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**IN THE COMPETITION  
APPEAL TRIBUNAL**

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

Case Nos. 1251/1/12/16  
1252/1/12/16  
1253/1/12/16  
1254/1/12/16  
1255/1/12/16  
  
13 May 2016

Before:

**THE HON. MR. JUSTICE ROTH**  
(President)  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

<b>GENERICS (UK) LIMITED</b>	<u>Appellant</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>
- AND -	
<b>GLAXOSMITHKLINE PLC</b>	<u>Appellant</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>
- AND -	
<b>(1) XELLIA PHARMACEUTICALS APS</b>	
<b>(2) ALPHARMA LLC</b>	<u>Appellants</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>
- AND -	
<b>ACTAVIS UK LIMITED</b>	<u>Appellant</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>
- AND -	
<b>MERCK KGaA</b>	<u>Appellant</u>
- and -	
<b>COMPETITION AND MARKETS AUTHORITY</b>	<u>Respondent</u>

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**CASE MANAGEMENT CONFERENCE**

## **APPEARANCES**

Mr. Stephen Kon and Mr. Christophe Humpe (Partners, of King & Wood Mallesons LLP) appeared on behalf of the Appellant (Generics (UK) Limited).

Mr. James Flynn QC, Mr. David Scannell and Miss Charlotte Thomas (instructed by Nabarro LLP) appeared on behalf of the Appellant (GlaxoSmithKline PLC).

Mr. Robert O'Donoghue (instructed by Clifford Chance LLP) appeared on behalf of the Appellants (Xellia Pharmaceuticals ApS and Alpharma LLC)

Ms. Sarah Ford (instructed by King & Wood Mallesons LLP) appeared on behalf of the Appellant (Actavis UK Limited)

Ms. Ronit Kreisberger (instructed by DLA Piper UK LLP) appeared on behalf of the Appellant (Merck KGaA).

Mr. Jon Turner QC and Mr. David Bailey (instructed by CMA Legal for the Competition and Markets Authority) appeared on behalf of the Respondent.

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1 THE PRESIDENT: Good morning everyone. You have all had the agenda. Thank you, as  
2 always, for your helpful written observations. I will not precisely follow the order of all the  
3 items on the agenda, but we can start with item 1: "The forum". All the submissions are  
4 that this should be England and Wales, and I agree and will make an order accordingly  
5 under Rule 18 of the Tribunal Rules.

6 Secondly, on the conduct of the five appeals it is clear from what everyone has said they  
7 should be heard together. In my view it is not appropriate to order consolidation.

8 Consolidation, as a concept, normally means they become a single appeal and usually have  
9 single representation and that is obviously not appropriate here. I have seen what the CMA  
10 said about it. There is no problem having a single hearing and producing a single judgment  
11 and, indeed, having a consolidated defence to all the appeals, but they will remain separate  
12 appeals and there will be separate orders at the end. We will seek to structure the hearing so  
13 that parties who are not concerned with an issue that is limited to only some parties can  
14 avoid having to attend that part of the hearing. The obvious aspect is the Chapter II finding  
15 and GSK's appeal against that. I shall order that they be heard together and the CMA may  
16 serve a single, consolidated defence so long as it expressly addresses the individual grounds  
17 of appeal of each party, but that can be done in combination, so it can be said under a  
18 heading: "Ground 1 of GSK's Appeal and Ground 3 of Merck's Appeal and Ground 4 of  
19 Actavis Appeal", etc as a heading, and then they are all dealt with. Obviously, what is  
20 important is that each party should be able to identify that the Grounds it has raised are  
21 covered.

22 MR. TURNER: Yes, Sir. The only qualification I would make is that if we could be given some  
23 degree of flexibility as to precisely how we organise that in the writing of the defence.

24 THE PRESIDENT: Yes, I am not imposing any structure as long as it will be clear to everyone  
25 that all the grounds of appeal are being addressed.

