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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)

Tuesday, 6 December 2022

(2.00 pm)

PROFESSOR TOMMASO VALLETTI (continued)

Cross-examination by MR BREALEY (continued)

THE PRESIDENT: Good afternoon, Mr Brealey, good afternoon.

MR BREALEY: Good afternoon.

Professor Valletti, I have already said hello to you so I will move swiftly on. I want to start by recapping on some basic facts, and just to put your mind at rest these facts are not specific to any dominance or market definition. They are simply facts, what happened in the market in the infringement period, okay? So if you want to draw a distinction at some point of course, but I am simply looking at the historical facts for the moment.

I would like to start, please, with the Decision which is at {A/12/135}, just to remind ourselves ... just to remind ourselves of the pharmacies' purchases and the volumes, and these are the volumes that the CMA provides in 2016 to November 2017.

This is the -- we referred to this last Friday, well, we referred to the pharmacies and you see the volumes.

A. Yes.

Q. We see the ten main ones, and the two exceptions who are not the assured customer base are Day Lewis and Tesco.

1 Remember them?

2 A. Yes, I do.

3 Q. In fact, Day Lewis did not buy any for about a year, but
4 its purchases really kicked in, I think, around about
5 August 2016. But there we have it. We have the ten
6 pharmacies, the two non-assured pharmacies are Day Lewis
7 and Tesco, and as Mr Holmes put to Mr Bishop, the Boots
8 and Lloyds' volumes dwarf anybody else; that is correct,
9 is it not?

10 A. Well, there is also a large fringe of independent
11 pharmacies, of course.

12 Q. Of the independents, but --

13 A. They represent a large fraction of the market.

14 Q. Of course. Yes, of course. That is where we get
15 broadly the 50% from.

16 Can I go briefly to the CMA's case as it was put to
17 Mr Bishop, so I am going to go back to the transcript of
18 what the CMA said to Mr Bishop.

19 We can look, for example, at Boots. So I think you
20 were in court when Mr Bishop was cross-examined by
21 Mr Holmes to my right; yes?

22 A. On Friday, that's right, yes.

23 Q. So if we go to the transcript on Day 7, page 45.

24 {Day7/45:1}. (Pause) Have you been given a copy of the
25 transcript at all, of Day 7?

- 1 A. I was sent the transcript last -- yesterday at 4.00 pm
2 but I do not have it in front of me.
- 3 Q. No, but you have familiarised yourself with it, you have
4 read it?
- 5 A. Yes, to some extent. But I was here on Friday also.
- 6 Q. Yes. (Pause)
- 7 A. As we wait, may I ask a question, when we left the
8 Tribunal on Friday you gave me homework for the weekend
9 to unpack a couple of figures that were seemingly in
10 contradiction about the stability of market shares.
11 I have done my homework, I am just asking whether you
12 would like me to comment on those or not.
- 13 THE PRESIDENT: Well, I think counsel will have noted that,
14 and I am sure he'll come to it if he does not and you
15 have something to say we will --
- 16 MR BREALEY: Let us just finish. I really do not mind. We
17 can -- if Professor Valletti wants to hand in his
18 homework --
- 19 A. No, no, it's just a statement of fact. Just
20 an interpretation, I think, to just describe why some
21 series of data look the way they do.
- 22 Q. Is this in written form or is this oral?
- 23 A. No, no, just by showing three figures one after the
24 other from the Decision. That is it.
- 25 Q. Shall we do that now, because this document is not

1 coming up at the moment.

2 THE PRESIDENT: Why do we not do that now.

3 A. Okay. So we were referring to market shares which had
4 stabilised around 50%. That discussion was done among
5 the experts in the context of market definition, and we
6 were looking at the whole time series of the post-entry
7 period. So I may ask you just to put on the screen
8 figure 3.20 and 3.21, {IR-A/14/163} if possible.
9 Thank you very much.

10 So the diagram on the top refers to market shares by
11 volumes, physical units over the entire period after
12 entry. We have -- instead I was referred to some other
13 figures during the dominance period, but this is the
14 entire period, and time period -- and you will see that
15 the market share of Auden obviously decreases from 100%
16 rather rapidly in the first year and a half and then,
17 you know, fluctuates around 50%. This is what --
18 a statement which was proposition 21 in the joint expert
19 report which I agree with. I was referring to the
20 overall trend of the data. If you look at the data
21 a bit more closely it's not stable. Sometimes it is
22 60%, sometimes it is 40%. In a period it is even 30%.
23 Anyway, compared to the initial big jump most of the
24 switching did happen initially and then the market share
25 stabilises around 50%, plus/minus 10%.

1 Instead the diagram below is the market shares in
2 terms of value, so value means price times quantity,
3 pounds value. So these are different figures and it
4 does not stabilise. It does not stabilise at all.
5 Actually it comes down then it goes up, and then it
6 comes down again at the very end.

7 So if I now can put figures 7 and 8 in my report,
8 figures 7 and 8 in my report, it would be at -- you can
9 put next to each other, that would be {IR-F/1/27}, and
10 if you can put two pages next to each other it will be
11 27 and 28 {IR-F/1/27-28}. Thank you. So one next to
12 each other. The next page as well, 27 and 28.

13 It is basically zooming just on the first part, just
14 this is during the dominance, okay. So it is just
15 a subset of the data set that I have just shown you.
16 Before it was the longer series, this is just a subset.
17 I can see there again there is this convergence, say,
18 around 50% and then it has stabilised around there
19 plus/minus 10%, and instead when it comes to value it
20 does not.

21 How can we square all of this? That is the last
22 figure I promise I will show you. As we said, one
23 figure is about volume shares, so physical units. The
24 one other is, it is value shares. Value is price times
25 quantity, so it would be relative quantities weighted by

1 relative prices. So the missing information is relative
2 prices.

3 So the last diagram I would like to show and then
4 I will stop is {IR-A/14/398}, which is over exactly the
5 same period as the figures 7 and 8 I have just shown.
6 Very good. Only the top figure, because we are not
7 discussing about 20mgs. So, the relative prices are
8 described by the lighter red almost pinkish curve, the
9 relative prices, and where the price difference
10 increases over the same -- this is the same time period
11 as the previous figures 7 and 8, the same, and it goes
12 from the same prices to a difference of 100%, 200%, 300,
13 400, 500%. So over -- this is the period or during
14 alleged dominance.

15 So this explains the difference between the two
16 diagrams. If you multiply, basically, this pink curve
17 times the market share curve in terms of physical units
18 you get the market shares in terms of sales value. So
19 that is where those discrepancies are coming from.

20 I hope it clarifies the differences. Thank you.

21 MR BREALEY: Thank you, professor. Thank you.

22 So, just on that -- I am looking at your figure 8,
23 which is at {IR-F/1/28}. I think you referred to that.
24 So, {IR-F/1/28}6 ... and enlarge that. Yes.

25 A. Yes.

1 Q. So I think what you are -- I do not have the transcript
2 in front of me, but I think what you said was that it
3 broadly, plus or minus 10%, converged to 50%?

4 A. It fluctuates around 50%.

5 Q. If you take -- so if you look at, for example, just
6 before April 2016 you have a lot of blue and then you
7 have a triangle coming down, and then it goes up blue
8 again and then October 2016 it comes down.

9 Concentrating on October 2016, it goes then up to
10 blue --

11 A. -- and down, yes.

12 Q. -- and then down. So these are monthly fluctuations,
13 and I just remind you that the CMA put to Mr Bishop, we
14 can go to it if you want, that it was more appropriate
15 to average out over a longer period of time given the
16 lumpy nature of ordering patterns; do you remember that?

17 A. Yes, I'm neutral on whether it is better. I think both
18 ways of collecting data are informative.

19 Q. But if you average it out it does --

20 A. By definition if you average out things that go up and
21 down, the ups and downs will move -- will become -- more
22 move, yes.

23 Q. It is roughly at 50%.

24 A. It fluctuates around 50%, yes.

25 Q. Yes, thank you.

- 1 A. You are welcome.
- 2 Q. So, we were, I think, going to the transcript and we
3 were, I would hope, going to Day 7, page 45 {Day7/45:1}.
- 4 Now, I just want to look at the perception of Boots
5 that Mr Holmes put to Mr Bishop to try and persuade him
6 that Boots was an assured customer.
- 7 If you go to 45 line 12 {Day7/45 12}, and then if
8 you read on to page 47, line 17 {Day7/47:17}. So if you
9 just tell the lady when you are finished, but I would
10 just note while you are going there that this is
11 Mr Holmes taking Mr Bishop to a document, a Boots
12 document, and it is by the senior ethical commercial
13 development manager at Boots. That is line 20
14 {Day7/45:20}. That is the senior commercial development
15 manager at Boots. Mr Holmes goes down and we can go
16 down to 46 {Day7/46:1}, and just read that. I do not
17 want to take anything out of context.
- 18 A. Did you say 46?
- 19 Q. Page 46.
- 20 A. Page?
- 21 Q. There is not much there that I want to refer to, but you
22 see there 95% of tablets are dispensed for patients over
23 18 years.
- 24 A. Yes.
- 25 Q. Then 47 --

1 A. Can you remind me which date that was. Early 2016, you
2 say?

3 Q. Yes, so this is January 2016.

4 A. Thank you.

5 Q. Then 47, Mr Holmes says "At (a)", this is the document:

6 "... the author says that a full switch of Boots'
7 preferred product to a skinny label alternative product
8 is not possible and the reason that is given is that the
9 alternative product does not have all licensed
10 indications 'and ...'"

11 These are the words that he emphasised:

12 "... 'and would only be acceptable clinically and
13 ethically for 5%.'

14 Would you agree that the 5% is the 5% of non-adult
15 prescriptions?"

16 Answer: It appears to be, yes.

17 Question: The author is saying that for 95% of
18 a 10mg tablet requirements Boots' perspective is that it
19 is not possible for it to use skinny label; is that
20 right?

21 Answer: As of January 2016.

22 "Question: The author is not saying this is just
23 a matter of commercial preference. They are saying in
24 their view it is not possible and not possible because
25 of the orphan designation issue?

1 Answer: In their view, yes."

2 I would just like to clarify whether you agree with
3 what Mr Holmes is essentially putting to Mr Bishop, that
4 the reasons are concerned -- and you will see this on
5 line 5 and 6 {Day7/47:5-6}, that to Boots it would not
6 be acceptable clinically and ethically?

7 A. Yes, that is what it says.

8 Q. That accords with your understanding?

9 A. That is what it says, yes.

10 Q. I shall not go --

11 A. We know that that was not correct, because -- but that
12 was the interpretation of Boots because there was no
13 ethical or clinical difficulty. So we know that that
14 was not the case, but that is the way I can read that
15 Boots interpreted it.

16 Q. Then if you then -- page 53, if you go to Lloyds.
17 Again, we will not go over old ground, but you will see
18 line 16 on page 53 {Day7/53:16}:

19 "Question: ... Now, you see that Lloyds explains
20 that it considers that using a skinny label product
21 outside of its licensed indication would be contrary to
22 the principles of the UK medicines licensing system."

23 So again, that, you would accept, was at least
24 Lloyds' perception at the time?

25 A. That is again what I can read, yes.

1 Q. Again, I will not go over old ground, but you do you
2 remember I took you to the assured customer base. Can
3 we go to the transcript on Day 7, which is page 166.
4 {Day7/166:1}. I would just like you to read 166 and
5 167, just to remind you what your evidence was.

6 A. That was my evidence?

7 Q. Sorry, I should clarify. This is now moving to you.

8 A. Okay.

9 Q. So this is not Mr Bishop, this is you. Apologies. So
10 at 166 I have taken you to the Decision on assured
11 customer base. I have taken you to the joint statement.
12 (Pause)

13 A. Yes.

14 Q. Then I would just like to remind you what you said
15 at 167, line 4 {Day7/167:4} when asked about the assured
16 customers:

17 "Answer: So, I agree with the spirit of the
18 paragraph, but ..."

19 Then you go on at line 6 {Day7/167:6}:

20 "Answer: ... What I write in my report very
21 explicitly is that I consider there are basically two
22 market segments, one which is price -- , more
23 price-sensitive and one which is less price-sensitive,
24 and the skinny label suppliers could not compete because
25 of the orphan designation for the more inelastic segment

1 of the market ..."

2 A. Yes.

3 Q. That is what you said.

4 Then finally, I would like to just go back to
5 proposition 21 of the joint statement which is at
6 {G1/1/15}, where you said:

7 "The bulk of switching was within the first
8 12 months [and then] with limited switching thereafter."

