say, personally, from an economist's  
4 point of view, I do not view uncertainty as something  
5 inherently beneficial to competition. So the fact that  
6 you might lower uncertainty, I guess this comes back  
7 down to I could -- we could equally end up with a worse  
8 outcome. For example, the true amount of volumes,  
9 demand there was for skinny label might have been 5,000  
10 and Auden ends up -- sorry, AMCo ends up with 10,000  
11 full label volumes, in which case, happy days, everybody  
12 is better off.

13 Or you could end up in a situation where the demand  
14 for skinny label was 15,000, AMCo has bought 10,000 full  
15 labels, in which case ex-post consumers would have been  
16 better off if AMCo had gone with the independent.

17 In my view though those are going to be -- AMCo is  
18 going to have the right incentives to make the best  
19 estimate that it can have in order to minimise that  
20 uncertainty.

21 Q. Can we have a look at section 6.2 of your report,  
22 please. {D3/1/44}. I want to look at paragraph 147, if  
23 we can look in on that. It is just summarising what you  
24 do in this section. You ask yourself the question:

25 "What volume AMCo could have won if it had been able

1 to enter independently?"

2 So that is what this section is about; is that  
3 right?

4 A. That is correct. So that is saying let us suppose that  
5 the idea that AMCo could have bought 10,000  
6 independently was a sham and it did not actually think  
7 it could buy 10,000. Actually, in reality, it could buy  
8 30 or 40,000. In this part, what I am doing -- yes,  
9 correct -- in this part what I am doing is saying: if  
10 that was true, if it was a sham and it could only -- and  
11 it could not buy 10,000, it could actually have bought  
12 30 to 40,000, would it have had the incentive to enter  
13 into that sham agreement?

14 Q. I understand. You approach it through that particular  
15 lens, but in the course of looking at it what you are  
16 looking at is the volume that AMCo could have won if it  
17 had been able to enter independently. That is one of  
18 the steps in your analysis here.

19 A. Ex-post.

20 Q. Yes, ex-post. You conclude, do you not, if we look at  
21 paragraph 148, the next one, you conclude:

22 "If AMCo had been able to enter independently, it  
23 could have achieved anything up to 50% of the market."

24 Can we go to the next page, please, 45 {D3/1/45}.

25 Yes, there it is.

1       A. So, again, this is me trying to model the CMA's case,  
2       ie the idea that this agreement was a sham and that  
3       actually they could have entered in with much greater  
4       volumes but they chose not to. So this is what I am  
5       trying to model. I am saying, well, let us suppose that  
6       they thought or they actually could have entered in with  
7       40 to 50% share.

8       Q. Let me pause you, because that is actually not quite  
9       what you do here. You are not saying that they thought  
10      that. In the course of doing this, you yourself make  
11      predictions, assessments of what they could have  
12      achieved, had they entered independently?

13      A. That would have been an upper bound.

14      Q. That is right, although we can see your lower bands in  
15      para 149.

16      A. 30%, correct.

17      Q. So they are still quite punchy?

18      A. Correct.

19      Q. I mean the point I am putting to you -- I appreciate the  
20      reason why you are using it here. You are using it  
21      essentially as evidence to say: AMCo must not have  
22      believed that it could enter with these volumes,  
23      otherwise it would have done that. That is how you  
24      package it. But the point I am putting to you is that  
25      it also shows is that if AMCo had been able to enter,



1 then the outcome would have been far more competitive  
2 than under the agreement. That is actually something  
3 that you have proved, not intentionally, it was not what  
4 you were trying to do, but that is in fact what you have  
5 shown in section 6.2 of your report?

6 A. So I agree that this looks at a scenario where had AMCo  
7 entered in from an ex-post viewpoint and won all of the  
8 skinny shares that we saw in reality turning out  
9 afterwards, then, yes, this is exactly what I say.

10 Q. AMCo did not, you say, believe that it could do that.  
11 The basic point, and it goes back to certainty, is that  
12 the agreement meant that AMCo did not try to do that,  
13 whereas had it tried, as I have said, what you have  
14 shown here is that it would have actually led to a more  
15 competitive outcome. So by removing the uncertainty you  
16 have removed the prospect of this outcome.

17 A. So this goes back to our original discussion about  
18 uncertainty and that uncertainty could work both ways.  
19 There can be uncertainty and it comes out and it turns  
20 out it was a good thing and uncertainty that turns out  
21 that ex-post it would have been nicer if they had  
22 entered independently, because demand was greater.

