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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 22nd November-Friday 23rd December 2022

Before:

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

BETWEEN:

Appellants

(1) ALLERGAN PLC (“Allergan”)

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

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

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

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

AND:

Respondents

COMPETITION AND MARKETS AUTHORITY (“The CMA”)

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)

Friday, 2 December 2022

(10.00 am)

(Proceedings delayed)

(10.20 am)

THE PRESIDENT: Mr Palmer, good morning.

MR PALMER: Sir, may I start with an apology and
an expression of gratitude to the Tribunal for your
patience in awaiting the bundles -- the bundles which
were here in good order on Wednesday were not here in
good order today, it turned out, and so --

THE PRESIDENT: The gremlins have been working overtime,
I am sure.

MR PALMER: So, I am going to call Mr Bishop to give
evidence.

THE PRESIDENT: Very good. Mr Bishop, good morning.

MR SIMON BISHOP (affirmed)

Examination-in-chief by MR PALMER

MR PALMER: Mr Bishop, you have behind you now some folders
containing your first and second reports and their
exhibits, the joint expert statements and the other
expert statements. That is clean copies of all of them
behind you, should you wish to refer to any of them in
hard copy.

But can I take you to the screen in front of you
first of all and call up {IR-D5/1/1}. Is that your

1 first expert report, "An Economic Assessment of 10mg
2 Hydrocortisone Tablet Pricing Between" those dates?

3 A. It is.

4 Q. Can we turn to page 38 of that document {IR-D5/1/38}.
5 We are reading the IR version, please. Is that your
6 signature there?

7 A. It is.

8 Q. Can we go to {IR-D5/2/1}. That report, "Reply to the
9 Economic Points raised in the Valletti Report and the
10 CMA's Consolidated Defence". Is that your second expert
11 report?

12 A. Correct.

13 Q. Can we go to page 39 {IR-D5/2/39}. Is that your
14 signature again there?

15 A. It is.

16 Q. Can we go to page 41 of this document {IR-D5/2/41}. Do
17 we see there some corrections to two of your tables
18 since the Tribunal may first have seen those tables?

19 A. That is correct, yes.

20 Q. Do any of those corrections affect any of your
21 substantive findings?

22 A. They do not, no.

23 Q. What we see is that some of the columns are moved over,
24 effectively. They have been formatted in the wrong
25 place, is that effectively the substance of it?

1 A. Yes.

2 Q. Thank you. Can we turn to {IR-G1/1/53}. That is the
3 final page of the joint expert statement. Is that your
4 signature that we see second along there?

5 A. It is.

6 Q. Do the views and opinions that you express in each of
7 your expert reports in that joint expert statement
8 express your true, complete and independent professional
9 opinion?

10 A. They do.

11 MR PALMER: I am very grateful.

12 Cross-examination by MR HOLMES

13 MR HOLMES: Good morning, Mr Bishop and thank you for
14 waiting so patiently. I know you were here and raring
15 to go on Wednesday.

16 Your reports address the issues of dominance and of
17 abuse and excessive pricing; that is correct, is it not?

18 A. Correct.

19 Q. You do not directly consider market definition in your
20 evidence?

21 A. No, in my evidence I have essentially adopted the CMA's
22 market definition.

23 Q. Yes. So although you make a point about inconsistency
24 between the CMA's market definition and its findings on
25 dominance, it is not your evidence that the CMA's market

1 definition was wrong in any respect?

2 A. Not in my view. I think if you look at what happened in
3 the marketplace, the skinny label came in, prices went
4 down, market share was lost. Kind of my prior on that
5 would be that skinny label is providing an effective
6 competitive constraint on full label.

7 Q. I propose to discuss matters in the order in which you
8 deal with them in your first report, so I would like to
9 begin, if we may, with dominance.

10 To set your evidence in context, your analysis of
11 that issue is limited to the Intas period, that is to
12 say the period starting in January 2017 when Intas
13 purchased the Actavis UK business; is that right?

14 A. That is correct.

15 Q. The Intas period ends in July 2018 because that was the
16 end date for the unfair pricing infringement referred to
17 in the Decision?

18 A. That is correct.

19 Q. You know that the CMA did not consider in the Decision
20 whether Actavis remained dominant after July 2018?

21 A. Correct.

22 Q. Now, your position is that it is necessary to consider
23 the period of dominance separately for the Intas period,
24 but would you accept that the fact that Intas acquired
25 the Actavis business is not itself a factor that affects

1 the dominance analysis?

2 A. Well, let me first of all say my instructions were to
3 focus on the Intas period. I think Mr Holmes' question
4 is does it affect the issue of dominance? I think it
5 does, because the position at the beginning of the Intas
6 period was quite different from the beginning period of
7 the unfair pricing abuse.

8 Q. Yes. My question was a slightly different one. The
9 change of the corporate ownership of Actavis is not
10 itself a factor which affects the dominance assessment,
11 is it?

12 A. I think you are taking me outside my area of expertise.

13 Q. You are not aware of any reason why the mere change of
14 corporate control would affect the dominance assessment?

15 A. Well, I think the mere corporate change in control
16 probably doesn't, but -- and I think this is
17 an important point in my view, is this question of
18 whether you are dominant on day T and then on day T plus
19 one you suddenly become non-dominant. In this changing
20 competitive environment it is quite hard, I think, to
21 identify, in my view, when the market flipped from
22 dominance to effective competition, and so whether that
23 is a corporate change or not I do not know, but one
24 would want to look at the changes in the competitive
25 constraints over the entire period.

1 Q. Yes. So I think what you are really saying then is that
2 the CMA and the Tribunal need to be satisfied that there
3 is sufficient evidence to support a finding of dominance
4 in the Intas period specifically, having regard to
5 developments over the period under consideration; is
6 that right?

7 A. Correct.

8 Q. You are not saying that the CMA was obliged to have
9 a section in the Decision headed "the Intas period" and
10 to deal with that period distinctly from any other part
11 of the post-entry period?

12 A. Again, I am not a lawyer, so I do not know whether that
13 is required or not but my instructions were to focus on
14 the Intas period, which is what I did.

15 MR HOLMES: No, that's what I'm asking.

16 THE PRESIDENT: But I think what you are saying is, and
17 irrespective of how it is drafted, one does need to bear
18 in mind material changes in the market over time because
19 it is quite possible for a dominant position to be lost
20 or a dominant position to be gained depending on what is
21 going on.

22 A. Exactly, exactly.

23 THE PRESIDENT: I mean, put that way it is as trite as can
24 be, but there we are.

25 MR HOLMES: Yes. You have not opined in this case on

1 whether the Auden/Actavis undertaking held a dominant
2 position prior to the Intas period.

3 A. I have not, no.

4 Q. That includes the period before there was any
5 competitive entry. You do not offer any opinions on
6 whether Auden/Actavis was dominant then?

7 A. I do not, no.

8 Q. You also do not offer any opinions on whether it was
9 dominant in the period of around 15 months between the
10 first competitive entry and the start of the Intas
11 period?

12 A. I do not, correct.

13 Q. That is why those propositions in the expert table
14 contain "N/A", just to be clear, "not applicable", yes?

15 A. I should say "yes", for the transcript.

16 Q. I am grateful. Yes. Can we please turn to paragraph 49
17 of your first report at {IR-D5/1/11}. I should say,
18 these things will come up on the screen but if you want
19 to consult in the paper copy that is obviously fine as
20 well. Do you have that, page 49 [sic]?

21 A. Yes.

22 Q. You say here that the key economic question, this is the
23 final paragraph on the page:

24 "... the key economic question ... is whether
25 Accord-UK faced effective competition in the supply of

1 10mg ... tablets [during the Intas period]."

2 That is to say, January 2017 to July 2018, and you
3 say this question "feeds into" both dominance and abuse.

4 Now, just to clarify a small point, you are not
5 intending there to draw any distinction between 10mg and
6 20mg supply, are you? Presumably your view is that
7 whether a firm faces effective competition is the key
8 economic question when it comes to 20mg supply as well?

9 A. Well, again, my instructions were to look at 10mg but
10 I think as a point of principle that was probably
11 correct.

12 Q. Yes, and as we will come on to see, you do consider the
13 20mg competitive conditions as well insofar as you say
14 they inform the assessment of the 10mg arrangements?

15 A. I make some comment in relation to whether they were
16 captive customers or not.

17 Q. Yes. Now, in terms of what you mean by "effective
18 competition", you say in your second report that you are
19 referring to a situation in which:

20 "... the competitive constraints to which a firm is
21 subject are sufficient to prevent it from exercising
22 significant market power."

23 Do you recall that or would you like to look at it?

24 A. If you could pull it up.

25 Q. Yes, of course. It is the second report. That is at

1 {IR-D5/2/11}, at the foot of the page. If you could
2 just enlarge the footnotes, footnote 17. You see there
3 that you say that:

4 "... the term is generally understood ... to mean
5 that the competitive constraints to which a firm is
6 subject are sufficient to prevent it from exercising
7 significant market power."

8 Now, can we agree then that competitive constraints
9 are a matter of degree?

10 A. We can.

11 Q. An important question when it comes to dominance is
12 whether a firm is subject to sufficient competitive
13 constraints that it is prevented from setting prices
14 that are substantially above competitive levels; would
15 you agree with that as well?

16 A. I would, yes.

17 Q. You would also accept, I think, that a firm can face
18 some competition and yet still be dominant?

19 A. I would.

20 Q. Similarly, you accept that if the competitive landscape
21 changes it may take some time for outcomes to change to
22 reflect this, so that, for example, if a firm is
23 dominant because it is a monopolist it does not
24 necessarily cease to be dominant immediately just
25 because some competitors enter; would you agree with

1 that?

2 A. To reflect, you said to reflect this. Can you be more
3 precise, please?

4 Q. So, the question was: you accept that if the competitive
5 landscape changes it may take some time for outcomes to
6 change to reflect this, so just taking it by degrees; do
7 you agree with that?

8 A. Well, I think it might be useful on this point to take
9 the Tribunal to my first report at paragraphs 36.

10 Sorry, I do not know the page number. Sorry,
11 {IR-D5/1/9}. Here, for me this is a rather unusual
12 excessive pricing case because we are not talking about
13 a firm not subject to any competition at all, protected
14 from regulatory barriers to entry. Here we have
15 a situation where skinny label came in and full label
16 was subject to some competition, and the question
17 is: are we trying to distinguish between when that "some
18 competition" became effective?

19 Now, I think there is a philosophical debate one
20 could have about whether we are looking at competition
21 as being instantaneous. So we move from a position of
22 monopoly, competition comes in and only competition
23 happens when we move precisely to the competitive price,
24 whatever that is, and that is a big issue with excessive
25 pricing cases, is because identifying what the

1 competitive price is is a priori very, very difficult.

2 That is one kind of view. The other view is
3 competition is a process, and so -- and I know analogies
4 are problematic, but if a firm introduces a new product
5 and it is a monopolist and is earning monopoly rents for
6 12, 18 months, and then competitors come in and the
7 first competitor comes in and there is a drop in price,
8 and then another competitor comes in and we drop and
9 so on, and the process of that competition is we move
10 from monopoly pricing to competition. For me, that is
11 competition working. It is not competition only works
12 when we get to the endpoint. It is the process, and it
13 is about when that process starts to be implemented.

14 I think that is a really important point, that
15 I would argue that the entry of skinny label,
16 particularly by the time of the beginning of the Intas
17 period, was providing effective competitive process to
18 take -- to erode those any monopoly profits in the
19 market and take us towards the ultimate competitive
20 price equilibrium.

21 MR HOLMES: Yes.

22 THE PRESIDENT: To take an example unrelated to this case,
23 at the beginning of the Covid pandemic an awful lot of
24 people who had never purchased a mask before began
25 purchasing masks, and the demand for masks shot through

1 the roof and those who were able to gear up quickly to
2 produce masks, i.e. those who were already producing
3 them, gained significant monopoly rents, if you like,
4 because they had the supply and the demand had gone
5 through the roof and prices went up.

6 But because it was a contestable market you
7 immediately got people gearing over to produce, instead
8 of whatever they were producing, masks and the price
9 came down.

10 So what you have got is the, if you like, excessive
11 price at the beginning acting as an attraction to other
12 people coming into the market, and your position is that
13 that is competition working, not competition not
14 working?

15 A. Correct. Absolutely, sir.

16 MR HOLMES: Thank you, sir.

17 If we could go in the joint expert statement to
18 {IR-G1/1/30}, and if we could look at proposition 50.
19 The proposition is:

20 "Dominance does not necessarily cease to exist at
21 the point of entry of rival suppliers."

22 You see that Professor Valletti agrees with that,
23 and he notes that:

24 "Otherwise, the suggestion would be that only
25 monopolies can be dominant, whereas firms can hold

1 market power while still facing some degree of
2 competition in the market."

3 You also agree:

4 "A firm ceases to be dominant once it faces
5 effective competition from rival suppliers."

6 You say that Professor Valletti mischaracterises
7 your assessment in claiming that you argued that:

8 "... dominance and excessive pricing necessarily
9 ceases to exist at the point of entry by rival
10 suppliers."

11 Now I have heard what you have just said. I do not
12 think any of that is intended to detract from the
13 evidence you give there. That simply is the fact of
14 competitive entry does not in itself mean that there
15 will be immediately effective competition from rival
16 suppliers, does it?

17 A. I do not think anything I have said here contradicts
18 what I have just said.

19 Q. No.

20 A. But I also, if I may, since it is up on the screen,
21 comment on Professor Valletti's argument that only
22 monopolies can be dominant. That is clearly not the
23 case, is it? Clearly not the case. One can think of --

24 Q. But that is what he is saying, Mr Bishop. He is saying
25 that that is clearly not the case.

1 A. Yes, and --

2 Q. So I think you are agreeing with him.

3 THE PRESIDENT: I think you are in agreement on that.

4 A. We are.

5 THE PRESIDENT: Reading Professor Valletti's answer on 50,
6 he is saying you have got to agree with that otherwise
7 only monopolies could become ...

8 A. Correct.

9 MR HOLMES: Yes. So there is no, just to be clear, there is
10 no disagreement there, is there?

11 A. No.

12 Q. Thank you. Then looking at the next proposition:

13 "The response to changes in competitive conditions
14 may take some time."

15 Again, this is a point, happily, on which you and
16 Professor Valletti are agreed. You say in your column:

17 "In real-world markets, it is often the case that
18 outcomes do not change instantaneously to changes in
19 competitive parameters."

20 Then you refer to a paragraph in your second report.

21 Again, that remains your evidence?

22 A. It does, yes.

23 Q. I am grateful. So I think we can then move on. Would
24 you agree then that whether a firm ceases to be dominant
25 is a matter of degree that will require a rounded

1 assessment of all of the evidence?

2 A. Yes.

3 Q. In the analysis of dominance in your first report, you
4 consider the findings in the Decision concerning market
5 shares. But can I just check, it is right, I think,
6 that you do not actually dispute any of the factual
7 findings made by the CMA in relation to market shares?
8 You do not suggest there is any miscalculation?

9 A. No.

10 Q. If we could look, for example, at paragraph 4.249 in the
11 Decision. That is {IR-A/12/390}. Taking 10mg tablets,
12 which are the focus of your reports, subparagraph (b)
13 records that:

14 "... after declining [from a starting point of
15 monopoly] until March to May 2016, Actavis's [share of
16 the market] stabilised [measured by value] above 70%."

17 You do not dispute that, do you?

18 A. No.

19 Q. As we can see here, this finding applies throughout the
20 Intas period on which you focused. Indeed, we see here
21 that Actavis's value-based market share was 86% in
22 July 2018, so that is right at the end of the Intas
23 period, is it not?

24 A. Correct.

25 Q. You say in footnote 41 of your first report, if we could

1 just go there, so that is {IR-D5/1/17}. You say that
2 the Decision focuses predominantly -- sorry, do we have
3 that on Opus? {IR-D5/1/17}. So just at the foot of the
4 page, footnote 41, you say there that:

5 "... the Decision focuses predominantly on market
6 shares calculated [by] value..."

7 And that it is also important to consider market
8 shares by volume.

9 You are not suggesting that value shares are
10 an irrelevant consideration for the purposes of
11 dominance assessment, are you?

12 A. No.

13 Q. And in any case, if we return to the Decision,
14 {IR-A/12/390} at 4.250(a), if I could just ask you to
15 read that to yourself, please.

16 A. 4.250(a)?

17 Q. Yes, please. It is on a page on Opus, I think.

18 A. I have 4.249 on the screen.

19 Q. Can we move on a page on Opus, please. Sorry, thank you
20 {IR-A/12/391}. Do you have that?

21 A. Yes.

22 Q. So you would accept, I think, that the CMA does here
23 consider Actavis's market share by volume?

24 A. It does, yes.

25 Q. It finds that they remained above 50% for most of the

1 post-entry period and they stabilised at around 50% in
2 2018, fluctuating slightly above and slightly below that
3 level and reaching 53% at the end of the Intas period in
4 July 2018. Again, those factual findings are not
5 contested, I think?

6 A. Correct.

7 Q. What these market share figures show is that despite its
8 higher prices and its decline in volumes, Actavis was
9 able to generate much higher revenues than its
10 competitors right up until the end of the Intas period?

11 A. Correct.

12 Q. Yes. Now, I am not going to ask you about the legal
13 issue of whether dominance is to be presumed on the
14 basis of market shares, because I appreciate that is not
15 your domain. But as an economist you would presumably
16 agree that if an undertaking possesses high market
17 shares over a sustained period, however you are
18 measuring them, that is at least a relevant condition
19 when coming to assessing market power?

20 A. I would agree that it is a relevant consideration, but
21 I do not think -- and maybe I am straying back into
22 whether this is a legal presumption or an economic
23 presumption -- that these are rebuttable. So if I see
24 a firm maintaining market shares above 50%, do
25 I immediately conclude that that firm possesses

1 significant market power? I do not. I think there is
2 a possibility that it does, and then I would want to
3 look at other factors such as, is it maintaining its
4 market share through other competitive responses, for
5 example by dropping its price?

6 I think in those situations that would give me
7 a very different answer to: I see a firm maintaining
8 a 50% market share with no changes in its prices. The
9 two situations from my economic perspective would be
10 very different.

11 Q. Yes. That is very helpful. Turning to pricing.

12 I believe you also do not take issue with the CMA's
13 finding that there is a significant price premium
14 between the prices charged by Actavis and those charged
15 by the skinny label suppliers?

16 A. I do not, no.

17 Q. No. If we could turn, please, to a figure that appears
18 in the Decision but it is in corrected form. I think it
19 has wandered in the bundle, but I think I am right in
20 saying that it is now {IR-A/12.1/1}. So if we could
21 turn that to the portrait, please. Sorry, to the
22 landscape. This is a version of figure 1.4 on page 22
23 of the Decision. The only correction to it is that it
24 now indicates the end of the unfair pricing abuses in
25 the right place. The solid red line is Actavis's 10mg

1 prices and the dotted red line is competitors' skinny
2 label 10mg prices, and the purple line at the bottom
3 represents the CMA's assessment of costs of 10mg supply.

4 I think we can agree that this shows there is
5 a substantial gap between Actavis's 10mg prices and its
6 competitors' prices which persists well past the end of
7 the Intas period in July 2018?

8 A. Agree, yes.

9 Q. Can we also agree that the gap in fact grows between
10 October 2015 when the differential first starts to
11 emerge and January 2017 at the start of the Intas
12 period? Do you see that? We can go to a different
13 figure, actually, which may be clearer if that is
14 helpful. I agree there are quite a lot of different
15 lines and squiggles here.

16 THE PRESIDENT: There is quite a lot. It may not matter for
17 now, but the costs line, it would be helpful to
18 understand -- probably, I am sure, in the Decision --
19 how that has been calculated, whether that is the
20 marginal cost of an additional packet or whether it
21 contains some common costs.

22 MR HOLMES: Those are the costs of production. They are the
23 direct costs, cost plus figures as shown elsewhere.

24 So if we go in the Decision to {IR-A/12/398} and
25 look at figure 4.19 at the top of the page. This shows

1 the difference -- if we could enlarge the top of the
2 page, please. So, this shows the difference between
3 Actavis's prices and average competitors' prices for
4 10mg, and that is in relative and absolute terms. The
5 pink line is the relative price, so it shows the, if you
6 like, the percentage difference between them.

7 You can see the overall upward trend, and this
8 continues after Intas acquired the company in 2017,
9 January 2017; do you see that?

10 A. Yes.

11 Q. At one point getting as high as 600, or just shy of
12 600%.

13 A. Yes.

14 Q. Again, you do not dispute any of the calculations or
15 factual findings about the position?

16 A. I do not, no.

17 Q. We have already seen from the joint experts' statement
18 that you agreed that dominance is associated with a firm
19 being able to charge substantially above the competitive
20 price. So I think, given that you do not challenge the
21 Decision's findings about the price differential, your
22 position must be that the price charged by Actavis's
23 competitors is not a good benchmark of the competitive
24 price; is that fair?

25 A. Correct.

1 Q. Otherwise you would have to accept that this price
2 differential was an indicator of dominance?

3 A. But I also think here, and if I may take the Tribunal to
4 my first report on {IR-D5/1/10}, paragraphs 38 and 39,
5 this comes back to why we do not see excessive pricing
6 cases in this type of situation, because there is
7 a certain degree of circularity between this issue about
8 dominance and excessive pricing. I think, as I say
9 here, it is important not to guard about saying, "I am
10 inferring dominance from high prices" and then I am
11 going to, from that dominance, infer that the high
12 prices are excessive. It is a kind of circular
13 reasoning.

14 So these statements saying these are large
15 differentials, that is true, but relative to what?
16 Relative to what benchmark? We do not have that, and it
17 seems to me there is big circularity in the CMA's
18 analysis of dominance here between dominance and
19 excessive pricing.

20 Q. I understand the concern you are expressing there, but
21 to go back to your earlier answer, and forgive me if
22 I have misunderstood, but I think you said that you
23 would not regard sustained high market shares as in
24 themselves conclusive and you would want to look at
25 pricing. So is this price differential not where you

1 would go next?

2 A. No, I think you would look at pricing responses. But
3 the actual existence of a price differential between
4 full label and skinny label is entirely consistent with
5 the products being differentiated, and I think that is
6 a point of being accepted, that these products are
7 differentiated, and where products are differentiated
8 they can be sold at -- one product can be sold at
9 a premium to another. Whether this observed premium
10 here is "the competitive price premium" or a monopoly
11 price premium you cannot tell. By just saying it is
12 500%, I do not know whether that is a big number, and
13 particularly when I look at skinny label pricing we see
14 differentials there.

15 So we have products which are "homogeneous" but we
16 have price differentials. No one is saying that is an
17 outcome of monopoly significant market power. So I do
18 not think you can infer dominance from observed premium
19 between full label and skinny label.

20 Q. But I think this might be the point that you are making
21 at page 18 of your first report, paragraph 102. If you
22 can just go there, that is {IR-D5/1/21}. You say that:

23 "... the key question is not whether Accord-UK
24 charged a premium, but whether or not that price premium
25 is as a consequence of a lack of effective competition."

1 So if I can paraphrase your position. You accept
2 there was a premium, as demonstrated by the figures we
3 have just been looking at, but your position is that you
4 also need to consider whether the premium was a result
5 of effective competition or not. Is that fair?

6 A. Correct, and I would say that the CMA's own market
7 definition implies that it was subject to effective
8 competition, and I think it is important to kind of try
9 and draw this out, because whether we talk about
10 defining markets according to the SSNIP test or
11 hypothetical monopolist test or by looking at the most
12 important competitive constraints, it all comes down to
13 the same thing. What we are arguing, addressing here,
14 is whether a hypothetical monopolist of full label would
15 be able to profitably increase prices above the
16 competitive level. The market definition adopted by the
17 CMA, which I agree with, says the answer to that
18 question is it could not. That is saying that skinny
19 label is providing an effective competitive constraint
20 on a hypothetical monopolist of full label tablets. But
21 of course, in this case we do not have a hypothetical
22 monopolist, we have an actual monopolist. So we are
23 saying that the market definition adopted by the CMA
24 necessarily implies that Accord could not increase
25 prices above the competitive level, otherwise the market

1 definition is wrong.

2 Q. But is the market definition exercise not aimed at
3 identifying products that are capable of constraining
4 market power? It is not conclusive on the question of
5 whether there is or is not dominance. Once you define
6 the market you may find that the operator is dominant
7 despite the existence of products capable of
8 constraining competition?

9 A. In theory Mr Holmes is absolutely correct, but in this
10 particular example he is incorrect because the question,
11 the market definition question is: could a hypothetical
12 monopolist profitably increase prices above the
13 competitive level? In the market definition question
14 the CMA says no, skinny label constrains it and prevents
15 that hypothetical monopolist from increasing prices
16 above the competitive level.

17 When we move to dominance we are almost asking the
18 same question: can this particular firm increase prices
19 above the competitive level? The CMA is trying to say
20 the answer to that as yes. There is some logical
21 inconsistency, because in this situation the market
22 definition question is exactly the same as the dominance
23 question. So in this particular case I think I have to
24 respectfully disagree with you.