9 And you agree.

10 A. Yes, and I think it was useful to present the
11 information about the figure, because that was the
12 context we were discussing among -- . So can I just go
13 back one page of the joint report, one page only, to the
14 previous page 14 {G1/1/14}. Thank you. It is called
15 "relevance of trends". For instance, on the last column
16 Mr Holt talks about prices up to May 2021 as you can
17 see. If you go to the next proposition, is it 19
18 I suppose? Next page, please {G1/1/15}. Yes, we are
19 also talking about -- the proposition itself talks about
20 prices from 2016 to 2021. So I gave my agreement to
21 that statement where we, the economists, were discussing
22 about the bulk of evidence in the entire post-entry
23 period.

24 Q. Yes.

25 A. Yes, and limited -- again, limited with respect to what?

1 Limited in respect to the big jump in switching we had
2 observed in the initial period.

3 Q. Yes, but limited -- I mean, I think a moment ago you
4 said that the market shares broadly stabilised plus or
5 minus 10%?

6 A. Between 40 and 60%. So that's -- this is not
7 irrelevant. But yes, but I said on average it was 50%.
8 I was averaging out.

9 Q. Yes. So I then asked you a question, and if we go to
10 page 174 of the transcript at line 21 {Day7/174:21}.
11 This is where we got into the debate at the end of
12 Friday. So, I say at line 21:

13 "Question: ... Now, given that there was limited
14 switching after the first year ..."

15 Now, that is proposition 21, limited switching; yes?

16 "... and given that there was a lack of effective
17 competition between Auden and the skinny suppliers" --

18 That was again your evidence, and I repeat it ...

19 "... limited switching after the first year, and
20 given that there was a lack of effective competition
21 between Auden and the skinny suppliers after the first
22 year, logically the fall in Auden's prices after the
23 first year was not ..."

24 Then can I insert the word "mainly":

25 "... was not mainly caused by any direct

1 constraint?"

2 Now, if I ask the same question but insert the word

3 "was not mainly caused by any direct constraint",

4 I would assume that you would agree with that?

5 A. So the period is what, in which years?

6 Q. After the first year.

7 A. It is --

8 Q. There is limited switching, there is lack of effective
9 competition.

10 A. I think we have not been able to distinguish between the
11 direct and indirect constraints. I have seen evidence
12 of both.

13 Q. What is the evidence of a direct constraint after the
14 first year that you refer to in your report?

15 A. So, for instance, can we take the figure --

16 Q. Can you just -- take the figure.

17 A. Sure, I just would like to pick up the right figure,
18 which is the figure which has the drug tariff mechanism
19 and the prices of the various competitors.

20 Q. Before you go to a figure, could you just --

21 A. Because that would just --

22 Q. Just explain orally and then we can go to it.

23 A. So --

24 Q. What would be the evidence in your report which shows
25 there is a direct constraint between the skinny and

1 Auden which would be the main cause?

2 A. For instance, if I can refer, if you will allow me to
3 pick that figure, let us pick the figure that you showed
4 me earlier. That is {IR-A/14/142}. So these are the
5 wholesalers' sales.

6 Q. Sorry?

7 A. So, for instance, jointly AAH and Alliance, they double
8 their proportion of skinny between 2016 and 2017.

9 Q. These are wholesalers, so --

10 A. Yes, but these are the firms to whom the manufacturers
11 are actually selling to, because this is relevant for
12 them. If you actually look after 2017, because again
13 the discussion was in the context of defining the
14 competitive constraints in the market, you will see that
15 that figure has increased even further.

16 Q. Yes, but --

17 A. So there has been --

18 Q. As was put to Mr Bishop, the whole -- let us concentrate
19 on the pharmacies, shall we?

20 A. Yes, let us concentrate on the pharmacies.

21 Q. (Overspeaking)

22 A. There is -- so, we are in agreement that there are
23 roughly two segments, one which is more inclined to be
24 price-sensitive and one which is more price-insensitive.
25 Okay. We are in rough agreement with that and I have

1 never disputed it.

2 But the evidence is that, for instance, after the
3 first year in 2016 Morrisons did buy more, for a bit, of
4 skinny.

5 Q. For a bit.

6 A. Sorry?

7 Q. For a bit.

8 A. For a bit, yes. Yes, for a bit. I observe, let us take
9 two pharmacies like, let us go back to {IR-A/14/135},
10 the one that you showed earlier. It is not -- so it is
11 a bit earlier than that. It is table 3.8. 135.

12 Q. So, what Mr Holmes suggested to Mr Bishop and he agreed.

13 A. No, no, you asked -- can I finish the comment, just --

14 Q. You can.

15 A. So 135.

16 Q. 135.

17 A. 135. It is the same table you showed earlier. Just to
18 pick that --

19 Q. 135 or 145?

20 A. 135. Thank you, that's perfect. So, for instance, let
21 us take two buyers which in principle look similar to
22 us, Sainsbury's and Tesco are large supermarket chains
23 in the UK that went for very different choices.

24 Sainsbury's decided not to buy any skinny label ever in
25 that period and instead Tesco decides to concentrate

1 most if not all on -- so there is (inaudible) and some
2 pharmacies were experimenting, the more price-sensitive
3 large group or the independent decided to go early on on
4 skinny, and the others instead made different choices.
5 But Morrisons, you see there are some numbers, so to say
6 there is no switching whatsoever is, again, it is
7 a strong characterisation. I do accept that there is,
8 roughly speaking, two different groups which have
9 different elasticities of demand.

10 Q. And no substitution between the two different groups for
11 any -- to any significant extent?

12 A. I do not know what it is any -- there is substitution,
13 so --

14 Q. Significant substitution?

15 A. Significant substitution, I have seen some substitution.
16 I have seen the market shares, let us say, another -- go
17 at a different figure, so maybe data --

18 Q. Let us just go to another figure.

19 A. They -- visualisation may differ. Can I have, please,
20 {IR-A/14/336}, please.

21 Q. IR-A/14 now?

22 A. Yes, 336. Okay. These are -- these bars represent --
23 it is another visualisation of something everybody has
24 seen but maybe it jumps out in a different way. These
25 are the market shares. The dark bars are those of full

1 label. They start from 100%. They go down in the first
2 year and a half, I would say not just the first year,
3 and then they do fluctuate. It may be the lumpiness of
4 the purchases, it may be -- so no one is able to go down
5 to that granularity in the data. But to say that there
6 has been no switches, no switching when this kind of
7 data is in front of you would be a very, you know,
8 extreme statement.

9 Q. Did I say -- sorry, Professor Valletti, we got hung up
10 about this last Friday. I did not say "no switching";
11 I asked you the simple question: what is the evidence
12 that you have in your report which shows that there was
13 any significant switching after the first year,
14 particularly given your evidence that you say there is
15 limited substitution and a lack of effective
16 competition. Given those two facts, could you point to
17 me, in your report, any evidence of any significant
18 substitution in the period after the first year.

19 A. Thank you very much. I think you are asking in general
20 the wrong question. Let me take you through it so you
21 see --

22 Q. So I --

23 A. -- a very simple example. Let me take you through
24 a very simple example.

25 Q. Can I -- no, no. We are on the transcript. Can you

1 just say, I do not have the evidence.

2 A. No, I think that this evidence would not be telling us
3 any useful information. So if I may just give
4 an example.

5 Q. Well, you can say --

6 A. (Overspeaking)

7 Q. (Overspeaking) With respect, Professor Valletti you can
8 say it is not useful, but can we just have the answer to
9 the question: where is the evidence? If you say there
10 is no evidence, fine, and then you can tell me and the
11 Tribunal why it is not useful.

12 A. So --

13 Q. But to answer the question, "it is not useful", is not
14 answering the question: where is the evidence of demand
15 substitution?

16 A. You asked me a slightly different question. Maybe
17 I have misunderstood it, in which case I do apologise,
18 that there is no evidence that there is any direct
19 competition. I said in my report it is very difficult
20 to unravel the difference between direct and indirect
21 effects. For the purpose of market definition it does
22 not matter. It does not matter given the ample evidence
23 that we have overall in the case about the pattern of
24 substitution, the pattern of prices and other elements
25 of the case which I do mention in my report.

1 I do observe some patterns of continuous
2 substitution at the wholesale level, more limited at the
3 wholesale level -- at the, sorry, at the pharmacy level.

4 Q. At the pharmacy level.

5 A. At the pharmacy level, but there is evidence of
6 continuous substitution at the --

7 Q. -- at the wholesale level --

8 A. -- wholesale level.

9 Q. -- because they are obviously supplying independents,
10 yes, as Mr Holmes said to Mr Bishop. Do go on, yes?

11 A. Yes, and to focus on the -- relative market shares
12 whether they are stable or unstable, it is a parameter
13 but it is not evidence of anything. So if I might
14 just -- maybe it is helpful, if it is not helpful then
15 I will interrupt myself, if it is helpful: consider the
16 following example.

17 Take a firm which is a monopolist, it has
18 an invention and it has a full market share. Then this
19 firm, successful, but attracts the (inaudible) of some
20 other firms. They enter -- a second firm enters the
21 market with a slightly moderate differentiation. There
22 will be a transition period when market shares will
23 adjust a lot obviously, because there is a new market
24 entrant. Prices will go down, and we reach what we call
25 in economics a new equilibrium, competitive equilibrium,

1 I am not making any assumptions here. The market will
2 split perhaps 50/50, one firm is located to the left of
3 the town and one north of town and another one south of
4 town, so customers will go to the closest supplier and
5 the market will stabilise around 50/50% for each firm.
6 It is a competitive equilibrium. It is a new --
7 the prices are low. There is no further entry so the
8 situation is pretty stable. You will have no further
9 switching, obviously, because you have reached
10 a competitive equilibrium, 50/50. There is no -- it
11 does not imply at all that these are in different
12 markets, just the numbers will tell you that you reach,
13 after a transition phase, a new equilibrium. That is
14 why I am saying focussing on actual switching,
15 especially when one product is perceived of higher
16 quality, is not a very interesting parameter for finding
17 market definition in.

18 Q. To be fair, that is what you say in your report. So if
19 we just quickly go to your report and then I will move
20 on.

21 If you go to {IR-F/1/15}. I will not go to -- if
22 you just enlarge it. So, here is where you say:

23 "There are two mechanisms by which skinny label
24 imposes a competitive constraint on full label for
25 10mg ..."

1 You say there are direct constraints and indirect
2 constraints; yes?

3 A. Correct.

4 Q. You define the direct constraint as:

5 "... the standard constraint that we see in any
6 market where competition between substitute products
7 leads to a downward pressure on the prices of both
8 products."

9 Now, that, I think you would say, is the classic
10 demand size substitution?

11 A. Yes.

12 Q. Yes. Then you have at paragraph 35 the indirect
13 constraint, which Mr Holmes has described as the
14 regulatory constraint because it operates via the drug
15 tariff; yes?

16 A. Yes.

17 Q. Then over the page at 36 you say:

18 "There is a legitimate debate as to the exact
19 relative importance of each constraint in reducing
20 the price of full label tablets."

21 You go on to say:

22 "... the exact strength of each constraint is not
23 important:"

24 Yes?

25 A. Mm-mm.

1 Q. So I would suggest to you that after the first year you
2 do not adduce any compelling evidence of a direct
3 constraint as you have defined it in paragraph 32, any
4 evidence of a direct constraint for the period after the
5 first year. What you do say is, it does not matter.

6 A. Yes, so in --

7 Q. So is that a "yes" to the question?

8 A. No, it is not true that I do not present any evidence,
9 but there is evidence and I say there is evidence
10 especially at the wholesale level and we have commented
11 on that just five minutes ago.

12 Q. Does the wholesale level mean there was switching
13 between the independents and the main pharmacies?

14 A. So, the wholesale level, there is competition at the
15 wholesale level and there is no ability to discriminate
16 between the wholesaler who is selling to Boots versus
17 the wholesaler who is selling to Tesco, say. So they
18 cannot do that, so there will be competitive
19 constraints.

20 Once again, in the example I gave you, without any
21 tariff mechanism, so without any indirect mechanism,
22 indirect effect, I just told you that there is very
23 plausible ways where there is competition, there is
24 potential to substitute. However, the market does
25 convert to a new equilibrium and so you do not observe

- 1 the switching. So observing for the switching is not
2 determinative of anything.
- 3 Q. So the fact that -- you have not observed any switching;
4 is that correct?
- 5 A. I -- we have observed some switching, more limited than
6 compared to the initial period.
- 7 Q. Right. So we have established at paragraph 32 of the
8 report that the direct constraint is essentially, is the
9 standard demand side substitution. That is what you
10 have just said?
- 11 A. Yes.
- 12 Q. So, on that, can we go to {M/14}, which is the
13 EU Commission's market definition and guidelines
14 {M/14/1}. I can see that is also found at {H/655}.
15 This is the Commission notice on -- now, I cannot see
16 that you refer to this in your report; is that true?
- 17 A. I do not remember. By the way, these guidelines have
18 been just revised, as you probably know.
- 19 Q. Have they been adopted?
- 20 A. No, but --
- 21 Q. So these are the ones in force and these are the ones
22 that were in force at the time.
- 23 A. Sure. But they have been circulating for a couple of
24 years.
- 25 Q. They have been circulating, and I do not think -- you

1 will correct me if I am wrong and you can show me the
2 updated ones I have seen. I do not think they alter
3 what I am about to say.