23 So what I am saying is you are assuming that  
24 removing uncertainty is always a good thing and I am  
25 saying: no, I disagree with the idea that the removal of

1           uncertainty is always good, because sometimes that  
2           uncertainty can lead to better outcomes than what might  
3           actually arrive ex-post.

4           In this instance, it may not have, but we did not  
5           know that at the time and we are using the benefit of  
6           hindsight in order to say that an agreement was  
7           anti-competitive and I do not view that as -- that would  
8           become self-fulfilling, because if you say whenever  
9           I see demand turning out to be higher ex-post, it is  
10          going to be anti-competitive. In that case, nobody is  
11          going to enter into agreements that are going to be  
12          beneficial in the first place, because there is always  
13          a possibility that they will be wrong. So you are not  
14          only going to be shutting out anti-competitive  
15          agreements, or ones that turn out -- I would not say  
16          anti-competitive -- turned out to have an effect that  
17          was less advantageous, you are also going to be shutting  
18          out agreements that turned out to have an effect that  
19          are advantageous. So I do not think you can make that  
20          kind of one-sided statement.

21        Q.    Could we turn next, please, to pricing trends and what  
22           we can draw from the pricing evidence in this case,  
23           which is another topic addressed in your reports.

24           Can we look, please, in the Decision at  
25           {IR-A/12/299} and we are at figure 4.1. Price is the

1 red line. We can see the start of the 10mg agreement  
2 is October 2012 and we can see what happens to the red  
3 line after that particular point.

4 Just as a starting point, would you agree -- and  
5 I should say, Dr Bennett, I am going to go through other  
6 propositions. I just want to see whether you agree with  
7 this basic proposition to start.

8 This certainly does not provide any support for the  
9 suggestion that the 10mg agreement led to price  
10 competition, does it?

11 A. So I do not think we can make that statement --

12 Q. It does not --

13 A. -- one way or the other without knowing what the  
14 counterfactual would have been. So, in my view,  
15 a simple before and after looking at prices or, sorry,  
16 before the agreement and during the agreement, unless  
17 you are controlling for all other impacts on price, has  
18 the potential of being very misleading and --

19 Q. Sorry, go on. Dr Bennett, obviously, that is true in  
20 a general sense.

21 A. Yes.

22 Q. But you have not suggested -- I am not aware of anything  
23 else that happened around October 2012, which would have  
24 caused prices to remain broadly on the trajectory they  
25 were on before that date?

1 A. Actually, that is not correct, because I have gone back  
2 since looking at the joint expert statement and if we  
3 could maybe go to 3.1, the figure and, apologies, I do  
4 not -- again, I do not know off by heart what page it is  
5 on. I think there is a very useful figure, 3.10.

6 Q. I think various people are trying to find the page  
7 reference.

8 A. It is a very helpful figure because it tells you what is  
9 happening at every point in time on price.

10 Q. 147. {A/12/147}.

11 A. Yes, this is the one. So this gives a view on the  
12 entire price evolution before and during the agreements  
13 and it gives you some important other context of what  
14 was happening before the agreement and during the  
15 agreement.

16 So the first point of that I would -- the first  
17 element I would point out is the Daily Mail article  
18 published in 2010 and the CMA in the Decision very  
19 clearly says the impact of this Daily Mail article, and  
20 it was an article that was very critical of Auden and  
21 the prices that it was charging, was that Auden kept its  
22 prices relatively constant for the next year.

23 So that is why you can see, at the point at which  
24 this comes out, there are no price increases for  
25 a significant period of time.

1           Now, obviously, that is in the before period and if  
2           you are going to do a comparison, that is something that  
3           is completely separate from the agreements and you would  
4           want to take that into account.

5           The second element here is January 2014. So Auden  
6           becomes aware of the effects of the orphan designation  
7           on MAs. Now, that is during the agreement, because the  
8           agreement started in October 2012, but you clearly see  
9           there is a much steeper increase in price at that point  
10          after Auden is aware that people are not going to be  
11          able to enter in with a full MA, just a skinny MA.

12          Again, that is an exogenous -- separate from the  
13          agreement. It is a piece of information that had an  
14          impact on price.

15          So, I would want to take account of all of these  
16          elements in any before and after -- sorry, before and  
17          during analysis of pricing in the agreement in order to  
18          attribute whether the agreement is having  
19          a pro-competitive effect or an anti-competitive effect.