26 Interventions: there have been no applications from any outside third parties to intervene.

27 Several parties have applied to intervene in other appeals, and that is not opposed. I think it  
28 is sensible for me to make just a general order that each party has permission to intervene in  
29 any of the other four appeals insofar as relevant. I know not everyone has applied to  
30 intervene in every other appeal, but I will make a general order, I assume no one is unhappy  
31 about that, and I shall direct that there is no need to serve a separate statement of  
32 intervention, and I shall also order that the evidence in each appeal shall stand in the other  
33 appeals so far as relevant.

1 Next is confidentiality: the CMA Decision has not yet been published, I have seen what has  
2 been said about that and that you are hoping to publish by the end of June. I will be  
3 directing that there is a further CMC in the autumn, I will come to that. I will just say that I  
4 will be very concerned if it has not been published by then, and I would hope, Mr. Turner,  
5 that the redactions will be very limited, the conduct here involved came to an end in 2004. I  
6 think the last relevant patent expired in January 2013; it is really hard to see that there can  
7 be any extensive confidentiality in 2016, but I just make that as a general observation  
8 because clearly we will all be looking at the Decision at the hearing of the appeals.

9 MR. TURNER: Sir, the CMA has that point well on board and is approaching things precisely  
10 with that mind-set. We have received some extensive submissions on confidentiality, in  
11 one case amounting to 80 pages, so we do have to deal with it meticulously, but we are  
12 adopting precisely that approach.

13 THE PRESIDENT: Yes, thank you. As regards the notices of appeal, I think the only claims to  
14 confidentiality are very limited parts of GSK's evidence, and that can be served if it has not  
15 been already, in redacted form on the other parties.

16 MR. FLYNN: It has been, Sir. We arranged that a while ago.

17 THE PRESIDENT: Thank you very much. Subject to one very minor point on redaction, which  
18 we will take up in correspondence, Mr. Flynn, I am content with those redactions for now.  
19 It seems, at present at least, there is no need for a confidentiality ring unless anyone wants  
20 to submit otherwise.

21 I then come to item 7 on the Agenda. My understanding is the CMA does not object to the  
22 admissibility of the new evidence relied on here, is that right?

23 MR. TURNER: That is correct.

24 THE PRESIDENT: Thank you. Then just going back to item 6, the *Lundbeck* appeals in the  
25 General Court. It may be that others here know more than I do, because two of the parties  
26 here, I think, are applicants in challenges to the *Lundbeck* Decision. But, in any event, my  
27 understanding is that two of the judges on the constitution of the court that heard those  
28 appeals, their mandate comes to an end on 30<sup>th</sup> September, so I think the assumption must  
29 be that the judgment will be given by 30<sup>th</sup> September if not before, and the present appeals  
30 here will clearly be heard after that date. So there is no problem, I think.

31 I have looked at the grounds of appeal in the *Lundbeck* appeals and, so far as published, it  
32 seems to me they may be relevant on certain points, potential competitors, for example, but  
33 that can be addressed in supplementary submissions if relevant after the judgment has been  
34 given. I do not think it should impact on the timing of further pleadings in this case.

1 Item 8: deferral of the penalty issues. Mr. Turner, can you just help me on that? Are you  
2 proposing in this application that the grounds of appeal regarding breach of the rights of  
3 defence, excessive delay and so on, for example I think it is Ground 3 in the Merck appeal,  
4 that that should be deferred?

5 MR. TURNER: No, we will deal with that now.

6 THE PRESIDENT: Yes. But in some of the other appeals, for example, the GSK appeal, the  
7 same submissions are bound up in their Ground concerning penalty, so a clear break, as it  
8 were, is not very easy. How much time do you think this suggestion of having a separate  
9 hearing on penalty would take up?

10 MR. TURNER: We see that, to start with, there would be a saving for the CMA in terms of the  
11 preparation of the defence, we will get on to the precise extension of time. It is said on the  
12 other side that these----

13 THE PRESIDENT: Sorry to interrupt you, but a separate hearing on penalty?

14 MR. TURNER: How long that hearing would take?

15 THE PRESIDENT: Yes.

16 MR. TURNER: Clearly, that will depend on the nature of the Tribunal's judgment on liability,  
17 but we do not expect a separate hearing on penalty to be extensive at all.