25 Q. I think we will come back to that. But can I just

1 check: you suggested that Actavis was a monopolist.
2 During the period we are considering it was not
3 a monopolist, was it? The question is whether the
4 constraints that it faced from competing entrants were
5 sufficient to constrain its market power.

6 A. I think we may just be talking about semantics.
7 Actavis, Accord-UK was the only full label supplier. So
8 that is what I was talking about when I said
9 "monopolist", and again, the market definition question
10 says: what is constraining the price of full label? It
11 is skinny label. Then when we move to the dominance
12 question we are asking exactly the same question.

13 Q. It asks whether -- the market definition question asks
14 whether competition is capable, whether other products
15 in the market are capable of constraining a hypothetical
16 monopolist, does it not?

17 A. I really do not understand your --

18 Q. Okay, I will come back to that. If I can cut to the
19 chase, can we agree that the main bone of contention
20 between you and the CMA on this point about effective
21 competition is whether there was a group of captive
22 customers that were only prepared to buy full label 10mg
23 tablets and therefore had no choice but to buy from
24 Actavis?

25 A. Could you repeat the question, please?

1 Q. So, would you agree that the main bone of contention
2 between you and the CMA on the question of effective
3 competition is whether there was a group of captive
4 customers who were only prepared to buy full label 10mg
5 tablets and therefore had no choice but to buy from
6 Actavis?

7 A. No, I think my main bone of contention is the
8 inconsistency between the market definition question and
9 the dominance question.

10 Q. Well, let us just see what you say --

11 A. Can I just finish.

12 Q. Yes.

13 A. Sorry. But the issue of captive customers is introduced
14 in the Decision in order to try and square the circle
15 between this inconsistency between the market definition
16 question and the dominance question, and as I have set
17 out in my report, if there are captive customers then
18 the market definition is wrong.

19 Q. So --

20 A. And -- sorry.

21 Q. Not at all.

22 A. Then the question is: we, I would expect, and I tried to
23 do in my report but it is not in the Decision,
24 an assessment of whether customers are actually captive
25 and also why they would be captive. Those two aspects,

1 I think, are missing from the Decision.

2 Q. Yes. So if we turn to see how you put it in your first
3 report, just pick it up in the summary of conclusions on
4 {IR-D5/1/7}, starting at paragraph 26. Do you have
5 that?

6 A. Yes.

7 Q. You repeat here in the final sentence the point that the
8 relevant question is whether competition from skinny
9 labels was effective.

10 Then at paragraph 27 you say that the Decision finds
11 that it was not because of the existence of a number of
12 customers that were captive to Accord-UK, the point
13 I think you were just making.

14 A. Correct.

15 Q. Then at paragraph 28 you disagree with the CMA about
16 that. You say:

17 "... the Decision provides no cogent evidence to
18 support the notion that ... customers were captive [to
19 Accord].

20 Then at paragraph 28 -- sorry. I will ask you for
21 a moment about the basis for that disagreement, but can
22 we first turn on a page and look at paragraph 31
23 {IR-D5/1/8}. Looking at the third sentence, you say
24 that:

25 "... in the absence of any compelling evidence to

1 indicate that there was a substantial base of captive
2 customers that were unable to switch from full label to
3 skinny label tablets ... I conclude that there was
4 effective competition ..."

5 So what you are saying here is that because in your
6 view the CMA was wrong about the group of customers that
7 were captive it was wrong to conclude that Actavis did
8 not face effective competition, and on your view that
9 means it was wrong about dominance; is that right?

10 A. Correct.

11 Q. So you are challenging the CMA's premise there was
12 a large group of captive customers but not necessarily
13 its reasoning from that premise; is that right?

14 A. I am not sure I understand the distinction.

15 Q. You hang your conclusion in paragraph 31 to the absence
16 of any compelling evidence to indicate that there was
17 a substantial base of captive customers that were unable
18 to switch, and you say that because you consider that
19 was incorrect -- that the CMA's conclusion about that
20 was incorrect, there was no evidence, accordingly
21 Accord-UK was not dominant during that period?

22 A. Correct.

23 Q. So I think it goes back to the question with which
24 I began. We can agree, can we not, this discussion of
25 captive customers, captive customers and the CMA's

1 findings about that are a central bone of contention
2 between you and them?

3 A. They are. They are.

4 Q. If we look down on this page to paragraph 32, you make
5 essentially the same point about abuse: no captive
6 customers therefore effective competition, therefore
7 prices cannot be deemed to be excessive.

8 Can we agree that this issue about captive customers
9 is important to the opinions you express on both
10 dominance and abuse?

11 A. Yes.

12 Q. Now, before turning to the details of your analysis of
13 this captive customer issue, can I clarify one point
14 with you. I am right, I think, that the analysis that
15 you do of this issue does not depend on any
16 considerations that are specific to the Intas period.
17 In other words, you are not saying that customers were
18 captive in some earlier part of the post-entry period
19 but that they were no longer captive by the time of the
20 Intas period because something about the attitudes of
21 those customers changed in some way?

22 A. I do not think I considered the issue of captive
23 customers outside the Intas period.

24 Q. Would you accept that prior to competitive entry all
25 customers were captive by definition because there were

1 no other suppliers?

2 A. Well, what do you mean by "captive"?

3 Q. They had no choice but to purchase Auden/Actavis's
4 product?

5 A. In a situation where that is the only available product
6 then I would say that they were captive.

7 THE PRESIDENT: But Mr Holmes, you are really treating in
8 that sense "captive" as meaning no more than being the
9 reflection of the significant market power of the
10 undertaking having a dominant position. The label
11 "captive" adds nothing in that context to the position
12 of dominance.

13 MR HOLMES: Yes.

14 THE PRESIDENT: It may in others, but not in that example?

15 MR HOLMES: I think that is fair, sir. I think that under
16 conditions of monopoly the suggestion I was making was
17 that all customers are in a sense captive, they have no
18 choice. I do not think I was making any more
19 sophisticated point than that, and I think that
20 Mr Bishop, understandably, agreed with that truism.

21 THE PRESIDENT: I think he did. It is just that one does
22 not normally in that context use the phrase "a captive
23 customer market".

24 MR HOLMES: No, indeed.

25 THE PRESIDENT: Sometimes I think it may be that the label

1 is importing something more than just a flip side of
2 market dominance. If that is the case, then I think we
3 will want to unpack exactly what the nature of that
4 difference is so that we can follow you and Intas can --

5 MR HOLMES: Indeed. It may be sensible that we turn to the
6 post-entry period when the distinction, maybe, between
7 captive and non-captive may be more meaningful for the
8 reasons that you have stated, sir.

9 Can we look first at what the Decision found on this
10 issue. It is at {IR-A/12/135}, 3.282. If we could
11 enlarge the bottom of the page, please. Is it just
12 delayed?

13 EPE OPERATOR: Yes.

14 MR HOLMES: Thank you. So the CMA there refers to the
15 existence of some pharmacies that determined, do you see
16 in the fourth line:

17 "... that they could not or should not dispense
18 skinny label ... tablets because of their assessment of
19 a potential regulatory risk from dispensing off label."

20 For those pharmacies only full label tablets were
21 able to meet their needs. Then looking down the page,
22 they had no choice but to buy Auden's product as the
23 only supplier of full label tablets. At the foot of the
24 page, those pharmacies formed an assured base, turning
25 over the page, accounting for just under 50% of total

1 demand by volume. Then a number of pharmacies are
2 identified, and an indication of what percentage of each
3 of the pharmacies' purchases were skinny as opposed to
4 full label. If I could just ask you to refresh your
5 memory of that list and of the percentages shown.

6 (Pause)

7 A. That is over the entire period, is it?

8 Q. I believe so. It is -- for which data is available,
9 yes. I think you do not take issue with the basic
10 figures. You accept, for example, that Sainsbury's made
11 no skinny label purchases, only 1% of Boots's purchases
12 were skinny label tablets and only 2% of Superdrug's
13 were, and so on?

14 A. Yes.

15 Q. There is no dispute about the figures, is there?

16 A. No.

17 Q. What you take issue with is the CMA's characterisation
18 that Boots and the other pharmacies had no choice but to
19 buy full label tablets from Accord-UK?

20 A. Well, I think I take -- two issues here. Because what
21 has -- even if we accepted that some customers were
22 captive for whatever reason, does that mean that they
23 are not protected by non-captive customers? One of the
24 things that I tried to do in my report is: were the
25 customers identified by the CMA as captive? Did they

1 end up facing higher prices than those which were
2 non-captive, which is what you would expect if there was
3 a clear distinction between these and you were able to
4 identify who these people were. If I had --

5 Q. Yes. So if you were to price discriminate, you mean, if
6 price discrimination is possible?

7 A. If price discrimination were possible then I would say
8 I can identify Boots as a captive customer, I am going
9 to charge them a higher price than another customer who
10 I see as non-captive or I am unsure.

11 Q. Yes.

12 A. So it does not seem from the data that Boots was being
13 charged higher prices. They are non-captive customers.
14 Then if we are into a world of saying, "Oh, well, there
15 is no price discrimination here", then we are just back
16 to a question about whether we talk about captive as
17 essentially being inframarginal customers, which is
18 a much more, kind of less pejorative phrasing, and those
19 inframarginal customers can be protected by competition
20 from the marginal customers, the ones which we are
21 labelling here non-captive --

22 In the absence of price discrimination we again go
23 back to the CMA market definition, you know, would
24 a single supplier of full label products be able to
25 increase price above the competitive level? Answer: no,

1 because it is being constrained by skinny label.

2 So the only way out of that is if you can have price
3 discrimination, and there is no evidence that there was
4 price discrimination.

5 PROFESSOR HOLMES: Can I ask you a question about that price
6 discrimination. In your report in paragraph 135, which
7 is {IR-D5/1/27-28}, you refer to the fact that Boots,
8 Lloyds and Well do not appear to have been charged
9 systematically higher prices than Day Lewis, despite the
10 former three chains being alleged to be captive to
11 Accord-UK according to the Decision. But then you say:

12 "While this analysis does not take into account
13 differences in volume against the different chains, it
14 is consistent with the Accord-UK not charging higher
15 prices to pharmacies on the basis of whether or not they
16 were captive."

17 Is that not a big assumption, the not taking into
18 account differences in volume? Is this something you
19 looked at, because one might intuitively think that
20 chains like Boots, Lloyds and Well would have taken
21 a bigger volume, and were that the case then de facto
22 they have been charged a higher price?

23 A. That is a possibility. I cannot remember why I have not
24 taken into account volumes at this stage, I am sorry.
25 It is over a year ago since I did this analysis. But

1 I think the point here is that on the basis of this
2 Day Lewis is not facing much lower prices than these
3 others.

4 PROFESSOR HOLMES: But you did not take into account any
5 possible volume effects?

6 A. No, correct.

7 PROFESSOR HOLMES: Thank you.

8 MR HOLMES: Thank you. I will return to your analysis of
9 the possibilities for price discrimination and what the
10 evidence shows about the price, the prices that were
11 being charged to captive and non-captive customers.

12 But can we first of all agree that you also take
13 issue with the CMA's characterisation that Boots and the
14 other pharmacies had no choice but to buy full label
15 tablets from Accord-UK?

16 A. Correct.

17 Q. Do you accept that what matters here is whether
18 customers considered that they had no choice but to
19 purchase from Actavis, and that is what is important for
20 an assessment of Actavis's market power?

21 A. No, I would need to know what that -- Boots may or may
22 not -- let us assume that Boots did not have any
23 alternative, they just thought for commercial reasons or
24 some other reasons that they could only buy full label.
25 But as a supplier, if I did not know that how would

1 I take that into account?

2 Q. So is it your position then, assuming -- let us assume
3 for a moment that the supplier was aware of the
4 understanding of some of its pharmacy customer base, in
5 those circumstances would you accept that what is
6 important is what the customers considered to be the
7 case, whether they considered that they had no choice
8 but to purchase the full label tablet?

9 A. I am sorry, I am being slow. Will you repeat the
10 question?

11 Q. I am trying to understand what -- for a start, let us
12 take it in stages. You are not in position to comment
13 on whether certain customers were correct to take the
14 view that regulatory considerations meant that they
15 needed to buy full label tablets, are you?

16 A. No.

17 Q. You do not comment on this regulatory issue in your
18 reports for that understandable reason, you are not
19 a lawyer or a regulatory expert. So the question I am
20 putting to you is whether -- let us imagine for a moment
21 that there was no regulatory requirement in place,
22 a strict rule of law that prevented pharmacies from
23 purchasing and dispensing full -- sorry, skinny label as
24 opposed to full label, but some pharmacies considered
25 that they were required to purchase full label rather

1 than skinny label. Are you suggesting that that would
2 not be sufficient, if there were a large enough assured
3 base of such customers, to confer dominance?

4 A. Well, I go back to earlier question, I think. If
5 I could identify those captive customers and charge them
6 prices above the competitor level, then my market
7 definition would be pricing to captive customers, and
8 I keep coming back to this inconsistency between
9 a market includes full label and skinny label, and then
10 moving to try and introduce these captive customers.
11 For me there is just a logical inconsistency.

12 Q. With respect, I am not sure that you answered the
13 question that I asked. I think you moved on to another
14 question, which was whether the market definition was
15 correct or not.

16 Let us just imagine that there is a large assured
17 base of captive customers -- of customers who feel that
18 they have no choice, consider that they have no choice
19 but to buy from the previous incumbent, they have to buy
20 full label tablets.

21 Would that understanding on the part of the
22 pharmacies not be capable of conferring dominance on the
23 supplier of those products, regardless of whether as
24 a matter of law there was any such requirement?

25 A. But again, I think it comes down to whether the supplier

1 can identify those customers.

2 Q. Let us assume for a moment that they could not price
3 discriminate. In those circumstances, do you agree that
4 a large assured base of customers who have a settled
5 predisposition to purchase full label because of their
6 understanding of the regulatory position, that would be
7 capable of conferring dominance?

8 A. In the absence of price discrimination.

9 Q. In the absence of price discrimination.

10 A. Possibly --

11 Q. Possibly?

12 A. -- but not definitely. Again, I come back to, in the
13 absence of price discrimination the CMA's definition of
14 the relevant market enables us to answer that question.
15 The answer is an assured base which I cannot identify or
16 discriminate towards says that I cannot exercise market
17 power against those customers.

18 Q. Let us assume that they can identify those, but that
19 they cannot price discriminate. They know that they
20 have a large base of customers who will continue to buy
21 full label, but they -- we will come on to the question
22 of price discrimination. Let us assume for a moment,
23 though, that they cannot price discriminate. In those
24 circumstances, would you accept that a large group of
25 customers whose subjective belief is that they have no

- 1 choice might confer dominance?
- 2 A. I am sorry to be difficult, but the answer to that
3 question is no, because I am setting a price for the
4 whole market to those who are characterised as captive
5 and to those who are characterised as non-captive.
- 6 Q. But why does that rule out the possibility of dominance?
- 7 A. Because the CMA's own market definition question says,
8 and we keep coming back to this, that it is saying
9 an increase in these prices is not profitable.
10 Increasing prices above the competitor level is not
11 profitable. So then you have to say, to get away from
12 that you have to then say, I can identify captive
13 customers and price discriminate against them, and that
14 these captive customers are truly captive in the sense
15 of there are lots of reasons why they cannot switch
16 or -- which is very, very different from, "I prefer not
17 to switch at this price differential but I will switch
18 at a different price differential."
- 19 Q. Let me try again: you seem to return there to the
20 question of price discrimination and to market
21 definition. Can we lay aside market definition for now.
22 Let us ignore --
- 23 A. I am sorry, but no, no.
- 24 Q. Can I put the question?
- 25 A. Sorry.

1 Q. If we could lay aside what the Decision says about
2 market definition and just consider a scenario in which
3 a supplier has a large, assured section of demand" who
4 have the subjective belief that they are required to
5 purchase the full label product, and let us further
6 assume that price discrimination is not possible, you
7 cannot effectively separate out the customers with the
8 willingness to buy the full label and the willingness to
9 buy the skinny label. In those circumstances, I am
10 asking you whether that subjective opinion on the part
11 of the customers who feel obliged to buy the full label
12 product could be capable of conferring dominance. So we
13 ruled out price discrimination, we are not interested in
14 what the CMA had to say about market definition; I am
15 just interested in that narrow question.

16 A. I am sorry, Mr Holmes, you cannot put aside -- in
17 answering that question, you cannot put aside the
18 definition of the relevant market. If you are asking me
19 de novo, so we are not talking about this case at all,
20 we are talking about something completely new, and says,
21 there are some customers who could only buy from me and
22 there are other customers who could buy from lots of
23 other suppliers, is it possible that I would find it
24 profitable, absent price discrimination, to increase
25 the price to those customers who can only buy from me?

1 The answer to that question in principle is yes. In
2 principle, yes.

3 But in this particular case we have already asked
4 that question and we have come to the decision,
5 conclusion, the answer to the question is no because
6 skinny label is providing the effective competitive
7 constraint on full label.

8 Q. Could we now go, please, to the joint expert statement,
9 {IR-G1/1/35}. Could we look, please, together at
10 proposition 69 and you see the proposition states:

11 "There were certain customers that considered
12 themselves to be unable to switch from full label
13 tablets to skinny label tablets."

14 Looking at your column on the right, you say that
15 you disagree with that proposition. Can we be clear
16 about what you are actually disagreeing with here. You
17 are disagreeing with the proposition that certain
18 customers considered that they were unable to switch.
19 That is right, is it not?

20 A. Correct.

21 Q. In other words you are disagreeing with the CMA's
22 interpretation of what pharmacies said?

23 A. Correct.

24 Q. Can we clarify the basis on which you disagree with the
25 CMA's findings about the assured customer base and with

1 that proposition in the joint experts' statement. You
2 have not yourself spoken to any pharmacies directly, is
3 that right?

4 A. Correct.

5 Q. You do not yourself have any particular expertise in the
6 factors that pharmacies take into account when deciding
7 what kind of drugs to purchase?

8 A. Correct.

9 Q. Your views are really based on two kinds of
10 consideration and you have mentioned them both: first,
11 you have carried out an assessment of the evidence
12 relied on by the CMA in the Decision and that is what
13 you cover in 3.5.2 of your first report; is that right?

14 A. Correct.

15 Q. Secondly, you have also carried out your own assessment
16 of Auden/Actavis's pricing to different customers and
17 that is where the price discrimination point that we
18 have been discussing comes in; is that right?

19 A. Correct.

20 Q. So, beginning with the assessment of the customer
21 evidence. Can we look at paragraph 112 of your first
22 report. That is at {IR-D5/1/23}. You refer there to
23 two pieces of evidence. Your first bullet refers to
24 evidence that a number of pharmacies continued to
25 purchase only full label after competitive entry, or did

1 so for a substantial majority of their requirements.

2 I think we have established that you do not take issue
3 with the CMA's factual findings about the identity and
4 number of pharmacies who did so or the extent of their
5 full label purchases; is that right?

6 A. Correct.

7 Q. The second bullet refers to the reasons the pharmacies
8 gave for continuing to purchase full label; is that
9 right?

10 A. Correct.

11 Q. If we could turn, please, to your assessment of those
12 reasons. Your assessment of the evidence is given at
13 paragraph 123 of your first report. If we could turn
14 that up, please. It is at {IR-D5/1/25}. Picking it up
15 in the second sentence, you say that:

16 "For brevity, [you] do not discuss each of the
17 responses provided [by pharmacies and wholesalers]
18 but ... taken as a whole the responses indicate ... each
19 firm faced a trade-off and different
20 pharmacies/wholesalers took different views on whether
21 the advantage of lower prices was sufficient to outweigh
22 the (real or perceived) disadvantage of switching to
23 skinny label [tablets]."

24 So there, you are suggesting that each firm
25 considered that the choice between full and skinny

1 involved a trade-off and they made different decisions
2 as a result of that trade-off. Is that right?

3 A. Correct.

4 Q. You refer here to "firms". Can we agree that it is
5 evidence from the pharmacies that really matters here?
6 Although Actavis's direct customers are wholesalers, it
7 is the pharmacies' purchasing decisions that will
8 determine the purchasing decisions of the wholesalers.
9 It is derived demand at the intermediate level; is that
10 right?

11 A. Correct.

12 Q. Can we agree that Boots and Lloyds are the most
13 significant pharmacies for these purposes?

14 A. Correct.

15 Q. If we look at table 3.8 in the Decision, that is
16 {IR-A/12/135}. We see the pharmacies' purchases set out
17 for 2016 and 2017, the years for which we have data, and
18 if you look at the overall tablet purchases volumes
19 looking down the line it is fair to say that Lloyds and
20 Boots dwarf any of the other suppliers, individual
21 multiple chains, and in combination they, I think they
22 are pretty much at the same level of all of the other
23 independents put together; is that fair?

24 A. It is, yes.

25 Q. Thank you. I would like to turn now to look first at

1 some of the evidence from Boots to see to what extent
2 that reflects the trade-off which you say informed
3 pharmacies' choices. We have agreed that around 99% of
4 Boots's purchases were full label in the post-entry
5 period; is that right?

6 A. I do not recall the actual figure, but ...

7 Q. I think you can see it on this figure, if you look along
8 to the right.

9 A. Oh, yes, yes.

10 Q. Do you see you have got 0.8% in 2016 and 1.3% in 2017?

11 A. Yes.

12 Q. Could we please look together at a document
13 from January 2016. So in the post-entry period. It is
14 at {IR-H/810/1}. If we could enlarge the top of the
15 page. This is an internal Boots email dating
16 from January 2016. You see the subject is
17 "Hydrocortisone tabs 10mg". It is from someone whose
18 name who I do not think I am allowed to repeat. Looking
19 at the bottom of the page, we can see that they are the
20 Senior Ethical Commercial Development Manager at Boots.
21 Do you see that?

22 A. Yes.

23 Q. Can I check first of all whether you have any
24 recollection of having seen this email before? Is it
25 one that you have reviewed for the purposes of your

1 evidence in this case?

2 A. Yes.

3 Q. It is. If we look back at the top of the email you see
4 under the heading "Summary of our discussion" point 1
5 refers to Actavis as Boots current preferred supplier
6 for 10mg. Do you see that?

7 A. Yes.

8 Q. You see that it also refers to the orphan designation
9 enjoyed by Actavis. It has all licensed indications
10 including for adults aged 18 years or over.

11 At point 2 you see that 95% of Hydrocortisone
12 tablets are dispensed for patients over 18 years on
13 Boots' understanding of the position.

14 Then looking at point 3 do you see that it refers
15 to:

16 "...alternative manufactures launching products
17 without orphan status ..."

18 So we can agree that it is there talking about
19 skinny label entrants; is that right?

20 A. Yes.

21 Q. If you could look then, please, at point 4 it refers to.

22 "...concerns raised regarding potentially
23 introducing the alternative product."

24 Then a discussion of possible solutions and
25 associated risks.

1 At (a) the author says that a full switch of Boots'
2 preferred product to a skinny label alternative product
3 is not possible and the reason that is given is that the
4 alternative product does not have all licensed
5 indications "and would only be acceptable clinically and
6 ethically for 5%."

7 Would you agree that that 5% is the 5% of non-adult
8 prescriptions?

9 A. It appears to be, yes.

10 Q. The author is saying that for 95% of a 10mg tablet
11 requirements Boots' perspective is that it is not
12 possible for it to use skinny label; is that right?

13 A. As of January 2016.

14 Q. The author is not saying this is just a matter of
15 commercial preference. They are saying in their view it
16 is not possible and not possible because of the orphan
17 designation issue?

18 A. In their view, yes.

19 Q. The remainder of the email then weighs up the pros and
20 cons of having a dual preferred product and buying
21 skinny label to cover the remaining 5% of supply. What
22 is clear is that the author is saying that this will not
23 be possible for 95% of its requirements. Do you see
24 that?

25 A. Yes.

1 Q. You do not refer to the email in your report although
2 you did review it?

3 A. Correct.

4 Q. Why was that?

5 A. I cannot remember.

6 Q. Fair enough. That is as good an answer as any.

7 We saw that you said in the joint experts' statement
8 that you disagreed with the proposition 69 which was
9 that customers thought they were unable to switch to
10 skinny label. Would you now accept that this email
11 suggests that Boots at least did think this as at the
12 date of this email for at least 95% of their 10mg tablet
13 requirements?

14 A. As of the date of this email, yes.

15 Q. Now, can we please look at paragraph 124 of your first
16 report in the first bullet. That is {IR-D5/1/25}. You
17 say there that Boots mentioned that price is a factor
18 that it considers when deciding which product to
19 purchase and dispense but it is not the only factor.

20 So I think what you are suggesting here is that
21 price was one of the factors that Boots considered when
22 deciding who to source 10mg tablets from; is that right?

23 A. Correct.

24 Q. But you would accept in the light of the internal Boots'
25 email that we have just seen that that was not the case

1 as at January 2016 for the overwhelming majority of
2 Boots' 10mg requirements?

