

This Transcript has not been proof read or corrected. It is a working tool for the Tribunal for use in preparing its judgment. It will be placed on the Tribunal Website for readers to see how matters were conducted at the public hearing of these proceedings and is not to be relied on or cited in the context of any other proceedings. The Tribunal's judgment in this matter will be the final and definitive record.

**IN THE COMPETITION  
APPEAL TRIBUNAL**

Case Nos. 1275-6/1/12/17

Victoria House,  
Bloomsbury Place,  
London WC1A 2EB

8 March 2017

Before:

**PETER FREEMAN CBE, QC (Hon)**

(Sitting as a Tribunal in England and Wales)

**BETWEEN:**

**(1) FLYNN PHARMA LIMITED  
(2) FLYNN PHARMA (HOLDINGS) LIMITED**

Applicants

- and -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

- and -

**(1) CONCORDIA INTERNATIONAL RX (UK) LIMITED  
(2) BRITISH GENERIC MANUFACTURERS ASSOCIATION**

Proposed Interveners

**AND BETWEEN**

**(1) PFIZER INC.  
(2) PFIZER LIMITED**

Applicants

- and -

**COMPETITION AND MARKETS AUTHORITY**

Respondent

- and -

**(1) CONCORDIA INTERNATIONAL RX (UK) LIMITED  
(2) BRITISH GENERIC MANUFACTURERS ASSOCIATION**

Proposed Interveners

\_\_\_\_\_  
*Transcribed by BEVERLEY F NUNNERY & CO.  
(a trading name of Opus 2 International Limited)  
Official Court Reporters and Audio Transcribers  
5<sup>th</sup> Floor, 5 New Street Square, London EC4A 3BF  
Tel: 020 7831 5627 Fax: 020 7831 7737  
info@beverleynunnery.com*  
\_\_\_\_\_

**CASE MANAGEMENT CONFERENCE**

## APPEARANCES

Miss Kelyn Bacon QC (instructed by Macfarlanes LLP) appeared for the Flynn Appellants.

Mr. Mark Brealey QC and Mr. Tim Johnston (instructed by Clifford Chance LLP) appeared for the Pfizer Appellants.

Mr. Mark Hoskins QC, Mr. Hugo Leith and Miss Jennifer MacLeod (instructed by CMA Legal) appeared for the CMA.

Miss Sarah Love (instructed by Morgan Lewis & Bockius UK LLP) appeared on behalf of the Proposed Intervener, Concordia International Rx (UK) Limited .

Miss Jemima Stratford QC (instructed by Stevens & Bolton LLP) appeared on behalf of the Proposed Intervener, the British Generic Manufacturers Association.

---

1 THE CHAIRMAN: Thank you for agreeing to bring the time forward. This is partly for my own  
2 convenience, but partly to make sure that we have enough time to deal with everything that  
3 we need to deal with today. Who is going to start? Mr. Brealey?

4 MR. BREALEY: If I can just start and set the scene, I believe that most issues are actually agreed  
5 between the appellants and the CMA.

6 THE CHAIRMAN: That is what I thought until I started reading the correspondence.

7 MR. BREALEY: That is the great thing about getting here at ten, that you then find out whether  
8 there is agreement. I do not think there is going to be much to be decided between the  
9 appellants and the CMA. I think the only two big issues are the intervention by Concordia  
10 and the BGMA.

11 What I was going to propose is maybe we just go through the agenda. If you want me to, I  
12 will just introduce everybody.

13 THE CHAIRMAN: If you introduce everybody and I thought we could probably deal with item 1  
14 on the agenda fairly swiftly. Then I would propose to deal with the interventions, and to  
15 deal with them one by one, and then I may want to retire very briefly, and then we will  
16 come back and deal with the rest.

17 MR. BREALEY: Forgive me, did you want me to introduce everybody?

18 MR. BREALEY: Yes, please, this is the start of a long haul and we need to know who we are.

19 MR. BREALEY: I act on behalf of Pfizer with Mr. Johnston. Miss Bacon, at the end, is on her  
20 own today, but at times she will appear with Miss Kreisberger and Mr. Pascoe who are not  
21 here today.

22 THE CHAIRMAN: I had a sort of initial round on the interim relief stage.

23 MR. BREALEY: Then Mr. Hoskins appears for the CMA, along with Mr. Leith and Miss  
24 MacLeod, and then we have Sarah Love for Concordia and Miss Stratford for BGMA.

25 So the first point on the agenda, the forum, is a pretty obvious one. I think we will be at  
26 Victoria House.

27 THE CHAIRMAN: I shall make an order under Rule 18.

28 MR. BREALEY: Then moving quickly to the interventions, technically there are four  
29 applications to intervene. I do not know whether you have a supplemental bundle.

30 THE CHAIRMAN: Mr. Brealey, I think we ought to deal with Concordia first, BGMA second,  
31 and then we will deal with Flynn and Pfizer's cross-applications. I think probably the best  
32 thing is to hear from Miss Love first.

33 MISS LOVE: Sir, as Mr. Brealey said, I appear for Concordia International, which is a generic  
34 pharmaceuticals company that applied on Friday of last week to intervene. You should

1 have received two documents from us. The first is our request, and the second, which was  
2 sent over this morning, is a short skeleton argument responding to the CMA's objections.  
3 Can I check that you have both of those?

4 THE CHAIRMAN: Just to be clear, this is an application for me to exercise my discretion - is  
5 that right?

6 MISS LOVE: Yes. I do want to apologise at the outset that I was not able to get the skeleton to  
7 you sooner. Unfortunately, we did not actually see the CMA's response until the Registry  
8 kindly sent it to my solicitors yesterday afternoon. I hope that you have had time to read it.

9 THE CHAIRMAN: You can take it that I have read it.

10 MISS LOVE: Thank you, sir. The other point that I ought to mention for understandable reasons  
11 is that I do not have any of the bundles, so I shall try not to slow things down by not having  
12 the appropriate page references to hand.

13 THE CHAIRMAN: Are you suggesting that having bundles speeds things up!

14 MISS LOVE: One can but hope, sir! I would like to start by explaining Concordia's interest in  
15 these appeals, and then explain on the discretion point why it would be appropriate for the  
16 Tribunal to let us in. The interest is a point we addressed in paras.9 to 13 of our request. It  
17 is also covered in paras.2 to 13 of the skeleton argument of this morning. I would prefer,  
18 sir, if I can, rather than trying to anticipate all the arguments and reply, to make the  
19 application and then go to the skeleton, if need be, in the light of Mr. Hoskins' response.  
20 I think it is uncontroversial that the aspects of the decision that the appellants are  
21 challenging in these appeals are not merely points of detail of the sort that the CMA got the  
22 arithmetic wrong arguments, but they are fundamental points about the way in which the  
23 CMA has approached the assessment of market power and the test of excessive pricing in  
24 pharmaceuticals cases. The appellants are saying basically that that framework, the  
25 methodology of how you should look at these things, in particular pricing, was wrong. For  
26 example, if you take Flynn's fifth ground of appeal, which overlaps to an extent with  
27 Pfizer's third ground, I believe, what is said is that taking a cost plus benchmark of whether  
28 there is a 6 per cent return on sales is just wrong. It is not the right approach. I think that,  
29 according to the published summary of the appeal, Flynn also says in particular that it is not  
30 the right approach because it is out of step with the evidence on how things work in the  
31 generic pharmaceuticals industry.

32 It should be pretty obvious that when this Tribunal determines that point, when it makes its  
33 findings about whether a 6 per cent return on sales is a suitable benchmark to assess  
34 whether the way in which a generic pharmaceuticals company is pricing is unlawful, that

1 will have immediate impact on Concordia. Basically, the Tribunal most likely is going to  
2 be deciding the yardstick for the lawfulness of my client's pricing, how my client conducts  
3 its business. So whichever way your decision goes, sir, and whether a 6 per cent return on  
4 sales turns out to be appropriate or not, there is then direct read-across to our legal position.  
5 I could make similar points about other grounds of appeal.

6 As well as that, there is the fact that we, ourselves, are being investigated by the CMA for  
7 suspected excessive pricing, so we have a particularly pressing and acute interest here as we  
8 are very much, as it were, at the coalface of the application by the CMA of the principles  
9 and the methodology in the decision.

10 Although I did not want to deal with any reply points at this stage, that is actually a  
11 convenient point for me to pick up here, which is that it has been suggested by the CMA  
12 that this is all fact specific, and each decision on excessive pricing will turn on its own facts,  
13 and this is all of rather limited relevance to us.

14 THE CHAIRMAN: Just before you do that, what significance do you want me to attach to the  
15 fact that you are also being investigated by the CMA?

16 MISS LOVE: It does not change the nature of our interest, sir. It does, if I may put it this way,  
17 change the acuteness of the matter to us, and in so far the questions on pricing are  
18 contingent on prior questions of market definition, market power, it does, if I may say so,  
19 rather raise the likelihood that we are going to come to the pricing points as well.

20 THE CHAIRMAN: Are you saying that it is a similar sort of product that is being investigated  
21 raising similar issues of market definition, and so forth?

22 MISS LOVE: Sir, I have to be careful what I say here, as these investigations are ongoing.

23 THE CHAIRMAN: I do not want to pry. You must say what you feel you can say.

24 MISS LOVE: What I can say is that it seems to us, from how the CMA is pursuing these  
25 investigations, that there is every indication that the same framework and the same pricing  
26 methodology - the same methodology for assessing pricing - is going to be used, as the  
27 CMA has done for Pfizer and Flynn.

28 THE CHAIRMAN: Pricing rather than market definition?

29 MISS LOVE: Sir, I am going to turn ((inaudible)), that is our primary...

30 When the CMA is investigating our products and deciding dominance and also, as I say,  
31 primarily costs allocation and excessive pricing, the question is obviously what  
32 methodology it is using, and what I say you rather tellingly do not see in their response is a  
33 statement that these points, whether 6 per cent is appropriate, they are not issues for your  
34 investigation. The reality is that there is going to be commonality of the principles. We are

1 in a situation where there are issues of principle that are being determined in these appeals  
2 and the Tribunal's determination of those will have a direct impact not contingent on some  
3 future eventuality, not contingent on intervening steps, and, in my submission, that is good  
4 enough for Rule 16(1).

5 Just to make that good, I have actually cited in para.11 of our skeleton argument the case of  
6 *BetterCare*. I have brought some copies which I will hand up, but the critical passage is  
7 actually in my skeleton argument. (Same handed) Here we are in 2001, jurisprudence by  
8 (inaudible), and if one turns to the first page, paras.2 and 3, para.2, the complaint is set out  
9 which concerns the abuse of a dominant position in relation to North and West Belfast  
10 Health and Social Services Trust. Paragraph 3, that the Director has chosen to reject that  
11 complaint, essentially on the grounds that the Health & Social Services Trust is not an  
12 undertaking, which *BetterCare* then appeals.

13 If one turns forward, sir, to the bottom of p.5, one sees at para.16 that there are two  
14 applications to intervene. There is the Registered Homes Confederation of Northern Ireland  
15 Limited, which is a trade association. Over the page, 17 to 19, are the ones that I would  
16 invite you to consider. The Bedfordshire Care Group, as one might expect from the name,  
17 represents the interests of private nursing and residential home owners in the county of  
18 Bedfordshire. So one immediately sees no particular interest in whether there has been an  
19 abuse of anything in an Irish market.

