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IN THE COMPETITION

Case No: 1524-1525/1/12/22

APPEAL
TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 6th November – Friday 1st December 2023

Before:

The Honourable Mr Justice Marcus Smith
Eamonn Doran
Professor Michael Waterson

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Appellants

**Pfizer Inc. and Pfizer Limited & Flynn Pharma Limited and Flynn
Pharma (Holdings) Limited**

V

Respondent

Competition & Markets Authority

A P P E A R A N C E S

Mark Brealey KC, Robert O'Donoghue KC & Tim Johnston (Instructed by Clifford Chance LLP) on
behalf of Pfizer

Jemima Stratford KC, Tom Pascoe & Alastair Richardson (Instructed by Macfarlanes LLP) on
behalf of Flynn

Josh Holmes KC, David Bailey, Jennifer MacLeod, Julianne Kerr Morrison
& Conor McCarthy
On Behalf of the Competition & Markets Authority

1 Wednesday, 22 November 2023

2 (10.00 am)

3 MS RACHEL WEBSTER (recalled)

4 THE PRESIDENT: Mr Holmes, good morning.

5 MR HOLMES: Good morning, sir.

6 Ms Webster has obviously already been sworn. With
7 the Tribunal's permission, I have just one question by
8 way of correction of a point in one of the documents
9 that Ms Webster has prepared.

10 THE PRESIDENT: Of course.

11 Good morning, Ms Webster. Welcome back.

12 THE WITNESS: Good morning.

13 Examination-in-chief by MR HOLMES

14 MR HOLMES: Ms Webster, do you have a set of your slides to
15 hand?

16 A. I do.

17 Q. The reference for Opus is {XE7/4/23}, and could you turn
18 to page {XE7/4/23} in the slide deck, and you see there,
19 I hope, a slide headed:

20 "Key issue of disagreement ... 3: Comparison of
21 Capsule margins with tablet margins ..."

22 Could you review point 6 on the left-hand side of
23 the page. Is there anything you would wish to add or
24 change in relation to your evidence on that point?

25 A. Yes. I would like to draw attention to the 52% figure

1 which is the comparison of Flynn's margin with
2 Wockhardt's margin. The asterisk at the end of that
3 sentence sets out a definition for how that 52% has been
4 arrived at, and in doing further QA on the numbers,
5 I have realised that actually I have not taken the full
6 period for the Flynn margin, and the 52% relates only to
7 the period to the end of period 3. When extending
8 to April 2015 as set out in the footnote, that figure
9 falls to 47%.

10 So it does not change my conclusion, but I feel it
11 is right that I bring that error to your attention and
12 correct it.

13 THE PRESIDENT: I am grateful, thank you.

14 MR HOLMES: I am grateful.

15 Ms Webster, I think Mr Brealey will have some
16 questions for you.

17 A. Thank you.

18 Cross-examination by MR BREALEY

19 MR BREALEY: Good morning.

20 Ms Webster, on Wednesday last, you swore that your
21 opinion was complete and true. That is correct, it was
22 last Wednesday?

23 A. Yes.

24 Q. Is there anything you have heard so far in this trial
25 that makes you change your mind?

1 A. No.

2 Q. So nothing said in the teach-ins or the openings?

3 A. I do not believe so.

4 Q. Nothing in the light of the clinical evidence?

5 A. I did not listen to the clinical evidence.

6 Q. Okay, we will have to correct that, then. Nothing said
7 by any of the factual witnesses?

8 A. I did not listen to the factual witnesses.

9 Q. Right.

10 THE PRESIDENT: Just to be clear about how much you do not
11 know of what they said, you have not looked at the
12 transcripts of their evidence?

13 A. No.

14 THE PRESIDENT: That is fine. Just so we know.

15 MR BREALEY: So with that in mind, could we go to the
16 transcript of Day 7 when you were sworn in, and it is
17 page {Day7LH1/105:14}. This is when you were sworn in.
18 I am not nitpicking here, there is a point we are going
19 to make, but this is when you were sworn in, and you
20 were asked whether the opinions in your report and the
21 position paper represented your true and complete
22 professional opinion on the matters to which they
23 relate; yes?

24 A. Yes.

25 Q. Can we go to your first report to the statement of

1 truth, so that is at {XE1/16/80}. There you see the
2 expert declaration and statement of truth. You see the
3 standard duty to the Tribunal which you know about, and
4 you see the statement of truth there, and at
5 paragraph 1.2 you say you have consulted the CMA and
6 they have made comments, okay. It is 1.3 that I just
7 want to clarify. You say there:

8 "I confirm that I have made clear which facts and
9 matters referred to in this report are within my own
10 knowledge and which are not. Those that are within my
11 knowledge I confirm to be true."

12 Now, it is standard for experts to base their expert
13 opinions on the facts; correct?

14 A. Yes.

15 Q. I am not quibbling whether you confirmed the first two
16 sentences, because you did not, but we do need to be
17 clear on what you have relied on. So with that in mind,
18 can we go to the transcript again, and it is line 19.
19 {Day7LH1/150:19}.

20 If you just remind yourself there, so this is the
21 slide that you have just been referring to, and you
22 actually, I think, are referring to slide 13, we will
23 see that in a moment. So at 19 you say:

24 "So then turning to my view on whether the tablet
25 prices, ASPs, would have been consistent with normal and

1 sufficiently effective competition, and here my view is
2 no, and I base this -- and in fact, everything shown on
3 this slide and my analysis is based on what I have taken
4 from the Decision, the remittal Decision. I have not
5 looked at the underlying primary evidence that the CMA
6 collected, so I am relying on what I have read in the
7 Decision. I think I have looked at one call note ...
8 that was raised by Dr De Coninck."

9 So could you just explain that? What was the
10 process, that you did not look at any underlying
11 documents? Were you told not to? Did you ask to see
12 any underlying documents?

13 A. So the process that I went through, we received -- the
14 CMA will have received the notices of appeal and asked
15 that I -- instructed me to provide my expert opinion.
16 The period of time that was available for me to provide
17 my expert opinion was relatively narrow. On that basis,
18 I was instructed to look at the evidence as described in
19 the CMA's remittal decision and then to provide my view
20 as an expert economist taking those facts as described
21 in the CMA Decision.

22 If true, what do they then imply for the degree to
23 which competition could have arisen, and this is
24 specifically in relation to the tablet market. It would
25 apply more generally to the relevance of the £30 drug

1 tariff price and also to the other AEDs.

2 Q. That is very helpful, because if we could then put some
3 context to that answer. If we go to the slide which is
4 {XE7/4/13}, this is your overview, and under the heading
5 "Tablet ASPs", and you see there "No", you say:

6 "Based on the evidence presented by the CMA ..."

7 That is consistent with what you have just said.

8 So the evidence presented includes, I take it,
9 quotes from documents, hard data, but it refers to how
10 the CMA has presented the evidence, its assessment; that
11 is correct: its assessment of the underlying documents?

12 A. So what I have looked at in the CMA's remittal decision,
13 is the remittal decision does include the CMA's
14 interpretation of that evidence, but I have tried to
15 focus on what is the nature, and thinking about the
16 tablet market in particular, what is the nature of the
17 constraints that the CMA describes, and the CMA then
18 references various underlying documents which lead it to
19 then describe those constraints. I have not looked at
20 the underlying documents, I have looked at the nature of
21 the barriers as described by the CMA.

22 Q. So you have relied on their assessment of the underlying
23 documents, I think that is what you have just said?

24 A. So I have relied on the description provided. Whether
25 that constitutes an assessment by the CMA I do not know.

1 The word "assessment" suggests that there is some
2 judgment, and what I have tried to do is abstract from
3 the judgment that the CMA applies and look at the -- the
4 more factual evidence without going to the primary
5 evidence itself.

6 THE PRESIDENT: Yes, but the extent to which you are relying
7 on judgmental questions of the CMA will be
8 context-sensitive. So, for instance, where the CMA in
9 their decisions describe the effect or what they think
10 the effect is of, let us say, the guidelines regarding
11 continuity of supply, you are not in a position to
12 second-guess the description, whatever it may be, of the
13 CMA in that regard, and so to that extent you are not
14 exercising judgment at all, you are simply following the
15 judgment of the CMA in that regard.

16 A. So, yes, if we took the specific example of continuity
17 of supply guidance, I have looked at the facts as
18 described by the CMA and also looked at the CAT's
19 finding in the appeal in 2017.

20 THE PRESIDENT: But the extent to which you can properly
21 exercise your own judgment in that regard is actually
22 remarkably narrow because you are not a medical
23 expert --

24 A. That is right.

25 THE PRESIDENT: -- you are an economist. On the other hand,

1 to take a hypothetical example, were the CMA to express
2 a judgmental view about, for instance, unfairness or
3 indeed excess, then that is something where you would
4 expect to have your critical faculties fully engaged --

5 A. Yes.

6 THE PRESIDENT: -- and would be exercising your opinion as
7 an expert as you should?

8 A. That is right.

9 THE PRESIDENT: I am grateful.

10 MR BREALEY: You said you did not have much time, but as
11 I understand it, I have just been informed you had
12 a three-month extension from October 2002
13 to December 2002, is that correct?

14 A. I think it was not a three-month extension, it would
15 have been a three-month period.

16 Q. I was informed that you had a three-month extension;
17 that is not correct?

18 A. Sorry, I was just -- I had from October to December.

19 Q. So lastly on this, could you go to {XE1/16} which is
20 your main report, and page {XE1/16/13}, paragraph 2.3,
21 and this, I think, confirms, which you have just told
22 the Tribunal:

23 "I have considered the arguments and evidence
24 available to me and take the view that the constraints
25 on competition in the supply of Tablets described in the

1 CMA's Remittal Decision, if supported by the factual
2 evidence, are of the type that would prevent the
3 development of sufficiently effective competition."

4 So you are accepting there that if the CMA's
5 description, if you want to call it, presentation of the
6 factual evidence is wrong, your opinion might be wrong,
7 because you say "if supported by the factual evidence".
8 Do you accept that? Do you want me to repeat the
9 question?

10 A. No.

11 Q. No, okay.

12 A. I think that is right.

13 Q. Thank you. Now, if you go to page {XE1/16/5} of this
14 report, your main report, if you blow it up a little
15 bit, if you could, it is at the bottom, I want to go to
16 paragraph 1.10 to 1.13.

17 At 1.10, you say:

18 "I have been asked to consider the following
19 extracts from the Court of Appeal Judgment, in
20 particular, which I understand describe the legal test
21 for fairness as articulated in the *United Brands* case."

22 At the footnote there, you give three paragraphs;
23 yes?

24 A. Yes.

25 Q. Then if you go over the page you see the paragraphs that

1 you set out, 61, 97, and if you go over the page, and
2 again and again, you set out the law here. Go over the
3 page, please {XE1/16/8}. Then "Summary". Then at
4 paragraphs 1.12 to 1.13 you say:

5 "In my view, for the comparator analyses to show
6 that the Parties' prices were fair they would need to
7 identify a comparator product that:

8 "(a) is sufficiently similar ..."

9 That is the first condition, yes, which we do not
10 have to bother about because you and Dr Majumdar are in
11 agreement. Need that:

12 "(b) is priced at a level that reflects sufficiently
13 effective competition in the supply of that product."

14 Then you go on at 1.13:

15 "If both of these conditions are met, the price of
16 the comparator product should provide a good indication
17 of a fair price ... In contrast, if one of the
18 conditions is not met, my view is that the comparator
19 analysis cannot inform the fairness of the Parties'
20 prices for Capsules."

21 So your view is that Pfizer and Flynn need to
22 satisfy the two conditions. It is what you say there.

23 A. Yes, just to provide the context in which I say that,
24 I have understood from the CMA that its case in relation
25 to the finding of unfairness relates to the excessive

1 limb and then that the CMA finds that Pfizer and Flynn's
2 prices were not fair in themselves.

3 They have then considered the comparators which have
4 either been put forward by the parties or considered by
5 the CMA, to understand whether, looking at those
6 comparators undermines the conclusion that the CMA
7 reaches on the excessive and unfair in itself limb.

8 So my interpretation, therefore, of this legal
9 framework and what leads me to these criteria is that
10 I would really want to find a comparator where it is
11 clear that the prices of that comparator are consistent
12 with normal and sufficiently effective competition, it
13 is a sufficiently similar product, and then when I do
14 a sort of side by side comparison with the parties'
15 capsule prices, if I know the comparator is one which is
16 a truly competitive price, then that gives me the
17 evidence that would then -- it would tell me whether
18 actually the finding that comes from unfair in itself
19 would be undermined. So it is in that context that
20 I set out those criteria.

21 MR BREALEY: But they are conditions, you say, that need to
22 be met?

23 A. So in order to answer the question as I set out,
24 I consider that is what a comparator would need to look
25 like.

1 Q. Yes. Then we see something similar if we go to your
2 position paper at {XE6/8}. This is your position paper.
3 If you can blow it up a little bit, paragraph 1.2, you
4 say:

5 "I have been guided by relevant case law (see [the
6 paragraph we have just been looking at]). I have also
7 been directed to the Tribunal's recent judgments in
8 *Liothyronine* and *Hydrocortisone*. Where appropriate,
9 I include references to aspects of the Tribunal's
10 judgments below."

11 It is fair that you have noted various references in
12 footnotes 7, 9, 10, 18, 46, 47, 52, there are references
13 to *Liothyronine*, and *Hydrocortisone* gets at least one
14 reference at footnote 11.

15 Now at paragraph 1.3 of your position paper you say:

16 "Given this guidance, in my view, for [a] comparator
17 [analysis] to show that the Parties' prices were fair
18 they would need to identify..."

19 And you come back to your two conditions.

20 I just want to be crystal clear: is this the legal
21 framework directed by the CMA, or have you read the
22 cases and decided that in your view this is the
23 framework? The reason I am asking that is because two
24 times now you have said "in my view". So is it your
25 view, reading the legal text, or have you been directed

- 1 to the framework by the CMA?
- 2 A. I have been directed to the legal framework which was
3 set out in my first expert report, and then it is my
4 view that in this case it is therefore appropriate to
5 look for comparators which have the characteristics that
6 I have described, so I have not been directed to use
7 that framework.
- 8 Q. You say "given this guidance", so you say you have not
9 been directed by the CMA?
- 10 A. No, it is as I described. I have understood the CMA's
11 case to be reliant on excessive and unfair in itself.
12 The question is how -- how is it therefore relevant to
13 bring in comparators? What do those comparators need to
14 do to be informative of whether the CMA's conclusions on
15 excessive and unfair in itself are undermined.
- 16 Q. Sorry, we need to be clear on this: as to the law, is it
17 your view or the CMA's view that the two conditions need
18 to be satisfied, or both?
- 19 A. I think I have been clear on that. I think that is my
20 interpretation.
- 21 Q. Of the case law?
- 22 A. Not of the case law, of the paragraphs that I set out in
23 RW1 and thinking about what is appropriate in this case.
- 24 Q. Well, I am not sure that answers the question, but
25 I will ask another one.

1 Would you accept, if your interpretation of the law
2 is wrong, your opinion, your expert economist's opinion
3 may be wrong or at least incomplete?

4 A. I think that would depend on the nature of the error
5 that would be inappropriate.

6 Q. So depending on the nature of the error, then your
7 opinion could be incomplete or wrong?

8 A. If I have not set that framework appropriately.

9 Q. Correct, thank you. Could we go to another document?
10 This is {XG/12}. This is a Department of Health
11 document:

12 "New long-term arrangements for reimbursement of
13 generic medicines.

14 "Scheme M."

15 I appreciate you have not seen the underlying
16 documents, but are you aware of this document, have you
17 seen this document?

18 A. No.

19 Q. No. It is referred to in the Decision, just for your
20 note, at paragraph 2.167, so you do not know what the
21 purpose is of this document?

22 A. No.

23 Q. Could we go to page {XG/12/12}, please, of this
24 document. Again, every time if you could blow it up
25 a little bit. If you read paragraphs 22 to 24, this is

1 where the Department of Health sets out the purpose of
2 the document. I am not going to ask you about the
3 scheme, but I am going to ask you some questions
4 relating to it.

5 So this is the purpose of Scheme M, setting the
6 category M drug tariff for generic medicines, 22 to 24.

7 Essentially --

8 A. Sorry, could I have a moment to read?

9 Q. Of course you can.

10 A. Thank you. (Pause)

11 Q. Okay, so --

12 A. Sorry, I have not finished yet. Apologies for being
13 slow.

14 Q. That is okay. 22 to 24. It is just to give you
15 background context, really. (Pause)

16 Just the three paragraphs, 22 to 24.

17 A. Yes.

18 Q. If I can just summarise: the scheme is used to calculate
19 category M drug tariff prices. Do you see that? The
20 Department of Health uses the sales and volume data of
21 suppliers to calculate a volume-weighted ASP for each
22 drug, and then makes an adjustment to ensure that
23 pharmacies can earn sufficient margin. Did you hear
24 Mr Williams yesterday about the pharmacy margin?

25 A. Yes.

1 Q. So you would be aware that the generics market relies on
2 this scheme and many hundreds of millions of pounds are
3 incurred, spent, relied on with this scheme in mind, and
4 we are talking about 800 million worth of generic
5 prices. So the generic industry relies on the Scheme M
6 to do business. Do you understand that?

7 A. I am not an expert, but I assume what you have said to
8 be the case.

9 Q. Okay, but this is relevant to your legal framework. If
10 we go to page {XG/12/13} and paragraph 28, the Tribunal
11 will have seen this several times before but if you have
12 not seen it and we blow it up, paragraph 28.

13 For the transcript, it says:

14 "Wherever possible, the Department will allow
15 changes in market prices to be influenced by existing
16 market mechanisms. This means that where there is
17 effective competition in respect of any given generic
18 medicine then the Department will not interfere in the
19 operation of the market for that medicine."

20 So that is saying that the way the market is
21 working, where it is effective competition the
22 Department is quite happy, yes?

23 "However [it goes on to say], should the Department
24 identify any significant events or trends in expenditure
25 that indicate the normal market mechanisms have failed

1 to protect the Department from significant increases in
2 expenditure ..."

3 And this is what I want you to focus on, if you
4 would:

5 "... then the Department may intervene to ensure
6 that the NHS pays a fair price for the medicine(s)
7 concerned."

8 A fair price.

9 Now, I appreciate you have not seen this document
10 before, but it is absolutely critical to the framework.

11 Can I give you an example relating to this
12 paragraph, and if you want -- you wanted some paper,
13 I do not know if you have it.

14 A. I have paper, thank you.

15 Q. So assume that the Department of Health rings up a sole
16 supplier of a medicine and says: your £50 price is too
17 high, the market is not working, I want a fair price for
18 the medicine within the meaning of paragraph 28 of
19 Scheme M. I want a fair price of £25, says the
20 Department.

21 Assume the supplier agrees and reduces its price
22 to £20 which is £5 below the fair price, and assume that
23 the £20 is well above cost plus and there is no
24 comparator. My question to you as an economist is this:
25 within your framework, is that supplier entitled to

1 charge £20 as being a fair price?

2 A. So my response to this question would be that there are
3 two frameworks here: there is the framework as set out
4 in this guidance which refers to a fair price, there is
5 laws in relation to abuse of dominance which talk about
6 the fair price in the context of abusive pricing, and
7 I am not an expert in those matters, but I would see
8 those as potentially two different frameworks.

9 What I have sought to do is apply the framework as
10 set out in the context of abuse of dominance with
11 reference to the paragraphs that I quote in my first
12 expert report, and, therefore, on that basis, I would
13 not necessarily say that the supplier that agrees to
14 a £20 price in this hypothetical example is necessarily
15 charging a fair price.

16 In order to understand whether it is charging an
17 unfair price, I would need to go through some exercise,
18 as has been done in this case, to establish the amount
19 of excessiveness and other factors which would be
20 relevant to fairness.

21 Q. So as I understand that answer, the supplier would not,
22 without potentially abusing its dominant position, be
23 able to charge a price the Department says is fair?

24 A. That may or may not be the case.

25 Q. Okay, let us just unpack that one. Why would it may not

1 be the case? It is ten times above cost plus. There is
2 no comparator.

3 A. So this comes back to the framework that I set out in my
4 teach-in. One starts by looking at cost plus and then
5 one would consider what are the reasons for the price
6 being substantially above cost plus. So one would look
7 at the extent of the difference between cost plus and
8 the actual price and one would look at reasons for that
9 difference.

10 One reason why the price at that elevated level may
11 not be unfair would be if it were -- like the face mask
12 example -- something that arose for a temporary period
13 of time, it was a price that then attracted entry and
14 then had the expectation of attracting entry such that
15 prices would then fall. If that were the case, I would
16 not consider that price to be abusive or unfair.

17 Q. Is it your -- I am asking you as an economist -- is that
18 supplier on day one entitled to say: the Department told
19 me it was fair, and it should not charge that price
20 because of your legal framework relating to your two
21 conditions? What would your advice be to that supplier
22 who charges at £20 as an economist?

23 A. So, as I explained in my teach-in, I think economics
24 gets you so far, and then there is a judgment that then
25 needs to be applied as to whether a price that is

1 materially above cost plus would be abusive. So, as an
2 economist answering that question to the company,
3 I would be able to give a partial answer. I would, in
4 my view, ask that company to give thought to why the
5 price is so much higher, what is the reason for it. Is
6 it a price that can be justified with respect to other
7 things which are happening in the market? Is it a price
8 where they expect entry will come in and bring that
9 price down so they are taking a reward for the
10 investment, perhaps, that they made in getting the
11 product to where it was?

12 So my advice would be to look at the reason for the
13 elevated price.

14 Q. So it cannot take the Department's statement that it is
15 fair at face value?

16 A. I think ultimately that is a question for the company.

17 Q. I am asking you as an economist. The company is coming
18 to you, you have given expert economic in this trial
19 which is relating to this very issue and I am asking
20 your opinion: can the supplier take that charge,
21 that £20 -- it cannot charge that £20 as being fair at
22 face value?

23 A. So as an economist, I would advise the company to look
24 at the difference between its cost plus and the price
25 that it is seeking to charge and to consider the reasons

1 for the differential cost plus to price and to consider
2 whether that is -- and then one could apply the
3 framework for abusive pricing to consider whether the
4 price that the company is intending to charge would be
5 abusive or not. I think the company can look at that
6 framework.

7 THE PRESIDENT: But to be clear, assuming you are being
8 asked for your advice on Chapter I and Chapter II
9 infringements, you would not allow a different regime,
10 such as the one here described, to affect your judgment
11 as to what was or was not abusive under a competition
12 regime, the two are un-interconnected?

13 A. I think that is right, yes, I think that is my view.

14 MR BREALEY: So in other words, Scheme M, as we know, is
15 subject to Chapter II, but nevertheless the factual
16 situation is that the supplier -- on your evidence the
17 supplier cannot take what the Department says is fair at
18 face value?

19 A. I think that is where we have got to.

20 Q. Let us just go on and tease this out a little bit more.

21 In this document at paragraph 27 {XG/12/12}, if you
22 just read this, this is about -- where you have the
23 branded drug and then you have a new generic. So the
24 Department of Health is saying here:

25 "To determine the drug tariff for new generic

1 products introduced following the granting of
2 a marketing authorisation, the list pricing will be
3 allowed at the discretion of the company on entering the
4 market, subject to a maximum equal to the price of the
5 originating brand product. An interim drug tariff will
6 be calculated on the basis of that list price until such
7 time as information is made available to allow a proper
8 determination using market information. In the case of
9 a new generic medicine launched following patent expiry
10 of a branded medicine with which it will compete, the
11 Department may request monthly information to be
12 submitted for the first two quarters following launch."