3 A. Yes, and I think here though this footnote refers to
4 a note of a call much later.

5 Q. Yes, shall --

6 A. I want to see their views.

7 Q. Shall we look at that.

8 A. Yes.

9 Q. It is at {IR-H/1256/1}. You can see from the heading
10 this is a note of a call between the CMA and Boots that
11 took place in April 2021. This document you clearly do
12 recall having seen and it is in fact the note from which
13 you have taken the quotation about Boots treating price
14 as a factor.

15 If we go down to paragraph 2.1 of the note we can
16 see that the quotation is taken from there. If you look
17 at the first line:

18 "Price is a factor that Boots considers when
19 deciding which product to purchase and dispense ..."

20 This was the material you relied on for your
21 conclusion that Boots traded off price and non-price
22 factors when deciding whether to buy full and skinny
23 label tablets; is that right?

24 A. Correct.

25 Q. Can we look over the page at 2.2, please. You see there

1 that Boots explained to the CMA:

2 "For 10mg Hydrocortisone tablets, price was not
3 a factor because licensing indications determined which
4 Hydrocortisone tablets Boots needed to use ..."

5 Do you see that?

6 A. Correct, yes.

7 Q. The same point is developed in paragraph 2.4. Do you
8 see there:

9 "Boots needed a product that was licensed for the
10 adult indication ..."

11 That is the fully indicated product. And that is
12 why Boots discounted procuring alternative 10mg tablets
13 as a potential source of supply.

14 What Boots is telling the CMA in April 2021 is fully
15 consistent with the internal Boots' email that we saw
16 from January 2016; is it not?

17 A. Correct.

18 Q. But for 10mg Hydrocortisone tablets price was not
19 a factor?

20 A. For Boots, yes.

21 Q. Returning to your paragraph 124, first bullet, that is
22 {IR-D5/1/25}, would you accept that the quotation you
23 set out from 2.1 of the note of the call with Boots
24 thereby misstates the position as regards 10mg
25 Hydrocortisone tablets?

1 A. I would, yes.

2 Q. That is because you have omitted to mention what Boots
3 went on to say in paragraphs 2.2 and 2.3?

4 A. Correct.

5 Q. It would have given the Tribunal a more accurate and
6 complete picture if you had mentioned those paragraphs.
7 Do you agree?

8 A. I agree, yes.

9 Q. Be that as it may, can we now agree in the light of the
10 evidence that we have just been looking at that Boots
11 was not engaged in any trade-off between price and other
12 considerations, at least for a very large majority of
13 its 10mg Hydrocortisone requirements?

14 A. It appears so, yes.

15 Q. The CMA was therefore right that Boots was a customer
16 that considered it had no choice but to purchase from
17 Actavis for its 10mg tablets given its view of the
18 regulatory issues?

19 A. Correct.

20 MR HOLMES: Sir, I do not know if that is a convenient
21 moment for a short adjournment.

22 THE PRESIDENT: Yes, thank you, Mr Holmes. We will resume
23 at quarter to midday. Thank you very much.

24 (11.36 am)

25 (A short break)

1 (11.49 am)

2 MR HOLMES: Mr Bishop, may I pick up one transcript
3 correction just to make sure that your evidence has been
4 correctly captured. There was one point that my team
5 noticed may not have been caught on the transcript
6 correctly.

7 It is on page 29 of today's transcript at lines 22
8 and 23. Do you see, your answer is recorded as having
9 been:

10 "Answer: I do not think I considered the issue of
11 captive customers in the Intas period."

12 I think what you actually said was that you
13 considered -- that you did not consider the issue of
14 captive customers outside the Intas period; that is
15 right, is it not?

16 A. That was certainly what I intended to say.

17 Q. I think that is what you did say. No criticism at all
18 of the transcribing, which is a work of wonder.

19 Okay. Can we now turn to Lloyds. We have already
20 covered the point that Lloyds is another example of
21 a major pharmacy that remained with Actavis for
22 approximately 96% of its purchases in the post-entry
23 period.

24 Can we please look at {IR-H/1105/1} {H/1105/1}. You
25 see that this is a Lloyds response to a Section 26

1 request from the CMA. The first question refers back to
2 an earlier Section 26 response in which Lloyds had
3 explained that Lloyds has only purchased full label
4 products.

5 If we could turn on to page 2 and look at
6 question 4, please {IR-H/1105/2} {H/1105/2}. The CMA is
7 here asking various questions about whether Lloyds has
8 considered switching to skinny label given the lower
9 prices that are available. Could I ask you, please, to
10 read to yourself Lloyds' response beginning,
11 "Lloyds Pharmacy Limited approaches ..." in the lighter
12 text at the foot of the page. (Pause)

13 A. Yes, I have read that.

14 Q. Thank you. Were you familiar with this document?

15 A. I cannot remember.

16 Q. You can't recall. Now, you see there that Lloyds
17 explains that it considers that using a skinny label
18 product outside of its licensed indication would be
19 contrary to the principles of the UK medicines licensing
20 system. I am not going to discuss the principles of the
21 licensing system with you, but this suggests, does it
22 not, that Lloyds did not base its decision to buy full
23 label on price or other considerations. It will not buy
24 skinny labels because it takes the view that to do so
25 would be contrary to the spirit of the regime; is that

- 1 fair?
- 2 A. That is a fair interpretation of the document, but my
3 understanding from the data is that Lloyds did buy
4 a reasonable amount of skinny label towards the end of
5 2017.
- 6 Q. We will come on to that. Having looked at this, would
7 you accept that Lloyds, like Boots, is another example
8 of a customer that was committed to purchasing full
9 label tablets notwithstanding the availability of
10 cheaper product?
- 11 A. Agreed.
- 12 Q. It does not appear from this document that Lloyds, as
13 with Boots, engaged in any trade-off with price and
14 other factors?
- 15 A. Agreed.
- 16 Q. So when you refer at paragraph 123 of your report to the
17 evidence showing pharmacies all engaged in such
18 a trade-off, this was also inaccurate so far as Lloyds
19 as well as Boots was concerned, was it not?
- 20 A. Correct.
- 21 Q. If we could go back to your first report and look again
22 at paragraph 124 in the first bullet {D5/1/25}, you do
23 not mention Lloyds but you do refer to the views
24 expressed by "AAH"; do you see that?
- 25 A. Yes.

1 Q. Now, AAH is a wholesaler. Its main customer is Lloyds.
2 They are part of the same corporate group but it had
3 other customers as well; would you agree?

4 A. Yes.

5 Q. Those other customers may have taken a different view
6 from Lloyds about the appropriateness of buying skinny
7 label tablets; is that right?

8 A. Correct.

9 Q. So it makes sense that AAH would consider other factors
10 in order to service other customers who may have been
11 considering price and not just regulatory issues, and so
12 might be interested in the cheaper skinny product?

13 A. Yes.

14 Q. Would you now agree that Lloyds was also not a customer
15 that engaged in any commercial trade-off when deciding
16 to purchase full label products?

17 A. Agreed.

18 Q. Like Boots, the CMA was right that Lloyds had no choice
19 but to buy 10mg tablets given its views about the
20 regulatory issues?

21 A. Well, it did buy skinny label products. I know we will
22 come on -- you said we will come on to that --

23 Q. Yes.

24 A. -- but it did buy skinny label products.

25 Q. I will indeed, but that is a fair point, thank you.

1 Sticking with your paragraph 124 first bullet, you
2 say that AAH:

3 "... considered various factors including product
4 characteristics, licensed indications, product
5 interchangeability and commercial attractiveness
6 (including but not limited to unit price)."

7 Do you see that?

8 A. Yes.

9 Q. So you are suggesting here that AAH was engaged in
10 a trade-off involving price and other factors; is that
11 right?

12 A. Correct.

13 Q. The implication is that it was not captive to Actavis?

14 A. Correct.

15 Q. Can we please look together at the document you cite in
16 support of this proposition in footnote 65. It is at
17 {IR-H/1013/1} {H/1013/1}. This is an annex to an AAH
18 Section 26 response from May 2017, so that is a response
19 to a request for information from the CMA. If we could
20 turn to page 3, please and see what is said at
21 paragraph 5(a) {H/1013/3}.

22 So, looking at the question in the first column you
23 see that the CMA is asking AAH which factors it has
24 taken into account when considering purchasing hydro
25 tablets from suppliers other than Actavis, and you can

1 see that AAH lists the four factors you refer to:
2 product characteristics, licensed indications,
3 commercials, interchangeability.

4 That is the part of the document you refer to; is
5 that right?

6 A. Correct. Yes.

7 Q. Could we turn on, please, to page 4 and look at (d) and
8 (e) {IR-H/1013/4}. So AAH says at (d) that they have
9 sourced 10mg from Bristol Labs since October 2015. So
10 that is a skinny label supplier; is that right?

11 A. Correct.

12 Q. But then look at (e). AAH is asked whether it has ever
13 decided against purchasing hydro tablets from suppliers
14 other than Actavis, and if so why it decided not to do
15 so. You see that AAH responds:

16 "We did not transfer our business to the Bristol
17 product despite the fact that Bristol's commercial offer
18 was more attractive to that from Actavis because the
19 product from Bristol Labs was not licensed for all of
20 the indications offered by the Actavis product (Bristol
21 product is only licensed for Paediatric patients)."

22 So AAH is saying there in clear terms that it did
23 not make a full switch to buying skinny label products
24 despite the fact they were more commercially attractive,
25 precisely because the skinny product was not licensed

1 for all indications offered by Actavis; would you agree?

2 A. Agreed.

3 Q. That is not a trade-off between price or other factors,
4 it is basing a decision on the orphan designation issue
5 notwithstanding that this was more expensive for AAH?

6 A. Agreed.

7 Q. The reason why AAH took this view must have been because
8 some of the key pharmacies that it served including, as
9 we have seen, Lloyds also took the view that they needed
10 to buy full label products; would you agree?

11 A. Agreed.

12 Q. So this evidence from AAH runs counter to what you say
13 about AAH at paragraph 124 of your report.

14 A. I agree.

15 Q. Now, returning to your paragraph 124, first bullet, it
16 is fair to say that you do recognise that AAH did not
17 source from skinny tablet suppliers but began to do so
18 once Teva entered the market.

19 Now, just as one point of clarification, the
20 document we were just looking at suggests that AAH had
21 bought some 10mg products from Bristol Labs already,
22 albeit that it had not switched its business to that
23 product entirely; would you agree?

24 A. Agreed.

25 Q. The fact that AAH purchased some skinny label products

1 does not tell you anything about the views of big
2 pharmacies like Lloyds, who it appears were not willing
3 to buy skinny label, does it?

4 A. Agreed.

5 Q. It just reflects the fact that AAH, as a wholesaler,
6 needed to serve customers who were willing to buy skinny
7 label tablets because they based their decisions on
8 price and not on the kind of regulatory considerations
9 that Lloyds had in mind?

10 A. Agreed.

11 Q. Can we now look at the second bullet point in your
12 paragraph 124 {D5/1/25}. You refer there to two other
13 pharmacies, Rowlands and Well, who chose not to switch
14 because of the perceived legal risk involved with
15 dispensing products outside of their indications.

16 You do not suggest that these pharmacies engaged in
17 any trade-off involving price or other factors, they
18 just based their decision on the regulatory risk; is
19 that right?

20 A. Yes.

21 Q. What you say is that the fact that other firms switched
22 indicates that this was ultimately a commercial
23 consideration by Rowlands and Well rather than
24 an outright impediment. But you would accept that these
25 two pharmacies were also not willing to switch to skinny

- 1 label despite the lower price available?
- 2 A. They chose not to, correct, yes.
- 3 Q. You say it was a commercial decision but you accept that
4 it was not commercial in the sense of being based on
5 price; as you accept here, it was based on perceived
6 legal risk. That is right, is it not?
- 7 A. Yes.
- 8 Q. That perceived legal risk arose because of the orphan
9 designation, did it not?
- 10 A. Yes.
- 11 Q. So we can agree that Rowlands and Well are also in the
12 category of pharmacies who considered they had no choice
13 but to buy 10mg from Actavis given that only full label
14 products overcame the legal risk that they believed to
15 exist?
- 16 A. Agreed.
- 17 Q. So it is another counter example to your paragraph 123
18 and the trade-off you described there?
- 19 A. Agreed.
- 20 Q. Now can we please look over the page at the third bullet
21 of your 124 {D5/1/26}. You say there that some
22 pharmacies were concerned about increased operational
23 complexity, and you mention both Lloyds and Boots in
24 this context. But we have seen the evidence, both
25 Lloyds and Boots were basing their decisions on the fact

1 that Actavis had a full label indication, not on price
2 and other considerations; do you agree?

3 A. Agreed.

4 Q. Insofar as there was any operational complexity in
5 relation to skinny label products, this was precisely
6 because of the limited scope of their licensed use. The
7 relevant pharmacies took the view that their pharmacists
8 would have to ensure that any skinny label tablets in
9 stock were not inadvertently dispensed to adults with
10 adrenal insufficiency and therefore outside the scope of
11 their licence. Would you agree?

12 A. I would not disagree, yes.

13 Q. This complexity would not arise if they simply stocked
14 full label tablets which are indicated for both adults
15 and children?

16 A. Agreed.

17 Q. So this operational complexity is also a product of the
18 orphan designation; is that right?

19 A. Agreed.

20 Q. Does it not support the CMA's position on Auden/Actavis
21 enjoying an assured customer base? It just extends it
22 from the 90 or 95% of adult scripts to the 5-10% of
23 child scripts that could in principle be met with skinny
24 label tablets were it not for the operational problems
25 that that would present?

- 1 A. I am sorry, can you repeat the question.
- 2 Q. So does this not support the CMA's position on
3 Auden/Actavis enjoying an assured customer base? What
4 it does is to extend it from the 90 or 95% of adult
5 scripts that the pharmacies in question felt that they
6 were required to dispense full label against to the
7 5-10% of child scripts that could in principle be met
8 with skinny label tablets but would have involved
9 additional operational complexity to do so?
- 10 A. I think I agree with the question.
- 11 Q. Going on to the fourth and final bullet point at
12 paragraph 124, you refer there to pharmacists having
13 a preference for single supply and you mention Boots
14 again. But the key point is that Boots selected Actavis
15 as its single supplier, at least for the overwhelming
16 majority of 10mg tablets, because only Actavis had the
17 full licensed product; is that not right?
- 18 A. Correct.
- 19 Q. So Boots had no choice but to purchase from Actavis for
20 this purpose, did it?
- 21 A. Correct.
- 22 Q. This is another point that supports the CMA's position
23 on the assured customer base; would you not agree?
- 24 A. But again, I think coming back here is whether this as
25 an assured base is protected by the non-assured base,

1 and it comes back to the inframarginal versus marginal
2 customers. So the existence of a customer who cannot or
3 will not switch in response to a price increase, whether
4 that price increase arises or becomes profitable depends
5 on the reactions of non-captive customers and on the
6 non-assured base.

7 Again, I come back to the inconsistency of the CMA's
8 approach on assured base with the definition of the
9 relevant market.

10 Q. I understand that is your position, Mr Bishop. I will
11 stick, if I may for now, to this part of your report
12 where you are challenging the CMA on the basis that, as
13 you put it in the introduction, there is no cogent
14 evidence of the existence of an assured base.

15 Can we move on to paragraph 125 of your first report
16 {D5/1/26}. You refer to the witness statement that
17 Dr Burt has provided. Now, Dr Burt is an executive of
18 Intas; is that right?

19 A. Yes.

20 Q. Have you had conversations with Dr Burt about this issue
21 of pharmacies' decision-making, or have you confined
22 yourself to reading what is in Dr Burt's statement?

23 A. I have just confined to the witness statement.

24 Q. You say that Dr Burt highlights a number of these
25 considerations, by which I think you mean considerations

1 that pharmacies would have taken into account when
2 deciding whether to switch to skinny label; is that
3 right?

4 A. Yes.

5 Q. Can we go to Dr Burt's statement, please. It is at
6 {IR-B5/1/17} {B5/1/17}. Now, you cite in particular
7 paragraph 58 at the foot of the page, and I will come to
8 that in a moment. But for context, could we please look
9 first at the immediately preceding paragraph, that is to
10 say paragraph 57. If we could enlarge that at the top
11 of the page.

12 "For many [customers, he says] the most important
13 factor is the full indication of our product."

14 He says that:

15 "For some pharmacists it is important to adhere
16 strictly to the regulatory regime, and to dispense
17 products according to their marketing authorisation
18 rather than stray outside them."

19 In the final sentence he says that the perceived
20 regulatory risk:

21 "... was a particularly important point for larger
22 chains who in my experience are more risk-averse."

23 Now, can we agree that this evidence is entirely
24 consistent with what Boots and Lloyds and indeed AAH
25 told the CMA in the documents we have considered?

- 1 A. Agreed.
- 2 Q. Dr Burt is saying that there are some risk-averse
3 pharmacies who want to adhere to the regulatory regime
4 and dispense products strictly according to their MA; is
5 that right?
- 6 A. Agreed.
- 7 Q. And that it was the larger chains like Boots and Lloyds
8 who saw this point as particularly important?
- 9 A. Agreed.
- 10 Q. You do not suggest anywhere in your reports that what
11 Dr Burt says in paragraph 57 is incorrect?
- 12 A. I do not.
- 13 Q. In hindsight, do you think it would have been a good
14 idea to mention paragraph 57 and not just paragraph 58
15 of Dr Burt's statement in your report?
- 16 A. Yes, I think I should have mentioned it, yes.
- 17 Q. Looking now at paragraph 58 of Dr Burt's statement,
18 which is the paragraph you rely on, Dr Burt refers to
19 various factors that may be:
- 20 "... relevant to the decision to do business with
21 Intas generally in the generics market in the UK."
- 22 So he is here talking about doing business with
23 Intas generally, not about factors relevant to buying
24 10mg or 20mg Hydrocortisone tablets specifically. Would
25 you agree?

- 1 A. Agreed.
- 2 Q. Turning over the page and looking at the list of factors
3 he identifies there {B5/1/18}, they are: very reliable
4 full-range supplier, wide range of products, adaptable
5 logistics, packaging design, market-leading sales team
6 and customer service, quality perception of our
7 products. Carrying on over the page {B5/1/19}: full
8 coverage, environmentally conscious approach and
9 complimentary training to our customers.
- 10 None of these are about Hydrocortisone tablets
11 specifically, are they?
- 12 A. Correct.
- 13 Q. Dr Burt is talking in entirely general terms. He is not
14 talking about any specific pharmacists or what they base
15 their views on when buying Hydrocortisone tablets?
- 16 A. Correct.
- 17 Q. So, with due respect to Dr Burt, none of this really
18 assists us with the issue you are dealing with in this
19 part of your report, namely why specific pharmacies
20 decided to purchase 10mg tablets from Actavis regardless
21 of their higher price; would you agree?
- 22 A. I am sorry, can you repeat the question.
- 23 Q. With all due respect to Dr Burt, and meaning no
24 criticism of him, none of what we have just been looking
25 at in paragraph 58 assists us with the issue you are

1 dealing with in the relevant part of your report that we
2 have just been looking at, which is why specific
3 pharmacies decided to purchase 10mg tablets from Actavis
4 despite their higher price?

5 A. (Pause). I am not sure I agree.

6 Q. Would you like to elaborate?

7 A. I am trying to think, sorry. I think paragraph 58 is
8 saying there were a number of factors which affect
9 purchasing decisions, and I think in paragraph 59 he
10 goes on to say for each customer:

11 "I would say their decision is based on
12 a combination of all these factors ... and the
13 importance placed on different factors may vary from
14 customer to customer."

15 Q. But none of the factors identified in paragraph 58 to
16 which you refer relate specifically to the decision to
17 purchase Hydrocortisone tablets?

18 A. Correct.

19 Q. We have seen the evidence about why the big multiples
20 chose to purchase from Actavis, it was because of their
21 regulatory qualms, was it not?

22 A. That was a factor in their purchasing decisions, yes.

23 Q. Now, the Tribunal will appreciate that there is a lot of
24 other evidence from pharmacists and wholesalers which
25 the CMA took into account in its Decision. I have taken

1 Mr Bishop to the principal evidence from customers that
2 he discusses in his report and I do not propose to take
3 him to the evidence from other customers. I propose
4 instead to return to that as needed in submission.

5 But what I propose now to do is to consider
6 a separate topic with you, Mr Bishop: why did captive
7 customers still buy some skinny tablets, the point you
8 were making, I think, in relation to Lloyds buying
9 a portion of skinny tablets.

10 Now, can we look, please, at paragraph 118 of your
11 first report {IR-D5/1/24} {D5/1/24}. Would you like to
12 just refresh your memory of that paragraph.

13 A. Which paragraph, 118?

14 Q. 118, please. (Pause)

15 A. Yes.

16 Q. So, I think the point you are making here is that some
17 captive customers bought some skinny label products; is
18 that fair?

19 A. Correct.

20 Q. You are suggesting that this shows that it was
21 a voluntary commercial decision for them to stick with
22 Actavis's full label products for most of their
23 requirements; is that the inference?

24 A. Yes.

25 Q. But if lots of large pharmacies decide to stick with

- 1 Actavis's products for the vast majority of their
2 requirements regardless of price, that could still
3 confer market power even if those customers also
4 purchased a small number of tablets from skinny label
5 competitors; would you agree?
- 6 A. Again, it depends on what is the trade-off between the
7 sales, the purchasers of skinny label and the, kind of,
8 relative price.
- 9 Q. We have agreed for the large multiples, I think, that
10 for the great bulk of their purchases that there was no
11 trade-off, there was a regulatory concern; is that not
12 right?
- 13 A. Well, if we look at paragraph 19 -- sorry, 119 here --
- 14 Q. Yes. That is the Lloyds point.
- 15 A. That is the Lloyds point, yes.
- 16 Q. So the key point is that a large proportion of the
17 demand for these customers still remains with Actavis
18 and cannot be tempted away by the skinny label suppliers
19 offering a cheaper price; that is right, is it not?
- 20 A. Well, that is almost saying it is irrelevant what
21 the price differential between full label and skinny
22 label is.
- 23 Q. Let us take -- sorry.
- 24 A. So just -- I think the point is how much people will
25 switch; is that in response to a relative price change

1 between skinny and full label? You know, that is the
2 question.

3 Q. We have seen already what Boots said about why it bought
4 from Actavis. They made clear that it was permissible,
5 according to their understanding of the regulatory
6 position, to use skinny label products for around 5% of
7 their Hydrocortisone requirements so as to meet
8 prescriptions from adrenal insufficiency in children; is
9 that right?

10 A. That is correct.

11 Q. In that case the potential regulatory issue that was of
12 concern to the multiples does not arise, does it?

13 A. Sorry, I am being really slow.

14 Q. We have -- no, no, not at all, do not worry. 95% of
15 customers, on Boots's estimation, are adult adrenal
16 insufficiency patients, and when a prescription is
17 presented in respect of an adult the view taken by
18 Boots, I think we saw, was that there was a regulatory
19 requirement in their assessment to dispense full label
20 rather than skinny label. Are we agreed about that?

21 A. Yes.

22 Q. But there is a portion of the demand, a subset of
23 prescriptions which are permissible, on Boots' views, to
24 be met with a skinny label product because the skinny
25 label product, notwithstanding the orphan designation,

1 has a marketing authorisation which permits the product
2 to be dispensed for paediatric adrenal insufficiency.

3 Does that match with your understanding?

4 A. Yes.

5 Q. So there is going to be a portion of demand that even
6 for the pharmacies, the multiples that are concerned by
7 regulatory risk, that could be met with the skinny label
8 product. Do you see?

9 A. At 5%?

10 Q. Exactly so, or thereabouts, 5 to 10%. The same would be
11 true where an adult patient is given a Hydrocortisone
12 tablet for something other than adrenal insufficiency,
13 would you not agree? That the orphan designation
14 relates to adrenal insufficiency in adults?

15 A. Yes.

16 Q. We saw that Boots was considering whether it was
17 practical to source from the skinny label suppliers for
18 that 5% of demand that was unaffected by the regulatory
19 issue. Can we agree about that?

20 A. Yes.

21 Q. That is not a Boots-specific point, is it? It applies
22 to any pharmacy. It is only where you are dispensing
23 a skinny label product for treating adrenal
24 insufficiency in adults that the perceived regulatory
25 concern that weighed with the multiples arises?

1 A. Correct.

2 Q. So the fact that customers like Boots purchased some
3 skinny label products does not really tell you anything,
4 does it? The point is that they overwhelmingly
5 purchased full label.

6 A. Overwhelmingly, but then that purchase, if that was
7 totally correct and there was no competitive
8 interaction, then the purchasers ought to be close to or
9 spot on 5%.

10 Q. Well, I think we can look at what the Decision says
11 about this at page 76, paragraph 3.127. That is
12 {IR-A/12/76} {A/12/76}. If you could look at 3.127, it
13 explains:

14 "The precise breakdown of the age range of patients
15 on hydrocortisone tablets is unclear, as opinions vary.

16 The Royal College of Physicians estimates that the
17 proportion of ... approximately for 5% for 10mg and 10%
18 for 20mg ..."