20          Q. But I think, Dr Bennett, in fairness, the point I put to  
21          you was that you did not have anything in October 2012,  
22          because the basic point is that prices remain roughly  
23          where they are before and after the agreement. I was  
24          listening carefully to what you just said, but,  
25          actually, I think the first point you made was about an

1 article which I think you said had an impact, according  
2 to the Decision, up until July 2011 and the second point  
3 you made was a point about January 2014.

4 So, in fact, I think I am right to say to you, you  
5 do not have anything to point to, to explain -- to say  
6 that prices would have behaved differently  
7 in October 2012 in the counterfactual.

8 A. Sorry, if I was not clear. Obviously, if you are trying  
9 to do a comparison of the price before the agreement and  
10 how it has evolved and the trend and a price during the  
11 agreement and you are trying to draw conclusions to say:  
12 look, the price during the agreement went up much faster  
13 than it went before the agreement, then you do need to  
14 look at what was happening before the agreement and what  
15 was happening during the agreement.

16 Q. Can I just be clear. I am not suggesting --  
17 I appreciate why you have made this point, because  
18 Professor Valletti, I think, does suggest that prices go  
19 up higher during the agreement?

20 A. Correct.

21 Q. That is a factual question. But the point which I am  
22 putting to you is not actually that prices go up higher;  
23 maybe they did, maybe they did not.

24 A. Okay.

25 Q. The point I am putting to you is that your theory

1 predicts competition on price. So it is the other way  
2 round. If you are right, the agreement is going to be  
3 entered into and then prices are going to drop.

4 My suggestion is prices remain around the monopoly  
5 level. So it is not about going up. It is about  
6 whether there is a drop or not. I am also not  
7 suggesting a complicated before and after analysis.  
8 I am just making quite a simple point, which is that  
9 I look at the graph, with all of that in mind, and I say  
10 to myself: Dr Bennett predicts prices falling  
11 in October 2012 and you just do not see it.

12 A. To be very clear, I am not predicting prices falling as  
13 such. What I am predicting is that prices will fall  
14 relative to the counterfactual. That is, relative to  
15 how prices would have evolved absent the agreement.

16 Q. Yes.

17 A. Now, because there is an excessive pricing case going on  
18 at the same time, it is very difficult to make an  
19 assumption that prices will fall.

20 Q. Yes, well, that is a very fair point that it is compared  
21 to the counterfactual, but of course you will understand  
22 that is why I have put to you a couple of times now that  
23 you do not have any other reason for thinking that  
24 prices would have behaved differently, but for the  
25 agreement. You have only pointed to things which were

1 at least a year before or I think at least a year after  
2 the start of the agreement. But we do not have anything  
3 else to say that price would have behaved differently?

4 A. Sir, apologies, just to make sure I understand the  
5 question. Are you saying that in order for my views to  
6 be correct I would -- you would expect prices to fall or  
7 are you saying that you would expect them to fall  
8 relative to what they would have been, absent the  
9 agreements, because that is what I am saying.

10 Q. Yes, exactly. Just to be clear, I agree with you. It  
11 is the latter. They would fall relative to what they  
12 would have been, absent the agreement, which let us be  
13 clear here, at this particular point, is going to be  
14 monopoly -- it is going to be the continuation, at least  
15 in this immediate point, of the monopoly prices. So one  
16 would expect prices to fall relative to that.

17 I understand your answer is: well, yes, but we do not  
18 know what might have happened to monopoly prices had it  
19 not been for the agreement?

20 A. Correct.

21 Q. To which I say, do you have any reason to think that  
22 monopoly prices would have done anything differently  
23 in October 2012 to what they were doing in July 2011,  
24 October 2011, etc etc, because they just continue on  
25 the same general trajectory? Do I understand your



1 answer is, you actually do not have anything to point  
2 to. You are essentially making the point that there  
3 might have been something, but you do not know?

4 A. Okay. So, again, just to make sure I understand the  
5 question. So you are saying: let us look at the point  
6 at October 2012 and let us look at the trend, for  
7 example, six months before that and the trend six months  
8 after that, so not a long, long period, just a short  
9 period around October 2012, do we see any change in the  
10 trend? Is that your question?

11 Q. It was not quite the question. I think the question is  
12 simply: there is no reason to think that prices under --  
13 were it not for the agreement that prices would have  
14 gone up more, which I think is what you are suggesting.  
15 They might have gone up even more so the agreement might  
16 have kept them down lower than they would have been  
17 otherwise. I am simply putting to you that you do not  
18 have any reason to think that might have happened  
19 in October 2012?