20 Here we are, para.18, they have a sufficient interest because they do supply private nursing  
21 and residential home services, and they have an interest in a point of principle, whether a  
22 body, such as an hospital trust, or an authority is an undertaking for the purposes of the Act.  
23 Paragraph 19, that being the case, let us not speculate at this stage about what they can add  
24 or show a sufficiency of their interest.

25 THE CHAIRMAN: That is a fundamental question of the *BetterCare* case, was it not, whether  
26 the definition of "undertaking" was fulfilled.

27 MISS LOVE: We say that (inaudible),

28 On the question of whether we should be allowed in for your exercise of discretion, I have  
29 addressed this in para.14 of our request, and also in 14 and 15 of the skeleton argument.  
30 Sir, as you have just seen, the approach that was taken in *BetterCare* was to say that if a  
31 sufficiency is shown then that is that and the rest is really due to management. I do  
32 respectfully say, sir, in the circumstances of this case there is something to be said for that  
33 point of view. To pick up on a point that the CMA has made in response about whether the  
34 appellants are well placed to say everything that could be said, it would be very premature

1 for you to conclude there is nothing we can usefully add in a situation where we have not  
2 seen the decision, we have not seen any of the appeal documents, and we are basically  
3 working off what is in the public domain, the summaries on the CMA's website and  
4 published summary notices by this Tribunal. I think we and the BGMA are very much at a  
5 big informational disadvantage here, and to effectively put the onus on us to say what we  
6 can bring to the party is really not a fair or sensible way to go.

7 As far as adding to the complexity of the case is concerned, I am sure that more or less  
8 every party in front of you who has ever applied to intervene has said we will not duplicate,  
9 but I hope it is clear from para.15 of my skeleton argument that we are not just paying lip  
10 service to that. We have given a great deal of thought to how we could minimise the extent  
11 to which our intervention would add to length or complexity. We will be proactive in  
12 liaising. We will not just say what others are saying. I hope we will be able to do it largely  
13 in writing. Certainly I do not expect we will be wanting time at the oral openings. We can  
14 fit into the four week hearing slot. We can work with the timetable. I do not think it is  
15 suggested by anyone that there is a realistic chance of the 30<sup>th</sup> going.

16 THE CHAIRMAN: We will hardly know you are intervening at all!

17 MISS LOVE: Right now, sir, I do not know. Unless I can assist further, that is Concordia's  
18 request and I will see what Mr. Hoskins says in reply.

19 THE CHAIRMAN: Shall I hear the others first?

20 MR. HOSKINS: I am in your hands.

21 THE CHAIRMAN: Otherwise we will get into a ding-dong. You do not object?

22 MR. BREALEY: We do not object.

23 MISS BACON: We do not object, and indeed we think it would be positively helpful. I was  
24 going to say the same thing about the BGMA. I would reiterate that, of course, as  
25 Miss Love has explained, she has a very limited oversight of what the issues are. There are  
26 certain issues in the case, which I think, when they have seen the pleadings and the  
27 decision, which they may be of particular assistance. I could develop that now or in  
28 response to the BGMA.

29 THE CHAIRMAN: Later.

30 MR. HOSKINS: Sir, you will be well aware there is a two tier test for intervention, and that  
31 comes from Rule 16(1) and 16(6) of the Tribunal Rules. It is nicely summarised in the  
32 *Barclays Bank*. I have it loose. I am told it is in tab 11 of your supplemental bundle.

33 THE CHAIRMAN: Is it a judicial review?

34 MR. HOSKINS: I think it was.

1 THE CHAIRMAN: I remember it well.

2 MR. HOSKINS: You had an interest as well. Paragraph 1, perhaps you could read that. It is  
3 uncontroversial. I will pick up a couple of lines once you have read. You will see after the  
4 quote?

5 “There is therefore a threshold question which may be summarised as a sufficient  
6 interest. There is then a discretion if that threshold is satisfied by any applicant to  
7 intervene as to whether the Tribunal should permit that intervention ...”

8 etc. So that is where the two stage test comes from, and both limbs must obviously be  
9 satisfied.

10 Dealing first with sufficient interest, Concordia has put two points to you. First of all, the  
11 findings in this case of the Tribunal will have a direct impact on Concordia’s pricing. That  
12 can only be because the Tribunal may make general findings as to the sufficiency, or indeed  
13 insufficiency. We do not know yet of the CMA’s approach at the end of the day.

14 I will come on to the case law in a minute, but that is not a direct specific interest of  
15 Concordia’s, because the industry generally will be watching the case. So if that is a  
16 sufficient interest for Concordia, it’s a sufficient interest for every other generic company  
17 potentially. I will show you when we come to the case and we are looking at how directly  
18 you have to be affected, that is a factor.

19 So the first point they put is not specific to them. It is a matter of general interest to the  
20 industry, and of course we accept that, the industry will be watching us.

21 The second point they put is that they are subject to a current CMA investigation into  
22 excessive pricing. There is not even an SO yet, so it is quite bold, I think, for Concordia to  
23 say, “We can see that the same issues are going to be raised”, etc. It is relatively early days,  
24 pre-SO.

25 Neither of those points that have been put to you we say show a sufficient interest. I would  
26 like to show you the practice because *BetterCare* is, as Miss Love, candidly admitted, 2001,  
27 and the practice has moved on. There has been quite a lot more since then and the process  
28 has become, with respect to the CAT in 2001, a bit more of a bind.

29 I would like to start by showing you the test in Luxembourg. I am not saying you are bound  
30 by it, but it is useful because it frames the sort of issue that has arisen as a result of  
31 Concordia’s request. That is *BASF* case, case T-15/02, which again should be in the  
32 supplemental bundle. It is paras.26 and 27, and again could I invite you to read those to  
33 yourself, sir. (After a pause) The point in 27, I say that distinction applies here. I am not  
34 saying it is binding on you, but it is useful:

1 “... prospective interveners establishing a direct interest in the ruling on the  
2 specific act whose annulment is sought and those who can establish only an  
3 indirect interest in the result of the case by reason of similarities between their  
4 situation and that of one of the parties.”

5 That is, at its highest, Concordia’s submission to you. You will readily see that that  
6 submission could be made by a number of parties if they wish to. That is not a sufficient  
7 interest. It does not distinguish them enough. It does not give them a sufficient high level  
8 of interest in the outcome of this case.

9 THE CHAIRMAN: That case is only two years after *BetterCare*. Has European practice  
10 changed at all in the last----

11 MR. HOSKINS: Not as far as I am aware.

12 THE CHAIRMAN: More restrictive perhaps.

13 MR. HOSKINS: Yes, that is fair, but certainly that distinction is still in the European position.

14 *Verizon* is a case, sir, on which you sat as a member of the Tribunal. It is not exactly the  
15 same situation as this case. I am not going to say that. One can see from the discussion in  
16 the Tribunal’s judgment, there are issues of approach that certainly resonate in this case.  
17 Perhaps I can just briefly remind you what *Verizon* was about? It is BskyB and TalkTalk  
18 who were applying to intervene.

19 “BskyB and TalkTalk contended that, although they do not purchase TI services,  
20 and so cannot be affected by any adjustment in the price control for TI services,  
21 they nevertheless have an interest in the outcome of the appeal, sufficient to entitle  
22 them to join the Appeal as interveners. The basis for that application was as  
23 follows ...”

24 Then could I ask you to read, please, sub (1) and sub (2), you will remind yourself of what  
25 was happening in that case.

26 THE CHAIRMAN: It is very familiar.

27 MR. HOSKINS: You have still got it, sir, you have a better memory than me. So 5(1), just to  
28 pick it up half way down:

29 “Because the Appeal challenged Ofcom’s allocation of common costs, and because  
30 common costs have to be allocated somewhere, an allocation away from TI  
31 services to other services might potentially affect other price controls in respect of  
32 services which BskyB and TalkTalk do buy.”

33 So you will see the similarity between the argument that has been put by Concordia and the  
34 arguments in *Verizon*. There is going to be a decision in *Verizon* about allocation of

1 common costs, and that is something that is very likely to affect us, BSKyB and TalkTalk, in  
2 future price controls. You see the similarity.

3 In 5(2) there is a quote from Mr. Pickford, who was acting for both BSKyB and TalkTalk.  
4 You will see a quote from his submissions - I am picking it up half way down the quote -  
5 where he says:

6 “So we are concerned in that context to protect our interest to ensure that no  
7 findings are made, or anything is established by the Competition Commission, that  
8 would lead to the conclusion that the appropriate place for those costs to end up are  
9 the services that we are purchasing because we say that the cost of those services  
10 already reflects an appropriate apportionment of those costs.’

11 In short, BSKyB and TalkTalk were intervening in order to persuade the Competition  
12 Commission, if it were minded to state where the common costs were to be allocated if not  
13 to TI services, to allocate those costs away from BT services in which BSKyB and TalkTalk  
14 had an interest, as purchasers of those services.

15 Again, you see very clearly the analogy with what is attempted here. I am not just saying it  
16 because of an issue of common costs, it is because the Tribunal, here the Competition  
17 Commission, was going to adopt a general approach to issues that would be replicable  
18 potentially in other cases. BSKyB and TalkTalk are saying, “Because this might have an  
19 effect on us at a later date, we have a sufficient interest”. It was not sufficient.

20 Then para.7:

21 “The question is whether the risk that the Competition Commission might find, in  
22 the course of this Appeal, that the common costs presently allocated to TI services  
23 should be allocated to a service in which BSKyB and TalkTalk are interested as  
24 purchasers, creates a sufficient interest for the purposes of intervention. We have  
25 no doubt that it does not.”

26 Then if I can pick up some of the points that are made by the Tribunal:

27 (1) Although a responsible regulator like Ofcom will seek to achieve  
28 consistency amongst the various price controls that it imposes, including  
29 consistency as to the calculation and allocation of common costs, each decision by  
30 Ofcom to impose a price control is a separate and distinct decision, which must be  
31 based on the evidence before Ofcom in relation to that decision, on which evidence  
32 interested parties will be able to comment during the consultation stages built into  
33 Ofcom’s decision making processes.”

1 Exactly the same here. If the Tribunal upholds the CMA's approach, for example, to costs -  
2 either common costs or allocation in this case - or its approach to assessment of excessive  
3 pricing, some of which, as you will have seen from the decision, the means by which the  
4 CMA made its decision, are general in nature but some are very specific to Pfizer's and  
5 Flynn's businesses, it is not simply the case that there is one general test and that is what is  
6 going to be before this Tribunal. There is actually a gamut of reasons, some of which are  
7 specific to Pfizer, Flynn and indeed this product.

8 Then 7(2):

9 "A finding by Ofcom during the course of a previous price control (or, for that  
10 matter) a finding of this nature by the Competition Commission, can at best be  
11 only of limited relevance in determining what a later price control in respect of a  
12 different product should be. This is because the parties interested in that later price  
13 control would, rightly, expect Ofcom to determine the appropriate price control  
14 based upon the evidence before Ofcom as part of that process."