18 THE PRESIDENT: A few days?

19 MR. TURNER: A few days at most.

20 THE PRESIDENT: And this is not a case where there is any discrete evidence related to penalty?

21 MR. TURNER: There is none of that. What will happen----

22 THE PRESIDENT: There is no elaborate evidence, for example, about how the relevant turnover  
23 should be calculated and disputes about that?

24 MR. TURNER: No. Those sorts of debate do not arise. This is not a penalty hearing that will  
25 occupy a great deal of time. I have in mind, casting my mind back over a decade, the  
26 Replica Football Kit case where there was an extensive hearing, this is not that sort of case.

27 THE PRESIDENT: Presumably, your submission is that you are going to succeed on liability so  
28 there will have to be a penalty hearing.

29 MR. TURNER: If we succeed fully on liability, then there may be a penalty hearing depending  
30 on whether at that point the appellants decide not to contest depending on the nature of the  
31 judgment that is given.

32 THE PRESIDENT: But we cannot change the penalty in the judgment if penalty is not before us.  
33 If the penalty stands you can say the CMA might, if it seeks to change the penalty. But I

1 can see that if the appellants fully succeed there will not be a penalty hearing, but that is not  
2 your position, you say?

3 MR. TURNER: No, what I have in mind is that the route by which the Tribunal in its judgment  
4 decides that the findings are X or Y may itself relate to matters that the appellants will then  
5 want to take into account on the question of penalty.

6 THE PRESIDENT: The Tribunal will take it into account in viewing penalty.

7 MR. TURNER: And there may be a desire on the appellants' part to take into account those  
8 findings in submissions that they would want to make.

9 THE PRESIDENT: Yes, but the CMA has imposed the penalties and its case on the penalties is  
10 as in the decision.

11 MR. TURNER: Yes.

12 THE PRESIDENT: You can try and persuade me otherwise, but I have to say I am very, very  
13 disinclined to make such a separate hearing and split them. It would be a very exceptional  
14 course. It is sometimes justified in really exceptional circumstances but really particularly  
15 where there is no separate expert evidence on penalty or anything. I think it would be  
16 inefficient and mean that the Tribunal were having to be reconstituted many months later  
17 with delay and, having read the Grounds on penalty, I do not think there is any particular  
18 saving; on the contrary, I think it is going to lead to extra costs and extra pleading, so that is  
19 my provisional view. You can try and persuade me otherwise.

20 MR. TURNER: Sir, it is a strong provisional view, and therefore I will deal with it only briefly in  
21 case these points hit home.

22 This is a case where the penalty issues are, in large part, contingent on what the Tribunal  
23 will find in relation to infringement. For that reason, it is highly likely that the parties and  
24 the Tribunal will wish to take account of the findings which the Tribunal makes. On that  
25 basis, if we do not adopt the course of separating it in the way that was, for example, done  
26 most recently in *Tesco*, one is putting the CMA and the parties in their replies, to  
27 unnecessary further work and cost, and dealing with matters at the single hearing which  
28 may turn out not to be based on an appreciation of what the Tribunal has in mind for its  
29 liability findings.

30 I mention this only for completeness, there may not be even a need for a penalty hearing  
31 after the Tribunal's liability judgment. What happened in *Tesco*, by way of example, was  
32 that the parties there took account of the Tribunal's findings on liability and entered into a  
33 consent order concerning a varied penalty which the Tribunal endorsed. Two of the parties  
34 here, Xellia and Merck in particular, say there is considerable overlap between the liability

1 arguments, for example, on novelty, lack of precedent and how this relates to the object  
2 infringement case, on the one hand, and the penalty arguments on the other. In a sense, it is  
3 therefore clear that the findings that the Tribunal makes on those issues will also be relevant  
4 to the way in which the parties then go on to address those points as they arise in relation to  
5 penalty.

