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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1380/1/12/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

8 August 2022

Before:

SIR MARCUS SMITH
(President)
BRIDGET LUCAS QC
PROFESSOR DAVID ULPH CBE

Sitting as a Tribunal in England and Wales

BETWEEN:

(1) BGL (HOLDINGS) LIMITED
(2) BGL GROUP LIMITED
(3) BISL LIMITED
(4) COMPARE THE MARKET LIMITED

Appellants

- v -

THE COMPETITION AND MARKETS AUTHORITY

Respondent

Heard at Salisbury Square House on 1 – 19 November 2021

JUDGMENT

APPEARANCES

Mr Daniel Beard, QC and Ms Alison Berridge (instructed by Linklaters LLP and TLT LLP) appeared on behalf of the Appellants.

Ms Marie Demetriou, QC, Mr Ben Lask and Mr Michael Armitage (instructed by the Competition and Markets Authority) appeared on behalf of the Respondent.

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A. INTRODUCTION

(1) The Decision

1. By a decision dated 19 November 2020 in Case No 50505 entitled "Price comparison website: use of most favoured nation clauses" addressed to the above-named Appellants (collectively **Compare The Market**), the Competition and Markets Authority (the **CMA**) found that Compare The Market had infringed the Chapter I prohibition[1] and Article 101 TFEU[2] by imposing on its contractual counterparties certain contractual obligations known as "Wide Most Favoured Nation Clauses" (**wMFN**s) in the period between 1 December 2015 and 1 December 2017 (the **Relevant Period)**.[3] We shall refer to this decision as the **Decision**.

2. The CMA found that the imposition of wMFNs (a clause whose nature we will describe in due course[4]) had the appreciable effect of preventing, restricting or distorting competition in breach of the Chapter I prohibition and Article 101 TFEU.[5] We shall refer to these provisions as the **Chapter I Prohibition**, and will try to avoid repeating the lengthy mantra "appreciable effect of preventing, restricting or distorting competition" and use instead less accurate, but shorter, terms like "anti-competitive effect".

3. The Decision is a lengthy one. It comprises a main body – 422 pages long – supported by various **Annexes** (Annexes A to S), bringing the total page count to 795 pages. Compare The Market appeal the Decision on various grounds, which we shall in due course describe.

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[1] As stated in section 2 of the Competition Act 1998.
[2] **TFEU**: the Treaty on the Functioning of the European Union.
[3] Decision/§10.49.
[4] See paragraph 20(2) below.
[5] See Decision/§1.6.

B. BACKGROUND

(1) The sale of home insurance products

4. The market[6] for home insurance products is an unsurprisingly large one. It generated income of £5.9 billion in 2016.[7] In 2017, there were between 19.2 and 24.3 million active policies.[8] Home insurance policies are generally renewed annually.

5. Home insurance products are purchased by consumers wishing to insure their homes and/or the contents of their homes. It is important to bear in mind that insurance is a heavily regulated sector, and that the regulatory complexity extends to those purchasing home insurance products. An insurance lawyer would refer to such purchasers as "proposed insureds" or "proposers", which serves as a reminder that (unlike with some other products) the purchaser has certain obligations beyond just paying the price for the product. Disclosure of material information is a significant and important part of the business of insurance, and the burden of that disclosure rests on the proposed insured. The manner in which disclosure obligations are discharged or not discharged can very much depend on the manner in which insurance products are sold. The use of agents in the insurance sector is commonplace, and a very important question can often be <u>for whom</u> the agent is acting – the proposed insured or the underwriter. Having noted these issues, we will refer to the purchasers of home insurance products as **consumers**.[9]

6. Ultimately, it is insurance **underwriters** who provide home insurance. It is the underwriter who bears the risk and who has the legal responsibility for paying claims.[10]

7. In terms of how home insurance products are marketed, however, the position is much more varied. An underwriter may sell home insurance directly, which may be done

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[6] In due course, it will be necessary to have a very clear understanding of the market or markets in play, and "market definition" is an important aspect of this appeal. For the present, we are simply setting out the background, and we should make clear that we are using "market" at this stage of our Judgment in a lay and not a legal sense.
[7] Decision/§2.25.
[8] Decision/§2.25.
[9] This term is fraught with ambiguity, which is both helpful and unhelpful. As will become clear, it is very important to be clear what consumers are actually buying when considering the market or markets which are the subject of the Decision. Consumers can be consumers of many different things, and we consider that it is important to be clear what it is that the consumers actually think they are getting. We are presently describing the purchasers of home insurance products, but in the case of price comparison websites that may not be what the consumers are actually seeking to obtain.
[10] Decision/§2.11.

"online" (through a website) or "offline", over the phone or through branches.[11] But an underwriter may also sell home insurance indirectly, via brokers or retail partners (like banks, building societies and utility companies).[12] An undertaking selling home insurance as an intermediary may sell the insurance products of a single underwriter or of multiple underwriters. The Decision refers to the various different ways in which insurance products can be sold as **channels**, a term we adopt. We also propose to adopt the term **home insurance provider** rather than underwriter to reflect the diverse ways in which home insurance products are provided and sold. Thus, in our terminology, home insurance products are sold by home insurance providers to consumers, it being understood that the consumers in this case are insurance purchasers.

(2) New and renewal business

8. The Decision divides the sale of home insurance products into two classes:

   (1) **New business**, which comprises *(i)* those consumers who are buying home insurance for the first time and *(ii)* those consumers who are changing their home insurance provider.[13] The business is "new" from the perspective of the home insurance provider, not the consumer.

   (2) **Renewal business**, where the consumer simply renews with their existing provider. Such renewals can be agreed (in the sense that the consumer engages with the home insurance provider at the point of renewal) or may be automatic (where the policy is renewed without particular engagement).[14]

9. The CMA estimates that in recent years, most consumers renew (74%); but a significant minority each year are new business (26%).[15] The distinction between new business and renewal business is more permeable than the classification in paragraph 8 above might suggest. A consumer might – before renewing – explore the alternatives, rather than simply passively renewing. If, on exploring those alternatives, the consumer elected to

[11] Decision/§§2.11 to 2.12.
[12] Decision/§2.13.
[13] Decision/§2.30(a).
[14] Decision/§2.30(b).
[15] Decision/§2.31.

buy from a different[16] home insurance provider, then that would be "new business", but if the consumer elected to renew, then that would be "renewal business", notwithstanding the consumer's consideration of alternative home insurance products. It is important to appreciate that we are using the terms "new business" and "renewal business" in these specific ways. Furthermore, within the rubric of renewal business, it is important to differentiate between:

(1) "Transactional" or "passive" renewals, where a consumer passively renews with their home insurance provider without exploring the alternatives.

(2) "Process" renewals, where a consumer does in fact explore the alternatives to renewal but – having done so – elects to renew with their existing home insurance provider.

Transactional/passive renewals and process renewals are thus both treated in the Decision as renewal business, and no doubt there is no particularly clear line to be drawn between one class and the other: but the difference is, nevertheless, important in terms of how home insurance providers can compete for business by converting what would otherwise be renewal business into new business.

(3) Price comparison websites

10. Price comparison websites – the term, for reasons we will come to, is an unfortunate one – are digital platforms that introduce consumers to providers of various products and provide comparison services to consumers.[17] In this case, Compare The Market

[16] It is an interesting, but ultimately irrelevant, question as to how the purchase of a home insurance product from the same home insurance provider would be classified. Arguably, that could be classed as a "renewal". But if the consumer submitted all of his/her details afresh, without adverting to the fact that this was a renewal, then the label "new" business might be more apposite. At the end of the day, the renewal/new business distinction is a helpful way of describing the market(s) we are concerned with, but cannot and should not affect the ultimate analysis of the case, to which we will come. It did not affect the analysis of the CMA which – as will be seen – defined the relevant market on the consumer side as the provision of "Price Comparison Services". Where a contract of insurance was concluded through the price comparison website, this would be "new" business. Where it was not, and the consumer elected to renew with their existing home insurance provider, that would be "renewal" business. This demonstrates the permeability of the distinction between "new" and "renewal" business. It is not a hard-and-fast distinction. It is one that is entirely informed by the consumer's decision whether to take out a home insurance product with a home insurance provider through the price comparison website or to take out a home insurance product by accepting (with or without negotiation) the renewal offer from the consumer's existing home insurance provider.

[17] Decision/§1.18.

provides to consumers a price comparison service in relation to home insurance products,[18] such products comprising a combination of buildings and/or contents insurance for homes.[19] A question to which we will revert in due course, as it is material to market definition, is precisely what the consumer is in this case consuming. Is the consumer an insurance purchaser? Or a purchaser (or acquirer, since these services are "free") of some other service – a price comparison service, for example? Now is not the time to resolve this question – we will do so in due course – but it is important to be alive to the issue.

11. The owners/operators of price comparison websites are not underwriters. They do not sell home insurance products directly.[20] The Decision asserts that price comparison websites do not "resell" home insurance products and – as far as that goes – that is right.[21] But, if and to the extent that the Decision seeks to draw a hard-and-fast line between price comparison websites on the one hand, and other indirect sellers of home insurance products on the other, we consider that the Decision is more likely to obscure than clarify.[22] For example, it is very difficult to draw a clear-cut line between a price comparison website and an agent to insure, such as a broker, in terms of the service being provided. They are both channels by way of which insurance products can be sold. Another type of channel, to which significant further reference will be made, are the channels whereby home insurance providers directly market their products to consumers, including online. We refer to these as **direct channels**, and will refer to channels that are not direct as **indirect channels**. Price comparison websites are examples of indirect channels.[23]

12. A price comparison website operates in the following way:

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[18] Decision/§1.18. Compare The Market provides such price comparison services in a variety of sectors (Decision/§2.7), but the only sector which the Decision is concerned with is the sector for home insurance products.
[19] Decision/§2.26.
[20] Decision/§1.19.
[21] Decision/§1.19.
[22] See Decision/§1.19. We propose, in deconstructing the Decision, to eschew such attempts at characterisation before the fact, and will focus instead on the functional descriptions contained in the Decision. To the extent it helps at all, questions of characterisation and categorisation can follow the facts.
[23] The borderline between direct and indirect channels may in some cases be unclear. For instance, policies incepted pursuant to affiliations between underwriters and retail partners could arguably be included under either rubric. We consider such policies to be sold through direct channels – but do not consider that anything turns on this in the present case. We use the term "underwriter" to embrace such retailer/underwriter affiliations.

(1) In response to a series of inputs (i.e., requirements for the submission of certain factual data) provided by the insurance purchaser using the website,[24] the price comparison website produces a range of quotes for the home insurance products that are available via that particular price comparison website.[25]

(2) The range of quotes offered to the consumer depends on *(i)* the number of home insurance providers subscribing to that particular price comparison website and *(ii)* the willingness of these subscribing home insurance providers to provide a quotation in response to these particular inputs.[26]

(3) The consumer will then either walk away or choose one of the products listed by the price comparison website. A hyperlink will re-direct the consumer to the home insurance provider's own website, for the consumer to purchase their chosen product from the provider without the need to enter all of their details again.[27] The contract of insurance that results will be directly between the consumer (the proposed insured) and the home insurance provider (the underwriter) and will be on terms and at a price agreed between these two persons.[28]

(4) A home insurance provider will pay a commission to the price comparison website on the completion of the transaction.[29] Usually, this will be monitored by seeing which transactions referred via hyperlink to the home insurance provider complete, but transactions may be completed using a dedicated phone line or via the home insurance provider's own website. There are mechanisms in place to ensure that where the transaction completes other than by way of the

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[24] Decision/§2.22. We appreciate that we may be begging a very important question here.
[25] Decision/§2.22.
[26] Decision/§2.22. The distinction between a home insurance provider subscribing to a price comparison website and a subscribing home insurance provider limiting the types of quotation it is prepared to offer is a distinction that does not emerge clearly from the Decision, but one which assumed greater importance on appeal. For that reason, we highlight early on in this Judgment the two limiting factors on the range of quotations provided to a consumer. Those limits, to be clear, are: *(i)* the number of providers subscribing to the price comparison website and *(ii)* the range of products each subscribing home insurance provider is prepared to offer via that price comparison website. We stress that the failure in the Decision to draw this distinction more clearly is not in any sense a criticism, and we do not understand Compare The Market to advance any such criticism. To the extent that Compare The Market did, we reject it as a criticism of the terms and content of the Decision.
[27] Decision/§2.23.
[28] In practice, on the home insurance provider's terms.
[29] Decision/§1.20; §2.23.

hyperlink, the price comparison website still receives its commission.[30] The mechanics do not matter.