15 Sir, you have hopefully had the chance to enjoy the decision, and you will very much see  
16 that the focus of the decision is on Phenytoin. It's on Pfizer's business, it is on Flynn's  
17 business. Yes, there are some general - I do not want to use the word 'benchmarks', that  
18 has a form - positions which are taken, but there is also a great deal of specificity in relation  
19 to the product and these companies. So we say 7(2) applies here as well.

20 Then 7(4):

21 "In short, we do not accept Mr. Pickford's basic contention that there is so  
22 fundamental a connection between one price control and another, that a finding of  
23 fact in one feeds through so as to determine another, later, price control."

24 Mr. Holmes, counsel for Ofcom, put the point correctly [when he says]:

25 "... this concerns a separate price control which will shortly be the subject of  
26 consultation and on which his [Mr. Pickford's] client will have a full right of  
27 appeal, and will not be precluded from taking any points. In so far as the  
28 Competition Commission reaches conclusions that are *per incuriam* because  
29 particular issues relevant to another price control appeal have not been fully  
30 ventilated before them, they will have a full right of appeal ..."

31 as will Concordia if a decision is ever adopted against them -

32 "and it is much more appropriate for good order, and a manageable appeal process  
33 to take price controls one by one and not try to enlarge the Competition

1 Commission's task to consider the implications of this price control for other price  
2 controls that can be appealed later."

3 You will see the danger that is referred to in our submissions on Concordia. Concordia will  
4 come in with a view to try and protect the position in the investigation into it, and we have a  
5 real risk of ending up with not just the CMA trying to fight Pfizer and Flynn, but fighting  
6 pre-emptively Concordia, and the Tribunal should not be put in that position either, we  
7 submit.

8 So, in relation to sufficient interest, we say there is no sufficient interest. None has been  
9 shown to you. Indeed, if that threshold is not satisfied then this application must fail. You  
10 do not have to go on to discretion. So I only go on to discretion if you are against me on the  
11 sufficient interest point.

12 In relation to sufficient interest, I would like to take you to the *British Broadcasting Limited*  
13 *v Ofcom* decision.

14 THE CHAIRMAN: We are still on sufficient interest?

15 MR. HOSKINS: No, I am moving on now to discretion, so this is assuming that you are against  
16 me on sufficient interest. So *British Broadcasting Limited v Ofcom*, which is tab 13 of the  
17 supplemental bundle. They are slightly odd facts procedurally, but I will just canter through  
18 them nothing is going to turn on it. You see para.2, EE applied to intervene and its original  
19 application for permission comprised a single paragraph.

20 3 None of the parties objected to EE's proposed intervention. However, the  
21 Tribunal did not consider that the application showed that EE had a sufficient  
22 interest for the purposes of rule 16. Moreover, the application contained no  
23 information as to why the Tribunal should exercise its discretion to allow the  
24 intervention even if a sufficient interest had been demonstrated. ... the Tribunal,  
25 having indicated that it was minded to dismiss EE's applications, invited EE's  
26 counsel to make any further submissions in support of the application."

27 So there further oral submissions. You will see the final sentence of para.3, that was to no  
28 avail.

29 "In a short ruling delivered in the course of the CMC, the Tribunal therefore  
30 dismissed EE's application."

31 But EE was not easily deterred, as you will see from para.4. It renewed its application for  
32 permission----

33 THE CHAIRMAN: This is the liberty to apply case?

34 MR. HOSKINS: I cannot remember. I must confess I have not looked at the details.

1 THE CHAIRMAN: They were given liberty to apply, but that was not meant to be an invitation!

2 MR. HOSKINS: Yes, absolutely, they came back, and that is para.4:

3 “... EE renewed its application ... The Application was, this time, supported by  
4 detailed reasons by which EE sought to demonstrate a sufficient interest in these  
5 proceedings ...”

6 Then you will see, for example:

7 “EE set out more detail of the financial implications for its business of the issues  
8 that it wants to challenge, rather than simply stating that it also buys the services  
9 covered by the price control.”

10 So again here what we have is Concordia comes and says, “These decisions will have an  
11 impact on our pricing”. There was no attempt to explain any further detail. EE went further  
12 than that the second time round.

13 THE CHAIRMAN: To be fair, they say they have not read the case in detail, so they cannot say  
14 any more.

15 MR. HOSKINS: I am going to come to that point, sir, because obviously it is one I have to deal  
16 with. I understand the point.

17 Perhaps you could read paras.5 and 6 to yourself, if you would not mind. You can see the  
18 statements of general relevance to exercise of discretion.

19 THE CHAIRMAN: I am somewhat perplexed because it says that reference to previous Tribunal  
20 decisions is not helpful, and you are referring me to a previous Tribunal decision.

21 MR. HOSKINS: In relation to discretion, you have a discretion, but, as you know, it is common  
22 practice to show the Tribunal ways in which it has previously exercised its discretion,  
23 because no doubt you will want to be consistent if you think it is appropriate.

24 THE CHAIRMAN: I might indeed.

25 MR. HOSKINS: I am not suggesting that you are bound by this, but it is a useful indication of  
26 how to approach the question of discretion.

27 “It will generally be the case that the appellant will be well placed to make all  
28 relevant submissions in support of its appeal.”

29 We say that is the case here. Neither Pfizer nor Flynn can be accused of lacking in  
30 resources or indeed in effort. You have seen the notices of appeal, you have seen the detail  
31 that is in there. There is no obvious gaps which are crying out for someone else to come in  
32 and fill. The field has been well ploughed by Pfizer and Flynn. They have put their back  
33 into it.

34 Then 6:

1 “Given the potential for interventions to add complexity and cost to proceedings, it  
2 is important that the Tribunal has the necessary information to decide whether  
3 these factors are outweighed by the intervener’s potential contribution in the  
4 particular proceedings concerned. This evaluation will be highly dependent on the  
5 facts of the individual case, so that reference to previous Tribunal decisions is  
6 unlikely to be helpful.”

7 In relation to discretion and in relation to that point, yes, I do not shy from that.

8 “In all cases it is incumbent on a proposed intervener to advance sufficiently  
9 detailed reasons to enable the Tribunal to exercise its discretion under rule 16.”

10 Of course, that statement is made against a backdrop where the intervener will not have  
11 seen, one imagines, the decision in many cases, or indeed the detailed notices of appeal.  
12 That is still the approach to be taken. It is not enough for a would be intervener to turn up  
13 and say, “We have not seen anything, so take it on trust, we will come in and do a good  
14 job”. That is actually not enough.

15 What one can do is say that there are the detailed grounds of appeal. The summaries that  
16 have been published of the Pfizer and Flynn appeals by the Tribunal are relatively detailed.  
17 There can only be a summary of all the work that has gone on, but there is an indication of  
18 the sort of material there, and Concordia has had regard to it. You see today they say, “We  
19 are particularly interested in Flynn ground 5”, etc, so they have that.

20 What they have not done is gone on to say, actually, what they do think they can add, even  
21 with the limited knowledge they have. Let us imagine, what could they do? They might  
22 add factual material which is specific to Concordia, but how is that going to help? They are  
23 a generic business, sure, but they are a different business. They do not even make, as far as  
24 I am aware, an anti-epilepsy drug. As an economist once said to me, “If you are comparing  
25 apples with pears and having more pears does not help”, and actually what you are being  
26 offered here is a surfeit of pears, but we are looking at apples.

27 They might say, “We are going to come in and we are going to give evidence on the  
28 position of the generic market generally”, but again you have that. You have got detailed  
29 expert reports from Pfizer and Flynn. How are Concordia going to add anything to what we  
30 already have. It is just going to be more of the same.

31 Then one is left with, they might make submissions on principle. You have Pfizer and  
32 Flynn’s submissions on principle. We do not need Concordia. You have Pfizer and Flynn,  
33 well resourced, etc.

1 So, in truth, one can stand here and say, “As a matter of discretion what do I think  
2 Concordia can add?” They have given you no help. They have not identified anything.  
3 I have explained why it is actually very unlikely they will be able to add anything.  
4 There is the point that Concordia says, “We have not seen the decision, we have not seen  
5 the notices of appeal, and therefore we are in a difficult position”. I accept that. Sir, you  
6 have seen the decision and you have seen the notices of appeal and you can form a view as  
7 to whether you think Concordia can add something. In our submission, they clearly cannot.  
8 There is no basis for allowing Concordia to intervene in this case either because of  
9 sufficient interest or discretion. All it is going to do is add to the time, cost and effort,  
10 whilst adding nothing of value.

11 Sir, unless you have any further questions for me, those are the reasons why we oppose the  
12 intervention.

13 THE CHAIRMAN: Their point is that the way in which we approach this case clearly has an  
14 impact on their business, and they would like to be able to be in a position to influence that.  
15 That is what they are saying, and you would say that is not enough.

16 MR. HOSKINS: I say that is not a sufficient interest for the reasons I have given.

17 Sir, if you had any doubt about my submissions, let me put something in the alternative to  
18 you, a sort of prematurity type point, because that is the way it is put by Miss Love, “Well,  
19 it is unfair because we have not seen everything”. One mechanism you might adopt is to  
20 say, “I am not going to give you permission to intervene now, but what I am going to order  
21 is that Concordia be provided with a copy of the non-confidential version of the decision  
22 when it is available; and that Pfizer and Flynn provide suitably redacted copies of their  
23 notices of appeal to Concordia”. Then they can have a look at the material. If they  
24 genuinely think they have something of value to add they can back to you at the second  
25 CMC, that I think we are all agreed should happen in June. If you have any doubt at all  
26 about shutting them out now, at least let us see in June when they actually have anything to  
27 add. That is the alternative that I would urge upon you.

28 Thank you.

29 THE CHAIRMAN: Miss Love, do you have anything to say in reply?

30 MISS LOVE: Sir, can I just pick up three points that Mr. Hoskins has made. I will be brief. I am  
31 mindful there is another application to be heard.

32 The first is about this question of sufficient interest, and the word that has crept into  
33 Mr. Hoskins’ submissions is not direct impact but specific impact. What seems to be being  
34 said is, “If this affects others in the same way as it affects you, if this has an industry wide

1 impact, then somehow how that tells against you being appropriately affected". Sir, that is  
2 simply a non-sequitur. Yes, this does have industry wide impact. One imagines that is why  
3 Miss Stratford is here making her application. I do not recoil from that. It does not have  
4 any bearing on the sufficiency or adequacy of Concordia's interest. Nor, if I may  
5 respectfully say so, does the fact that our investigation is in early days. It does not matter if  
6 it is pre-SO, SO, or looking for typos in the final decision, we are under investigation for  
7 suspected excessive pricing.

8 The second and third points that I wanted to pick were the *Verizon* analogy and this  
9 question of test in Luxembourg and direct and indirect. Sir, I am reluctant to turn this into  
10 more of a three ring circus with paper, but I think the convenient way of dealing with both  
11 of those in one is a quick look at what was actually in *Verizon* in the case management  
12 conference, if I could just hand this up. I have printed out the first part up to the point at  
13 which the Tribunal retired to give its decision. There are just a few passages that I think it  
14 would be helpful to go to very briefly.