6 THE PRESIDENT: Yes.

7 MR. TURNER: And that can be viewed, sensibly, as a reason for saying that you should deal  
8 with the liability points first and then deal with the penalty issues later in the light of the  
9 findings that are made, so that those can be taken into account. That is the essence of the  
10 point, it is not complicated. I understand the provisional view, Sir, that you have formed,  
11 but in case there was a need for me to explain further our position that is how we justify it.

12 THE PRESIDENT: Yes, I understand. Thank you very much. I can see that there is some force  
13 in what you say. I am not going to direct a separate hearing on penalty now. There will  
14 certainly be full pleadings on that issue. We can review it at the next CMC, but my present  
15 view is that there should be a full hearing on all grounds and if the Tribunal, when it comes  
16 to consider its judgment, thinks there is some radical change such that further submissions  
17 on penalty would be helpful, then I think it can direct that and invite the parties back but I  
18 think there should be pleading and argument on all points, and I think it would be listed on  
19 that basis, so I will not accede to the CMA's application.

20 That takes one to timing of defence and the next steps, and I think it is sensible to work  
21 back from the hearing date. I want to fix the hearing date now so you will know what you  
22 are working towards, and your teams, and your experts insofar as there are experts and so  
23 on.

24 Mr. Flynn, my impression is, and correct me if this is wrong, that the GSK appeal on the  
25 Chapter II infringement is rather discrete. The guts of it seem to me, regarding dominance  
26 and market definition, in the sense that if you win on market definition the Chapter II  
27 finding falls away. If you lose on market definition you have some other points on abuse,  
28 but they really are fed in from your submissions on object and effect. Is that a fair  
29 characterisation?

30 MR. FLYNN: I think that is a fair characterisation because the abuse is effectively entering into  
31 the Chapter I and excluded agreements.

32 THE PRESIDENT: I know there is some slight reliance on market definition in your submissions  
33 on effect, and I think Xellia does rely on market definition at one point in support of its

1 submission that the GSK/Alpharma agreement was *de minimis*, but that seems to me the  
2 extent of the overlap.

3 Obviously, we have not had the CMA's defence. My impression is that if one were to  
4 separate out the GSK appeal on the Chapter II, that is to say your Grounds 1 and 6, all the  
5 other issues, including penalty, but excluding closings, could be heard within three weeks,  
6 and probably not 15 days, but more like 12/13 days.

7 MR. FLYNN: Everything except Chapter II?

8 THE PRESIDENT: Except Chapter II, and that in the fourth week that would be ample – one  
9 week, again I would have thought not five days, maybe four – to hear the Chapter II appeal,  
10 market definition and dominance, the evidence of Professor Young, and Dr. Stillman has  
11 very helpfully produced his expert evidence in two separate reports, so that report on market  
12 definition, and the CMA's responsive experts, and then other appellants could attend or not  
13 as they wish. It may be that Mr. O'Donoghue and Xellia would come for a small part of it,  
14 but it may be that the others would not feel it necessary to attend at all, and that one could  
15 structure the hearing that way.

16 MR. FLYNN: You are envisaging a single hearing with a Chapter II "week" as it were?

17 THE PRESIDENT: At the end.

18 MR. FLYNN: Yes.

19 THE PRESIDENT: And that Chapter II could be embraced within a week, and everything else  
20 could be embraced within three weeks; that is my impression.

21 MR. FLYNN: We got to four weeks as an indicative trial length. I think this would be a busy  
22 four weeks, but I think it could be done.

23 THE PRESIDENT: I would be interested in any other views as to whether people think that is  
24 reasonable and practicable. Perhaps Mr. Turner first because you are going to be covering  
25 everything.