13. It is, at this stage, worth making the following general points:

(1) First, price comparison websites only deal with new business, as we have defined it. By definition, renewal business is not transacted through price comparison websites. Home insurance providers will want to retain their customer base, and will want to encourage renewals in so far as they can.

(2) Secondly, whilst it is understandable to speak of home insurance products as if they were generic or fungible products, a more accurate description is that they are products which, whilst sharing a number of general characteristics, are actually individual or bespoke to the consumer purchasing a particular home insurance product. As to this:

(i) Home insurance products provide an indemnity payable on the occurrence of certain defined circumstances in return for the payment of a premium.

(ii) However, the nature and extent of the indemnity is a matter that can be tailored in accordance with the wishes or desires of the individual consumer. It is the individual consumer that will decide upon the level of cover they wish to purchase,[31] the breadth of that cover,[32] and the amount of any excess.[33] The choices that the consumer makes will affect the amount of the premium for the insurance policy.

(iii) There are factors – that have nothing to do with the consumer's choices – that will also affect the premium that is payable. Thus, the location of the property to be insured and the consumer's claim and loss history will

[30] Decision/§2.23.
[31] I.e. an indemnity up to a certain limit.
[32] In addition to choosing building and/or contents insurance, there are often add-ons, like travel insurance.
[33] I.e. the first part of any loss that the consumer bears.

likely be relevant (amongst, no doubt, other factors) to the home insurance provider.

(3) Thirdly, it follows from the foregoing that the provision of information by the consumer to the home insurance provider is absolutely material to the insurer's decision *(i)* whether to accept the risk and *(ii)* if so, how to "rate" the risk, i.e. determine the appropriate premium to charge. In the case of price comparison websites, the information that the consumer provides is given in response to a series of questions articulated by the price comparison website. Quite how these questions are framed is a matter not discussed in great detail in the Decision, but the point is an important one:

(i) For the reasons we have given, the provision of information is central to an insurer's decision to accept a risk (i.e., agree to insure) and rate it (i.e., work out what premium to charge). Generally speaking, a home insurance provider will want more information, not less, and (although somewhat attenuated in consumer cases) a proposed insured is obliged to make full and frank disclosure of facts and matters material to the risk.

(ii) However, consumers dislike having to answer large numbers of questions simply to get a price, and price comparison websites are sensitive to this. There will – in order to encourage custom – be pressure to ensure that the process of obtaining a quotation is as streamlined as possible.

(iii) Moreover, the price comparison website will have to have standardised questions which will be common in respect of each subscribing home insurance provider. It would undermine the whole process of comparison if different data were provided at the instance of different subscribing home insurance providers using different question sets.

(4) Fourthly, and finally, the term "price comparison website" is dangerously incomplete. As we said in paragraph 10 above, the term is an unsatisfactory one. Of course, price comparison websites provide price comparisons. But an essential part of the business – and how these undertakings make their money –

is the use of the price comparison website to connect the consumer with their home insurance provider of choice, thereby enabling *(i)* a contract of insurance to be concluded and *(ii)* the price comparison website to generate commission.

14. During the Relevant Period, there were four main price comparison websites for home insurance products. These were:

(1) Compare The Market.

(2) **MoneySuperMarket**.

(3) **GoCompare**.

(4) **Confused**.[34]

15. These four price comparison websites (the **Big Four PCWs**) together accounted for over 90% of home insurance products sold through price comparison websites in 2016 and 2017.[35] The Decision says this about Compare The Market:[36]

> "[Compare The Market] was by far the largest [price comparison website] for home insurance sales in 2016 and 2017, almost twice the size of its nearest rival (Money Supermarket) and accounted for over 50% of sales of home insurance made through [price comparison websites]. [Compare The Market] had a strong market position throughout the Relevant Period such that it had market power."

(4) Contractual relations between price comparison websites and home insurance providers

(a) The general position

16. Compare The Market – as would all price comparison websites – contracted with home insurance providers for the provision by them of insurance quotations on Compare The

[34] Decision/§1.21.
[35] Decision/§1.21.
[36] Decision/§1.21. We have quoted from the Decision, and not paraphrased, because we would not want any paraphrasing to obscure the basically confusing nature of this passage. As the footnote to this passage notes (footnote 6), market definition is considered in Section 5 of the Decision, and this statement does no more than articulate the CMA's conclusion ahead of its reasoning. But the reference to "market power", suggesting that this is an abuse of dominance case, and not an effects-based case, is undoubtedly confusing. See also Decision/§1.8 and Section 5 (which conflates market definition with an assessment of Compare The Market's market power).

Market's website in return for a commission paid to the home insurance provider in the case of successfully completed transactions.

17. In the Relevant Period, Compare The Market had contracts with many subscribing home insurance providers. The precise terms of these contracts are not stated in the Decision, but these are, when examined, complex arrangements.[37] They provide for the identification and compiling of the data Compare The Market needed to gather from the consumers visiting the Compare The Market website in order to enable subscribing insurers to generate insurance quotations that could then be provided to those consumers by way of the Compare The Market website.

18. Contracts of a similar nature will have subsisted between other price comparison websites and the home insurers subscribing to those price comparison websites.

(b) Price competition and Most Favoured Nation Clauses

19. Home insurance providers compete on price and – as part of that competitive process – use differential pricing strategies. Thus, a home insurance provider may price the same product differently according to the channel through which it sells or seeks to sell that product.[38] One aspect of such differential pricing involves promotional deals, whereby a particular home insurance product is "promoted" by a special offer. Such promotions may involve a money discount or offer a benefit equivalent to a money discount, but the promotional benefits may not necessarily be monetary.[39] We shall refer to such discounts as **promotional discounts**, and we shall differentiate between **monetary promotional discounts** and **non-monetary promotional discounts**.

20. Generally speaking, the contracts between price comparison websites and their subscribing home insurance providers contain provisions restricting home insurance

[37] The Decision contains a fairly broad-brush description at Decision/§§2.47 to 2.52. The contracts themselves were in the papers before the Tribunal.
[38] Decision/§1.47.
[39] Decision/§1.28. Thus, Compare The Market offers from time to time discounted or free cinema tickets. Such promotions will not affect the price of the product being promoted. Other forms of promotion – cash-back, for example – are purely monetary, but do not necessarily involve a reduction in the premium quoted.

providers' ability to price differentially across different price channels. In broad terms, these restrictions fell into two classes (there were, of course, variants):[40]

(1) What are termed "Narrow Most Favoured Nation Clauses" (**nMFN**s). Most favoured nation clauses derive their name from the law of international trade. Such clauses typically provide that a party must receive rights and benefits under the contract that are equal to or more favourable than the rights and benefits received by any other party or parties. In the context of the Decision, a nMFN prevents the home insurance provider from undercutting the prices quoted on the price comparison website on its own website (or, no doubt, other direct marketing channels such as retail partners[41]). However, to the extent that the home insurance provider subscribes to two or more price comparison websites, the home insurer may price differentially as between those price comparison websites.

(2) "Wide Most Favoured Nation Clauses" or, as we describe them, wMFNs.[42] In the context of the Decision, where a price comparison website imposes a wMFN it prevents the home insurance provider from undercutting the prices quoted on the price comparison website both through its own website (or other direct marketing channels) and on any other price comparison website that home insurance provider subscribes to. In short, the constraint on pricing differentially is market wide, and is not limited simply to the direct ways in which the home insurance provider sells its products.

[40] In a letter dated 31 March 2021, the parties helpfully provided instances of both types of clause. Obviously, the precise wording varied from case-to-case, but we have sought to capture the essence of the difference between wMFNs and nMFNs. See, further, Decision/§1.33 and §§2.55 to 2.57.

[41] The Decision does not parse the precise ambit of nMFNs or wMFNs, and we did not receive detailed submissions on this ourselves. However, the purpose of nMFNs is to prevent undercutting of an indirect channel (the price comparison website) through direct channels, and we have no doubt that this would have been the case whatever the nature of the direct channel doing the undercutting, and this Judgment proceeds on that basis.

[42] The wMFNs deployed by Compare The Market are described in Decision/§§2.58 to 2.60. There was some dispute – articulated in the Decision (at §2.61 and §§4.17*ff*) – as to whether all of the clauses alleged by the CMA to be wMFNs were in fact properly so described.

(c) The infringing agreements

21. During the Relevant Period, Compare The Market had contracts with 32 home insurance providers subscribing to its price comparison website which contained wMFNs.[43] The home insurance providers in question are listed in Annex 1 to this Judgment.[44] The Decision refers to these agreements as Compare The Market's "network" of wMFNs.[45] It will be necessary to consider "network" effects in due course. For the present, we will simply refer to the 32 contracts containing wMFNs as the **wMFN Agreements**.

22. The Decision records that wMFNs in the wMFN Agreements were "integral" to Compare The Market's competitive strategy, "namely to strengthen its competitive position by ensuring it was not undercut by rival [price comparison websites] whilst maintaining growth in commission fees".[46] The Decision records that there was widespread compliance with the wMFNs in the wMFN Agreements by those home insurance providers party to them.[47]

23. It is important to note that the Decision is not addressed to any party other than Compare The Market. In particular, the Decision is not addressed to the home insurance providers who were party to the wMFN Agreements, i.e., Compare The Market's contractual counterparties.[48]

(5) Terminology: Premiums and Commissions

24. It is important to be clear what the Decision means when it uses phrases like "competing on price". There are two prices in issue:

[43] Decision/§1.2, §1.5, §1.33.
[44] Annex 1 also lists the home insurance providers, subscribing to Compare The Market, who only had nMFNs in their agreements.
[45] See, for example, Decision/§1.45.
[46] Decision/§1.38.
[47] Decision/§1.52.
[48] Decision/§2.4.

(1) The price quoted or charged for a home insurance product by a home insurance provider to the consumer (the insured or proposed insured). This price we will refer to as the **Premium**.[49]

(2) The price charged by a price comparison website to a home insurance provider. We will refer to this price as the **Commission**.

There is, self-evidently, going to be a relationship between levels of Commission charged and levels of Premium charged, in the sense that the former (Commission) is a cost element to the home insurance provider that must be recovered (if the home insurance provider is to stay in business) by way of the revenue it derives from the Premiums it is paid.[50] We are, of course, not saying that there is a direct correlation between Commission and Premium, in the sense that the cost of Commission is inevitably discharged out of the Premium generated by the successful sale of the home insurance product.