20 A. But, again, this is not something that I have provided  
21 evidence on. My understanding is there is an excessive  
22 pricing abuse case going on simultaneously, such that  
23 Auden was increasing its prices excessively from the  
24 period of October 2008 and, therefore, I would expect  
25 prices to be going up from October 2008, given the

1 excessive abuse allegation, sorry, excessive price  
2 allegation.

3 Q. Prices do not need to be on an upwards trajectory for  
4 there to be excessive pricing. We can look at the graph  
5 and for most of this period that we are talking  
6 about, October 2012, this may be a very shallow gradient  
7 before and a shallow gradient afterwards, but, again,  
8 I do not see how that point, with respect, Dr Bennett  
9 really answers the question?

10 A. If we are talking about a short period before and  
11 a short period after, then I completely agree that there  
12 does not seem to be a change in the gradient a short  
13 period before and a short period after, six months  
14 before and six months after.

15 Q. Let us move on. The next point I want to turn to is  
16 negotiations and this is what I described at the start  
17 as a more general point, maybe not tied or not only tied  
18 to this particular agreement.

19 It is helpful to look, I think, at the summary of  
20 your argument in your first report, paragraph 118.  
21 Could we look at that, please. It is {D3/1/36}. What  
22 you explain there is that the fundamental point is this:

23 "... that the ability to threaten to use different  
24 sources of supply to obtain lower input prices generates  
25 consumer benefits. These benefits would be lost if the

1 Decision's view were to be upheld that entering  
2 a wholesale agreement with an incumbent supplier in  
3 preference to an external supplier was  
4 anti-competitive."

5 So the fundamental point that we are focusing on  
6 here is the ability to threaten to use different sources  
7 of supply in order to obtain lower input prices, yes?

8 A. Yes, that is correct.

9 Q. What we are thinking of in practical terms is AMCo being  
10 able to use the threat of supply from Auden to obtain  
11 a better deal from its third party supplier, which in  
12 this case is Aesica. Is that right?

13 A. Yes, that is correct.

14 Q. If we look, please, at your first report at {D3/1/36}.  
15 We are there already, I think. It is paragraph -- yes,  
16 I apologise. It is on the same page. Paragraphs  
17 115-117, so leading up to the conclusion we just looked  
18 at. The essential point is that the ability to make  
19 such threats gives the entrant a tool to leverage lower  
20 prices from its supplier?

21 A. That is correct.

22 Q. You do understand, Dr Bennett, that no one has suggested  
23 that it would be wrong for someone in AMCo's position to  
24 say to Aesica that if it cannot get a better deal, it  
25 will use a cheaper supply from elsewhere?

- 1 A. No, but you are saying they cannot say that they will  
2 get a cheaper supply from Auden.
- 3 Q. I wonder about that. I mean, firstly, of course they do  
4 not need to explain to Aesica exactly their terms with  
5 Auden. Do you agree with that?
- 6 A. Well, obviously, in a negotiation and when you are  
7 trying to have that negotiation, you are trying to be as  
8 credible as possible to say that you have an outside  
9 option. Otherwise, if you are not credible, then people  
10 are not going to believe you and that negotiation is not  
11 going to get you a benefit. So you have to be credible  
12 and you do want to try and give as much information as  
13 possible, subject to competition law, in order to ensure  
14 that that threat of going elsewhere is feasible.
- 15 Q. I suppose though even if AMCo did want to say to Aesica  
16 that it might get supply from Auden, it would not need  
17 to be explaining the agreement in a way which presented  
18 it as an unlawful agreement?
- 19 A. Correct.
- 20 Q. So it is only unlawful agreements that the CMA has taken  
21 objection to here, not supply, full stop.
- 22 A. Here is where I am struggling, because I think you are  
23 saying there is no explicit agreement not to supply.  
24 There is an inference of an agreement not to supply and  
25 therefore --

1 Q. Not to enter I think.

2 A. Sorry, not to enter, thank you. Therefore, it is very  
3 difficult to understand -- there is nothing to credibly  
4 bind yourself on. So if I have -- let me start again.  
5 Let me try and explain this more clearly.

6 If I go to a third party and I say, I have an option  
7 of going to the incumbent. Therefore, please make your  
8 offer better or give me higher volumes or give me  
9 a lower price or anything along those lines. Then, as  
10 far as I can see, there is a risk that it will be  
11 inferred that because you have the option of going to an  
12 agreement, if you then turn out not to go with the  
13 independent third party, you will be inferred to have an  
14 agreement not to enter.