4 So, these are the Commission guidelines. If you go
5 to recital 13, "Basic principles for market
6 definition -- Competitive constraints". Recital 13,
7 this is the basic principle:

8 "Firms are subject to three main sources of
9 competitive constraints: demand substitutability, supply
10 substitutability and potential competition. From an
11 economic point of view, for the definition of the
12 relevant market, demand substitution constitutes the
13 most immediate and effective disciplinary force on the
14 suppliers of a given product, in particular in relation
15 to their pricing decisions. A firm or a group of firms
16 cannot have a significant impact on the prevailing
17 conditions of sale, such as prices, if its customers are
18 in a position to switch easily to available substitute
19 products or to suppliers located elsewhere. Basically,
20 the exercise of market definition consists in
21 identifying the effective alternative sources of supply
22 for the customers of the undertakings involved, in terms
23 both of products/services and of geographic location of
24 suppliers."

25 Now, I cannot believe that you are going to disagree

1 that those are the three main sources of competitive
2 constraint: demand substitutability, supply
3 substitutability and potential competition?

4 A. I agree. Can I add, though, that this case has
5 a special quirk that we cannot ignore. There is a drug
6 tariff mechanism, and of course the general guidelines
7 of the European Commission cannot capture those things.
8 I think we agree on that.

9 Q. So the regulatory constraint is a special quirk?

10 A. Well, it is a characteristic of this market. When I am
11 considering who is competing and how I need to consider
12 it. I cannot just dispense and forget about it. It
13 would be strange.

14 Q. If one goes to recital 14, the Commission then
15 distinguishes between the demand side substitution and
16 supply side and potential competition. It says:

17 "The competitive constraints arising from supply
18 side substitutability other than those described in
19 paragraphs 20 to 23 and from potential competition are
20 in general less immediate and in any case require
21 an analysis of additional factors. As a result such
22 constraints are taken into account at the assessment
23 stage of competition analysis."

24 So you would agree, I think, that the demand side
25 substitution is the classic test for a market

1 definition, and while supply side and potential
2 competition are not irrelevant, the Commission is saying
3 that they are generally taken into account at the
4 assessment stage of the competition analysis stage;
5 correct?

6 A. That is -- because typically it takes time and cost to
7 enter a market.

8 Q. That is the standard approach to market definition?

9 A. It is, yes. Yes, and as we know, market definition is
10 not an exercise we do in itself, etc., etc. So this is
11 also something that would be in the guidelines.

12 Q. I am just going to take you to a case, not to -- it is
13 because of the law, but if one can go to the *EasyJet*
14 case which is at {M/48.12/36} at paragraph 99. We see
15 there the General Court endorsing what the Commission
16 has said in its market definition guidelines:

17 "As the Commission stated in the notice on market
18 definition, companies are subject to three main sources
19 of competitive constraints: demand substitutability,
20 supply substitutability and potential competition. From
21 an economic point of view and for the definition of the
22 relevant market, demand substitution constitutes the
23 most immediate and effective disciplinary force on the
24 suppliers of a given product, in particular in relation
25 to their pricing decisions ..."

1 It is essentially a quote from paragraph 13. It
2 then goes on to say:

3 "Substitutability must therefore be looked at not
4 only from the supply side but also from the demand side,
5 which remains, in principle, the most effective
6 assessment criterion."

7 So when in paragraph 32 you refer to "the direct
8 constraint", and you have said that is an element of the
9 demand side substitution, you would accept, I take it,
10 that the demand side, the direct constraint which you
11 refer to at paragraph 32, in principle is the most
12 effective assessment criterion for market definition?

13 A. That is what the guidelines say.

14 Q. And that is what the court says?

15 A. Yes.

16 Q. The indirect constraint, the regulatory constraint you
17 rely on is not one of the three main sources of
18 competitive constraint referred to, is it?

19 A. Obviously it is not a common feature across markets, so
20 it is not in the notice of the Commission. Obviously it
21 is a very special mechanism, yes. But it does affect
22 this market.

23 Q. Again, if one goes to the joint statement, to
24 proposition 1 at {IR-G1/1/2}, you agree that:

25 "The objective of market definition is to identify

1 products which are sufficiently substitutable to act as
2 a sufficient competitive constraint on the focal product
3 and thus be considered in the same market."

4 So the objective is to identify products which are
5 sufficiently substitutable. Again, the indirect
6 regulatory constraint is not of that nature, is it?

7 A. So, I am a bit puzzled by your questions because
8 whatever the answer we need really to be able to
9 interpret the facts, and the facts of this case, no
10 matter how you are going to turn the arguments around,
11 is that there was only one thing that occurred in this
12 market which was entry, entry by skinny labels and the
13 entry of skinny labels, by whatever combination of
14 factors, turned the market upside down. 50% of the
15 customers switched from full to skinny, 95% price
16 decline over a period of time. On top of this we also
17 have an agreement that was trying to delay entry,
18 because entry was perceived as a threat to competition,
19 as a threat to the -- sorry, to the rates that Auden had
20 created. There is a price discount which is very big,
21 which is what Allergan renegotiated when they bought
22 Auden from £520 million to £320 million, that is a 40%
23 discount. If you put all these elements together, I am
24 sorry, as an economist I do not know what to answer.
25 These things are not things which are unrelated to each

1 other. You are going really towards a very formalistic
2 approach which I do not think is very useful, because
3 I need to make sense of the facts as an economist, and
4 these are the main facts. Whatever the causes, it is
5 skinny label that turns the market into a new phase, 50%
6 of the market switched away over time and then the price
7 went down, and all the other factors which I mentioned
8 to you.

9 But I also disagree with something you said earlier,
10 and I want to go back, that I do not present any
11 evidence. So since you want to unravel -- this
12 obsession about unravelling the direct versus indirect.
13 Can I please go to {IR-F/1/14}, and I want to -- because
14 this I need to clarify. Can you please magnify, it
15 would be nice to magnify the figure 4, which is more or
16 less what you have in the Decision. So -- and I want
17 also to make a couple of observations there.

18 This drug tariff mechanism is very complex, it has
19 a lot of features. I went back to it. Let us remind
20 ourselves that this is a category M drug. For some
21 reasons which are unknown to me the only drug that was
22 put in this basket at the beginning of the period was
23 only AMCo; not even Auden was there. AMCo alone. So
24 there is -- Alissa enters -- it is not, though, in
25 category M, okay? Because they adopted -- they do not

1 belong to the Scheme M. There is entry of Resolution
2 and then Bristol. They are not Scheme M. So again,
3 they do not take part to the price which comes from the
4 drug tariff mechanism. They do not.

5 In the drug tariff mechanism you only have AMCo at
6 the beginning, at some stage finally Auden enters. If
7 you look at the data in that period it just happens that
8 AMCo was more expensive than Auden, so you see that the
9 price goes still a little bit up in the drug tariff
10 mechanism simply because Auden -- and then starts going
11 down because Auden was slightly cheaper than AMCo by
12 a couple of pounds. There is no further entry in the
13 drug tariff mechanism until March 2017, okay?

14 The weight in the drug tariff mechanism that Auden
15 gets when they do enter in the drug tariff mechanism is
16 around 80%, if not bigger. So most of the drug tariff
17 mechanism until February 2017 is largely driven by the
18 price of Auden, and the price of Auden is going down.
19 Why is it going down? Because they have found some
20 competition. So this is well above the first year you
21 are talking about.

22 Let me go on. Let me go now towards -- to the end
23 of 2017, okay, with one exception which was these AMCo
24 prices which are a bit strange and they are very small
25 in volumes because they represented something they

1 procured to a hospital, basically competition among
2 skinny labels has stabilised. Those prices are very
3 cheap, okay? They are not going to put any further
4 downward trend on the drug tariff mechanism. Instead
5 the drug tariff mechanism still goes down. Why?
6 Because there are also probably direct constraints, and
7 that is what I say in my report by the way. I cannot
8 distinguish the weight of those two, but it is
9 impossible for me to tell that everything comes only
10 from the drug tariff mechanism and there is no direct
11 constraints, because the evidence can point in both
12 directions. It is probably both, I am saying.

13 The last point I will make, because an example was
14 made last week that the drug tariff mechanism is akin to
15 linking to the price of bananas, obviously that was
16 an extreme example for the sake of it. But that is
17 a misleading example, because if you did price -- if you
18 did link the price of full label to the price of bananas
19 and imagine the price of bananas was going down, sure,
20 the price of full would come down but there are two
21 fundamental differences: (a) bananas are not
22 biologically equivalent to full label tablets,
23 obviously. Instead the skinny label are, which is to me
24 quite a good starting point, and secondly, if you had
25 a much cheaper price of bananas you would not switch 50%

1 of the market from a full to skinny, which is a gigantic
2 factor in this market. So this is not just linking
3 prices randomly; this is linking prices of two products
4 which belong roughly to the same market.

5 Q. Very good. One thing one thing I can agree on in that
6 quite long answer is that what one has to do in market
7 definition is weigh up all the factors; you would agree
8 with that? Weigh up all the factors which are relevant
9 to market definition. You have to look at it in the
10 round.

11 A. In order to understand the economic constraints on the
12 focal product, that is what you have to do.

13 Q. You have to weigh up all the relevant factors.

14 A. For its own sake, no.

15 Q. You do not?

16 A. For its own sake, no, because market definition is not
17 an end in itself. This is, you know, the guidelines as
18 well. So I do not, I need to understand the boundaries
19 to competition.

20 Q. If one -- the last document I will take you to is the
21 joint expert report, proposition 44, which is at
22 {IR-G1/1/28}.

23 A. Which proposition?

24 Q. {IR-G1/1/28}. The joint expert report. Now, at
25 proposition 44 you say:

1 "Exact market definition does not matter to the
2 assessment of the 10mg Agreement."

3 And you agree with that. Then the reason you give
4 is:

5 "Either Auden/Actavis was dominant and entered into
6 an agreement to exclude a potential competitor (if full
7 and skinny are in the same market) or Auden/Actavis was
8 a monopolist in full label tablets market and the
9 agreement delayed entry of constraint that put
10 substantial downward pressure on prices and volumes of
11 full label tablets (if separate full and skinny label
12 markets): I tend [and this is what I want you to focus
13 on] to be more inclined towards the first explanation."

14 Now, I am not going to ask you about the reasons
15 there, Mr O'Donoghue will, but I want to just ask you
16 about the words, "I tend to be more inclined towards the
17 first explanation." Because that suggests, to me at
18 least, that the answer to the market definition exam
19 question in this case is quite finely balanced.

20 A. Yes, yes.

21 Q. You will be aware that Dr Bennett and Mr Holt believe
22 there are two markets; correct? This is what they say?

23 A. Yes. I haven't seen any in their analysis that made me
24 change my opinion.

25 Q. No, and you will be aware that Mr Bishop believes there

1 is one likely market but there is likely two markets if
2 there is an assured customer base. I think you saw, you
3 heard his evidence on Friday; correct?

4 A. Yes.

5 Q. So assuming that you are right and that there is
6 an assured customer base and that is a fact, the three
7 other experts in this case conclude that there are two
8 separate markets; correct?

9 A. So --

10 Q. Just bear with me, yes? There are three --

11 A. If I understand correctly, Mr Bishop is saying there is
12 one.

13 Q. One, but if the Tribunal was to conclude, and on the
14 basis of your evidence, that there is an assured
15 customer base, he said he would likely say there were
16 two separate markets; correct?

17 A. Yes.

18 Q. Can I just ask the question?

19 A. Please.

20 Q. I am just postulating. Now, you may say that the views
21 of these three experts are wrong, but given what you
22 have just said about this exam question being finely
23 balanced they are not unreasonable, are they?

24 A. I think we are really putting ourselves into this strait
25 jacket of market definition.

1 Q. Are they unreasonable views to hold?

2 A. My view on this case is that full and skinny belong to
3 the same market.

4 Q. Yes.

5 A. So I am in disagreement with their views. I am in
6 disagreement.

7 Q. You are in disagreement. Are the views of the other
8 experts unreasonable?

9 A. I am in disagreement, I do not know what -- can I limit
10 myself to --

11 Q. Well, because what I am suggesting to you that you are
12 giving evidence to the tribunal, you are not giving
13 evidence to this side --

14 A. Absolutely.

15 Q. -- and I am postulating to you that there are a range,
16 there is a range here and it is reasonable to hold that
17 there are two separate markets, and if the Tribunal was
18 to conclude there are two separate markets you may
19 believe that it is -- the Tribunal was wrong, but it
20 would not be unreasonable.