(6) Anti-competitive effects found by the CMA

25. The Decision found that the wMFNs in the wMFN Agreements produced an anti-competitive effect in breach of the Chapter I Prohibition and Article 101 TFEU in the Relevant Period. In summary, the Decision finds that these clauses had the appreciable effect of preventing, restricting or distorting competition in breach of these provisions by: [51]

(1) Reducing price competition between price comparison websites.

(2) Restricting the ability of Compare The Market's rival price comparison websites to expand, enabling Compare The Market to maintain or strengthen its market power.

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[49] There is potential for the same risk to be priced differently according to how the consumer and home insurance provider are dealing with each other. There is also the potential – although this is not particularly identified in the Decision – for the premium quoted by a price comparison website to differ from the price that is ultimately contractually agreed (e.g. because of a material change in the cover sought or in the nature of the risk). We use the term "Premium" simply to reference the price quoted or the price charged to a consumer by a home insurance provider. We fully recognise that there may be different premia quoted and charged for the same risk.
[50] The components of home insurance pricing are described in Decision/Figure 2.2.
[51] Decision/§1.6.

(3) Reducing price competition between home insurers competing on price comparison websites.

26. These findings are expanded upon in Section 9 of the Decision, which finds five anti-competitive effects. We consider these in greater detail below.

(7) Penalty

27. As a result of the findings made by the CMA in the Decision, the CMA imposed on Compare The Market a financial penalty of £17,910,062.[52]

(8) The grounds of appeal

(a) A framework of analysis

28. The infringements found by the CMA in the Decision are infringements of the Chapter I Prohibition that are said to be by effect rather than by object. This is a distinction that it will be necessary to unpack in a little greater detail, but for present purposes it is sufficient to note that the CMA found that the imposition of wMFNs by way of the wMFN Agreements had the appreciable effect of preventing, restricting or distorting competition in breach of the Chapter I Prohibition and Article 101 TFEU. The CMA must show an anti-competitive effect and the burden of proof – as all before us accepted – is on the CMA.

29. There is a well-established framework or process for assessing the existence or otherwise of an anti-competitive effect. We shall refer to this as the **Framework**. The process, as informed by the Framework, is as follows:[53]

(1) It is necessary, first, to identify the relevant agreement or provision that is said to constitute a restriction on competition. That, in itself, may or may not be controversial. Questions may arise as to the precise nature of the restriction, including (for instance) whether it is in fact enforced or paid regard to.

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[52] See Section 11 of the Decision and, in particular, Decision/§11.87.

[53] This analysis is drawn from *Sainsbury's Supermarkets Ltd v. MasterCard Incorporated*, [2016] CAT 11 at [105]*ff*.

(2) Having identified the relevant agreement or provision said to constitute a restriction on competition, it is necessary to identify the market in which the effect of that agreement or provision is to be gauged.

(3) Having identified the relevant agreement or provision and the relevant market or markets, a theory of harm must be articulated. The essential usefulness of a theory of harm is that it enables there to be a focus on the evidence that supports these allegedly harmful effects. Without a theory of harm, it is very difficult, if not impossible, to focus the inquiry.

(4) The allegedly harmful effect is then assessed by reference to what the position would have been in the absence of the allegedly infringing agreement or provision. This "counterfactual" hypothesis imagines what the market would have been like absent the infringing agreement or provision. In this way, by comparing the actual case or the real-world case with the counterfactual case, one can determine whether the provision or agreement under scrutiny is indeed restrictive of competition.

30. No framework of analysis can be applied unthinkingly or without regard to the specific circumstances of the given case, and we certainly would not wish the Framework here articulated to be read as monolithic or immutable. It is a framework for assessing a form of competition infringement in an objective and predictable way. It is, therefore, helpful to consider the grounds of appeal advanced by Compare The Market against this well-established approach for assessing the existence of an anti-competitive effect infringing the Chapter I Prohibition.

31. It is necessary to be very clear that the Framework does not consider pro-competitive effects. Unlike in the United States, where pro- and anti-competitive effects are considered at the same stage and "balanced",[54] the Framework focusses only on infringements. It is, of course, possible to justify an infringement on grounds of competition: see section 9 of the Competition Act 1998 and Article 101(3) TFEU. However, in this case, no pro-competitive effects within the meaning of section 9 or

[54] We apologise for summarising a sophisticated system in a single sentence, which inevitably omits all nuance and is obviously going to over-simplify.

Article 101(3) TFEU were asserted by Compare The Market, and so it is unnecessary to consider the justification of an infringement by reason of these provisions in this case.

(b) Compare the Market's appeal against the finding of infringement

32. By its Notice of Appeal (the **Notice**), Compare The Market appeals against the Decision under section 46(1) of the Competition Act 1998. The essence of the appeal is that the CMA erred in focussing on what Compare The Market called "*intra*-brand competition", where the same product (i.e., the home insurance offered by a home insurance provider) was priced differentially across different price comparison websites, without paying sufficient regard to "*inter*-brand competition", where different products (i.e., home insurance offered by multiple home insurance providers) compete against each other. Thus, whilst wMFNs may have inhibited price differentiation in relation to the same product or provider, they did nothing to affect competition between products of different insurers.[55] Compare The Market contended that considering competitive constraints as a whole (i.e., both *intra*- and *inter*-brand competition, across all channels) there was no anti-competitive effect and no evidence that the prices for home insurance generally were affected.[56] Moreover, Compare The Market contended that even if *intra*-brand competition was the correct touchstone, and *inter*-brand competition could be ignored, the CMA has failed, even here, to identify anti-competitive effects.

33. These essential points were articulated in six substantive grounds of appeal (i.e., in relation to the finding of infringement). Tying these in to the Framework set out in paragraph 29 above, these substantive grounds of appeal may be stated as follows:[57]

(1) *Ground 1: wrong definition of the relevant market.* Ground 1 asserts that the market definition adopted by the CMA in the Decision was flawed. Market definition matters because it sets the scene in which the effect of the allegedly

[55] See the Notice/§4.
[56] Notice/§6.
[57] Although, generally speaking, we try to use Compare The Market's precise language, we have also tried to be consistent. Thus, the CMA and Compare The Market refer not to "Commissions" but to "CPAs" (cost per acquisition), which is not a term we have adopted.

anti-competitive agreement or provision can be gauged.[58] In the Notice, Compare The Market contended:

> "64. The CMA defines the relevant market as the provision of [price comparison website] services for home insurance in the UK. It specifies that this is a two-sided market comprising the supply by [price comparison websites] of: (i) customer introduction services to insurers; and (ii) price comparison services to consumers.
>
> 65. This definition underlies important aspects of the CMA's effects analysis, in particular "coverage" of the [wMFNs] and, by the same token, the proportion of the market which was free of, or unaffected by, the [wMFNs]. Insofar as the CMA materially erred in its market definition, therefore, the Decision on adverse effects cannot stand."

Clearly, it will be necessary to consider the substance of the CMA's market definition in some detail. We would only observe at this stage that the last sentence of paragraph 65 of the Notice, just quoted, overstates matters. It was common ground between the parties – and we agree – that market definition is an important tool in assessing the existence of anti-competitive effects. Getting it wrong may materially undermine a conclusion that there have been anti-competitive effects, but that is not necessarily the case. It is perfectly possible – even using an incorrect market definition – nevertheless to discern an anti-competitive effect. That is because market definition – at least when used as part of the Framework – is not concerned with effects (whether pro- or anti-competitive) at all, but merely in identifying the context in which these effects are to be tested for.[59] We do not, therefore, accept that even if the CMA incorrectly defined the market, it automatically follows that the Decision cannot stand. Although defining the market wrongly is scarcely a good start, and is liable to lead to an erroneous conclusion on infringement, it may nevertheless be possible (notwithstanding any error) to correctly identify an infringement of the Chapter I Prohibition or Article 101(1) TFEU. We consider this ground of appeal (**Ground 1**) in Section F below.

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[58] The significance of market definition is described in paragraph 29(2) above.

[59] In short, what an economist would call an "externality" – the cost or benefit of an economic activity to an uninvolved third party – does not feature at this stage. What is being determined is the context in which the existence of negative externalities are being considered. Obviously, the purpose of the Framework as a whole is to enable the identification of negative externalities, positive externalities being the subject matter of section 9 of the Competition Act 1998 or Article 101(3) TFEU: see paragraph 31 above. But that is not the purpose of the market definition stage within the Framework.

(2) *Ground 2: errors in respect of effective coverage of the wMFNs.* Ground 2 concerns the identity of the relevant agreements said to constitute a restriction on competition.[60] The Decision frequently refers to "CTM's network of [wMFNs]", meaning the wMFNs that featured in the wMFN Agreements that Compare The Market had with various of its subscribing home insurance providers.[61] We will describe in greater detail the "network effect" attributed by the CMA to these wMFN Agreements, and Compare The Market's contention that the "effective coverage" of these agreements was far less than the CMA had found. We consider this ground of appeal (**Ground 2**) in Section G below.

(3) *Grounds 3 to 6: failure to provide evidence of effect on Premiums or Commissions; failure to provide evidence of effects on promotional deals; failure to establish the counterfactual and causation; further factual errors in relation to Compare The Market's wMFNs.* Whereas Grounds 1 and 2 are most conveniently dealt with separately, Grounds 3 to 6 are sufficiently interrelated as to warrant consideration together. In essence, these grounds of appeal assert that the CMA failed to show – to the requisite standard, or at all – any anti-competitive effects. These grounds of appeal (**Grounds 3 to 6**) are considered in Section H below.

(c) Appeal against penalty

34. The final two grounds of appeal in the Notice are advanced on the basis that Grounds 1 to 6 all fail and that the Decision stands. On this basis, Compare The Market appeals against the penalty imposed by the CMA.[62] These grounds constitute **Ground 7** and **Ground 8** of the Notice, and are considered in Section I below.

(9) Structure of the Judgment

35. This Judgment considers the following points in the following order:

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[60] As to the need to identify the relevant provisions in play, see paragraph 29(1) above.
[61] The phrase is certainly not underused in the Decision, appearing 626 times in total. See, for example: the title above Decision/§1.53; Decision/§1.59; the title above Decision/§1.66; Decision/§9.1; Decision/§9.4.
[62] See paragraph 27 above.

(1) In Section C below, we set out the law that informs the conduct of appeals such as this. To a very considerable degree these points were uncontentious between the parties, although their application and significance were not.

(2) In Section D below, we describe the evidence that was before the Tribunal.

(3) The Decision makes many findings that are not the subject of this appeal, and which were uncontroversial as between the parties. Indeed, much of the factual background in this Section B draws on these findings, as the footnotes to the text make clear. Before considering the various grounds of appeal, it is helpful, by way of further background, to set out more of the relevant uncontroversial facts as found in the Decision. Because the grounds of appeal can only be understood and resolved by reference to these findings, it is appropriate that they be set out in the Judgment before considering and determining the grounds of appeal. Accordingly, Section E below sets out – as briefly as possible – the facts material to this Judgment.

(4) Sections F, G and H then respectively consider (as we have already indicated in paragraph 33 above) Ground 1, Ground 2 and Grounds 3 to 6. Section I considers Grounds 7 and 8.

(5) Finally, Section J describes how we propose to dispose of this appeal.

C. RELEVANT LAW REGARDING THE APPEAL

(1) An appeal "on the merits" but "by reference to the grounds of appeal"

36. Compare The Market appeals the Decision pursuant to section 46(1) of the Competition Act 1998. Paragraph 3 of Schedule 8 of that Act sets out the Tribunal's jurisdiction on appeals pursuant to section 46. It provides that:

> "(1) The Tribunal must determine the appeal on the merits by reference to the grounds of appeal set out in the notice of appeal.
>
> (2) The Tribunal may confirm or set aside the decision which is the subject of the appeal, or any part of it, and may –
>
> (a) Remit the matter to the CMA,

(b) Impose or revoke, or vary the amount of, a penalty;

[…]

(d) Give such directions, or take such other steps, as the CMA could itself have given or taken, or

(e) Make any other decision which the CMA could itself have made.