15 Q. I understand, but that is your -- there is going to be  
16 argument, submission, about what the agreement is here  
17 and what is the evidence of the agreement. But the  
18 basis of these opinions that you set out then is your  
19 understanding of CMA's Decision in the in the terms that  
20 you have just described it; is that right?

21 A. Yes.

22 Q. In that case, Dr Bennett, thank you very much. I for my  
23 part do not have any further questions, thank you.

24 A. Thank you.

25 PROFESSOR MASON: I have one, if I may. Actually, it

1 centres on the paragraph that we just looked at, which  
2 was 118 {D3/1/36}. There it is on the screen,  
3 thank you. You fairly describe the model that you have  
4 developed as stylised. I understand at least one strand  
5 of the argument to be that the theoretical possibility  
6 that an agreement of the nature that we have been  
7 discussing generates consumer benefits.

8 A. Mm-hm.

9 PROFESSOR MASON: To what extent is that a purely  
10 theoretical point? To put it slightly differently and  
11 open up a different line of question, which assumptions  
12 are you making in the model that really matter for the  
13 theoretical possibility that you develop?

14 A. For the theoretical possibility that the agreement could  
15 be beneficial?

16 PROFESSOR MASON: Yes.

17 A. So I think one of the key assumptions is that there is  
18 some degree of uncertainty and that the incumbent and  
19 the potential entrant have -- well, in one simple aspect  
20 of the model it is that the incumbent and the entrant  
21 have different expectations of how much volumes could be  
22 successfully sold on the market if the entrant came on.

23 PROFESSOR MASON: Sufficiently different I take it?

24 A. Correct, correct. There is a second more complicated  
25 model which looks at the ability to have benefits via

1 the presence of an outside option and assumes that there  
2 are only two choices. So I guess a key assumption, in  
3 the stylised model, is that there is not a third  
4 alternative, other than the incumbent and the  
5 independent entrant. Therefore, what generates the  
6 benefit is because you are able to negotiate down that  
7 entrant and, in some sense, you are taking surplus from  
8 the entrant in order to give it to consumers, but at the  
9 simplest version of the model it is simply the  
10 difference in uncertainty and the difference in the  
11 expectations.

12 PROFESSOR MASON: Okay, thank you. Do I understand -- have  
13 I understood your argument correctly to be that, as  
14 a matter of economics, showing the theoretical  
15 possibility of the agreement increasing being beneficial  
16 to consumers implies that the object of an agreement  
17 cannot be to be anti-competitive? Is that what you are  
18 arguing?

19 A. No, my argument is simply that additional volumes on the  
20 market generates benefits and they generate benefits  
21 regardless of whether they come independently or whether  
22 they come from a third party, from the incumbent. They  
23 are always going to generate benefits. At that point,  
24 we cannot assume that the agreement is going to be  
25 anti-competitive because there are benefits generated.

1 We need to consider what the counterfactual will be in  
2 order to determine whether that agreement is  
3 anti-competitive. We are not in a world such as  
4 lump-sum agreements where you do not get entry, there is  
5 no incentive to compete on volumes and, therefore, we  
6 can safely say there are no benefits generated. We are  
7 in a world where there are benefits generated and what  
8 we need to do is determine whether those benefits  
9 outweigh or outweighed by any potential anti-competitive  
10 harm.

11 PROFESSOR MASON: Would it be fair to say that thus far you  
12 have established that point theoretically, but not in  
13 a model that has been matched empirically to the market  
14 situation?

15 A. So in the later part of my paper I do look at the  
16 evidence, and I do not want to overstep my position here  
17 because it is obviously for the court to determine what  
18 the evidence says, but if the court was to find that  
19 AMCo believed it could sell 10,000 or obtain 10,000  
20 volumes independently, and I am thinking particularly  
21 about this June 15 email talking about they are offering  
22 12,000, given we can only get 10,000 from Aesica, let us  
23 go with 12,000. If you believe -- if the court finds  
24 that that is correct, then in my view that is clearly an  
25 instance where AMCo is receiving greater volumes than it



1           would have independently and therefore that will  
2           generate benefits.

3           PROFESSOR MASON: Thank you.

4           MR JONES: Could I pick up on that because I think there is  
5           a bit of a danger here of confusing the issues.  
6           I think, Dr Bennett, if we just look at what you just  
7           said which was about a situation. You were asked by  
8           Professor Mason whether you had established this  
9           theoretically or empirically and you said, well if the  
10          court were to find that AMCo believed it could sell  
11          10,000, or obtain 10,000 volumes independently, if you  
12          believe -- if the court finds that that is correct, then  
13          in my view that is clearly an instance where AMCo is  
14          receiving greater volumes than it would have  
15          independently and it would generate benefits.