26 MR. TURNER: We have discussed this by email, and the thinking that we conveyed to the other  
27 parties to explain why we had a five week estimate was broadly along these lines, and it  
28 does support what Mr. Flynn had just said, that even if one puts market definition to the  
29 end, envisaging the entirety of this within four weeks, it may be a little tight. We envisage  
30 something like a first week, which would include reading in for the Tribunal.

31 THE PRESIDENT: I am sorry to interrupt you; I am not including reading in.

32 MR. TURNER: Not including reading in, that is helpful. Two to three days for oral openings -  
33 there are going to be a number of parties' counsel.

34 THE PRESIDENT: Yes.

1 MR. TURNER: Factual witnesses. There are three as, Sir, you have seen from GSK. We  
2 anticipate up to two from the CMA. Given that there will be potentially five witnesses  
3 dealing with significant topics we thought one would imagine up to five days for the factual  
4 witness examinations.

5 THE PRESIDENT: Yes.

6 MR. TURNER: We are taking into account that there will be avoidance of duplication between  
7 counsel, but nonetheless some of these are significant. That would be perhaps a week and a  
8 half on this approach now without an allowance for reading in.

9 The experts: this is potentially something that will occupy some time. We have not  
10 debated whether there would be any form of 'hot-tubbing' approach. Working on the basis  
11 of traditional cross-examination, we have potentially four to five economists. Those break  
12 down into Dr. Stillman, Dr. Jenkins, potentially somebody from RBB - at the moment, Sir,  
13 you have seen that they present that in the form of an analysis on behalf of the firm. We  
14 will wish to have two economists on behalf of the CMA dealing with discrete issues - the  
15 one with the detailed pricing analysis, the other with the conceptual issues concerning the  
16 consumer welfare incentive implications of these arrangements as well as market definition.  
17 That is the economists.

18 There is also a psychiatrist expert now for GSK and we are considering actively whether we  
19 will need an expert psychiatrist.

20 So, on a worst case scenario for planning, you have there four to five economists and up to  
21 two psychiatrists. For that reason, working on the basis of traditional cross-examination, we  
22 were envisaging perhaps seven to eight days for the expert evidence. Sir, you think that  
23 might be too much?

24 THE PRESIDENT: Yes.

25 MR. TURNER: If one nonetheless says something perhaps a little over a week, again there are a  
26 number of parties who will be examining these individuals.

27 Then you will have, we anticipate, a break for writing and for reading closing submissions.  
28 Then two to three days for oral closings.

29 It was on that basis that in email discussion we had come to the conclusion that a five week  
30 estimate on a precautionary basis - and that is for everything including market definition -  
31 would seem----

32 THE PRESIDENT: That is including the break for reading?

33 MR. TURNER: That includes that period, yes. What it did not include was penalty, I am  
34 reminded by Mr. Bailey.

1 THE PRESIDENT: Have you any view on hearing everything except Chapter II first, and then  
2 dealing with Chapter II, which is essentially market definition, at the end, so that other  
3 parties need not attend? It seems to me wholly separate.

4 MR. TURNER: I have not taken instructions obviously from my team, so I am expressing a  
5 provisional view, which is that that could be workable, yes. The implications for the court  
6 would be that Dr. Stillman and his counterpart for the CMA, who deal with market  
7 definition, may have to return for a second examination on the market definition issues.

8 THE PRESIDENT: I do not see a problem about that, and no doubt your experts will deal with it  
9 in a separate section of their report, so it can be dealt with in that way.

10 MR. TURNER: They will.

11 THE PRESIDENT: It is not wholly different from what I had in mind, because I am not sure one  
12 needs five days just because there are five factual witnesses - it is quite long, a whole day of  
13 cross-examination - but if one fixed it on the basis that there will be a maximum of 15 days  
14 for everything except Chapter II, fourth week, maximum of five days for Chapter II, then a  
15 break for written closings, and you come back towards the end of a fifth week for two to  
16 three days of closings, that fits with roughly what you have outlined.