(3) Any decision of the Tribunal on an appeal has the same effect, and may be enforced in the same manner, as a decision of the CMA.

(4) If the Tribunal confirms the decision which is the subject of the appeal it may nevertheless set aside any finding of fact on which the decision was based."

37. The wording of section 46(1) is very similar to (the now superseded) section 195(2) of the Communications Act 2003, which provided that (in the case of appeals under section 192 of the Communications Act 2003) "[t]he Tribunal shall decide the appeal on the merits and by reference to the grounds of appeal set out in the notice of appeal". This provision was considered in *British Telecommunications plc v. Office of Communications*,[63] where it was noted that this provision obliged the Tribunal to determine appeals: *(i)* on the merits; and *(ii)* by reference to the grounds of appeal set out in the notice of appeal.[64]

38. The Tribunal emphasised that the first requirement ("…on the merits…") meant that the appeal was not a judicial review. In an appeal the question was not whether the decision under appeal was within the range of reasonable responses of the decision-maker, but whether the decision was the right one.[65] That said, where the decision involved an overall value judgment, based upon competing considerations in the context of a public policy decision, it might be difficult for the Tribunal to conclude that a decision within the range of reasonable responses was not also right.[66]

39. Turning to the second requirement ("…by reference to the grounds of appeal set out in the notice of appeal…"), the Tribunal made clear that any "on the merits" review was confined to a consideration of the points raised in the notice of appeal,[67] and that whilst

[63] [2010] CAT 17.
[64] At [67].
[65] At [70].
[66] At [71].
[67] At [73].

new evidence might be adduced on appeal, the appeal was by no means a full *de novo* appeal on the merits:[68]

> "…What is intended is the very reverse of a *de novo* hearing. OFCOM's decision is reviewed through the prism of the specific errors that are alleged by the appellant. Where no errors are pleaded, the decision to that extent will not be the subject of specific review. What is intended is an appeal on specific points."

40. The decision in *British Telecommunications plc* concerned a Communications Act appeal against a decision of OFCOM (as the law then stood), but what was said there holds good in relation to section 46 appeals.

(2) Flynn Pharma

(a) The facts

41. The nature of the Tribunal's jurisdiction under section 46 was considered by the Court of Appeal in *Flynn Pharma Ltd and Pfizer Inc v. CMA* (***Flynn Pharma***).[69] This was not a case concerning the Chapter I Prohibition or Article 101 TFEU, but concerned the Chapter II Prohibition and Article 102 TFEU. The questions before the Tribunal and the Court were therefore different in substance; but what was said about the nature of section 46 appeals can be read across from *Flynn Pharma* to this appeal.

42. In *Flynn Pharma*, the CMA had commenced an investigation pursuant to section 18 of the Competition Act 1998 (i.e., in relation to the Chapter II Prohibition) and Article 102 TFEU into whether a number of undertakings that manufactured and supplied pharmaceutical products had abused a dominant position in the market by charging excessive prices for an anti-epilepsy drug. There was a two-limb test for determining abuse. First, it had to be demonstrated that the price was excessive. The CMA determined that it was, since the prices exceeded the undertakings' costs, plus a reasonable rate of return (the "cost-plus" approach). Secondly, it had to be shown the prices were unfair either in themselves, or when compared to competing products. The CMA determined that the prices were unfair in themselves, and that it therefore did not have to go on to consider whether the prices were unfair compared to competing

[68] At [76].
[69] [2020] EWCA Civ 339.

products. Having found that the undertakings had dominant positions in the relevant markets, the CMA decided that the undertakings had infringed the Chapter II Prohibition and Article 102.

43. On appeal, the Tribunal found that the CMA had correctly identified the relevant geographical and product markets, and that the undertakings were dominant in those markets; but that the finding of abuse in the decision was vitiated by errors of law and fact. The Tribunal held that the CMA had been wrong to restrict its assessment of whether prices were excessive to the "cost-plus" approach. Rather it should have identified a benchmark price or range of prices which realistically would have applied in conditions of normal and effective competition. The Tribunal also held that the CMA had erred by basing its assessment solely on whether prices were unfair in themselves and should have conducted a full investigation into *prima facie* valid comparators put forward by the relevant undertakings.

44. The CMA appealed. It argued that, having correctly found that the CMA had to be accorded a substantial margin of appreciation, the Tribunal was wrong to find that the investigation by the CMA of comparables was of insufficient depth. The CMA argued that the "margin of appreciation" applied at each stage of the analysis including: *(i)* the choice of methodology; *(ii)* the assessment of whether a price was excessive and unfair; and *(iii)* the assessment of economic value and overall evaluation of whether a price bears no reasonable relation to the economic value of a product. The CMA contended that these were all assessments in relation to which there was no single right or wrong answer, and the CMA was required to make choices and exercise its judgment.

45. The Court of Appeal decided that the Tribunal had erred when it held that the CMA was required to establish a benchmark price or range of prices beyond the "cost-plus calculation" in order to determine whether the prices charged were excessive, but dismissed the CMA's appeal. The Court of Appeal held that, whilst the CMA had a margin of appreciation in deciding what methodology to use and what evidence to rely on, where it proceeded on the basis that the prices were excessive in themselves, and the undertaking raised arguments and evidence to suggest comparators tended to show that the prices were fair, the CMA was under a duty to evaluate fairly and impartially those arguments and that evidence. Whilst the CMA had a discretion as to how it performed its duty, and there was no obligation on the authority to perform a full

investigation in all cases, it was not open to the CMA to ignore the comparator evidence. The Court of Appeal found that the CMA's treatment of the comparators had been insufficient.

(b) Margin of appreciation

46. As regards the "margin of appreciation", having extensively reviewed the case law relevant to the Chapter II Prohibition and Article 102 TFEU, and the test to be applied Green LJ concluded at [97]:

> "…
>
> (iii) There is no single method or "way" in which abuse might be established and competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely upon.
>
> (iv) Depending upon the facts and circumstances of the case a competition authority might therefore use one or more of the alternative economic tests which are available. There is however no rule of law requiring competition authorities to use more than one test or method in all cases
>
> …
>
> (vi) In analysing whether the end price is unfair a competition authority may look at a range of relevant factors including, but not limited to, evidence and data relating to the defendant undertaking itself and/or evidence of comparables drawn from competing products and/or any other relevant comparable, or all of these. There is no fixed list of categories of evidence relevant to unfairness.
>
> (vii) If a competition authority chooses one method (e.g. cost-plus) and one body of evidence and the defendant undertaking does not adduce other methods or evidence, the competition authority may proceed to a conclusion upon the basis of that method and evidence alone.
>
> (viii) If an undertaking relies, in its defence, upon other methods or types of evidence to that relied upon by the competition authority then the authority must fairly evaluate it."

47. Having conducted a detailed review of the economic literature, Green LJ concluded that this supported his conclusions derived from the case law. He stated:[70]

> "There are many different tests which might be used to determine whether a price is excessive and unfair; there are or may be difficulties with all tests and much will depend upon the availability of evidence and data; all cases are highly fact and context specific;

[70] At [107].

> … and, it is economically rational that competition authorities should have a margin of appreciation as to the choice of method and evidence that they seek to rely upon."

48. Green LJ summarised the position as follows:[71]

> "In short, the authority has a duty to conduct a fair evaluation of the evidence. It has a margin of manoeuvre or discretion in how it goes about meeting this obligation. This might, depending upon the facts, involve the taking of proactive steps, such as the issuance of requests for information to third parties, but it will not inevitably do so. The extent of the duty will be affected by the nature, extent and quality of the evidence adduced by the defendant undertaking which has an evidential burden. The fact that upon an appeal the Tribunal might review the evaluation is not a factor which affects the nature and extent of the prior duty imposed upon the competition authority."

49. As we have already noted, the points made in the judgment of Green LJ as to the CMA's duty to conduct a fair evaluation of the evidence, and its margin of manoeuvre, discretion or appreciation, apply equally to the CMA's investigations relating to the Chapter I Prohibition and Article 101 TFEU.

(c) Appeals to the Tribunal: the Tribunal's supervisory jurisdiction

50. Green LJ then considered the distinction between the CMA's margin of manoeuvre or appreciation and the supervisory jurisdiction of the Tribunal. The CMA had argued that, having found that the CMA was to be accorded a margin of appreciation, the Tribunal had then wrongly interfered with it when finding that its investigation of comparables was insufficient. Green LJ rejected this submission, finding that the CMA had wrongly elided two "quite different principles". As we have noted, Green LJ accepted that the CMA had a "margin of manoeuvre", and a significant latitude as to the methods and evidence it resorts to in order to prove an infringement, which it applies in order to prove an abuse of unfair pricing. However, he considered this to be:[72]

> "…quite different in principle to the question whether the Tribunal, as a supervisory judicial body, must pay deference to that exercise of judgment. Under the [Competition Act 1998] the Tribunal has a merits jurisdiction as to both law and fact and upon the basis of established case law it is not bound to defer to the judgment call of a competition authority. It is empowered under the legislation to come to its own conclusions on issues of disputed fact and law and can hear fresh evidence, not placed before the CMA, to enable it to do so. The conferral of a merits jurisdiction upon the Tribunal flows from important legal considerations relating to the rights of defence and

[71] At [116].
[72] At [136].

> access to a court, under fundamental rights such as article 6 of the Convention. The starting point is that competition law is treated as a species of criminal law…"

51. Having analysed the relevant case law, he drew the following conclusions about the role of judicial bodies in relation to the margin of appreciation of a competition authority:[73]

> "(i) for a (non-judicial) administrative body lawfully to be able to impose quasi-criminal sanctions there must be a right of challenge; (ii) that right must offer guarantees of a type required by article 6; (iii) the subsequent review must be by a judicial body with "full jurisdiction"; (iv) the judicial body must have the power to quash the decision "in all respects on questions of fact and law"; (v) the judicial body must have the power to substitute its own appraisal for that of the decision maker; (vi) the judicial body must conduct its evaluation of the legality of the decision "on the basis of the evidence adduced" by the appellant; and (vii), the existence of a margin of discretion accorded to a competition authority does not dispense with the requirement for an "in depth review of the law and of the facts" by the supervising judicial body".

52. At [141] to [147], he considered the limits of an appellate jurisdiction. In summary:

(1) At [141], "…the jurisdiction of the Tribunal is not unfettered…the appeal is not a *de novo* hearing but takes the decision as its starting, middle and end point…The appellant must identify the decision under appeal and set out why it is in error…".

(2) At [142], "[t]he Tribunal can hear evidence, including fresh evidence not before the CMA, and make findings of both fact and law", but the notice of appeal must identify any evidence which was not before the CMA.

(3) At [143], "[t]he Tribunal should only interfere if it concludes that the decision is wrong in a material respect." The reference to "materiality" is important. Whether an error is material is a matter of judgment for the Tribunal.

53. Green LJ made a number of observations on materiality at [144] to [147], which were relevant to the issue of whether or not the Tribunal should have interfered with the CMA's findings of fact:

> "144. First, materiality is not an exact science…
>
> 145. Second, there is no fixed list of errors that the Tribunal might consider material. Case law indicates that the following might be relevant: failing to take account of relevant evidence; taking into account irrelevant evidence; failing properly to construe

[73] At [140].