13 Now, you see here that the government says that
14 a new generic, the first generic, can price up to the
15 price of the incumbent drug; yes?

16 A. Yes.

17 Q. The Department is saying that a new interim drug tariff
18 will be calculated on the basis of the brand owner's
19 price; correct? There is a new --

20 A. Yes.

21 Q. -- interim drug tariff, if you want to go back and look
22 at it, will be calculated on the basis of the brand
23 owner's price. An interim drug tariff will be
24 calculated on the basis of that list price.

25 A. Apologies, the list price is the list price for the new

1 generic supplier, is that right?

2 Q. No, the list price -- so:

3 "To determine the drug tariff for [the] new generic
4 products ..."

5 Yes, we are going to look at a new drug tariff:

6 "... following the granting of a market ...the list
7 pricing will be allowed at the discretion of the company
8 on entering the market, subject to a maximum equal to
9 the price of the originating brand product."

10 So, yes, the list price and the interim drug tariff
11 is calculated by reference to the price of the
12 originating brand product; yes? It is normal?

13 A. No, that is not entirely how I have read this. I have
14 read this that the new generic supplier can come in, is
15 able to set a list price. The list price must be no
16 higher than the price of the originating brand product.

17 Q. Yes.

18 A. Then the interim drug tariff will be based on the
19 price -- the list price of the new generic supplier,
20 subject to that maximum.

21 Q. Yes.

22 A. Yes, thank you. Understood.

23 Q. Now let us see an example of this because again, this is
24 what happens on a daily basis in the generics industry,
25 yes? Do you accept that?

- 1 A. I take your word for it.
- 2 Q. New generics come in every day. If we go to the
3 Decision at {XA1/1} and we go to page {XA1/1/369}, blow
4 that up, we saw this with one of the witnesses of fact,
5 but I will take you through it. So you will have seen
6 this, this is in the Decision, this relates to some
7 other AEGs, it concerns lamotrigine, generic, and
8 Lamictal, the brand. We see here the CMA setting out in
9 2004 you have the brand, and then the generic comes in,
10 and the volume goes down because obviously the price is
11 lower, and then it goes down again. So the brand is
12 losing volume because of price competition, and if we --
13 you are nodding, but you probably agree with that?
- 14 A. Yes.
- 15 Q. I do not know whether you can put this side by side, but
16 if we can go to {XE1/2}, which is Mr Ridyard's second
17 report and go to page {XE1/2/19}, you see the
18 correlation between the two. You see the price of the
19 generic falling. It starts off very close to the
20 branded price as the government allows, and then within
21 a year it falls from about 400 to 300, this is an
22 average six-month treatment, and then falls to 100 by
23 2006, then I imagine close to cost in 2016, eight years
24 later. Yes?
- 25 A. Yes.

1 Q. So that is a classic example how the generic markets
2 work.

3 Now, again, a couple of questions which are grounded
4 in the real world. Assume that the brand is off-patent
5 but the generic has -- no, sorry. First of all, assume
6 that the brand owner in this example exits on day one.
7 It does not want to compete in a generic market, and the
8 new generic is now the sole supplier and is dominant,
9 yes?

10 So my question is similar to the previous one: what
11 does that generic supplier do? It is pricing at the
12 higher price of the brand owner, but the brand owner has
13 exited. What does that generic supplier do? Does it
14 price immediately at just above cost?

15 A. So based on the discussion that we had in the hot-tub,
16 my expectation is if that first generic supplier were
17 the only supplier in the market, then for a period of
18 time the generic -- sorry, following Scheme M, the
19 generic supplier would be able to price up to the price
20 of the originator's price.

21 So I would not expect it to price at a significant
22 discount while it is the only supplier in the market.

23 Q. That is very interesting. So while it is the only
24 supplier in the market, it can price at quite a high
25 level above cost plus?

1 A. Yes.

2 Q. How does that fit within your legal framework of your
3 two conditions?

4 A. So if I might go to the -- refer back to my teach-in
5 slides, I think this would be an example, which is like
6 the face mask example, assuming there are no barriers to
7 entry in relation to the supply of this generic product,
8 the first generic entrant prices at a level which is
9 high, but that high price then attracts further generic
10 entry. This is the temporal element that I described in
11 my teach-in.

12 If one observed that this high -- this generic
13 supplier, being the only supplier in the market, had
14 that position over an extended period and charged a high
15 price, that would be a very different situation than if
16 it prices high initially, the high prices attract entry,
17 and over time the price comes down, and I think in
18 relation to understanding whether a price is unfair, it
19 is relevant to draw a distinction between those two
20 situations.

21 THE PRESIDENT: When you say "assuming there are no barriers
22 to entry", you are referring to barriers that are
23 improper, or are you referring to all barriers to entry?

24 A. I am referring to all barriers. So if there are
25 barriers in the market that mean that competition cannot

1 take place so there is this market signal, a high price,
2 signalling high profits, if there are conditions which
3 prevent other firms coming in to also supply that
4 product, and then one observed off the back of that that
5 there were many years where this supplier was then --

6 THE PRESIDENT: Let us leave the many years out of account,
7 I am interested in your definition of what a barrier to
8 entry is.

9 A. Yes, I think it is something that prevents what I would
10 describe as the normal workings of competition, which is
11 the ability of firms to respond to the price and profit
12 signals in the market.

13 THE PRESIDENT: Yes, well let us suppose in order to compete
14 you have to invest in a factory that produces the
15 competing product --

16 A. Yes.

17 THE PRESIDENT: -- and that involves an upfront capital
18 investment.

19 A. Yes.

20 THE PRESIDENT: One might say that is a barrier to entry
21 because you have to find the money to spend, and things
22 may go wrong, but you would not regard that as a barrier
23 to entry in the sense that you are using it, or
24 would you?

25 A. That is a very good question. Thank you for the

1 clarification.

2 To my mind, that comes to something which I think
3 you said yesterday: it introduces a time-lag by which
4 competition will take some time, but if the profits are
5 there such that the investment will be profitable, then
6 I would expect the investment to be made and entry to
7 come into the market, and it will take some time, which
8 is why I think the temporal element is relevant, or
9 becomes relevant, but I would expect over a period of
10 time for the market -- for firms in the market to
11 respond to those market signals and come in.

12 So it is a barrier to entry, but it is not one which
13 is insurmountable over a period of time.

14 THE PRESIDENT: I see. Suppose you have a situation where
15 the market is a dying one, as might be said here, that
16 you have limited new entrants in terms of the supply of
17 the capsules.

18 A. Yes.

19 THE PRESIDENT: Let us suppose that the existing demand
20 actually has a graph that means it is going to end in
21 a year, for whatever reason, and it takes a year to
22 gear-up to supply an alternative. In that case, you are
23 not going to enter the market as a new entrant.

24 A. I agree.

25 THE PRESIDENT: How do you analyse on those facts the prices

1 that are being charged by the incumbent who does not
2 have these costs to incur because they are already
3 present in the market?

4 A. Yes, so what you have described in that situation is
5 a barrier to entry that comes from the combination of
6 the investment cost and time that would be needed by the
7 potential entrant plus the ending of the market at
8 a definitive date which curtails the returns that can be
9 made. The returns will not be sufficient, I am
10 assuming, to repay the investment, and, therefore, it
11 will not happen, so that creates a situation of, let us
12 say monopoly supply, a monopoly situation, for the one
13 generic company that is in the market, and then that
14 company has a choice as to where it wants to price, and
15 it could -- because it would be free from competitive
16 constraints, it could price at a level which is
17 significantly above its cost plus, and that would be at
18 a level which is higher than one would expect if
19 competition were working effectively.

20 One may, as a sort of -- applying the legal
21 framework, take the view that that is, therefore,
22 abusive because they have extracted some gains that
23 would not have been available had competition been
24 working well, but it might be that that is not
25 considered a policy priority because there is only

1 a year and then it will be finished. But for me that is
2 not so much a matter of economics.

3 THE PRESIDENT: The trouble is I am slightly not
4 understanding the significance you are attaching to an
5 absence of contestability. So the scenario that I have
6 put to you is that there is a market which is only going
7 to be around for a year, and if the lead time for
8 entering the market is a year, you are not going to
9 enter the market because it will be gone by the time you
10 enter.

11 A. Yes.

12 THE PRESIDENT: If you postulate an absence of the death of
13 the market, in other words it continues, you will expect
14 entry within a year --

15 A. Yes.

16 THE PRESIDENT: -- because the market continues, but does
17 that mean that the criteria for assessing an excessive
18 and unfair price in that year are different according as
19 to whether the market is dying or not, and, if so, why?

20 A. That is a good question. So if I just may play back,
21 the situation that we are constructing, if I have
22 understood correctly, is a sort of in the moment --
23 well, is it -- are we in the moment trying to judge
24 whether the pricing of this company in this year-long
25 period whether the company is justified at pricing at

1 a certain level, or is it an ex post were they justified
2 as market facts played out? Actually, I am not sure
3 that is relevant.

4 THE PRESIDENT: I am not sure that is relevant. I mean,
5 I am very happy to try and answer it if it assists you
6 in answering my question.

7 A. Maybe not. Could you repeat the question, just so
8 that -- it would help me.

9 THE PRESIDENT: Of course, I absolutely want you to be on
10 the same page.

11 So we are talking about variants on the face mask
12 example.

13 A. Yes.

14 THE PRESIDENT: What you said was the face mask example
15 is it is fine to have a higher price because the higher
16 price attracts entrants, and so what you get is you get
17 a period of what might be regarded as prices well above
18 cost, and the reason that is justifiable is because it
19 attracts new people into the market, and therefore the
20 constraint is in effect a temporal one.

21 What you are saying is: I am less bothered about the
22 higher prices in the period because they serve to act as
23 a signal to bring in someone else, and it seems that on
24 your thinking, the attraction to bring in someone else
25 means that when one is working out whether there is an

1 abusive price, there is more latitude.

2 So I understand your thinking there. What I am
3 doing is I am removing, but through no abuse by the
4 incumbent, I am removing the incentives on a new entrant
5 to come in, because what I am somewhat artificially
6 postulating is that the market will only persist for
7 precisely the same length of time that it takes for the
8 new entrant to gear up to enter, and, therefore, by
9 definition, they will not enter because they will spend
10 all the costs of gearing up and the moment they are
11 ready to go in, the market has gone.

12 Now, I fully acknowledge that is a somewhat unreal
13 example, but what I am saying is by virtue of the
14 removal of that aspect of contestability, are you
15 changing the criteria by which you assess the prices in
16 that period when the incumbent is there on their own,
17 and, if you are, by what reference, to what test, are
18 you doing so?

19 A. Yes, thank you, that is really very helpful. In which
20 case, I realise that I feel I am straying from what
21 economics can tell us into what would be a policy
22 decision. I am straying into what I had as the grey box
23 on my teach-in, which is the situations in which the
24 legal or policy framework may seek to have a view on
25 whether there would be a difference in those two

1 situations, and I think I should just be clear about
2 sort of where I feel that I can get to as an economist.

3 I think if I turn this to the tablet market
4 where I --

5 THE PRESIDENT: Well, pausing there, I mean, is what you are
6 saying -- and I would quite understand if you were --
7 that you consider that it is actually outside your
8 expertise as an economist to answer my somewhat
9 artificial question?

10 A. Yes, that is right.

11 THE PRESIDENT: Okay, well, that is fine. I mean,
12 I completely respect that.

13 Does that also explain your hesitancy, if I can call
14 it that, if memory serves, to articulate what the
15 control should be in my example of the important
16 medicinal patent where one has, let us say, a 20-year
17 monopoly which, by virtue of that fact, means that it is
18 not contestable for that length of time, and are you
19 similarly saying that in that situation, economics stops
20 and policy begins?

21 A. Yes.

22 THE PRESIDENT: So there too we are on the cusp of the end
23 where you feel that you can assist the court as an
24 expert and one moves into an area where your opinion is
25 no better than anybody else because you are outside the

1 area of your expertise?

2 A. Yes, that would be a good summary, thank you.

3 THE PRESIDENT: Thank you.

4 Mr Brealey, I am so sorry, I interrupted you.

5 MR BREALEY: I am just trying to work out the implications
6 of this. So when you started off, you seemed to suggest
7 that you had your two conditions, which is your legal
8 framework, correct? But there was some sort of proviso
9 or exception which you, in your teach-in said, there is
10 a temporal exception in all this. So you said that in
11 your teach-in and you said that just a few moments ago.

12 So you have come to this Tribunal saying as a matter
13 of your economic opinion there are these two conditions,
14 but with the face mask and what you have just said there
15 may be a temporal exception to this which would allow --
16 just looking at the transcript -- this generic company
17 for a period of time to charge at a high price.

18 So are you saying there is an exception --
19 a temporal exception or not?

20 A. Apologies if I just may go back, that was quite a long
21 question. I think you started by --

22 Q. Let me just -- sorry, are you saying there is a temporal
23 exception to your two conditions?

24 A. I think the answer to that is no. When I am looking at
25 these conditions, they are very specifically tailored to

1 what I would want to see in a comparator in order that
2 I feel that that comparator provides evidence of the
3 fairness or otherwise of the allegedly abusive price.

4 If the comparator is one that is clearly one that
5 reflects normal and sufficiently effective competition,
6 then it will have the characteristics which enable me to
7 look at then the allegedly unfair price and say: does
8 that reflect normal and sufficiently effective
9 competition.

10 What I then say is that is where the economics gets
11 you, there then may be other considerations as to
12 whether that price was abusive, but that is not for me
13 and that is not something that features in these two
14 criteria. If I may just add, I think you started your
15 question with a "my legal framework". I think just to
16 be clear it is not my legal framework, I have read the
17 framework and I think that these are two relevant
18 conditions.

19 THE PRESIDENT: You are seeking to apply a legal framework
20 that you understand?

21 A. Yes.

22 THE PRESIDENT: And if that understanding is wrong, then the
23 consequences may be that your reasoning from it may or
24 may not be right?

25 A. Yes.

1 MR BREALEY: I just need to, with respect, sir, just tease
2 this out.

3 THE PRESIDENT: No, of course.

4 MR BREALEY: You have come today, we are talking about
5 whether a company is -- a sole supplier is abusing its
6 dominant position and we are trying to work out whether
7 a price is unfair or not, yes? In the example I have
8 just given you, the brand owner is not there, it is only
9 the generic, and that company needs some certainty.
10 There is no comparator -- so you get your first
11 condition, the comparator, the answer is no. You go to
12 your second condition, is the price what you perceive as
13 deriving from workable competition? The answer is no.
14 It is a high price, it is the brand owner's list price.
15 So you have a big no for both conditions, but you did
16 say that the new generic could, for a period of time,
17 charge that high price?

18 A. I think we need to be really clear about what those two
19 criteria as set out in my report are doing. That is all
20 about what I would want a comparator to look like to be
21 informative of the allegedly unfair price. If I have
22 understood the question correctly, you are trying to
23 apply my criteria to understanding whether a price is
24 unfair or not which is a separate question.

25 Q. Sorry, Ms Webster, that is what you have done to Flynn

1 and to Pfizer. They are sole suppliers, and you have
2 said there is a comparator but the prices are not the
3 product of workable competition, therefore they are
4 unfair. My only question has been so far: is that an
5 all-embracing test or are there exceptions? Is a sole
6 supplier entitled to charge a price well in excess of
7 cost plus for a period of time? I thought you had said,
8 yes, they could.

9 A. Thank you, that is helpful, because that has clarified
10 your question for me.

11 I have not looked at -- I have set out the test for
12 the comparator, I have then looked to see whether there
13 are comparators, and I have said that on the basis that
14 I do not think the comparators are good comparators,
15 they are not capable of undermining the CMA's
16 conclusions that it reaches through its excessive and
17 unfair in itself limb.

18 That is different from me saying there is not
19 a comparator, therefore the parties' prices were unfair.
20 I am not saying that.

21 Q. Are you saying that the two conditions that you have
22 applied, and in particular, the workable competition, is
23 grounded in economics?

24 A. When it comes to workable competition --

25 Q. Pardon?

1 A. -- when it comes to workable competition, I start from
2 a similar position as Dr Majumdar: there is no strict
3 meaning of that in economics. There is a spectrum from
4 monopoly supply to perfect competition. As one moves
5 along that spectrum, at some point a market tips from
6 being insufficiently effective competitively to being
7 sufficiently competitive, and Dr Majumdar and I disagree
8 as to where one draws the line.

9 Q. Sorry, again, it may be I was not sufficiently clear.
10 That is not what I was asking. All I was asking was are
11 these two conditions grounded in economics? In other
12 words, are these -- and they are mandatory conditions,
13 you say that both have to be satisfied for a valid
14 comparator analysis, yes? Do you say that the mandatory
15 two conditions are grounded in economics?

16 A. It is my view, which is as I have expressed it in my
17 report, that if a comparator price is not one that is
18 consistent with normal and sufficiently effective
19 competition, in my view I find it very difficult to say
20 how that price can tell me something about the allegedly
21 abusive price as to whether that is a price which is
22 consistent with normal and sufficiently effective
23 competition.

24 Q. Okay, with that answer in mind --

25 THE PRESIDENT: I am sorry, just to understand a little

1 better the term you and Dr Majumdar cannot define,
2 normal and sufficient competition or workable
3 competition, I take it those are synonymous?

4 A. Yes.

5 THE PRESIDENT: To what extent is normal and sufficiently
6 effective competition removed not by an abuse but by the
7 existence of a different system? In other words, your
8 assumptions or your test for what is workable or normal
9 and sufficient is based upon interactions of supply and
10 demand in a more or less free market?

11 A. Yes.

12 THE PRESIDENT: Which is another term which I suspect
13 neither of us are able to define.

14 A. Yes.

15 THE PRESIDENT: So "workable" is in fact quite a good phrase
16 because the opposite is "unworkable" or "not working",
17 but suppose one has an overlay of regulation that is not
18 really looking to a market system at all but is doing
19 something else for perfectly rational and defensible
20 reasons such that the outcome of the interactions
21 between buyers and sellers is just not what an economist
22 would expect given a market economy because it is not
23 a market economy. How do you deal with that sort of
24 difference in philosophical approach, if you like, when
25 you are categorising what is going on in what may or may

1 not be a market?

2 A. So I gave some thought to that following your questions
3 to Dr Majumdar yesterday, and, because you had talked
4 about the various constraints that apply in relation to
5 generic medicines and branded medicines, and my thinking
6 on it is that it is relevant to consider the nature of
7 the regulatory constraints or system constraints and
8 think about what is it -- what is the effect that they
9 are having and try to be quite granular about that.

10 So one example would be where the system creates
11 a barrier to entry and says nobody can -- no other firms
12 can come in and respond to the price signals that might
13 be set, so it precludes entry, and so in that case that
14 system creates the opportunity, if prices are
15 unregulated, for the supplier that benefits from that
16 constraint to increase prices to a level which would be
17 above cost plus, say.

18 It might alternatively be that the way in which the
19 regulation operates is to mandate prices and then again
20 one would think: well, how is that operating, what level
21 of price is delivered, and you might have differences
22 between, I do not know, a regulated market like the
23 energy market, energy networks, you know, where there is
24 an awful lot of work that goes into determining a price
25 which perhaps would be more akin to what would result

1 from competition, versus a system where there is
2 a light-touch regulation. So one would sort of need to
3 get into the facts of it, I think.

4 There is also, you know, the regulatory framework
5 may be there because there is a particular value that it
6 is necessary to protect or create through that
7 regulatory system, and then one would want to identify,
8 well, what is that, and then, you know, it follows from
9 that what do we want to pay for that? But I think the
10 answer lies in unpicking exactly how the
11 regulatory/system operates on a market and what it
12 constrains by way of normal market operations and what
13 effect that can then have.

14 THE PRESIDENT: That was a very full answer, and do you mind
15 if I come back and try and unpick it a little further.

16 Let us take as a given that markets are actually
17 creatures of law in the sense that certain building
18 blocks of a market need to be provided by the law, so
19 you need a law of contract, you need a law of property,
20 you need a law of money, just to make the thing work.
21 Otherwise you just get anarchy.

22 So the presence of a legal set of constraints is not
23 inimical to a market; it is actually necessary to its
24 proper functioning. I think we can agree on that.

25 A. Yes.

1 THE PRESIDENT: So lawyers are not completely useless, that
2 is really what I am getting at there, but that is where
3 law is supportive of a market situation, and you said
4 a moment ago -- and if I may respectfully say so, it
5 seems right -- you say the answer lies in unpicking
6 exactly how the regulatory system operates on a market.

7 Let us take a form of regulation that is not to do
8 with making markets work better but that has another
9 policy objective: let us take a minimum wage, for
10 example.

11 Now, there you might say we want everyone to have
12 a minimum wage of £35 an hour. Now, that is going to
13 alter the costs base of those undertakings in the market
14 that are employing persons. I mean, whatever the
15 average was before, it goes up, and I have picked
16 a figure of 35 because it is significantly higher than
17 the minimum wage now. So, yes, costs go up, but the
18 market will simply take that into account and things
19 will adjust, prices will almost certainly go up, but
20 that is no issue in terms of having to unpick anything
21 that operates on the market.

22 My question is really this: does there come a point
23 where the direction of regulation and the nature of it
24 is so inimical to a market regime -- and I am not saying
25 bad, I am just saying different -- that it is no longer

1 pointful to ask how the regulatory system operates on
2 a market because the regulatory system is actually
3 creating something other than a market, it is doing
4 something different, so that your notion of workable
5 competition actually ceases to be meaningful because
6 that is not what is going on in the world that we are
7 hypothesising.

8 A. I find that question quite difficult to answer in the
9 abstract, so it may help to think of a situation which
10 would help me to do that, if there is value in that.

11 THE PRESIDENT: Well, it is a very difficult question to
12 answer, and I am not going to have resort to the usual
13 response that a judge gives which is it is for me to ask
14 the questions and you to answer them, because that would
15 be entirely unhelpful and not in the spirit in which we
16 are having this dialogue, but let us take the most
17 extreme opposite of a market economy, a command economy
18 where you have some central authority that is saying:
19 you will produce that and you will deliver it to someone
20 else and someone else will deliver something else to
21 someone else and you have simply a completely dirigiste
22 approach to the creation of supply and the allocation of
23 that supply to someone else.

24 Now, that is, I think, as extreme as I can go. In
25 that situation, there is no point in asking about

1 a market or workable competition because we are just on
2 a different planet.

3 A. I think I would agree.

4 THE PRESIDENT: So the question is, having identified, as
5 I did with Dr Majumdar yesterday, a series of factors
6 which are regulatory incursions into what may or may not
7 be a market, one examines those and it is a far harder
8 question whether a competition analysis is appropriate
9 or not, and so reframing my question, do you regard the
10 factors that I identified and anything else that might
11 occur to you that did not occur to me or Dr Majumdar
12 yesterday, do you regard those factors as not inhibiting
13 you in reaching a view as to what is or is not workable
14 competition?

15 A. So firstly to say that your list of factors that you got
16 to with Dr Majumdar sounded sensible to me and I could
17 not think of any that I would add.

18 In terms of the implications for the question and
19 the relevance of thinking about normal and sufficiently
20 effective competition, my understanding is that -- and,
21 again, I am not an expert at all in the operation of the
22 drugs reimbursement system, etc -- my understanding is
23 that the way in which the framework is generally set up
24 for generic supply is to take advantage of competition
25 between the generic suppliers and to bring prices down

1 to a level that is good value -- well, competitive and,
2 by definition, then good value for the Department of
3 Health.