21 A. I am, sorry, this is a --

22 Q. It would be open --

23 A. This is thin ice for me because I am not sure. I would
24 say that I would be in disagreement because it would not
25 be in line with my assessment which I have observed. If

1 they were in different markets I would not be able to
2 reconcile with the fact that I have observed substantial
3 switching in this market in the extent of 50% plus/minus
4 10% in other periods, prices declining for whatever
5 reasons by 95%. I have -- that would not be in line
6 with the fact that Actavis renegotiated their
7 acquisition price of Auden and gave a substantial
8 discount. That would not be consistent with my view
9 about the agreement, so I would be in disagreement for
10 a variety of factors. I would disagree on the basis of
11 my reasoning.

12 Q. Yes. But the contrary view is not unreasonable because
13 the question is finely balanced?

14 MR HOLMES: I think this question has been put several times
15 and I am not sure that Professor Valletti can really
16 comment on the reasonable or unreasonableness of other
17 views.

18 MR BREALEY: I am trying to establish --

19 MR HOLMES: He has set his own view about market definition
20 which is all that he can reasonably be expected to
21 supply.

22 MR BREALEY: I am not sure that is correct. I think an
23 expert can legitimately say, "I disagree with expert A,
24 but his view is not unreasonable and it is one that
25 could" --

1 A. Well, I will comment more specifically.

2 THE PRESIDENT: This is a very difficult area to traverse
3 because you are really asking Professor Valletti to
4 articulate the distinction that the Tribunal often draws
5 between an "on the merits" appeal and a JR. I mean,
6 what Professor Valletti is saying is he thinks the other
7 experts are wrong.

8 MR BREALEY: Yes.

9 A. I have articulated in my report why they are wrong.

10 THE PRESIDENT: Indeed, and they have articulated in their
11 reports why they are right. If we conclude, and that is
12 a matter for us, that the other experts are so far --
13 any expert is so far off the radar to be holding
14 unreasonable views then of course we will say so. But
15 I am not sure that this witness's characterisation of
16 what another expert is saying in terms of anything other
17 than error is particularly going to assist us. We are
18 perfectly prepared to accept this is a difficult area
19 that we are going to have to apply our minds to and it
20 is not a no-brainer case, but how much further on that
21 can Professor Valletti's view that he thinks the other
22 experts are so wrong that they are actually putting
23 forward an unreasonable viewpoint? I mean, it is
24 tantamount to asking him to comment on whether they are
25 actually trying to lead the Tribunal up the garden path.

1 It is a very hard question.

2 MR BREALEY: I do not think that was the sense of the
3 question, but I will leave it with -- this is, according
4 to Professor Valletti, a finely balanced question.

5 THE PRESIDENT: Okay. I mean, Professor, look, what you are
6 being asked is not do you disagree with the other
7 experts. It is quite clear that you do and you have set
8 out your reasons why. You, not to put too fine a point
9 on it, think they are wrong and they, for the reasons
10 they give in their report, think that you are wrong to
11 the extent that they disagree.

12 Are you able to provide any insight as to degrees of
13 wrongness? I mean, that is what you are really being
14 asked.

15 A. So, the degree of wrongness. There is one thing, for
16 instance, I am very happy to go on the record.
17 I thought it was misleading when Dr Bennett told you
18 last Wednesday that he had performed standard tests in
19 market definition taken from the toolbox. He has not
20 done standard tests. He has done the wrong SSNIP test
21 using relative prices. But not even that, he used
22 observed prices. He has not run any SSNIP test, which
23 is not compulsory. It is not an obligation to run
24 a SSNIP test by the way, but he has not done it in the
25 right way, he has done it in the wrong way. He has done

1 it repeatedly in the wrong way, and I express in my
2 report, so I am 100% sure that what Dr Bennett has done
3 is wrong as a matter of economics, and I am happy to say
4 that, to go on record. So it is not reasonable.
5 I would not say it is possibly reasonable. It is
6 unreasonable to me what he has done. No one has done
7 a correct SSNIP test in this case. It is as simple as
8 that.

9 The other positions are more nuanced. I -- you
10 commented on Mr Bishop, Mr Bishop has not done anything
11 on market definition, so I cannot even know what his
12 views are on market definition because you are trying to
13 use his assessment of dominance and break it back
14 through another way. I am very pragmatic there, and
15 I am simply saying on the basis of the facts I have
16 seen, of the evidence presented by the other expert,
17 they have not convinced me to any reasonable degree that
18 there is a possibility that they are right. So I have
19 responded.

20 MR BREALEY: I have no further questions. I think

21 Mr O'Donoghue after the break may have some questions on
22 Dr Bennett's SSNIP test, but we will see.

23 THE PRESIDENT: Thank you very much, Mr Brealey.

24 Mr O'Donoghue, do you want to take a break now or do you
25 want to make a start? Why do you not make a start,

1 Mr O'Donoghue, unless, Professor you want a break after
2 nearly an hour.

3 Cross-examination by MR O'DONOGHUE

4 MR O'DONOGHUE: Professor Valletti, what I want to cover
5 with you primarily is aspects of market definition not
6 covered by Mr Brealey, and of course the question of
7 an object restriction. There is one point I want to
8 pick up here, a short point but it is an important one,
9 and it is picking up on your comment on the
10 reasonableness of Dr Bennett's views in particular.

11 Now, can I show you two documents and then I have
12 a handful of questions.

13 First, can we bring up {IR-N/23.1/3}, please. Now,
14 this, Professor Valletti, is an interview you gave last
15 year to Counterbalance; do you remember that?

16 A. Yes. Can you remind me the period, because I do not
17 remember when it was.

18 Q. 2021.

19 A. Maybe it is on the first page.

20 Q. April 2021.

21 A. April 2021.

22 Q. So last year. You then look on page 3, you were asked
23 a question about the machinery of monopoly in Brussels
24 and so on, then you say the gatekeepers are the law
25 firms?

1 A. Yes.

2 Q. "Clients establish relationships with big law firms, and
3 these relationships continue over time. The big law
4 firms instruct the consultants about what they have to
5 say. The economists who serve them are just useful
6 fools."

7 Then further down the page, "Can you name these
8 gatekeepers?" and you say:

9 "That is easy. There are basically three economic
10 consultancies: Compass Lexecon ... CRA ... and RRB."

11 You mention some others in generic terms, and you
12 say:

13 "[There are] very few law firms, for example
14 Freshfields, Latham and Watkins, Cleary Gottlieb,
15 Skadden, Linklaters, Clifford Chance and others.

16 Not everything they do is bad, of course. But this
17 legal mentality has proved toxic. They will do anything
18 for money."

19 Now, just to show you the second document, we have
20 seen this a month ago. It is a tweet you made also last
21 year. It is {IR-N/24.1/1}, please. You say:

22 "Working on my first competition case ... I have
23 read many of the so-called 'economic experts reports' by
24 the usual big consultancies.

25 It's horrifying to see how badly economics can be

1 used and abused.

2 All read like Ayn Rand with some maths and stats to
3 make it look more 'scientific'. Also sad how the market
4 prices consultants: millions paid to scare enforcers and
5 possibly save hundreds of millions in fines for their
6 clients.

7 How can we improve and bring in some ethics?"

8 You remember we saw this document before.

9 So, in the first document you have named two of the
10 law firms representing the appellants in this case as
11 well as two of the economic consultancies working for
12 the appellants in this case as well, and you say that
13 these economists are "useful fools", the law firm
14 mentality is toxic, they will do anything for money and
15 having read the economics reports you think you need to
16 bring more ethics to economics and economists.

17 Now, you would agree these are strong words?

18 A. These are my personal opinions which I express
19 exercising my freedom of speech.

20 Q. Do you agree they are strong words?

21 A. These are my personal opinions. I am a bit surprised
22 that you want to have this discussion which I think
23 is -- I would like to talk about the economics of this
24 case, if possible.

25 THE PRESIDENT: No, I think you have to respond to these

1 questions.

2 A. Okay. I am very happy. Absolutely. So I am very happy.
3 So you may or may not know I was the Chief Economist of
4 the European Commission of DG Comp for three years.
5 From my vantage point I have run a lot of cases,
6 hundreds, hundreds. Mergers, anti-trust and state aid,
7 and I have been exposed to a lot of economic reports.
8 A lot of economic reports, and from that point of view
9 I found that those reports were typically of, I would
10 say poor quality, but more worryingly as an enforcer is
11 that they were not objective. They were not objective.
12 They would not help the enforcer in taking good
13 decisions. So it became really cases of advocacy rather
14 than expert reports.

15 MR O'DONOGHUE: Sorry to interrupt you.

16 A. So -- no, let me -- since you are bringing my personal
17 history I have to give my personal history, and when --
18 and I started expressing my disappointment with the
19 profession of consultants in several places, you have
20 quoted one interview but I gave many more and you will
21 find traces in public speeches and reports which I have
22 written and articles, and there is plenty of those.

23 So here, for instance, you may or may not like my
24 sense of humour when I am saying Ayn Rand and this
25 libertarian approach that everything is free market,

1 etc.

2 Q. Professor Valletti, sorry --

3 A. I am referring to this bunch of reports that I was --
4 I had to look for.

5 Q. Do you think the word "toxic" is a joke? Is that your
6 evidence?

7 A. Sorry?

8 Q. Do you think the word "toxic" is a joke? Is that your
9 evidence? Do you think the words "useful fools" are
10 a joke?

11 A. I was -- by the way, I have also been abused myself.
12 There is lots of evidence that people took against me,
13 so I have made my choices. It is part of my -- it is
14 clear I do not have financial incentives to do this, but
15 I started a conversation which I think is a useful
16 conversation to change a little bit of things in the way
17 we are doing economics in practice, because we have
18 become extremely complacent. From an economics point of
19 view it is clear, the incentives are very skewed. All
20 the money is on one side and this is not leading to good
21 decisions, this is not leading to good economics, and
22 I am playing my part.

23 Q. Let us come back to this case.

24 A. To this case.

25 Q. To this case. Now, you are aware that you have a duty

1 of independence to this court, correct?

2 A. Yes, of course.

3 Q. I would suggest that, is that not bound to be affected

4 by the strong prejudicial --

5 THE PRESIDENT: Duty to the defendants?

6 MR O'DONOGHUE: To the court. A duty of independence.

7 THE PRESIDENT: Oh, sorry. The transcript says -- a duty of

8 independence to the court. Yes, the transcript had

9 something rather different.

10 MR O'DONOGHUE: If only that were true. So, you have a duty

11 of independence, you know that?

12 A. Yes.

13 Q. You take that seriously?

14 A. Very seriously.

15 Q. Now, I would suggest to you, is that independence not,

16 certainly as a perception, bound to be affected by the

17 strongly prejudicial views you have expressed about two

18 of the law firms in this case and two of the experts in

19 the case?

20 A. I do not think so, because I was not referring to this

21 case in particular. I was referring to my

22 disappointment with the way the economic profession in

23 consultancy has been going on over the past years.

24 So --

25 Q. I am going to move on. I have two final questions on

1 this.

2 A. Please.

3 Q. So, you say you were not referring to this case. In the
4 tweet we saw it looks like you are referring to this
5 case.

6 A. So, it is a tweet. It is 200 characters, so do we need
7 to make a big story out of it? I do not know, it is up
8 to you.

9 Q. You are talking about a case; which case?

10 A. I am going to give you another example. So, one of the
11 experts which is involved in this case --

12 Q. Well, let me --

13 A. -- has attacked me also on these platforms, and he
14 thought it was funny and people thought it was
15 horrifying, by saying what, "the views of
16 Professor Tomato Spaghetti", okay? And he was using
17 this stereotype because of my nationality. People
18 thought it was very offensive. At first maybe I was
19 upset, then I spoke about it when I was at home and my
20 kids found it hilarious. So I moved on, I moved on.
21 I would like also to move on. I do not have any
22 prejudice. I have views about the way economic
23 consultancies have been going. I have written papers,
24 I have been to conferences. The article that you showed
25 earlier that was "The European System of Monopoly" has

1 been used by Professor Bill Kovacic to give conferences,
2 to give seminars because he thought it was interesting
3 to discuss the views I had after a relevant policy
4 experience because they thought there was some degree of
5 truth. Of course when you write an article that
6 journalists wanted to, you know, to have an impact to
7 attract audiences, which is what journalists do. But it
8 is -- I did not have the right, obviously, to modify
9 that interview, so --

10 Q. You are not denying you said it?

11 A. Do I remember it, the precise wording?

12 Q. It was only last year, come on.

13 A. Well, the precise wording I do not. But again, if you
14 think I have a prejudice against economists, I am
15 analysing the economics which has been presented in this
16 case and that is my job, and I am a professional about
17 that.