> significant documents or evidence; drawing inferences of fact from evidence about relevant matters which are illogical or unjustified; failing adequately or sufficiently to investigate an issue that the Tribunal considers to be relevant or potentially relevant to the analysis…
>
> 146. Third, but importantly, it is consistent with a merits appeal for the Tribunal, even having heard the evidence, to conclude that the approach taken by the CMA and its resultant findings are reasonable in all the circumstances and to refrain from interfering upon that basis. If the Tribunal considers that the findings of the CMA are reasonable it might be difficult to say that any findings that it arrives at which differ from those of the CMA are material…Because the Tribunal has a full merits jurisdiction and can hear fresh evidence there could of course arise circumstances where the Tribunal finds that on the evidence before the CMA it arrived at a reasonable conclusion but on the basis of the new evidence before the Tribunal the CMA's conclusions were nonetheless wrong. Such cases may be rare, but the possibility necessarily arises because of the power of the Tribunal to receive and assess fresh evidence.
>
> 147. Fourth, I would expect that in a judgment the Tribunal would set out its reasoning on the materiality of errors so found. If the Tribunal annulled a decision upon the basis of an error that was very slight or de minimis and/or gave no reasoning to justify the annulment that might be considered an error of law, subject to an appeal."

54. In the context of his second point on materiality, Green LJ referred at [145] to Case C-272/09P, *KME Germany v. European Commission* as being illustrative and analogous:

> "… the Court, in the context of a judicial review, explained that because the Commission enjoyed a "margin of discretion with regard to economic matters" that did *not* mean that the court would refrain from reviewing the Commission's interpretation of the evidence, its factual accuracy, its reliability, its consistency and also "…whether that evidence contains all of the information which must be taken into account in order to assess a complex situation and whether it is capable of substantiating the conclusion drawn from it…"

This is an important point to which we will return in light of the CMA's decision not to obtain its own econometric or quantitative evidence in support of the Decision.

55. Again, we consider that the principles set out by Green LJ apply equally to our consideration of the grounds of appeal against the CMA's decision in this case.

(3) Burden and standard of proof.

56. There was no dispute between the parties that the legal burden of establishing an infringement of the Chapter I Prohibition and/or Article 101 TFEU was on the CMA, and that the standard of proof was the civil standard of the balance of probabilities. In

Durkan v. Office of Fair Trading,[74] the Tribunal summarised the position as follows at [94]:

> "The question of the standard of proof has been considered in a number of cases. In *Napp*[75] at [109], and *JJB Sports plc and All Sports Limited v. Office of Fair Trading*, [2004] CAT 17 ("JJB"), at [204], the Tribunal held that the standard of proof is the civil standard of proof on the balance of probabilities. The seriousness of an infringement of the Chapter I prohibition involving (as here) the imposition of penalties, is a factor to be taken into account in considering the probability of an infringement having occurred. We were referred by Mr Beard to the well-known passage from the speech of Lord Hoffmann in *Secretary of State for the Home Department v. Rehman* [2001] 3 WLR 877 concerning the relative likelihood of coming across Alsatians and lions in Regent's Park and to a passage in the opinion of Lady Hale in *Re B*, [2008] 3 WLR 1 where she stressed that the seriousness of an allegation of misconduct is not necessarily a factor which makes it less likely that the allegation is true: context is everything…"

57. At [95], the Tribunal went on to say:

> "…it is incumbent on the OFT to adduce precise and consistent evidence in order to establish the existence of an infringement. But it is sufficient, according to the case-law, if the body of evidence relied on by the OFT, viewed as a whole, meets that requirement…"

58. Compare The Market, whilst accepting the latter proposition, suggested that "each element of the evidence relied upon must still be considered as to whether it contributes to proof as a whole".[76] If it is suggested that this is a requirement additional to the need to have regard to the totality of the evidence when considering whether the CMA has discharged its burden of proof, then we disagree.

(4) The presumption of innocence

59. Competition cases are *quasi*-criminal in nature. Given the nature and seriousness of the allegations in such cases, the presumption of innocence applies. This was common ground. On the basis of the presumption, Compare The Market went on to contend that:

(1) Where a finding of fact might be consistent both with a finding of non-infringing conduct or infringing conduct, the finding in question is not itself supportive of a finding of infringement. Compare The Market maintained that it was not sufficient for the CMA to refer to evidence "in the round" as being probative of

[74] [2011] CAT 6 at [94].
[75] A reference to *Napp Pharmaceutical Holdings Ltd v. Director General of Fair Trading*, [2002] CAT 1.
[76] Notice/§32.

its case when key elements of the evidence were not themselves clearly supportive of a finding of infringement. Essentially, Compare The Market contended that a "collection of ambiguous or ambivalent material does not amount to proof in the round".[77]

(2) It was insufficient for the CMA to contend that certain facts or analysis were "consistent with" a finding of infringement. It was necessary for the CMA to establish that a particular finding was inconsistent with non-infringement. If the finding could reasonably be held to be consistent with non-infringing conduct it is not probative of any infringement.[78]

60. These contentions were not common ground. In its Defence, the CMA did not accept these submissions.[79] The CMA submitted that a particular finding might, when taken on its own, be consistent with both infringing and non-infringing conduct but, when taken together with all of the evidence, be supportive of an infringement. Its task was to consider the whole body of relevant evidence and determine whether, on the balance of probabilities, it established an infringement. The Tribunal's task was to determine whether the CMA committed any material error in its assessment. There was no justification, the CMA contended, at either stage for disregarding relevant evidence on the basis that, taken on its own or in another context it may not be "inconsistent with non-infringement".

61. We consider that there is significant danger in attempting to lay down, in the abstract, how evidence is to be weighed in light of the various factors (margin of appreciation; standard of review; burden and standard of proof; and presumption of innocence) already considered in this section. We reject the approach of Compare The Market as being altogether too prescriptive in how evidence is to be weighed and assessed, both by the CMA when making its decision, and by this Tribunal on appeal. We consider that the CMA must produce sufficiently precise and consistent evidence to support its decision that the alleged infringement took place. However, it is not necessary for every item of evidence produced by the CMA to be consistent only with infringement. It is sufficient if the body of evidence relied on by the CMA, viewed as a whole, meets that

[77] Notice/§34.
[78] Notice/§35.
[79] Defence/§27

requirement. In other words, the fact that any particular element of conduct is consistent both with infringing and non-infringing conduct does not mean that it is to be disregarded altogether. It is a factor to be taken into account, but above all else the evidence must be considered *in toto* and material should not be jettisoned in advance of such consideration simply because it fails to meet some abstract requirement of admissibility.

D. EVIDENCE BEFORE THE TRIBUNAL

(1) Qualitative and quantitative evidence

62. In its *"Guidelines for national courts on how to estimate the share of overcharge which was passed on to the indirect purchaser"*,[80] the EU Commission describes two forms of evidence:[81]

(1) **Qualitative evidence**, to understand a firm's business behaviour or pricing strategies comprising, e.g. (i) contracts, (ii) internal documents, (iii) financial and accounting reports, (iv) witness statements, (v) expert opinions as well as (vi) industry reports and market studies.

(2) **Quantitative evidence**, relating particularly to data for the use of econometric techniques, such as (i) sales prices, retail and end consumer prices of the product or service in question, and of comparable products or services, (ii) financial reports, (iii) expert opinions, (iv) prices set by regulation, (v) volume sales, (vi) rebates as well as (vii) other input costs and cost elements.

We find this distinction a helpful one and adopt it. The distinction says nothing about how such evidence is adduced. It is quite clear that expert opinion (by way of example) can be either or both qualitative and/or quantitative. The distinction is relevant in terms of what the evidence goes to or proves.

63. As will become clear from this Judgment, the Decision relies primarily on qualitative evidence and – to the extent it refers to quantitative evidence – it is to dismiss or reject

[80] 2019/C-267/07.
[81] At (37).

quantitative evidence adduced by Compare The Market. The qualitative evidence adduced by the CMA was, with the exception of the evidence of Ms Glasgow, mainly documentary in nature.

64. By contrast, the evidence adduced by Compare The Market was, on the whole, quantitative in nature and adduced by way of expert opinion evidence (which the CMA sought to rebut by its own expert evidence).

65. We will describe the nature of the documentary evidence in due course, when we come to consider Grounds 3 to 6. The next section briefly describes the witnesses that we heard evidence from.

(2) Evidence from witnesses (including expert witnesses)

66. In terms of witness evidence, we heard from the following witnesses:

(1) *Ms Natasha Glasgow.* Ms Glasgow's statement in the appeal – dated 22 April 2021 – did no more than exhibit and confirm the continued accuracy of her earlier statement made in connection with the CMA's investigation, which culminated in the Decision. That statement, dated 28 July 2020 (**Glasgow 1**), describes Ms Glasgow's understanding in relation to nMFNs and wMFNs, Ms Glasgow having been involved in the industry for some years, in particular as Commercial Director at MoneySuperMarket between 2014 and 2019. Ms Glasgow was called by the CMA to give evidence on Day 4 of the proceedings. She was a careful and helpful witness, doing her best to assist the Tribunal. We accept her evidence.

(2) *Dr Gunnar Niels.* Dr Niels is a partner in Oxera Consulting LLP and gave expert evidence – in relation to market definition – on behalf of Compare The Market. He submitted two reports:

(i) A report dated 2 February 2021 (**Niels 1**).

(ii) A report dated 4 June 2021 (**Niels 2**).

Dr Niels' evidence was directed to the question of market definition, and he was (given the Tribunal's concern and interest in relation to this question) subjected to a fairly long interrogation from the Tribunal on this question, before being cross-examined by Ms Demetriou, QC for the CMA. He gave his evidence on Days 4 and 5 of the proceedings. Dr Niels dealt with our questions (and, indeed, those of Ms Demetriou) with patience, courtesy and formidable expertise. We are very grateful to him. Although we found Dr Niels of great help in framing our own views as to market definition, we have concluded that the way a market is to be defined in a particular context – at least when part of the Framework described in paragraph 29 above – is in general a matter to be determined by the Tribunal rather than expert economic evidence. It is for this reason, which we expand upon at some length below, that we place relatively little weight on some of Dr Niels' evidence. That should not, in any way, be taken as a reflection on the quality of Dr Niels' evidence, which was in the best traditions of experts assisting courts with their opinion.

(3) *Ms Helen Ralston.* Like Dr Niels, Ms Ralston is a partner in Oxera Consulting LLP. She gave expert evidence on behalf of Compare The Market, essentially setting out detailed quantitative evidence in support of Compare The Market's case that the anti-competitive effects found by the CMA did not, in fact, arise out of the wMFNs contained in the wMFN Agreements. Ms Ralston also supported Dr Niels in his evidence in relation to market definition. Ms Ralston submitted the following reports:

(i) A report dated 2 February 2021 (**Ralston 1**).

(ii) A report dated 4 June 2021 (**Ralston 2**).

Ms Ralston gave evidence on Days 5, 6, 8 and 9 of the proceedings.[82] It will be necessary to describe Ms Ralston's work in greater detail below. In general terms, Ms Ralston was a formidable witness, clearly master of her discipline. It

[82] Dr Walker, for the CMA, was interposed, for parts of Days 6 and 7. Ms Ralston did not give evidence for the whole of Days 5, 6, 8 and 9. Dr Walker was interposed because Ms Ralston dealt with market definition and other econometric questions, and the parties had agreed (and the Tribunal concurred) that market definition should be dealt with first, and then the remaining econometric or quantitative evidence.

was when she strayed into areas outwith her economic expertise that we consider her evidence to have been less helpful. We will explain the nature of these areas of less helpful evidence when we come to them, but we would not want this point to be taken as a criticism of Ms Ralston, who we consider was doing her very best to assist the Tribunal. The fact is that Ms Ralston was asked to approach questions by those instructing her in a manner which unduly exposed her into evaluating questions of fact which were the province of the Tribunal.