17 MR. TURNER: Yes, they are close.

18 THE PRESIDENT: So we will take a five week window, but it will not be five weeks in court,  
19 and we will be able to review at the CMC in the autumn the exact number of days one  
20 might need for both the Chapter I parts and the Chapter II part. I would hope that the  
21 Chapter I part can be done in about 12, 13 days, and the Chapter II part in four days, so we  
22 do not need the complete week.

23 MR. TURNER: Provisionally, Sir, that sounds very sensible to us.

24 THE PRESIDENT: Has anyone else got any comments on that?

25 MR. O'DONOGHUE: Sir, you have quite rightly perceived that Xellia and Alpharma LLC in  
26 their appeals have mentioned market definition in the context of Ground 2 on effects, but it  
27 is essentially, Sir, a parasitic point on the correct market definition. It is simply to  
28 understand what is the frame of reference one is considering when taking into account anti-  
29 competitive effects. My clients were not proposing to deal with that on a stand-alone or  
30 additional basis. It is essentially parasitic on Dr. Stillman's evidence, and the market  
31 definition grounds of appeal. So in terms of scheduling, Sir, that point has no impact in  
32 terms of length.

33 THE PRESIDENT: That is very helpful. Does anyone want to say anything about that?  
34 I think we will proceed that way and then look at dates on that basis.

1 We need to constitute a Tribunal with appropriate expertise to hear this. That poses listing  
2 difficulties on availability. I think that it is likely that we would have to start this hearing on  
3 27<sup>th</sup> February 2017. That is allowing one week, the previous week, for reading in. I think  
4 we have to allow a full week of reading for the Tribunal, but that is not included in the  
5 timing that I have outlined. So there would be, as it were, a five week window from then,  
6 but the fifth week is only for closings and preparation of closings, reading of closings.  
7 On that basis, there is the question of an extension of time for the CMA to file its defence. I  
8 have seen what is being said. One must be (a) realistic, and (b) take into account when the  
9 appeals would be heard. It might be different if they could be heard in December, but they  
10 cannot be. I propose to grant the CMA an extension of time to 29<sup>th</sup> July, unless anyone  
11 wants to stand up and shout against that; and to grant the appellants time for their replies to  
12 7<sup>th</sup> October. I have selected 7<sup>th</sup> October to give you time to take account of the General  
13 Court's judgment in *Lundbeck* in your replies. I will also order that any supplemental  
14 submission by the CMA, limited only to the implications of the *Lundbeck* judgment, will be  
15 by 21<sup>st</sup> October.

16 We will then have a further CMC in the week commencing 31<sup>st</sup> October, which will give us  
17 a chance to have absorbed these replies and submissions.

18 Are there any observations on that? Does anyone wish to object to that timetable? You can  
19 take instructions if you like. I will pause for a few minutes.

20 MR. FLYNN: I have taken instructions, Sir. On the basis that the Tribunal is not available until  
21 the end of February then really all the questions of principle fall away, and the timetable  
22 falls out for case management reasons.

23 THE PRESIDENT: I have seen what is being said. This is not suggesting that, therefore, the  
24 CMA can rely on such an extensive extension in all future cases. I think this is an  
25 exceptional case, but even so, if it could have been heard in December, I would have taken  
26 some persuasion to grant you as long as the end of July, but it cannot be so I do not think we  
27 need get embroiled in that sort of argument.

28 MR. FLYNN: Given that that is academic, Sir, and working with your timetable, the CMA's  
29 defence and possibly, so we hear, two expert reports covering three issues, and possibly a  
30 psychiatrist and possibly two factual witnesses on matters so far completely unspecified,  
31 will land right at the end of term, just when not only lawyers but when clients, experts and  
32 factual people tend to take holidays, we may be facing something on the factual side  
33 completely new, and on the expert side, one assumes that the expert reports will be confined  
34 to saying, in our case, why Dr. Stillman is wrong and why the decision is right, nevertheless

1 it may require some extensive consideration. You put 7<sup>th</sup> October for replies and reply  
2 evidence, which I think will be potentially quite significant in this case, and I am wondering  
3 whether an extra week might be available without disturbing your timetable for the reasons  
4 I have outlined.