19 Then over the page, if we can turn on a page, please
20 {IR-A/12/77} {A/12/77}. Perhaps I should just read it
21 to you. "Other estimates", so at 3.127(b), this
22 paragraph continues:

23 "Other estimates of the proportion of patients that
24 are children by market participants include: 2% (Auden),
25 5% (Boots), 8% (Wells Pharmacy), 10% (Alissa) and 20%

1 (Resolution Chemicals)."

2 So I do not think we can treat the 5% as a precise
3 point estimate. There is going to be some uncertainty
4 around the exact level which seems to go either way, on
5 the available evidence. So I think the point that you
6 were making that you would expect the purchasing to be
7 bang on 5% is not necessarily correct in view of the
8 evidence that we see there; would you agree?

9 A. Well, I think in relation to a particular pharmacy's
10 estimate of that number, you would expect the skinny
11 label to match up with that --

12 Q. But --

13 A. -- on a customer-by-customer basis.

14 Q. But we do not know exactly what that level is based on
15 the evidence. So the fact that some purchasing is above
16 5% does not mean that particular customers are not
17 purchasing to meet paediatric demand; do you see that?

18 A. No, I am being slow again, sorry.

19 Q. No, not at all. So I had understood you to be saying,
20 but correct me if I have misunderstood your point, that
21 if the multiples who purchase some skinny were
22 purchasing to meet paediatric demand, you would expect
23 the purchasing on a customer-per-customer basis to be at
24 exactly 5%, is that right?

25 A. Roughly, yes.

1 Q. The evidence that I was showing you, you can see it now
2 on the page if it helps at (b), is that there were
3 a range of estimates about the extent of demand that is
4 accounted for by the paediatric indication; do you see
5 that?

6 A. Yes.

7 Q. So there is not a precise level in the evidence against
8 which we could adjudge the ordering in order to
9 determine whether your hypothesis was correct; do you
10 see that?

11 A. But I am saying if you looked at Boots, for example,
12 then with this estimate you would expect skinny label to
13 be no more than 5%.

14 Q. But as we know, it was actually around 1% --

15 A. Yes.

16 Q. -- and the reason was because they decided against
17 purchasing for -- separately for paediatric demand.
18 They were committed to buying the 95%; do you not agree?

19 A. Mmm.

20 Q. And they decided not to buy the paediatric -- for
21 paediatric use separately because of the operational
22 complexity that that involved. But here we are debating
23 only that 5% of their demand or thereabouts; do you
24 agree?

25 A. For Boots, yes.

1 THE PRESIDENT: Mr Bishop, just to be clear. These are, at
2 least on the face of this paragraph (b), estimates. So
3 one would not necessarily expect, or would one,
4 a precise correlation between the estimate and what in
5 fact happened, because we might get the estimate wrong?

6 A. Correct, correct.

7 MR HOLMES: Thank you. If we could return, please, to the
8 note of the call between Boots and the CMA that we were
9 considering earlier. That is at {IR-H/1256/3}
10 {H/1256/3}. Could you please read paragraphs 3.2 and
11 3.3 to yourself. (Pause)

12 A. Yes.

13 Q. So Boots is here identifying some specific other reasons
14 why its pharmacists may have purchased some skinny label
15 products, notwithstanding the regulatory issues that
16 they perceived; do you agree?

17 A. Agreed.

18 Q. Again, at least some of those reasons are not specific
19 to Boots. They could also explain why other pharmacists
20 purchased small quantities of skinny label tablets
21 despite generally sticking with full label; do you
22 agree?

23 A. Agreed.

24 Q. Returning to paragraph 118 of your first report, you
25 specifically refer -- so that is at {IR-D5/1/24}

1 {D5/1/24}, you specifically refer, if we could enlarge
2 the bottom half of the screen, to two customers, Asda
3 and Morrisons, who switched some of their purchases to
4 skinny label tablets. You say that the Decision
5 provides no explanation for why that may have been the
6 case.

7 But does not paragraph 3.127 of the Decision, which
8 we have just looked at, the paediatric demand, offer one
9 perfectly plausible explanation, as does the evidence we
10 have just looked at in relation to Boots?

11 A. It does offer a plausible explanation, but these 10% and
12 11% are annual -- average across these two years, and
13 I do not have it in front of me but my recollection is,
14 particularly from Morrisons, that their purchases of
15 skinny label in particular months were significantly
16 higher than 11%.

17 Q. Yes, and you make this point, I think, in footnote 62 to
18 paragraph 118 {D5/1/24}, if we go to the foot of the
19 page and enlarge that. So is this the point you are
20 making:

21 "I ... note that, when viewed on a more
22 disaggregated monthly basis, sales data for Morrisons
23 indicate that in some months in late 2016 to early 2017,
24 the proportion of purchased tablets that were skinny
25 label was significantly higher than this, and equivalent

1 to approximately half of all tablets purchased."

2 So that is your point, they were higher at
3 particular times?

4 A. Correct.

5 Q. But would you agree, though, that it is more appropriate
6 to average over a longer period of time given the lumpy
7 nature of ordering patterns?

8 A. But if the skinny label demand were limited to, and I do
9 not know what the estimate is for Morrisons but let us
10 say it is 5%, and then you saw purchases of 30% in
11 a particular month, one would have to kind of say, why
12 is this jumping up to 30% in that particular month and
13 then for the following month and then dropping back down
14 again?

15 Q. Is it not perfectly possible they were buying for the
16 next six months?

17 A. It is possible, but it is also possible that it is them
18 thinking about engaging in switching.

19 Q. Could we please turn up another document, {IR-H/1058/1}
20 {H/1058/1}. These are some emails between Morrisons and
21 the CMA in the course of the investigation. Have you
22 seen this before?

23 A. No.

24 Q. Can you see from the top email that what is being said
25 is that a decision was taken by Morrisons'

1 superintendent pharmacist to only buy full label
2 products, and that applied from April 2017; yes?

3 A. Yes.

4 Q. So returning to your footnote 62 at {IR-D5/1/24}
5 {D5/1/24}, you are talking here about the proportion of
6 skinny label tablets purchased in late 2016 and early
7 2017. But you now see that it was only in April 2017
8 that a decision was taken by the superintendent
9 pharmacist to confine Morrisons' purchasing to full
10 label tablets for regulatory reasons. Can we agree
11 about that?

12 A. Agreed.

13 Q. So data from prior to April 2017 is not really very
14 informative of whether they should be viewed as part of
15 Auden/Actavis's assured base of customers, is it?

16 A. Sorry, can you say that again, please?

17 Q. Data from prior to April 2017 is not very informative of
18 whether they should be viewed as part of Auden/Actavis's
19 assured customer base, at least from that date on, is
20 it?

21 A. Sorry, why not?

22 Q. Because their superintendent pharmacist decided it was
23 unethical for them to dispense skinny label as at
24 April 2017?

25 A. And that was the choice Morrisons made, yes.

1 Q. A choice -- we have debated this already, have we not,
2 Mr Bishop? We have seen that these multiples considered
3 that they had no choice?

4 A. They considered that they had no choice. The question
5 is: did they have a choice?

6 Q. If they considered they had no choice, whether they did
7 or did not have a choice is neither here nor there, is
8 it?

9 A. I think there is a difference between whether I take
10 a commercial decision to do something or whether I have
11 no alternative but to do something.

12 Q. By a commercial decision, do you mean a trade-off of the
13 kind you describe in your evidence between price and
14 other considerations?

15 A. Yes.

16 Q. And if the evidence shows that there was no trade-off,
17 they were not looking at the price and saying,
18 "the price gets us some of the way but there are these
19 regulatory qualms that we have which count against the
20 purchase", but if they are instead saying, "Whatever
21 the price difference we cannot do it", then that puts
22 them in the assured base just as certainly as if there
23 were a rule that prevented them from doing it?

24 A. Agreed.

25 Q. I am grateful.

1 Now, have you looked at the data for Morrisons's
2 purchases of skinny tablets from April 2017 until
3 December 2017 when the data ceases to be available?

4 A. I have, yes.

5 Q. Can you recall what levels of ordering were to be
6 observed from that date?

7 A. From skinny labels it is very low, yes.

8 Q. It's between 0 and 2%.

9 A. Yes.

10 Q. Is that fair? We can go there if you like.

11 A. I trust your figures, yes.

12 Q. I am grateful. Now, in relation to Asda, which is the
13 other supplier you mention at paragraph 118 of your
14 first report, you appreciate that Asda delegated its
15 purchasing decisions to AAH. Were you aware of that?

16 A. I was not aware of that, no.

17 Q. Very well. Were you aware that Asda's purchases were
18 only around 2% of all Hydrocortisone tablet sales in the
19 UK in 2016-2017?

20 A. Yes.

21 Q. Morrisons was much smaller still. We can take a look at
22 Decision table 3.8 if you like. But these are minnows
23 by comparison with the likes of Boots and Lloyds, are
24 they not?

25 A. Correct, yes.

1 Q. So in paragraph 118 you refer to the position of two
2 small multiple purchasers to illustrate a point about
3 the level of skinny label purchases. But you do not
4 mention there a major chain like Boots whose purchases
5 of skinny label tablets were significantly lower as
6 a proportion of their overall purchases. Why was that?

7 A. I do not know, do not remember.

8 Q. Is there not a risk that you thereby failed to give
9 a fair and complete picture in paragraph 118 of your
10 first report?

11 A. No, I do not think so.

12 Q. You say:

13 "... even amongst those customers that are described
14 as being captive ..."

15 So you are referring to those at a level of
16 generality and then you pick two particular examples,
17 Asda and Morrisons, but you do not treat with the bulk
18 of demand represented by Boots or Lloyds?

19 A. Just highlighting that for -- amongst customers that the
20 CMA has identified as being captive.

21 Q. To be fair, you do deal with Lloyds in paragraph 119, so
22 we should perhaps turn to that now. You say that it
23 started to source over -- and I need to be cautious
24 there is confidential material here -- a certain
25 percentage of its purchase requirements for 10mg tablets

1 from skinny label suppliers after a certain date until
2 a certain date.

3 That is right, is it not?

4 A. Yes.

5 Q. But the percentage figure you give is actually broadly
6 in line with the material we have seen in the Decision
7 showing the various estimates of the proportion of
8 patients taking Hydrocortisone tablets that are
9 children, is it not?

10 A. It is not 5% but it is 10%, yes.

11 Q. Yes, but we saw there was a range?

12 A. Yes.

13 Q. While we are on this point, you are aware that some
14 prescriptions by GPs are closed. They name a particular
15 manufacturer. If a GP names a skinny label
16 manufacturer, for example when a patient requests that,
17 the pharmacy has to dispense the tablets?

18 A. Yes.

19 Q. This point is referred to in the Boots meeting note as
20 an explanation for why it continued to order some skinny
21 label stock?

22 A. Agreed.

23 Q. So even a supplier like Lloyds, whose general position
24 was that dispensing off label was contrary to the
25 regulatory regime, might purchase some skinny label

1 tablets to meet such demand?

2 A. Agreed.

3 Q. Again, if Lloyds was generally making its decisions to
4 a material extent on the basis of price, would you not
5 expect it to purchase a much higher proportion of skinny
6 label tablets given how much cheaper they were and the
7 significant extra profit they could have earned if they
8 purchased and sold more skinny label tablets?

9 A. Agreed.

10 Q. So is it not actually consistent, this body of evidence
11 we have been considering? We see small purchases of
12 skinny label tablets by the multiples, but that does not
13 suggest that they are doing so because generally
14 speaking they were trading off price against other
15 considerations. What it suggests is that they were
16 prepared to do so for a small section of their demand
17 where they felt that regulatorily they could. The
18 alternative explanation that they were buying skinny
19 label because it was cheaper just does not stack up,
20 because otherwise why would they stop at such
21 comparatively low levels?

22 A. (Pause). But I think -- I come back to, again, the
23 question of ... if these two pharmacies are an assured
24 base in which the price of skinny label has no impact on
25 their purchasing decisions and no impact on the price of

1 full label, then we should be defining the relevant
2 market narrowly to be full label only.

3 Q. So you think this evidence actually counts in favour of
4 the points made by other appellants that the market
5 definition should have been narrower?

6 A. I do, yes.

7 Q. I want now to ask you some questions about section 3.5.3
8 of your first report {IR-D5/1/27} {D5/1/27}, and you are
9 here moving away from evidence provided by customers and
10 looking instead at Actavis's pricing. That is right, is
11 it not?

12 A. Correct.

13 Q. Your overall view is that its pricing, and in particular
14 the absence of any price discrimination between captive
15 and non-captive customers, does not support the CMA's
16 suggestion that there was an assured customer base; is
17 that right?

18 A. Correct.

19 Q. I think this part of your analysis is confined to the
20 Intas period. Your various graphs are all looking at
21 prices between January 2017 and July 2018; is that
22 right?

23 A. Correct.

24 Q. Now, I think there may not actually be a great deal of
25 difference between you and Professor Valletti on these

1 points. Can we turn, please, to the joint expert
2 statement at proposition 65. That is at {IR-G1/1/34}
3 {G1/1/34}. We see there the proposition that:

4 "Accord-UK did not price discriminate between
5 allegedly captive and non-captive customers during the
6 Intas period."

7 You agree with that and so does Professor Valletti,
8 so no evidence of price discrimination between captive
9 and non-captive customers; that is right, is it not?

10 A. Agreed.

11 Q. Can we then look at the next proposition on the same
12 page, proposition 66, and we can see that
13 Professor Valletti's view -- sorry, the proposition is:

14 "Whether or not Accord-UK price discriminates
15 between allegedly captive and non-captive customers does
16 not reveal anything meaningful for the dominance
17 analysis."

18 And you see Professor Valletti agrees, the presence
19 or absence of price discrimination does not reveal
20 anything meaningful. You say you partially agree, and
21 you then state that taken on its own an absence of price
22 discrimination tells you nothing meaningful about
23 dominance; is that right?

24 A. Agreed, yes.

25 Q. In any case, you accept that the absence of price

1 discrimination between customers with different
2 preferences for full and skinny labels does not
3 necessarily tell you anything about whether pharmacies
4 like Boots and Lloyds were captive to Actavis. It may
5 just mean that Actavis was unable to price discriminate.

6 A. Agreed.

7 Q. Now, if we could please look at paragraphs 100 and 101
8 of your second report. That is {IR-D5/2/22} {D5/2/22}.
9 Here, you specifically recognise the possibility that
10 Accord-UK was simply not able to price discriminate but
11 your position is, though, that that is highly unlikely
12 to have been the case; is that right?

13 A. Yes.

14 Q. Your client has not put forward any factual evidence on
15 this point, has it? It has not put forward a witness to
16 say that Actavis was actually fully able to price
17 discriminate between different groups of customers?

18 A. But I think the point I am trying to make here is: did
19 Actavis charge different customers different prices?
20 I think the answer is yes, it did. Is it able to adjust
21 those prices in relation to whether a given customer is
22 captive or not? If it is captive and I know it is
23 captive and I can price discriminate, then I ought to be
24 charging higher prices to those customers.

25 Q. Taking it in stages, at the start of paragraph 99 you

1 say that there is no systematic difference between
2 the prices charged to different sets of customers.

3 A. Correct.

4 Q. So there was no price discrimination between the full
5 and the skinny label categories; that is right, is it
6 not?

7 A. Yes.

8 Q. The question is how one explains that; is that right?

9 A. The different sets of customers are between captive and
10 non-captive.

11 Q. Yes. You did not find any price discrimination between
12 those two categories, did you?

13 A. No.

14 Q. The question is: how can we explain that? One possible
15 explanation is that it is simply not possible to price
16 discriminate effectively between those two groups of
17 pharmacies, according to their preference as between
18 full and skinny label, yes?

19 A. Yes.

20 Q. Your view is that it is highly unlikely that it would
21 not be possible to price discriminate, I think; is that
22 correct? If we turn on a page, I think it is at the top
23 of the following page. You see at paragraph 101
24 {D5/2/23}, this is a "theoretical possibility", that
25 price discrimination is not possible, but you consider

1 it to be highly unlikely in this case; yes? Do you want
2 to read paragraph 101 to yourself just so that we are on
3 the same page?

4 A. Yes, please. (Pause)

5 Yes, I think --

6 Q. So you are saying it is a theoretical possibility that
7 they are unable to price discriminate but that is highly
8 unlikely in this case; is that right?

9 A. No, I think what I am trying to say here in relation to
10 paragraph 100 is Professor Valletti said you do not need
11 to price discriminate in order to exercise market power
12 over the assured base, because you could increase
13 the price and you would lose all of the non-captive
14 customers and you would just keep the captive customers.

15 That, as I have already said a few times already, is
16 inconsistent with the definition of the relevant market.
17 But the thing is that in practice people are negotiating
18 on an individual basis, so if I knew that there was an
19 assured base, that someone was in my assured base,
20 I ought to be able to charge them a higher price than if
21 they were outside my assured base.

22 Q. Let us take it in stages. 101, you are agreeing with
23 the theoretical possibility, I think, that
24 Professor Valletti has proposed that Accord-UK was
25 unable to price discriminate at all and opted to charge

1 a uniformly exploitative price to all customers. You
2 consider that to be highly unlikely and then you set out
3 several reasons. I think the reasons must be to do with
4 whether or not price discrimination is possible to
5 practice because if you look at 102 you say:

6 "First the Valletti's report proposition that
7 Accord-UK was unable to charge different prices to
8 different customers at all is entirely speculative ..."

9 That is your first point. Your second point is that
10 the ability to price discriminate is consistent with the
11 available evidence which indicates that Accord-UK did
12 charge different prices to different customers.

13 So I think we are on the same page here. We are
14 debating -- you say that there was the ability to price
15 discriminate and the absence of price discrimination is
16 telling; is that right?

17 A. Correct.

18 Q. Can we just discuss whether you are right to say that
19 whether this is a theoretical possibility or not it is
20 highly unlikely in practice. That is the proposition
21 that I want to engage with you about. Are we clear
22 about that?

23 A. Yes.

24 Q. Good. The first point is you have said it is highly
25 unlikely that there is no scope for price discrimination

1 but I put to you the point that Intas has not put
2 forward any factual evidence to support the proposition
3 that price discrimination was possible between full and
4 skinny label suppliers. There is no factual evidence?

5 A. Discrimination between?

6 Q. Sorry, excuse me, that pharmacies with preferences for
7 full and skinny label. Forgive me. Intas is the
8 supplier.

9 A. Yes.

10 Q. And it has not said I can price discriminate in support
11 of the propositions that you are putting forward here?

12 A. Correct, yes.

13 Q. Great, thank you. If we could please look at
14 paragraph 102 of your second report. Picking it up in
15 the second line you refer to what Dr Burt says in his
16 witness statement about customers being able to
17 negotiate prices.

18 Now, Actavis's customers are typically wholesalers,
19 not pharmacies. That is right, is it not? They are
20 direct customers?

21 A. Yes.

22 Q. It is in the nature of wholesalers' business that they
23 will be serving multiple pharmacies. Do you agree?

24 A. Agreed.

25 Q. Some of the pharmacies would want skinny label, others

1 would want full label, different wholesalers will have
2 different mixes of those two. But we know as far as
3 pharmacies were concerned, it was about 50/50 overall in
4 the post-entry period. That is right, is it not?

5 A. Yes.

6 Q. A wholesaler is unlikely to have accepted it if Actavis
7 tried to charge it one price for tablets destined for
8 one type of customer and a different price for tablets
9 destined for another type of customer. Do you not
10 agree?

11 A. Agreed.

12 Q. And Actavis would not necessarily know which tablets
13 were going to which pharmacies and so it could not have
14 charged different prices based on their categorisation
15 as full or skinny label pharmacies even if it had wanted
16 to. Do you agree with that?

17 A. Agreed.

18 Q. So even if Actavis was negotiating on price with a given
19 wholesaler, it does not follow that it could price
20 discriminate vis à vis different pharmacies as regards
21 their preferences for full or skinny label tablets.
22 Would you agree?

23 A. Agreed.

24 Q. And Dr Burt does not anywhere say that customers were
25 able to negotiate discounts on the basis of customers'

1 preferences for full as against skinny label tablets.

2 Do you agree?

3 A. Agreed.

4 Q. And he does not otherwise address Actavis's ability to
5 price discriminate?

6 A. Agreed. I think but for me -- I am sorry if I am being
7 slow, but again, the fact is that if I knew that Boots
8 was part of the assured base, had no ability to switch
9 away from me, then I ought to be able to obtain better
10 prices from that customer, and the fact that I am not
11 doing that, you know, vis à vis a different customer who
12 takes a different view, tells me that there is this
13 competitive constraint going on. I am not treating an
14 assured base customer differently from a non-assured
15 base.

16 Q. Yes, but that might be because they just cannot. Boots
17 buys through Alliance. Alliance is a wholesaler.
18 Alliance serves pharmacies with preferences for full and
19 skinny and so it is quite hard to price discriminate on
20 that dimension, is it not?

21 A. Yes.

22 Q. So that means that price discrimination -- you say that
23 price discrimination while it is a theoretical
24 possibility that price discrimination is not possible
25 you consider it to be highly unlikely to be in this

1 case. Paragraph 102 is explaining your reasons for
2 that, as is paragraph 103.

3 A. Yes.

4 Q. I think you agreeing with me that far from being
5 a theoretical possibility there are perfectly sound and
6 valid reasons why price discrimination may not be
7 possible in this case between pharmacies with
8 a preference for full and pharmacies for a preference
9 for skinny?

10 A. But then I am again -- if there is no price
11 discrimination then how can I target the assured base?

12 Q. Just by pricing higher.

13 A. But we have already ruled that out.

14 Q. No, we have not. We have seen a big price differential.
15 How have we ruled that out?

16 A. We have ruled it out through the CMA's definition of the
17 relevant market.

18 Q. I think that you are eliding market definition and
19 dominance assessment there but it is a point I will
20 return to if I may subsequently.

21 For now I am just debating with you the propositions
22 that you have advanced in your second report about the
23 feasibility of price discrimination. So you have drawn
24 assumptions based on the absence of price
25 discrimination. Professor Valletti has come back and

1 said maybe they did not price discriminate because they
2 could not. You say you think that is a theoretical
3 possibility but you consider it highly unlikely. I am
4 putting to you a mechanism which may explain why price
5 discrimination is not possible and I would be keen to
6 understand whether you now agree that price
7 discrimination is -- sorry, that the impossibility of
8 discriminating on price is a concrete possibility,
9 a very real possibility?

10 A. But the fact that different customers are being charged
11 different prices tells you that there was price
12 discrimination.

13 Q. But not --

14 A. But not necessarily on the basis of whether someone is
15 captive or not captive.

16 Q. Yes, exactly so. You can see very easily how volume
17 requirements, levels of volume could be used as a basis
18 for price discrimination?

19 A. Could be, yes.

20 Q. Your evidence suggests that they are, does not it? If
21 you look over the page, at your figure 1, you have got
22 a range of prices. You have got your volume weighted
23 average down at the bottom of the price range. Is that
24 not pretty good evidence that what discrimination there
25 is, is by reference to volume?

1 A. In part, yes, yes, but there is also --

2 Q. That is why it is down at the bottom.

3 A. But not always at the bottom.

4 Q. Not always entirely at the bottom?

5 A. And there is a range.

6 Q. Yes.

7 A. So if you look at December 17, the volume weighted

8 average price is not quite in the middle but ...

9 Q. Just because sales by volume to wholesalers can easily

10 and readily allow for price discrimination according to

11 the volumes procured, yes, which might then be passed on

12 down the line, yes, that does not mean, does it, that

13 there was any mechanism whereby Auden/Actavis could

14 price discriminate between pharmacies based on their

15 willingness to purchase skinny as opposed to full label?

16 That is a different dimension of price discrimination

17 which would involve them, the wholesalers, being

18 prepared to accept different prices for quantities

19 according to which pharmacy they went to. Do you see

20 that?

21 A. No, I am not sure I do see that.

22 Q. Let us take it in stages then. So if we look at

23 paragraph 103 which is where you develop this evidence,

24 you say there that the available evidence shows that

25 Accord-UK did charge different prices to different

1 customers. I think the point you are trying to make is
2 that this shows that Actavis could have priced
3 discriminated between captive and non-captive pharmacies
4 if it had wanted to; is that right?

5 A. Yes.

6 Q. Now, we have agreed that customers are typically the
7 wholesalers. The fact that different wholesalers were
8 charged different prices does not mean that there was
9 any ability to price discriminate between captive and
10 non-captive pharmacies, does it, based on their
11 willingness to dispense off label?

12 A. Agreed, agreed.

13 Q. Can we turn on to figure 1 over the page, {IR-D5/2/24},
14 which we were just looking at. You rely on this in
15 support of the claim that Auden/Actavis could price
16 discriminate and the shaded area shows that Actavis
17 charged a range of different prices to different
18 customers during the Intas period. That is right, is it
19 not?

20 A. Correct.

21 Q. The dotted green line shows the average monthly price
22 weighted by volume of sales?

23 A. Yes.

24 Q. Now, if we could please keep figure 1 of your second
25 report on the screen and look at the joint experts'

1 proposition 66, {IR-D5/2/24}. I am afraid it is quite
2 small but do you see that Professor Valletti makes the
3 point since the dotted line is near the bottom of
4 the price range in your figure 1 that indicates that the
5 higher prices are being paid by virtually no one. So in
6 reality there is little price dispersion.