16                 I am afraid, Dr Bennett, you are muddling up two  
17          things there when you say "if you believe that is  
18          correct". I think what you are saying is if you believe  
19          that AMCo made that prediction then you will go on to  
20          decide in your view that this was pro-competitive  
21          because that was the debate we had at the start which  
22          was that you pin it all not on what happened post facto  
23          but on AMCo's predictions. I think that is what you  
24          meant --

25          A. I agree that is fair.

1 Q. -- because, and this just goes back to the point I was  
2 putting you to on section 6.2 because as it turns out,  
3 you did not mean to do this but you have actually done  
4 an ex post facto analysis so regardless of what they  
5 believed it is also right in answer to Professor Mason  
6 that the empirical analysis you have done in fact shows  
7 post facto, yes, but in fact shows that it was less  
8 competitive, the agreement was less competitive compared  
9 to what would have happened had AMCo been able to enter  
10 independently?

11 A. If you were taking the benefit of hindsight and ignoring  
12 what their expectations were at the time then, yes,  
13 I agree.

14 MR JONES: Thank you, sir, that is all.

15 THE PRESIDENT: Do we have anyone else before Mr O'Donoghue  
16 has an interest? No. I see the time. We will rise for  
17 a ten-minute break.

18 (3.34 pm)

19 (A short break)

20 (3.45 pm)

21 Re-examination by MR O'DONOGHUE.

22 MR O'DONOGHUE: Dr Bennett, we are in the home straight.

23 I have got just over a handful of things I would like to  
24 cover with you, if I may.

25 Can I start with your bananas example and I think,

1 by your own admission, it was somewhat extreme to  
2 illustrate a point of principle.

3 Now, can we look at something a bit closer to home,  
4 which is Plenadren. You are obviously aware that the  
5 CMA found that Plenadren was not in the same market as  
6 the other forms of Hydrocortisone?

7 A. Correct.

8 Q. Plenadren, we know from the Decision, was in category C  
9 for the relevant period. Now, let us assume for the  
10 purpose of my question that Plenadren was in category M  
11 for the period in question and, therefore, the drug  
12 tariff indirect effect the CMA relies upon would be  
13 equally present in a case of Plenadren.

14 Now, given the CMA's finding on the market that  
15 Plenadren was in, what would be the consequence, on the  
16 CMA's analysis, of Plenadren being in the same drug  
17 tariff category as the other forms of Hydrocortisone, in  
18 market definition terms?

19 A. In market definition terms, you would then find that  
20 Plenadren was in the same relevant market as  
21 Hydrocortisone.

22 Q. Thank you. Now --

23 A. Assuming that that constraint was binding and assuming  
24 that -- yes, I think you would find it in the same  
25 relevant market.

1 Q. Now, you mentioned, I think more than once, this issue  
2 of one way substitution of migration. A couple of  
3 things, one, can I clarify the terminology? Do you mean  
4 one way --

5 MR HOLMES: I hate to interrupt, but you obviously must not  
6 lead the witness in re-examination.

7 MR O'DONOGHUE: I am not leading.

8 MR HOLMES: It sounded as though you were about to put  
9 a proposition to him.

10 MR O'DONOGHUE: How can I be leading something I have not  
11 said.

12 THE PRESIDENT: Let us see how we go.

13 MR O'DONOGHUE: Please do not interrupt.

14 THE PRESIDENT: My understanding about the niceties of  
15 re-examinations, having looked this up, is that you can  
16 lead, but it goes to weight. So do not do it, because  
17 you are not going to get as much traction as you  
18 otherwise would.

19 MR O'DONOGHUE: Indeed, sir, which I am acutely conscious  
20 of. I am repeating to Dr Bennett a phrase he used,  
21 which can be checked in the transcript if you want to  
22 bother. Anyway, so you use this phrase of one way  
23 substitution. Can I clarify what you mean by "one way"?

24 A. We only see people switching from full label to skinny  
25 label. We subsequently do not see any of them switching

1 back for reasons of price and when there is substantial  
2 changes in the relative prices, we do not see that  
3 having any impact on volumes. Volumes are constant. As  
4 I have cited in my report in -- I think it is my second  
5 report, there are a number of cases where the CMA has  
6 had a similar sort of fact pattern in mergers, for  
7 example, in Sainsbury's/Asda, in Coral/Ladbroke's and the  
8 CMA has said this one way migration does not constitute  
9 a constraint and, therefore, should not be considered.  
10 I am simply saying that could be the case here, because  
11 we only see switching in one direction. We do not see  
12 switching going back to full label from skinny label.