5 My only other comment on it, if I may, is this: one assumes that if the CMA is putting in  
6 submissions on *Lundbeck*, would you envisage that the appellants would be responding to  
7 that in skeletons in due course? Is that how you see that matter?

8 THE PRESIDENT: Yes, because you can make your initial submissions on *Lundbeck* in your  
9 replies.

10 MR. FLYNN: Yes, if it is out by then.

11 THE PRESIDENT: As I say, from what I understand----

12 MR. FLYNN: Your intelligence suggests that it may well be.

13 THE PRESIDENT: It is public knowledge that the judges' mandate expires. It may come earlier,  
14 but it seems to me that is the latest date that it is likely to come.

15 MR. FLYNN: Our position so far is that it is not mentioned in the decision, it is another case  
16 involving another drug and on other facts, and it is not especially relevant, but we will  
17 happily see what the CMA wish to make of it.

18 THE PRESIDENT: We will see how relevant it is. I think one party has expressly reserved the  
19 right to make submissions on it, understandably, I think.

20 MR. FLYNN: Indeed.

21 THE PRESIDENT: So basically what you are saying is a further week. Mr. Turner, you will  
22 need clearly to bear in mind that your evidence can rebut Professor Young and Dr. Stillman,  
23 but it is not new grounds for the decision.

24 MR. TURNER: We are not making a new case.

25 THE PRESIDENT: You cannot make a new case, and in particular your factual evidence can  
26 only be supporting what is in the decision. So there should not be new material. The  
27 psychiatric evidence might be perhaps a slightly different category. I have not been through  
28 Professor Young's report, so it may raise new matters. It was not, I think, before you when  
29 you took the decision.

30 MR. TURNER: No.

31 THE PRESIDENT: But everything else effectively was. You may want to respond to what is  
32 said. I will say 12<sup>th</sup> October instead of 7<sup>th</sup> October. If you run into difficulties you can  
33 make an application. You have heard what Mr. Turner has said about the nature of the  
34 evidence. That should be sufficient.

1 MR. FLYNN: Might I just explain a particular point that concerns us, Sir? We have had no  
2 indication at all as to what the factual evidence will be, what Mr. Turner means by “possibly  
3 up to two witnesses on factual evidence”. This may not simply be responding to our factual  
4 witnesses, it may be factual evidence on other points for which, say, our current witnesses  
5 are not the appropriate person. So we may have to get someone completely other involved  
6 in responding to it. That is why I am slightly surprised that at this stage of the game we  
7 have not had an indication of what the CMA has in mind. That is a concern that I have,  
8 given the timing of it as well.

9 THE PRESIDENT: Mr. Turner, I will not press you to identify them. I do not know if you are  
10 able to clarify what the factual evidence is likely to be?

11 MR. TURNER: I am not able to go into it precisely. There are a number of factual points that  
12 have been raised as part of the appeals which we are looking at and measuring up with what  
13 is already there to see whether responsive evidence on those allegations is needed. I cannot  
14 go into that in detail.

15 THE PRESIDENT: That is fair enough. I will say on that basis any supplemental submissions on  
16 *Lundbeck* which are not really contingent on any evidence in the replies, they are just based  
17 on the judgment, I said the 21<sup>st</sup>, I will say 24<sup>th</sup> October, just so you can digest what is in the  
18 replies about *Lundbeck*.

19 MR. TURNER: The only comment I would make about that, Sir, is that the 21<sup>st</sup> is a Friday and  
20 the 24<sup>th</sup> is a Monday, so what you are effectively giving us is no working days. May I ask  
21 for until the 25<sup>th</sup>?

22 THE PRESIDENT: Yes, all right, the 25<sup>th</sup>. It is only on *Lundbeck*. The CMC, I would like to  
23 have it in the week of the 31<sup>st</sup>, but it may be towards the end of that week, but we will  
24 contact the parties about a date.