4 So the underpinnings for me are that competition
5 should work in the supply of generics in the system as
6 it is regulated, and then there are certain elements of
7 that regulatory system which have a bearing on the
8 degree to which that competition can be realised. So
9 I think in my view I am in a world where one can still
10 apply the concept of normal and sufficiently effective
11 competition and one would need to then think about the
12 specific barriers to competition, say, that might be
13 created by the regulatory system and judge their impact.

14 THE PRESIDENT: That is helpful. So I think, if I can
15 repackage what you are saying -- and do, please,
16 disagree with my repackaging -- what you are saying is
17 that it is a matter of context-sensitivity, but looking
18 at the factors that we discussed, Dr Majumdar and I,
19 yesterday, looking at those, you consider that
20 a workable competition analysis is possible. You are
21 nodding.

22 A. Yes.

23 THE PRESIDENT: But, when considering what is and what is
24 not workable competition and what is and is not an
25 infringement of the Chapter II Prohibition, you need to

1 look at the broader context of the regulatory
2 environment in which the market sits?

3 A. Yes.

4 THE PRESIDENT: Do you want to revise -- and this is not
5 a criticism, it is just a desire to be absolutely clear
6 about what you are saying -- I got the sense in your
7 early answers to Mr Brealey's questions that you
8 regarded the interactions between the Department of
9 Health and operators in the market as in some way
10 hermetically sealed from a competition analysis. Did
11 I misunderstand that, or do you see a need to consider
12 a competition analysis in the framework of the market as
13 a whole, including the regulatory incursions that exist
14 as they may do?

15 A. So the way that I have thought about it is -- so this is
16 all in the context of the tablets supply, and I have
17 considered whether, against this backdrop of generic
18 supply can deliver competitive outcomes, whether
19 tablets, given the regulatory framework that affected
20 tablets, whether that can be the case.

21 So I suppose I have taken into account the
22 regulatory framework in the context of thinking about
23 whether tablets' supply is sufficiently competitive.

24 I feel that might not have answered your full question.

25 THE PRESIDENT: I think it is certainly sufficient for my

1 purposes. I will leave Mr Brealey to follow up if he
2 thinks he needs to.

3 MR BREALEY: Yes, a follow-up question on that. I mean, we
4 are talking about the regulated nature of the market,
5 and I want you to think about the regulated nature of
6 the market and the mandatory second condition of
7 workable competition, yes?

8 A. Sorry, the nature of the market and the ...?

9 Q. Mandatory second condition, workable competition.

10 A. Yes.

11 Q. Now, clearly you have just said, with a regulated
12 market, you can have workable competition, we say it
13 exists in this case, you say it does not, but my
14 question to you is this: does the regulated nature of
15 the pharmaceutical market mean that it is imprudent to
16 have such a mandatory condition of workable competition?
17 So does the regulated nature of the pharmaceutical
18 market mean that it is imprudent to have a mandatory
19 condition of workable competition?

20 A. So if I take your question, I feel like it is extending
21 the relevance of my second criterion beyond that which
22 I intended it for. I am simply saying that in this
23 case, if we want to look at -- if we want to use
24 comparators to inform the fairness of the parties'
25 pricing, because we want to show that those prices are

1 not ones where there has been the ability to reap
2 benefits not available under normal and sufficiently
3 effective competition, it is important that the
4 comparators themselves reflect prices that would arise
5 from normal and sufficiently effective competition.

6 That is not making a judgment at this stage about
7 the fairness or otherwise of the parties' pricing; it is
8 making a judgment about what can a comparator tell us,
9 so let us use a comparator that has workable
10 competition, and see what that tells us.

11 Q. The reason I say this is because, when you come to your
12 workable competition, you do refer to certain regulatory
13 constraints, it is what you refer them, there are MHRA
14 guidance, there are the need for an authorisation.

15 The reason I am putting this to you is that if it is
16 difficult in this market to identify workable
17 competition because you are going to examine every
18 intervention by the MHRA or whatever, you are going to
19 end up almost with a default cost plus approach.

20 A. So my view is that it is not necessarily difficult to
21 identify workable competition in markets for generics
22 supply. What I have found is that in the specific case
23 of tablets, that is difficult because of certain
24 regulations that apply, and therefore, that reduces the
25 informativeness of comparators in this instance.

1 MR BREALEY: I notice the time. Shall we have a break, sir?

2 THE PRESIDENT: That seems a good time if that is convenient
3 for you, Mr Brealey.

4 Ms Webster, you will have heard me say to the other
5 witnesses not to talk about your evidence, you
6 understand that.

7 Can I make one thing clear, though: if you are
8 feeling tired or in need of some remission from the
9 questioning, do, please, speak to your legal team and
10 get Mr Holmes to do the talking for you. I think that
11 is probably better than if you ask yourself, because you
12 might feel a little constrained, whereas I am quite sure
13 Mr Holmes will have no such constraints in order to
14 ensure that you give of your best.

15 So to that extent, it is not really talking about
16 your evidence, but it is talking about your ability to
17 give evidence, do talk to your team about that if you
18 wish.

19 A. Thank you.

20 THE PRESIDENT: We will rise for 10 minutes until 25-to.

21 (11.25 am)

22 (A short break)

23 (11.42 am)

24 THE PRESIDENT: Mr Brealey.

25 MR BREALEY: It seems a long time ago now, but at around

1 about, I do not know, 10.30 or 11.00, I asked you
2 a question: do you say that the mandatory two conditions
3 are grounded in economics; do you remember that?

4 A. Yes.

5 Q. If I can just read your response, you said to the
6 Tribunal:

7 "It is my view ... that if a comparator price is not
8 one that is consistent with normal and sufficiently
9 effective competition ... I find it very difficult to
10 say how that price can tell me something about the
11 allegedly abusive price..."

12 Do you want to see that? I am reading from what you
13 said. Do you want me to say it again?

14 A. No, that is fine, thank you.

15 Q. With that in mind, just for the record that is at
16 {Day11LH1/38;} of today's transcript.

17 With that in mind could we go to {XE1/1}. Now this
18 goes even further back in time to 2017, and this is the
19 report of Derek Ridyard; yes? Can we go to page
20 {XE1/1/40}? Let us just remind ourselves at the bottom,
21 the other AEDs, where Mr Ridyard in the last hearing
22 said:

23 "Other AEDs offer an alternative benchmark ..."

24 And he says:

25 "... and do not suggest that Pfizer's prices were

1 abnormally high."

2 He says other AEDs offer an alternative benchmark,
3 and at 122 he says:

4 "Quite apart from the phenytoin sodium tablet,
5 a number of the other AEDs that are recommended in the
6 UK provide a rich source of potential benchmark
7 comparisons."

8 He says:

9 "Yet the CMA has not considered [them]."

10 Then he says:

11 "I consider that it is important to compare the
12 price of phenytoin sodium to these other recommended
13 AEDs which ultimately treat the same condition, with
14 similar levels of efficacy, when judging if Pfizer's
15 prices are abusive."

16 Then at page {XE1/1/43} just for completeness we see
17 there -- we are not going to look at these, I am just
18 showing you and the Tribunal that they exist. This is
19 a figure 3 comparative analysis of AEDs costs; yes?

20 You have obviously seen that.

21 A. Yes.

22 Q. If one goes to his second report {XE1/2}, at page
23 {XE1/2/15}, paragraphs 35 and 36, again, we will not go
24 into the substance of this, but again he is drawing
25 attention to a data set of comparables, yes, what he

1 says are comparable AEDs?

2 A. Yes.

3 Q. Thank you. If one goes to your report, that is
4 {XE1/16}, page {XE1/16/72}, this is dealing with the
5 other AEDs, that is where you, in your chapter, the
6 relevance of other AEDs as comparators for capsules, and
7 one goes to page {XE1/16/73} and it is paragraphs -- and
8 then if you go over the page to paragraph 5.10 and 5.11
9 {XE1/16/74}.

10 So you say:

11 "An important issue raised by Pfizer's approach is
12 the similarity of Other AEDs ..."

13 And you go on to say that the CMA has said they are
14 not comparable, so they do not meet your first
15 condition, and you fairly say:

16 "I am not an expert on AEDs and their clinical
17 characteristics and so cannot provide a view on this."

18 So the first condition, the CMA disagrees with
19 Pfizer, you offer no view, yes?

20 Now, at 5.11 you say:

21 "Notwithstanding this, my view is that there are
22 other grounds for rejecting the prices that Pfizer puts
23 forward for the Other AEDs as relevant comparators.
24 Specifically ... the prices used by Pfizer are not
25 consistent with those that would result from

1 sufficiently effective competition due to the inclusion
2 of branded prices."

3 So you are rejecting the comparators because they do
4 not satisfy the mandatory condition of workable
5 competition; correct? We are going to run out of time,
6 so if we could keep -- I mean, I do not want to cut you
7 short, but that is a question that can have a very short
8 answer.

9 A. I do not think that the prices that were put forward in
10 Pfizer's notices of appeal are prices that I would think
11 are consistent with normal and sufficiently effective
12 competition.

13 Q. What I would like to do -- we are just going to go to
14 the *Liothyronine* judgment and not get into -- we are not
15 going to debate any law, but we just do need to see
16 where I am going to come from on this.

17 So the *Liothyronine* judgment -- and your attention
18 was drawn to the *Liothyronine* judgment, and that is at
19 {XN2/28}.

20 Can we go to page {XN2/28/48} at paragraph 132.
21 I would like to refer you to 132 there. If you just
22 want to read it. Again, this is not going to be a legal
23 analysis, this, I just want to tell you where we are
24 coming from on this, but paragraph 132 of *Liothyronine*
25 is very important. It is referring to Lord Justice

1 Green in Pfizer, so you were obviously directed to the
2 *Liothyronine* judgment. Do you know whether you were
3 directed to this paragraph?

4 A. I do not believe I was.

5 Q. Right. So just so that you are aware -- and again this
6 is not a legal test here -- this paragraph -- there are
7 other instances, but this paragraph we say is authority
8 for the proposition that effective competition, workable
9 competition, is a test, is a good test, but it is not
10 the test, it is not a mandatory condition, and that is
11 why I am drawing your attention to this, yes?

12 Now, with that in mind could we go to page
13 {XN2/28/82} of the judgment at paragraph 236.

14 This is the reference to the CMA's Decision:

15 "The Decision also compared the current price of
16 Liothyronine Tablets with drugs with a similar market
17 size to Liothyronine Tablets."

18 It is reproduced as figure 4 which has been
19 redacted, but this was in the Decision.

20 Then if we go to page {XN2/28/94} at paragraph 264,
21 this is where the Tribunal is referring to the
22 cross-examination of Professor Valletti; do you know
23 Professor Valletti?

24 A. I do.

25 Q. Yes. So he was giving evidence for the CMA and he was

1 Professor Valletti that, given the size of the datasets
2 used in comparisons, they were meaningful."

3 So we have there the CMA and its economist adducing
4 a data set that was not subject to workable competition,
5 nevertheless the CMA was advancing the case that the
6 data set was meaningful and the Tribunal accepted that
7 the data set was meaningful.

8 Now, my question to you is that if you jettison the
9 legal guidance, if you jettison those two mandatory
10 conditions and just focus on your view as an economist,
11 would you accept as an economist that
12 Professor Valletti's data set in that case and
13 Mr Ridyard's approach of comparative data sets is
14 a usual tool employed by economists? Looking at
15 comparative data sets, is it a usual tool employed by
16 economists?

17 A. So what I think is the usual tool is where comparisons
18 are to be made that the selection of those comparators
19 is relevant to the situation, to the case.

20 Q. I have asked you to jettison the legal conditions and
21 just answer the question whether they would be a useful
22 tool, whether the -- the data set by, here, Mr Ridyard,
23 would be a usual tool employed by economists?

24 A. I am not sure that I know how to answer your question as
25 posed, so --

1 Q. You are an extremely experienced economist in mergers,
2 etc. Do you look at comparator data sets as
3 Professor Valletti did and Mr Ridyard did in the trial
4 before?

5 A. So I would frequently look at comparators, but I would
6 always take care to understand whether the comparators
7 that I choose are meaningful.

8 Q. Correct.

9 A. I think it would be too broadbrush to say I would take
10 the approach that Professor Valletti has here
11 necessarily. This is a case which I do not know. He
12 will have had a basis for making that selection, and
13 equally, I can comment further on what Dr Ridyard has
14 done because that is much closer and relevant to this
15 case in relation to capsules.

16 THE PRESIDENT: Ms Webster, can we articulate it at a level
17 of generality and see if you agree with this.

18 When one is talking about comparators in this
19 situation, substitutability is probably a key factor as
20 to how valuable the substitute or the comparator might
21 be, in other words, if you have something which is
22 a substitute for the product under investigation, it is
23 valuable as a comparator; would you accept that?

24 A. It may be, but I think it would depend on other factors
25 as well.

1 THE PRESIDENT: Right. Well, in this case, is the other
2 factor the fact that one is in a situation where, if one
3 is accused of or has a finding against one of excessive
4 pricing, then almost by definition, you are going to be
5 in a market where there are no substitutes?

6 A. Yes.

7 THE PRESIDENT: Was that the reason you were hedging or
8 qualifying your answer to my earlier question, or were
9 there other things in your mind?

10 A. The other things in my mind were, in the situation that
11 we have got, we want to know about -- we want the
12 comparator to give us information about whether the
13 allegedly unfair price was actually a price that was
14 consistent with what one would expect under normal and
15 sufficiently effective competition. So, therefore, you
16 may have a product which is a substitute, in this case
17 it is not a substitute by construction, but you may have
18 a very closely related product, but unless it has market
19 conditions which are such that the price of that product
20 can be reflective of effective competition it will not
21 be a good comparator, and that is the overlay, and that
22 was the qualification that I was thinking of.

23 THE PRESIDENT: But you would not reject the data out of
24 hand; what you would do is you would qualify it.

25 A. I would qualify -- if it were possible to look at it and

1 make an adjustment, I might well do that, because then
2 it can be used. If I look at it and think: well, it is
3 not consistent with normal and sufficiently effective
4 competition and I do not know by how much to adjust it
5 in order to get a price that would be consistent, then
6 I might say, as in this case, I cannot tell anything
7 from that comparator.

8 THE PRESIDENT: That is helpful. I mean, what you are
9 saying is that in the case of any comparator you will
10 look at it and you will try to work out what useful
11 material you can derive from it?

12 A. Yes.

13 THE PRESIDENT: If and to the extent you find something
14 useful, you will articulate it. If and to the extent
15 you do not regard it as useful you will say: well, with
16 some regret, because it is evidence, it needs to go in
17 the bin?

18 A. Yes, that would be a good summary.

19 THE PRESIDENT: In some cases, it is an easier question as
20 to whether it goes in the bin or not --

21 A. That is right.

22 THE PRESIDENT: -- because the difference is -- or the
23 unusability is so extreme?

24 A. That is right.

25 THE PRESIDENT: Okay, thank you.

1 MR BREALEY: You said:

2 "I would frequently look at comparators, but I would
3 always take care to understand whether the comparators
4 that I choose are meaningful."

5 Yes?

6 A. Yes.

7 Q. Are you saying that simply because the comparators do
8 not reflect workable competition they are not
9 meaningful?

10 A. So in the context of the question which I have been
11 asked, I think the answer is yes. The context
12 being: are the comparators capable of demonstrating that
13 the parties' prices would have been consistent with
14 normal and sufficiently effective competition.

15 Q. That is why I asked you to jettison the context, the
16 legal constraints, the mandatory conditions and as an
17 economist, just answer the question whether this sort of
18 data set would frequently be used to determine
19 a competition case, whether it be unfair pricing or
20 a merger. You would look at a comparator analysis
21 without having to satisfy the condition of workable
22 competition.

23 A. My view is that that is too general a proposition.
24 I think one is always -- when looking at a comparison,
25 it is for a purpose, and one needs to be specific about

1 what that purpose is and then specific about what the
2 comparator must do in order to be informative.

3 Q. To put it another way, let us assume that you had not
4 been given any guidance, you had not been given any
5 context, no guidance, no two mandatory conditions and
6 you were given a free hand as an economist working out
7 whether the price was fair or not, yes? Free hand.
8 Would you, as an economist, have had regard to
9 comparators, as Mr Ridyard did?

10 A. I mean, I think that is asking me to assume a situation
11 where there is not a legal framework, and then as an
12 economist I am not actually sure what framework I would
13 be applying in that case.

14 Q. I am trying to work out whether your legal framework is
15 grounded in good economics.

16 A. The economics is there to answer a question, and I think
17 it is important that we specify exactly what the
18 question is and then economics can, and sometimes
19 cannot, help us get to an answer to that question.

20 Q. So if the correct approach is that the economist must
21 look at all the circumstances, you would accept that you
22 have not?

23 A. I have identified what I think the comparator needs to
24 do in this case and then I have looked at all of the
25 evidence that has been made available to me in order to

1 reach a view on that.

2 Q. So if the law says you have to look at all the
3 circumstances, your answer to that question is you have
4 not?

5 THE PRESIDENT: Well, that is not really an easy question
6 because what it is saying is you look at everything and
7 you really cannot look at everything. I mean, you are
8 saying, surely, the correct approach that the economist
9 must take is to look at all material circumstances.

10 MR BREALEY: Yes.

11 THE PRESIDENT: Okay. Does that make the question a little
12 easier?

13 A. I think so. I feel that I have looked at the relevant
14 information that is necessary for me to answer the
15 questions as I have set them out.

16 THE PRESIDENT: If you have the relevant information wrong,
17 well, then, that affects your opinion?

18 A. Yes. Yes.

19 MR BREALEY: Yes, okay.

20 Can we move on? Can we go to transcript
21 {Day5LH1/93:}. I am going to have to take this slowly,
22 I am afraid, because you told me that you have not
23 looked at the evidence of the factual witnesses; is that
24 correct?

25 A. That is correct.

1 Q. Even though they are the factual witnesses adduced by
2 the CMA?

3 A. That is correct.

4 Q. This is the cross-examination of Mr White, so again,
5 I will take this slowly because you need to absorb it,
6 so I am going to put forward certain facts and then, in
7 the light of those facts, I am going to ask you a few
8 questions.

9 You then do not know that Mr White advised the
10 Greater Manchester Medicines Management Group, which is
11 called the GMMMG, which coordinated strategies for
12 12 clinical commissioning groups across Manchester, and
13 that body was responsible for about 2.8 million people
14 and had a budget of about 6 billion apparently. But if
15 we look at page {Day5LH1/93:17}, and if you read from
16 93:17 to page {Day5LH1/95:}, and Opus will take you
17 through it, and tell us when you are ready.

18 So we start at line 17 where I say:

19 "Question: Can I just ask the question again: what
20 will be the difference in healthcare services that is
21 provided to someone who is seizure-free and not
22 seizure-free?"

23 Yes?

24 A. Yes.

25 Q. We go on to 95. We see what he is saying. I was a bit

1 quick I think -- so he is saying there:

2 "Question: ... if you are seizure-free there will
3 be fewer A & E visits?

4 "Answer: Potentially.

5 "Question: Less inpatient care?

6 "Answer: Potentially.

7 "Question: Less outpatient care?

8 "Answer: Potentially."

9 Then you will see there at 15 I am asking the
10 question:

11 "Question: It follows ... does it not, that
12 anti-seizure medicines benefit the NHS because they save
13 the NHS money?"

14 If you go to {Day5LH1/95:} -- sorry, if you just go
15 back to {Day5LH1/94:} at the bottom, line 25 is
16 a relevant passage, so the question is:

17 "Question: ... if you are seizure-free, you are
18 costing the NHS less because there are fewer --
19 potentially fewer A & E visits, less inpatient care,
20 less outpatient care, correct?"

21 He says:

22 "Answer: Yes ..."

23 So that is his evidence; yes? It will be a matter
24 for the Tribunal to determine whether this is correct,
25 but this is a primary fact that I would like you to

1 accept for present purposes.

2 Then I took Mr White to a Department of Health
3 letter. If we go to {XG/243}, this is the Department of
4 Health letter from a Dr Ridge, the Department of
5 Health's chief pharmacist, dated 20 December 2012. Just
6 so that you are aware, you may have seen the
7 cross-examining of Mr Williams yesterday and counsel was
8 putting forward certain complaints by the CCGs. This
9 and other letters is essentially a pushback by the
10 Department as regards the complaint.

11 So if you just read that, this is from the
12 Department of Health, the chief pharmaceutical officer.
13 It is the fourth and fifth paragraph down which is
14 relevant for what we are doing at the moment:

15 "The Department is in discussion with the company
16 about ensuring that the NHS is getting value for
17 money ..."

18 Then:

19 "However shall as I am sure you will appreciate, one
20 of the Department's principal concerns has been to
21 ensure continuity of supply to those patients currently
22 being treated with phenytoin capsules -- in line with
23 NICE guidelines."

24 It goes on, this is what I would like you to focus
25 on, please:

1 "The cost of any medicine has to be balanced with
2 the potential additional costs to the NHS through
3 adverse reactions and reduced patient outcome if supply
4 is interrupted."

5 So the Department there is saying that the cost of
6 any medicine has to be balanced with the potential cost
7 to the NHS; do you see that?

8 A. I do.

9 Q. I took Mr White to that letter, as I say. We can see
10 another letter, because I do not want you to think this
11 is an isolated letter. If we go to {XD1/4}, we also saw
12 reference to the Somerset CCG yesterday, and it is page
13 {XD1/4/27}.

14 Again, this is a similar reply from -- this is at
15 ministerial level. This is -- this is the first
16 paragraph:

17 "I am replying as the Minister responsible for
18 medicines and pharmacy policy."

19 This is essentially written in response to
20 a complaint by the Somerset CCG, and then you see at the
21 last paragraph:

22 "The cost of any medicine has to be balanced against
23 poorer patient outcomes and the potential additional
24 costs to the NHS ... if supply is interrupted."

25 So again, there is a balancing exercise between the

1 cost of the medicine and the cost to the NHS.

2 You go over the page to page {XD1/4/28} and the
3 minister says:

4 "I realise that this reply may be disappointing ..."

5 So that is why I say it is a pushback to the
6 complaints.

7 We go back to the transcript on {Day5LH1/118:}. It
8 is just -- and I ask, this is Mr White:

9 "Question: What the Department is telling the CCGs
10 here is that those potential costs have to be balanced
11 with the price of the drug."

12 He says:

13 "Answer: I would agree."

14 So he is agreeing that that is what he is
15 understanding the Department to be saying: the potential
16 costs have to be balanced with the price of the drug.

17 Now, again, can you just accept that?

18 Now, I know the answer to this question, but you
19 have not calculated the daily dose of phenytoin?

20 A. No.

21 Q. No. If we just try and do the maths, and then we will
22 have a look at the document.

23 A patient is taking a daily dose of 100mg. We know
24 in May 2014 the capsule reimbursement drug price
25 was £18; yes? So daily dose of 100mg, we know that

1 the May 2014 reimbursement drug tariff price was £18,
2 and that equates, on the maths, to 64p per day assuming
3 a dosage of 100mg at 2014 prices: 64p per day.

4 Now, the clinical experts, which again, you have not
5 seen or read the transcripts, the clinical experts
6 stated that they would start at 200mg, see what happens,
7 and then the dosage might increase to 300mg, and for the
8 transcript, Professor Walker said that at {Day5LH1/184:}
9 and {Day5LH1/206:} and Professor Sander said that at
10 {Day6LH1/236}.