15 THE CHAIRMAN: This is the *Verizon* case management conference?

16 MISS LOVE: Yes, in which the points that Mr. Pickford summarises in para.5 of the judgment  
17 are actually made. Sir, can I invite you, first, to turn to p.6, in which Mr. Pickford put the  
18 three points on which Sky and TalkTalk wanted to intervene. Can we look briefly at the  
19 first two points that they are putting. The third about an error in the end effectively fell  
20 away. In particular, what is said in 20 through to 25, is that "it is a point of general  
21 importance, it might apply across price controls generally, we do not purchase those  
22 services, but we purchase some other price regulated ones", so, effectively, if there is a  
23 future price control - if there is a future price control - on the services that we purchase then  
24 there is a potential impact, and one immediately sees, sir, that our position is simply not  
25 analogous. Companies have to assess for themselves their compliance with competition  
26 law. I think Mr. Hoskins does not like the word 'benchmarks', but if the general positions  
27 are upheld by this Tribunal then the question of whether we are in compliance currently,  
28 now, with competition law is effective with very serious consequences.

29 One then turns forward to p.14 to see how Mr. Holmes for Ofcom characterised that first  
30 ground. Again, this simply reinforces my point about why we are not analogous. It is a  
31 concern about the knock-on effects of the present appeal on possible future price controls  
32 which are not in issue here, and on which his client could, if it thought fit, raise an appeal in  
33 due course. So nothing direct, nothing unmediated, if this is taken across into a future price  
34 control for a product they buy.

1 Sir, I respectfully say that this point was put more starkly and rightly by Mr. Beard for BT  
2 whose submissions started on p.27, but I particularly want to look at p.28, lines 10 to 15. I  
3 am sorry, we are on a whistle-stop tour here. Mr. Beard commented that if that were  
4 enough it would be a sufficient licence for any communications provider who might be  
5 potentially be buying something from BT, or indeed not price control, just buying stuff from  
6 BT where there might be issues of cost allocation.

7 One immediately sees that we are talking about an extremely wide class of people on a very  
8 contingent basis, and, in my submission, that is in no way analogous to the situation here in  
9 which, for instance, and it is the most obvious example, 6 per cent is being held up as  
10 “general position”, 6 per cent is under appeal, and for those companies that are bound to  
11 occupy a dominant position the lawfulness or otherwise of a 6 per cent benchmark has  
12 immediate competition law consequences.

13 Sir, this is also a convenient point, if I can invite you to look across the page to what the  
14 President said about the approach of the European courts, and I do particularly ask that  
15 attention be paid to lines 8 through to 24, which it might be convenient to look at now.

16 THE CHAIRMAN: I am familiar with all this.

17 MISS LOVE: It is a different statute. It is a more restrictive one, very interesting one, but not  
18 what is the jurisprudence of this court.

19 THE CHAIRMAN: With great respect to the President in that case, the former President, we look  
20 at European cases and we draw what we can from them.

21 MISS LOVE: Sir, in my respectful submission, what can be drawn from *BASF*, given the nature  
22 of the decision, the case management point is very limited indeed. It is not the practice of  
23 this Tribunal to shut those out who have no interest in the final part of the order. Sir, I can  
24 recall myself have permission to intervene in a Telecoms matter in which my client has a  
25 analogous ladder pricing scheme to that of BT, which was under challenge.

26 Thinking back further back to Mr. Hoskins and I being involved in *Pay TV*, in which  
27 various sports bodies were granted the right to intervene essentially to make points about  
28 the potential effect on rights values.

29 THE CHAIRMAN: I have also been involved in various cases on *Pay TV*.

30 MISS LOVE: Sir, as far as discretion is concerned, I heard a lot of agricultural metaphors about  
31 well ploughed fields and apples and pears and whether we going to be more pears or apples  
32 or quinces, or something. The difficulty is, sir, there is simply not much that I can say here.  
33 I respectfully say that if this is going to be a point of importance, one ought to hear from

1 Miss Bacon on this, because we hope that we will be in a position to add something  
2 different.

3 Sir, you have seen the *EE* decision in which a smaller different industry player was thought  
4 to bring something useful to the table. Whipping Mr. Hoskins' suggestion on its head, if it  
5 really is the case that we do not have anything to add, if you give us permission we are not  
6 going to add anything. We are not going to go to time and effort to no avail, but it is the  
7 view of those who have seen these notices of appeal that there is something that we can add,  
8 and if that is a matter that is important I respectfully say now is the time to hear from  
9 Miss Bacon on it.

10 THE CHAIRMAN: Thank you very much. I think I have heard enough on this, I really do, with  
11 great respect. Can we now move on to the BGMA?

12 MISS STRATFORD: Thank you, sir. Our applications are even more recent than Concordia's,  
13 so I am sorry you do not have anything in writing from me. There were two letters which  
14 were sent on Monday by my instructing solicitors, which are our formal applications for  
15 permission to intervene in both appeals.

16 These appeals do raise, as far as we understand, issues of profound importance to generic  
17 pharmaceutical manufacturers and suppliers. As you will have seen the BGMA is a trade  
18 association which represents a very significant proportion of the UK generic industry - it  
19 estimates around 90 per cent by volume.

20 On the basis of the limited information we currently have about the decision and the  
21 appeals, the CMA appears to have broken wholly new ground in its approach to unfair or  
22 excessive pricing in the generic pharmaceutical industry. I heard what Mr. Hoskins has said  
23 to you about the decision containing both general and specific points, and obviously I am at  
24 a disadvantage on this, but even on the basis of what he has said it does appear that there are  
25 general, and we submit, very important industry wide findings which are going to be  
26 considered in this appeal.

27 The outcome of the appeal, whichever way it goes - and I do mean that, whichever way it  
28 goes - will have enormous impact on BGMA's members, and on the generic pharmaceutical  
29 industry going forward. So, accordingly, I do submit that the BGMA plainly has sufficient  
30 interest and that the Tribunal should exercise its discretion to permit this application to  
31 intervene.

32 Moving on to deal with some of what the CMA has said---

33 THE CHAIRMAN: Just before you do, could you explain, first of all, why Concordia is not a  
34 member?

1 MISS STRATFORD: It is a member.

2 THE CHAIRMAN: Concordia is a member - why Flynn is not a member?

3 MISS STRATFORD: Miss Bacon may be better placed than me to answer that. We are the UK  
4 based - I do not know whether that is the answer.

5 THE CHAIRMAN: If you were to be allowed to intervene, what would be the position of your  
6 members vis-à-vis you, as the trade association? Would you expect to give them access to  
7 all the information, or what?

8 MISS STRATFORD: Are you referring to confidentiality arrangements, sir?

9 THE CHAIRMAN: In terms of the conduct of the case, what would be the BGMA's role be in  
10 the litigation apart from making submissions?

11 MISS STRATFORD: Sir, what I had envisaged is that we would make submissions in a  
12 statement of intervention. Probably one of the things we can most usefully do, which we  
13 genuinely believe will assist the Tribunal, is to provide evidence. I am not yet in a position  
14 to know whether that would be factual and/or expert evidence. I presume there will need to  
15 be some form of internal consultation process among our members before the submissions  
16 and evidence are finalised. We are simply not in a position to provide detail about that yet.  
17 I do suggest that the very process of having to agree a consensus set of submissions and  
18 evidence will provide something additional and useful for the Tribunal when it is hearing  
19 this appeal, because it will, as I have said, represent the views of a very significant majority  
20 of the industry, and that is something which one or even two companies, with the best will  
21 in the world and the best resources in the world, simply cannot provide.

22 THE CHAIRMAN: What was the BGMA's involvement in the CMA decision making process?

23 MISS STRATFORD: Sir, as far as I have been instructed, they were not approached by the  
24 CMA. They were not consulted. I was going to say, sir, that it seems to me that the CMA -  
25 Mr. Hoskins has informed me they do oppose our application to intervene as well, and they  
26 are taking what I think may fairly be described as an adversarially driven approach to our  
27 application. In my respectful submission, that is regrettable, given that our submissions do  
28 have very real potential to assist the Tribunal in the best determination of these appeals and  
29 help it arrive at the best outcome whether or not that differs in any respect from the CMA's  
30 decision.

31 Sir, I would observe that in the past the CMA and its predecessors have, on occasion, taken  
32 a different approach. For example, in the *BetterCare* decision that Miss Love just showed  
33 you, the trade association there, the application to intervene was not opposed. In the

1 *Burgess* case, with which you will be very familiar, the application of the Consumer  
2 Association to intervene was not opposed.

3 Of course they are entitled to oppose our application, but I do submit that the BGMA is  
4 uniquely well placed to provide the Tribunal with an industry wide perspective and  
5 evidence which we do think will assist.

6 THE CHAIRMAN: Do you have a view, Miss Stratford, on this: if the BGMA were allowed to  
7 intervene, would that strengthen or weaken Concordia's individual application, Concordia  
8 being a member of the BGMA?

9 MISS STRATFORD: Sir, you will understand that I do not want to say anything to undermine  
10 Miss Love's position, but I think I have to acknowledge that the first, more general head of  
11 her submissions is probably weakened if, as I submit, we are given permission to intervene.  
12 Obviously she then has a very particular interest, which I am not in a position to comment  
13 on due to the pending investigation against Concordia.

14 THE CHAIRMAN: In terms of the general assistance as to how the generics industry works, your  
15 association is in as good as, if not a better position to assist the Tribunal as one of your  
16 individual members?

17 MISS STRATFORD: I have to say we are in a better position, yes, sir. We are in a better  
18 position than Pfizer or Flynn - and I make that submission unashamedly - however well  
19 resourced and brilliantly lawyered they are, because we can consult much more widely, and  
20 will not have, for example, commercial confidentiality difficulties that those companies will  
21 inevitably have in obtaining industry wide data.

22 THE CHAIRMAN: All right.

23 MISS STRATFORD: Sir, I was going to make a few points on the cases that you have been  
24 shown if that would assist, but I am very happy to be guided by you.

25 THE CHAIRMAN: I am quite familiar with these cases. If there is anything extra that you can  
26 say, by all means say it, but...

27 MISS STRATFORD: Maybe for now, at least until I have heard what Mr. Hoskins has to say, I  
28 will leave it at that.

29 I would say that there is no question of the BGMA achieving through an intervention, in  
30 effect, their own appeal out of time, which is the concern that one detects in some of the  
31 cases. For example, that is the concern which plainly troubled the Tribunal in the *Barclays*  
32 case in relation to Shop Direct. The BGMA intervention would be a pure intervention, if I  
33 can call it that, not linked to any other past or future decision of the CMA. The  
34 intervention, in our submission, will also be consistent with the just, expeditious and

1 economical conduct of the proceedings. With a hearing date of late October envisaged  
2 there is no reason why a properly managed intervention should delay or render more  
3 complex the resolution of these proceedings. Of course, the BGMA, as Miss Love has  
4 already said, would certainly intend to liaise, as appropriate, with the other parties to avoid  
5 any unnecessary duplication in our submissions and evidence.