(4) *Dr Mike Walker.* Dr Walker is the CMA's Chief Economic Adviser, and he gave expert evidence in support of the CMA's approach to market definition and, specifically, the report of Dr Niels. He submitted one report dated 23 April 2021 (**Walker 1**). Although Dr Walker – as the CMA's Chief Economic Adviser – cannot, for that reason, be regarded as an independent expert, the CMA is a public body acting in the public interest, and we regarded his evidence as being similar in weight to that of an expert. Dr Walker gave evidence on Days 6 and 7 of the proceedings. Like Ms Ralston, he was a formidable witness, and obviously highly intelligent. Whilst he was master of his brief, perhaps as a consequence of that mastery, he had, we find, lost sight of the broader picture when giving evidence in relation to market definition. It will be necessary to consider the failings in Dr Walker's approach when we come to the question of market definition, but we again want to stress that whilst this is a criticism of Dr Walker's evidence, he was presenting his honest and expert opinion on the question of market definition, doing his very best to assist the Tribunal.

(5) *Professor Jonathan Baker.* Professor Baker is a Research Professor of Law at the American University Washington College of Law. He gave expert evidence – in reply to that of Ms Ralston – on behalf of the CMA on Days 9 and 10 of the proceedings, having previously submitted a report dated 22 April 2021 (**Baker 1**). The CMA – as we have already indicated – did not seek to advance any kind of positive case based upon quantitative evidence: the CMA's position was that quantitative evidence did not assist. As a result, Professor Baker's evidence was entirely negative in the sense that it was aimed solely at undermining the conclusions expressed by Ms Ralston. That was Professor Baker's brief and, given that limitation, Professor Baker performed as a competent and straightforward expert.

67. Two joint expert reports were produced, both dated 9 July 2021:

(1) A joint report between Ms Ralston, Dr Niels and Dr Walker (the **Ralston/Niels/Walker Joint Report**).

(2) A joint report between Ms Ralston and Professor Baker (the **Ralston/Baker Joint Report**).

E. MORE UNCONTROVERSIAL BACKGROUND FACTS

(1) Introduction

68. The Decision is structured around an introduction (Section 1), factual background (Section 2), the legal framework (Section 3), the relevant undertakings (Section 4), market definition and market power (Section 5), the counterfactual (Section 6), the nature of competition (Section 7), Compare The Market's use of wMFNs (Section 8), anti-competitive effect (Section 9), other aspects (Section 10) and penalty (Section 11). We will address the content of these sections as necessary in the course of this Judgment. It is appropriate to note that a number of the CMA's findings are controversial, as appears from the grounds of appeal. However, Section 7, entitled "Nature of Competition", which describes the operation of the market, is both largely uncontroversial and, in our judgement, necessary to properly understand the later issues that we come to address.

(2) Section 7 of the Decision: "Nature of Competition"

(a) A connection between consumers and home insurance providers

69. Price comparison websites serve to connect consumers with home insurance providers.[83] As the Decision notes, "[c]onsumers use [price comparison websites] to search for and compare home insurance products, and then potentially click through and purchase home insurance from a provider, while home insurance providers use [price comparison websites] to access customers".[84]

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[83] See Section A above, and Decision/§7.9.
[84] Decision/§7.9.

(b) Consumers' use of price comparison websites

70. So far as consumers' use of price comparison websites is concerned, they may either "single-home" or "multi-home":[85]

> "When more than one [price comparison website] is available, consumers can decide either to "single-home" or to "multi-home". Consumers are described as single homing when they use only one [price comparison website] (to search and compare insurance quotations, and then, potentially, to click-through to make a purchase), whereas multi-homing refers to a consumer using more than one [price comparison website] (for the search and comparison functions, and then, potentially, using one [price comparison website] to click-through to make a purchase)…"

71. One can see that the decision whether to single-home or multi-home is one that can be taken by a consumer without any particular prior planning (no up-front "investment" is required), more or less on the spur of the moment. Nor will consumers necessarily be consistent in their choice. What informs the choice is the trade-off between time spent/effort and perceived benefit of spending that time/effort in getting a better deal.[86] The point is related to the distinction drawn in paragraph 8 above, as between new business and renewal business, and in paragraph 9 above, as between passive and process renewals.

72. The Decision records that: [87]

(1) A majority of consumers (58% to 80%) on each of the Big Four PCWs single-homed. In the case of Compare The Market, this was 80% of the consumers who used Compare The Market.

(2) Each of the Big Four PCWs had a material portion of consumers who multi-homed: as is clear from the foregoing sub-paragraph, these ranged from 20% in the case of Compare The Market to 42% in the case of the price comparison website at the other end of the scale.

73. The distinction between single- and multi-homing consumers matters because differential pricing between price comparison websites by the same home insurance

[85] Decision/§7.10.
[86] There is no particular part of the Decision that says this in terms, but these points are clear from the Decision as a whole.
[87] Decision/§7.14.

provider makes no difference in the case of the single-homing consumer, for that consumer will only look at a single price comparison website on a given occasion (although, of course, there is no reason why the consumer need be consistent in their behaviour).[88]

74. On the other hand, a consumer may be affected by differential pricing of the same product if they multi-home.[89] The extent to which this has an effect will depend on how far a consumer looks only at price and how far a consumer looks at the price of a product by a given home insurance provider.

(c) The importance of Premium levels to consumers using price comparison websites

75. Consumers will not – generally – know the level of Commission charged by price comparison websites to home insurance providers on the conclusion of a contract of insurance. Certainly, such pricing/cost is not transparent to the consumer. On the other hand, price – that is to say, level of Premium – is both clear to see and significant.[90] The Decision records Premium level as being a very significant factor in a consumer's choice of home insurance product.[91]

76. We should be clear that the analysis and evidence we are here describing relates to the importance of Premium levels to consumers using price comparison websites. The paragraphs here cited do not consider the position of consumers who are *(i)* renewing or *(ii)* shopping around using other (non-price comparison website) channels. With this qualification in mind, we turn to the CMA's conclusion at Decision/§7.27:

> "The CMA finds that two linked factors – the retail prices quoted on [price comparison websites] and the way in which search results are ranked on [price comparison websites] – are particularly important factors for consumers when choosing a specific provider on a [price comparison website]."

77. In short, demand for home insurance products on price comparison websites is highly elastic. For a 1% change in price, there will on average be a 7% change in demand.[92]

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[88] Decision/§7.11.
[89] Decision/§7.12.
[90] Decision/§7.22.
[91] Decision/§7.22. See also Decision/§§7.33 and 7.34.
[92] See Table 7.2, referenced in Decision/§7.29.

That is unsurprising, given that the very essence of price comparison websites is to provide easy price comparison and easy fulfilment of choice by the ability to "click through".

78. So far as direct home insurance provider channels are concerned, the CMA considered demand to be elastic, but less so. Thus, in relation to direct online channels, for a 1% change in price, there would be on average a 3% change in demand. As the Decision notes, "[t]hese median estimates show that, in response to a 1% increase in the price of a policy, a provider would lose more than twice as many sales on the [price comparison website] channel [7%] than they would on their direct channels [2-3%]".[93] The Decision concludes that "consumers who use [price comparison websites] are more sensitive to the retail prices offered by home insurance providers relative to consumers using other channels".[94]

79. The elasticity of demand on price comparison websites is affected not merely because like home insurance products are grouped in one place, but also because of the way in which they are ordered. By default, products are listed in retail price order, which makes price comparison particularly easy.[95] The Decision notes:[96]

> "…the CMA finds that a brand's position in the list of returned quotes is the main driver of its sales and, consequently, there is a diminishing chance for a provider to attract consumers when it appears further down on the screen, particularly outside the top five positions. This is reflected in the fact that providers told the CMA that they monitored and reacted to changes in their rankings on PCWs…"

(d) Home insurance providers' use of price comparison websites

80. Like consumers, home insurance providers can either "single-source", by listing on or subscribing to only one price comparison website; or "multi-source", by listing on or subscribing to more than one price comparison website.[97]

81. By contrast with consumers, the "vast majority" of home insurance providers multi-source.[98] The reasons for this are clear:

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[93] Decision/§7.30.
[94] Decision/§7.32.
[95] Decision/§7.36.
[96] Decision/§7.37.
[97] Decision/§7.10.
[98] Decision/§7.16.

(1) Unlike for consumers, subscription to a price comparison website takes a degree of pre-planning (it cannot be decided on a whim), but the advantages of doing so (when compared to not doing so) are great. A consumer will – typically – only actually buy home insurance once a year, but may use various channels to check out the options and their prices. It makes sense for a home insurance provider to be on as many channels as possible, particularly when the immediate transactional cost (the Commission) is paid only on contracts of insurance that complete.[99] Thus, the Decision records that between 2012 and 2017 providers making up over 80% of sales of home insurance via price comparison websites subscribed to all of the Big Four PCWs.[100] We refer to "immediate transactional cost" because there are, of course, other, less immediate, costs of subscription. By way of very important example, a less immediate cost of subscribing to Compare The Market is that Compare The Market was – as is self-evident – keen to include a wMFN in the agreement with that subscribing home insurance provider.[101] We have seen that the majority – albeit by no means all – of the home insurance providers subscribing to Compare The Market in the Relevant Period were party to a wMFN Agreement – which, given how we have defined this term – by definition included a wMFN.[102]

(2) This reflects the fact that price comparison websites represent "the main distribution channel for home insurance providers acquiring <u>new</u> business as they are the most important tool for shopping around for a large proportion of consumers".[103]

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[99] In other words, apart from the administrative costs of subscribing, the "cost" of the Commission only arises where the home insurance provider gets a Premium: Decision/§7.15(b).
[100] See Table 7.1 in Decision/§7.16.
[101] Compare The Market might baulk at our use of the word "keen". It was suggested that there was no evidence that Compare The Market pressed particularly hard in insisting on wMFNs in its agreements, and Annex 1 discloses a significant minority of home insurance providers subscribing to Compare The Market who were subject only to nMFNs. Be that as it may, we consider the term justified: as the Decision describes, Compare The Market persisted in using wMFNs when it is clear that the regulatory tide was moving against them; and the majority of its agreements with home insurance providers <u>did</u> contain wMFNs.
[102] See Annex 1 hereto.
[103] Decision/§7.15(a), emphasis supplied. It is important to bear in mind that most business is renewal (74% to 26%: paragraph 9 above).

(e) Home insurance providers' approach to pricing

82. As we have noted already, home insurance providers would be sensitive to the price elasticity of demand of consumers, particularly where those consumers were using price comparison websites.[104] Home insurance providers would be concerned to maintain their rankings with price comparison websites, and that concern would be correlated with the extent to which quotations by price comparison websites converted to actual contracts of insurance.

83. But, as the Decision recognises, the Premiums charged by home insurance providers are not (and cannot be) driven solely by rankings on one or more price comparison websites. There are at least three other factors that are relevant to Premiums:

(1) *Cost.* Clearly, a home insurance provider must cover its costs, and these extend beyond simply the cost of the Commission.[105] Home insurance providers will have many other costs, including the obligation to pay out on claims. This, in turn, will be driven by the home insurance provider's ability to price "good risks" from "bad risks", or at least weight the Premium charged according to risk.[106] Quite how costs are passed through to Premiums will vary from case to case.[107]

(2) *Pricing to attract business from other channels.* Of course, home insurance providers do not acquire business only from price comparison websites, and will have regard to the pricing on other channels in order to attract business.