18 Q. Let us move on. One last question: you say you do not
19 have financial incentives, you are obviously being paid
20 by the CMA, correct?

21 A. Sure.

22 Q. So you have financial incentives?

23 A. As you can imagine, I have destroyed my potential
24 employability in other cases with many of the -- but
25 I am paid by the CMA, yes. I am not doing this for

1 money, if I may say. My job is a different job.

2 THE PRESIDENT: Well, Professor, let me just ensure that we
3 have unpacked this completely. I take it that you are
4 being paid in a manner that is not dependent upon the
5 outcome of the case?

6 A. Absolutely, sure. Certainly.

7 MR O'DONOGHUE: You are not suggesting that the economists
8 of the appellants are being paid on a different basis?

9 THE PRESIDENT: I do not know, I am not thinking he needs to
10 answer that question. The question of remuneration has
11 been raised with this witness; it has not been raised
12 with any other witness. I have assumed that they are
13 being paid in a proper way.

14 MR O'DONOGHUE: Well, indeed, indeed.

15 Before we move on, you have name-checked these law
16 firms, the four we have seen. Would you accept
17 instructions from those firms?

18 A. Generally, on a specific case, on what?

19 Q. Sorry?

20 A. No. On what, I said "On what case?"

21 Q. If you did not have a client conflict and one of these
22 four firms asked you to represent one of their clients
23 in a matter, would you accept or would you refuse?

24 A. It is such an absurd question. I would want to
25 understand what the case is about, of course. Would

1 I have an interest? So I am not a consultant. My day
2 job is to do research, to teach and to run a department.
3 I choose very few cases if I am motivated, because
4 I find them interesting from an economics point of view,
5 so if there is an interesting economic question I might.
6 If it is an uninteresting economic question I would not.

7 Q. So you would work for these private firms?

8 A. I did not say that. I do not know. It is such
9 an absurd question it does not -- I cannot answer until
10 I know what I am talking about, it is so generic.

11 Q. You understand the reason I ask. You describe their
12 legal mentality as "toxic"?

13 A. It is a single phrase out of context, so --

14 Q. Okay, well, let us move on.

15 A. Thank you.

16 Q. Now, on market definition you obviously agree the fact
17 that two products are bioequivalent or therapeutically
18 similar does not itself mean they are part of the same
19 relevant product market?

20 A. I accept that.

21 Q. You also agree, presumably, that the mere fact that
22 prescriptions are open, they do not specify a particular
23 brand or product, does not itself mean that all products
24 falling within that open definition form part of the
25 same product market?

- 1 A. No, I would say these are important considerations.
2 These are almost necessary but not sufficient
3 conditions, yes.
- 4 Q. Yes. Well, we know in this case, for example, that 80%
5 of the major pharmacies only or primarily stock 10mg
6 full label despite open prescriptions?
- 7 A. Yes. Yes, the independent pharmacists stocked skinny
8 labels, yes, it is a (inaudible).
- 9 Q. Despite open prescription?
- 10 A. Yes.
- 11 Q. Now, I think you would also agree, as I think you have
12 basically agreed this with Mr Brealey, that the key
13 concept of a competitive constraint in the context of
14 market definition is a question of the sufficiency of
15 the constraint; do you agree with that?
- 16 A. Yes. It is the sufficiency on the constraint on the
17 ability of the firm supplying the focal product to set
18 certain prices and sell certain quantities. I want to
19 see what is the impact on the profit of that firm, yes.
- 20 Q. Yes, there has to be a certain minimum level of
21 sufficiency?
- 22 A. Yes.
- 23 Q. Now, your report does not cite any direct evidence of
24 attempts by Auden's customers to negotiate a better
25 price, does it?

1 A. Negotiations, so ...

2 Q. Attempts by Auden's customers to negotiate a better
3 price?

4 A. My report does not -- does not focus on negotiation. It
5 looks at some switching, looks at behaviour of prices
6 and quantities, yes.

7 Q. Okay, well, let us look at some of the evidence. We can
8 start with Boots which Mr Brealey touched upon briefly,
9 and he showed you a reference to the transcript which
10 I will not go back to. Can we please look at
11 {IR-H/1256/1}, please. This is Boots. If you can look
12 at the bottom of the page, do you see that,
13 Professor Valletti?

14 A. 2.1?

15 Q. Yes. It says:

16 "Price is a factor that Boots considers when
17 deciding which product to purchase and dispense, but it
18 is not the only factor, and patient safety is the most
19 important factor."

20 So that is a general point.

21 If we then go over the page, please {IR-A/1256/2}.

22 They say:

23 "For 10mg hydrocortisone tablets, price was not
24 a factor because licensing indications determined which
25 hydrocortisone tablets Boots needed to use before Boots

1 turned to considering price."

2 Then the same again at 2.3:

3 "Boots considers the indications covered by
4 a product before looking at price."

5 Then at the bottom of the page, 2.9, they say:

6 "The situation was different for 20mg hydrocortisone
7 tablets [and so on] ... In that case, price was one of
8 a number of relevant factors for Boots in considering
9 which ... tablets to use."

10 Now, one more document and then I am going to ask
11 you some questions. It is {IR-H/1097/5}, please. If
12 you can look under (c):

13 "Has Boots threatened to switch to skinny label
14 product in an effort to secure a price decrease from
15 Actavis UK?

16 No, Boots has not threatened Almus Pharmaceuticals."

17 A. Can I ask you who is Almus? I do not know who is Almus.

18 Q. It is the in-house brand of Boots.

19 A. Of?

20 Q. Of Boots.

21 A. I am sorry, I did not get that.

22 Q. It is an internal supplier to Boots.

23 A. Of what?

24 Q. Of pharmaceutical products including Hydrocortisone.

25 A. Okay. So it is a wholesaler or --

1 Q. It is part of the same undertaking.

2 A. It is part?

3 Q. Part of the same undertaking.

4 A. Which entity, sorry, I do not understand. Who is --

5 Q. Almus is part of Boots.

6 A. Why then would Boots --

7 Q. Almus is purchasing from Auden in this case.

8 A. So why would Boots threaten -- sorry, you said that

9 Almus is part of Boots. I do not -- okay, but anyway,

10 go on. Because I do not understand the context. So

11 Boots is threatening whom? Almus? Well, and Almus is?

12 Q. Auden supplies Almus, which is part of Boots.

13 A. Yes, so it is a wholesaler.

14 Q. It is upstream and Boots is the retailer.

15 A. Okay.

16 Q. So I would suggest what we see from Boots in these

17 documents is that the price of skinny label is basically

18 irrelevant when it comes to purchasing full label

19 because of its views on dispensing; you saw that?

20 A. We have seen many, if I may give an answer.

21 Q. Let us stick to Boots before you --

22 A. Sure. This is telling me that this is a differentiated

23 product. There are different considerations that the

24 pharmacy is taking into account, and given the price

25 levels at that moment in time, those price differences

1 between full and skinny would not be a factor that Boots
2 would take into account to -- so the price differences
3 were not large enough to let Boots consider the skinny.
4 This is what -- from an economics point of view this is
5 what it means. It is not a general statement that
6 I will never do it, but it is simply, it has to be put
7 again in the financial negotiations that people were
8 doing, they would know what price level was the skinny
9 product, what price level was the full level product and
10 then they would make their own decisions.

11 Q. Professor, we saw what they said: in general price is
12 a factor.

13 A. Yes.

14 Q. By contrast, for 10mg hydrocortisone because of the
15 clinical issue, price is not a factor.

16 A. But I am answering as an economist. I am a bit
17 sceptical when the people say -- and they are, these are
18 business people and I trust them very much, but they say
19 a general statement that can go, you know, all over the
20 place. So if the price of food had not been 60 but 160,
21 560 and it went up, at some stage it would become
22 a consideration of course. So it is important, again,
23 to frame the question in the right way. Boots is making
24 a commercial decision taking into account a bunch of
25 factors including their own perception about risk, etc.,

1 given the price differences that they observed in the
2 market they would consider that the price of skinny was
3 not a factor for them in that moment in time. This is
4 what it means to me as an economist.

5 Q. They say more than that and let me see if you agree or
6 disagree. They are saying for this particular product
7 because of the clinical ethical issues they come first
8 and price is not relevant and they are saying in effect
9 no matter what the price of skinny, for clinical or
10 ethical reasons we cannot switch. That is what they are
11 saying.

12 A. Tell me when was this conversation happening, please,
13 which point in time?

14 Q. April 2021.

15 A. Okay. So April 2021 and they were referring
16 to April 2021 or they were referring to the beginning of
17 the period?

18 Q. They were referring to all periods because we know that
19 Boots has de minimis purchases of skinny.

20 A. Then I am surprised because by 2021 everybody knew that
21 there was no medical restrictions at all so they were
22 referring probably to 2016, to early 2016.

23 Q. You are saying they made this up?

24 A. No, I am just trying to understand. Sorry, I have not
25 interviewed Boots so I am trying to --

1 Q. The CMA has and you have seen what they have said?

2 A. Yes, I do not know what the question was. Was it about
3 2015, 2016? Which part of the time are we talking
4 about?

5 Q. Any period.

6 THE PRESIDENT: Professor, just pausing there. You have
7 said a couple of things that everybody knew there was no
8 medical restriction at all. I just want to unpack
9 exactly what you are saying because there are, I think,
10 layers in terms of how preferences were articulated in
11 this particular market.

12 So one has got most fundamentally what the law says
13 regarding the prescribing of on label and off label
14 products and that is not a matter for you. It is not
15 a matter for any of the experts. It actually is not
16 a matter for anyone other than the tribunal.

17 One then has a sense of the commercial perception or
18 the perception of players in the market as to what the
19 law entails. They may get it wrong, they may get it
20 right. In a sense that is not something which again you
21 can assist on. You might have your own views, but what
22 the market participants considered subjectively might be
23 completely wrong but might be in terms of
24 substitutability, for example, extremely significant if
25 they have a sense that there is a -- for no very good

1 reason -- a legal inhibition in preventing them from
2 doing something, and that to an economist is as
3 important as an objective constraint on choice. Would
4 you accept that?

5 A. I would. I was trying to understand the period they
6 were referring to because I totally accept there was in
7 particular some uncertainty at the beginning when skinny
8 were launched because it was a novelty and, as we also
9 know, there was Project Guardian that was actually
10 launched to try and influence the market perception. So
11 some of this perception could have been polluted even by
12 the behaviour of Auden. I do not know. I just do not
13 know.

14 I would imagine that this would be particularly
15 relevant at the beginning of the entry of skinny label.
16 That is why I was asking -- and then I would imagine as
17 an economist because of observation of things, because
18 of word of mouth, that over time this would fade away.

19 MR O'DONOGHUE: Professor Valletti, at no stage did Boots'
20 purchases exceed 1% of skinny?

21 A. I do not know. The data we have in the Decision are
22 between only 2016 and 2017. They did buy some skinny
23 for kids I think but --

24 Q. In diminished quantities.

25 THE PRESIDENT: Professor, just to close that thought. In

1 a sense, does it matter whether they are objectively
2 incorrect in their assessment? I mean, the fact is they
3 may have taken a view, we will have to look at the
4 evidence, but really what I am unpacking is that this is
5 evidence you cannot give. The line that Boots may have
6 taken is that they were under no circumstances going to
7 permit off-label prescribing because for whatever
8 reason, reputational or a desire to stick strictly to
9 their understanding of the law, they were only prepared
10 to allow skinny label to be dispensed to those who
11 absolutely fell within the designations in the list of
12 treatments that were appropriate to that drug, even
13 though it was pharmaceutically exactly the same.

14 Now, that may be -- it may be right or wrong, it may
15 be reasonable or unreasonable, but at the end of the day
16 we are going to have to look at this separately from
17 what your subjective view is on this, because it is
18 outside economic expertise. It is how the market was
19 operating.

20 A. You are absolutely right, and sticking to my economic
21 expertise I just reiterate what I said a bit earlier,
22 that when they say "under no circumstance", for me the
23 circumstances are: the price is available at that point
24 in time, there is a trade-off they were making and they
25 decided that given that range of prices they could

1 A. Yes.

2 Q. Now, you touched on Lloyds briefly with Mr Brealey, and
3 given that Lloyds also made de minimis purchases of
4 skinny, would you also agree for Lloyds that given their
5 clinical and ethical requirements skinny label from
6 their perspective would also not be a sufficient
7 constraint?

8 A. A sufficient constraint? Okay.

9 Q. Now, can we look at Intas. It is {IR-H/1111/3}, please.
10 So, as you know, Intas is one of the subsequent owners
11 of the Auden business.