6 Mr. Hoskins in his fall-back submission, if I can call it that, suggested permission should  
7 not be given now, and it could be revisited in June. I say that is plainly not a sensible  
8 alternative. It is far more likely to disrupt the timetable. In my submission, the sensible  
9 course is for us to put in our statement of intervention and supporting evidence now, and  
10 obviously we can discuss what 'now' means, but I imagine it would be some time in April,  
11 and then for any submissions on its relevance to be made at the next CMC. So, if none of it  
12 is relevant, as Mr. Hoskins appears to envisage might be the case, he can seek to persuade  
13 the Tribunal of that. That is much less likely to disrupt the timetable, and at that point  
14 directions can be made about the extent to which we will participate in the oral hearing, for  
15 example, once the parties have seen our evidence.

16 So, for all of those reasons, I submit the BGMA's applications to intervene in both the  
17 appeals should be granted and appropriate directions made.

18 THE CHAIRMAN: You say you are not supporting either Flynn or Pfizer necessarily - is that  
19 right?

20 MISS STRATFORD: That is right, sir.

21 THE CHAIRMAN: Does that make it more or less attractive that you should intervene?

22 MISS STRATFORD: In my submission, it makes it more attractive. We are, as I sought to put it,  
23 perhaps clumsily, a pure intervener, we are a genuine intervener. It may be that once we  
24 have seen the decision, and in particular the grounds of appeal, we may feel much more  
25 strongly aligned, maybe even nearly aligned, I do not know, with one of the parties. We are  
26 an intervener concerned not with the specific factual matters which occurred in this case  
27 but with more general issues.

28 THE CHAIRMAN: Thank you. Miss Bacon?

29 MISS BACON: Sir, I am grateful, and you will see in a minute why my submissions are perhaps  
30 more relevant to Miss Stratford's application than Miss Love's. Can I just enquire, sir, do  
31 you have a copy of the decision before you and our notice of appeal, because I wanted to  
32 refer to a couple of paragraphs? If not, I can just make my point and tell you where those  
33 paragraphs are.

1 THE CHAIRMAN: Again, I am very familiar with it, I am not sure I have actually got it here.

2 Right, go ahead.

3 MISS BACON: If you have it now, I think the starting point must be the fact that, contrary to  
4 some of the statements that Mr. Hoskins has made, there is a distinct point of principle in  
5 the decision, and it is stated to be a point of principle, regarding the industry standard for  
6 returns on pharmaceutical products. The position that the CMA has adopted is quite  
7 explicitly said to be drawn from what the CMA regards as the agreed industry standard, and  
8 that is at para.5.203 of the decision. You will see from our notice of appeal that we take  
9 issue with that, and we take issue with it for a number of reasons, including that if one has  
10 regard to the returns on other generic products, whether particularly comparable or not, they  
11 bear no resemblance to the figure that the CMA has alighted upon.

12 We support our submissions by reference to the scheme and rules which, as we have  
13 pointed out in our notice of appeal at para.85, specifically and explicitly say that if the  
14 Department of Health is making an assessment of the reasonableness of a scheme member's  
15 price, it is relevant to have regard to the average of other similar companies, and  
16 information from external sources that relate to the generics industry across companies.

17 So if there were any doubt, sir, as to the relevance of looking at comparators and  
18 benchmarks from the industry as a whole, and other comparable companies, those doubts  
19 would have been laid to rest by the explicit wording of Scheme M. As I have said, the  
20 relevant section is set out at para.85 of my notice of appeal.

21 As you will have seen, we have done our best to fill that gap in our submissions, and in  
22 particular our evidence. We have had regard to, as we did before the CMA in its  
23 investigation, various benchmarks drawn from other generic companies. As Miss Stratford  
24 rightly says, with the best will in the world and with the resources that we have, we are not  
25 able to speak for the industry as a whole. We are not able to go to the generic industry as a  
26 whole and say, "Tell us your costs and your margins on the products that you supply". That  
27 would be particularly difficult for us because we would be competing with many of these  
28 companies. That is the information that the BGMA has to supply. In effect, it is coming to  
29 the Tribunal and it is presenting the gold standard of evidence from the industry as a whole  
30 - this is what it is saying it is going to be able to do - on the reasonableness of returns. So it  
31 is filling a gap that the parties are not able to supply because of the position that they are in.

32 THE CHAIRMAN: Are you able to tell me why Flynn is not a member of the BGMA?

33 MISS BACON: I am not, and I am instructed they simply have not applied. There are some  
34 companies that are not members of the BGMA, and we are one of them. Miss Stratford did

1 not say that she covers the entirety of the industry, she said that her company is supplying  
2 90 per cent of the generic products. I do not know specific reasons why we have not  
3 applied.

4 We are not a member of the BGMA, but in a way that makes the relevance of the BGMA's  
5 evidence all the more pertinent because it represents companies of which we are not part,  
6 and we cannot obtain that information from them.

7 THE CHAIRMAN: If you were members you would have been able to obtain that information.

8 MISS BACON: Even if we were members we would not have been able to obtain that  
9 information. These are comparator companies - they are relevant comparator companies -  
10 and the Department of Health's own guidance in Scheme M indicates that in assessing the  
11 reasonableness of returns, it is relevant to look at external evidence about the generics  
12 industry as a whole. So, in my submission, the BGMA's evidence would be particularly  
13 pertinent, and it would be a question of filling gaps that the parties are not able to supply.  
14 As for the apples and pears, to the extent that analogies are appropriate at all, it is different  
15 varieties of apples in a situation where there is guidance saying that one looks across the  
16 apple orchard as a whole.

17 THE CHAIRMAN: I would not pursue that any further.

18 MISS BACON: The other point that I think ought to be made is the buyer power point. You will  
19 see Scheme M is very relevant to both parties' submissions on buyer power. My  
20 understanding is that the BGMA actually negotiated the Scheme M framework with the  
21 Department of Health. I cannot say what evidence it is going to submit, but it seems to me  
22 that having at the table the party that negotiated that framework will be of immense use to  
23 the Tribunal when there is, as you will have seen, a direct issue about Scheme M and buyer  
24 power and the way that Scheme M actually works. That is a point that I presume  
25 Miss Stratford was not able to make because she has not seen the parties' pleadings.  
26 I anticipate that that will be something on which the BGMA may well be able to assist the  
27 Tribunal.

28 As for Mr. Hoskins' suggestion that we wait before making a decision on this point until the  
29 second case management conference, we do have a real concern that that would imperil the  
30 timetable and make it very difficult for us to make meaningful submissions within the time  
31 available.

32 As you have seen, Pfizer has put forward a suggested timetable for accommodating the  
33 statement of interventions that would fit, perhaps with a little adjustment, with the existing  
34 timetable that we have suggested down to the end of May with the case management

1 conference then scheduled for June. I would have thought that that would be the right first  
2 step. If we wait until the second case management conference to make any decision, we  
3 then have the spectre of having a further round of written submissions during July, during  
4 the time at which we would all prefer to be preparing for the hearing.

5 THE CHAIRMAN: What a terrible thought. I was willing to hold the hearing in July.

6 MISS BACON: We might discuss that at the next stage of the case management conference. Can  
7 I just check if there is any other point that I need to make. No. Those are my submissions.

8 THE CHAIRMAN: Thank you. Mr. Brealey?

9 MR. BREALEY: Yes, again, we do not oppose the intervention, but just for the Tribunal's note, I  
10 think it is important - I am not supporting or whatever - that you have this: in the decision,  
11 and I do not know if one can go to p.25 of the decision, because it picks up a point that you  
12 asked Miss Stratford. There are two points I want to make on intervention.

13 THE CHAIRMAN: Which paragraph number?

14 MR. BREALEY: It is para.2.47, p.25. This is the section where the CMA is telling the reader  
15 that it has gathered information from other sources. Just a couple of companies, so  
16 requested information. Obviously these people are relevant. One sees here Teva. Teva is  
17 one of the BGMA's members. That is in schedule 1 to their application, and that is 27.  
18 Then you have a company called Auden Mackenzie. As I understand it, they are now called  
19 Actavis and they are listed at number 2 of schedule to the BGMA's application. Again, as I  
20 understand it from p.231 of the decision, Auden Mackenzie/Actavis acquired NRIM. So  
21 NRIM features quite large in this story, and I think it is important to see that you have at  
22 least the BGMA having access to Auden Mackenzie/Actavis/NRIM.  
23 One notes here that the BGMA was not - I do not know, but certainly on the face of it - the  
24 subject of any request for information, and nor was Concordia.

25 THE CHAIRMAN: So the fact that these companies that were consulted are BGMA members----

26 MR. BREALEY: Are generics.

27 THE CHAIRMAN: -- is that a point for or against supporting the intervention?

28 MR. BREALEY: I think it is in favour to a certain extent of their intervention, because the CMA,  
29 at least in the administrative stage, regarded their views as relevant.

30 THE CHAIRMAN: I see.

31 MR. BREALEY: The only other point I would make in favour of Concordia and the BGMA----

32 THE CHAIRMAN: We have dealt with Concordia.

33 MR. BREALEY: The second point is that, of course, one cannot forget that Pfizer has been fined,  
34 and there was in the fine - and this is, for reference, p.459, para.7.100 - Pfizer has been

1 fined, and the fine has been increased for deterrence, and we get the CMA stating what we  
2 all know, that deterrence is not only to deter Pfizer but others. Sir, that is the second line of  
3 7.100. You do need much of an inference for Concordia and the BGMA's companies to see  
4 that, that Pfizer has been fined in order to deter people in a similar position from carrying  
5 out similar allegedly anti-competitive conduct.

6 THE CHAIRMAN: It would be the fine on Flynn that was deterring other generic companies  
7 presumably, not the fine on Pfizer?

8 MR. BREALEY: I do not know whether Flynn had----

9 MR. HOSKINS: There is a slightly odd position, Flynn's fine was capped at the statutory  
10 maximum.

11 MR. BREALEY: Yes, I think that is right. It is clear that Pfizer has done a deal with Flynn  
12 which relates to generics, and if anybody else wants to execute a similar sort of deal they  
13 are being told that Pfizer at least is being fined to deter them from pursuing similar conduct.

14 THE CHAIRMAN: Thank you. Mr. Hoskins?

15 MR. HOSKINS: Sir, we do oppose the application, and it is not out of some adversarial spirit but  
16 to protect this procedure and make sure it is efficient and focuses on what actually matters.  
17 The first point in relation to the BGMA, if you have their letter,

18 THE CHAIRMAN: Just remind me where I find it?

19 MR. HOSKINS: I have it loose, sir, I am sure somebody will give me the reference to the  
20 supplemental bundle. It is tab 4. I only got the bundle this morning, which is why I am not  
21 familiar with that. It is a letter to the Registrar of the Competition Appeal Tribunal dated 6<sup>th</sup>  
22 March.

23 THE CHAIRMAN: It is a letter from Stevens & Bolton dated 6<sup>th</sup> March.

24 MR. HOSKINS: It is the Flynn letter, tab 4. You will see para.7, and I think you have referred to  
25 it already this morning, sir:

26 The name of any party whose position the person making the request intends to  
27 support. The BGMA is seeking to ensure that its members are represented in these  
28 important proceedings in relation to the price of generic medicines in the UK, The  
29 BGMA does not intend to support the position of either of the parties to the case.”