(3) *Lifetime value.* The significance of this is explained in the Decision:

> "7.127 …providers calculate the lifetime values (LTV) of the consumers they acquire where the LTV of a consumer reflects the revenues and costs associated with a consumer for the duration of the provider's relationship with that consumer. Providers use these LTVs to determine their base retail prices to maximise their profits over the lifetime of the consumer relationship…this typically involves

[104] See paragraphs 75 to 79 above.
[105] Although the significance of the Commission must in no way be understated. It is a significant cost, in one example, of about 35% - 40% of Premium: Decision/§7.130(a). The CMA found that commission fees account for 35% of home insurance retail prices on PCWs on average: Decision/§5.28. Naturally, variations in Commission affect Premium: e.g., Decision/§7.131.
[106] Decision/§§7.126*ff*
[107] Decision/§7.133.

> providers selling new business policies at a loss to remain competitive to acquire new customers, with subsequent increases in retail prices at renewal to recoup the costs of acquiring new business.
>
> 7.128 A provider's LTVs can vary for each [price comparison website]. In particular, a provider's assessment of the LTV of a consumer it acquires through a [price comparison website] is based on historic data on consumers acquired through that [price comparison website] on, for example, claims costs, customer retention rates, customer mix, average price of policies and acquisition costs. This information is used to calculate the expected revenue and cost of insuring a typical consumer acquired through that [price comparison website]."

(f) Price comparison websites' approach to consumers and home insurance providers

(i) As regards consumers

84. Self-evidently, any given price comparison website will prefer consumers that single-home with it to multi-homing consumers since there is a much higher probability of securing a sale with the former than the latter. On the other hand, all price comparison websites will seek to encourage single-homers with competitors to at least try their offering and to this extent become multi-homers.[108]

(ii) As regards home insurance providers

85. Price comparison websites will care <u>less</u> about home insurance providers multi-sourcing, than about the range of home insurance providers subscribing to their particular price comparison website. Price comparison websites will aim to offer as much "range" to consumers as possible.[109]

(g) Competition between price comparison websites: how do they compete?

86. The CMA found that competition between price comparison websites occurred through:[110]

(1) *Marketing and advertising.* The Decision recognises that advertising is a way of enabling price comparison websites to "expand their consumer base, for

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[108] Decision/§§7.11 and 7.12.
[109] Decision/§7.18.
[110] Decision/§7.41. See also Decision/§7.20, where the same point is made.

example, to attract customers who would otherwise renew, single-home on other [price comparison websites] or single-channel on providers' other channels"`.[111]

(2) *The usefulness of the comparison service.* The Decision notes that "the usefulness of comparison services is an important consideration for consumers when choosing a [price comparison website]".[112] Of course, unlike with advertising, this implies at least a cursory or "low-level" use of the website in question. The factors affecting usefulness include ease of use[113] and quality of comparison (number and range of providers, quality of offerings and relevance of results).[114]

(3) *Offering the lowest prices.* As to this, the Decision notes (unsurprisingly, given the sensitivity to price of consumers):[115]

> "The CMA finds that the retail prices quoted by home insurance providers on a particular [price comparison website] are an important dimension of competition between the Big Four PCWs. As such, in order to attract consumers to their platform and expand, each of the Big Four PCWs needs to implement competitive strategies aimed at securing the lowest price (or at least equal lowest price) compared to their rival [price comparison websites]. Such strategies include incentivising providers on their panel to quote lower prices on their platforms than they quote on the other Big Four PCWs (i.e. "differential pricing strategies").

Not only would any given price comparison website be incentivised to have, on its website, the "best" prices, so too would home insurance providers: home insurance providers would want to appear in the "top five" of rankings.[116] Such pricing strategies would have included promotional discounts.[117] More specifically:

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[111] Decision/§7.42.
[112] Decision/§7.44.
[113] Decision/§7.45(a) and Decision/§7.19.
[114] Decision/§7.45(b) and Decision/§7.18.
[115] Decision/§7.47.
[116] Decision/§7.49.
[117] The respective pricing strategies of the Big Four PCWs is reviewed at length in Decision/§§7.55*ff*. The conclusions drawn by the CMA are at Decision/§7.117. We do not set out the findings here, but note that they are consistent with the general points here articulated, albeit of course that the details vary according to price comparison website.

(i) Given the competition between price comparison websites, "the pricing strategies employed by one provider depend on the pricing strategies of other providers".[118]

(ii) Such pricing strategies would involve differential pricing, including pricing through monetary promotional discounts.[119] Of course, such strategies could only be implemented with the agreement of the home insurance providers, who would themselves be concerned to ensure that their rankings on price comparison websites remained high.[120] These rankings, as we have noted, were based on price alone.[121]

(iii) As regards promotional deals, the CMA found that such deals:[122]

> "(a) Led to a decrease in providers' retail prices on the relevant [price comparison website] and an improvement in the retail price quoted by the provider on the relevant [price comparison website] relative to rival [price comparison websites].
>
> (b) Led to a relative improvement in the provider's ranking on the relevant [price comparison website]."

Promotional deals were, the Decision finds, "an important and effective way for [price comparison websites] to compete on the prices quoted on their platforms during and after the Relevant Period".[123]

F. GROUND 1: FLAWED MARKET DEFINITION

(1) The CMA's approach

(a) The CMA's conclusion

87. In Decision/§5.2, the Decision concludes:

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[118] Decision/§7.119.
[119] The impact of promotional discounts specifically on prices and rankings is considered in Decision/§§7.181*ff*. Non-monetary promotional discounts obviously could not affect the rankings.
[120] The Decision describes the pricing strategies of home insurance providers in Decision/§§7.127*ff*. Home insurance providers might price differentially (Decision/§§7.140*ff*) or uniformly (Decision/§§7.151*ff*) or through promotional deals (Decision/§§7.158*ff*).
[121] At least as the default. See paragraph 79 above.
[122] Decision/§7.183.
[123] Decision/§7.184.

> "The CMA finds that the relevant market in this case is the provision of [price comparison website] services for home insurance products (**PCW Services for Home Insurance**) in the UK. The market for PCW Services for Home Insurance is a two-sided market comprising the supply by [price comparison websites] of (i) customer introduction services to home insurance providers and (ii) price comparison services to consumers."

The term "PCW Services for Home Insurance" appears to define a single – albeit "two-sided" – market. It will be necessary to unpack exactly what the CMA meant by this in the Decision.

(b) Process: the point of market definition according to the CMA

88. In Decision/§5.7, the point is made that "market definition is not an end in itself but is a key step in identifying the competitive constraints acting on a supplier of a given product or service". The point of the test is to identify the constraints that exist in relation to the supplier[124] of particular goods or services. More specifically:

(1) In order to define the market in this case, the CMA "uses the conceptual framework known as the hypothetical monopolist test to carry out its assessment of the relevant market. This test seeks to establish the smallest product group and geographical area such that a hypothetical monopolist controlling that product group in that area could profitably sustain 'supra competitive prices'."[125] We shall refer to this as the **Hypothetical Monopolist Test**.

(2) As the Decision notes:[126]

> "The assessment starts by considering a hypothetical monopolist of the focal product operating in a focal area (i.e. an area under investigation in which the focal product is sold). Then the question is whether it would be profitable for the hypothetical monopolist to sustain a "Small but Significant Non-transitory Increase in Price" (**SSNIP**) above competitive levels. If the answer to this question is "yes" then the relevant market is defined: the product and area under the hypothetical monopolist's control is (usually) the relevant market".

(3) The Decision then goes on to state:[127]

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[124] Constraints can also exist in relation to the "demand-side", and nothing in this Judgment should be taken to say the contrary. Market definition can be as important to "demand" and it is to "supply". But the analysis in this case was on the basis that price comparison websites were supplying services to two specific markets.
[125] Decision/§5.8.
[126] Decision/§5.9.
[127] Decision/§5.10.

> "If the answer to the question is "no", the scope of the products/geographic area under consideration is expanded and then the question is considered again based on the expanded set of products/geographic area. This is repeated until it is possible for the hypothetical monopolist to sustain profitably a SSNIP and therefore the relevant market is defined."

And also:[128]

> "The relevant product market is defined primarily by considering the degree of demand-side substitution. In practice, the question the CMA considers in relation to demand side substitution is whether the customers of the focal product would switch to alternatives in response to a 5% - 10% price increase such that a hypothetical monopolist of the focal product would find such a price increase unprofitable and therefore the product consumers switch to should be considered to be part of the market in which the focal product competes. The CMA will only factor in supply-side substitution if it is reasonably likely to take place, and already has an impact by constraining the supplier of the product in question."

89. These paragraphs are, in reality, little more than a (very capable) statement of competition law orthodoxy in Chapter I Prohibition cases,[129] and as such we are very happy to adopt them. But it is necessary to make clear a number of matters, which we consider to be inherent in this statement of competition law orthodoxy:

(1) The Hypothetical Monopolist Test and the SSNIP bear – quite deliberately – no relation to the realities of the typical case. Most markets – including those under examination here – do not involve monopolies. In the present case, it is quite clear that competition subsists both between price comparison websites and home insurance providers. Why, then, bother with the hypothetical monopolist at all? Assuming – for the sake of argument – that price comparison websites are the providers of the "focal product"[130] in a given case, why not simply consider the competition that in fact exists between the suppliers of essentially similar products?

(2) The reason the Hypothetical Monopolist Test is significant lies not in the fact that other competition constraints do not or may not <u>also</u> exist. Clearly, where competitors are all providing the same focal product, the existence of competition between these competitors is likely to give rise to some constraint on anti-competitive behaviour. How great that constraint is depends on the

[128] Decision/§5.11.
[129] The Decision is clearly only considering such cases, and the same is true of this Judgment.
[130] We are leaving the geographic aspect of market definition entirely out of account.

nature of the infringement of the Chapter I Prohibition under investigation. If one takes the fully-fledged cartel – where price and output are centrally controlled – the constraint on anti-competitive conduct will be very limited indeed. On the other hand, where (as here) there are competing price comparison websites offering broadly the same service and forming part of the undertaking that is the "hypothetical monopolist", the constraints from competition between providers may be significant.

(3) But that does not mean that other constraints – arising because of the existence of substitute products – do not exist. It is important to be aware of these constraints when considering the Chapter I Prohibition. The Hypothetical Monopolist Test and SSNIP do no more than identify these. When the Decision says that "market definition is not an end in itself but is a key step in identifying the competitive constraints acting on a supplier of a given product or service", that is entirely correct.[131] Market definition does no less, but also no more, in the context of the Chapter I Prohibition. In particular, market definition says nothing about the adverse, or indeed positive, effects of the anti-competitive conduct under consideration. Anti-competitive effects are of course considered later on in the Framework we have described, and pro-competitive effects are considered (where they arise) separately.[132]

(4) The process of market definition is an iterative one and a sequential one. It is part of a process (the Framework, described in paragraph 29 above) and so "sequential". But it is also not a process where, *ex ante*, the correct answer will immediately suggest itself. One considers different products (and different market geography), and (considering these different parameters) seeks to work out whether the hypothetical monopolist could profitably sustain a 5% to 10% increase in price for that particular product in that particular geographic area. Clearly, there is a substantial element of "trial and error" involved in carrying out the exercise, and that is what we mean by "iterative".