7 I think the point he is making is that the volumes
8 are all being supplied, overwhelmingly being supplied at
9 the lower price. That is right, is it not?

10 A. It would be correct, yes.

11 Q. This figure is consistent with the point that bigger
12 customers would have been benefitting from volume
13 discounts. Whereas smaller pharmacies or wholesalers
14 with less volumes may not have been able to benefit from
15 such discounts, and that accounts for the range of
16 prices that you observe; is that right?

17 A. Yes.

18 Q. So it does not actually tell you about Auden/Actavis's
19 ability to engage in price discrimination between
20 customers according to their preference for full or
21 skinny label tablets, does it?

22 A. But Actavis would know which wholesaler is supplying
23 Boots and which wholesaler is supplying Lloyds. It is
24 not as if it is kind of random or hidden. So in that
25 sense it would know. It would know.

- 1 Q. So you would expect it to charge more to Alliance
2 because Boots is a customer?
- 3 A. Yes. If you believe in the assured base theory, yes.
- 4 Q. Turning on to paragraph 106 of your second report at
5 page 25. {IR-D5/2/25}. You here suggest a second
6 reason why in your view it is unlikely Actavis was
7 unable to price discriminate between captive and
8 non-captive customers. You say that if the hypothesis
9 is correct you would expect to see minimal sales to the
10 non-captive customers. That is right, is it not?
- 11 A. Correct, yes.
- 12 Q. Now please look at paragraph 107. You recognise there
13 that Actavis's sales to non-captive customers was small
14 but you say that they were not so negligible as to be
15 "considered random irrational purchases".
- 16 You then say over the page at paragraph 108 that
17 sales to non-captive customers accounted for around 9%
18 of sales by value and 8% by volume and 7.1% and 7%
19 during the Intas period. That is right, is it not?
- 20 A. Correct.
- 21 Q. We have already discussed closed prescriptions where
22 a GP names a particular supplier in which case
23 a pharmacy would be obliged to dispense it regardless of
24 its general views on full versus skinny label?
- 25 A. Correct.

1 Q. So that is one potential reason why a price sensitive
2 pharmacy that generally wanted the cheaper skinny label
3 products may still have needed to obtain some full
4 tablets in stock?

5 A. Agreed.

6 Q. Another reason might be that a patient had an open
7 prescription but asked a pharmacist to dispense
8 Actavis's product because that is what the patient was
9 used to and a pharmacy might in that case dispense
10 Actavis's product even if it generally purchased skinny
11 label. Would you agree?

12 A. Agreed.

13 Q. That is another potential reason why a non-captive
14 pharmacy might purchase some Actavis full label products
15 despite its general preference for skinny label?

16 A. Agreed.

17 Q. Or the wholesaler may simply have been out of skinny
18 stock. Would you agree?

19 A. Out of skinny stock?

20 Q. Yes. We are talking about non-captives buying full
21 label here.

22 A. Yes.

23 Q. I think you note in your first report that Boots bought
24 from other suppliers than Actavis in the event of stock
25 shortages. So stock shortages could arise in this

1 market, could not they?

2 A. Agreed.

3 Q. In any case, none of this tells you anything about
4 whether Actavis was able to engage in price
5 discrimination as between captive and non-captive
6 customers, does it, because the data is not about
7 pricing. It is about the volumes supplied. It does not
8 tell you the terms on which the volumes were supplied?

9 A. Agreed.

10 MR HOLMES: Sir, I am conscious of the time. I am nearly at
11 the end of this topic but I am very happy to break now
12 if that is convenient.

13 THE PRESIDENT: Indeed. How are you doing generally for
14 time?

15 MR HOLMES: It is moving along quite briskly. It is always
16 hard to tell when points might require further
17 discussion.

18 THE PRESIDENT: I just want to map out the day.

19 MR HOLMES: Of course. I would hope that I would be
20 finished with Mr Bishop within an hour to and an hour
21 and a half.

22 THE PRESIDENT: And then is it, Mr Palmer, just your
23 re-examination?

24 MR PALMER: I believe so.

25 THE PRESIDENT: Good. Thank you very much.

1 Mr Bishop, you have probably heard me say this to
2 other witnesses. Do not talk to anyone about your
3 evidence but do not let that stop you asking for
4 a sandwich when you are having your break.

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

6 (1.01 pm)

7 (Luncheon Adjournment)

8 (2.00 pm)

9 MR HOLMES: Sir, taking stock over the lunch adjournment

10 I think we have covered an awful lot of ground already
11 this morning and I think I can be rather briefer than my
12 estimate this morning. We will see where we get to.

13 THE PRESIDENT: We will see where we get to. I am grateful,
14 thank you for being updated.

15 MR HOLMES: The next topic I would like to discuss with you,
16 Mr Bishop, is market share variability. This is a point
17 which arises from Professor Valletti's report. If we
18 could please turn to the joint experts' statement,
19 proposition 61 at {IR-G1/1/32} {G1/1/32}. The
20 proposition is:

21 "Following entry, Accord-UK's market shares were
22 relatively stable compared to the high degree of
23 fluctuation among market shares."

24 You can see that Professor Valletti agrees with
25 that. He notes that you omit to report the coefficient

1 of variation of market shares, which he thinks:

2 "... is the most natural measure of volatility to
3 use when groups of data have very different magnitudes
4 (i.e., it does not make sense to look at the absolute
5 increase in energy cost for very rich and very poor
6 households, as the increases have to be anchored to
7 their incomes). If one calculates the coefficient of
8 variation, it is immediate [apparent, I think it should
9 say] that the market shares of Accord-UK were very much
10 more stable than those of its rivals."

11 You see he has reported them at the foot of the
12 page, and you compare the Auden/Actavis row with those
13 for the other suppliers active in the market, both for
14 the Intas period and the post-entry period.

15 So just beginning with the position of principle, do
16 you accept that if an undertaking's market shares were
17 more stable than its rivals that could be relevant
18 evidence, obviously alongside other factors, for the
19 purposes of assessing dominance?

20 A. Could be, but could also, you know, not be. It depends
21 on all the other factors.

22 Q. Yes, and I think this is what you say at
23 paragraphs 67-70 of your second report. So if we could
24 go to that, please. It's at page {IR-D5/2/16}
25 {D5/2/16}. If you could just refresh your memory of

1 what you say there. (Pause)

2 A. Yes.

3 Q. So I think you accept there that volatility in market
4 shares could be relevant to an assessment of dominance
5 provided you have a sufficient understanding of the
6 reasons, and in that regard you say at paragraph 70 that
7 the bulk of Actavis's sales were accounted for by sales
8 to Lloyds and Boots; is that right?

9 A. Correct.

10 Q. Is that not an explanation for why Actavis's sales may
11 have been more stable, precisely because the two largest
12 pharmacy chains considered that they needed to purchase
13 full label tablets, as we saw earlier from the evidence?

14 A. Well, it is -- in the last sentence of paragraph 70 it
15 says:

16 "Retaining these customers can naturally be expected
17 to have enabled Accord-UK to retain a significant market
18 share over the Intas period ..."

19 So your interpretation is one possibility is that
20 they could not switch; the other is that there was
21 competition but they competed and they retained these
22 customers.

23 Q. Yes. So it all comes back, then, to whether they really
24 were an assured customer base or a captive base?

25 A. Well, if I may, the debate on captive, assured, I think

1 should not kind of distract us from the key market
2 observation, namely that Accord's prices did come down
3 and quite significantly even from the Intas period,
4 I think. At the start it was around £54 and by the end
5 around £20. So what led to that significant decrease in
6 the price of full label? I think there are three
7 possible explanations. One is it is all driven by the
8 drug tariff, and that is not something that I would
9 personally subscribe to myself, and I heard Dr Bennett's
10 evidence who is supporting that on Wednesday, but I take
11 a different view.

12 The second explanation is the assured base exists
13 but there is no ability to identify and price
14 discriminate against them, and because of that they are
15 protected by competition from others who consider skinny
16 label to be an effective alternative; and the third
17 alternative is there is no assured base.

18 Now, for me either explanation two or three is
19 entirely consistent with skinny label providing
20 effective competitive constraint, so the debate about
21 whether or not there is an assured base has to feed back
22 into, well, why do we observe such a decline in prices?

23 Q. You understand the CMA's position is that there was some
24 competitive constraint from skinny but that it is clear
25 from the price differential that it was not sufficient

1 to constrain prices as it was in relation to skinny
2 label tablets?

3 A. I understand, but it is trying to articulate what that
4 actually translates to. Because if it is saying Boots
5 and Lloyds, for example, cannot switch, so everyone who
6 could switch to skinny has done so by the beginning of
7 the Intas period, why are full label prices still coming
8 down in that situation?

9 That is -- if there was -- there was no strong
10 competitive constraint on full label, why did prices
11 fall from £54 at the beginning to around £20 at the end
12 of the Intas period? We have to have a good explanation
13 for that, and I have set out three possible explanations
14 of which two are entirely consistent with strong
15 competition from skinny label.

16 Either there is an assured base which we cannot
17 price discriminate against and they are protected by
18 customers who do consider skinny label to be an
19 effective alternative, or there is no assured base.

20 It does not really matter whether we are in
21 scenario one or the second -- my second scenario or my
22 third scenario.

23 Q. But taking the second scenario, where you and the CMA
24 I think part company but tell me if you disagree, is in
25 the idea that the constraint is sufficient to protect

1 the assured base?

2 A. Yes, and I think it has to be, and again it comes back
3 to the CMA's own analysis says that that is the case
4 through its market definition of the relevant market,
5 and how do you square saying -- an argument saying there
6 is an assured base of which a full label provider has
7 effective monopoly over, that with the full label price
8 falling. I do not think the CMA Decision provides
9 a good explanation for -- to reconcile those two things.

10 Either there is -- the price has fallen from £54 to
11 20, I think is kind of prima facie evidence of strong
12 competition from somewhere, and where is that coming
13 from if it is not coming from skinny label?

14 Q. Well, you say strong competition. You accept that there
15 is an indirect price constraint also at work in this
16 market, as the CMA found in the Decision, namely the
17 drug tariff?

18 A. Mmm.

19 Q. The question then is whether the competitive constraint
20 from the skinny label suppliers operates effectively to
21 constrain market power, and you have a very large
22 differential which emerges between the full and the
23 skinny prices. It is not more complicated than that, is
24 it?

25 A. Are you suggesting that the drug tariff is the primary

- 1 driver for the decline in full label?
- 2 Q. That is consistent with the findings in the Decision.
- 3 The Decision found two constraints at work, indirect and
- 4 direct, and it said it was very difficult to work out
- 5 how much each contributed.
- 6 A. Exactly, and that's why I said there were three possible
- 7 explanations, the first of which was the price decline
- 8 is driven by the drug tariff. But the reason I do not
- 9 find that a convincing explanation by itself is again,
- 10 if the assured base, everyone who has switched away to
- 11 skinny has done that, then I as the -- I have a monopoly
- 12 over all of the people who are left buying full label,
- 13 I can affect the drug tariff by putting up price. By
- 14 putting up the full label price, that feeds back into
- 15 the drug tariff. So the fact that the drug tariff is
- 16 actually coming down over time I get -- would suggest
- 17 again, I agree with the CMA that it is an indirect
- 18 constraint but it would not be if you had this assured
- 19 base which had -- was completely isolated from skinny
- 20 label competition.
- 21 Q. I am not sure I understand -- can we just tease out why
- 22 you say it is that if the drug tariff is declining it
- 23 would be possible for Auden/Actavis to have put its
- 24 prices up?
- 25 A. Because the Auden/Actavis price feeds into the drug

1 tariff.

2 Q. As one constituent?

3 A. One constituent, true. I am not saying it has complete
4 control in overturning it but in the world where I know
5 that Boots and Lloyds cannot switch any more away to
6 skinny, if the profit-maximising price for me at the
7 beginning was £54, well, the profit-maximising price for
8 those customers is not going to fall to £20. I can
9 go -- keep saying to them, you have to pay this price,
10 you are going to have to swallow it, until -- and so
11 I can moderate the -- and effect what the drug tariff
12 is. But the fact that the drug tariff is coming down is
13 indicating that there is competitive pressure from the
14 skinny label on full label.

15 Q. I think we have probably taken that discussion as far as
16 we can.

17 Returning to the question of market share
18 variability where we came into this, we have discussed
19 whether in principle market share variability is
20 a relevant consideration. I think you have agreed that
21 it is, depending upon the explanation. But you also
22 take issue with Professor Valletti's position on the
23 data, and I think you resist the conclusion that
24 Actavis's market shares were more stable; is that
25 correct?

1 A. I put forward in my second report four standard measures
2 for variability. I also set out in footnote 43 of my
3 report why I did not consider the coefficient of
4 variation. So it -- you can have a debate about whether
5 coefficient of variation is a measure that we should
6 include and disagree with the reasons why I have not
7 included it, but even if you did say it is a relevant
8 factor, so then you have one measure of variability
9 against four others. So where does this leave us?

10 Q. Shall we have that debate. But first of all, can I just
11 ensure that we are singing from the same hymn sheet in
12 relation to the meaning of the coefficient of variation.
13 Can I offer my explanation of it and you can tell me if
14 I am going wrong, just to make sure that I have
15 understood?

16 So two firms, let us imagine, firm A and firm B.
17 Firm A has a market that shares between 4 and 6%.
18 Firm B has a market share that varies between 89 and
19 91%. Now, on your preferred approach to measuring the
20 variability in the two firms' market shares you take the
21 range, and on that approach firm A's and firm B's market
22 shares would be equally volatile since the range is two
23 percentage points in each case; is that right?

24 A. Correct.

25 Q. But Professor Valletti's approach would add a further

1 element. By using the coefficient of variation instead
2 of the range he takes account of the size of the change
3 in market shares relative to how big the firm's market
4 share is in the first place; is that right?

5 A. Correct.

6 Q. So on that approach, and putting it very simply,
7 a change of two percentage points from a starting point
8 of 4% market share, as in the case of firm A in the
9 example I put to you, will be much more significant than
10 a change of two percentage points from a starting point
11 of 89% market share, as for our firm B.

12 A. Correct, and that is the explanation I put.

13 Q. Yes, I am sorry. Forgive me for taking it slowly but
14 I just want to make sure that I have it right.

15 So it would be the difference between losing a third
16 of market share and a small fraction which would -- the
17 coefficient of variation would show, is that right, on
18 the example?

19 A. Correct, yes.

20 Q. Now, I appreciate that you do not think it is
21 appropriate to use the coefficient of variation. I just
22 want to make sure that we agree what the metric is. If
23 we could look now at page 33 of the joint experts'
24 statement, that is at {IR-G1/1/33} {G1/1/33}. You can
25 see that Professor Valletti has presented some results

1 at footnote 2, and these results show that when you do
2 use the coefficient of variation, Actavis's shares, both
3 by volume and value, were significantly more stable than
4 any of its rivals' shares both in the Intas period and
5 across the post-entry period. You do not challenge any
6 of that arithmetic? You agree with his calculations, do
7 you?

8 A. If I am being totally honest I have not even taken --
9 checked these coefficients, so I accept them. I mean,
10 these are obviously new evidence introduced at joint
11 expert stage, but I assume that Professor Valletti can
12 calculate these correctly.

13 Q. Now, in terms of that debate, it may be that this is
14 something that will be addressed by Professor Valletti
15 in his evidence so I will be brief, but can I ask you to
16 turn to page 17, footnote 43 of your second report which
17 you referred to a moment ago, and we can look at that
18 {IR-D5/2/17} {D5/2/17}. You say there that you do not
19 consider it is insightful means of comparing variability
20 of the market shares of different suppliers and you have
21 not included this measure in the table:

22 "In particular, this measure would effectively mean
23 that any given percentage point change in Accord-UK's
24 market share would be considered to reflect a lower
25 level of variability than for any other competitor,

1 purely as a function of Accord-UK's higher market share
2 overall. This ignores the fact that a percentage point
3 loss of market share amounts to the same absolute loss
4 volume (and profit) for all firms, irrespective of their
5 size. There is no reason to discount the importance of
6 lost sales (and the likely effect that the risk of any
7 such loss would have on a firm's competitive strategy)
8 simply because their market share is higher."

9 So that is your position, is it not?

10 A. Correct.

11 Q. Now, professor Valletti's approach does not discount the
12 importance of lost sales, he just uses a metric that
13 takes account of the scale of those lost sales relative
14 to Actavis's and its competitors' market shares; do you
15 agree?

16 A. Yes.

17 Q. That is a sensible approach, is it not? A loss of two
18 percentage points in market share might be the
19 difference between remaining and exiting the market for
20 a small firm, but it would be a trifling -- be trifling
21 to a firm with enormous market shares?

22 A. Not necessarily.

23 Q. But you would agree that in this market several
24 suppliers have exited or temporarily stopped supply at
25 different times?

- 1 A. Agreed.
- 2 Q. So if they have a smaller market share overall the loss
3 of a large portion of that would render them more
4 economically precarious; would you not agree?
- 5 A. At that individual firm level, yes.
- 6 Q. Yes. Now, sticking with this topic, can we briefly
7 consider annex A of your second report in its corrected
8 form. It is at {IR-D5/2/41} {D5/2/41}. You here
9 present -- it is confidential, but I do not think that
10 we will need to touch on the figures. You here present
11 some results in relation to market share variability.
12 Starting on the previous page {IR-D5/2/40} {D5/2/40},
13 table 3 shows variability in value-based market shares
14 and indicates that Accord-UK's shares were more variable
15 according to various metrics; that is right, is it not?
- 16 A. Yes.
- 17 Q. To be clear, this table does not present the coefficient
18 of variation for the reasons you gave; is that right?
- 19 A. Correct.
- 20 Q. Then at paragraph 182 -- no, you say that:
21 "Similar results are obtained from looking at the
22 entire post-entry period ..."
23 Now, by "similar results" you presumably mean
24 results that show that Auden/Actavis's market share was
25 more variable than its competitors' market shares in the

- 1 post-entry period; is that right?
- 2 A. Correct.
- 3 Q. Then if we turn on to the next page, page 41
- 4 {IR-D5/2/41} {D5/2/41} and look at the column entitled
- 5 "Range", we see that the figures that you presented
- 6 first of all, the ones that have been struck through, in
- 7 fact show in each table that Accord-UK had a lower
- 8 percentage of variability than the other suppliers that
- 9 are shown, do they not? Is that right?
- 10 A. Yes.
- 11 Q. They were presented in error. That is why they have
- 12 been struck through; is that right?
- 13 A. Correct.
- 14 Q. Now, I think when you were shown these corrections it
- 15 was put to you that some of the figures had been moved
- 16 across one column. Is that right?
- 17 A. Yes.
- 18 Q. So the figures that were in the inter-quartile range
- 19 column have now been moved to the range column, and
- 20 similarly for the inter-quartile range exclusive and
- 21 inclusive. They have all just gone across one.
- 22 A. Yes.
- 23 Q. But the figures which were originally in the range
- 24 column have now been deleted, haven't they; is that
- 25 right?

- 1 A. Yes.
- 2 Q. What were those figures?
- 3 A. In the range column?
- 4 Q. Yes. Do you know what the original figures were?
- 5 A. They are the ones which have been struck out here.
- 6 Q. Yes, and do you know how they were calculated?
- 7 A. No, my team calculated them.
- 8 Q. They were actually the coefficient of variation figures
- 9 that you decided not to display. You can see that, we
- 10 can look at it if you like, by comparing them with the
- 11 relevant columns of Professor Valletti's table in
- 12 footnote 2 of the joint statement, yes?
- 13 A. Okay.
- 14 Q. So you in fact calculated the coefficient of variation
- 15 in preparing your second report before
- 16 Professor Valletti put in his evidence about it in the
- 17 joint expert statement, but you decided not to present
- 18 them; is that right?
- 19 A. For the reasons I set out in that footnote, yes.
- 20 Q. So you presented them unintentionally and in error in
- 21 tables 4 and 5, is that right?
- 22 A. Correct.
- 23 Q. Now, I appreciate your position is that the coefficient
- 24 of variation is less informative than the range, but
- 25 since you calculated the coefficient of variation as

- 1 well, would it have been better in hindsight to have
2 displayed that also?
- 3 A. It would have been, yes.
- 4 Q. Yes. Did you decide not to present those figures
5 because they showed Auden's market share variability was
6 less by that measure than its competitors?
- 7 A. No, because I think I would have given you the same
8 answer that I gave five minutes ago.
- 9 Q. Yes, understood. Very good. I want now to turn to --
- 10 A. Could I just make one observation. All of this analysis
11 was done in response to a claim by Professor Valletti in
12 his first report which just said market shares were more
13 volatile, more variable but did not actually present any
14 analysis to support it. So this analysis here is -- was
15 done in response to Professor Valletti's claim.
- 16 Q. Yes, and you did one type of analysis which you chose
17 not to present, namely the coefficient of variation
18 analysis, and Professor Valletti then presented the
19 results of that analysis in the joint experts'
20 statement, as you say, introducing new evidence, as you
21 put it, at the final stage; is that right?
- 22 A. It is.
- 23 Q. I want now to turn to the issue of abuse, and I am going
24 to take this briskly because your analysis of the
25 captive customers' issue is also at the heart of what

1 you say about abuse.

2 So, as we have seen, your position is that
3 competition for the customers that the CMA considered to
4 be captive was effective; that is right, is it not?

5 A. Yes.

6 Q. Since there was effective competition Auden/Actavis
7 cannot have been dominant, at least in the Intas period?

8 A. Correct.

9 Q. Can we see how this ties with your analysis of abuse by
10 looking at paragraph 32 of your first report, that is at
11 {IR-D5/1/8} {D5/1/8}. So you say there that:

12 "Furthermore, the existence of effective competition
13 during this period [that is to say the Intas period]
14 necessarily implies that observed prices cannot be
15 deemed to be excessive."

16 If we could now move forward to paragraph 161 of
17 your first report {IR-D5/1/34} {D5/1/34}. You say in
18 paragraph 161:

19 "As I have explained above, I do not believe that
20 the CMA's cost plus benchmark is an appropriate basis to
21 estimate economic value in the case at hand."

22 Now, pausing there, I do not propose to debate this
23 point with you, and we will pick that up in submissions
24 as necessary.

25 Your paragraph 161 then continues:

1 "Nevertheless, I have been asked to consider whether
2 Accord-UK's hydrocortisone tablets are likely to possess
3 an economic value over and above cost plus."

4 I will not read them out, but at paragraphs 162 and
5 163 {IR-D5/1/35} {D5/1/35} you make clear that you
6 disagree with the CMA's conclusion that Auden/Actavis's
7 Hydrocortisone tablets have no greater economic value
8 than its competitors' prices.

9 Then if we look at your 164 you say that:

10 "This is particularly so since, for the reasons set
11 out in sub-section 3.5 above, customers do not appear to
12 have been captive to Accord-UK, and thus could have
13 switched to skinny label suppliers if it made commercial
14 sense to do so. Hence, the decision of customers to
15 still source from Accord-UK at higher prices indicates
16 that they perceived there to be additional value to them
17 from doing so."

18 So what you are doing here in relation to the
19 question of economic value is relying on the analysis
20 which we have already considered in section 3.5 of your
21 first report. That is right, is it not?

22 A. Correct.

23 Q. That is the section which addresses the "captive
24 customers" point in relation to the issue of dominance?

25 A. Yes.

1 Q. So can I summarise your reasoning as follows: you say
2 that the customers that the CMA considered to form part
3 of an assured customer base were actually free to switch
4 to skinny label suppliers if it made commercial sense
5 for them to do so, and you say that the fact that the
6 captive customers nevertheless did not switch to skinny
7 label suppliers must therefore indicate that
8 Auden/Actavis's products had a greater economic value
9 than the skinny label products; is that right?

10 A. I think the first step I would disagree with. I think
11 again, it is even if there were some infra marginal
12 customers who would not consider switching to skinny
13 label but could still be protected by all of those other
14 customers, the marginal customers who would consider
15 switching to skinny label.

16 Q. Sorry, are you making a point about dominance there or
17 about economic value?

18 A. It is -- I guess the two things are the same.

19 Q. So let me just ask you a few questions about that. You
20 accept that the mere fact that customers were willing to
21 pay Auden/Actavis's higher prices does not mean that
22 those prices were not abusive; that is right, is it not?

23 A. Correct.

24 Q. You are also aware, I think, that it is common ground in
25 this appeal that Auden/Actavis's products are

1 bioequivalent to the skinny label products; that is
2 right, is it not?

3 A. That is correct.

4 Q. So that is to say that Auden/Actavis's full label
5 products do exactly the same thing as the skinny label
6 products from a clinical standpoint, they are basically
7 the same product in terms of their physical
8 characteristics?

9 A. Correct.

10 Q. You would accept that the products are therefore
11 functional substitutes?

12 A. Yes.

13 Q. Now, it follows that in your view there must be some
14 other reason beyond the medicinal properties of
15 Auden/Actavis's product that justifies its higher
16 pricing during the Intas period; is that right?