11 So again, if we do the maths, at 2014 prices we
12 might be looking at about £2 per day for a daily dose of
13 300mg, yes? That is just simple maths, three times 64.

14 If we want some confirmation of the maths, can we go
15 to {XE3/1}. Now, this is -- I take it you have not read
16 this --

17 A. No.

18 Q. No. This is Dr Skedgel's evidence and he is the expert
19 health economist called by Pfizer, and if we go to page
20 {XE3/1/22} of this document -- and he will be giving
21 evidence, I think, next week -- you see there, if you
22 blow that up, again, we are not going to go to the
23 substance of this, this is the -- he is looking at, 91:

24 "My comparison of cost per daily dose, based on the
25 average price across all doses and pack sizes ..."

1 You see there the average cost per daily dose for
2 phenytoin, it is in -- and if you go to the footnote for
3 the people who are interested, you see there he gets
4 to £2.41 which is basically the average daily dose for
5 300mg, yes?

6 So, so far so good. If we now go back to the
7 transcript at {Day5LH1/166:5}, so you know, this is
8 another CMA factual witness, Ms Smith, and she is giving
9 similar evidence to Mr White. The question at line 5:

10 "Question: Could you identify the potential cost to
11 the NHS? We have looked at the hospitalisation.
12 Mr Green referred to the costs of feeding, ambulances,
13 community care ...?

14 "Answer: I would agree with all of those, yes.

15 "Question: Could you expand? ...

16 "Answer: I cannot really think of anything
17 further ... ambulance costs, hospital costs, community
18 epilepsy nurse costs potentially ...

19 "Question: The secondary care?

20 "Answer: Secondary care is hospitals...

21 "Question: Right... consultants, it is secondary
22 care if you visit a consultant, not in the hospital, but
23 in their practice?

24 "Answer: Yes."

25 If you go over. {Day5LH1/168:7} Then we see the

1 President then asks a question of Ms Smith about the
2 costs of this healthcare, and the President says:

3 "Ms Smith, it is something of an unfair question,
4 but I will ask it anyway, and to be clear, I am only
5 really getting -- wanting a ballpark answer, but if we
6 define something as an avoidable seizure, in other
7 words, where a seizure results because continuity of
8 supply has been breached, so just assume that, there is
9 a seizure in an epileptic that would not have happened
10 but for the change to a different form of medicine
11 [whatever]. What sort of cost are we talking about in
12 a ballpark? £100, £1,000, £10,000, £100,000 ...?"

13 And the answer she gives:

14 "Answer: I think we are talking several thousand
15 pounds if someone is admitted to hospital."

16 So several thousand pounds.

17 "THE PRESIDENT: Yes."

18 She goes on:

19 "Answer: But I would not quantify it closer than
20 that."

21 The President says:

22 "Fair enough, but if we are talking my orders of
23 magnitude, it is perhaps in the ballpark, in a bad case,
24 will be more like 10,000 than 1,000 or...

25 "Answer: Again, there is such a spectrum of

1 patients.

2 "THE PRESIDENT: Of course."

3 Then she says:

4 "Answer: ... I would not want to be drawn on that,
5 but we are probably talking thousands of pounds, not
6 hundreds of pounds."

7 So we have costs there of hospitalisation, thousands
8 of pounds. So to put this in perspective, the cost of
9 one hospital visit caused by one seizure is potentially
10 several times the annual cost of the phenytoin capsule.
11 Do you see that from the evidence?

12 A. Yes.

13 Q. If you accept that -- and again that will be a matter
14 for the Tribunal -- my question to you as an
15 economist -- please jettison the legal context, but my
16 question to you as an economist is this: do you agree
17 that the cost to the NHS of acquiring phenytoin should
18 be balanced with the cost savings to the NHS?

19 A. So my response to that is, in this situation, the
20 question that is really being posed is could, and maybe
21 should, the NHS have been able to access the phenytoin
22 capsules at a lower cost than it did incur had the
23 prices of the capsules been lower.

24 So I would accept, because this is what is written
25 and what you have taken me through, that it appears on

1 the basis of what I have read that the NHS Department of
2 Health is making a balancing act that appears --

3 Q. Do you --

4 A. If I may finish?

5 Q. Yes, of course.

6 A. -- that appears to be factually true, but that is not
7 the question which I have addressed, which is did it pay
8 more than it would have done had there not been abusive
9 pricing, and that is the question which I have
10 addressed.

11 Q. I am asking you a different question, and I think you
12 know the question, so let us try again.

13 We have the cost of the phenytoin capsule; yes?

14 A. Yes.

15 Q. £2.41 a day at the 2014 price, £2.41, and my simple
16 question to you is this: as an economist, do you believe
17 that that cost of acquiring phenytoin should be balanced
18 against the cost savings to the NHS that that drug
19 affords, as a matter of simple economics?

20 A. My view is I do not feel that as an economist sitting
21 outside of the Department of Health and National Health
22 Service that I am qualified to take a view on that.

23 I see from the documents that that is what is described
24 as happened. It is not for me, I think, to say whether
25 that is -- I mean, it seems sensible that they might do

1 that. That is not what I am instructed to look at.

2 Q. No.

3 THE PRESIDENT: Well, let us put some figures and make the
4 example being articulated by counsel a little bit more
5 quantitative.

6 Let us suppose that an epileptic sufferer or an
7 epilepsy suffer taking sodium phenytoin capsules is
8 guaranteed to avoid one seizure per year. So, if they
9 did not take those tablets, they would have a seizure of
10 one per year, now, that is entirely unrealistic, but let
11 us assume.

12 Let us also assume that the avoided seizure cost is
13 £10,000. So if you have a seizure, that is what it
14 costs the NHS to deal with it, and let us suppose that
15 the cost of the provision of the capsules to the patient
16 is £10 a year.

17 Is it unfair for the provider of the capsule to
18 price up to and including the cost saving of the NHS or
19 not? In other words, is a price well in excess of £10
20 per year and going up to but not exceeding £10,000 per
21 year a fair price, and, if it is, why, and, if it is
22 not, why?

23 A. Okay, so my view is that I would not say that in the
24 set-up of the example that you have created that it
25 would be a fair price because the £10 is below the

1 £10,000. What is clear, I think, in the set-up of your
2 example is that the NHS, Department of Health, would be
3 better off paying the £10 for the tablets -- sorry,
4 capsules, rather than incurring the £10,000 to have to
5 treat the seizure, that is clear.

6 The question of whether the £10 is fair comes to two
7 elements: is it a price which is consistent with normal
8 and sufficiently effective competition? So if I add
9 some further numbers to your example, let us say it cost
10 5p to produce this in comparison with the £10 that is
11 charged, and let us say there were no other costs that
12 were incurred, that is it, and that would include
13 a return, then one might say, well, the 5p is what you
14 would get were there competition in the supply of the
15 capsules, it might be 5, it might be 7, you know, but
16 somewhere in the region of that cost plus price, and on
17 that basis, the fact that this supplier has charged 10
18 when actually if competition were working it would not
19 have been able to, that tells me that the price would be
20 potentially unfair, and that is from an economics point
21 of view, and then we come to the policy considerations:
22 is there anything else in the policy framework that
23 would mean that there was a decision to allow for the
24 company to charge more.

25 MR BREALEY: As an economist, you think it would be sensible

1 to do this balancing act?

2 A. I think if I were at the Department of Health, I would
3 like to minimise the cost that I incur to keep people
4 safe, and if minimising the cost involves selecting the
5 tablet -- sorry, the capsule rather than paying for the
6 sort of aftereffects and care following a seizure, then,
7 yes.

8 Q. You keep on coming back to workable competition. I am
9 going to just take to you a case, just so again you know
10 where we are coming from. I am not going to debate the
11 law with you, but it is the *Attheraces* case which is at
12 {XN3/10}.

13 This is a judgment we will be coming to in closing.
14 Do not worry, I am not going to ask anything about the
15 law. But if one goes to page {XN3/10/41}, there is
16 a lot in this in the paragraphs above, but I would just
17 like you to look at paragraph -- well, if one just goes
18 up, the next page, we can just see it in context
19 {XN3/10/40}, and then up again {XN3/10/39} and then up
20 again {XN3/10/38}. That is where we have conclusions.
21 It is talking about excessive pricing. I just want to
22 put it in context for you. So:

23 "Conclusions on excessive [prices]."

24 Then we go back to that paragraph 218 {XN3/10/41}:

25 "... we conclude [this is the Court of Appeal] that,

1 in holding that the economic value of the pre-race data
2 was the cost of compilation plus a reasonable rate of
3 return, the judge took too narrow a view of economic
4 value in Article 82. In particular he [the judge] was
5 wrong to reject BHB's [that is the seller's] contention
6 on the relevance of the value of the ... data to the
7 [purchaser] in determining the economic value of the ...
8 data and whether the charges ... were excessive [or]
9 unfair."

10 So just so you know this is authority for the
11 proposition that it is important in a legal framework to
12 take into consideration the value, the benefit, to the
13 purchaser of the product that is being supplied.

14 Do you accept that? I mean, do you accept that when
15 you said it was sensible, that is sound economics seems
16 to be aligned with what the law requires?

17 MR HOLMES: Sir, with great respect, this witness cannot
18 comment on what the law is authority for which seems to
19 be embedded in the question that Mr Brealey was asking
20 if I have understood it correctly.

21 MR BREALEY: I will rephrase the question.

22 MR HOLMES: You asked if she accepted that this is authority
23 for the proposition that it is important to take into
24 consideration the value.

25 THE PRESIDENT: Perhaps you should just say: should one take

1 it into consideration. Would that meet your need?

2 MR BREALEY: If the law provides that you should take it
3 into consideration, assuming that is correct, you would
4 accept that you have not taken into consideration any
5 benefit, any cost savings, to the NHS.

6 A. I have not taken those factors into account.

7 THE PRESIDENT: It does not matter what the law says.
8 Either it says or it does not. What matters is what the
9 witness has taken into account. That has been answered.

10 MR BREALEY: I only say the law because we are faced with
11 paragraph 1.10 of the first report which says this is
12 a legal framework and I am trying to give the witness
13 some assistance, when I put forward propositions,
14 whether it is a question of economics, I get pushback
15 that that is not what the law says, that is not the
16 legal framework, so I am trying to assist the witness
17 and I am just not making this up, that there is some --
18 when I am asking these questions, there is some
19 authority in the law, that is all I am trying to do.

20 But you have not taken into consideration any
21 savings to the NHS, we are agreed on that?

22 A. I agree.

23 Q. Even though, as a matter of economics, you say it would
24 be sensible?

25 A. I said if I were at the Department of Health, I would

1 want to undertake that balancing act to understand how
2 I can most cost effectively support patients.

3 Q. So you accept, whether it is a matter of economics or
4 policy, that it is a relevant consideration?

5 A. Could you -- a relevant --

6 Q. Consideration.

7 A. For what?

8 Q. For determining the value of the product.

9 A. No, not necessarily for valuing the product. It would
10 be a relevant consideration to considering how I might
11 act at the Department of Health and the decision that
12 I might make. I would rather, in the set-up that we
13 described, the example, I would rather pay £10 a year to
14 avoid £10,000 worth of cost for any individual patient.
15 I would rather pay 5p than £10.

16 Q. Well, I think everybody in the room would adopt that --
17 I would rather pay £1 for an Aston Martin. I would
18 rather pay less money for my football tickets. So the
19 fact that you would rather pay a lower sum is not that
20 informative, I suggest to you.

21 A. So where that lower sum is the outcome that I would
22 expect under normal competition, I think that does
23 become relevant. Where the lower sum that I would want
24 to pay is unrealistic because it could not be delivered
25 even in the most competitive market, then I agree, then

1 it is not relevant.

2 THE PRESIDENT: Ms Webster, I think what we are trying to
3 get a grip on is what the courts refer to as economic
4 value, and it may be that you say that it is simply
5 something that an economist cannot comment on, and, if
6 that is right, then we will move on, but it may be that
7 it is something on which you can assist.

8 Now, let us move away from what might or might not
9 be the outcome in the context of workable competition
10 because the premise that we have here is that there is
11 an abusive situation where the price is too high, and
12 what we are trying to grapple with is whether that is
13 indeed the case, and one of the factors -- and do,
14 please, jettison questions of law or what you think the
15 law is, do not worry about that.

16 A. Yes.

17 THE PRESIDENT: Let us see whether we can establish some
18 sort of economic ballpark for establishing value.

19 So when one is trying to work out whether a price is
20 or is not aligned with value, is the extent to which the
21 incurring of that price as a cost avoids greater costs
22 relevant to determining the value that you get through
23 making the payment. Now, is that something which is
24 simply a matter for the lawyers to thrash out in
25 closing, or is that something on which an economist can

1 give assistance to the Tribunal as an expert economist?

2 A. Thank you, that is very clear.

3 My answer to the question about the costs that are
4 avoided is I think that that is not something where
5 I can offer my view as an economist, but I do think that
6 economics can help us in many situations to get a handle
7 on where value does exist and has been created in
8 a product, and that is -- I am thinking about your
9 case 2 example in Hydro. So we have moved away from the
10 perfect competition benchmark, we have identified in
11 case 2 that there is a product where it is
12 differentiated in some way and that brings a value, and
13 my starting point is in most cases, or in many cases,
14 that value comes about because there is an activity or
15 an investment that is made by the firm.

16 Now, this becomes possible because we have moved
17 away from perfect competition. In perfect competition,
18 all the products look the same, all the suppliers are
19 the same, they have all got the same costs. We are now
20 saying: right, we take a supplier. They invest in doing
21 something different that consumers value, but that
22 investment, there will be a monetary sum, there will be
23 time taken to do it, so it is not without cost.

24 Now one can say: well, let us measure the costs that
25 it did incur in generating that value. So, again, what

1 is different from your base case in Hydro is you have
2 not got cost plus where cost plus measures costs as they
3 would be under perfect competition. You have
4 a measurement of costs as they are with a differentiated
5 product, and what that would lead you to is a higher
6 measure of cost plus, not -- higher than under perfect
7 competition. I would say it will be a measure of cost
8 plus that is consistent with workable competition in
9 that instance.

10 Now, the price that the firm can then charge will
11 depend on a number of factors. If they have
12 differentiated themselves to such an extent that there
13 are no other firms able to do this, then, for a period
14 of time, their price might be very high because there
15 will be no substitutes, but then the normal workings of
16 competition would say over time that comes back down
17 again.

18 So in the long run, my sense is that prices, even
19 under workable competition, will come down to a level
20 which is reflective of those costs and where those costs
21 are reflective of value. So value can absolutely be
22 informed by looking at the economics and bringing
23 economic thinking in. It is not, in my mind, solely
24 something that sits above cost plus. It can be embodied
25 within cost plus.

1 THE PRESIDENT: I am so sorry, I am just trying to frame
2 a supplementary question.

3 Let us postulate for a moment a situation of
4 workable competition, even though we are not really sure
5 what that is, but let us assume that is a state. Do you
6 accept that the price that is paid in a context of
7 workable competition equates to economic value?

8 A. Yes.

9 THE PRESIDENT: The problem we have in this case is that we
10 have an argument and a finding that workable competition
11 does not pertain.

12 A. Yes.

13 THE PRESIDENT: So we have a situation where what is paid is
14 not the outcome of the interaction of the forces of
15 workable competition.

16 A. Yes.

17 THE PRESIDENT: Presumably you would accept that it follows
18 that in that situation, price does not necessarily equal
19 economic value?

20 A. That is right.

21 THE PRESIDENT: Would you say that it is axiomatic that in
22 a context of not workable competition, economic value
23 will always be -- well, the price will always be higher
24 than economic value, or is it a question that it only
25 may be?

1 A. I think it may be on the basis that the supplier of that
2 product could choose to price their product at any
3 level.

4 THE PRESIDENT: Including --

5 A. Yes?

6 THE PRESIDENT: Including the level that would pertain in
7 workable competition?

8 A. Yes.

9 THE PRESIDENT: Right.

10 A. Then to build: if I were applying my economic
11 principles, I would say the profit-maximising firm in
12 that instance would price at a higher level and that
13 higher level being determined by the nature of the
14 barriers to competition.

15 THE PRESIDENT: Indeed, forces which would not exist in the
16 context of workable competition?

17 A. That is right.

18 THE PRESIDENT: Right. So the problem that we have is that
19 the equation of price equals economic value does not
20 necessarily pertain in the context of non-workable
21 competition, so --

22 A. Yes.

23 THE PRESIDENT: -- we have a blank to fill.

24 A. Yes.

25 THE PRESIDENT: Now, is the only way to fill the blank on

1 your analysis, your economic analysis, to say: well, we
2 must look at cost, we will work out a rate of return for
3 cost, and anything above that is excessive but not
4 necessarily unfair because there is a value judgment on
5 which an economist cannot give their opinion?

6 A. So that would be one way. I think a second way is to
7 look at comparators. If one can find a comparator where
8 one is confident that the prices are consistent with
9 those that would result from normal and sufficiently
10 effective competition, then that would be another way,
11 because that would then be a comparator which explicitly
12 includes the value of that product.

13 THE PRESIDENT: Fair enough. So if you have a situation
14 where there is a reliable read-across in circumstances
15 of workable competition, you read the price across and
16 you say: well, one equals economic value, if the price
17 is broadly the same in the two markets, then the
18 economic value box gets a big tick?

19 A. Yes.

20 THE PRESIDENT: Okay. So if there are no comparators, which
21 is your case on our case --

22 A. Yes.

23 THE PRESIDENT: -- if there are no comparators, then all we
24 are left with is cost plus?

25 A. I think that is right, and then understanding what the

1 reasons are for the difference between cost plus and the
2 price that was charged and what is the likely source of
3 that differential.

4 So, for example, does it result because there are
5 substantial barriers to competition and so therefore it
6 could be seen as taking advantage of those barriers, or
7 is there something which is value which is not captured
8 in the cost base.

9 THE PRESIDENT: Right, but you are only looking at the cost
10 base in articulating the justification for the gap
11 between cost plus and the price that is charged?

12 A. So I would start by working out cost plus --

13 THE PRESIDENT: Yes.

14 A. -- I would then identify the gap to the actual price --

15 THE PRESIDENT: Yes.

16 A. -- and then I would ask the question about what has led
17 to that gap being able to persist. Is it a result of
18 barriers to entry, for example, or, thinking back to
19 Professor Waterson's example of Picasso, is it because
20 there is something which is so, you know, unique that is
21 clear value that one might think that that causes the
22 difference.

23 THE PRESIDENT: I am so sorry to interrupt, but is the
24 Picasso example not one that is simply scarcity in
25 a market with workable competition?

1 A. Yes, that would be a good way to characterise it.

2 THE PRESIDENT: Right, so we can bin that, because we are
3 not talking about workable competition --

4 A. Okay.

5 THE PRESIDENT: -- we are talking about non-workable
6 competition. So given that we are in this particular
7 quandary because we are hypothesising a case where there
8 is not workable competition, does it follow from that
9 that the gap between your cost plus line and the price
10 that is charged is incapable of a justification by an
11 economist?

12 A. So, sorry, I hesitate. I think as an economist, I would
13 want to understand what has caused it, and I would
14 not -- I feel uncomfortable ruling out of hand that
15 there may be some value that is created which has not
16 been captured in cost.

17 My starting point is that for the most part, value
18 creation will be associated with a cost. So that is my
19 starting point, and I am hesitating only to make sure
20 that one does not rule out that there is some other
21 value creation which does not lead to a level of costs
22 which can accurately be measured.

23 Now, I think in the case of capsules that that
24 situation probably does not arise, and the reason for
25 that is the articulation as set out in your questions to

1 the experts was the value comes from the keeping
2 production going at Pfizer in order that there is no
3 discontinuity of supply because capsules become
4 unavailable.

5 Now, that keeping production capability running,
6 that is possible to measure, the costs associated with
7 that, and so if that is built into cost plus, then that
8 feels to me it takes away the reason why one might
9 expect there to be prices above cost plus that would be
10 justified by reference to differentiation in the
11 capsules example.

12 THE PRESIDENT: But it all comes back to cost?

13 A. Yes, in that case, yes.

14 THE PRESIDENT: Well, no, not in that case, but generally in
15 your assessment?

16 A. I think cost, yes, it does give a very good grounding.

17 THE PRESIDENT: Right, but given that we do not know what
18 the outcome of workable competition will be in terms of
19 price, we just do not know that because we are not in
20 that scenario, we are assuming a case of not workable
21 competition because --

22 A. Yes.

23 THE PRESIDENT: -- when it is workable, price equals
24 economic value and we can all go home.

25 A. Yes.

1 THE PRESIDENT: So we cannot go home because it is not
2 workable competition, so, by definition, assuming no
3 comparables, we do not know what price would pertain in
4 the world of non-workable competition that we are in?

5 A. So one would then have to say what other information do
6 I have that could give me an indication of the price
7 that would pertain under workable competition.

8 THE PRESIDENT: Yes.

9 A. My view is that starting with the cost plus, I would
10 expect the price under workable competition to be
11 quite -- to be located relatively close to cost plus.

12 THE PRESIDENT: Right, okay. So is your underlying premise
13 that in the case of workable competition, price tracks
14 cost?

15 A. Yes. Not exactly, but it would be closely related, yes.

16 THE PRESIDENT: If that is right, then I can see why you are
17 taking the line you are, but suppose that is not right.
18 I mean, are you saying that price tracks cost in
19 a general sense in that an undertaking viewed in the
20 round will always try to recover its costs through
21 pricing in the round?

22 A. That would not be my starting point, although that is
23 relevant. My starting point would be let us assume that
24 this firm allows its price to elevate significantly
25 above cost plus, so it is making a very healthy return.

1 THE PRESIDENT: Yes.

2 A. Those prices can be observed in the market. Other
3 suppliers may think, actually, there is a lot of profit
4 to be made there, and then the process of entry starts,
5 and under workable competition, I do assume that, while
6 there may be some barriers to entry, they are not
7 insurmountable. So entry comes in response to those
8 high prices. When entry comes, the process of
9 competition starts working to bring those prices down.
10 You may get a third entrant comes in, the prices come
11 down further.

12 So my hypothesis is that in a sort of long-run
13 sense, workable competition does not equal prices
14 significantly above cost plus, because workable
15 competition, to my mind, implies entry will happen and
16 those prices will come down.

17 THE PRESIDENT: Thank you very much.

18 MR BREALEY: From what you have just said there, the
19 supplier does not have to price on day one at a price
20 that would be the product of workable competition. You
21 have just said that that supplier can wait a period of
22 time until competition brings the price down?

23 A. Yes, I think I agree with that.

24 Q. Going back to my --

25 THE PRESIDENT: I am so sorry, Mr Brealey. You are rooting

1 your analysis in cost and in, as it were, contestable
2 markets. So just to revisit our patent case or our
3 abridged face mask case where contestability does not
4 arise because the market dies before you can contest,
5 does it not follow that you have to say that if your
6 price persists at above the level of the price that
7 would pertain if you had enough competitors in, then
8 that is almost by definition unlawful.

9 In other words, the moment you have prices which are
10 at above cost plus, however you compute cost, you are,
11 absent workable competition, at risk of being found to
12 be pricing unfairly?