25 MR. TURNER: Yes.

26 THE PRESIDENT: At that CMC we will be able to give directions about experts’ meetings,  
27 experts’ joint statements, and look more precisely at the length of the hearing in terms of  
28 number of days required in the five weeks we have set aside.

29 MR. TURNER: Yes, Sir, in relation to that merely to note, as is known to my friends, I am  
30 occupied in a trial as matters stand that begins in October of this year and runs for 12 or 13  
31 weeks, as I believe junior counsel for one of the parties is too. Therefore, it will not be me,  
32 and we will need to ascertain our diary commitments for the case management conference,  
33 Sir, that you have in mind.

1 THE PRESIDENT: I understand that, but clearly we cannot wait for the CMC to allow for your  
2 trial.

3 MR. TURNER: Not at all, Sir, it will be somebody else.

4 THE PRESIDENT: Mr. Bailey or someone else from your team can deal with it.

5 MR. TURNER: I do not have their diaries to hand.

6 THE PRESIDENT: We will fix the date through solicitors and the CMA then and not counsel's  
7 clerks in so far counsel are involved and they can decide, but it will be in that week.

8 The only point I would make on your experts, Mr. Turner, is this: you will appreciate, I am  
9 sure, it is not quite for the CMA to decide how many experts it wants, it is for the Tribunal  
10 to decide how many to admit. I can understand that you have said two economists and  
11 potentially one psychiatrist. Having seen the evidence put in, that seems to me reasonable,  
12 so that would be acceptable.

13 MR. TURNER: Sir, I am grateful. We had no intention of saying otherwise. It is merely  
14 covering the ground which we will need to cover.

15 THE PRESIDENT: Yes. On that basis, is there anything else that we need to deal with?

16 MR. O'DONOGHUE: Sir, I think my clients were the party taking the lead in respect of a  
17 possible patents judge. It may be that it is implicit in your scheduling comments that that  
18 is----

19 THE PRESIDENT: I cannot make any commitment as to who will be on the Tribunal. There are  
20 problems of commitments with a hearing of that length. There are also problems with  
21 conflicts that arise, so we do not have a completely unrestricted choice.

22 Just to be clear, when I said a five week window, it is four weeks for the hearing and the  
23 fifth week is only for two to three days of closings. I hope that is clear. We will then be  
24 completed by the end of March.

25 MR. TURNER: Sir, in relation to the composition of the Tribunal, we have not said anything  
26 about the proposal we see in parties' skeletons concerning an IP judge forming part of the  
27 panel. I hear, Sir, what you say, but just to clarify our position: we do not think that that is  
28 a necessary or appropriate step for the Tribunal to take in this case. It is said that in this  
29 case that patent experience is much more important than economic expertise. That is in Mr.  
30 O'Donoghue's skeleton. We disagree. An appreciation of the economics is what is  
31 important. The case is not put on the basis that the strength of the patent is somehow  
32 decisive of the competition points. On the contrary, it is expressly put in a different way.  
33 So far as any Patents Court experience is concerned, Sir, we understand that you do sit  
34 occasionally in the Patents Court.

1 THE PRESIDENT: Yes, I am a judge of the Patents Court, but I do not pretend, as no doubt all  
2 the patent specialist counsel who appear in front of me would say, to be a great expert in the  
3 field of patents.

4 MR. FLYNN: Having done that myself, Sir, I would say, in response to what Mr. Turner  
5 says-----

6 THE PRESIDENT: I do not think I need a response. I am not going to have submissions on the  
7 composition of the Tribunal. I have heard what is said. I can assess what is involved in the  
8 case from reading the decision and the notice of appeal and we will constitute what----

9 MR. FLYNN: It is not just the strength of the patent, it is patent litigation.

10 THE PRESIDENT: Yes, we will constitute what we think is an appropriate Tribunal, and you  
11 will be informed in due course who the other members are.

12 MR. FLYNN: Thank you, Sir.

13 THE PRESIDENT: Is there anything else? Thank you all very much.

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