12 A. Yes.

13 Q. This is an information request response from them. If
14 we can go to page 3, please, {IR-H/1111/3}.
15 Professor Valletti, if you look under question 2 you see
16 Intas was asked:

17 "... provide all contemporaneous documents dating
18 after ... January 2017 that record:

19 (a) AAH/Lloyds and/or ... Boots threatening 'to
20 switch all or parts of their demand [for Hydrocortisone
21 Tablets] to Actavis UK's competitors in order to obtain
22 the best terms and conditions, including price' ..."

23 Then if you look at its response, it is the second
24 paragraph. Do you see that?

25 A. Second paragraph as set out, or --

- 1 Q. Actavis.
- 2 A. Actavis UK.
- 3 Q. If you can read that, "Actavis ... is not able", do you
4 see that?
- 5 A. Yes. Can I read it?
- 6 Q. So they could not provide a single document evidencing
7 these threats to switch as a result of receiving
8 a better price. Do you see that?
- 9 A. They say nevertheless the risk of AAH or Alliance could
10 switch is a real one as demonstrated by the number of
11 customers who have already done so.
- 12 Q. Yes?
- 13 A. They say -- yes.
- 14 Q. That is fair, they could not provide a single piece of
15 evidence in support of that, at least a document,
16 a contemporaneous document?
- 17 A. "As demonstrated by the number of customers", it is
18 interpretation of the statement. I see both ways, but,
19 yes.
- 20 Q. We will come back to the second part. But can we at
21 least agree they could not provide a single document
22 evidencing these threats?
- 23 A. Yes.
- 24 Q. That is what they say.
- 25 A. That is what they say.

1 Q. So if we then go to AAH, it is {H/1013/4}, please. You
2 will see under (e) on the left there is a question, and
3 on the right there is an answer.

4 A. Can I see the question?

5 Q. So, on the right they said:

6 "We did not transfer our business to the Bristol
7 product despite the fact that Bristol's commercial offer
8 was more attractive to that from Actavis because the
9 product from Bristol Labs was not licensed for all of
10 the indications ..."

11 And so on.

12 So even when faced directly with the much more
13 attractive skinny label offer, AAH was unable or
14 unwilling to take it; yes?

15 A. Again, I am reading this part of the answer. I do not
16 know at all the context of this, which period it refers
17 to, but, yes, they say we did not transfer -- I am
18 reading the answer, yes.

19 Q. But the context is clear, I would suggest. There was on
20 the table a better price for skinny from Bristol, more
21 attractive, and they rejected that lower price because
22 of the licensing indication issue; do you see that?

23 A. They also say -- and again this is a document which,
24 I apologise, is new to me, so to extract it out of
25 everything it is a bit difficult to comment upon. At

1 question (d) above:

2 "Whether AAH has ever engaged with alternative
3 supplier(s)"

4 And it says:

5 "We have sourced Hydrocortisone 10mg Tabs from
6 Bristol Labs since October 2015 ..."

7 So they simply say they did not transfer, maybe our
8 business, their entire business. I cannot answer, to be
9 honest.

10 Q. Well, I am putting to you a very specific point which
11 is: when they are presented with a better price from
12 Bristol Labs they are not willing or able to accept it
13 for clinical or ethical reasons.

14 A. So, I know that AAH has been selling both full and
15 skinny label, so it is not that they only offer full
16 labels. We have seen the data before. Maybe do we need
17 to go back to that those? They have been selling both,
18 and as I said, in 2017 it was 20% which increased to
19 30%. So they have been selling skinny labels. I do not
20 know where they procured them from. Apologies, I do not
21 know that. But they have been selling --

22 Q. We will come back to the data. I am not shutting you
23 out. We will come back to the data, I promise you that.

24 A. Yes.

25 Q. Now, let us just wrap this up with two more, please.

1 Rowlands and Well. Can we go to the transcript on
2 Day 7, please, page 59, this is the cross-examination of
3 Mr Bishop. I think you were here for this. It starts
4 at line 23 {Day7/59:23}. It is in the middle. Do you
5 see reference to Rowlands and Well?

6 A. Yes, line 13 {Day7/59:13}.

7 Q. Yes, thank you. If you can read that. (Pause)

8 So what Mr Holmes is putting to Mr Bishop is, again,
9 it is the same point: for these clinical ethical reasons
10 these pharmacies were unwilling or unable to accept
11 a low price for skinny labels, so in other words
12 the price of skinny was not for their purposes
13 a constraint in the context of purchasing full; do you
14 agree with that?

15 A. I do agree that Rowlands, Well and other pharmacies
16 considered full label as a product that had less risky
17 implications. So I do not know if they ever did
18 trade-offs or not. I just know that they decided -- so
19 they are more price-inelastic for sure. That is what
20 I know.

21 Again, we go back to the thing they will never
22 consider at all -- as an economist I said earlier I am
23 a bit sceptical that these grand statements can be done
24 over a large range of prices. Over the range of prices
25 that we are considering, I do totally accept that

1 Rowlands and Well and previously Boots, they could not
2 consider switching to skinny label, I do accept that.

3 Q. Now, the one example you do give, which you have touched
4 upon with Mr Brealey, is Morrisons. Can we look at
5 that, please. So, you say in your report at 37
6 {F/1/16}:

7 "Morrisons switched back and forth although only
8 once;"

9 Do you remember that?

10 A. Yes, in March 2017, I think, or something like that?
11 2016, yes?

12 Q. Yes. Can we go to {IR-H/1058/1}, please. This is
13 an exchange between Morrisons and the CMA. Now, some of
14 this I think is confidential, particularly the names
15 so -- can we look at the IR version, please
16 {IR-H/1058/1}. So the bits in red are confidential,
17 Professor Valletti. This is an exchange between the CMA
18 and Morrisons. Now, if we scroll down to page 3, please
19 {IR-H/1058/3}, you will see at the bottom if you can
20 quickly look at that, there was a degree of confusion
21 between Morrisons and the CMA as to exactly what
22 Morrisons were saying about switching. Do you see that?

23 A. (Pause) Okay, yes.

24 Q. If we then go to page 1 at the top, please
25 {IR-H/1058/1}, you will see the confusion was clarified.

1 So they say:

2 "The Superintendents instructions applied to all
3 purchases since April 2017. Once the Superintendent was
4 fully aware of the situation, Full Label was his
5 preference, as it allows our Pharmacy Teams to dispense
6 without having to check/research which licensed
7 indications are covered by the Skinny Label, thus making
8 the dispensing process easier and safer for stores and
9 customers."

10 So the initial switch in 2016, which is the bit you
11 rely on, that was basically a mistake by Morrisons and
12 once the situation came to the attention of the
13 superintendent Morrisons switched back to full and did
14 not switch again; correct?

15 A. "Mistake" is your term. So I would not call it
16 a mistake, because I am not in a position to decide
17 whether it was a mistake or not. They tried, they
18 switched and then they switched back. That is what
19 I observed.

20 Q. Well, they say a bit more. They say it is "easier and
21 safer"?

22 A. Sure. They had a preference. It is very clear that
23 they had a preference for full label. It is written,
24 "Full label was his preference". So -- these are
25 differentiated products -- there has never been any

1 disagreement that there is a differentiation between
2 products where full is perceived as being a better
3 product by some pharmacies, not by all.

4 Q. But do you at least now accept this is not actually
5 a good example of switching at all?

6 A. I have no reason -- so, it is an example of switching.
7 So, a good example, what -- can you qualify what a good
8 example is?

9 Q. There was an initial switch to skinny, which you rely
10 on. The superintendent intervenes and for reasons of
11 safety and ease of internal use they switch back to full
12 and do not switch again to skinny save in de minimis
13 quantities?

14 A. Sure, that is the preference of Morrisons, yes.

15 Q. It is not therefore a good example of switching from
16 full to skinny?

17 A. Morrisons is a large national supermarket chain, as we
18 discussed also earlier, this other example like Tesco
19 that instead decided to have only skinny, and
20 Sainsbury's decided not to. So there have been
21 different views taken by different pharmacies even if in
22 principle they look similar in terms of business models,
23 because these are pharmacies inside supermarkets, but
24 there are different views, yes.

25 Q. But I would suggest, what you say in your report is at

1 best incomplete. You said they switched only once, but
2 what you omitted in your report was to say, yes, and
3 they switched back to full --

4 A. So --

5 Q. -- for clinical and other reasons and did not switch
6 again.

7 A. So I should have written perhaps they switched back and
8 forth only once. That is what I meant, yes. They
9 switch once and back and forth, yes.

10 Q. Well, it is an important difference?

11 A. Well, I think -- okay, yes, it is. Let me leave it
12 there.

13 Q. Now, finally, so these are on the larger pharmacies, if
14 I can call them that.

15 A. Which pharmacies, sorry?

16 Q. The larger pharmacy chains. They are the ones I have
17 been showing you; correct?

18 A. The independent or the large national ones?

19 Q. The ones we have seen are the large nationals.

20 A. So far, yes.

21 Q. So just to round this off and put the point to you in
22 a plain way, if we go again to the transcript on Day 7,
23 page 83 {Day7/83:1}. So this is Mr Holmes again with
24 Mr Bishop. So Mr Holmes says:

25 "Question: Again, if Lloyd was generally making its

1 decisions to a material extent on the basis of price,
2 would you not expect it to purchase a much higher
3 proportion of skinny label tablets given how much
4 cheaper they were and the significant extra profit they
5 could have earned if they purchased and sold more skinny
6 label tablets?"

7 And Mr Bishop agreed.

8 Now, I think you agree with me that that basic
9 proposition is equally true for essentially all of the
10 large national pharmacies; correct?

11 A. Let me read it again, if you do not mind.

12 Q. Yes. (Pause)

13 A. Yes, so Lloyds is one of those pharmacies who do have
14 a preference for full, yes.

15 Q. Well, I am putting a broader point to you. Let me just
16 put it very clearly: for these large national pharmacies
17 the price of skinny is not a sufficient constraint on
18 the price of full because they have decided for all or
19 most of their requirements that for clinical or other
20 reasons they will not substitute between skinny and
21 full?

22 A. So, again, I am pretty sure that discussion was in the
23 context of dominance of course. So you are dragging me
24 back into something related to market definition. So
25 first of all, to assess the purpose of market definition

1 it is not possible to discriminate between different
2 types of pharmacies. I think that has been discussed
3 last Friday. Perhaps it may be useful to do it at least
4 once. Imagine you wanted to run a SSNIP test which you
5 do not have to.

6 Q. I am going to come to the SSNIP test in some detail.

7 A. Right. So -- this is saying that Lloyds was price
8 inelastic. This is what it is saying. So we do observe
9 a higher price that Lloyds would pay for full because
10 the wholesaler has a derived demand coming from this
11 kind of pharmacist.

12 Q. So we see they are leaving a lot of money on the table.

13 A. Who is leaving a lot of money on the table?

14 Q. These pharmacies because they could, at least in theory,
15 substitute full for skinny?

16 A. They have -- we agree. They have a preference for full.

17 Q. But they are leaving a lot of money on the table. We
18 know the difference is hundreds of per cent, correct?

19 A. They have a preference so they are making their own
20 trade-offs and they have a preference for full label.

21 Q. We know under the drug tariff that they are reimbursed
22 at a single price and therefore they have strong
23 incentives if possible to dispense a cheaper product?

24 A. That is much more complicated than that because
25 unfortunately when they are reimbursed also their own

1 profitability is capped overall, so this is a bit more
2 complicated.

3 Q. All else equal --

4 THE PRESIDENT: Just pausing there. I am not conscious of
5 having seen, and I am sure my fault, an on-paper
6 articulation of exactly how much money they are leaving
7 on the table in choosing skinny over full label. Purely
8 for my own note I think it would be helpful to have --

9 MR O'DONOGHUE: Let me put it to the witness.

10 THE PRESIDENT: -- that material.

11 MR O'DONOGHUE: Forgive me.

12 We know that throughout the post-entry period
13 the price differential between skinny and full ranged
14 from hundreds of per cent to on the latest data 100%,
15 correct?

16 A. Yes, that is a figure we started from this afternoon
17 I think, yes. Well, these are percentages and then you
18 may also want to look at the absolute differences.
19 Those were also significant, yes.

20 Q. So these large national pharmacies were leaving a large
21 amount of money on the table by not taking the lower,
22 the considerably lower skinny label price. Do you agree
23 with that?