30 I must admit, I was a bit confused whether that meant it was not supporting the CMA or  
31 Pfizer and Flynn on one hand, or whether it is not supporting Pfizer or Flynn. I think  
32 Miss Stratford's submission tends to suggest----

33 THE CHAIRMAN: Being pedantic, this is the Flynn appeal against the CMA, so I took that to  
34 mean the CMA and Flynn.

1 MR. HOSKINS: You had the same problem I did then. It was not clear to me, and I will come  
2 on to why that might be significant. Is it, “We are not putting our colours to the mast on  
3 Pfizer or Flynn”, which would be slightly different given that they both pushing in the same  
4 direction, or “we are not able to tell you now whether we are going to support the CMA or  
5 Pfizer and Flynn on the other hand”.

6 THE CHAIRMAN: The rule refers to any party, does it not?

7 MR. HOSKINS: It does. Before making an application to intervene, in our submission, a  
8 representative body should have a clear mandate from its members as to what position it is  
9 actually adopting. That must be fundamental, and it is not clear at all that the BGMA  
10 knows what its members want. Can I show you a document - I gave a copy of this to  
11 Miss Stratford this morning, I did not realise the others would be quite so vexed by this  
12 intervention, so I have not given copies to the other parties yet, but Miss Stratford has seen  
13 it. (Same handed)

14 This is a press release that was issued by the BGMA shortly after the decision which has  
15 been challenged. Could I invite you to read it, sir.

16 THE CHAIRMAN: (After a pause) Yes.

17 MR. HOSKINS: As you see, sir, it is condemning what it describes as ‘Pfizer’s cynical  
18 behaviour’, but it is also clear that it is condemning generics who had partaken in such  
19 behaviour. You will see that from the final paragraph:

20 “We [the Association] would never support activity designed purely to artificially  
21 increase prices. This equally breaks the virtuous circle of which the industry in  
22 the UK, originators and the generic, can be rightly proud.”

23 So what this suggests is that, at least in the minds of the Director General of the BGMA, it  
24 may well be that the generic industry condemns the conduct of Pfizer and Flynn. That is the  
25 clear inference from this press release.

26 Then you look at schedule 1 to the request, so back to the letter at tab 4, and, as you have  
27 already picked up, we have Concordia in there, for example. We know what Concordia  
28 thinks. It thinks Pfizer and Flynn have done nothing wrong, but we do not know what the  
29 other members think. The really troubling thing is nor does the BGMA, because, if I heard  
30 correctly, what Miss Stratford says - when you said what role are the BGMA going to play,  
31 how are you going to take this forward, how are you going to participate in this procedure -  
32 is that there will have to be some sort of internal consultation process, and she assured you  
33 it provides something that would be additional and useful. With respect, if a representative  
34 body wants to come and make an application to intervene it has to have that consultation

1 process before it comes to the Tribunal. It is not sufficient for it to come and say, “We will  
2 work out, after you have let us in, what our members want us to do, in terms even of being  
3 which side we are on”, and they simply have not done that. It is completely premature. It is  
4 an improper way to come before this Tribunal.

5 The second point in relation to the BGMA - and again this just reflects the fact that it simply  
6 has not given thought to what it might do - go back to the letter at tab 4, 8(b):

7 “In coming to a decision on the legality on the behaviour of Flynn, it is likely to be  
8 helpful for the Competition Appeal Tribunal to have access to wider evidence  
9 about the way in which drug prices are arrived at across the generic medicines  
10 industry.”

11 That is very much the thrust of Miss Stratford’s submissions this morning. Then look at  
12 (d):

13 “We do not consider that the intervention of the BGMA should lead to a  
14 proliferation of documents or evidence, increased expense or increased delay  
15 before any hearing.”

16 With respect, if they are going to put in, if they are allowed to put in, wider evidence about  
17 the way in which drug prices are arrived at across the generic medicines industry, (d) simply  
18 does not follow. It is not just some clever point, “Ho, ho, look, there’s an inconsistency in  
19 their letter”, my point is they have not thought this through, and that is what the letter  
20 demonstrates.

21 The third point is one you flagged up, sir, the potential confidentiality issues. They have  
22 got 31 members. You have got Flynn who is not a member, and you have got all this  
23 confidential information apparently that is going to be flying around. Have they given any  
24 thought as to how that is going to be dealt with? No. Is that going to increase the  
25 complexity of dealing with this case? You bet it is. They are all competitors.

26 Can I deal with Miss Bacon’s point? She referred you to Scheme M. That really related to  
27 both her points, both in terms of looking at pricing in other companies, and also the  
28 countervailing buyer point. Phenytoin is not in Scheme M. It never has been in Scheme M.  
29 What this case is about, as you will have seen from the decision, is Phenytoin. What you  
30 see from the decision is that in relation to the Pfizer Phenytoin product, the capsules, there  
31 were dramatic increases in prices since September 2013 in relation to a product which is 80  
32 years old, has been off patent for a long time. There was no innovation to justify the  
33 increase, there was no increase in cost to justify the increase. What you have seen from the  
34 evidence is that whilst that is the core of the decision, both appellants are trying to widen it

1 out, and are saying you should look at companies generally in the generic market, you  
2 should look at Flynn generally, you should look at Pfizer's products generally. They are  
3 moving it out. They are entitled to do that if that is the way they want to run their appeal,  
4 and one understands why they do not want to focus on Phenytoin, but that is what they want  
5 to do.

6 What, sir, you can do when you are sitting, having read the decision and the notice of  
7 appeal, is ask: how helpful is it going to be to have more of that material, given that you  
8 already have it? What we are actually doing is moving further and further away from the  
9 core of the case and piling in more and more general information, and you will form a view  
10 on it. Our submission is that we have already got enough of that smoke around the core and  
11 we do not need any more. That is not a hard edged line, it is a question of your  
12 appreciation, and that is the way I put it.

13 THE CHAIRMAN: So you are not saying that we should not consider benchmarks, you are  
14 saying that there is enough in the evidence already to enable us to do so?

15 MR. HOSKINS: I make both points actually, or I will when we come to the trial. Yes,  
16 absolutely, we say that in so far as it is appropriate to look at general benchmarks there is  
17 enough materials, but our submission will be, when you see our defence, that looking at just  
18 simply other companies, even other generic companies, in general is not going to be  
19 particularly helpful when we are considering an excessive pricing decision in relation to a  
20 drug with particular characteristics----

21 THE CHAIRMAN: And the point that if Flynn and Phenytoin had been in Scheme M the  
22 position might have been different, you say that is just not relevant, or what?

23 MR. HOSKINS: I say it is of limited relevance. It is difficult to see. They are trying to bring it  
24 in, but, yes, we say, so what. It is all about sufficient comparables. That is really it. I do  
25 not want to skip ahead to the trial, but that is what this case is ultimately going to be about.

26 THE CHAIRMAN: I do not think you should skip ahead to the trial, that would be most unwise.

27 MR. HOSKINS: That is why I say it is a matter for your appreciation today, sir, whether this is  
28 genuinely going to assist.

29 You are absolutely right, sir, your observation in questioning, if the BGMA comes in, there  
30 is absolutely no reason for Concordia to come in. They cannot have two bites of the cherry.

31 THE CHAIRMAN: That was a question, that was not an observation.

32 MR. HOSKINS: In our submission, if BGMA comes in there is no reason for Concordia to come  
33 in. I apologise if I mischaracterised, but you have my submission.

1 On the alternative point I suggested, with respect, the cheerleaders for the BGMA have not  
2 thought it through, because, as you have seen, the redaction process in relation to the  
3 decision is still ongoing, what we have indicated to you is that we hope the decision will be  
4 available in late April. A lot of representations have been made on confidentiality, and it  
5 depends how contentious they are. Our best guess at the moment is that the redacted  
6 version of the decision will be available in late April. So when one looks at my counter  
7 suggestion which is, let them back at the June CMC having seen the decision, by definition,  
8 they are going to be able to put a statement of intervention in that helps in any event until  
9 they have seen the decision and, at the earliest, that is going to be late April. This other  
10 suggestion of, "Let us in, we will do a statement of intervention and that will get things  
11 moving", it is not going to happen until some time after late April, and they are going to  
12 need a matter of weeks in any event.

13 Then they say, "If we wait until the June CMC to deal with the applications to intervene, so  
14 that it can be dealt with on a focused basis", and once they have gone and actually got a  
15 mandate from their members as to what they want to do, that will interfere with the hearing.  
16 I am sorry, we are talking about a CMC in early June. We are talking, if you agree, sir, of a  
17 30<sup>th</sup> October hearing - that is five months.

18 THE CHAIRMAN: We will come back to early June, if we may.

19 MR. HOSKINS: That is fine. Whenever the CMC is, you have still got five months, if we just  
20 work from that, there is plenty of time. The whole point is that it will be easier to decide  
21 whether intervention should be granted when you see what these people have got to offer,  
22 and it will be easier to manage the process in terms of, for example, restricting them to  
23 issues they can and should deal with. There has been a suggestion they might be limited in  
24 pages. We can deal with all that, but it is premature, we simply cannot do that.

25 I do not go for the alternative, I say you should simply reject both these applications now,  
26 but if you have any doubt the alternative is far preferable to just opening the door and  
27 saying, "Come on in, and then we will see what you come up with". That is not an  
28 attractive prospect.

29 My primary submission for BGMA is that it is simply inappropriate for an association to  
30 come before this Tribunal without even having had a mandate from its members as to what  
31 it might do. Thank you, sir.

32 THE CHAIRMAN: Miss Stratford?

33 MISS STRATFORD: Sir, four points, if I may, in reply. First, the press release: you have it, that  
34 was issued in the immediate aftermath of the decision, and obviously without seeing it, as

1 we still have not seen it. In my submission, if it shows anything, it shows the deep interest  
2 that there is in the decision in the industry.

3 THE CHAIRMAN: Are you saying you were not aware of this?

4 MISS STRATFORD: I am sorry?

5 THE CHAIRMAN: You were not aware of this press release?

6 MISS STRATFORD: I was shown it this morning.

7 THE CHAIRMAN: Are you aware of whether your instructing solicitors were aware of that?

8 MISS STRATFORD: I will have to take specific instructions on that, if you will forgive me.

9 (After a pause) They saw it this morning.

10 THE CHAIRMAN: It does beg the question in my mind as to how the BGMA operates, because  
11 this purports to be a statement by the Director General. Presumably the instructions to  
12 Stevens & Bolton, and through them to you, came from the BGMA, and one would presume  
13 with the Director General's knowledge, so I have to say I find it surprising that this point of  
14 view at least, or an allusion to it, was not included in the instructions.

15 MISS STRATFORD: Sir, if I could explain, this is a press release reacting immediately to what  
16 is in the public domain about the decision.

17 THE CHAIRMAN: I appreciate that. I am not attaching any weight to the press release, it is the  
18 circumstances of it that are necessary to pursue.

19 MISS STRATFORD: Since then, I am instructed, there has been discussion within the BGMA,  
20 very careful further consideration. There has been a vote. There was a vote on 1<sup>st</sup> March on  
21 whether this application to intervene should be made. Perhaps, with further consideration,  
22 the wider implications of the case and of the appeal for generic pricing generally were  
23 appreciated, and that is why this application is now being made.