13 A. So this is where the grey box in my teach-in came, the
14 gap to the mezzanine. I think it would -- so I am an
15 economist, this is not for me to judge, I would find it
16 an odd framework if the moment your price tipped above
17 cost plus or price consistent with normal and
18 sufficiently effective competition, if that were to be
19 immediately --

20 THE PRESIDENT: Right, so there is a marginal appreciation?

21 A. Yes, and temporal factors would come in there as well.

22 THE PRESIDENT: But the way you frame your box, your grey
23 box, that is defined by reference to the prospect of
24 someone entering the market and there being no barriers
25 to entry in that sense?

1 A. That would be a relevant consideration, yes.

2 THE PRESIDENT: But if those barriers exist such that there
3 is not going to be entry, we are into the realm of: you
4 cannot answer the question because you cannot draw your
5 grey box?

6 A. I think that is where economics would stop and the
7 policy would need to start.

8 THE PRESIDENT: I see.

9 Last question, I promise, Mr Brealey: does not this
10 insistence on cost plus itself betray a value judgment?

11 A. So I do not think that it needs to. I think that when
12 one is seeking to identify whether an individual price
13 is abusive or not, one needs to have reference to
14 relevant other information, and part of that is getting
15 a sense of what would be the price that would pertain
16 under normal and sufficiently effective competition, and
17 I think there is the ability, from an economics point of
18 view, there is the ability to look at comparators and
19 then there is the ability to look at costs, and they are
20 two inputs into the considerations.

21 THE PRESIDENT: But let us take forward Mr Brealey's example
22 and the one I have crystallised with some figures: the
23 saving of £10,000 per year at a cost of £10 per year.

24 So why can one not say that an economically valuable
25 price is paying the price up to £10,000 because you are

1 going to save even a pound and you get on top of that
2 the unquantifiable benefit of the patient not suffering
3 the seizure, which is something one cannot monetise but
4 which is obviously valuable.

5 So whilst I appreciate it is not an absolute answer
6 to the question, one would not, or rather one would
7 hesitate to say that £10,000 or below equals a fair
8 price, why is it not relevant to feed into the question
9 of economic value when price is not in itself a reliable
10 indicator because we are in a context of not workable
11 competition? Why are you excluding this, this saving to
12 the NHS of incurring a price, why are you excluding it
13 from the inputs that an economist would use in order to
14 answer the question of economic value?

15 A. So I think it goes to the point that, in that construct,
16 the Department of Health would be paying very much more
17 than it would need to pay if there were not certain
18 barriers to competition.

19 THE PRESIDENT: Right, so it does all trend back to cost?

20 A. It trends back to what would be paid if competition were
21 working well.

22 THE PRESIDENT: Yes, but that trends back to cost.

23 A. And that will be related to cost, yes.

24 THE PRESIDENT: Yes, I see. Well, thank you very much,
25 Ms Webster.

1 Mr Brealey.

2 MR BREALEY: I am grateful.

3 I think that is probably a good time, actually.

4 THE PRESIDENT: Thank you very much.

5 PROFESSOR WATERSON: Could I just raise an issue here? The

6 President said several times "fair", or "fairness". Do

7 you distinguish between excessive and unfair?

8 A. Yes.

9 PROFESSOR WATERSON: Right. Do you think it is reasonable

10 for an economist to opine on excessiveness but not on

11 unfairness?

12 A. So I am thinking about now the reasons why I chose to
13 distinguish. What is clear is that I have been asked to
14 comment on unfairness specifically in the context of my
15 instructions, and that is considering unfair in relation
16 to comparators, and so what I am able to comment on is
17 whether the comparators (a) are capable of informing the
18 fairness or otherwise of the parties' pricing, and then,
19 if one thought they were capable, what they would show.

20 Now, I think within that, if it had been the case
21 that I thought the tablets were a good comparator,
22 I think one would also have factored in the value that
23 comes -- that is associated with those products, and,
24 therefore, my comparison would cover -- it would tell me
25 that the -- it had the potential to tell me that the

1 parties' prices were consistent with normal and
2 sufficiently effective competition and reflect the value
3 of that product.

4 So I do not know if that answers your question or
5 not. I think that is what I can inform on.

6 PROFESSOR WATERSON: Okay, thank you.

7 MR DORAN: Can I just ask one question?

8 In the example that the President took you through,
9 which is the £10,000 of benefit, a £10 cost and a 5p to
10 10p price for the tablet, the issue seems to turn upon
11 how you identify sufficiently workable competition and
12 as I understood what you were saying to us a little
13 earlier, in the face mask example, the far higher price
14 is one you can take into account because it is going --
15 it is a flag, for want of another word, for market
16 entry.

17 To what extent does your view change -- how do you
18 judge how long you wait for market entry being
19 a possibility before you start to say that the
20 difference between the £10 and the £10,000 is something
21 on which an economist could have a view as opposed to
22 the difference between the 10p and the £10?

23 A. I think that again is probably a policy question. It is
24 a bit related to patents, how long do we want the patent
25 to last in order to allow the firm to recover their

1 costs and provide an incentive for entry.

2 MR DORAN: So the trigger for an economic judgment on --
3 I am not quite sure whether I should call them "markets"
4 now, but on this particular issue is triggered by
5 a policy question which is not one on which you could
6 have a view, but once triggered, you could then give an
7 assessment of the difference between the £10 and the
8 10,000 and the 10p -- it just seems one can exclude
9 oneself from this process in economic terms.

10 Sorry, I do not want to be unfair, I am just trying
11 to get the concept straight in my head.

12 A. So if we perhaps bring it to the example that we have in
13 capsules. That is a situation where, as I understand it
14 from the cost plus workstream, a price was changed, sort
15 of overnight with the new arrangement with Flynn, the
16 price level increased, and then the price level stayed
17 at that inflated level for a long period, and regulation
18 was such that there could be no expectation of entry in
19 that case.

20 So then the economics comes in, and said, well, was
21 that price level abusive or not -- sorry, and the
22 economics bit of that is, well, how does it compare to
23 a price that would have arisen had competition worked
24 effectively, and then we have the comparator analysis
25 and then, in my view, the cost plus analysis will be

1 relevant to that as well.

2 MR DORAN: It is the rear-view mirror from the policy
3 decision is the point?

4 A. I think that is right.

5 MR DORAN: Yes, that is fine. That is very interesting,
6 thank you.

7 THE PRESIDENT: Mr Brealey, you are way behind time.

8 MR BREALEY: I beg your pardon?

9 THE PRESIDENT: We have been asking a lot of questions of
10 the witness.

11 MR BREALEY: No, that is fine.

12 THE PRESIDENT: You are comfortable with timing?

13 MR BREALEY: I am always comfortable with time.

14 THE PRESIDENT: Well, that is very helpful to know. We will
15 rise until 2.00. Thank you.

16 (1.04 pm)

17 (The short adjournment)

18 (2.03 pm)

19 THE PRESIDENT: Mr Brealey, good afternoon.

20 MR BREALEY: Could we go to the Decision, please, at
21 {XA1/1/332}. If we look at the bottom, as you will be
22 aware the CMA states that in period 3 competition was
23 more, and they say the word "intense", yes? So:

24 "Contemporaneous documentary evidence from Teva
25 confirms that Milpharm's entry resulted in a period of

1 more intense competition, particularly in the
2 period September to December 2012."

3 We can take this fairly briefly because I appreciate
4 from the answer you gave right at the beginning of
5 today, you have not really seen the contemporaneous
6 evidence, the underlying documents?

7 A. I have seen some underlying documents, so at the time
8 when I prepared my expert report I had seen the CMA call
9 with Wockhardt which was dated 17 November 2020. I have
10 subsequently been shown sort of in preparation for trial
11 the two call notes with Milpharm, one was
12 9 February 2021 and 20 January 2022, I believe, and
13 I have been shown the factual extracts which were
14 referred to in Pfizer's openings.

15 Q. Right. So you have seen those notes, those notes, okay.

16 All right, well, let us just have a look at a few
17 documents and you can tell me whether you have seen them
18 or not, then, that show the intensity of the
19 competition.

20 Can we go to {XG/216}. We will not go to all of
21 them, but {XG/216} and blow that up.

22 If we start at the bottom, we normally -- so this
23 is -- if you want to read it, then ...

24 So this a price challenge -- this is a Teva
25 document, Teva email of 29 October 2012. Wockhardt has

1 offered an ASP of £12.75 to Lloyds Pharmacy. Lloyds
2 Pharmacy is a very large -- you know that.

3 If you go:

4 "... fed in a price challenge last week on the
5 above @ £12.75. Clive has just confirmed this is from
6 Wockhardt. Please can you update ..."

7 Then the reply is:

8 "Do we already have these volumes and therefore need
9 to defend?"

10 Then the answer is:

11 "Yes, we do currently have the volume with all the
12 One Celesio accounts ([that is] Lloyds, HX and Trident).
13 The total volume equates to 25% of our volume ... so
14 definitely need to defend this one."

15 So you are accepting, I would imagine, at face value
16 that here is Teva defending 25% of its volume?

17 A. Yes.

18 Q. If we go to another Teva email of 25 January, that is
19 {XG/255}, and go first to the bottom and then again
20 {XG/255/2}. So this is:

21 "Any questions ... give me a shout."

22 Then you will just see phenytoin up there,
23 "phenytoin sod tabs" 12.75, when we see the next page,
24 11.50.

25 "Yes can match on the condition the £11.50 price is

1 not challenged again in [quarter] 1. Will update Hx,
2 Trident and Lloyds price."

3 Then you will see this is just phenytoin here is
4 part of a whole series of price challenges, yes? In the
5 green you will see different products here.

6 A. Yes.

7 Q. If you go to the first page {XG/255/1}:

8 "... can you please update the product prices
9 highlighted in green and orange ... The table below is
10 what I've replied back to the buyer, but it should make
11 sense to you ..."

12 So this is what Teva has said to Celesio again, who
13 owns the very large pharmacy Lloyds, 25% of its volume.
14 Again, you go back to the second page {XG/255/2}, and on
15 the right-hand side, this is what Teva said to the
16 buyer:

17 "Yes can match on the condition ... is not
18 challenged again ..."

19 Now, have you seen these two documents?

20 A. I believe they were included in the documents shared in
21 your openings, so I think I have looked briefly --

22 Q. Ah, so when I asked this morning whether -- okay, so the
23 answer to that, notwithstanding these documents you do
24 not feel that you need to change your opinion?

25 A. So if I clarify. When I put my report together,

1 I looked at the CMA Decision and I looked at the one
2 Wockhardt call note because it was something that was
3 referenced by Dr De Coninck in his expert evidence.

4 I have then subsequently, in preparation for this
5 trial, following Pfizer's openings, been shared this set
6 of material that Pfizer have -- are relying on because
7 the CMA thought that might be useful for me to have an
8 awareness of those documents.

9 THE PRESIDENT: Indeed, but just to be clear, if and when
10 you look at a document and they cause you to change your
11 view, you will obviously say so?

12 A. Yes.

13 THE PRESIDENT: What we are inferring from the fact that you
14 have seen these and have not changed your view is that
15 you have not changed your view.

16 A. Yes, that is right.

17 THE PRESIDENT: Yes.

18 A. Thank you.

19 MR BREALEY: You did say: I have not seen any underlying
20 documents for the purposes of my analysis, that was your
21 teach-in, and I did refer to have you changed your mind
22 concerning anything said in opening, but I think your
23 answer is notwithstanding having seen these documents,
24 you have not changed your opinion?

25 A. That is right.

1 Q. Do you consider that these two documents are evidence of
2 effective workably competitive process in themselves?

3 Forget the barriers to entry, we will come on to those,
4 but just looking at these documents, Teva having to
5 match to defend 25% of its volume, do you not consider
6 these two documents would show competition is working?

7 A. So what is clear to me is that when Milpharm entered the
8 market in the period starting period 3 --

9 Q. Sorry --

10 A. -- competition occurred and there was a degree of
11 competition in the market.

12 I have looked at, based on the CMA's evidence,
13 whether competition in the round is sufficient for me to
14 consider it workable competition, and I think that
15 cannot be judged with reference to individual cases
16 where these would be cases of customers, for example,
17 who may be less concerned with issues such as continuity
18 of supply.

19 I have tried to assess whether the conditions in the
20 market were consistent with workable competition by
21 reference to the -- all of the customers in the market.

22 Q. So looking at these two documents, do you consider that
23 they at least show competition being effective, looking
24 at these two documents?

25 A. I consider that they show a process of competition.

- 1 Q. Show a process of effective competition?
- 2 A. No, show a process of competition beginning in the
3 market.
- 4 Q. So these two documents that show Teva having to match
5 a price to defend 25% of its market is not, in your
6 view, in themselves evidence of effective competition;
7 that is your evidence, is it?
- 8 A. I do not consider that competition is a one-stage event,
9 I consider that it is a process, and what I have
10 understood in relation to generics markets is a new
11 entrant will come in, it will charge a slightly lower
12 price. The incumbents in the market must decide whether
13 to match it or not, and then that process continues, and
14 if competition is working well, then those players will
15 undercut each other to the point at which they decide
16 they no longer wish to do so, and so what is here is
17 evidence that the process is starting.
- 18 Q. A process of effective competition?
- 19 A. It is a process of competition. I think the question is
20 at what point we get to a level where that competition
21 is effective. I think that comes later in the process.
- 22 Q. Can I just take you to one last document at {XH/94}.
- 23 Have you seen, this is a response by Alliance
24 Healthcare, one of the national wholesalers; yes?
25 Alliance is one of the national wholesalers?

1 A. Yes.

2 Q. You see there in the response at (ii) if we just blow it
3 up, so this is a response to:

4 "During the period ... 2004 to ... 2017 ... did you
5 purchase Phenytoin ... Tablets...

6 "Explain the reasons for purchasing..."

7 Then, if you go to (ii), Alliance, who is one of the
8 national wholesalers:

9 "Up until the middle of 2011 the vast majority of
10 our purchases were from Teva ... the sole supplier of
11 this product. During 2012 competition entered the
12 market from Wockhardt and [Milpharm], we used the
13 availability of these products to negotiate a lower
14 supply cost from Teva and also bought from those
15 suppliers occasionally."

16 But there is Alliance saying that it negotiated
17 a lower cost from Teva by threatening to buy from the
18 other two suppliers. Do you see that?

19 A. Yes.

20 Q. You do not think that that is evidence of a process of
21 effective competition?

22 A. I think it is, as my answer before, it is a process of
23 competition and whether or not competition had become
24 effective or sufficiently effective at this point is
25 based on my wider assessment of the evidence.

1 Q. So, if it is a wider process, I think you have said in
2 your position paper what is important is to look at the
3 outcome; is that right?

4 A. I do not recall that particularly.

5 Q. Okay, go to {XE6/8/3}, paragraph 2.4:

6 "In *Liothyronine*, the Tribunal ... emphasised the
7 need for comparator ... to reflect the outcome of
8 sufficiently effective competition."

9 I understood from that that you were emphasising the
10 word "outcome".

11 A. Yes, and it was in relation to the prices that would be
12 observed in the market.

13 Q. So if you focus on the outcome, I think you accept that
14 Teva suffered a fall in prices of about 60%
15 from January 2012 to July 2014, and almost 50% in the
16 period of three-player competition; is that correct? Do
17 you accept those figures: a fall in prices of about 60%
18 during January 2012 to July 2014, almost 50%?

19 A. I understand those to be correct.

20 Q. By any account, that is a significant fall in price, you
21 would accept that?

22 A. Yes.

23 Q. So the process resulted in a significant fall in price?

24 A. Yes.

25 Q. Let us see what factors you rely on to say that that 60%

1 fall is not evidence of workable competition, because
2 you would accept, on its face, that would be significant
3 evidence of workable competition taking place, would you
4 not, a 60% fall?

5 A. So I think that is a very helpful question because one
6 needs to have an idea of what one might expect, and
7 I think in generics markets -- this brings me to the
8 Oxera study of the evolution of prices in generics
9 markets following the loss of exclusivity of the branded
10 product, I believe the Oxera study points to prices
11 between two and five years after loss of exclusivity of
12 between 10 and 20% of the prices prior to the loss of
13 exclusivity.

14 So in that context, the 60%, although it is itself
15 a large number, it is not a particularly large number in
16 comparison to the average observed across the drugs that
17 were included in Oxera's study.

18 Q. I do not understand that with the greatest of respect.
19 You just said that the Oxera study -- in your report you
20 refer to two years, and then you say four years in your
21 position paper, relying on the Oxera study, so you go
22 from two to four, but it is -- that period starts from
23 the date of loss of exclusivity. When did Teva lose its
24 exclusivity?

25 A. So --

- 1 Q. Just when did Teva lose its exclusivity?
- 2 A. I do not know the exact date.
- 3 Q. October 2009. So the time -- that is about almost
4 five years, and so that five years is within your
5 extended Oxera time period?
- 6 A. It might be helpful at this point if we may to turn to
7 the table in the Oxera report.
- 8 Q. No, let us just -- I am just interested in the timing.
9 No, Mr Holmes, please, I am just interested at the
10 moment on the timing. You can go into it in a moment.
11 Mr Holmes can get the reference. You say the four years
12 runs from the date of loss of exclusivity, is not
13 concerned with the period of workable competition.
- 14 A. So the question is what causes prices to fall? What
15 causes prices to fall is generic entry, and in the Oxera
16 study, the table which I have in mind -- I think it is
17 table 4.1 -- shows that, following loss of exclusivity,
18 it then sets out the number of competitors in each
19 quarter following loss of exclusivity and then it shows
20 the relationship with price. So what I have done in
21 drawing the inference for that for tablets is to think
22 about where we had market entry and market entry
23 noticeably changed the competitive dynamic.
- 24 Now, my view is that Wockhardt's entry in 2009 did
25 not markedly change the competitive dynamic. We saw the

1 flatlining of the price in period 2 at the same level,
2 broadly, that continued from period 1 when Teva was
3 a monopolist.

4 Then what happens in period 3 is that Milpharm comes
5 in and it really changes the competitive dynamic as
6 I have identified and as the CMA has identified, so the
7 question then, and the reason why I initially focus on
8 the two-year period is what I say in my first report, is
9 the Oxera study would tell you from the point at which
10 you get generic entry, prices are continuing to evolve
11 and to fall over two full years, eight quarters, so to
12 my mind, competition is evolving over that whole period.

13 So what I am interested in thinking is does period 3
14 give us sufficient time to enable that process to work
15 through such that the prices we observe in period 3
16 might be consistent with the outcome of that competitive
17 process developing.

18 So does that help?

19 Q. No. I am sure Mr Holmes is --

20 MR HOLMES: I am simply aware Ms Webster was interested in
21 consulting a figure, I think, from the Oxera report. We
22 hope that this is the correct reference. It is
23 {XG/427/40}.

24 A. Yes, that is the one, thank you.

25 So this figure shows the greeny grey bars are the

1 number of entrants. So from loss of exclusivity, even
2 in the sort of first four quarters you have got between
3 four and five entrants on average for these products
4 that are considered. These are 56 different drugs
5 from -- all of them in Scheme M, and then the black line
6 shows the relationship between the generic prices and
7 the price of the brand in, I believe it is the year
8 prior to the loss of exclusivity.

9 The first point that I drew out in my first expert
10 report is that prices are falling on average over the
11 first eight quarters and in fact, looking at it now, it
12 is even longer, it is probably ten quarters, but they
13 fall for a long period, and in my view that is
14 consistent with the fact that competition is continuing
15 to evolve in that period, moving from a position where
16 there was not effective competition to a period where
17 there is more competition.

18 MR BREALEY: If you go up {XG/427/39}, 4.20:

19 "Figure 4.1 shows the average generic price ratio
20 when using the [loss of exclusivity] date as the
21 reference date for the generic price ratio. While there
22 is variation across molecules, this shows that on
23 average across the selected products, the generic price
24 is 30% of the pre-[loss of exclusivity] originator price
25 immediately following the loss of exclusivity. The

1 reduction in prices continues [to fall] and the generic
2 price is, on average, below 10% of the originator price
3 for two to five years after the [loss of exclusivity]
4 date."

5 So all I was putting to you was this is an average,
6 and you have taken as your temporal point the
7 four years, and I was saying to you -- I was putting to
8 you quite fairly that the loss of exclusivity started
9 in October 2009, and we saw, if you saw the opening,
10 Wockhardt actually discounted against Teva's price.

11 A. My response to that is when Wockhardt entered, there was
12 not a change in the competitive dynamic. The change in
13 the competitive dynamic came with Milpharm's entry.
14 That is in my view when the competitive process started
15 properly. So I take -- that is why I think it is
16 relevant to consider that from the beginning point when
17 Milpharm entered in period 3, one might expect then the
18 competitive process to take some time to develop.

19 Q. But, Ms Webster, in period 2, which is the Wockhardt
20 period -- October 2009 -- it acquired 23%. That is
21 a significant market share, 23%; would you agree with
22 that?

23 A. It is not negligible, no.

24 Q. We are splitting hairs.

25 A. Whether it is significant...

1 Q. Is it significant, 23%? In the old days 25% was
2 a reference point for a monopoly, so is 23% significant?

3 A. It is 23%, is it not?

4 Q. Well, I will take that as an evasive answer. I would
5 suggest to you that acquiring a 23% is a significant
6 gain in market share. Would you accept that the Teva
7 fall in price in the first eight months of 2012 was
8 significant, a 14% fall in price?

9 A. So again, I think there is a question about significance
10 in relation to what. It is 14%. There has been
11 a change in price, I agree with that. I notice that the
12 Wockhardt price goes up during that time, the Teva price
13 comes down. There is a question about what drives the
14 Teva price coming down, but there is a price movement,
15 and I agree with you it is noticeable, and it needs to
16 be -- it can be taken into account.

17 The question about its significance is significance
18 of what? I think -- sorry, I am speaking perhaps as an
19 economist and one likes to have a -- significance can
20 take a particular meaning in relation to economics. So
21 apologies, I am not meaning to be evasive.

22 Q. I am conscious of the time. Let us move on to what you
23 say are the factors which would indicate that a 60% fall
24 in price is not reflective of workable competition. Can
25 we take first the continuity of supply and go to

1 {XG/49}.

2 This is another Teva email, 5 November 2009. I take
3 it that you have seen this from the opening that I --

4 A. I think that is probably right.

5 Q. So you did not see this when you prepared your report,
6 but you have seen it since the trial began?

7 A. Yes.

8 Q. Do you just want to read it?

9 A. Yes, thank you. (Pause)

10 I've read it, thank you.

11 Q. Okay. We can see there there is some element of price
12 competition between Wockhardt and Teva. I am more
13 interested in the last few lines of the big paragraph,
14 where the Teva business manager says:

15 "He would prefer to give us the business rather than
16 Wockhardt but given the price differential is finding it
17 hard to resist. I have detailed that patients really
18 should not be changing from one product to another as
19 this may have a detrimental effect on their health. He
20 took that on board but the way I read it they do not
21 really care too much as price is a [great] motivator."

22 Have you taken that into consideration in your
23 opinion concerning continuity of supply?

24 A. Yes, I have. I think that is consistent with what

25 I have taken from the CMA's description about the effect

1 of continuity of supply. I have understood from that
2 that there were some customers for whom it was not
3 a concern and was not a barrier to switching in response
4 to price signals, and for some other customers it would
5 have been a barrier.

6 Q. Let us just go to another one, 10 November 2009,
7 {XG/50}. Go to page {XG/50/3}:

8 "Attached are the lines that are of concern ... [I
9 think that is to Lexon]. I have indicated the
10 [parallel] lines ... If we are willing and can match
11 then we would prefer to take from us ..."

12 Then it goes on:

13 "... there are some lines that he sources from the
14 grey [market]..."