17 A. Yes.

18 Q. If we could go back up to paragraph 164 of your first
19 report, you are suggesting here that one of the things
20 that differentiates Auden/Actavis's product is the fact
21 that it is full label; is that right?

22 A. Correct.

23 Q. You are aware, are you not, that the fact that
24 Auden/Actavis was the only holder of a full label
25 authorisation for 10mg tablets and one of only two

1 holders of a full label authorisation for 20mg tablets
2 was the result of a regulatory quirk?

3 A. Yes.

4 Q. It was because a different drug, Plenadren, had been
5 granted an orphan designation which meant that no new
6 full label licences could be granted after that point?

7 A. Correct.

8 Q. But that prohibition did not affect Auden/Actavis
9 because it had already got into the market before the
10 orphan designation was granted to Plenadren. Now, this
11 regulatory quirk did not reflect any research or
12 innovation that had been undertaken by Auden/Actavis?

13 A. Correct.

14 Q. It had nothing to do with the intrinsic qualities of
15 Auden/Actavis's product at all, did it?

16 A. Correct.

17 Q. Yes. Now, if we could look finally at paragraph 165 of
18 your first report, you say here that:

19 "... this indicates that there was an economic value
20 to [Auden/Actavis's] full label tablets over and above
21 cost plus (and indeed over and above the prices charged
22 by other suppliers)."

23 Now, by this you are referring to the fact that
24 customers were willing to stick to purchasing from
25 Auden/Actavis despite, in your view, being free to

1 switch if it made commercial sense to do so; is that
2 right?

3 A. Sorry, could you say that again?

4 Q. So by "this" in paragraph 165, you are referring to the
5 fact that customers were willing to stick to purchasing
6 from Auden/Actavis despite the fact that, as you see it,
7 they were free to switch if it made commercial sense for
8 them to do so?

9 A. Well, the fact that they purchased shows that they had.

10 Q. Now, I appreciate that you take a different view from
11 the CMA on whether there really was an assured customer
12 base who felt compelled to purchase full label products,
13 but let us assume that the Tribunal decides that there
14 was. Would you agree that this would then strongly
15 support a finding that Auden/Actavis's prices did not
16 reflect the economic value of their products?

17 A. No, I do not see why that is the case.

18 Q. Because the price premium charged by Auden/Actavis would
19 reflect the fact that it benefited from a base of
20 customers who were generally unwilling to consider
21 switching to skinny label products rather than any
22 additional value possessed by the Auden/Actavis product?

23 A. Okay. I think we need to go back to where do the
24 competitive constraints come and we just had half
25 an hour ago that the assured base -- essentially,

1 I think there are two ways of thinking about this.

2 There is one way saying the prices of full label went up
3 to such a level that everyone who could switch switched
4 away, and therefore -- prefer to use the word "captive".
5 Those customers remained captive and then they could be
6 charged excessive prices.

7 We are not seeing that. We are seeing prices -- you
8 still need to understand why a price is coming down.

9 I think for me it comes down to that those customers who
10 are captive if, to the extent that they were captive,
11 were protected by the pricing decisions of the
12 non-captive customers.

13 Q. That is your position on dominance, is it not? That is
14 your reason why you say there is no market power in this
15 market?

16 A. Correct.

17 Q. Yes. But I am asking you now to consider the question
18 of economic value, and I am saying that if one accepts
19 that there is an assured base of customers who are not
20 prepared to switch, and the price premium charged by
21 Auden/Actavis would in that case reflect the fact that
22 that base of customers could not consider switching away
23 rather than anything additional in terms of economic
24 value possessed by the Auden/Actavis product.

25 A. Well, you can certainly say that people who purchased

1 the product valued the product more than they paid for
2 it, otherwise they would not have bought it.

3 Q. But -- sorry.

4 A. That obviously does not mean to say that that price is
5 not excessive, but it does tell you one thing that, you
6 know, they value something about that product over and
7 above the cost. I think that is pretty uncontroversial.

8 Q. Sure, but it sounds then as though economic value, on
9 your assessment, is collapsing into the question of
10 willingness to pay, and I thought we had agreed that
11 willingness to pay in itself did not avoid the question
12 about whether prices reflected economic value, whether
13 they were excessive or not.

14 A. Well, you know, the problem I have is, what does
15 economic value mean? I bought this marker pen and
16 I might consider it has economic value to me of 10, £10
17 but I paid 50p for it. What does that tell me anything
18 about the economic value intrinsic in this?

19 Q. So again, that seems as though it is a question of
20 willingness to pay?

21 THE PRESIDENT: To what extent, Mr Bishop, do you equate
22 economic value with the potential for consumer surplus?
23 So you might value the highlighter for £10 but you have
24 paid 50p, so we are in the happy position, or you are in
25 the happy position of having a subjective consumer

1 surplus of £9.50, which is jolly good because you want
2 consumers to get maximisation of their consumer surplus.

3 A. Indeed.

4 THE PRESIDENT: So do you equate economic value with
5 consumer surplus rather than the price actually paid?

6 A. I think from an economic perspective, and I think
7 economic value is not something which we normally talk
8 about but we talk about the willingness to pay, which
9 obviously has to be greater than the price being charged
10 because otherwise I would not buy the product. There
11 is --

12 THE PRESIDENT: Greater or equal to?

13 A. Greater or equal to, correct. There is the competitive
14 price level and then there is an excessive price level,
15 and obviously anyone who purchases at the observed
16 price, you can tell that they are willing to pay at
17 above or equal to that level.

18 I am trying to say what economic value is in the
19 sense of, why do I value this at £10? What intrinsic
20 economic value is there in this yellow highlighter?
21 No one knows. It is the fact that I value it and
22 I purchased -- I see the price and think it is worth me
23 buying it. So I am not really sure these discussions
24 about the economic value are really -- how they actually
25 affect our ability to identify what the competitive

1 price is in this industry but also in general.

2 THE PRESIDENT: No, to be clear, Mr Bishop, we are talking
3 general terms here, not specific. But I think what you
4 are saying, and do please correct me if I am
5 mischaracterising you, is I think you are saying that
6 economic value is fundamentally either a meaningless
7 concept or it is so subjective as to be meaningless.

8 A. Correct.

9 THE PRESIDENT: You would agree with that, okay.

10 MR HOLMES: That is a very helpful place, I think, sir, to
11 leave this discussion because it suggests that we are
12 really moving beyond the realm of economics and into
13 other areas.

14 THE PRESIDENT: Into some echelons -- indeed, I think that
15 is on one level a very helpful answer, on another level,
16 if I may be so rude as to say, a totally unhelpful
17 answer but that is only because it is a rather difficult
18 problem. So I am very grateful to you, Mr Bishop, thank
19 you.

20 MR HOLMES: So, sir, I have no further questions for
21 Mr Bishop.

22 THE PRESIDENT: No, we have no further questions for you.

23 Mr Palmer, are you ready to re-examine?

24 MR PALMER: Yes, sir.

25 Re-examination by MR PALMER

1 MR PALMER: Mr Bishop, can I take you back to the question
2 of captive customers. I want to take you back to the
3 terms in which Mr Holmes invited you to answer questions
4 about captive customers. So if we could look at the
5 transcript at page 36 from earlier today. I think it is
6 line 14 with any luck. Do you see there:

7 "Question: So the question I am putting to you is
8 whether -- let us imagine for a moment that there was no
9 regulatory requirement in place, a strict rule of law
10 that prevented pharmacies from purchasing and dispensing
11 skinny label as opposed to full label, but some
12 pharmacies considered that they were required to
13 purchase full label rather than skinny label. Are you
14 suggesting that that would not be sufficient ..."

15 Do you see that? So the premise upon which that
16 question was put, that there is no regulatory
17 requirement but that some pharmacies believed, perceived
18 there to be regulatory risk attached to the purchase of
19 skinny label products, that was the premise of that
20 question.

21 How significant is it, though, that any
22 understanding that might have been derived by a pharmacy
23 that there was a regulatory risk attached to a purchase
24 is in fact baseless? What does that tell us about
25 whether or not that pharmacy is captive or not?

1 A. (Pause) Well, I think that would suggest that that is
2 their view, so there is no actual restriction on that
3 pharmacy switching, it is just that they are taking
4 a view that they were not going to do so on this basis.
5 So on that basis I would say that that customer was not
6 captive.

7 Q. If there is a misunderstanding at any particular point
8 in time does it follow, as it was then put to you by
9 Mr Holmes that there was a settled predisposition to
10 that effect?

11 A. No.

12 Q. From the point of view of a supplier, how significant is
13 it from their point of view in terms of the constraints
14 on them, that this perceived -- this perception of
15 regulatory risk might be revised at some point, unknown
16 point in the future whether short term or long-term?

17 A. Well, obviously if the reluctance to switch from full
18 label to skinny label goes down then one would expect
19 the competitive constraint provided by skinny label to
20 increase.

21 Q. You were then asked some questions about Boots's own
22 position, do you remember that?

23 A. Yes.

24 Q. You were taken to a document from 11 January 2016.

25 A. Correct.

1 Q. About a year before the Intas period which you have told
2 us you were considering in your report.

3 I will remind you in that January 2016 document it
4 was said by Boots that it was "not possible to use
5 skinny label", and you were asked why you hadn't
6 referred to it in your report.

7 If that is their position in January 2016, again on
8 the premise that there is in fact no regulatory
9 requirement compelling that conclusion, what does that
10 tell you about the assured nature of their position or
11 otherwise as at January 2017 or subsequently?

12 A. Well, their position could obviously change, and how
13 they viewed the possibility of switching to skinny label
14 would change.

15 Q. Yes, right. You were taken to a note of a call from
16 14 April 2021. Let us just call that up again, it was
17 at {IR-H/1256/1} {H/1256/1}. Do you remember, you were
18 shown 2.1 at the bottom of that page?

19 A. Yes.

20 Q. Then just on the next page you were shown 2.2 to 2.4
21 {IR-H/1256/2} {H/1256/2}. I do not think you were taken
22 to 2.5. Can you just have a look at that now. (Pause)
23 Is there anything you want to comment on in 2.5?

24 A. Well, it seems to be saying that they could switch
25 potentially but the actual benefits of doing so were not

1 sufficient to make switching from full label to skinny
2 label commercially attractive to them.

3 Q. I just want you to hold that thought. This was a call
4 in 2021 discussing in fact what was an earlier
5 Section 26 response which you were not taken to from
6 11 January 2018. Can we call that up, that is at
7 {IR-H/1097/1} {H/1097/1}, which you refer to in your
8 report but you were not asked questions about it. Could
9 we look within that document at question 1(b), which
10 will be over the page, {IR-H/1097/2} {H/1097/2}. Do you
11 see under question 1(b) there is a paragraph beginning
12 "In relation to hydrocortisone 10mg tablets, a review
13 was undertaken in January 2016 ..."

14 Do you see that context?

15 A. Yes.

16 Q. Have you seen any evidence of any other review from
17 Boots beyond the January 2016 review?

18 A. No.

19 Q. Do you see what is said to have happened? This is
20 closer to the events, in the last four lines of that
21 same paragraph as to what view was taken in that
22 January 2016 review?

23 A. It says here that:

24 "... an internal Boots discussion took place to
25 establish whether the new product would be suitable..."

1 Q. Yes. That was based on professional clinical and
2 operational aspects; do you see that?

3 A. Yes.

4 Q. If you go on to question 1(c), which will be over the
5 page {IR-H/1097/3} {H/1097/3}, what information was used
6 to arrive at this decision. Can you just review that.
7 (Pause)

8 A. Yes.

9 Q. Then if we go on to page 5, please {IR-H/1097/5}
10 {H/1097/5}, question 4(a) and (b), please. If you could
11 just read those to yourself and I will ask for your
12 comment. (Pause)

13 A. Well, it is weighing up the benefits of professional
14 clinical and operational factors against the potential
15 profit of switching, and this review -- on the basis of
16 this review Boots decided that the benefits of switching
17 were not outweighed.

18 Q. Can we move on to Lloyds. You were taken to the
19 document at {IR-H/1105/1} {H/1105/1}. You were asked to
20 look at, I think, the answer to question 1(a) there, and
21 question 4, I think on page 2 {IR-H/1105/2} {H/1105/2}.
22 At the bottom of that page:
23 "Lloyds Pharmacy Limited's position is that use of
24 a skinny label product outside of its therapeutic
25 indications, and licence, when a licensed product is

1 available, is contrary to the principles of the UK
2 medicines licensing system."

3 Do you remember being taken to that?

4 A. Yes.

5 Q. What emerges from that paragraph, read as a whole, is
6 that the view had been taken was that there was
7 a clinical perspective which dictated the result; do you
8 see that?

9 A. Yes.

10 Q. During the questions just a moment ago this afternoon
11 Mr Holmes put to you that the CMA recognised that --
12 this was in the context of his questions on economic
13 value, he said this was a bioequivalent product, the
14 same product, the same from a clinical standpoint and
15 functionally substitutable. That was put to you as fact
16 and indeed it is agreed fact, it is common ground.

17 A. Yes.

18 Q. Again, how significant then is the error in Lloyds'
19 position here that there is a clinical reason to prefer
20 full label over skinny label, in terms of the constraint
21 on them and the degree to which they can be considered
22 to be a captive?

23 A. Well, on the basis that this, you know, this was
24 a decision that they have made not to switch.

25 Q. Yes. Do you see in that paragraph about their position

1 any consideration of the precise position of
2 Hydrocortisone tablets as opposed to other medicines
3 being dispensed off-label?

4 A. No.

5 Q. Can we go to {IR-H/1013/1} {H/1013/1}. You were asked
6 about this and AAH's position including Lloyds. I think
7 you were asked the reasons why AAH would choose
8 a product would be to dictate in effect by its customers
9 including Lloyds, was the question put to you, to which
10 you assented.

11 A. Yes.

12 Q. Can I ask you then to look at {IR-H/1104/1} {H/1104/1},
13 which is a further response by AAH. If we go to
14 question 7 there at the foot of the page, it says, look
15 at the question:

16 "Besides Lloyds, have any other of AAH's top 10
17 customers expressed a clear preference for full label
18 product over skinny label ... at any stage since
19 July 2016?"

20 Do you see that?

21 A. Yes.

22 Q. That is the question, and you see the answer at the foot
23 of the page, "no customer", do you see that?

24 A. I do, yes.

25 Q. "Sales in the 'skinny label' product increased in the

1 second half of 2017 but this could be as a result of
2 increased needs for the product rather than customers
3 choosing to buy 'skinny label' rather than 'full
4 label'."

5 Is what AAH said, but that can be assessed by
6 reference to the figures.

7 So is it right to put to you that AAH's demand was
8 derived from any pharmacy other than Lloyds, so far as
9 full label product was concerned?

10 A. Sorry, could you repeat the question?

11 Q. Yes, it was put to you that this captive nature of AAH,
12 as I understood the question, was being driven by demand
13 from pharmacies including Lloyds who considered they had
14 no choice but to buy full label products. I am asking
15 you for your comment on that suggestion in the light of
16 that response?

17 A. Well, in light of this response it is saying that all
18 its top ten customers other than Lloyds did not see any
19 difference between skinny label and full label.

20 Q. Can we go to consider the position of Lloyds now at
21 {IR-H/844/1} which is a document Mr Holmes put to
22 Mr Holt I believe the other day. This is the Celesio
23 email which the Tribunal may recall.

24 If we go down to the next page to provide the
25 context of this email, the email at the top of that

1 page, you can see it is an email from Focus Pharma on
2 behalf of AMCo to AAH checking on the superintendent
3 pharmacist's view on the Hydrocortisone view.

4 "I assume you cannot use a product unless it has the
5 full indications."

6 Do you see that?

7 A. Yes.

8 Q. That was the question. If we go back to the previous
9 page and that bottom email there you see the response:

10 "Your assumptions are correct, need all indications
11 to be of any use to us really. For sure independent
12 pharmacies won't care but just not worth the hassle for
13 us at the moment."

14 The point that Mr Holmes put to Mr Holt was that
15 reference to "us" was a reference to Lloyds Pharmacy.

16 Do you understand that?

17 A. Yes.

18 Q. And if you read that:

19 "That may change [they say] if the price
20 differential grows."

21 What do you derive from that statement?

22 A. Well, that statement is saying the decision to purchase
23 full label rather than skinny label depends on the price
24 differential.

25 Q. Thank you. You have not conducted a full review of all

1 the documents in the case nor have you been asked to and
2 so many of these points can be dealt with in submission
3 to the Tribunal in due course. I do not intend to take
4 you through all the documents in relation to every
5 pharmacy. I think the principles that emerge are
6 sufficiently clear for our purposes.

7 I am going to ask you about the questions you were
8 asked about price discrimination next. Do you remember
9 those questions?

10 A. Yes.

11 Q. And the ability to price discriminate or otherwise. You
12 made the point, I think, in your report, that if some
13 pharmacies genuinely were captive, you would expect to
14 see some price discrimination against them effectively
15 charging them higher prices. Now, you were asked
16 a series of questions about that and it was put to you
17 essentially that wholesalers are the purchasers and you
18 could not discriminate between pharmacies through the
19 wholesalers.

20 I just want to ask you some questions about that
21 point.

22 Starting point, please. Could we look in your
23 report -- this is your first report -- at page 28. That
24 is {D5/1/28}. Do you see figure 2 there?

25 A. Yes.

1 Q. We have seen it earlier but that is your graph showing
2 the monthly average net selling prices sold by Accord-UK
3 to four named retail pharmacies there. Do you see that?

4 A. Yes.

5 Q. They include Day Lewis, who we know bought skinnies as
6 well as the others who we know mainly bought full label.

7 If we go on to the next page, figure 4, please, if
8 we can focus on that. That is the monthly average net
9 selling prices and those of price differences for 10mg
10 Hydrocortisone tablets sold by Accord-UK to wholesalers.

11 Do you see that?

12 A. Yes.

13 Q. So we have got two graphs, one for retailers and one for
14 wholesalers. The source of each is said to be the RRB
15 analysis of Accord-UK sales data. So do we take it from
16 that that you do have separate data in respect of
17 retailers as opposed to wholesalers?

18 A. Yes.

19 Q. Looking at this graph, you see we have got two lines,
20 one solid, one dashed, captive wholesale is solid,
21 non-captive wholesale is dashed. That is using the
22 CMA's terms of course rather than yours.

23 A. Correct, correct.

24 Q. Can you remind us, non-captive wholesale for this
25 purpose is what?

1 A. They were all the wholesalers identified in the Decision
2 as not being captive.

3 Q. Yes, so if we look at your annex C, page 53, please.
4 {D5/1/53}. This is your methodology and focus on
5 paragraph 190. Five lines down:

6 "The non-captive customers comprise Day Lewis,
7 DE Pharma, Mawdsleys and Sigma."

8 Now DE Pharma, Mawdsleys and Sigma have been
9 described as the short-line wholesalers who principally
10 supply independents, I believe?

11 A. Yes.

12 Q. Whereas Alliance, AAH, Phoenix, they are all concerned
13 with the big chains respectively, Boots and Lloyds and
14 Rowlands I think, is it not? So if you wanted on that
15 level to price discriminate between independents and
16 Day Lewis who wanted to buy skinny tablets and the big
17 chains who went through the main line, full line
18 wholesalers, to what extent is there an ability in fact
19 to do so through the wholesalers?

20 A. It seems quite strong to be able to do so.

21 Q. Right. Concentrating on the full-line wholesalers then.
22 A point was put to you that, take, for example, AAH,
23 they do not just supply Lloyds, they supply some other
24 pharmacies as well. I think the point was being put to
25 you that in those circumstances you could not separate

1 out retailers who were captive from those who were not?

2 A. Yes.

3 Q. I just want to ask you a question about what that tells
4 us about the nature of the constraint posed by skinny
5 label tablets. Suppose for the sake of argument Actavis
6 wished in that context to price discriminate against
7 Lloyds but leave open the possibility of offering better
8 prices to independents or other pharmacies supplied by
9 AAH. Suppose they had that desire?

10 A. Yes.

11 Q. So they negotiate a price with Lloyds which reflects
12 that and is higher than they might charge someone else
13 because they know on this premise that they are captive?

14 A. Yes.

15 Q. We know that Lloyds is vertically integrated with AAH,
16 just as Boots is with Alliance and so forth. How
17 credible is it if a better deal was being done through
18 AAH for skinnies -- I think this was being the point put
19 to you by Mr Holmes, but how credible is it that Lloyds,
20 that would escape Lloyds' attention through AAH that
21 they were being charged a worse price than those
22 independents who were also supplied by AAH?

23 A. Unlikely.

24 Q. Unlikely, right. So what does that tell us about the
25 ability of the skinny product to constrain prices for

1 full label prices if anything?

2 A. I think it increases its ability.

3 Q. In what way?

4 A. Because you cannot discriminate between so-called

5 captive customers and non-captive customers.

6 Q. Lastly, I just want to you about the issues you were

7 asked about, about the market share variation. Do you

8 remember those questions?

9 A. Yes.

10 Q. And just take you back to two documents. One was the

11 joint expert statement at {IR-G1/1/32}. Question 61.

12 Do you remember you were taken to that question where

13 Professor Valletti's answer indicates that he noted that

14 you had omitted to report the coefficient of variation

15 of market shares and produced those figures on the next

16 page. Do you remember that?

17 A. Yes.

18 Q. He did not there recognise that you had in fact already

19 provided an explanation which you took us to which is at

20 footnote 43 on page 17 of your second expert report,

21 {D5/2/17}. Focus on that bottom footnote please, and

22 Mr Holmes did take you to this. We will not go through

23 that whole footnote again. But you say at the end in

24 the final sentence:

25 "There is no reason to discount the importance of

1 lost sales (and the likely effect that the risk of any
2 such loss would have on a firm's competitive strategy)
3 simply because their market share is higher."

4 I just wanted to give you an opportunity to explain
5 to the Tribunal why that is and to expand on that in the
6 light of the points that Mr Holmes put to you about the
7 greater importance of, say, a 2% shift in market share
8 for a smaller operator than a bigger operator. Why, in
9 the context with which we are concerned, do you consider
10 that to be less helpful?

11 A. Okay, I think here, with Accord starting with market
12 share of around 50%, if it loses a 1 percentage point
13 share that is -- could be -- is as important in terms of
14 competitive switching as a firm which goes from 10% to
15 9%, or if Accord went from 50 to 51 and a smaller firm
16 went from 10 to 1. It is the competition over the 1%
17 which is important here, rather than just the relative
18 market shares.

19 MR PALMER: Thank you very much, Mr Bishop, those are all my
20 questions.

21 THE PRESIDENT: Thank you very much, Mr Bishop, for your
22 time. You are released from the witness box. We are
23 very grateful to you.

24 A. Thank you very much.

25 (The witness withdrew)

1 THE PRESIDENT: Mr Holmes, I imagine it is
2 Professor Valletti next.

3 MR HOLMES: It is, sir, I was just giving --

4 THE PRESIDENT: No, no, I was wondering whether we ought to
5 rise for ten minutes now to enable, as it were, the deck
6 chairs to be re-arranged.

7 MR HOLMES: Yes, that might make sense.

8 THE PRESIDENT: We will resume then at quarter past 3.
9 Thank you.

10 (3.05 pm)

11 (A short break)

12 (3.15 pm)

13 MR HOLMES:
14 PROFESSOR TOMMASO VALLETTI (affirmed)
15 Examination-in-chief by MR HOLMES

16 MR HOLMES: Good afternoon, Professor Valletti. I see that
17 you have two bundles in front of you. Can you tell the
18 Tribunal what those are.

19 A. The first bundle contains the Decision and the second
20 bundle contains all the expert reports and the joint
21 expert report by the economists.

22 Q. Those are unmarked?

23 A. They are unmarked.

24 Q. Yes. If we could turn, please, to the document which in
25 electronic form is at {IR-F1/1/1} {F1/1/1}. Do you have

- 1 that?
- 2 A. I do.
- 3 Q. You see that this is a document entitled "Expert Report
4 of Professor Tommaso Valletti", and if you could look at
5 the contents of that and turn within it, please, to
6 page 38 {IR-F/1/38} {F/1/38}. Is your signature shown
7 at the bottom of the page there?
- 8 A. Yes.
- 9 Q. Is this the report of your evidence in these
10 proceedings?
- 11 A. It is.
- 12 Q. Could we turn, please, to {IR-G1/1/1} {G1/1/1}, if you
13 have that.
- 14 A. I do.
- 15 Q. And you will see there, I hope, the document "Joint
16 Statement Between the Experts".
- 17 A. Indeed.
- 18 Q. Turning in to it, do you see that in the third column,
19 after the numbers and the propositions there is a column
20 entitled "Prof Valletti's position"?
- 21 A. Yes.
- 22 Q. Does that set out your position on the propositions
23 which are stated?
- 24 A. It does.
- 25 Q. Turning to page 53 {IR-G1/1/53} {G1/1/53}, is that your

1 signature at the foot of the page?