24 A. If you do not take into account the characteristics of
25 those goods, yes, but they had a preference over the

- 1 characteristics of those goods.
- 2 Q. To put the question another way. At least for these
3 customers, in what meaningful sense is the price of
4 a skinny label product a direct constraint on their
5 purchases of full label product? It simply is not, is
6 it?
- 7 A. Well, when you are looking at the market overall you
8 keep to the -- you ignore half of the market 50% --
- 9 Q. I am coming to the other half. Let us focus on this
10 half.
- 11 A. So I do not see the market segmentation in prices in
12 terms that you suggest.
- 13 Q. It is a simple question. You have agreed with me they
14 are leaving a huge amount of money on the table. Under
15 the drug tariff all else equal their margin will be
16 considerably larger if they purchased skinny over full?
- 17 A. Yes, but they would purchase --
- 18 Q. And they do not?
- 19 A. -- a good with characteristics they like less. These
20 are differentiated product markets. This is a better
21 product, a lower quality product and they prefer to pay
22 a higher price for the product which has better
23 characteristics from their perspective.
- 24 Q. I am focussing now on price. On what sense, therefore
25 in what meaningful sense is the price of skinny label

1 directly constraining full label for these customers?

2 A. As I think I have said earlier, if you start making that
3 gap bigger and bigger they will at some stage change
4 their mind.

5 Q. We know the gap was hundreds of per cent and they did
6 not change their mind?

7 A. But the gap is 100%, but there was significant market
8 power that Auden was able to exercise over those --
9 indirectly because they are selling through the
10 wholesaler -- over those pharmacies. I agree with that.

11 Q. Now, you mentioned the other segment. I want to come to
12 that. I think we can take this a bit quicker, at least
13 I hope we can.

14 What we are looking at now is customers who only or
15 at least primarily purchased skinny label. Now, as we
16 have just I think agreed we know that throughout the
17 post-entry period the price of full label remained for
18 most of that period hundreds of per cent above skinny
19 label and on the most recent data from 2021, it remains
20 double the price of skinny. So I would suggest it is
21 obvious that if you were a price-sensitive customer
22 the price of full label is basically irrelevant, is it
23 not?

24 A. So, I am not sure about the question, irrelevant. It is
25 a better-quality product which is priced at a higher

1 level. They also make their own trade-offs. They are
2 much more price-sensitive and they decide to go for the
3 lower quality product which is sold cheaper. I would
4 not say that is irrelevant. For instance, if the two
5 goods were sold at the same price if they were, imagine
6 they were, because this is going to be the starting
7 point if you want to do a proper SSNIP test by the way.

8 Q. Do not worry about --

9 A. If they were sold at the same price, probably I would
10 argue that they would go for the full label. If both
11 products were sold at £2, I bet they will buy the full
12 label, not the skinny. So it is not irrelevant at all.

13 Q. Let us put it in simple terms. The price of skinny is
14 £1 and the price of full is £4, £5, £3?

15 A. Which is not a competitive price, yes.

16 Q. The price of full is irrelevant to a price-sensitive
17 customer. There is no universe in which they would pay
18 that price?

19 A. So if the price differential is high enough those
20 pharmacies which are price-sensitive will not consider
21 the full label, but as you reduce the gap they will
22 consider the full label. So you just said no universe
23 and I have just given you a very plausible if the prices
24 are lower, they will consider it of course.

25 Q. But even at excessive prices -- that is the CMA's

- 1 case -- they still would not purchase?
- 2 A. I am sorry, if the price of full is excessive --
- 3 Q. Yes, that is the CMA's finding.
- 4 A. No, they would not. We have observed that they did not
- 5 consider it at the excessively high price of the full
- 6 label, yes.
- 7 Q. Can we look at what your report says on this. It is
- 8 paragraph 74. {It is IR-F/1/30}. It is about
- 9 two-thirds of the way down paragraph 74. Do you see
- 10 where it starts:
- 11 "If Auden did offer a discount ..."
- 12 A. Not yet, sorry. Yes.
- 13 Q. About two thirds of the way down, Professor Valletti:
- 14 "If Auden did offer a discount, it is very likely
- 15 that this could backfire as captive customers could put
- 16 some pressure on Auden/Actavis to benefit from that
- 17 discount too. Instead, Auden/Actavis likely optimises
- 18 its price over its captive market, and has nothing to
- 19 lose by offering the same price also to the non-captive
- 20 segments ..."
- 21 And so on.
- 22 A. Yes.
- 23 Q. What you are basically saying there, correct me if I am
- 24 wrong, is that Auden is focused on maximising price for
- 25 its captive customers, those who only mainly take full

- 1 label, correct?
- 2 A. So what I am saying there, because the discussion about
3 price discrimination, I said I do not find it plausible
4 that Auden/Actavis would offer for full label
5 a different price according to who is the ultimate
6 customers downstream, so it cannot go to AAH and say,
7 look, if you sell it to Boots I will charge you a lot
8 but if you instead as a wholesaler sell to an
9 independent pharmacy I will charge you a little, because
10 this is not sustainable. This is what I am saying.
- 11 Q. You say they have nothing to lose. I would suggest what
12 you mean by that --
- 13 A. They are profit maximising, yes.
- 14 Q. They have more or less given up on skinny label
15 customers. It has nothing to lose by offering a price
16 which is high because it knows they will never accept
17 it?
- 18 A. I am simply saying that it is profit maximising for
19 Auden/Actavis to concentrate on the segment of the
20 market which is more inelastic, yes.
- 21 Q. But they are making the skinny label customers an offer
22 that they know they will not accept?
- 23 A. Well, sometimes -- as I said, so you have a large market
24 and a small market. If you try to set a low price for
25 one and a high price for the other one there would be

1 lots of arbitrage conditions. You cannot sustain it.
2 So typically what you do is you concentrate on the price
3 on the more lucrative market and there may be also
4 spillover. You set a high price for everybody. That is
5 what you do. It is a very simple position.

6 Q. But the upshot of this is that for skinny label
7 customers Auden is not competing on price?

8 A. Sorry, say that again.

9 Q. For skinny label purchasers Auden is not competing on
10 price?

11 A. So it is not -- probably it is not profit maximising to
12 them to offer a very low price to everybody. It is
13 profit maximising to concentrate on the segment of the
14 market which is more price inelastic. This is what I am
15 saying.

16 Q. Because it knows it will never accept those prices?

17 A. No. So, what I am saying is that if Auden/Actavis
18 decided to compete head-to-head with low -- with the
19 skinny label this could backfire so they would
20 cannibalise their own profits in the profitable segment,
21 so that is why they do not want to do it.

22 Q. So they do not compete?

23 A. It is not because they would not consider it. If
24 the price of full was very cheap, that is to say,
25 the price was similar to the skinny label, they would

1 get many more customers. It is just not in their own
2 commercial interest to do so because they concentrate on
3 the inelastic segment.

4 Q. So they are not competing?

5 A. They decide not to compete.

6 Q. We agree. Let us look at what one of the short-line
7 wholesalers says, DE Pharma. It is {IR-H/1237/2}. If
8 you look at 2.6, please?

9 A. Again, can you give me a bit of context.

10 Q. This is DE Pharma short-line wholesaler. It is a note
11 of a call between DE Pharma and the CMA.

12 A. Thank you.

13 Q. In February 2021. If you can look at the last two
14 sentences of 2.6, please. They say:

15 "Actavis/Accord refused to compete on price with
16 skinny label tablet entrants -- a situation which
17 persists even today."

18 That underscores the point I have just made to you
19 and which I think in paragraph 74 of your report you
20 have agreed with, that Auden has effectively let the
21 skinny label purchasers go. It is not competing for
22 that cohort of customers?

23 A. Okay. Let us take it slowly because I think we are in
24 agreement. So Accord/Actavis has decided to
25 concentrate, for profit maximising reasons, on the more

1 inelastic segment. Okay. That means that given
2 the price differences, because they are exercising
3 market power, the customers that typically buy skinny
4 label would not consider full. That does not imply
5 though that there is no potential for substitution
6 generally between full and skinny label. It is a non
7 sequitur. It does not follow. At the observed prices
8 a customer that Actavis does not want to supply because
9 it is not profitable for them do not find the full label
10 an attractive proposition and they buy skinny.

11 But, but, but, if you did do, for instance -- you
12 said you will come back to it and I have not seen it
13 yet -- to a properly run SSNIP test which has to run
14 from competitive prices, for instance, you said, if the
15 price of both full and skinny was £1 as you suggested,
16 as I said earlier, I bet many skinny customers would
17 actually be very happy to go for the full.

18 Q. I promise you we will come to that, I suspect tomorrow,
19 but I promise you we will come to that.

20 Now, DE Pharma I would suggest is saying something
21 which goes beyond what you suggest. They are saying
22 post-entry Auden has refused to compete in price with
23 skinny and that is true even today, today being 2021?

24 A. So DE Pharma -- the next paragraph says: "Dual listed
25 skinny and full", so they are buying both by the way and

1 "let its customers choose".

2 Q. It does not look like much of a choice, does it?

3 A. It says it is listing both, they are buying both skinny
4 and full.

5 Q. Let us look at what you say in the joint statement,
6 proposition 32. It is {IR-G/1/22}. It is the second
7 paragraph:

8 "The direct constraint arises where pharmacies
9 switch from full to skinny label putting downwards
10 pressure on full label tablet prices, in order to reduce
11 the losses to skinny label tablets, or to recapture some
12 of those lost sales."

13 Can you give me a single example of where Auden
14 dropped its price for full label to recapture lost sales
15 from skinny label at any customer?

16 A. So first I just want to clarify, since you were talking
17 about DE Pharma. DE Pharma, if I go back to the
18 Decision in 2016, they bought 61% of skinny and 39% of
19 full, so, yes, they were carrying both. These are large
20 purchases, so, this is -- but anyway.

21 Q. Let me put the point to you very clearly so there is no
22 misunderstanding. Fine, they purchased both. The point
23 they are making here, which I think you see very well,
24 is there was no competition within skinny coming from
25 full and vice versa?

1 A. At the given prices that they are facing, consumers that
2 buy skinny buy skinny because the other product is too
3 expensive for them.

4 Q. So the answer is yes?

5 A. The answer is not a general statement. It is not that
6 there is no competition whatsoever. This is what we
7 call in economics it is all indigenous. The choices of
8 people are clear. There are two segments. Some prefer
9 one, some prefer the other one given the prices which
10 are in the market and the price differentials.

11 Q. Now, can you answer my other question.

12 A. Sorry, can you repeat the question. I was trying to go
13 back to the previous one.

14 Q. Yes, of course. Can you give me a single example of
15 Auden dropping its price of full label to recapture lost
16 sales from skinny at any customer?

17 A. If you remember the discussion we had earlier, for
18 instance, the time period in 2015/2016 and early 2017
19 most of the drug tariff mechanism is made by Auden's
20 prices, 80% of it, and we see the prices of Auden coming
21 down, substantially. This is evidence that there is
22 competition between Auden full product and the skinny
23 label products. That is the -- and I observe in that
24 period about 40/50% of the market switching. So that is
25 strong evidence I would say, would you not?

- 1 Q. I do not accept that. So I think the answer to my
2 question is no?
- 3 A. Why?
- 4 Q. You cannot give me a single example of Auden dropping
5 its price to meet or beat the price of a skinny label
6 product?
- 7 A. Auden started £72 before entry happens and they drop it
8 in a year -- so we can go to the actual number -- by
9 tens of pounds and they lose 50% of the market. So you
10 both observe switching and price reductions in a moment
11 where indirect constraint is not at work because the
12 other skinny products are not yet part of Scheme M.
- 13 Q. As you say in paragraph 74 of your report, all that is
14 actually happening is that it is letting those customers
15 go. It is not competing?
- 16 A. Again, this is one of those strange questions. They are
17 doing trade-offs. If they had not reduced the price
18 they would have lost even more. So that is a profit
19 maximising choice they were making there. So the right
20 point is not that they let them go. How much it would
21 have lost if they had not reduced the price is the right
22 question, and my answer is they would have lost even
23 more.
- 24 Q. What I suggest to is you is what we see is very clear.
25 Skinny label suppliers only compete with skinny label

- 1 suppliers and therefore do not represent a sufficient
2 constraint on Auden as the only full label supplier?
- 3 A. I disagree with this proposition, as I said many times,
4 because I have observed in the markets rather gigantic
5 changes of quantities going down by 50%, prices going
6 down by 95% for whatever reason. Plus I have observed
7 the Guardian Project. Plus I have observed the
8 agreement precisely at the time when prices were at the
9 highest level in order to delay entry. Plus I have seen
10 the reduction in acquisition price from 520 to
11 320 million. This is all going in the same direction.
12 Also --
- 13 Q. We have heard your mini speech twice already.
- 14 A. Yes, and I think it is very important evidence so it is
15 very difficult for me not to rely on the facts.
- 16 Q. Now, you talk quite a bit in your reports about common
17 sense which I think is what your mini speech is aimed
18 at. Now, isn't it common sense that if full label
19 prices remain hundreds of per cent above skinny, and the
20 volumes basically do not change after 2016, plus or
21 minus 10%, that Auden was simply not competing for
22 skinny label customers; isn't that obvious?
- 23 A. No, it is not.
- 24 Q. Does not it lack common sense to say that a product
25 which is subject to intense competition, the skinny

1 label product, is in the same market as a single
2 supplier product that essentially ignores the existence
3 of skinny label suppliers?