15 Then the last sentence is for our purposes relevant:

16 "I have also included the Phenytoin as Wockhardt are
17 offering a better price and as per all my customers are
18 not really concerned about the ethical issues here.
19 Price is king as they say."

20 So there we have again the business manager saying
21 that price is king and Teva is worried about the
22 customer switching to Wockhardt.

23 Do you not accept that that is not evidence of
24 a significant barrier to expansion?

25 A. I think my answer is as before, it is an example of

1 a customer who is willing to switch.

2 Q. Yesterday Professor Bailey referred to a CMA note of
3 a call in 2021 with Milpharm, for the Tribunal's note
4 that is {XG/462}, but could we go to another one which
5 is {XH/91}. This is a Milpharm response, 29 June 2020.

6 If one goes to page {XH/91/2}, Professor Bailey did
7 not refer the witness to this, if you look at the
8 bottom, this is what Milpharm told the CMA in 2020:

9 "The CMA is aware that the MHRA published guidance
10 on prescribing anti-epileptic drugs in November 2013.
11 Please explain what, if any, impact the MHRA's guidance
12 had on your:

13 "(i) Sales to existing customers. None.

14 "(ii) Your ability to win new sales. Little if any
15 impact."

16 Now, do you not consider that you should look at the
17 underlying documents to get a fair balance before you
18 can confidently say that this continuity of supply
19 prevented effective competition?

20 A. So my instructions have been to look at what is in the
21 Decision, and at the time when I wrote my report
22 I looked at the Wockhardt note, and I have looked at the
23 description of the evidence. I have not seen this
24 document.

25 The question -- what do I want to say? I believe

1 that in the role that I have been instructed to look at,
2 that is what I have been instructed to do: I have been
3 asked to take as given what is written in the Decision
4 and I have done that, and in that context, I think it
5 would not be for me to second-guess and say: no, I need
6 to look at all of the underlying documents, so I have
7 not.

8 What I have been made aware of, which is perhaps
9 relevant to placing this document in context: so there
10 is this document, the range of evidence that the CMA
11 describes in relation to continuity of supply covers
12 a range of other documents, the Milpharm notes and the
13 Wockhardt notes describe an impact of continuity of
14 supply. My reading of those documents is that they
15 provide a different view than what is written here.

16 I am not in a position to say what the balance of
17 the evidence shows, so I have taken it from the CMA's
18 Decision that the balance of evidence, and the CAT
19 finding/judgment in 2017 was that it did -- continuity
20 of supply did have an impact.

21 THE PRESIDENT: Ms Webster, does it come to this, I quite
22 understand that you are delimiting your expert opinion
23 by reference to what is said and found in the Decision,
24 and you have been very clear about that. If, therefore,
25 on the basis of other material we come to the conclusion

1 that the statement in the Decision or whatever it may be
2 on which you have relied is itself not reliable, then
3 you would have no complaint in us qualifying your
4 opinion by reference to the fact that it was based on
5 something which is not accepted by us?

6 A. Yes.

7 THE PRESIDENT: And you do not have any issue with these
8 documents not being put by Mr Brealey to you because at
9 the end of the day, it is for us to work out whether the
10 Decision and the underlying documents stand or do not
11 stand.

12 MR BREALEY: That is why we will take this quite quickly,
13 yes.

14 THE PRESIDENT: I am grateful. Well, it seemed to me
15 important that we had that clear, because otherwise you
16 do need to put it.

17 MR BREALEY: That is why I was going to take it ...

18 With that in mind I will just take you to some
19 evidence on the supply issues, and then we can move on.

20 If we go to the Decision, that is {XA1/1/336}, we
21 see these are the paragraphs -- if we go and look at the
22 bottom at 6.374, it goes on for three paragraphs, but
23 primarily it is 374 and 375, if you read 374 and 375.

24 (Pause).

25 A. Thank you, I have read 6.374.

1 Q. Then 6.375 {XA1/1/337}.

2 This is essentially the CMA describing, in your
3 words, what the issues were with Wockhardt about supply
4 issues; yes? If you go to the bottom of this page you
5 see there is a very long -- there is a footnote, and the
6 main piece of evidence that is relied on is this note of
7 a call with Wockhardt of 25 January 2022; yes?

8 A. Sorry, where are you directing me? Which footnote?

9 Q. Look at footnote 1421. All these footnotes are
10 really for the two paragraphs we have just looked at
11 relying on what Wockhardt told the CMA on
12 25 January 2022. That is just by way of context. That
13 is in the Decision, but this is the CMA describing
14 supply issues with Wockhardt; yes?

15 A. Yes.

16 Q. So if we go, then, to your first -- your main report
17 which is {XE1/16} at page {XE1/16/27}, paragraph 2.55
18 and 2.56, you say -- this is where we get a sense of you
19 accepting what the CMA is saying. Could you blow it up,
20 please:

21 "Supply issues experienced by Wockhardt ...

22 "The CMA outlines the following supply issues
23 encountered by Wockhardt ..."

24 Then essentially you give as the basis for the
25 evidence what the CMA has said, and then at 2.56 you

1 give your expert opinion which is:

2 "In my view, the nature of these supply issues was
3 such that they had the potential to limit competition to
4 a significant degree ..."

5 Yes?

6 A. Yes.

7 Q. Let us just have a look at what Wockhardt said to the
8 CMA. If we can go to {XH/169}, the Tribunal will
9 obviously read this at their leisure and what the CMA
10 says in the Decision is accurate but, with the greatest
11 of respect, misleading, because it does not give the
12 complete picture.

13 If one goes to page {XH/169/4} and paragraph 24 at
14 the bottom, if you blow that up, again, I am asking you
15 to focus on the CMA saying that Wockhardt had supply
16 issues. Now, this is -- NW is the Wockhardt person:

17 "... responded that Wockhardt supplied its customers
18 as required with production from Custom and ... did not
19 believe Wockhardt ever turned customers away due to
20 limited production. NW explained that he had not been
21 asked to try to scale up production as there was no
22 need -- Wockhardt could supply the customers it had.
23 However, there would be concerns with scaling up
24 production for the reasons already given."

25 If we go over {XH/169/5}, 25, blow it up, that is

1 AG, that is the CMA:

2 "... asked whether Wockhardt would have difficulties
3 in scaling up production if there was a big order for
4 its Tablets ... said Wockhardt would have considered
5 scaling up its production despite the risks, if
6 required. However, no one in the market ever requested
7 this.

8 "... asked whether the technical dissolution
9 problems ever caused Wockhardt to have issues with
10 supplying the market with its Tablets ... answered that
11 he was not aware of any specific instances of Wockhardt
12 suffering stock outs for its Tablets although there
13 could have been times when they were not in the market.
14 This was possible as stock outs were not uncommon in the
15 industry, especially when there were issues further up
16 the supply chain ..."

17 Then if you go to paragraph 29, just to be complete:

18 " ... asked why Wockhardt's marketing team wanted
19 Wockhardt to use blister packs."

20 Which is one of the reasons they left the market:

21 "... queried whether the market viewed products
22 which came in pots rather than blister packs as
23 inferior . [Wockhardt] answered that the use of pots
24 did not make Wockhardt's Tablets an inferior
25 product ..."

1 My question to you: have you seen these paragraphs?

2 A. No.

3 Q. Does it not make you feel at least nervous about how the
4 CMA has described Wockhardt's supply issues in the
5 Decision?

6 A. So I have not looked at the full document. I noticed
7 there was a potentially relevant point at paragraph 22.
8 Might I be able to read that?

9 Q. Yes, of course {XH/169/4}.

10 There are two things going on in this document:
11 Wockhardt is telling the CMA that it wanted to have it
12 in blister packs, it could not, there were technical
13 issues, that is what the CMA describes in the Decision,
14 but the CMA does not, in the Decision, refer to the
15 passages in this note which say -- where Wockhardt
16 says: I did not have supply issues.

17 A. So my reading -- sorry, I am looking at this very -- for
18 the first time and trying to make sense of it.

19 It appears from 21 and 22 -- and this was what I had
20 taken from the CMA description in the Decision -- is
21 that there were issues with the stability and,
22 therefore, reliability of the Wockhardt product.

23 That led Wockhardt not to seek to make further sales
24 in the market. I think that that probably is relevant
25 context, I do not want to second-guess this document,

1 I am looking at it very briefly, but I think that is
2 relevant context for then understanding what is
3 discussed later on, which is it appears that they sought
4 to respond to the customer orders that they had that
5 they felt able to meet the customer orders that they had
6 but they did not seek to try to make more sales, and the
7 comment that you took me to in one of the later
8 paragraphs in terms of nobody asked them to scale up,
9 well, if I am then thinking about a competitive market,
10 had they not experienced these issues about the
11 reliability of their supply and the stability of the
12 product, they might well have been going out to
13 customers in the market seeking to make more sales, but
14 the fact that they did not have that confidence is what
15 led them not to do that.

16 Now, I am looking at this very briefly, but I think
17 one probably needs to read the whole note to get the
18 full flavour.

19 Q. You do, exactly, you do, to get the full flavour, and
20 when Wockhardt says: I never turned any customers away,
21 I would suggest to you that is a very material fact that
22 should be in the Decision and should be reflected in
23 your opinion.

24 A. So if I have understood this document correctly, I am
25 not sure that knowing that fact causes me to take

1 a different view that competition would have -- my view
2 is that competition would have been stronger and more
3 effective had Wockhardt not felt the limitation that it
4 could not go after new customers, and that is, in my
5 view, what is preventing workable competition in this
6 instance.

7 Q. Would have been stronger and more effective is not the
8 same thing as saying that competition was not workable,
9 was not effective. To say it would have been more
10 effective is not the same as saying that competition was
11 ineffective.

12 A. So perhaps the other relevant context is this was
13 a market that had only three suppliers, and Wockhardt,
14 one of the three suppliers, was limited in its ability
15 to contest more sales, is what I have read from it.

16 I think in a market where there are only three
17 suppliers, where one is limited in that way and no doubt
18 we will come to Milpharm, I think in combination that
19 does suggest a limitation.

20 Q. What is the definition of a monopolist in economics?

21 A. Where there is a sole supplier of a product that does
22 not face the constraints of a contestable market.

23 Q. So can the monopolist -- is it free to raise prices?

24 A. It is free to raise prices -- it is free to raise prices
25 as much as it wants to. There will be

- 1 a profit-maximising level which will be determined by
2 the shape of the demand curve.
- 3 Q. What is the definition of a constrained monopolist?
- 4 A. I am not sure that there is a particular definition, but
5 I would, one, say one might interpret that as an
6 inability to raise price to the monopoly level.
- 7 Q. Correct. So if one goes to {XE1/16} your main report,
8 page {XE1/16/65}, 4.16(a), you say halfway down (a):
9 "I take the view that the £30 DT price, even if it
10 was constrained to be below the monopoly level ..."
11 You go on to say it is not consistent with
12 sufficiently effective workable competition, but you say
13 that a constrained monopolist is someone who is
14 constrained to pricing below the monopoly level; yes?
15 That is what you say there and what you just said to the
16 Tribunal a moment ago.
- 17 A. I think that in this case I was seeking to comment on
18 what the £30 drug tariff price was, and I accept the
19 position of Dr Majumdar that it was below the level that
20 an unconstrained monopoly might price at.
- 21 Q. So if one goes to 4.23 on page {XE1/16/67} you agree --
22 this is at paragraph 4.23 -- you agree in the second
23 sentence that the £30 DT was likely to be constrained to
24 some extent?
- 25 A. Yes.

- 1 Q. So in other words, Teva could not price at a monopoly
2 level?
- 3 A. Yes.
- 4 Q. So if one goes to page {XE1/16/21} of the report at
5 paragraph 2.36(a), again you are setting out what the
6 CMA says in your report, "Factors inhibiting
7 competition...":
- 8 "The CMA points to the following specific
9 limitations on the effectiveness of competition ...
- 10 "Prior to Milpharm entering the market
11 in September 2012, the Tablet market was supplied by two
12 firms and prices persisted at levels previously achieved
13 by Teva as a monopoly supplier."
- 14 I just want to clarify that, because you give the
15 impression that the level was at a level of a monopoly
16 supplier, whereas you are accepting that Teva was
17 constrained and, therefore, selling below the monopoly
18 level?
- 19 A. I do not think I intended to create the impression it
20 was a monopoly price.
- 21 Q. No.
- 22 A. I think I am clear in my language that it was the price
23 during the duopoly period had not changed much from when
24 Teva had been the sole supplier, and I have used the
25 word "monopoly supplier", but "sole supplier" would be

1 the same.

2 Q. In period 2 it had gone from just below £27 to £21, but
3 that is by the by.

4 Now, I would like to draw your attention to certain
5 facts -- now, I appreciate you have not looked at the
6 underlying documents, or you may have during the trial.
7 I want to draw your attention to certain facts why Teva
8 was constrained, as you accept.

9 We say these facts are uncontested, but the facts
10 will be a matter for the Tribunal, but for the purposes
11 of your expert opinion, I would like you to assume that
12 they are correct, and they relate to the meeting in 2007
13 with Teva and how the £30 drug tariff was fixed, so we
14 are clear where we are going.

15 So these facts will be a matter for the Tribunal to
16 say whether it agrees or not, but these are the facts
17 that we will be putting forward to the Tribunal and
18 I would like you to assume for the purposes of your
19 opinion.

20 First, the Department of Health required the price
21 of £30, required the price of £30.

22 Second, the Department threatened the sole supplier,
23 Teva, with its statutory powers to get the price it
24 wanted.

25 Third, Teva was fearful of falling out with its only

1 purchaser. The CMA suggested that to Mr Beighton in
2 cross-examination, the CMA said it goes without saying,
3 and Mr Beighton agreed, so the third fact we will put to
4 the Tribunal is Teva was fearful of falling out with its
5 only purchaser.

6 Fourth, after the meeting, the Department official
7 thanked Mr Beighton at Teva for helping the Department
8 reach a price that was of value to the NHS.

9 Fifth, this value of £30 was hardcoded in the
10 Department's system.

11 So those are the five facts we will be putting
12 forward. DoH required the price of £30, it threatened
13 to get the price by using its statutory powers, Teva was
14 fearful of falling out with the only purchaser, the
15 Department thanked Teva for its help in achieving value
16 to the NHS, and, fifth, the value of £30 was hardcoded
17 in the Department's system, and just to be fair to you,
18 if we go to {XH/152}, which is a Department of Health
19 response, no one from the Department has come to this
20 Tribunal to give evidence, and so we are stuck with
21 their section 26 responses. If we go to page
22 {XH/152/6}, the Tribunal has seen this before, I do not
23 know whether you have.

24 If we blow this up, this is at 6:

25 "In relation to the exclusion of phenytoin sodium

1 tablets from Category M ... please explain, to the best
2 of [the Department's] knowledge and understanding:

3 "(a) how, in practice, [it] was excluded ..."

4 I am interested in the answer:

5 "It is not possible to determine precisely how the
6 fixed price of £30 was maintained ... automated or
7 manually. A spot check of each quarter's model
8 from July 2010 to January 2013 ..."

9 And these are the words I want you to focus on:

10 "... confirmed the Category M calculation model had
11 a £30 value for phenytoin 100mg tablets hard-coded in
12 [the] relevant cells ..."

13 So there was a category M calculation model by the
14 Department which had, in quotes "a £30 value for
15 phenytoin 100mg tablets". Yes?

16 Now, assume that those five facts that I have put
17 forward are true. I will give you one last fact. We
18 will be submitting to the Tribunal that the combination
19 of these five facts led to a further material fact in
20 this case, and that is that the Department of Health was
21 willing to pay a price of £30 for the phenytoin tablet.

22 So the combination of these facts -- and indeed
23 other facts, we have seen the savings to the NHS this
24 morning, but the overarching fact we will be saying to
25 the Tribunal is that the Department of Health was

1 willing to pay a price of £30 for the phenytoin tablet.

2 Now, my question is -- and please jettison any
3 notion of a competitive price or workable competition --
4 my question to you as an economist is this: assuming the
5 £30 was a price that the Department was willing to pay,
6 when prices fell there would be a consumer surplus.
7 When prices fell, there would be a consumer surplus
8 because the consumer, here the Department, was paying
9 less than it was actually willing to pay.

10 Can you agree with that or not? I will repeat it:
11 when prices fell, would there be a consumer surplus
12 because the consumer was paying less than it was
13 actually willing to pay?

14 A. Is your question when prices fell from the drug tariff
15 price that existed prior to the 2007 meeting and fell to
16 £30?

17 Q. No, from £30. So assume the Department was willing to
18 pay £30, and it did so for a period of time but, as
19 prices fell, whether through workable competition or
20 not, as prices fell, was there a consumer surplus?

21 A. When you refer to prices falling, are those the --

22 Q. The price of tablets.

23 A. -- ASPs?

24 Q. Yes. So you have a £30 drug tariff price.

25 A. Yes.

1 Q. And prices are falling.

2 A. Yes.

3 Q. So if the Department wanted to, it could reduce the drug
4 tariff to coincide with the ASPs, I know it chose --
5 whether it is an oversight or it chose not to, but it
6 was entitled to reimburse the pharmacies at a lower
7 level.

8 A. Yes.

9 Q. Is the gap between the ASP and the £30 a consumer
10 surplus?

11 A. So not in the case where the Department of Health
12 continued to pay £30?

13 Q. No. What about if it reduced, as it did in 2016, the
14 ASP -- the drug tariff to coincide with the ASP? Is
15 there a consumer surplus there?

16 A. So that would have resulted in the Department of Health
17 paying less, ie the reimbursement price would have been
18 lower, and that would have created consumer surplus for
19 the Department of Health, yes.

20 MR BREALEY: I have no further questions.

21 THE PRESIDENT: Ms Stratford.

22 Cross-examination by MS STRATFORD

23 MS STRATFORD: Good afternoon, Ms Webster.

24 I would like to begin with some comments you made in
25 your teach-in about how you see the relationship between

1 cost and reasonable rate of return, so that is the cost
2 and the plus in cost plus.

3 If we could please go to {XE7/4/11}, so this is the
4 diagram from your teach-in slides that you will be very
5 familiar with --

6 A. Yes.

7 Q. -- and dare I say it, we are becoming quite familiar
8 with too, but just to orient ourselves, the lower blue
9 line here is your cost plus line. The middle blue line
10 is what we have been calling the mezzanine, and the top
11 blue line is the actual price. Thank you.

12 If you can say "yes" just for the transcript, that
13 is very helpful.

14 A. Okay, yes.

15 Q. Thank you. I want to focus on the lower blue line, so
16 the cost plus. You say that involves a margin to --
17 I am just reading from your chart -- to cover investment
18 costs and a reasonable rate of return?

19 A. Yes.

20 Q. Thank you. So you accept, I think, that the floor
21 should include a reasonable rate of return?

22 A. Yes.

23 Q. So it is not just limited to the seller's costs; it also
24 includes a reasonable rate of return?

25 A. Yes.

1 Q. Otherwise, all you would be doing is distinguishing the
2 price where the seller makes a loss from the price where
3 it breaks even. So, in other words, where it does not
4 cover its costs and where it does. That is why you have
5 both your investment costs and reasonable rate of return
6 in there?

7 A. So what you need to have is -- sorry, this is not the
8 area that I have focused on, so I have come at this from
9 a position of sort of general economic principles. It
10 is necessary to invest a certain amount of capital into
11 a business in order that the business can perform its
12 functions, and it is necessary that there is a return on
13 that investment. So my middle box, which is still red,
14 it talks about the margin, is a margin that sits within
15 the price which enables that level of return. Does that
16 help?

17 Q. Yes, thank you. I know you have not focused on cost
18 plus, but this is in your teach-in slides.

19 A. Yes.

20 Q. So I think it is important to be clear, and the simple
21 point that I was getting to is just that if you set your
22 benchmark at the floor where a seller breaks even, that
23 would simulate perfect competition rather than normal
24 competition, would it not?

25 A. So no, not as I have envisaged it. So this goes back to

1 what we were talking about this morning. I have moved
2 away from the concept of perfect competition. I am
3 imagining that you have got differentiated firms, that
4 they invest in their product, they make it different,
5 they capture some of that value, because customers are
6 willing to pay it.

7 In that sense, you get a costs stack, both of those
8 red boxes, which are bigger than you would expect under
9 the conditions of perfect competition.

10 Q. Sorry, Ms Webster, that is absolutely fine and
11 understood, I am not putting to you anything about what
12 you have said in your reports at the moment, I am
13 focusing on this teach-in slide.

14 A. Yes.

15 Q. I am just putting to you that, if you set your benchmark
16 at a floor where a seller simply breaks even, that would
17 simulate perfect competition. It would not be normal or
18 workable competition?

19 A. No, but thank you for prompting the second part of the
20 answer that I meant to give. This also comes back to
21 the discussion. Let us say that the seller achieves
22 a price which is quite considerably above the top of
23 cost plus. That equals supranormal profit. That will
24 be visible. In the long term it will attract -- or the
25 longer term it will attract entry, the price will come

1 down. So the price which I would say is consistent with
2 workable competition will trend towards and be
3 relatively close to cost plus. I am not saying it would
4 be at cost plus, I think it would be at or around cost
5 plus. It may be below cost plus, but obviously it could
6 not exist there in perpetuity, otherwise the firm would
7 choose to exit, but it will fluctuate around cost plus.

8 Q. Let us just park that, I am going to come back to that,
9 if I may, but for now can you just agree that
10 a reasonable rate of return should reflect conditions of
11 workable and not perfect competition?

12 A. Yes.

13 Q. I think that is something you say in your report.

14 A. Yes.

15 Q. Thank you.

16 THE PRESIDENT: Just so that we are clear -- you have
17 probably answered this already, but I fear I have
18 forgotten if you have -- investment costs, are those
19 costs that are directly related to the product in
20 question, or are they more broadly based as to the
21 investment costs of the firm producing the product?

22 A. So I think that depends on the nature of the product.
23 If one were talking about a patented drug, there will be
24 R&D that goes on, some of which is successful and some
25 of which fails. In that case, if the product that is

1 being sold is the one that happens to be successful out
2 of the ten that is not, it is necessary to look more
3 broadly at the costs incurred by the business. If the
4 product in question is not one where you need to take
5 into account failed R&D costs, it can be very much more
6 targeted at the costs associated with investments needed
7 specific to that product.

8 THE PRESIDENT: What about just failed product lines, the
9 product you produce and just does not sell and bombs
10 because you have read your market wrongly?

11 A. I think I would probably include that in the first
12 category.

13 THE PRESIDENT: Thank you.

14 MS STRATFORD: Do you agree that in working out your
15 reasonable rate of return it will usually be useful to
16 look at the real world, in other words, what returns are
17 actually earned on similar products? I am just
18 talking -- I am still talking in general terms here.

19 A. In general terms, I think it is helpful to think about
20 what would be reasonable in the real world, yes.

21 Q. Thank you. To reassure you, I can refer you to what you
22 said, for example, in the hot-tub on Monday where you
23 said it is important to have comparators in relation to
24 the excessive limb. Just for the transcript, that is
25 {Day9LH1/11:16-19}. In your teach-in actually you said:

1 "I think the comparator analysis is another measure,
2 and in the ideal, one would find other comparator
3 products and prices which also lend weight to you
4 understanding where this bottom blue line lies."

5 That is again, just for the transcript,
6 {Day7LH1/133:8-11}. Presumably you stand by those
7 comments?

8 A. I do. I think I was making those comments in the
9 context of unfairness rather than excessive.

10 Q. You were referring -- the second one I just read to you,
11 you were talking about your bottom blue line which is
12 where we started.