24 THE CHAIRMAN: That does not exactly inspire confidence, I have to say.

25 MISS STRATFORD: Sir, in my submission, there are two different strands here. There is a  
26 reaction to what the BGMA, at least at that time, understood on the basis of the CMA's  
27 press release about its decision to have been found on the specific facts of this case. That is  
28 what this press release is focusing on.

29 There is then the much wider issue about pricing in the generic industry generally, and that  
30 is perhaps what the BGMA has subsequently come to understand is raised very acutely by  
31 this decision and by these appeals, and that is why it then followed its own internal  
32 processes, voted, as I have said, on 1<sup>st</sup> March, and broad unanimity was achieved, I am  
33 instructed, to make this application. Sir, that is what I say about the press release.

1 Mr. Hoskins made points on para.(d) of our letter. In my submission, this really is a  
2 drafting quibble. I think his point is that we are not accepting that our intervention will add  
3 at all to the proceedings. Of course, if we put in some short focused submissions and some  
4 short relevant evidence, then to that extent it will add to the burden on this Tribunal, and we  
5 fully appreciate that. What we are saying, and what we were seeking to say, is that we will  
6 not disproportionately add, what we contribute will not be outweighed by the additional  
7 evidence. As it happens, I think the phrase used there by my instructing solicitors is taken  
8 from one of the Tribunal's earlier decisions, but I submit that is not a serious point.

9 Third, reference was made to confidentiality issues. My short answer is that, in so far as  
10 there are internal confidentiality issues, that is our problem, we are going to have to come  
11 up with a way to deal with that between and with our members. No doubt the BGMA, for  
12 other reasons, already has reasonably well developed mechanisms for consulting its  
13 membership and doing so appropriately and maintaining confidentiality.

14 My understanding is that, because of the two appeals, it is already going to be necessary to  
15 have confidential versions of the decisions, and confidentiality rings are already in place. I  
16 submit that, in reality, allowing the intervention of the BGMA is not going to increase the  
17 complexity of the arrangements vis-à-vis these proceedings and the Tribunal.

18 Finally, on Mr. Hoskins' alternative fall-back submission, my understanding from the  
19 reactions around me is that the suggestion that the redacted version of the decision should  
20 only be available in late April is not one that is necessarily agreed or expected by the  
21 appellants.

22 MR. HOSKINS: That is in our skeleton submissions at para.4, sir.

23 MISS STRATFORD: I am at a considerable disadvantage here. I have helpfully been provided  
24 informally with some documents, but----

25 THE CHAIRMAN: Make your point.

26 MISS STRATFORD: My short point is that Mr. Hoskins is seeking to lure the Tribunal down a  
27 tempting path of putting off this decision. Come the second CMC, whenever that may be, I  
28 have no doubt that he will not commit himself now to not arguing that there is too little time  
29 to allow the interventions in and that they will disrupt the timetable, and he is simply  
30 pushing it off because when we are nearer to the hearing the interventions, he hopes, will  
31 look less attractive to the Tribunal. If it is dealt with now there is plenty of time, it can all  
32 be done in orderly fashion and without disrupting the timetable.

33 Those are my submissions.

34 THE CHAIRMAN: Thank you. I propose to rise.

1 MISS STRATFORD: I am sorry, I should have said, Miss Love tells me that she has one short  
2 factual point.

3 THE CHAIRMAN: On the BGMA?

4 MISS LOVE: In response to the question that Mr. Hoskins raised about what we would add in  
5 the event that the BGMA's application was admitted.

6 THE CHAIRMAN: Yes.

7 MISS LOVE: Sir, I am instructed that, in relation to Scheme M and the negotiations, in fact, our  
8 former Chairman, who remains an officer of the company, was the architect to the Scheme  
9 M through his involvement in the negotiations with the Department of Health. So there is  
10 obviously that specific factual angle that we would bring. Mr. Hoskins doubts the relevance  
11 of Scheme M, but Flynn, who is in the position of an appellant, is raising it.  
12 Finally, sir, and I am sure you have the point, our interests are not identical to those of the  
13 BGMA. They speak for 31, we speak one. The very fact that we are intervening in support  
14 of these appeals, whereas their position is more nuanced, is eloquent in that regard.

15 THE CHAIRMAN: Thank you.

16 MR. HOSKINS: In fact, if Miss Love is referring to Mr. Beighton, he has already provided a  
17 witness statement on behalf of Flynn. I just wanted to check, if that is the individual we are  
18 talking about, can it please be confirmed.

19 MISS LOVE: It is. He has provided a witness statement to assist Flynn with this appeal. That is  
20 not to say that there may be further questions of relevance. I simply point out that we do  
21 bring - I was going to say another variety of apple in the orchard, but I think we are...

22 THE CHAIRMAN: Thank you. I have had enough. I am going to rise and we will reconvene  
23 shortly.

24 (Short break)

25 THE CHAIRMAN: Neither of these applications to intervene is approved. I will give reasons  
26 later today or tomorrow, but that is the situation, there will be no interventions.  
27 We then have to proceed to the cross-applications to intervene by Pfizer and Flynn in each  
28 other's appeals.

29 MR. BREALEY: Yes, sir, the application by Pfizer to intervene in Flynn's is at tab 3 of the  
30 supplemental bundle, and the application by Flynn to intervene in Pfizer's appeal is at tab 2.  
31 So essentially tabs 2 and 3. This is really a belts and braces application. We have, I think,  
32 subject to the Tribunal's direction, all agreed that evidence in one appeal should stand as  
33 evidence in the other appeal. We clearly support Flynn's appeal, and Flynn supports our  
34 appeal. I do not actually understand the CMA to be strongly resisting the applications.

1 THE CHAIRMAN: We had better hear what they have to say.

2 MR. BREALEY: I think they say there is not much point in it, but just on a strict legal basis we  
3 would want to support Flynn in its appeal and Flynn would want to support us in our appeal  
4 because we clearly have an interest - it is a single decision, the facts have been put together,  
5 and we are essentially two defendants, although there are separate infringements. In my  
6 respectful submission, normally both appellants would have the right to the intervene in  
7 each other's appeal. As I say - and we will find out what Mr. Hoskins says - I think his  
8 primary submission is that it is not necessary.

9 THE CHAIRMAN: Miss Bacon, anything to add?

10 MISS BACON: As I understand it, in *Paroxetine* all of the appellants were given leave to  
11 intervene in each other's appeals as a matter of form, but they did not put in statements of  
12 intervention, and that would probably be the appropriate approach here. Certainly, we are  
13 not envisaging putting in a statement of intervention and would not seek to add to the  
14 paperwork.

15 THE CHAIRMAN: Good. Mr. Hoskins?

16 MR. HOSKINS: I do not see what it adds, but if it does not add to the paperwork I am not going  
17 to die in a ditch over it.

18 THE CHAIRMAN: So we are agreed.

19 MR. HOSKINS: With a heavy heart!

20 THE CHAIRMAN: With a heavy heart! You must support your heart in the best way that you  
21 can!

22 Does that conclude item 2 of the agenda?

23 MR. BREALEY: Yes, it does.

24 THE CHAIRMAN: I do not need to make any directions. Can we rattle on with the question of  
25 confidentiality?

26 MR. BREALEY: Confidentiality: you will have picked up from the correspondence.

27 THE CHAIRMAN: I am sorry, you are free to leave. I should have said that earlier.

28 MR. BREALEY: Essentially, there is no dispute. The big dispute between Pfizer and the CMA  
29 was whether we could have five in-house counsel.

30 THE CHAIRMAN: Pfizer are happy to have a confidentiality ring - is that right?

31 MR. BREALEY: We are absolutely happy to have a confidentiality ring in the form that was sent  
32 to us by the Tribunal. We have in a letter added some more words to tighten it up, which,  
33 as I understand it, is satisfactory to the CMA. So it is essentially agreed.

34 THE CHAIRMAN: This is the position of the in-house lawyers?

1 MR. BREALEY: It is, so the five named individuals can be included in the confidentiality ring. I  
2 will leave Mr. Hoskins to add anything that he wishes to, but I was not going to trouble you,  
3 sir, if it was essentially agreed between us.

4 THE CHAIRMAN: Good. Miss Bacon?

5 MISS BACON: I believe the issue around our case is Mr. Roiter, and we have asked for  
6 Mr. Roiter to be added to the confidentiality ring. He is a non-executive director of Flynn,  
7 but he has absolutely no involvement in day to day commercial decision making. My  
8 understanding is that Pfizer, whose confidential information it is, does not object to his  
9 inclusion in the confidentiality ring. Flynn is a small company and we therefore do not  
10 have an in-house legal team, but guidance is provided on an informal basis by Mr. Roiter,  
11 and he is the person within Flynn who we can rely on to give us Flynn's business  
12 perspective on the materials that may be disclosed in the confidentiality ring.

13 In order to have some degree of equality of arms vis-à-vis Pfizer and its information, they  
14 have got five in-house lawyers, we are requesting one person who performs similar  
15 functions, and he is a non-practising solicitor, who acted for many years as a solicitor in this  
16 industry and has relevant expertise. As far as I understand it, there is no question of there  
17 being any leak of confidential information to the management of Flynn who are engaged  
18 with commercial negotiations with Pfizer or other parties. Pfizer does not object----

19 THE CHAIRMAN: You do have to be terribly careful, because every time somebody is allowed  
20 into one of these rings who does not fit the established categories, it is then used in the next  
21 case to justify further requests. So there is an issue.

22 MISS BACON: We do understand, but in this case Pfizer does not object, and we do not entirely  
23 understand what the CMA's objection is, if it is still maintained. So it is perhaps for  
24 Mr. Hoskins to explain it to you.

25 THE CHAIRMAN: As regards Pfizer there is no issue any more?

26 MR. HOSKINS: Pfizer is fine. As long as their extra wording, which was contained in  
27 Clifford Chance's letter of 7<sup>th</sup> March is added to the order, then we are content.

28 THE CHAIRMAN: Do I need to look at that?

29 MR. HOSKINS: You probably should. Has it made its way into the bundle?

30 MR. BREALEY: It is in the supplemental bundle, tab 10. It is a letter of 7<sup>th</sup> March. The relevant  
31 wording is four or five lines up from the bottom, that even if they are giving legal advice  
32 they will not use the confidential information.