13 Q. In your opinion, what implications, if any, does that  
14 have for market definition?

15 A. For me that implies that skinny label is not providing  
16 a constraint on full label. Full label is not being  
17 constrained by the price of skinny label, because you do  
18 not see people switching back.

19 Q. Thank you. My third question, you were referred on  
20 a number of occasions to the so-called indirect effect,  
21 the drug tariff. You referred it to as a regulatory  
22 constraint and I think you used the word "exogenous".

23 Do you remember that?

24 A. I do.

25 Q. Can we please go to yesterday's transcript with Mr Holt,

1 page 62, please. {Day 5/62:1}. Just give me a second.

2 (Pause).

3 I do not have that, but he referred to this  
4 constraint as a form of countervailing buyer power by  
5 the customer. Is that a characterisation you would  
6 agree with?

7 A. Yes, I think I said earlier today that I would see it as  
8 something that you might take into account within  
9 dominance or something along those lines. It is  
10 a regulatory constraint that acts exogenously and may  
11 have an impact on the ability to price independently,  
12 whether it is particularly countervailing buyer power or  
13 not, I think gets into maybe slight semantics.

14 Q. Yes. Can I just show you what the Decision says this,  
15 please. It is {IR-A/12/44} and it is 4.287. Do you see  
16 that? If I can just take this in two parts. So it was:

17 "It was also the case that Actavis did not need to  
18 rely on the drug tariff price to lower its price... It  
19 could have simply decided to lower its price."

20 Pausing there, what do you understand from that?

21 A. That Actavis was free to lower its price to meet  
22 the price of skinny label, if it so chose.

23 Q. Then at the end -- so this is the dominant section of  
24 the decision on countervailing buyer power. It says:

25 "The extent of the constraint coming from the Drug

- 1           Tariff was limited."
- 2           A. Then that would suggest that the drug tariff was not  
3           having an impact, which I disagree with.
- 4           Q. Now, fourthly, you mentioned more than once the use of  
5           a SSNIP test as evidence on market definition. Now, as  
6           a matter of economics, let us assume a SSNIP is done and  
7           the monopolist can impose a SSNIP level increase  
8           profitably, in your economic opinion would that be  
9           strong, weak or neutral evidence on the question of  
10          substitution and market definition?
- 11          A. In my view, that would be strong evidence that it is  
12          a separate market.
- 13          Q. Can you elaborate on why that is?
- 14          A. Well, as long as your analysis was robust, ie your  
15          estimate of the competitive price and the fact that  
16          a monopolist was pricing substantially above that was  
17          robust, then for me that is direct evidence that a 5 to  
18          10% price rise, indeed a 20 to 30 to 40% price rise is  
19          actually profitable in the market today.
- 20          Q. Thank you. Finally, you were asked about these, at some  
21          length, these two scenarios involving independent entry  
22          and a supply agreement. Do you remember that?
- 23          A. I do.
- 24          Q. If we can go to yesterday's transcript at 136, please.  
25          {D5/136:17-19}. Again, it is Mr Holt. This time I hope

1 to actually find it. Scroll down, please. It is at  
2 line 17-18. This is Mr Holmes. What has been looked at  
3 here is the start of the post-entry period where Alissa  
4 entered. It was the first skinny label supplier to  
5 enter. Mr Holmes says:

6 "It looks as though its [its being Auden] first  
7 instinct was to attempt to increase the price. Alissa,  
8 it has to be said, is the only entrant, perhaps  
9 rationally, was not competing hard during this period.  
10 It was keeping prices static. But even that limited  
11 competitive constraint appears to have led to a reversal  
12 of the upward trend, does it not?"

13 Then if you scroll down, Mr Holt says:

14 "Well, no, I would not say it is a reversal, because  
15 again, if you look at that six month period as a whole,  
16 the price was still going up ..."