13 A. Yes, but --

14 Q. I am not trying to trip you up here, Ms Webster.

15 A. My bottom blue line is also the line that I think can
16 be -- that is relevant to unfairness. This diagram is
17 not -- because it mentions cost plus, it is not focused
18 on the excessive limb. I have drawn this in the context
19 of the unfairness limb and making the connection that we
20 talked about this morning, which is I would expect price
21 under conditions of workable competition in the long run
22 to trend towards cost plus, which is why I have drawn my
23 lower blue line where I have. It is not determined --
24 it is not something which is specific to the excessive
25 limb.

- 1 Q. Thank you. Well, nevertheless, you did say in the
2 hot-tub on Monday that it is important to have
3 comparators in relation to the excessive limb. So do
4 you want to now demur from that?
- 5 A. I think that it is not the area that I have focused on,
6 so I think I would not want to overstep.
- 7 Q. In the real world, there is not going to be a single
8 reasonable rate of return, is there? So being
9 realistic, there is going to be a range of normal
10 returns, I think hopefully we can agree that?
- 11 A. I can answer from a general economist standpoint. I am
12 just conscious that I have not considered at all
13 reasonable rate of return in the context of this case,
14 and so I want to be as helpful to the Tribunal as I can.
- 15 THE PRESIDENT: I think the point is being put generally, is
16 it not, Ms Stratford?
- 17 MS STRATFORD: It is, I am grateful, sir.
- 18 THE PRESIDENT: If you feel able to answer generally, but
19 without reference to a specific answer.
- 20 A. Okay.
- 21 THE PRESIDENT: I am sure if the questions become more
22 specific, you will indicate at what point you feel you
23 have not done enough work to answer them, but please do
24 answer that one.
- 25 A. Yes, thank you.

1 So in general terms, I think it is again quite
2 similar to the answer that I gave in relation to the
3 comparators when we spoke about those this morning.
4 I think one really needs -- and, again, it is the same
5 issue, is it not? We are saying what should be the
6 comparators which will inform the rate of return that is
7 reasonable in any one case, and then one would need to
8 look at the comparators that are most informative.

9 MS STRATFORD: But at the moment I am just saying there is
10 going to be a range, it is not going to be a single
11 point; you are not happy to agree with that?

12 A. I think it will depend on what is available, and I would
13 not want to say look at a range when some of the
14 comparators implied by looking at that range would not
15 be relevant in the particular circumstances.

16 Q. I am talking about a range of normal returns, just to be
17 clear.

18 I think you are familiar, are you not, with
19 Mr Harman's theory for identifying Flynn's reasonable
20 rate of return, just in general terms, you have
21 certainly at least been sitting here in the tribunal
22 during the hot-tub and perhaps during some of
23 Mr Harman's teach-in?

24 A. Yes, I have heard the teach-in, I have been in the
25 hot-tub, I have not read his report.

1 Q. Thank you. Mr Harman says, just to summarise, that
2 Flynn's reasonable rate of return is the amount required
3 to service its cost of capital. Just take that from me
4 for the moment and obviously Mr Harman can more than
5 speak for himself if he needs to.

6 Just to take the simplest example, if Flynn finances
7 its business with a 10% loan, Mr Harman says that
8 Flynn's reasonable return is the amount needed to pay
9 the 10% interest rate each year, and I think you heard
10 him say that.

11 I would just like to show you briefly what the
12 Tribunal said about this point, this theory, in its
13 previous judgment and ask whether you agree or disagree
14 with some of the points, and just to explain, the reason
15 I am doing this is because they are relevant to where
16 you draw the cost plus line in your diagram, and
17 obviously I am asking you as an economist -- do not
18 worry, I know you have already been shown a number of
19 legal judgments today, but this is just the original
20 tribunal judgment in this case.

21 The reference is {XN1/2/104}. It is the original
22 tribunal judgment. If we could look at paragraph 317,
23 please, and as I say I am not putting a legal question
24 to you to be absolutely clear, what I am doing is
25 looking for your input as an economist on the correct

1 approach to drawing the lines on your chart.

2 317, first of all, I do not know if you want
3 a moment to look at it?

4 A. Thank you. (Pause) Thank you.

5 Q. It records Flynn's position in the last appeal, as you
6 can see, that the authority should examine:

7 "... available and informative benchmarks of either
8 price or profitability and see if a comparison of those
9 against the disputed price or disputed profit margin
10 points clearly in the direction of there being excessive
11 pricing."

12 And then carrying on:

13 "Different measures of profitability may well form
14 part of that process of establishing the price (or
15 range) that would apply in the counterfactual position
16 of normal and sufficiently effective competition."

17 So my question is, as an economist, do you agree
18 with that as a matter of general approach, and I stress
19 "general approach"?

20 A. I think that would go back to what I said a moment ago
21 which is, if there are different measures of
22 profitability which are applicable to the case and going
23 to be informative, then, yes, I think it is helpful to
24 look at a number of sources. It feels like if a number
25 of sources of evidence point in the same direction that

1 is more compelling, but one needs to consider the
2 relevance of those comparisons.

3 Q. Then if we could just carry on, if you could look at
4 318, the next paragraph over the page {XN1/2/105},
5 please, thank you.

6 I do not think you need all of the detail, but this
7 is the tribunal criticising the CMA for relying on what
8 it refers to as "a theoretical concept of idealised or
9 near perfect competition" rather than the real world,
10 and of avoiding making comparisons with other products
11 or companies.

12 Do you agree that if an authority -- if, I stress
13 "if" -- if an authority did indeed approach its cost
14 plus exercise in a theoretical way focused on, to use
15 the tribunal's words, idealised or perfect competition,
16 that would be a valid criticism?

17 A. I think that if that was how the assessment had been
18 approached, that feels like a fair criticism.

19 Q. Thank you. If we could go on and you could kindly have
20 a look at paragraphs on the next page, 322 to 323
21 {XN1/2/106}, this is where the tribunal considered the
22 CMA and Mr Harman's ROCE analysis. I do not know if you
23 want a little bit of time just to --

24 A. Thank you.

25 Q. You can read them fairly swiftly. (Pause)

1 A. Thank you.

2 Q. Thank you. So what I really want to focus on here is
3 323, and you can see the Tribunal said there that:

4 "Finding a minimum return on capital for investors
5 was merely another manifestation of using a Cost Plus
6 approach to calculate the excess, and was subject to the
7 same basic error as with finding a reasonable return on
8 sales (of not focusing, as a start point, on the prices
9 that would have pertained in circumstances of normal and
10 sufficiently effective competition)."

11 So my question is do you agree that the CMA's
12 approach in this second appeal likewise involves finding
13 a minimum return on capital for investors? So that at
14 least, as we discussed earlier, is where Mr Harman draws
15 his bottom blue line.

16 A. So this is where I feel that the questions have gone
17 beyond what I am able to comment on. I think that is
18 a question that Mr Harman would need to provide an
19 answer to.

20 Q. Well, I hear what you say about that, and I understand
21 your hesitancy and perhaps diplomacy about treading into
22 Mr Harman's domain, but these are, with respect,
23 questions it is important that I put to you because we
24 have your chart, we have your bottom blue line, and that
25 is not only the end point of the excessive limb, but it

1 is also the starting point of the unfairness limb which,
2 as you have fairly pointed out, is what you have
3 principally focused on. So I do submit that it is right
4 that we should properly understand the basis for where
5 you draw the line.

6 A. So I am not sure that I agree with the premise of your
7 question, so when I have looked at the fairness limb,
8 I have not made a judgment about where the cost plus
9 line is. I have not paid attention to that at all.
10 What I have done is to say: let us get a sense of where
11 that bottom blue line lies, if we can, by looking at
12 comparator information, and then what I find in relation
13 to the comparator information is that I have not got
14 a comparator which is going to help me greatly with
15 where that line is.

16 So I think, in that sense, it is not necessary for
17 me to think about where the cost plus line falls.

18 Q. You said earlier, Ms Webster, to me -- not much
19 earlier -- today:

20 "My bottom blue line is also the bottom blue line
21 that I think can be -- that is relevant to unfairness."

22 In this transcript that is at page {Day11LH1/134:17}
23 of today's transcript.

24 A. It can be in the absence of having good comparator
25 information. What I have looked at is the narrow issue

1 of, is there a comparator that we could rely on, and, if
2 we could rely on it, what would it show. It is then for
3 Mr Harman and the other experts to determine where the
4 cost plus line would fall and then, in my view, that
5 then is for the Tribunal to assess fairness against
6 that.

7 MS STRATFORD: Sir, I can see the time. I am just coming on
8 to another topic, it will not be very long, but I am
9 happy to break here for the shorthand writer if that
10 would be convenient.

11 THE PRESIDENT: Very good. That makes good sense if that is
12 a convenient moment.

13 We are doing okay for time?

14 MS STRATFORD: Absolutely.

15 THE PRESIDENT: I am very grateful. Well, we will rise in
16 that case for 10 minutes until half past.

17 (3.22 pm)

18 (A short break)

19 (3.40 pm)

20 THE PRESIDENT: Ms Stratford.

21 MS STRATFORD: Thank you, sir. Could we please bring up
22 {XJ/54/2}.

23 This a chart, Ms Webster, that Mr Brealey showed the
24 Tribunal in his opening submissions. I imagine you are
25 familiar with the various lines on the chart, even if

1 you have not seen this specific piece of paper before,
2 electronic diagram, I should say, but just again to
3 orient ourselves, the green, grey and yellow lines are
4 the tablet suppliers' ASPs; yes?

5 A. Yes.

6 Q. You have been discussing with Mr Brealey whether those
7 prices are the product of workable competition?

8 A. Yes.

9 Q. Now, you will be happy to hear we are not going to
10 re-cover that ground. I want to ask a more general
11 question: do you agree that there is no bright line
12 distinction between what is and is not a workably
13 competitive market? In other words, all markets will
14 fall somewhere on a spectrum.

15 A. Yes.

16 Q. Thank you. The closer a market fits with your
17 conception of workable competition, whatever that is,
18 the more informative it will be of what is a workably
19 competitive price for the focal product, and the further
20 away it is from that conception, the less informative it
21 will be.

22 A. So I would not put it exactly like that. I think
23 I would rather make an assessment of whether I think the
24 price in the comparator market is consistent with normal
25 and sufficiently effective competition. If I take the

1 view that it is, then I think it is a useful comparator
2 and can be used to assess the fairness of the allegedly
3 abusive price, rather than describing sort of where the
4 comparator price is on a spectrum.

5 Q. You do accept there is a spectrum, we agree about that?

6 A. The spectrum of competition?

7 Q. Yes.

8 A. Yes, and I would describe workable competition to be --
9 and perhaps to elaborate -- closer to perfect
10 competition than it would be to monopoly supply, if we
11 take those as the two extremes on the spectrum, and
12 workable competition, to my mind, is one where there are
13 not barriers to competition that limit competition to
14 a substantial degree.

15 Q. I am focusing on a narrower question at the moment, if
16 I may.

17 A. Yes.

18 Q. What I am putting to you is that it is not a binary
19 exercise, it is rather a question of gathering evidence
20 together and seeing if it tells you something rather
21 than nothing informative about what a normal competitive
22 price would look like.

23 A. I think that is the bit which I am not quite agreeing
24 with. I think, when it comes to identifying
25 a comparator, I would want to be able to see that that

1 comparator price is quite clearly one that is associated
2 with normal and sufficiently effective competition in
3 order that I can use it then to assess the allegedly
4 abusive price.

5 So I think I am probably saying that it is a bit
6 more of a bright line as to whether the comparator has
7 a price consistent with workable competition,
8 acknowledging that the set of prices consistent with
9 workable competition may themselves be in a range.

10 THE PRESIDENT: So what you are saying is that the
11 deployment of your bin for putting comparisons in is
12 rather attuned to workable competition, and if you have
13 a situation of competition that is not workable, you are
14 more likely to consign that particular comparator to the
15 bin rather than use it with significant qualification?

16 A. I think that is right, yes. Thank you.

17 MS STRATFORD: So to that extent you are really saying it is
18 a binary exercise, contrary to what I am putting to you?

19 A. Yes.

20 Q. I am grateful. So far I have been talking about prices.
21 I would put to you the same proposition in relation to
22 margins. Again, Flynn's position is that it is not
23 a binary exercise, and rather we should be gathering all
24 the evidence together and seeing if it tells us
25 something rather than nothing informative about what

1 a normal competitive margin is.

2 A. What I have done in relation to margins is I have only
3 looked at those in relation to tablets in response to
4 Dr De Coninck's expert report where he sets out that for
5 the unfair test it is more appropriate to look at tablet
6 margins and compare them against Flynn's margins as
7 opposed to looking at tablet prices.

8 So I have looked at margins only in that narrow way,
9 and what I have done is used the same test in terms of
10 I would consider the margin comparison for tablets to be
11 relevant if I am satisfied that the tablet market was
12 sufficiently competitive.

13 Q. So, again, you have taken a binary approach, if I can
14 use that shorthand?

15 A. Yes.

16 Q. Can we, please, go back to the original tribunal
17 judgment again. So again that is {XN1/2/107} and it is
18 just one paragraph this time, I promise, which is
19 paragraph 324, so immediately following the passages we
20 were just looking at. (Pause)

21 Have you had your time?

22 A. I have, yes, thank you.

23 Q. Ms Webster, I am sure you can see the point there that
24 I am going to put to you, that the tribunal there was
25 saying it was correct to use a weighted approach for

1 relevance rather than a binary approach. Do you see
2 that? Using a weighted approach for relevance rather
3 than the binary approach as to whether a comparator was
4 helpful or not?

5 A. I do see the reference. I note that these comments, if
6 I have understood correctly, are in the context of
7 looking at the cost plus and the excessive limb, and
8 that is not what I have been looking at, so I think it
9 is possibly a slightly different context.

10 I was not involved in the first appeal, so --

11 Q. I appreciate that.

12 A. -- I do not know the full context in which these are
13 made.

14 Q. Nor was I, nor was I. I am also a relative newcomer to
15 all of this. But you have, have you not, as you have
16 just explained to the President, you have looked at
17 margins in the sense of looking at margin comparators,
18 so to that extent --

19 A. Only in relation to the unfair limb, not the excessive
20 limb, and in response to the arguments made by
21 Dr De Coninck.

22 Q. Okay. So could we go back, then, to the chart,
23 Mr Brealey's chart, at {XJ/54/2}. Just to remind you,
24 this is the tablet suppliers' ASPs we were looking at
25 before.

1 Now, could we now look at the pink dotted line at
2 the bottom, the lowest line on the chart? This, you may
3 remember, is the CMA's estimate of cost plus, and you
4 are nodding helpfully. So that is assuming that each of
5 Pfizer and Flynn's price at cost plus their reasonable
6 rate of return?

7 A. Yes.

8 Q. So in other words, it is assuming that the CMA is right?

9 A. Yes.

10 Q. I am grateful. Now, if you could just take it from me
11 for now that the CMA's cost plus analysis results in
12 a price per capsule of 8p, 8p per capsule. You may or
13 may not have seen that Mr Bailey discussed the 8p with
14 Dr De Coninck yesterday.

15 A. Yes.

16 Q. I am grateful, you are indicating you are aware of that.
17 So the 8p figure, just to be clear, is calculated on the
18 basis that the Decision is correct about both Flynn's
19 and Pfizer's reasonable rates of return?

20 A. Yes.

21 Q. So in other words, it is the price that would be charged
22 if each of Pfizer and Flynn earned what the CMA says is
23 their reasonable rates of return?

24 A. Yes.

25 Q. I do not believe that the maths as such is in dispute.

1 There is dispute about what assumptions should be being
2 made and which figures are useful, but the maths, the
3 way that we get to the 8p I do not believe is in
4 dispute. So all the pink line is showing the
5 aggregate -- I think if you divided the pink line by 84,
6 if we can imagine that, we would get to 8p. I am
7 grateful.

8 Now, we know that you say -- and we have heard quite
9 a lot of discussion of this already today -- that there
10 is a sort of discretionary buffer above cost plus, if
11 I can use that language, but I want to suggest to
12 you: can we agree at a conceptual level that the purpose
13 of the plus in the cost plus is to approximate the rate
14 of return that would obtain under workable competition?

15 A. Yes, I think that is consistent with my understanding.

16 Q. Thank you. If you add a workably competitive margin to
17 your cost, you should get a workably competitive price?

18 A. Yes.

19 Q. Again, I do not expect these steps to be controversial.
20 I am grateful.

21 If we compare the CMA's cost plus price of capsules,
22 which as we have just looked at is 8p, to the average
23 price of tablets over period 3 which is 43p, we observe
24 what I assume you would agree is a very significant
25 difference?

1 A. Yes.

2 Q. 8p to 43p. So if we want to put it in percentage terms,
3 it is more than 500%. I am grateful.

4 So just for a moment, I want you to assume that you
5 are wrong in your conclusion that the tablets market
6 shows so little sign of competition that it tells you
7 nothing informative about normal competitive prices for
8 the product. Can we do that, just make that assumption.
9 So please could you just for now assume it tells you
10 something about a normal competitive price for the
11 product.

12 Do you agree that a more than 500% gap between the
13 CMA's cost plus price for capsules and the actual tablet
14 price could suggest that the CMA's approach to cost plus
15 has gone awry and is detached from the real world?

16 A. So under the construct of the question, if one assumed
17 that the tablet price was consistent with normal and
18 sufficiently effective competition, then it would be
19 surprising that the cost plus estimate for capsules is
20 so much lower when I have seen those two figures
21 compared in some of the documents. I suppose the other
22 interpretation is that this would -- may provide an
23 indication that the tablet price was not consistent with
24 normal and sufficiently effective competition.

25 THE PRESIDENT: Well, indeed, that is the flipside, but that

1 is not making the assumption that you are being asked to
2 make.

3 A. That is right, exactly, which is why I started --

4 THE PRESIDENT: Do not worry, I have entirely on board that
5 you are not in agreement with the assumption.

6 A. Yes.

7 THE PRESIDENT: But I think the answer on the basis of that
8 assumption is "yes"?

9 A. That is right.

10 MS STRATFORD: Thank you. The same would hold true even if,
11 completely arbitrarily one halved the actual ASPs of the
12 tablets to 21p, let us say, so the price would still be
13 quite dramatically out of kilter with the CMA's cost
14 plus price for capsules, and what I am -- sorry, just to
15 complete the point -- what I am putting to you is that
16 this suggests that the CMA has got their benchmark for
17 a normal competitive return wrong, so focusing on the 8p
18 which I am particularly interested in, or Flynn is
19 particularly interested in, they have got that wrong by
20 several orders of magnitude. Do you see the point?

21 A. I do see the point, thank you, and I think with that
22 different order of magnitude difference between the two
23 prices -- so let us say, tablets was 21 and the capsule
24 cost plus 8p -- I might then be minded to investigate
25 further the implications of the different market size

1 for tablets.

2 So we talked yesterday -- or was it the day
3 before? -- about the tablet market being a quarter the
4 size of the capsule market, and in the hot-tub I think
5 we agreed that that might potentially be relevant to the
6 price that could be expected to result from normal and
7 sufficiently effective competition.

8 So I think that would be a line that I would want to
9 explore to understand if that is why the tablet price is
10 coming out at 21p and that being consistent with normal
11 and sufficiently effective competition versus capsules
12 at 8p.

13 Q. Thank you. We heard that supposition about the market
14 size. Can I just confirm you have not actually
15 investigated empirically that there is any effect here
16 due to the tablet market being one-quarter the size of
17 the capsule market?

18 A. That is correct. What I have done in my first report is
19 to articulate two reasons why the small market size may
20 have an effect on the price that would result from
21 normal and sufficiently effective competition.

22 Q. Thank you. Just one final way of putting the point, let
23 us see if you like this better: let us imagine you as an
24 economist were advising companies in the position of
25 Pfizer and Flynn; am I right that your advice to them

1 would have to be based on what you have said that they
2 should price at or near the pink dotted line, in other
3 words 8p per capsule, otherwise they would be in what
4 I think at one point you called the danger zone within
5 your discretionary grey box?

6 A. So again, it is slightly difficult to answer that
7 question.

8 I would say the further -- if I were advising them,
9 I would say the further they are from a cost-reflective
10 price, knowing that they are in a position of dominance,
11 the more risk they would be encountering that their
12 price would be viewed as abusive so they would need to
13 think about the reasons why they were seeking to charge
14 a higher price, and including how they would expect the
15 market to respond.

16 Now, in this case, we know that the market would not
17 be able to respond because of continuity of supply.

18 Q. Thank you. I am going to move on now, if I may, to ask
19 some questions about tablet margins which, as you have
20 already mentioned, you have looked at.

21 Now, we have already agreed that comparators are
22 important when deciding whether a margin is excessive in
23 general terms, and you agree as I understand it that
24 tablets are a good comparator product, just thinking
25 about them as a product for the moment.

- 1 A. Yes.
- 2 Q. For the transcript, for the note, for example, you said:
- 3 "... I do not see any reason why they are not a good
- 4 comparator given the similarity."
- 5 That is {Day7LH1/149:23-25}.
- 6 So I want to go now to Dr De Coninck's teach-in
- 7 slides, if I may, at {XE7/1/15}.
- 8 So if we could look at the table at the bottom of
- 9 this slide and that contains some data on tablet margins
- 10 in the period which Dr De Coninck calls the three-firm
- 11 period, in other words, the most competitive period of
- 12 the market. He does not refer to four firms, of course,
- 13 because we do not have the data for Milpharm.
- 14 A. Yes.
- 15 Q. Now, before we comment on the value of these comparisons
- 16 can we just agree that on its face, just looking at
- 17 those numbers, the table shows that Flynn first of all
- 18 earned a lower percentage margin than any of the tablet
- 19 suppliers?
- 20 A. That is what the numbers in row 3 say.
- 21 Q. That is what the numbers say, I am grateful. Second,
- 22 that Flynn earned lower absolute margins than any of the
- 23 tablet suppliers?
- 24 A. That is what row 4 shows.
- 25 Q. Thank you. Now, we have just been looking at average

1 figures across the three-firm period, and one point that
2 you fairly made in your report is that these averages
3 mask changes over time. I do not think we need to go to
4 it, but it is at paragraph 3.69(a) of your first report.

5 So let us look at the evolution of the figures
6 briefly over time. If we could go, please, to
7 {XE1/11/38}, this is in Dr De Coninck's sixth report, it
8 is figure 7 on that page. It is a short point: can we
9 just agree the same thing here, ie that there was, to be
10 fair, a transitory blip -- I will call it that -- in Q1
11 of 2014, which there are specific reasons for that I do
12 not think we need to go into now, but other than that,
13 Flynn's margins were below those of the other tablet
14 suppliers?

15 A. So that is true when they are measured on a percentage
16 basis which is shown here.

17 Q. Yes. Now, as I understood it, your main immediate
18 response to this is that the tablet market did not
19 exhibit workable competition, and these comparisons are,
20 therefore, uninformative. Is that a fair summary?

21 A. Yes, that is right.

22 Q. I just again want to put the obverse point to you.
23 So I want to ask you to assume that the tablet market
24 does come close enough to your model of workable
25 competition, whatever that is, to say something

1 informative, and we say it would follow that these
2 comparisons do tell you something about what a workably
3 competitive margin is for this product. That is
4 correct, is it not?