2 A. It is my signature.

3 Q. Are these materials, insofar as you are responsible for
4 them, true to best of your knowledge and belief?

5 A. Yes, they are.

6 Q. Do they represent your true and complete professional
7 opinion on the economic issues arising in this case?

8 A. They do.

9 Q. I am grateful. There will be some questions from
10 others.

11 Cross-examination by MR BREALEY

12 MR BREALEY: What I will do is just out of courtesy
13 introduce you to the others. So I am Mark Brealey and
14 then you have Mr O'Donoghue who, I think, will ask you
15 some questions next week, and then I think Mr Palmer.
16 So that is the way it is going to go.

17 A. Thank you.

18 Q. Could I begin, please, by going to paragraph 3 of your
19 report, so that is {IR-F/1/3} {F/1/3}, paragraph 3.
20 I would like just to have a look at this paragraph. It
21 is obviously an executive summary:

22 "Dominance then assesses the ability of
23 an undertaking to raise prices substantially above
24 competitive levels. My conclusion is that Auden/Actavis
25 was dominant post-entry (that is, after the independent

1 entry of competing suppliers), as shown by absolute
2 market shares in excess of 50% (and more than 60% by
3 value) over a long time period, relatively stable market
4 shares of Auden/Actavis (but not of individual competing
5 suppliers), significant price premiums charged compared
6 to competing tablets, continued supra-competitive
7 profits, on top of the orphan designation that acted as
8 a barrier to expansion."

9 We know that you have just agreed with that
10 statement.

11 Just looking at supra-competitive profits, could you
12 just explain to the Tribunal what you actually mean by,
13 "supra-competitive profits"?

14 A. Sure. In economic terms, supra-competitive profits --
15 and apologies for the economic jargon -- means profits
16 which are above the normal level which is expected in
17 a competitive market with a certain degree of risk. So
18 normal market, depending on the risk, a firm would be
19 making 10%, 12% rate of return, and typically if you
20 go -- exceed -- given the degree of risk those are
21 called supra-normal.

22 Q. So if we can put this in context, then. If we can go to
23 page 422 of the Decision, so that is {IR-A/12/422}
24 {A/12/422}. So if you want to see it on the screen it
25 is 422. You have it in hard copy. Go to paragraph 5.1.

1 Can you read that:

2 "The CMA finds that Auden/Actavis abused its
3 dominant position ... [etc, etc]. The relevant periods
4 for these infringements are:"

5 Then (a):

6 "In relation to the 10mg Unfair Pricing Abuse, from
7 1 October 2008 until 31 July 2018."

8 So that is almost a ten-year period, correct?

9 A. That is right.

10 Q. Then if one goes to page 423 at paragraph 5.12
11 {IR-A/12/423} {A/12/423}, the Decision says that after
12 seven years of increasing prices as a monopolist Auden's
13 prices were £51.79. Do we see that?

14 A. Yes.

15 Q. In fact the prices reached were around £72, and the
16 Decision shows this. If we go to page 426 {IR-A/12/426}
17 {A/12/426} there is a table, and then we see the pricing
18 and the table on 426 at the top, table 5.3.

19 A. I do not see the table yet, so I wait.

20 Q. I am just trying to identify the prices at the moment.

21 A. Table -- so sorry, 5.3 you said?

22 Q. Yes.

23 A. Yes, I can see that.

24 Q. The price of ... and I think you essentially agree and
25 adopt these prices, because if you go to your report,

1 that is {IR-F/1/9} {F/1/9}, paragraph 17 --

2 A. I am sorry, can I just clarify, when you say you accept
3 those prices --

4 Q. Well, I'm just, when we are talking about
5 supra-competitive prices, I am just trying to identify
6 the prices that we are talking about.

7 A. The prices during the period when Auden was dominant?

8 Q. But it goes to -- do you see there, "prices during the
9 Unfair Pricing Abuses"?

10 A. Yes.

11 Q. So £72.14.

12 A. Yes.

13 Q. I take this it is pretty uncontroversial, so if one goes
14 to -- this is the pre-entry, paragraph 17 of your report
15 {IR-F/1/9} {F/1/9}:

16 "The period pre-entry corresponds to the period up
17 to October 2015 ... It is clear that, pre-entry, there
18 were no competitive constraints acting on full label
19 hydrocortisone tablets that were strong enough to stop
20 the monopolist, Auden ... from raising prices very
21 substantially."

22 Then you set out figures 1 and 2, replicate the
23 Decision and you give the price they rose from a little
24 over £4.50 to £70. That is where I got the £70 from.

25 A. Yes.

1 Q. We do not have to go to it, but paragraph 19 of your
2 report you say that prices essentially rose by 1,500%.

3 So that is the pre-entry. Going back to paragraph 3
4 of your report on page 3 {IR-F/1/3} {F/1/3}, you say
5 that Auden continued to make supra-competitive profits
6 as a dominant undertaking, and this is notwithstanding
7 market entry, correct?

8 A. That is correct.

9 Q. To put this in context, it is -- just for your note, it
10 is in your report but I think it has been amended at
11 {IR-K/60/1} {K/60/1} but it is at page 14 of your
12 report. If you go to {IR-K/60/2} {K/60/2} --

13 A. I see a blank page there.

14 Q. Let us go to, rather than muck around, go to {IR-F/1/14}
15 {F/1/14} which is your report. It is a bit smaller. We
16 see that Alissa, a competitor, entered in October 2015
17 for the 10mg.

18 A. Yes.

19 Q. Then Resolution and Bristol, March 16. AMCo entered
20 May 2016; Teva, February 2017; Genesis November 2017 and
21 then we see in July 2018 the excessive pricing
22 infringement ended.

23 A. Correct.

24 Q. Can you just explain to the Tribunal why Auden's prices
25 continued to be supra-competitive, notwithstanding this

1 entry?

2 A. So first of all, your original question was about
3 supra-normal profits, and I want to refer to my original
4 paragraph which was a summary of the abuse section and
5 the dominance section. So I was simply saying when
6 I analysed dominance I analysed issues of parameters,
7 and there I do reflect, I do comment on the
8 profitability and now you are showing me prices.

9 Q. Yes.

10 A. But I can see, so even from this figure you will see
11 that prices are substantially above the prices of any
12 other competitor. Remember, historically the price of
13 this product started at 70p so we still are, you know,
14 very much in excess of its historical levels in a market
15 where costs have not changed, investments have not been
16 made, there is nothing which has happened apart from the
17 market power that this firm had. So obviously this is
18 just one element of an analysis which is done throughout
19 the Decision and this is just looking at prices which
20 are indeed very high.

21 You do not see the cost there, for instance, so this
22 is a misleading picture to us of the very question. You
23 would have to show -- and there is a figure in the
24 Decision which compares those prices to cost, and the
25 table you showed me, table 3, gives you a range of costs

1 which go from £1 to maximum of £4, and here we have
2 prices which -- that is when the infringement period
3 ends because of the prioritisation of the CMA. Prices
4 are always above £20. That is enormous margins, in
5 fact, yes.

6 Q. You may --

7 A. Again, just for the sake of clarity --

8 Q. Of course.

9 A. -- supra-normal profits was your question. This is
10 prices, which is an important element but not the only
11 element.

12 Q. So just to confirm, they are supra-competitive prices as
13 well as profits?

14 A. Well, so we are talking about dominance in that summary
15 paragraph, you are making a lot of the summary
16 paragraph.

17 Q. Are the prices supra-competitive?

18 A. So, they are prices which are not effectively
19 competitive.

20 Q. Right.

21 A. Thank you.

22 Q. That is notwithstanding market entry?

23 A. Sure, so the abuse started by definition in this period
24 of post-entry with a 100% market share. It takes time,
25 for years, and I think we have agreed on several

1 occasions that the mere fact that there is entry is an
2 important element, but by itself is not going to end
3 potentially neither dominance nor an abuse.

4 Q. I think you make that point at paragraph 79 of your
5 report, page 32 {IR-F/1/32} {F/1/32} where you say it
6 takes time.

7 A. In this case specifically we get back the original price
8 is around £2 more than a decade after this whole period
9 has started in 2014, and we go on.

10 Q. So the prices, if we go back to that table --

11 A. Table 3?

12 Q. So the prices when there is entry --

13 A. Sorry, you said the table. Can I see the table on the
14 screen, please?

15 Q. Figure 4, is it on the screen?

16 A. Oh, sorry, figure 4, not table. Sorry, I thought you
17 had said "table".

18 Q. Figure 4.

19 A. Right.

20 Q. The prices post-entry are still contaminated by the
21 monopoly prices pre-entry, are they?

22 A. The starting prices, indeed. They start from the
23 highest level ever observed in the history of this
24 product, yes.

25 Q. If we could go back to paragraph 3 {IR-F/1/3} {F/1/3},

1 you refer to "absolute market shares in excess of 50%";

2 I think that is by volume, yes?

3 A. 50% is by volume, indeed.

4 Q. And more than 60% by value, correct?

5 A. Correct, in excess, yes.

6 Q. Could we just have a look at Mr Holt's figures. That is
7 at {IR-D2/1/34} {D2/1/34}. You have obviously read
8 Mr Holt's report?

9 A. Yes, I have.

10 Q. Mr Holt says that the "by value" figures are -- well,
11 you get 93, 72, 77, 82. So he had -- so the CMA and you
12 say more than 60%; he has calculated them at around 70,
13 80%. Is this something you agreed upon when you met
14 him? I mean, to be fair the CMA did not challenge these
15 figures in cross-examination. I do not know whether you
16 have agreed these figures or not?

17 A. So the only question mark I have is on 2015, in the
18 sense that in 2015 there is entry only in the last
19 three months.

20 Q. Right.

21 A. So by construction the previous nine months would have
22 been 100% because there is no entry. So I do not know
23 actually what Mr Holt did, if he weighted the three
24 months, or -- I do not know if it is an annual figure or
25 not. So I would not put a lot of weight on 2015 because

1 it is not clear what is done, but the rest, more or
2 less, is -- coincides -- the only difference is that
3 Mr Holt has aggregated --

4 Q. I think you just might have to be a bit slower for
5 the --

6 A. I am sorry, let me repeat it: so, in 2015 there was
7 entry only in the last three months of the year.

8 Q. Correct, yes.

9 A. So that by construction the first nine months will have
10 100% market share for full label. I do not know if this
11 figure which has been done by Mr Holt is considering
12 only the last three months or the total 12 months, so
13 I just do not know. But in general, if I may say, these
14 are figures, I understand, based on the same data as the
15 CMA, so they cannot be different. The only difference
16 is that he has aggregated over the year and instead the
17 CMA presents monthly figures. So there is more
18 fluctuation in there. So 60%, because in some quarters
19 or some months the value was 60%, so he has just
20 aggregated.

21 Q. I see, that is why it may be more than --

22 A. Yes.

23 Q. But actually when you average it out for the year --

24 A. Yes, that is right, these are annual figures.

25 Q. -- there is no question mark over those value figures?

- 1 A. No.
- 2 Q. I see. Can you just explain to the Tribunal why the
3 value figures, I think it's pretty obvious but it's
4 important to know, why the value percentages are higher
5 than the volume percentages?
- 6 A. Because full and skinny are differentiated products,
7 the price of full is higher and for the market value for
8 full will be higher. So for the same market share, if
9 one product is priced at a higher level it will command
10 a bigger share in terms of pounds value.
- 11 Q. Staying with the market shares, could we go to the
12 Decision at {IR-A/12/337} {A/12/337}. I just want to
13 look at paragraph 4, 116(a) and (c). So 4.116:
14 "... following independent entry by skinny label
15 suppliers, there was substantial switching away from
16 full label hydrocortisone tablets to skinny label
17 hydrocortisone tablets:"
18 Then (a):
19 "Switching occurred fairly rapidly for 10mg
20 hydrocortisone tablets. By October 2016 (that is around
21 12 months after entry had taken place); approximately
22 half of all 10mg hydrocortisone tablets purchased were
23 skinny label."
- 24 A. Yes.
- 25 Q. Then (c):

1 "Following the initial switching from full to skinny
2 label hydrocortisone tablets, proportions of full and
3 skinny label tablets have broadly stabilised for 10 for
4 both tablet strength ..."

5 That includes the 10mg. As I understand it, that is
6 the Decision, as I understand the position you agree
7 with the Decision on this, because if one goes to
8 page 26 of your report {IR-F/1/26} {F/1/26},
9 paragraph 66, you see starting with the third sentence,
10 "During the" -- this is paragraph 66, page 26:

11 "During the post-entry period, Auden/Actavis's
12 market share, after initially falling as some customers
13 switched to skinny label competitors, then stabilised to
14 a level around 50% by volume for most of the post-entry
15 period. Auden/Actavis's market share was even higher by
16 value, as it remained above 60%, and often substantially
17 above 60% ..."

18 I think that is where we get Mr Holt's figures, and
19 that is through the post-entry period.

20 Then, "This is shown ..."

21 The question arises as to why these volumes
22 stabilised, and I believe you answer that question why
23 they stabilised at paragraph 67 {IR-F/1/28} {F/1/28}
24 where you say:

25 "As well as [Auden's] market shares and prices being

1 high in themselves and much larger than those of
2 individual competitors, another striking feature from
3 the market share charts is the degree of fluctuation
4 amongst skinny label market shares as compared to the
5 relative stability of [Auden's] market shares. This
6 suggests that there was considerable rivalry amongst
7 skinny label suppliers while Auden enjoyed a more stable
8 customer base, and hence a considerable degree of market
9 power over those customers, after having lost some of
10 the more price-sensitive customers in the initial period
11 after entry."

12 So could you just, having looked at paragraphs 66
13 and 67, explain to the Tribunal why you say that the
14 volumes did in fact stabilise?

15 A. So, we are trying to assess general trends and as you
16 would see in the data there is -- there are lots of
17 nuances to this statement. But the big statement is
18 that there was, in competitive terms, quite a big
19 substantial switch of customers from full to skinny in
20 the initial period, in the first few months as the
21 Decision says. Then stabilising means that the market
22 had this fairly -- this fringe of fairly competitive
23 firms of skinny, and then there was instead Auden who
24 still commanded quite substantial market power over
25 full.

1 At the same time, I do not want to overstate this,
2 so if we can just -- can I just -- same page, but can
3 I just see the upper page of my report. There is
4 a figure on the same page, 28. Thank you. So if you
5 compare to the bigger picture, the market share was 100%
6 and then indeed this is a figure in terms of volumes.
7 It does go down around 50%. But there are changes
8 there. It is not that the market was completely
9 unstable. The striking feature to me is that the blue
10 shaded area keeps being large. Instead, the other
11 things are becoming larger and smaller, there was
12 an earlier debate earlier today about the coefficient of
13 variation. So those changes among the skinny labels
14 were substantial. This is limited during the dominance
15 period until 2018. In fact some of these companies have
16 disappeared since. So the first entrant, which was
17 Alissa, is not there any longer for instance. So firms
18 have died, have gone away and instead Actavis is still
19 pretty much alive and kicking with a very large market
20 share.

21 So I would not say it has stabilised like a constant
22 flat thing. There are variations. If you go even to
23 the previous figure 7, in terms of value this
24 fluctuation, the fact that the market share of Actavis
25 is in excess of 60%, it does not mean it has reached

1 a bound constant over the years. It has gone up and
2 down.

3 Q. That is a striking feature. We will just come back to
4 that in a moment. But a point was made earlier on. Can
5 I just go to page 30 as well of your report. You make
6 the point at 74 that it is -- made also at footnote 56,
7 if one goes to 56 on the screen {IR-F/1/30} {F/1/30}.
8 You say:

9 "I reviewed the volume data corresponding to
10 the price analysis presented by Mr Bishop. [You say]
11 They are highly incomplete but show that, generally,
12 purchases of full label tablets by non-captive buyers
13 are very small."

14 So do I -- going back to paragraph 67, you refer to
15 some striking features. The first is there is
16 considerable rivalry amongst the skinny suppliers; yes?

17 A. Yes. This is related to this rainbow of colours which
18 is the yellow, the light blue, the green, the purple
19 and --

20 Q. The skinny suppliers are primarily competing with each
21 other, not with Auden, because Auden is not supplying to
22 the non-captive customers as we have just seen.

23 A. Well, Auden is -- again, this is a big statement. Auden
24 is supplying a full product, as we know, and mostly the
25 full is bought by captive consumers. However, it is

1 also bought by non-captive for various reasons, to sell
2 to children, etc. It is not --

3 Q. That is right. That is why I said "primarily". So
4 a striking feature was considerable rivalry amongst
5 skinny --

6 A. That is right.

7 Q. -- and skinny suppliers are primarily competing with
8 each other, not with Auden?

9 A. Sure. If I may just clarify a striking feature, I mean,
10 there is clearly this divergence between the level of
11 competitive intensity, the rivalry amongst skinny, and
12 instead the persistence of market power that the full
13 label product supplied by Auden had in that period.

14 Q. The other, the other feature, one may call it the
15 striking feature, the other feature you refer to in the
16 last couple of lines of paragraph 67 is that Auden lost
17 volume to the more price-sensitive customers; yes?

18 A. Yes, which is a segment the skinny label products will
19 be competing for, yes.

20 Q. Correct. Just to put that in context, could we go to
21 the Decision at paragraph 4.122, and that is at page
22 {IR-A/12/340} {A/12/340}. Now, this is something that
23 we have seen a few times with some of the witnesses, but
24 it is fair that you also look at this as well.

25 So, this is paragraph 4.122, page 340. The Decision

1 says, the CMA says:

2 "Figures 4.6 and 4.7 show that between March 2016
3 and November 2017:

4 (a) certain pharmacies switched significant
5 proportions of their purchases of hydrocortisone tablets
6 to skinny label tablet suppliers. This is consistent
7 with certain pharmacies dispensing skinny label
8 hydrocortisone tablets for adult patients with adrenal
9 insufficiency (i.e., dispensing off-label).

10 (b) The proportion of skinny label hydrocortisone
11 tablets purchased varied across customers:

12 (i) Two of the ten largest pharmacy chains (Tesco
13 and Day Lewis), and the overwhelming majority of
14 independent pharmacies, switched the majority of their
15 dispensing of hydrocortisone tablets to skinny label
16 tablets.

17 (ii) Eight of the ten largest pharmacy chains (Asda,
18 Boots, Lloyds, Morrisons, Rowlands, Sainsbury's
19 Superdrug and Well) dispensed primarily full label
20 hydrocortisone tablets."

21 Now, as I understand it, we will come on to it but
22 you have reviewed some of this evidence and you broadly
23 agree with that?

24 A. Yes, I do.

25 Q. If we go again -- still in the Decision at

1 paragraph 3.289, that is at 142 of the Decision
2 {IR-A/12/142} {A/12/142}. The CMA, the Decision
3 summarised the evidence, this is paragraph 3.289:

4 "The evidence indicates that short-line wholesalers'
5 customers (predominantly independent pharmacies) are
6 more price sensitive (and therefore more likely to buy
7 skinny label hydrocortisone tablets) than full-line
8 wholesalers. Full-line wholesalers made their decision
9 on which hydrocortisone tablets to stock based on
10 a broad range of factors, whereas short-line wholesalers
11 prioritised price, leading them to sell more skinny
12 label tablets."

13 That is a fact that you have observed, I understand?

14 A. Yes, that is correct.

15 Q. Lastly, on the Decision, we will actually go to
16 a response. So if we go to page 144 of the Decision
17 {IR-A/12/144} {A/12/144}. This is paragraph 3.294:

18 "Short-line wholesalers DE Pharma and Sigma, on the
19 other hand, sold almost entirely skinny label
20 hydrocortisone tablets. They explained that this was
21 driven by customer demand, which, in their case were
22 independent pharmacies, who were price sensitive and did
23 not dual stock. Sigma further clarified that the 'drug
24 tariff lists only one product and therefore the demand
25 for our customers who are independent retail pharmacists

1 is for the cheapest product which is Skinny label'."

2 Again that, I think, is consistent with what you
3 have observed in your report?

4 A. It is consistent, thanks.

5 Q. I just -- I do not know whether you saw, sir, we see in
6 the footnotes reference to certain of Sigma's responses.
7 Sigma's response-- I do not think is referred to there,
8 but it is at H/1239 and at page 2 {IR-H/1239/2}
9 {H/1239/2}. So this is Sigma, the short line
10 wholesaler, paragraph 2.3:

11 "From when skinny-label products became available
12 Sigma offered both skinny and full label hydrocortisone
13 tablets to its customers. The majority of Sigma's
14 customers bought the skinny-label product as they are
15 very price-sensitive."

16 Again, that is something that you have observed.
17 Then lastly, at paragraph 2.5, I will let you read it at
18 your leisure. But I will emphasise for the transcript
19 the last bit:

20 "The short-line wholesale segment of the market buys
21 based on price because their customer base --
22 independent pharmacies -- are sensitive to price. Until
23 two to three years ago, around 90% of Sigma's customer
24 base were independent pharmacies (those pharmacies with
25 no more than five shops). [The person interviewed]

1 explained that Sigma does not supply hydrocortisone
2 tablets to the larger pharmacy groups such as Boots,
3 Rowlands and Well who would only buy from Sigma if their
4 suppliers were out of stock and Sigma had stock.

5 Currently, Sigma is focusing on independent multiple
6 pharmacies (with around 50 to 100 shops), who are even
7 more price-sensitive than independent pharmacies."

8 So again, emphasising this very price-sensitive
9 category of independent pharmacists, correct?

10 PROFESSOR MASON: Mr Brealey, sorry, just to make sure that
11 I followed that, was your first reference on that page
12 to paragraph 2.3?

13 MR BREALEY: It was, yes. Thank you.

14 PROFESSOR MASON: Okay, I think the transcript had it as
15 3.2, which threw me.

16 MR BREALEY: 2.3 and 2.5, yes.

17 PROFESSOR MASON: Thank you.

18 MR BREALEY: These facts, as we have heard quite a lot now,
19 led the CMA to conclude that Auden had an assured
20 customer base of certain pharmacies, and we know there
21 are many references to this notion of assured customer
22 base. You have seen Mr Bishop being asked questions
23 about it this morning and this afternoon.

24 A. Yes.

25 Q. But again, it is part of your evidence and so it is fair

1 that I show it to you. If we can go first to the
2 Decision at page 405 {IR-A/12/405} {A/12/405}. I will
3 just go through some paragraphs. Obviously, there are
4 quite a few of them. But at paragraph 4.292, and this
5 is page 405, "A significant number of" -- and I do not
6 know whether you, probably you should have the IR, I do
7 not see why you should have redacted versions, but it is
8 {IR-A/12/405} {A/12/405}:

9 "... a significant number of customers ... around
10 50% of total purchases by volume) continued to purchase
11 Actavis's product."

12 As we have already seen:

13 "Eight of the ten largest pharmacy groups -- Asda,
14 Boots, Lloyds, Morrisons, Rowlands, Sainsbury's
15 Superdrug and Well -- all purchased only, or to
16 a material extent only, full label hydrocortisone
17 tablets during the Post-Entry Period. These
18 customers" --

19 A. Sorry to interrupt you, but I do not see the full page
20 on the screen.

21 Q. I am sorry, it has not gone over. I beg your pardon.
22 So if we can go to the next page at 406, sorry
23 {IR-A/12/406} {A/12/406}. I am reading from the hard
24 copy.

25 PROFESSOR MASON: If you are able to do a two-page view that

1 would be easiest for us.

2 MR BREALEY: It is page 405 and 406.

3 A. If it helps I have the hard copy in front of me so I can
4 read it there. Yes, I can read it, thanks.

5 Q. Sorry, I do not know where I was, but --

6 A. Superdrug and Well.

7 Q. In the paragraph:

8 "These customers continued to purchase Actavis's
9 product despite its much higher price (a price
10 difference of 145% on average above skinny label prices
11 during the Post-Entry Period) and in doing so, those
12 customers were foregoing a significant amount of
13 profit."

14 I will just go to the next paragraph,
15 paragraph 4.293.

16 THE PRESIDENT: If you just pause there. I think we have
17 a slight problem with ... (Pause) We are back.

18 MR BREALEY: We are back.

19 THE PRESIDENT: Sorry, I interrupted you.

20 MR BREALEY: So paragraph 4.293, page 406:

21 "Therefore, the orphan designation's key impact on
22 the 10mg hydrocortisone tablets market in the Post-Entry
23 Period was as a barrier to expansion because competitors
24 could only compete for and supply customers that were
25 prepared to purchase skinny label tablets, but not those

1 who had no choice but to purchase full label tablets.
2 The orphan designation therefore rendered a significant
3 portion of the 10mg hydrocortisone tablets market
4 de facto incontestable for skinny label tablet suppliers
5 during the Post-Entry Period and provided Actavis with
6 an assured customer base."

7 Now, pausing there, that is what the Decision says,
8 and to be fair, I took that to you so -- can I then go
9 to the joint statement which is at {IR-G1/1/33}
10 {G1/1/33} and to the propositions 63 and 64. So
11 proposition 63 says:

12 "The orphan designation created a barrier to
13 expansion, with differentiated versions of
14 hydrocortisone tablets -- full and skinny label
15 tablets."

16 We do not have to go back, but you agree. Then 64
17 is where it is stated as a proposition, and you agree:

18 "As a result, Accord-UK retained an assured base of
19 customers following independent entry. Full and skinny
20 label tablets were not substitutes for all customers,
21 with a number of customers having no choice but to
22 purchase Auden/Actavis's tablets."