33 MR. HOSKINS: Sir, it begins in the middle of the line:

1                    “We confirm that each of the individuals will not use any confidential information  
2                    for any purpose ...”  
3                    etc. Do you see that, sir, it is that wording.  
4   THE CHAIRMAN: If they say that you are content.  
5   MR. HOSKINS: Correct.  
6   THE CHAIRMAN: With a heavy heart, no doubt!  
7   MR. HOSKINS: No, that is quite light! Even for a Scot, I have to have some shades of darkness!  
8   THE CHAIRMAN: Now, Flynn?  
9   MR. HOSKINS: Sir, you have put your finger on the CMA’s concern. It is not normal practice  
10                   to allow a person who is not an external adviser or an in-house lawyer into the ring. Flynn  
11                   has made this special pleading for their position. One might have sympathy for a small  
12                   company saying, “This is how we operate, we do not have in-house lawyers”. You can also  
13                   see that the risk of inadvertent disclosure is actually greater in a small company like Flynn if  
14                   you have someone like Mr. Roiter having access to confidential information.  
15                   Absolutely, the CMA’s real worry is just the precedent setting. If a year down the line  
16                   someone will turn up and say, “Look, in this case”... If I can try and just finesse this, we do  
17                   not consent to it, we say it is a matter for the Tribunal. If the Tribunal is, itself, satisfied  
18                   that Mr. Roiter should come in we would ask you, please, to make it clear this is not to set a  
19                   precedent, this is very fact specific. That is probably as far as I can go.  
20   THE CHAIRMAN: What undertakings is this chap offering?  
21   MR. HOSKINS: I think he is just planning to sign the ring that the Tribunal suggests.  
22   MISS BACON: If it helps, we are very happy for Mr. Roiter to sign the additional undertaking  
23                   that is contained in Pfizer’s letter.  
24   THE CHAIRMAN: Whether I say it is a precedent or not, it does not seem to make any  
25                   difference.  
26   MR. HOSKINS: It would give us some comfort and it may help.  
27   THE CHAIRMAN: Your view on the equality of arms point is, yes, you sympathise, but?  
28   MR. HOSKINS: One might see a degree of sympathy, but it is not a question of equality of arms  
29                   between Pfizer and Flynn, because they are not against each other.  
30   THE CHAIRMAN: No, between the CMA and Flynn, the CMA with all its resources stretched  
31                   behind you.  
32   MR. HOSKINS: They are instructed by very competent solicitors, they do not need an extra  
33                   individual. If they were here acting in person and they needed someone to help them  
34                   legally, but they have got very experienced solicitors, etc.

1 THE CHAIRMAN: Yes, understood, but I have to say I am inclined to allow this, but subject to  
2 the extra wording, and please impress upon your client that words mean what they say.

3 MR. BREALEY: I think we are now on the future conduct of the appeal.

4 THE CHAIRMAN: We have still got a disclosure point, and then you are going to tell me that  
5 you have resolved that in the half an hour before the case started.

6 MR. HOSKINS: I hope we have.

7 THE CHAIRMAN: Disclosure into the confidentiality ring?

8 MR. HOSKINS: Correct.

9 THE CHAIRMAN: But not the individual names at the end?

10 MR. HOSKINS: Correct.

11 THE CHAIRMAN: That is the big blanking out, is it? That is the whole page blanking out.

12 MR. HOSKINS: It is individual contact names. There is a list of companies, and then there is an  
13 individual to be contacted and contact details for them. It is the contact details and the  
14 name of the individual that goes, so I do not think it is not quite as dramatic.

15 THE CHAIRMAN: I have to say, that sounds reasonable to me. Are you happy with that?

16 MISS BACON: That has been accepted in correspondence.

17 MR. HOSKINS: What we have done is we have told Alliance Boots that that is what we were  
18 going to do. I think they were told yesterday. We basically said, "It is for you to come and  
19 make observations", and they have not. So, as far as we are concerned, we have put them  
20 on notice that that was our position, but I think it is important the Tribunal knows that.

21 THE CHAIRMAN: That is helpful. You mentioned earlier the date for the non-confidential  
22 version of the decision?

23 MR. HOSKINS: If you pick up our skeleton argument, para.4, they have given you a description  
24 of where the process has got to. Then you see:

25 "The CMA expects to be able to finalise a version of the decision by the end of  
26 April. However, the specific date depends on the parties' representations and, if  
27 necessary, any applications to the independent procedural officer in relation to  
28 redactions."

29 THE CHAIRMAN: It would be awfully helpful if this could happen as soon as possible.

30 MR. HOSKINS: I think that is our view, and the only reason why we have a caveat is it depends  
31 on what attitude other parties take to confidentiality.

32 THE CHAIRMAN: I am adding my view to your view with all the weight I can attach to it.

33 MR. HOSKINS: We are grateful for that.

1 THE CHAIRMAN: It might help the discussions with the third parties. We are in your hands on  
2 that.

3 Are there any other confidentiality issues? I think that is it then.

4 MR. HOSKINS: Those are the only ones that are live today.

5 THE CHAIRMAN: Thank you. So we are into the future conduct of the appeal. How are we  
6 going to proceed? We do not have to do this in the order of the agenda. We could cut to  
7 the date of the trial, if you want, and work backwards, or we could work forwards to it. I  
8 am quite relaxed.

9 MR. BREALEY: I can give you, sir, two, as I understand it, agreed dates, which are that it is  
10 agreed that the CMA can lodge a defence by 5<sup>th</sup> April 2017, and it is agreed that we can put  
11 reply in by 19<sup>th</sup> May.

12 THE CHAIRMAN: All right.

13 MR. BREALEY: As I understand it, working back, again subject to your direction, sir, the parties  
14 seem to be agreed on 30<sup>th</sup> October as a start date. That seems to accommodate various  
15 people.

16 THE CHAIRMAN: This is all down to counsel's availability - is that right?

17 MR. HOSKINS: I think it is my fault.

18 THE CHAIRMAN: Really, it is your decision. My preference was October, as you know.

19 MR. HOSKINS: That is correct, and if it is not the 30<sup>th</sup> October then the CMA would have to  
20 instruct other leading counsel as my diary stands. I am sorry, but----

21 THE CHAIRMAN: We denied Flynn interim relief. Can you wait until the end of October?

22 MISS BACON: We do not want it to be delayed any longer than, is our position.

23 THE CHAIRMAN: You have my support on that.

24 MISS BACON: We would be available for slightly earlier in the October window, but as I have  
25 explained in my submissions, I have a problem right at the start of October, so that would  
26 have been extremely difficult for us in any event. We do not object to the 30<sup>th</sup>.

27 THE CHAIRMAN: All right, but you would not object to the 23<sup>rd</sup> either?

28 MISS BACON: We would not object to the 23<sup>rd</sup> either.

29 THE CHAIRMAN: But presumably you would?

30 MR. HOSKINS: I think that causes me problems. I went over some detail with my clerks, but  
31 the 30<sup>th</sup> was the best I could do in good faith.

32 THE CHAIRMAN: What happens if your case settles and vacates, they surrender or whatever?

33 MR. HOSKINS: Then the position changes, but I am committed to other matters.

1 THE CHAIRMAN: We have had correspondence on this, which I have read. Let us go for the  
2 period starting on 30<sup>th</sup> October, which is a Monday. I have to say, the Tribunal's view is  
3 that we should have a window of four weeks.

4 MR. BREALEY: I think that is wise.

5 THE CHAIRMAN: I think arguing about three to four weeks at this distance of time is not  
6 constructive. How we fill the four weeks is for discussion. We will certainly allow a few  
7 days for preparation of closings and reading of closings, but not a whole week. If we can  
8 manage to do it before the end of the four week period, so much the better, but I think we  
9 are getting ahead of ourselves at this stage otherwise.

10 MR. BREALEY: I think four weeks gives us wriggle room.

11 THE CHAIRMAN: The detailed planning of the trial will be at the second case management  
12 conference, I think.

13 What else do we need to tickle?

14 MR. BREALEY: On the Tribunal's provisional agenda, 6 is agreed. Then 7 is agreed, that the  
15 CMA should serve a single integrated defence. As you may have picked up, sir, we have  
16 asked the CMA to remember that these are separate infringements when dealing with the  
17 defence.

18 We have just dealt with point 8, so really we need to just fix a date for the next CMC.

19 THE CHAIRMAN: Right. If I can put the selfish objection in, I think for me it has to be the  
20 second half of June, so it has to be a date after 16<sup>th</sup> June. If you could take away and  
21 consider whether it could be the 21<sup>st</sup>, 22<sup>nd</sup>, or 26<sup>th</sup>, 27<sup>th</sup>, 28<sup>th</sup>, it could be one of those,  
22 obviously with a preference for the earlier.

23 MR. BREALEY: Of course, yes, sir.

24 THE CHAIRMAN: I would prefer the 21<sup>st</sup>, if it is a choice.

25 MR. BREALEY: We will certainly do that. Then 9, I think, is agreed, evidence in one appeal  
26 would stand as evidence in the other.

27 THE CHAIRMAN: Yes. Mr. Hoskins had a point on that, and I think, in anticipation of it, we  
28 will deal with such issues as they arise. I think we understand the issue.

29 MR. HOSKINS: My point is, I agree, you cannot rule on it now, I just wanted to put the marker  
30 down.

31 THE CHAIRMAN: We will be watchful, do not worry.

32 MR. HOSKINS: That is all I wanted.

33 THE CHAIRMAN: Witnesses?

1 MR. BREALEY: I do not know whether you have seen it from our skeleton, para.12, where we  
2 set out our understanding of the witnesses. We have got one witness of fact, Mr. Poulton,  
3 Flynn intends to rely on the evidence of Mr. Walters and Mr. Beighton.

4 THE CHAIRMAN: So not Dr. Fakes?

5 MR. BREALEY: No. I do not know whether the CMA is relying on any witnesses of fact. As  
6 far as I am aware, we have not been informed.

7 On experts, this is para.13, for our part we intend to call Professor Walker on epilepsy and  
8 AEDs, and we have Mr. Ridyard, the economist. Flynn has got three experts, Mr. Williams  
9 on the PPRS, Mr. Davies on pricing, and Mr. De Coninck on economics. As I understand  
10 it, the CMA intends to rely on one economic expert.

11 THE CHAIRMAN: Mr. Hoskins, do you want to say anything?

12 MR. HOSKINS: Sir, I just did not quite catch what Mr. Brealey said, that Flynn were not calling  
13 a particular witness, I did not catch the name, I am sorry?

14 THE CHAIRMAN: That was me, Dr. Fakes. He appears in the witness statements, but you are  
15 not calling him?

16 MISS BACON: No, we are relying on Mr. Walters.

17 THE CHAIRMAN: Thank you.

18 MR. HOSKINS: Sir, we are still a work in progress. We may have one factual witness. We are  
19 likely to have an expert, but we are not going to ask the expert to canter across everything.  
20 I think almost certainly he will focus on the first limb of *United Brands*, particularly the  
21 issues of common costs allocation and assessment of excessive pricing.

22 THE CHAIRMAN: But not economic value?

23 MR. HOSKINS: No. We are going to do that by way of submission.

24 THE CHAIRMAN: When do you think you are going to complete the work in progress?

25 MR. HOSKINS: By 5<sup>th</sup> April. We will file the evidence at the same time as the defence.

26 THE CHAIRMAN: We are not going to decide on hot tubs, if we ever decide on them. You are  
27 going to be very careful to avoid duplication. It is the case, is it not, that there is quite a lot  
28 of common ground to these two separate infringements, but equally the issues they raise are,  
29 in some respects, distinct. So I think, while you avoid duplication on the common parts, we  
30 will not regard separate submissions as duplicative on the issues that affect you  
31 individually.

32 MR. BREALEY: Yes. I am not sure there is anything else, sir.

1 | THE CHAIRMAN: I am not sure there is. Thank you very much. That concludes the  
2 | entertainment for this morning, I am very grateful to you, and we will see you again at a  
3 | date in the second half of June.

4 | MR. BREALEY: Thank you.

5 | \_\_\_\_\_

6 |