17 Do you agree with Mr Holmes in relation to what he  
18 says about Alissa during this period?

19 A. Can you go back, please, just so I can check the  
20 question.

21 Q. It was keeping its prices static, not competing hard.

22 A. During this first period?

23 Q. Yes.

24 A. Apologies, I need to go back and have a look at the  
25 graphs.



1 Q. I think if we go to your report it is {D3/1/46}, please.

2 You have a graph analysing the --

3 A. Yes. So here I say the view that a --

4 Q. Sorry, Dr Bennett. Could you give us the reference  
5 where you are?

6 A. Sure, it is paragraph 152 on {D3/1/46}:

7 "The view that a skinny label entrant was unlikely  
8 to have entered at a substantially reduced price, is  
9 also consistent with the Alissa's pricing pattern as the  
10 first skinny label entrant in October 2015."

11 So here I am saying the fact that you only have one  
12 player entering may not mean that you have super intense  
13 competition. It might be that they enter just below  
14 and:

15 "As seen in the chart below, Alissa charged a price  
16 that was similar to Auden/Actavis's price at the time,  
17 (£68) and only dropped its price when they had further  
18 entry by AMCo..."

19 Q. Now, if we compare that single independent entry  
20 scenario with the scenario of an incumbent and a single  
21 supply agreement, as in this case, how do those two  
22 scenarios compare in terms of relative pricing levels?

23 A. This is the point that I was making in my discussion  
24 with the president earlier -- was that independent entry  
25 may look pretty much the same as entry through an

1 agreement in that in both situations you may have an  
2 incentive not to price substantially lower. You may  
3 price relatively smaller. I cannot rule that out. But  
4 then the question is: is the agreement having any  
5 impact? That is just what competition looks like in  
6 this market.

7 MR O'DONOGHUE: Sir, I have no further questions.

8 THE PRESIDENT: Thank you very much. Dr Bennett, we have no  
9 further questions for you. Thank you very much for your  
10 evidence.

11 A. Thank you very much.

12 (The witness withdrew)

13 MR HOLMES: Sir, I am conscious of the time. You said  
14 I think at the end of business yesterday that you were  
15 keen to have Mr Bishop done and dusted by the end of  
16 today. I fear it will come as no surprise to you to  
17 hear that is now unlikely to eventuate. Would you  
18 prefer, sir, to start Mr Bishop today. I am very happy  
19 to do so if you would like or would you prefer to wait  
20 and proceed afresh on Friday morning?

21 MR PALMER: Just before you answer that question, there is  
22 a request on behalf of Mr Bishop, if the tribunal is  
23 willing to accommodate it, to begin fresh on Friday  
24 morning, given that tomorrow is a non-sitting day.

25 THE PRESIDENT: He is going to be in purdah for quite a long

1           time.

2           MR PALMER: Exactly. That is the issue.

3           THE PRESIDENT: At the cost of half an hour, I can see some  
4           merit in drawing stumps now, but I think we ought,  
5           before absolutely going fast on that, to just reacquaint  
6           ourselves with any timetabling difficulties that we may  
7           have.

8           One point I think that we should flag up concerns  
9           the mop-up questions from the tribunal. We have been  
10          asking our questions as we go along and it has been  
11          extremely helpful in respect of the responses we have  
12          received from the witnesses and we are very grateful to  
13          all of them.

14          We do not have any large area of uncovered territory  
15          that we are saving up to put to the witnesses. We said  
16          earlier that if something occurred to us, we would raise  
17          it so that the parties knew. So whilst we would never  
18          say never, that such a thing may not occur, two days  
19          into the economic evidence, I suspect a concern of an  
20          area that had not been covered would have articulated  
21          itself at least in some amorphous way in our minds and  
22          it has not. So I think we can take it that that time is  
23          likely to be free time in the sense that overruns can be  
24          accommodated into that.

25          I do not know if that eliminates the problems about

1 the loss of the morning of 6 December, but perhaps the  
2 parties could over the next day consider whether they  
3 want us to sit longer than the 10 o'clock starts in  
4 order to ensure that everyone has got the time they need  
5 and that the very limited preparation time for closing  
6 submissions is not unduly encroached upon. I know in  
7 BGL we went into a lot of the time that was needed for  
8 closing submissions and that was not, I think,  
9 particularly kind to the parties and it is something  
10 that I would be anxious to avoid, if we can.

11 But I will leave it there as an offer to consider  
12 very carefully any suggestions that the parties have as  
13 to extended sitting times to make sure we catch up. But  
14 I do not think half an hour now is going to make much  
15 odds. So we will rise until 10 am on Friday, 2 December  
16 when we will start fresh with Mr Bishop.

17 MR HOLMES: I am grateful.

18 THE PRESIDENT: Thank you all very much.

19 (4.07 pm)

20 (The hearing adjourned until Friday, 2 December at 10.00 am)

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