23 You agree with that.

24 A. Correct.

25 Q. So I take it that you would agree, if we go back, if you

1 want to, to the paragraphs of the Decision that we were
2 referring to, 292 and 294 -- that is 4.292 and 4.294.

3 So we keep on there, you would agree that there was
4 an assured customer base and that for those assured
5 customers the market was de facto incontestable?

6 A. So, I agree with the spirit of the paragraph, but there
7 is a little bit of a matter of semantics, what we mean
8 by "assured" and "de facto". What I write in my report
9 very explicitly is that I consider there are basically
10 two market segments, one which is price-- more
11 price-sensitive and one which is less price-sensitive,
12 and the skinny label suppliers could not compete because
13 of the orphan designation for the more inelastic segment
14 of the market, whether that is -- in economic terms
15 again, "assured" and "de facto", these are not economic
16 terms.

17 Q. But could not compete, is what you are saying?

18 A. Yes, sure. The skinny label could not offer a full --
19 yes.

20 Q. Sorry, I just missed that, could not offer?

21 A. A full version, because of the orphan designation.

22 Q. So, if we go back, while we are still on there, so
23 I just want to see what the Decision says about the
24 price difference of 145% and the price premium.

25 Could we have a look at paragraph 4.295 -- well,

1 actually, 294, which we did not read {IR-A/12/406}. So
2 4.296:

3 "The assured customer base that Actavis enjoyed as
4 as a result of regulatory circumstance effectively
5 provided a floor to the erosion of its sales volumes.
6 This resulted in a significant market impact: as the
7 only supplier of full 10mg hydrocortisone tablets (with
8 10mg tablets accounting for 96% of the total volumes of
9 hydrocortisone tablets dispensed) and one of only two
10 suppliers of full label 20mg tablets (the other being
11 Waymade), Actavis was able to retain an ongoing and
12 significant price premium above its competitors."

13 I will just ask you to look at paragraphs 296 and
14 298. I will not read it out, but I will just then take
15 you to the part of your report which deals with this.

16 A. Did you say 296 and 298?

17 Q. Yes.

18 A. Sure, I have the hard copy in front of me.

19 Q. So 296:

20 "The fact that Actavis's hydrocortisone tablets were
21 full label was therefore a critical factor in its
22 ability to maintain a substantial price premium over
23 competitors during the Post-Entry Period."

24 Do you see that?

25 A. Yes, I do.

1 Q. You deal with this at paragraph 65 of your report, so
2 that is {IR-F/1/26} {F/1/26}. So paragraph 65 at
3 page 26, you say:

4 "Figure 6 above shows that skinny label entry led to
5 falls in both full label ([Auden's]) and skinny label
6 (competitors') hydrocortisone tablet prices. Yet, as
7 shown by the difference between [Auden's] prices and
8 those of rivals, [Auden] priced substantially above
9 skinny label tablet rivals. These price differences
10 were large in practice (amounting to an average premium
11 of 145% above competitors' prices for 10mg[...]), which
12 is pointing to a lack of effective competition."

13 So I think you have already explained it in your
14 last question, but can you explain to the Tribunal why
15 this price premium is showing a lack of effective
16 competition?

17 A. In this part of the report I am dealing with the issue
18 of dominance, and the issue of dominance is analysed in
19 economic terms by looking at several factors, of which
20 price is an important one but not the only one. As
21 I start saying in the following paragraph, prices must
22 not be considered in isolation. I do consider on the
23 basis of several elements that prices which are
24 substantially above rivals where competition does not
25 happen in the same way as in other segments, there is

1 a reason which is this technical, you know, gift that
2 Auden had which was the orphan designation that it did
3 not earn on the merits because it was just something
4 that came from the Plenadren orphan designation. The
5 market shares, which is what I am saying in the
6 following paragraph, show that they were substantially
7 above 50% or 60% in terms of -- all this is telling me
8 that these prices were not a result of effective
9 competition. So it is not just that this evidence
10 alone. This is an important element, so I am not --
11 I am just clarifying that just extracting one bit at
12 a time may lose the bigger picture I am relying on.

13 Q. Sure. Just to pick up on what you just said about
14 pricing above rivals, if you look at the last sentence
15 of paragraph 64 you say:

16 "... strong enough to remove its ability to price
17 substantially above competitive levels."

18 I think you are saying there that Auden was having
19 a substantial price premium and that that price premium
20 shows that the prices were substantially above
21 competitive levels?

22 A. What I am saying is that Auden had market power and was
23 able to price to an appreciable level independently of
24 what the competitors were doing, which is the definition
25 of dominance, yes.

1 Q. If we go to the joint report, please, at page 22. It
2 is, so you can look at it, you will know it very well,
3 proposition 32 {IR-G1/1/22} {G1/1/22}.

4 A. Just to clarify, in this part of the report we are
5 talking about market definition, we are not talking
6 about dominance.

7 Q. If that is what you say.

8 A. Yes. I just wanted to clarify the context.

9 Q. Yes. Anyway, proposition 32, so let us just have a look
10 at this. The proposition is:

11 "There was a direct constraint on Actavis's (full
12 label) prices following skinny label tablet entry."

13 You agree, and you say:

14 "By 'direct constraint' I mean the standard
15 constraint that we see in any market where competition
16 between substitute products leads to a downward pressure
17 on the prices of both products.

18 The direct constraint arises where pharmacies switch
19 from full to skinny label tablets putting downwards
20 pressure on full label tablet prices, in order to reduce
21 the losses to skinny label tablets, or to recapture some
22 of those lost sales.

23 In the current case, entry of skinny label 10mg
24 suppliers resulted in about 50% of 10mg volumes going to
25 skinny label suppliers, pointing very clearly towards

1 actual substitution."

2 So, is there anything you want to add to what you
3 mean by "direct constraint"? It is competition
4 between --

5 A. If I may -- can you clarify for the benefit of the
6 Tribunal if you are talking about market definition or
7 if we are talking about dominance at this stage.

8 Q. I am not going to ask you any questions -- I am not
9 going to answer any questions, I am asking you what you
10 mean in the proposition 32?

11 A. Sure. But I think it is important, as I clarified
12 earlier, the context where this proposition was actually
13 discussed among the experts, this was at the level of
14 defining the relevant market. That is when we were
15 assessing in economic terms the economic boundaries of
16 competition. Okay? So we are not talking about whether
17 the degree of competition is sufficiently intense. At
18 that level we were discussing whether or not skinny
19 labels exerted some constraint on the full label, and
20 I am saying, well, in a market where over five years
21 they have lost 50% of the market share and the prices
22 went down, sure, there was some economic context that
23 would lead me to conclude that full and skinny were in
24 the same market. It would be observed -- and that is
25 what I am saying there. That is what I am saying there.

1 Q. Okay. Can we just go back to what --

2 A. So, to clarify, I am not assessing the degree of the
3 competitive constraints.

4 Q. No, I fully understand that. I am just trying to
5 clarify for the purposes of the Tribunal what you mean
6 by direct constraint because obviously that looms large
7 in all the reports and I will go through it again.

8 You say:

9 "By direct constraint I mean the standard constraint
10 that we see in any market where competition between
11 substitute products leads to a downward pressure on
12 the prices of both products.

13 "The direct constraint arises where pharmacies
14 switch from full to skinny label tablets putting
15 downwards pressure on full label tablet prices ..."

16 So you have got emphasis there in this statement, in
17 your proposition, to competition between substitute
18 products leading to switching. Do you agree with that?
19 That is what you say?

20 A. Well, competition between differentiated products which
21 have a level of substitutability for a segment on the
22 market and I am saying these two products are
23 differentiated. They exert some constraint to other.
24 It is probably a differentiation. This is what we call
25 vertical or quality product differentiation. This is a

1 product which is perceived as being of higher quality,
2 for whatever reason and another product which is
3 perceived to be of lower quality.

4 So for the matter of market definition, yes, this is
5 the typical substitution that we observe and would lead
6 us to define those two products as in the same market.

7 Q. So there is competition between substitute products
8 which leads to a switching?

9 A. Right, I agree.

10 Q. That is the direct constraint. So competition between
11 substitute products which leads to switching.

12 Could we go to proposition 21 which is on page 15.
13 {G1/1/15}. Now, proposition 21 says:

14 "The bulk of switching was within the first
15 12 months, with limited switching thereafter."

16 And you agree with that and you say:

17 "The Decision states that switching occurred fairly
18 rapidly following skinny label entry. By October 2016,
19 around 12 months after entry had taken place,
20 approximately half of all 10mg HT purchased were skinny
21 label."

22 So that is ...

23 Now, given that there was limited switching after
24 the first year, and given that there was a lack of
25 effective competition between Auden and the skinny

1 suppliers -- and I will say that again. Given that
2 there was limited switching after the first year and
3 given that there was a lack of effective competition
4 between Auden and the skinny suppliers after the first
5 year, logically the fall in Auden's prices after the
6 first year was not caused by any direct constraint?

7 A. No, because --

8 Q. Logically?

9 A. First, as we already agreed you asked me a similar
10 question a short while ago. I said that the big
11 movement happens in the first 12 months because it
12 starts from 100% and it goes to a lower level in terms
13 of volume.

14 However, we saw that there was ongoing shifts in
15 market shares. We already commented on that. So one
16 thing is to talk about the general trend and then the
17 specifics. The figure which was shown earlier from my
18 report which is taken from the Decision was clear about
19 some market fluctuations afterwards. And also I do say
20 in my report that there was some constraint on the full
21 also, well after 2016 coming from a combination of the
22 direct and the indirect constraint.

23 Q. My question to you, Professor Valletti was very, very
24 simple. I went to proposition 32 to see whether you
25 were still saying that what a direct constraint was and

1 we agreed that a direct constraint means that there is
2 competition between substitute products which leads to
3 switching.

4 We then looked at proposition 21 and we know that
5 there was no switching after the first year. I put to
6 you a very logical proposition which is after the first
7 year the direct constraint cannot have led to a fall in
8 the prices, the direct constraint, because, you have
9 already admitted, there is no switching and there is no
10 effective competition?

11 A. Sorry, can you point out where I am saying that there
12 was no switching after the first year?

13 Q. Can I say "limited" as opposed to "no". I am looking at
14 proposition --

15 A. The proposition is the bulk of switching and again we
16 start from 100% and it goes indeed to a much lower level
17 but to say there was no switching is not what is in any
18 of my reports or the joint statement which I wrote and
19 nor in the data, so you are really pushing me in
20 a direction which I disagree with.

21 Q. What is the direction that you disagree with? Okay,
22 I will agree with you that between zero and 100%. You
23 agree at proposition 21 the bulk of switching?

24 A. That is what the proposition says and maybe it has
25 been -- our fault not to qualify more but it means

1 a large shift happened in the first year but it does not
2 imply that there was no shift. Can I just finish?

3 Q. Of course you can.

4 A. It does not imply whatsoever that there was no switching
5 afterwards.

6 THE PRESIDENT: Indeed, the words of the question, the
7 proposition are "with limited switching thereafter".

8 A. Sure, again, my anchor, as I said earlier, was starting
9 from a very large in fact total market share. I agree
10 with the proposition of course. But nowhere I am saying
11 that there was no switching afterwards.

12 Secondly, that is another part of the debate we had
13 among the experts. That does not mean that there was no
14 ongoing constraint afterwards. And that is what I write
15 also in my report to see -- again, it would be helpful,
16 if you do not mind, to let us understand whether we are
17 talking about market definition.

18 MR BREALEY: No, I am not going to --

19 A. It would be useful for me so I can answer in a better
20 way and be more helpful to the Tribunal.

21 Q. I would like to know -- let us put it another way. You
22 agree that there was very limited switching after the
23 first year?

24 A. Compared to the first year, yes, I agree with that.

25 Q. We went through the Decision and I thought we had agreed

1 that the volumes had stabilised?

2 A. If you go back to the transcript I said, I do not know
3 what it was, at the beginning of our cross-examination
4 this afternoon, I said that I agree with the general
5 trend but I did observe the market shares going up and
6 down even after the first year.

7 Q. Are you disagreeing with the CMA that the market did not
8 stabilise?

9 A. I said -- okay. I think I had already expressed myself
10 earlier so if the Tribunal did not understand what
11 I said I will be very happy to clarify. Shall
12 I clarify?

13 Q. It is your evidence. It is true to the best of your
14 professional opinion. You are entitled to say what you
15 want. I am asking you a very simple question. The CMA,
16 the Decision has said that market shares stabilised,
17 there was very little switching after the first year.
18 And it is a very simple logical proposition that I am
19 putting to you, that the direct constraint (which is
20 concerned with switching) could only have had a very
21 limited impact on the fall in prices because there was
22 no switching. It would be something else. Not the
23 direct constraint.

24 THE PRESIDENT: Mr Brealey, I think it is important that we
25 have careful regard to what is being said by the experts

1 because they clearly are using language quite carefully.
2 So you said a moment ago no switching. That is quite
3 clearly not the proposition in debate in proposition 21.

4 MR BREALEY: Hence I said limited.

5 THE PRESIDENT: So it is not no switching, it is limited
6 switching. We may have to unpack what this particular
7 witness understands by "stabilising" because no one is
8 saying, I do not think that the market position after
9 a certain point of time was absolutely constant.
10 Certainly the graphs do not show that.

11 So it may be that the witness needs to explain to us
12 what he understands by a stabilised market but the
13 broader point that I am making is that we are not, I do
14 not think, in the realms of statutory construction.
15 What we have got are opinions being expressed, language
16 is being used as precisely as is possible but I do not
17 think one can expect from any of the experts the degree
18 of consistency and precision of language that one would
19 get in a statutory interpretation exercise.

20 MR BREALEY: I appreciate that.

21 THE PRESIDENT: But I appreciate also what you are putting.

22 MR BREALEY: Yes. So can I go back.

23 THE PRESIDENT: Of course, I think you should.

24 MR BREALEY: What is meant by -- so if one goes to page 26
25 of your report which I took you to the decision for this

1 reason and I took you to your report and we went through
2 it together. So page 26. {F/1/26} on paragraph 66.
3 Your report which you said is true to the best of your
4 knowledge and belief:

5 "During the post-entry period Auden's market share,
6 after initially falling as some customers switched to
7 skinny label competitors then stabilised to a level
8 around 50% by volume for most of the post-entry period."

9 So I took that "stabilised to a level around 50%",
10 anything below or above that stabilised to a level
11 around, anything above or below that would be fairly
12 de minimis which is consistent with the CMA. So that is
13 your evidence. If you want to say something different
14 to what you say there, then so be it,
15 Professor Valletti. But do you accept that the market
16 shares stabilised to a level around 50% by volume?

17 A. So, can we see the figure I am referring to. It is on
18 the following page I think. This is figure 6 and
19 figure 6 is the previous one since you were referring to
20 it. So the previous figure in my report, and I am going
21 to repeat what I said earlier.

22 THE PRESIDENT: Is it figure 8 or figure 6?

23 A. I do not know which figure.

24 MR BREALEY: I think figure 7 it is by volume and figure 8
25 is by --

1 THE PRESIDENT: Let us put both pages up.

2 MR BREALEY: Figure 8 is volume and 7 is value.

3 THE PRESIDENT: Let us get them both up and then we will
4 hear your explanation, professor.

5 A. I am very grateful. So this part of the report is
6 trying to discuss dominance and I do say there that it
7 was an initial period where Auden lost in a rather
8 drastic way market share. It started from 100% both in
9 terms of sales and obviously also in terms of volumes
10 and then competition continued. I was trying in that
11 part of the report to strike the difference between the
12 intensity of competition among skinny and the stability
13 of the market share of Auden. That was my context.

14 In terms of volumes, you can see that the market
15 share was not always 50%, sometimes it was 60,
16 sometimes -- but it does fluctuate a bit. In fact, if
17 you look at market share by value, I would say it does
18 not even stabilise in terms of value, but that is
19 a secondary aspect I think.

20 MR BREALEY: Sorry, are you saying, and then we may -- are
21 you still saying that the market share stabilised to
22 a level around 50% which is in the first line of page 27
23 of your report?

24 A. I said in terms of volumes it does.

25 Q. Thank you --

- 1 A. It does. In terms of -- which is what I write. In
2 terms of values it does not. It reaches a minimum of
3 60% but it does not stabilise at 60%.
- 4 Q. If it stabilises at a level around 50% --
- 5 A. In terms of volumes just to be sure --
- 6 Q. -- in terms of volumes, and a direct constraint is
7 concerned with switching, it logically follows, does it
8 not, that the fall in prices after the first year was
9 not caused by any direct constraint to any significant
10 extent. I will put in brackets "to any significant
11 extent". Logical?
- 12 A. Why do you conclude that?
- 13 Q. Because it is a question of logic, is it not? If your
14 direct constraint is concerned with switching and there
15 is very limited switching after the first year, the
16 direct constraint is not having any impact?
- 17 A. So I can anecdotally tell you a lot of stories about
18 Morrisons who did switch everything they have for a few
19 months in March 2016, which is after the period you are
20 talking about, and then they switch back. So there is
21 lots of anecdotes of pharmacies that did switch.
- 22 But the economic point is even if you do not observe
23 big fluctuations because you reach a stability, well,
24 there is still competition between those products,
25 somehow to some level. And I do not know, so -- because

1 if you -- so if there was no competition, you would
2 observe something completely different happening in the
3 markets. Prices would go in different directions.

4 MR BREALEY: Maybe we will leave it until Tuesday as to
5 whether -- I do not know whether we are finishing at
6 4.15.

7 THE PRESIDENT: Mr Brealey, we are on this going to be
8 guided by the counsel teams. We all know the
9 constraints in terms of timetable. If that is
10 a convenient moment and we are not worried about time,
11 then I am more than happy to rise now. Obviously --

12 MR BREALEY: I may come back to this because I do not think
13 Professor Valletti, with all due respect, has answered
14 the question. Let us just -- we will go on until 4.30.
15 I am in your hands. It is Friday. Everyone is tired.

16 THE PRESIDENT: Mr Brealey, as I say, everyone is tired. It
17 has been a long week. Given that we will certainly do
18 our very best to accommodate any demands of extra time
19 next week, if no one is feeling uncomfortable about
20 rising now and losing an extra ten minutes, then I for
21 one am very happy to rise now and we can resume on
22 Tuesday morning at 10 o'clock.

23 MR BREALEY: That is --

24 THE PRESIDENT: And if we make up the ten minutes or quarter
25 of an hour over the lunchtimes we can of course do that.

1 MR BREALEY: Okay, we can rise now.

2 THE PRESIDENT: I do not want to force you. I am not --

3 MR BREALEY: No, no, no.

4 THE PRESIDENT: Very good. But it may be that we do want to

5 explore precisely what stability means because looking

6 at figures 7 and 8, and speaking entirely as a layman,

7 I think that stability has a certain nuance to it which

8 might want to be unpacked because those graphs did seem

9 to me to be going all over the place and it may be

10 stability is talking about a sort of average.

11 MR BREALEY: I think it is stability of Auden's market

12 share. Clearly the market share --

13 THE PRESIDENT: Clearly the market share within --

14 MR BREALEY: And that is all we are talking about is the

15 stability of Auden's market share.

16 THE PRESIDENT: I understand but even there, there are

17 jagged inroads.

18 MR BREALEY: There is a red jagged bit.

19 THE PRESIDENT: So we may want to explore the jagged bits in

20 a little bit more detail just to understand and to be

21 clear it is only going to be Professor Valletti's

22 understanding of what he thinks stability means that

23 will be in issue. There will no doubt be submissions

24 about what it means to the lawyer but that is something

25 we should explore further.

1 MR BREALEY: It is. I do not think anyone is saying, well,
2 not the red jagged edge bit that it is zero, but it is
3 a question is --

4 THE PRESIDENT: You cannot.

5 MR BREALEY: -- whether the direct constraint is having any
6 significant effect after the first year.

7 THE PRESIDENT: That perhaps is the real question and it
8 maybe we are --

9 MR BREALEY: Yes and if you can answer that. Did the direct
10 constraint have any significant effect after the first
11 year?

12 A. Can I just try to understand what is the purpose. Are
13 we talking about market definition -- because that is
14 important. All the question, if I may, about direct
15 versus indirect has been written in the context of
16 market definition and in my opinion, because it is
17 important also to keep in mind what is the question, it
18 does not matter for market definition to pin down
19 whether it was direct or indirect or the combination and
20 that is impossible. No matter -- for the matter of
21 market definition I know the answer from the way
22 switching behaved and prices behaved on --

23 THE PRESIDENT: I understand.

24 A. Understanding the context, if I may, sir, it is
25 important for me also to give a useful answer.

1 THE PRESIDENT: That is fair enough and this may be a good
2 point to stop on because I would like counsel, and
3 indeed you, professor, to think about this over the
4 weekend.

5 We heard this morning Mr Bishop saying that there
6 was an inconsistency in the CMA's answer on market
7 definition and market abuse and what he said in terms,
8 and he was asked about this a great deal, was that he
9 could not see how the answer to one could be squared
10 with the answer to the other. Did you hear that
11 evidence?

12 A. Of course, I did.

13 THE PRESIDENT: So Mr Bishop's view is that you cannot
14 contextualise these two questions without also
15 interrelating them. Now, I have no idea who is going to
16 be putting this point to you. I am quite sure it will
17 be put, but it does mean that we need to tread quite
18 carefully in terms of your answers to these questions
19 because what I anticipate may well be said in closing,
20 when you have left the witness box, that you cannot, at
21 least without our rejecting Mr Bishop's point, you
22 cannot contextualise in the way that I think you are
23 seeking of doing.

24 So I do not want to anticipate the sort of attack
25 that will be coming from counsel, but it is quite clear

1 that that is a point that arose out of Mr Bishop's
2 evidence and one to which we need to be alive.

3 So of course I am going to ensure that counsel ask
4 questions that are clear so that you know what you are
5 answering but I do not think the sort of delineation
6 that you are seeking to draw, whilst it may absolutely
7 be right and clearly is what you believe, is not
8 something that we can take as an answer to the questions
9 that you are getting because of this dispute, which to
10 be clear, I am not going to resolve while you are in the
11 witness box. We are going to have to consider it and
12 work out what the answer is in due course.

13 That is why I am not going to be intervening as
14 I otherwise would in your answer saying "I need to know
15 context" because clearly you do but there is a debate
16 about what the context is and how they interrelate. Is
17 that clear as to where ...

18 THE PRESIDENT: That is very clear and very helpful.

19 Mr Holmes.

20 MR HOLMES: I had a practical point about timing for
21 Tuesday, so I should let you finish.

22 THE PRESIDENT: We will finish this point and then talk
23 about timing.

24 MR BREALEY: All I say on that is that I have not talked
25 about dominance or market definition. I am purely

1 concerned with primary historical fact which I do not
2 think anybody can say changes depending upon whether it
3 is market definition or dominance. It is a question of
4 application but the historical primary fact does not
5 change whether you are looking at dominance or market
6 definition and that is what I was --

7 THE PRESIDENT: Mr Brealey, that is a fair point but one
8 does need to be careful when one is talking about direct
9 constraint because I think it would be quite legitimate
10 for an economist to say that what I mean by this term,
11 what is or is not a direct constraint, is in itself
12 context-sensitive. So it may very well be that we need
13 to be extremely careful terminologically to ensure that
14 you are putting factual points but that we are not
15 resulting in answers that are later on going to be
16 susceptible of mischaracterisation. So I do understand
17 the point you are making but the fact is this is a case
18 in which economics is pretty central and terms of art
19 are quite dangerous unless one works out exactly what is
20 being put.

21 I have got every sympathy with the point you are
22 making. I know that you are trying to put them
23 factually but I also feel that the expert does require
24 a degree of unpacking of terms.

25 MR BREALEY: Just to keep Professor Valletti happy over the

1 weekend, when he says "direct constraint" in proposition
2 32 that is in the context of market definition.

3 THE PRESIDENT: That may or may not make him happy. I do
4 not know.

5 THE PRESIDENT: Thank you very much. Mr Holmes.

6 MR HOLMES: Sir, it was simply to check. I think you said
7 Tuesday at 10 am. Am I right though that in fact we are
8 commencing at 2 pm on Tuesday?

9 THE PRESIDENT: That is the 6th. You are right.

10 MR HOLMES: I believe so, yes.

11 THE PRESIDENT: One loses track of the days. That is
12 exactly right. It is 2 o'clock. That is something
13 which of course you have to bear in mind but we have
14 indicated that the mop-up time that we marked in the
15 timetable is unlikely to be required and that position
16 has not changed.

17 Professor, thank you very much. I give this warning
18 to all witnesses. Please do not talk about your
19 evidence to anybody on the weekend. You may find that
20 a great relief, I do not know, but whatever you do, do
21 not and we will see you at 2 o'clock on Tuesday and I am
22 sorry your purdah time is as long as it is but these
23 things happen.

24 Thank you all very much. 2 o'clock on Tuesday.

25 (4.29 pm)

1 (The hearing adjourned until Tuesday, 6 December at 2.00 pm)

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