5 A. So I think it can be difficult when working in
6 percentages because it will be influenced by the high
7 input costs -- or, sorry, it may be influenced by
8 a difference in input costs as between the companies
9 that are being compared. I find it also useful to
10 therefore look at absolute margins to understand the
11 absolute amount that was made per pack.

12 Q. Well, Ms Webster, I showed you the absolute figures, do
13 you remember earlier, on Dr De Coninck's slide?

14 A. Yes, but not over time.

15 Q. Well, it is true, not every quarter, not broken down by
16 every quarter, but nonetheless you have the absolute
17 figures, and you have the percentage figures, and now
18 I have shown you the figures spread over time. You are
19 agreed that the tablet is a good comparator in every
20 other respect as a product?

21 A. Yes, apart from the small market size which I have
22 mentioned, which I have not investigated but could
23 potentially have a bearing.

24 Q. I am grateful. If we could just look now at what you
25 have said in your evidence, so you have put forward

1 a different, and we say very selective, comparison. If
2 we could go most conveniently to your position paper, so
3 that is at {XE6/8/15}, and if you could maybe re-read
4 paragraphs 4.17 to 4.18.

5 A. (Pause) Thank you.

6 Q. You say that any comparison of Flynn's margins with
7 those of tablet suppliers should be limited to the
8 period from September 2013 to December 2013, and also be
9 limited to absolute rather than percentage margins, and
10 that is the point you were just making.

11 If we could have a look at that on the graph at
12 {XE1/11/39}, please, that is a very limited slice of the
13 market indeed, is it not?

14 A. It is true that I have -- as we discussed some days ago,
15 in the slicing of the Matterhorn, I have opted to choose
16 those set of prices which I believe, if I thought any of
17 the prices were -- and margins were consistent with
18 normal and sufficiently effective competition, I have
19 sought to identify those or, put another way, the reason
20 that it looks so selective is I have tried to remove the
21 earlier period prices due to the contamination in those
22 prices that I consider would have existed from the
23 non-competitive pricing during period 2.

24 Q. Well, you have explored that already extensively
25 including with Mr Brealey in cross-examination, I am not

1 going to go over that.

2 A. Okay.

3 Q. But I do put it to you that it is a snapshot of time --
4 a four-month period -- when absolute margins were at
5 their lowest point, and just for one company?

6 A. Yes.

7 Q. So I put it that choosing the very bottom of the market,
8 there is a reason you have done that, because it is
9 consistent with your view that under normal competition,
10 prices should tend towards cost, and in fact, the
11 President put this to you this morning, and you agreed
12 with that.

13 A. I do agree with that statement, but that was not why
14 I have made that selection of margins in this case. It
15 is not because I expect prices to fall to a level which
16 is consistent with cost, so let me try and find the
17 lowest point on this chart. I have looked at the
18 evidence in relation to prices, I have seen in relation
19 to tablets during period 3 that Wockhardt and Milpharm's
20 prices are continuing to fall all the way to, I think,
21 October/November in 2013.

22 At that point, they do somewhat stabilise, so rather
23 than relying on a single data point, I have said what is
24 the best I can do that sort of enables me to look across
25 a number of months without having the contaminating

1 effect of period 2, so that allows me to -- I take
2 a starting point of September 2013, and then I finish in
3 sort of December 2013 because after that, Wockhardt
4 leaves the market.

5 What I did in my report was to focus on -- I think
6 I took a slightly different -- it was October 2013
7 to January 2014. What I have done in my teach-in is
8 say: let us just make this period consistent across my
9 comparisons. So I have focused on September to December
10 to bring that into line.

11 THE PRESIDENT: Just to ask about your use of the term
12 "contamination of prices", and again, to take it away
13 from this case but to ask about our face mask example
14 where you have got a peak due to high demand not being
15 matched by supply, would you regard the prices at the
16 peak well above cost as contaminated for the purposes of
17 any assessment, or would you regard them as prices that
18 were arising out of a competitive market?

19 A. So if I were wanting to use the face mask market as my
20 comparator, I would not take prices that were at the
21 peak or falling from the peak as my comparator because
22 they are prices that -- let us say they are falling from
23 the peak in response to entry. That is, just like in
24 tablets, it is a process where competition is starting
25 to happen. While prices are still falling, that

1 competitive dynamic is unfolding and we are working
2 towards workable competition.

3 THE PRESIDENT: I see, so you see workable competition as an
4 end point, and the steps running up to it, even if it is
5 in a workably competitive market, as a process leading
6 to a reliable outcome, not a reliable outcome in and of
7 itself?

8 A. I think that is right, particularly where the place
9 where the market has transitioned from is a market in
10 which there was not competition.

11 THE PRESIDENT: Thank you.

12 MS STRATFORD: Thank you.

13 So just to summarise that for myself, employing your
14 approach as an economist and the approach that you take
15 to these issues the result is that you have taken
16 a snapshot in time when absolute margins were at
17 their lowest point as a matter of fact?

18 A. That is the result of the decisions that I have taken.

19 Q. I am grateful. If we could now go back a page, please,
20 to page {XE1/11/38}, so these are now the percentage
21 rather than the absolute margins, and we can see here
22 that even in the selective period you have chosen,
23 Flynn's percentage margins are lower than those of all
24 the other tablet suppliers. I have heard what you say
25 about the input cost, let us just put that on one side

1 for the moment, it is a legal issue, with respect,
2 whether Flynn's costs are to be taken as actual costs or
3 require some sort of adjustment, but I just wanted to
4 show you that because it is an important part of Flynn's
5 case that even in your snapshot period of four months,
6 Flynn is well below.

7 A. So what is clear when the margin is expressed in
8 percentage terms, Flynn's margin, percentage margin is
9 below that of Wockhardt as the yellow line, and what the
10 other chart tells us is it nevertheless made more money
11 per pack than Wockhardt did.

12 Q. I hear what you say about that. I am sure you are aware
13 that in this investigation, and in fact, in the previous
14 one, Flynn was found guilty of an abuse based on
15 a percentage margin benchmark, so by referring to
16 percentage margins I am not choosing something that is
17 unfamiliar to the CMA, it is actually the basis of the
18 Decision.

19 A. I will take your word for it.

20 Q. Thank you. Now, on top of choosing the lowest point of
21 the market, you say that Teva's margin should be
22 excluded. So this is the -- we end up with only
23 Wockhardt.

24 I put it to you that this is self-serving. Now,
25 again, Mr Brealey has explored with you the limitations

1 of the factual documents that the CMA made available to
2 you, and I am not going to re-cover that ground, but to
3 be fair, I do need to put it to you that excluding Teva
4 is self-serving and not helpful to the Tribunal.

5 A. So if I might explain the basis on which I chose not to
6 include Teva's price or margin in my comparator
7 benchmark price. This goes back to the -- I think we
8 were discussing it in the hot-tub: it is the difference
9 in how Teva's price evolved over period 3 relative to
10 the price evolution of Wockhardt and Milpharm.

11 So initially in the period at the end of 2012,
12 Milpharm, Teva and Wockhardt's prices all fell together,
13 and then during 2013, Milpharm and Wockhardt's prices
14 continued to fall and Teva's stabilised and then
15 increased towards the end of 2013, and the difference in
16 the period, I think September to December 2013, is a 70%
17 price differential between Wockhardt and Milpharm's
18 prices and Teva's price, and that differential opened up
19 without there being a loss -- an apparent loss of sales
20 to Teva, and we saw that in -- this was in my teach-in
21 slides where I had the volumes and the prices described
22 next to each other.

23 My reading of that data, which is not reliance on
24 the underlying documents, is that there was a degree of
25 market power, therefore, for Teva to be able to allow

1 its prices to diverge without that triggering the level
2 of switching that we would expect in this market given
3 the incentives on pharmacies and wholesalers, and it is
4 on that basis of the observed market power in Teva's
5 price that I think it would not be appropriate to
6 include it in a benchmark that is used for comparator
7 purposes.

8 THE PRESIDENT: By "observed market power", are you saying
9 that they are dominant, or are you saying --

10 A. Yes, there is a degree of dominance, they have an
11 ability -- it looks like an ability to price
12 independently of the other competitors in the market
13 without losing sales.

14 MS STRATFORD: Sir, that has already been explored with
15 Mr Brealey by reference to some of the underlying
16 factual documents. Partly for reasons of time I am
17 certainly not going to attempt to retread any of that
18 ground.

19 THE PRESIDENT: No, Ms Stratford, you do not need to put
20 those points again.

21 MS STRATFORD: I am grateful. You also -- but I do, to be
22 clear, I do put it to you that excluding Teva's margins
23 is self-serving.

24 You also consider the margin calculation should
25 exclude Accord UK's margins, and that is due, in your

1 words, to Accord's niche role and the specificity of the
2 business model that it pursued. I am quoting there from
3 paragraph 4.12 of your position paper, I do not think we
4 need to turn it up, but one feature of Accord UK's
5 business model was that it was dependent on other
6 parties, so in other words, Wockhardt and Milpharm, for
7 obtaining supply, obtaining its supply, and the simple
8 point is that Accord UK's business model was in this
9 respect similar to Flynn's business model, was it not:
10 they were obtaining their supply from another
11 pharmaceutical company?

12 A. I think what is different in the case of Accord is it
13 appeared to play a much more niche role in the tablet
14 market.

15 Q. Yes.

16 A. So it set a very high price, and I think that was in
17 Dr De Coninck's table, and it secured sales in the
18 market of 1% on average over period 3. So --

19 Q. Yes, you put it in your report, and I did say this
20 a moment ago, it played a niche role.

21 A. Yes.

22 Q. But I am also pointing out that you refer to the
23 specificity of the business model that it pursued, and
24 I am just pointing out to you that that business model
25 is actually basically in this respect the same as

1 Flynn's business model because they were buying from
2 another pharmaceutical company.

3 A. If you define business model as the supply chain
4 arrangements and whether there was a separate upstream
5 supplier, then, yes, I would agree, I think business
6 model can be interpreted more broadly in terms of the
7 customers that it seeks to attract and how it maintains
8 those relationships, the products it wants to sell, any
9 services that go alongside the products. I do not know
10 enough about Accord's model, what I know is that it sold
11 very few volumes of tablets.

12 Q. Thank you. So, again, you are understandably going off
13 what you saw in the Decision, and you have not done any
14 further investigation into that for yourself?

15 A. That is correct, but I would also note that if I were to
16 take Accord's pricing into account, for example, in the
17 calculation of a weighted average benchmark, it would
18 make very little difference given the very small sales
19 that it made.

20 Q. Moving on, then, to Milpharm. You have excluded them as
21 well, and that is because the CMA chose not to obtain
22 their data. So what you are left with is a comparison
23 with one out of four suppliers at one point in time at
24 the lowest point in the market.

25 Mr Harman told us the other day -- I am afraid

1 I cannot remember -- I think it may have been Monday,
2 but I might have lost track -- that Flynn should be
3 deemed to have purchased its capsules from Pfizer at the
4 lowest price at which Wockhardt managed to buy its
5 tablets. I do not know if you remember that point.

6 A. No.

7 Q. It was in his teach-in slides, so I think, to be fair,
8 it probably was last week. We can look at it if you
9 want, I do not think there is any need, but for the
10 transcript it is at {XE7/3/23}. It is one of
11 Mr Harman's slides.

12 So point 4 -- it is under item 3, table 6.3, and
13 point 4.

14 Now, as you know Flynn's case is that it must be
15 judged on whether it is guilty of abusive behaviour
16 based on the costs that it actually incurred.

17 A. Yes.

18 Q. That is the basis of the decision against us. Just to
19 confirm, the question of whether Flynn can be found
20 guilty of excessive pricing based on costs different to
21 those which it actually incurred is not an issue within
22 your economic expertise, is it?

23 A. No.

24 Q. I am grateful.

25 Moving on, if we could go back to your teach-in

1 slide deck, please, and go to {XE7/4/24}, you will be
2 most familiar with this. On the right, we have the
3 relatively simple chart showing the difference between
4 the drug tariff price for tablets, which of course was
5 public, and the ASPs for tablets which were not public.
6 We have to keep in mind we are looking at all this now
7 with a degree of hindsight, and there are two sets of
8 prices on the chart: one the DT price which the
9 Department of Health agreed to pay, the £30, and the
10 other is the ASP which the suppliers charged to their
11 wholesalers. That is correct, is it not?

12 A. Yes.

13 Q. So a very simple question, I hope: do you agree that the
14 drug tariff price is the price that the Department
15 actually paid for these tablets?

16 A. Yes.

17 Q. Thank you. Therefore the delta between the drug tariff
18 price and the ASPs that we can see on your graph did not
19 benefit the Department of Health or the NHS, did it? It
20 just meant that pharmacies and wholesalers were getting
21 a larger slice of the pie.

22 A. I think that is correct, subject to something which
23 Dr Majumdar also mentioned which is the clawback
24 mechanism --

25 Q. The clawback, yes.

1 A. -- which I am not an expert in at all.

2 Q. I am not either, so let us just accept that this thing
3 colloquially called the clawback is there. I do not
4 think anyone is suggesting it makes a material
5 difference here, but subject to that detail --

6 THE PRESIDENT: I think it is common ground that it operates
7 at a broader level than simply the product. So if one
8 is talking about pure margin, then it is not relevant,
9 but if one is talking about an aggregated view as to
10 what a pharmacy dispensing pharmaceuticals is making,
11 then it may apply but in a manner that none of us
12 actually knows about, but if that limited articulation
13 is wrong then could someone please let me know.

14 MS STRATFORD: Yes, thank you. Of course one of the
15 difficulties, I cannot help but observe, one of the
16 difficulties here, sir, that we are all facing, however
17 expert we are, is that we do not have in court the
18 people who could probably most assist on some of these
19 questions, the Department of Health or their
20 representatives.

21 As far as you are aware, Flynn has not been accused
22 of committing a margin squeeze against wholesalers or
23 pharmacies, has it?

24 A. Not as far as I am aware.

25 Q. No, and you have not identified any evidence of that

1 happening. That is not what you have been looking at or
2 spotted?

3 A. No.

4 Q. The complaint is that the prices paid by the Department
5 for capsules was too high, is it not?

6 A. Yes.

7 Q. As far as you are aware no wholesaler or pharmacy has
8 complained that the prices charged to it were excessive?

9 A. In relation to capsules?

10 Q. Yes.

11 A. That is not within my knowledge.

12 Q. As far as you are aware?

13 MR HOLMES: Sorry, with respect, these questions are not
14 necessarily ones that this witness is particularly well
15 placed to answer. They are questions about the scope of
16 the investigations and the findings in it.

17 THE PRESIDENT: Well, look, Ms Webster, you have shown
18 yourself well able to indicate your comfort levels in
19 answering questions, and I would like you, so far as
20 possible, to answer the questions that you are given,
21 but of course, if you are straying outside either the
22 areas of your factual understanding or the areas that
23 you have investigated or indeed your general expertise,
24 as you have done so far, do, please, say so, and we can
25 explore the difficulty, but at the moment, you seem to

1 be doing fine.

2 A. Okay.

3 THE PRESIDENT: So with that guidance, do continue.

4 MS STRATFORD: Sir, I am very grateful. That was actually
5 the -- I was not going to attempt to go to anything more
6 on wholesalers or pharmacies with Ms Webster, that was
7 all I wanted to put to her.

8 THE PRESIDENT: I am grateful.

9 MS STRATFORD: I am grateful.

10 As you know, Flynn and Pfizer's case is that they
11 acted fairly by benchmarking their prices at a discount
12 to the £30 drug tariff price. Last week, I think it
13 was, you described the £30 price as being the product of
14 a process of bilateral negotiation between two parties,
15 a monopoly supplier and a monopsony buyer.

16 A. Yes.

17 Q. You put it rather nicely, I think, in the hot-tub, it
18 may have been in your teach-in, it is at, just for the
19 note, {Day7LH1/152:17-19}.

20 So I think we are all agreed that this price was the
21 product of negotiation rather than a competitive process
22 as such?

23 A. Yes.

24 Q. Subject to that, I assume that you agree it is not
25 within your expertise as an economist to decide whether

1 that was a fair approach to pricing a medicine or not.
2 I am putting to you that is a question really of fact
3 and industry practice rather than economics.

4 A. Yes, I think I agree with what you have said.

5 Q. Thank you. So we heard when you were discussing this
6 with Mr Brealey this morning that you have not gone to
7 any of the underlying primary evidence, the underlying
8 factual documents, you were not asked by the CMA to do
9 that or provided with them?

10 A. Yes.

11 Q. Understandably you were also given a rather tight
12 deadline for your report. Do you agree that if -- so
13 again, I am asking you to make one of these lawyerly
14 assumptions -- if it is true as a matter of fact that
15 the Department negotiated a price of £30 per pack of
16 tablets under the threat of intervening under its legal
17 powers, and if Pfizer and Flynn benchmarked to that
18 agreed price, that could be a factor to suggest that
19 their prices were fair?

20 A. No, I do not think that I do agree with that
21 proposition.

22 Q. So you do not even accept it could be a factor? Sorry
23 to interrupt you, but just -- I am putting something
24 quite modest, I suggest.

25 A. So if I can explain. What I -- and what I have written

1 about in my first report is that as a monopsony buyer,
2 the Department of Health, I imagine, would have had some
3 bargaining power, but the Department of Health would
4 also have been aware that it had, if you like,
5 a responsibility to the patients to have continuity of
6 supply, so to agree a position with Teva that enabled
7 and led to Teva continuing with the supply of phenytoin
8 sodium tablets.

9 So in that situation, you have two parties each with
10 some bargaining power, and then I cannot determine where
11 that price will end up. I would not have an expectation
12 a priori that that will lead to a price that is fair or
13 consistent with normal and sufficiently effective
14 competition.

15 What I can say, which is with reference to the chart
16 on the right-hand side, is that that chart tells me
17 something about where the price sits with reference to
18 a price that could be consistent with normal and
19 sufficiently effective competition, and the fact that
20 the purple line, the drug tariff £30 price, is
21 substantially above the tablet ASPs, which I also do not
22 think are prices consistent with workable competition,
23 that tells me that where the discussion ended up with
24 the Department of Health was at a price not consistent
25 with normal and sufficiently effective competition,

1 a price that would be above that.

2 So if I then apply my framework to go back to your
3 question about what can be said about the outcome of the
4 meeting and what it implies for fairness --

5 Q. Well, I --

6 A. Sorry, just to finish -- when I employ my criteria for
7 a relevant comparator, they tell me that the drug tariff
8 price is not a relevant comparator.

9 Q. Okay, it is of no relevance at all, it could not be
10 a factor, which was the more modest proposition I put to
11 you?

12 A. As I look at it from the position of an economist, it
13 does not have a bearing. It is clearly a price which is
14 above the level consistent with normal and sufficiently
15 effective competition, so I do not see how one can take
16 that price and make a judgment about whether the capsule
17 price was a price consistent with normal and
18 sufficiently effective competition.

19 MS STRATFORD: Ms Webster, I put it to you that that is
20 a very extreme position.

21 Sir, that is all I wanted to put to Ms Webster.

22 THE PRESIDENT: Thank you.

23 MS STRATFORD: Obviously the Tribunal may have some
24 questions.

25 THE PRESIDENT: No, thank you very much.

1 Is there any re-examination, Mr Holmes?

2 MR HOLMES: There is no re-examination, sir, so I think

3 Ms Webster is free to go.

4 THE PRESIDENT: Ms Webster, you leave with our gratitude.

5 You are released from the witness box. Thank you very

6 much for the assistance you have given us. Thank you.

7 MR HOLMES: Sir, Mr Harman is not here today.

8 THE PRESIDENT: We are not going to start with --

9 MR HOLMES: We were assuming Ms Webster would be the whole
10 day.

11 THE PRESIDENT: We are not going to start with Mr Harman.

12 He starts Monday, I think 10.00 am again is our start
13 time.

14 MR HOLMES: Yes, if that is convenient to others.

15 THE PRESIDENT: I anticipate that it will be covered in
16 cross-examination of Mr Harman, but I just want to put
17 Mr Harman and the parties on notice that, depending on
18 what is asked in cross-examination and the answers
19 given, I may have some questions about WACC and ROCE for
20 Mr Harman. I imagine that will be no surprise to him,
21 but he ought to know that.

22 It might assist -- it might not, but it might assist
23 if he were to just cast his eye over two areas where the
24 WACC was considered by this Tribunal, and if I just read
25 them into the record, you can pass them on for him to

1 look at if he can before giving evidence. That is
2 *Sainsbury's v MasterCard* [2016] CAT 11, paragraphs 527
3 to 546, and *Royal Mail Group v DAF* [2023] Cat 6 at 770
4 to 797. Mr Harman will be tolerably familiar with the
5 first since I think he gave evidence before a tribunal
6 which included me, I am bound to say I forgot that, but
7 when I was refreshing my memory, I remembered that he
8 had given evidence, but --

9 MR BREALEY: And I cross-examined him.

10 THE PRESIDENT: And you cross-examined. Well, we are all
11 back together.

12 MR HOLMES: One big happy family, sir, yes.

13 PROFESSOR WATERSON: One big happy family.

14 THE PRESIDENT: It is like the reunion, but I mention those
15 simply because if he could read those in advance then it
16 would save us a little bit of time if we refer to them.

17 MR HOLMES: Of course.

18 THE PRESIDENT: We may very well not, but that is why
19 I mention it.

20 Is there anything else by way of housekeeping that
21 we need to discuss?

22 MR HOLMES: No, sir, I think we are in good shape in terms
23 of timetable because we finished Ms Webster somewhat
24 earlier than had been anticipated.

25 MS STRATFORD: Yes. I mean, I have already put down this

1 marker, but just to be absolutely clear, I think you
2 will not be surprised to hear, particularly because the
3 Tribunal has indicated it may have some more extended
4 questions for Mr Harman, I do not think the CMA should
5 assume that he is necessarily going to be completed
6 within a day. There was always allowance in the
7 timetable for the experts to be available a day before
8 and a day after their listing, just to allow
9 flexibility.

10 THE PRESIDENT: Ms Stratford, I am going to be very slow at
11 closing people down because we regard the teams in front
12 of us as consummate professionals who will ask necessary
13 questions and will not ask unnecessary questions. So
14 you can take it that if you say you need more time then
15 we will do our level best to ensure that that occurs,
16 and that is true for everybody.

17 MS STRATFORD: I am very grateful.

18 MR HOLMES: That is well understood. Mr Harman is warned
19 for the Wednesday morning, so I would hope that that
20 would accommodate Ms Stratford's concerns.

21 MS STRATFORD: I am grateful. I was just conscious that he
22 is not in London today and did not want -- because we
23 have the break on Tuesday, I just wanted to make sure --

24 THE PRESIDENT: Indeed. We have effectively got a day and
25 a half with him --

1 MR HOLMES: Yes.

2 THE PRESIDENT: -- and although what goes for him -- or
3 rather what went for Ms Webster goes for him in that it
4 is going to be a long day on Monday for him and we will
5 want to ensure that he is appropriately breaked and
6 rested. We do have some latitude given that Ms Webster
7 has finished today. So we hear what you say,
8 Ms Stratford, but I am not, at the moment, overly
9 concerned that you are going to be squeezed.

10 MS STRATFORD: I am very grateful, thank you.

11 THE PRESIDENT: And if a squeeze situation arises, then we
12 will deal with it.

13 MS STRATFORD: Thank you.

14 THE PRESIDENT: In that case, we will adjourn until 10.00 am
15 on Monday. Thank you all very much.

16 (4.39 pm)

17 (The hearing adjourned until 10.00 am on
18 Monday, 27 November 2023)

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