4 A. So, you are conflating once again the absence of big
5 changes in market shares or relative prices which by the
6 way market shares do change and relative prices do
7 change but let us ignore that. You are conflating that
8 with separate markets which is not true. I have given
9 you an example of products which are in the same
10 markets. Once a new equity boom is reached you would
11 not imagine and expect a situation of stability with the
12 market participants with those who prefer product A,
13 those who prefer product B. They are still competing,
14 but you do not observe changes. You do not have changes
15 in demand in cost etc., etc.. So this is again one of
16 those propositions I disagree.

17 Q. In your report you have not looked at any of this?

18 A. What do you mean I have not looked at any of this?

19 Q. You talk about these changes in volumes and you make
20 a causality point. You have not looked at any of this.

21 A. I have not made any causality point. I am simply saying
22 you are making a causality point. You are really
23 putting in my mouth things which I never said. So
24 changes in the market shares by themselves are an
25 indication of nothing, so we cannot conclude anything

1 from the kind of evidence you are putting.

2 Q. We disagree on that. Let us look at what the Decision
3 says. It is {IR-A/12/166}, please. It is 3.329 (b),
4 please, at the top of the page. The CMA says:

5 "After the initial period of switching to skinny
6 label tablets, the continued rivalry between competing
7 suppliers (as seen through the volatile shares) has
8 resulted in prices continuing to fall after the initial
9 phase of entry and prices between those competing
10 suppliers converging with one another over time. By
11 contrast, the gap between Auden/Actavis's prices and its
12 competitors' narrowed more slowly over time (and even
13 increased in relative terms) during the infringement
14 period."

15 Let me show you a second part of the Decision and
16 then I will put the question to you. It is at page 400,
17 please. {A/12/400}. It is 4.274. (Pause) Do you have
18 a hard copy of the Decision?

19 A. I do.

20 Q. It is 4.274.

21 A. Yes, I have it.

22 Q. If you can quickly look at that. (Pause).

23 A. Yes, I have read it.

24 Q. Sir, would you like me to wait? Maybe it is safer to
25 wait.

1 THE PRESIDENT: Yes, we will have to look overnight to
2 ensure the system speeds up.

3 MR O'DONOGHUE: It is not having a great day, sir, from that
4 perspective.

5 THE PRESIDENT: We will take that on board but I think it is
6 probably better if you wait for the document to come up.
7 Annoying, but ... (Pause).

8 MR O'DONOGHUE: Can you see:

9 "However, Actavis' market share then stabilised at a
10 time when its competitors' prices continued falling
11 faster than its own prices. This is direct evidence
12 that Actavis was not losing any market share despite its
13 competitors' tablets becoming relative cheaper in
14 relation to its own provides a strong demonstration that
15 Actavis retained an ability to price above competitive
16 levels thereby demonstrating its market power."

17 Now, the two passages I showed you are they not
18 effectively saying there was no substitution in relation
19 to large relative prices and is not this exactly what is
20 needed to sustain separate markets and it is clearly
21 absent in this case?

22 A. Well, these two things you are citing are precisely
23 where we started from this afternoon by the way, where
24 we saw that the market share kind of fluctuate around
25 50% in terms of volumes, physical volumes, but not in

1 terms of monetary value because there was also an
2 increasing relative price during the dominance period.
3 So these two pieces of are exactly just the mirror image
4 of those two figures. This is not saying anything about
5 whether these two products belong to the same market.
6 They are simply saying that Auden/Actavis found it
7 profit maximising to exercise its market power over one
8 segment of it and at those prices they stabilised the
9 market and made a lot of money. That is all it is
10 saying. It does not say anything about whether these
11 two products are or are not in the same market.

12 Q. What it is clearly saying is that despite this enormous
13 gap in prices the skinny could not constrain the full?

14 A. This is saying.

15 Q. That is why Auden could price substantially above
16 competitive levels?

17 A. This is saying Actavis was exercising market power over
18 the segment of the market who had a strong preference
19 for full label.

20 Q. By pricing above competitive levels?

21 A. Yes.

22 MR O'DONOGHUE: Sir, Professor Valletti has a family
23 commitment I think at 4.30.

24 A. At 5.

25 MR O'DONOGHUE: I am about to move on to something different

1 anyway so that may be a convenient moment.

2 THE PRESIDENT: I am very grateful.

3 Just before we rise, if we turn up the transcript,
4 page 79, you suggested to the witness in a number of
5 different ways that skinny label price is not
6 a constraint on Auden as the only full label supplier.
7 So looking at your question, Mr O'Donoghue, at the top
8 of page 79 -- let us wait for the transcript to come up.
9 (Pause).

10 What you say is I will read it out.

11 "Question: What I suggest to you is what we see is
12 very clear. Skinny label suppliers only compete with
13 skinny label suppliers and therefore do not represent a
14 sufficient constraint on Auden as the only full label
15 supplier."

16 We have heard the witness's answers to
17 that.

18 I just want to get clear the implication of that.
19 I mean, what you are saying, Mr O'Donoghue, is that when
20 one looks at the price curves of full label and skinny
21 label and the various graphs we have looked at, and we
22 do not need to bring those up, the extent to which one
23 curve tracks the other, and it is not perfect, but the
24 extent to which one curve tracks the other is simply
25 a coincidence and there is no correlation or causative

1 correlation between the two. That is the point you are
2 putting.

3 MR O'DONOGHUE: Sir, in part, yes, of course. We do make
4 a correlation point in the paper submitted yesterday
5 which is there is a correlation but it is with the drug
6 tariff but there is no correlation in terms of direct
7 constraint from skinny.

8 Sir, on that the Tribunal has received the note from
9 Dr Bennett as requested.

10 THE PRESIDENT: Yes.

11 MR O'DONOGHUE: I do not know if the CMA wishes to show that
12 to Professor Valletti. We would certainly have no
13 objection. There is a subsidiary question as to whether
14 Dr Bennett will be recalled and if so logistically how
15 that may proceed. I appreciate Mr Holmes has not had
16 this long. Maybe we are better off coming back to this
17 tomorrow.

18 THE PRESIDENT: Indeed, we will not ask any further
19 questions but, Mr Holmes, it seems like a good idea,
20 given Mr O'Donoghue's very helpful suggestion, that
21 Professor Valletti do see Mr Bennett's document.

22 MR HOLMES: Sir, I respectfully disagree. The appropriate
23 course in my submission would be to allow us to consider
24 what is effectively a third report from Dr Bennett with
25 Professor Valletti after he has finished his evidence.

1 He can then consider whether he wishes to respond in
2 a considered way in writing. But it would be
3 appropriate for him to consider that with us and to
4 prepare a considered response rather than having to
5 respond on the hoof and without having had any
6 consideration of it with the wider CMA team.

7 As a further point, we have not yet had an
8 opportunity to ask any questions of Dr Bennett about
9 that note. It was received yesterday evening. The
10 ordinary course would be to cross-examine Dr Bennett
11 first on his evidence rather than proceeding in reverse
12 order and asking questions of Professor Valletti about
13 new written material from another of the experts which
14 has only just been submitted.

15 THE PRESIDENT: On the other hand, there would be no
16 objection to the points articulated by Mr Bennett being
17 put in cross-examination --

18 MR HOLMES: I am not suggesting --

19 THE PRESIDENT: -- if that were --

20 MR HOLMES: -- questions cannot be asked that cover the same
21 subject matter. I agree that they can, but to ask
22 questions directly about analysis or argument contained
23 in that note in our submission would not be appropriate.

24 MR O'DONOGHUE: Sir, I am somewhat surprised. I mean, this
25 is a point Dr Bennett covered in his evidence.

1 Professor Valletti has already made a point about the
2 lag. It is a handful of pages. One has to keep a sense
3 of proportion and practicality.

4 MR HOLMES: There is new material about correlation which we
5 apprehend is in response to a question from
6 Professor Mason.

7 THE PRESIDENT: Yes, we set this hare running not
8 Mr O'Donoghue. What we will do is this: I cannot see
9 any harm in Professor Valletti seeing the document and
10 I think it would save time if we go down a certain route
11 for him at least to have read it.

12 So, professor, if you do not mind.

13 A. Just to clarify, when do I need to read them? Tonight?
14 In order to be cross-examined tomorrow morning at 10?

15 THE PRESIDENT: I am not going to make any ruling about
16 whether these points should be put because I want to
17 think about what Mr Holmes has said. I just want you to
18 read it. If you do not have time tonight do not worry.

19 A. I will do my best.

20 THE PRESIDENT: Because we all have other things to do, but
21 to the extent one can shortcut the process by reading
22 out of court what would have to be read in court I can
23 see no harm in that but we will consider this question
24 overnight. I am bound to say, I have only read the
25 document once myself, so I suspect a re-read is

1 appropriate on our part and we will come back in the
2 morning with a clearer direction as to what we think
3 should be done.

4 But I think, Mr Holmes, it would be helpful --
5 I appreciate you will not have Professor Valletti's
6 assistance, but I think it would be helpful to know
7 whether you would want Mr Bennett to come back to be
8 cross-examined on this document or not.

9 MR HOLMES: We are not yet in a position to say, sir. We
10 hope that it may be possible to deal with the note in
11 submission but we are still considering that question.
12 We only received the document after business hours last
13 night.

14 THE PRESIDENT: I appreciate that. All I am saying is that
15 if you reach a view on this, it would be helpful to
16 know. I quite understand that I am not going to force
17 the pace on this. You need to take your own time to
18 consider it because it is a document only recently
19 received. But it does make a difference I think in
20 terms of what approach we take to this material because
21 on any view I suspect it would be useful to have
22 Professor Valletti's views on the document but we do not
23 want either the CMA or the witness to be prejudiced by
24 what is lately produced material, and I say that
25 entirely without criticism because, to repeat, this is

1 a hare we have set running rather than you.

2 MR HOLMES: I am grateful, sir. May we also provide
3 Professor Valletti with a copy of the transcript of
4 today's proceedings?

5 THE PRESIDENT: Yes, well, I believe that is normal course
6 in these cases. I cannot see any objection.

7 MR O'DONOGHUE: We have no objection.

8 A. Just a pragmatic question. How big is the report, are
9 we talking about four pages?

10 MR HOLMES: Five or six pages.

11 A. Just to have an idea because otherwise it is a very
12 abstract discussion. I will do my best.

13 THE PRESIDENT: It is six pages long but single spaced
14 aerial which usually means about 10 pages in times
15 Roman. I think that is the --

16 MR O'DONOGHUE: And figures and texts, sir.

17 THE PRESIDENT: And figures. Some people might say that
18 makes it worse rather than better but I will not say
19 that.

20 Professor, I do not want you to be in any way
21 inconvenienced by this, so if you do not have time to
22 read it do not worry.

23 A. I am very happy to receive it.

24 MR O'DONOGHUE: Dr Bennett is here today and of course can
25 be here tomorrow.

1 THE PRESIDENT: Thank you very much.

2 MR HOLMES: I am so sorry to interrupt. I understand there
3 are some underlying data sets which are relied upon by
4 Dr Bennett and if we may we propose to provide those as
5 well as the report itself. Of course unannotated. I am
6 sure my learned friend will not have any objection.

7 MR O'DONOGHUE: We do not think there are any underlying
8 data sets.

9 MR HOLMES: There is a correlation analysis which is based
10 upon data.

11 THE PRESIDENT: Look, I think Professor Valletti will have
12 quite enough to read with just the report itself. If
13 you have anything else that you think he needs to read
14 in order to comment on this, then run it past
15 Mr O'Donoghue and you can then provide it to him, but
16 I do not want material that Mr O'Donoghue would object
17 to going to the witness. So given that there is
18 a dispute about whether there are underlying data sets
19 or not, it seems to me that --

20 MR O'DONOGHUE: As I understand, it comes directly from data
21 in the Decision.

22 THE PRESIDENT: The source is always important. It may be
23 no more than identify what the source is in the Decision
24 --

25 MR HOLMES: I will take it up with Mr O'Donoghue afterwards.

1 THE PRESIDENT: -- in which case all I want is there to be
2 no complaint from Mr O'Donoghue's team that you have in
3 some way been steering the witness. I know you would
4 not want to, but it is better to be more careful than
5 not when communicating to a witness in the witness box.

6 MR HOLMES: That is well understood.

7 THE PRESIDENT: I am grateful.

8 Professor, thank you very much. We will see you at
9 10 o'clock tomorrow morning when we will resume and
10 until then thank you very much.

11 (4.35 pm)

12 (The hearing adjourned until Wednesday, 7 December at
13 10.00 am)

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