[131] Decision/§5.7, with emphasis added.
[132] See paragraph 31 above.

(5) Market definition is a tool in the analytic process towards determining whether a particular agreement, provision in an agreement, or network of agreements, does or does not amount to a restriction on competition. Market definition is concerned with articulating constraints that exist in the "market", but which arise out of products that are substitutes for the focal product. Market definition is – or ought to be – neutral in terms of whether there is an anti-competitive effect. The point about market definition is to identify the terrain within which the provisions under investigation are assessed. Market definition does not (or should not, at least) aim to be determinative of the question of anti-competitive effect. It should be a neutral tool.

(c) Process in the context of two-sided markets or platforms

90. Decision/§5.2 describes the market of PCW Services for Home Insurance as a "two-sided market". Although the term "two-sided market" is a term of economic art, it carries with it a high degree of uncertainty of concept, making it a difficult subject for analysis and – unsurprisingly – a difficult subject for the purpose of market definition. The paper that really set the two-sided ball rolling was by Jean-Charles Rochet and Jean Tirole entitled "Two-sided markets: A Overview".[133] They defined this type of market in the following "you know it when you see it" way:[134]

> "…Two-sided (or more generally multi-sided) markets are *roughly* defined as markets in which one or several platforms enable interactions between end-users, and try to get the two (or multiple) sides "on board" by appropriately charging each side. That is, platforms court each side while attempting to make, or at least not lose, money overall.
>
> Examples of two-sided markets readily come to mind. Videogame platforms, such as Atari, Nintendo, Sega, Sony Play Station, and Microsoft X-Box, need to attract gamers in order to convince game developers to design or port games to their platform, and need games in order to induce gamers to buy and use their videogame console. Software producers court both users and application developers, client and server sides, or readers and writers. Portals, TV networks and newspapers compete for advertisers as well as "eyeballs". And payment card systems need to attract both merchants and cardholders. …
>
> But what is a two-sided market and why does two-sidedness matter? On the former question, the recent literature has been mostly industry specific and has had much of a "You know a two-sided market when you see it" flavour. "Getting the two sides on board" is a useful characterisation, but is not restrictive enough. Indeed, if the analysis

[133] This paper was not itself before the Tribunal, but it was referred to in various of the materials that were before the Tribunal.

[134] Rochet & Tirole 2004, paragraphs 2-3.

> just stopped there, pretty much any market would be two-sided, since buyers and sellers need to be brought together for markets to exist and gains from trade to be realised."

91. This vagueness of concept is reflected in the Decision itself when considering the appropriate analytical approach to this particular two-sided market, the PCW Services for Home Insurance market:

> "5.15 …[Compare The Market] and other [price comparison websites] serve and connect two distinct customer groups (consumers and home insurance providers) and can be considered two-sided platforms. An initial question when applying the hypothetical monopolist test to two-sided platforms is, therefore, whether separate markets should be defined on each side of the platform that connects the user groups (in this case, the [price comparison websites]) or whether it is appropriate to define a single market.
>
> 5.16 These two possible alternatives are reflected in the approaches taken by competition authorities and courts to market definition in cases involving two-sided platforms. In some cases, separate markets have been defined on each side of the two-sided platform, while in others (including other cases relating to comparison services) a single market has been defined, covering users on both sides of the platform. The important point is that, however the market is defined, in carrying out an assessment of the effects of an agreement, it is necessary to take into account any factor that is relevant in relation to the economic or legal context in which an agreement occurs. Accordingly, even where the two-sides of the platform are defined as separate markets, it is necessary to take into account the interaction between those two markets, including any indirect network effects…"

We accept that two-sided platforms or two-sided markets (terms that the Decision uses interchangeably, but which are in fact not identical) have a distinct link or nexus between them, which may variously be described.[135] This is an aspect of the Decision that we consider further below.

(d) The CMA's granular approach in this case

92. Given the nature of the market being considered, and the uncertainties identified by the CMA itself, it is important to be clear how the Hypothetical Monopolist Test used by the CMA was applied. The problem, as stated in Decision/§5.16, which we set out above, is that there is no established approach to defining two-sided markets. Is a two-sided market: *(i)* two separate markets, linked by a common platform; or *(ii)* is it a single

[135] E.g., as "network effects", "network externalities", "two-way effects", "direct network effects", "indirect network effects", "uni-directional effects" and "bi-directional effects". We will consider these effects, and the manner in which they relate (or do not relate) to market definition, further below.

market; or *(iii)* does the answer depend as to (unarticulated) circumstances? These are novel questions for UK competition law.

93. As is clear from Decision/§5.8 and Decision/§5.9, the CMA took the view that there was a single focal product, namely the supply of PCW Services for Home Insurance. Thus, Decision/§5.12 states:

> "The assessment of the relevant product market starts with the product that the CMA's competition concerns relate to, which in this case is the supply of [PCW Services for Home Insurance] in the UK. Therefore, as a first step for defining the product market, the CMA has considered PCW Services for Home Insurance as the focal product for applying the hypothetical monopolist test. In particular, the CMA has considered whether a hypothetical monopolist of PCW Services for Home Insurance would find it profitable to increase commission fees (i.e. the prices that [price comparison websites] set) by 5% to 10%."

94. Taking this as the starting point, the approach adopted in the Decision was as follows:

> "5.17 To determine which alternative is appropriate in this case [i.e., whether to analyse the "market" as separate markets or as a single market], we have considered the nature of the two-sided platform. This is because a distinction can be made between (i) two-sided platforms which facilitate transactions between (or "match") customers on each side of the platform and (ii) those two-sided platforms that do not facilitate transactions (e.g., "media-type" platforms like radio stations and newspapers).
>
> 5.18 In the present case, [price comparison websites] "match" home insurance providers, which want customers to be introduced to them, and consumers, who want to search, compare and purchase home insurance. The options that are available for consumers to search for and compare home insurance, and to access insurance providers to purchase home insurance, are limited to the same channels that are used by providers to source customers (including [price comparison websites] and providers' online and offline direct channels). This means that the same potential constraints should be taken into account from the perspective of each side of the platform when assessing the constraints on a hypothetical monopolist platform.
>
> 5.19 The CMA, therefore, finds that it is appropriate to define a single product market for PCW Services for Home Insurance in this case. Within this single product market, the CMA has taken into account the perspective of both sides and the impact of any indirect network effects on the platform when assessing the hypothetical monopolist platform's ability to increase the price of concluding a transaction (i.e., the commission fee charged by the platform). The CMA has taken this approach because the possible competitive constraint on a [price comparison website] may come from either user group, as explained further in paragraph 5.25.
>
> 5.20 However, the CMA notes that for the purposes of analysing the restrictive effects of an agreement, it does not matter whether separate markets are defined on each side of the platform that connects both user groups or whether one market is defined encompassing both sides of the platform and includes both user groups. This is because, as both approaches would identify the competitive constraints acting on a supplier of a given product or service, either definition of the relevant market would provide a

coherent framework for analysing the restrictive effects of agreements under investigation in the present case.

…

5.25 The CMA's analysis has, therefore, focussed on the commission fees charged by [price comparison websites] to providers when applying the hypothetical monopolist test. The CMA has taken into account the constraints the [price comparison websites] face on both sides of the market, which means that a commission fee increase across all [price comparison websites] may be rendered unprofitable by the actions of providers and/or consumers:

(a) *Providers.* In response to a common commission fee increase across all [price comparison websites], providers might decide to stop or reduce their use of [price comparison websites] as a channel, especially if such an increase were to make the [price comparison website] channel less profitable than other channels for attracting and selling to some or all consumers ("direct impact" of the commission fee increase).

(b) *Consumers.* In response to a common commission fee increase across all [price comparison websites], providers might decide to continue using [price comparison websites] but set higher retail prices for products quoted through [price comparison websites] (i.e. to pass-through the higher commission fees to consumers). As a result of this increase in retail prices, some consumers may then decide to stop using [price comparison websites] and potentially use alternative channels through which to search, compare and purchase home insurance ("indirect impact" of the commission fee increase).

5.26 To understand the indirect impact of a common commission fee increase across the [price comparison website] channel as a whole, the CMA has considered to what extent (if any) commission fee increases can be expected to be reflected in the retail prices that consumers find on [price comparison websites] (i.e., the retail prices set by providers on [price comparison websites]). The CMA therefore asked home insurance providers about recent changes to their costs and whether they passed on those cost changes to consumers.

5.27 While most home insurance providers have passed "industry-wide" cost changes (e.g., increases in Insurance Premium Tax) directly onto consumers, providers told the CMA that their ability to pass on other cost changes depends on the trading conditions at the time they occur and it may take longer to react to firm-specific cost changes. The CMA therefore considers that the relevant pass through for the purposes of the hypothetical monopolist test is likely to be higher than the firm-specific pass through (as such a commission fee increase would affect all providers listing on [price comparison websites] and can be considered as similar to an "industry wide" cost change for this acquisition channel) but may not be as high as the 100% pass through of industry-wide cost changes.

5.28 Even if the rate of pass through of a commission fee increase by a hypothetical monopolist price comparison website was 100%, there would be a relatively small, [1.8 – 3.5%], increase in retail prices on average for consumers following a 5 – 10% increase in commission fees. This is because commission fees account for [35%] of home insurance retail prices on [price comparison websites] on average."

95. Thus, the CMA applied the Hypothetical Monopolist Test and the related SSNIP in the following way:

(1) The CMA applied the Hypothetical Monopolist Test to a sole provider of price comparison website services for home insurance products. The Decision, thus, hypothesised a monopoly comprising a single (price comparison) platform in relation to two distinct services articulated in Decision/§5.2 as:

(i) The supply of customer introduction services to home insurance providers (**Customer Introduction Services**); and

(ii) The supply of price comparison services to consumers (**Price Comparison Services**).

(2) The CMA applied a SSNIP on the Commission charged by this (hypothetical monopolist) price comparison website to the home insurance providers subscribing to it. In other words, the SSNIP was applied to the price for the Customer Introduction Services. That SSNIP would have – according to the CMA – both direct and indirect effects.

(3) The direct effect was used to define the market for Customer Introduction Services, whereas the indirect effect was used to define the market for Price Comparison Services (using these terms as defined in Decision/§5.2, set out in paragraph 87 above).

(4) The direct effect is easier to understand. It comprises a 5% to 10% increase in the Commissions charged by the hypothetical sole provider of price comparison services to those subscribing to those services, namely home insurance providers utilising Customer Introduction Services. The CMA's conclusion was that providers' demand-side characteristics were unlikely to constrain a hypothetical monopolist of PCW Services for Home Insurance from increasing the Commission in this way.[136] In other words, home insurance providers would be likely to stick with the Customer Introduction Services provided by the hypothetical monopolist's price comparison website, notwithstanding the

[136] Decision/§5.51. The Decision elides the consideration of direct and indirect effects. However, given that these effects operate in very different ways, separate consideration is warranted, to understand the thought processes in the Decision. That said, we certainly do not consider that a consideration of these effects in combination is inappropriate. It is clear from Decision/§5.51 that the CMA considered the position of consumers and providers both individually and in combination.

SSNIP, instead of moving away to other means of obtaining customer introduction services, like direct channels. From this it follows that the other means of introducing customers to home insurance providers are not in fact substitutes for the Customer Introduction Services provided by price comparison websites.

(5) We turn to the indirect effect. This involved no separate or distinct SSNIP, imposed, for instance, on the Price Comparison Services provided to consumers, but rather the transmission of the increase in Commission to this market. The reasoning in the Decision is that:

(i) The increase in Commission is a cost payable by the home insurance provider.

(ii) This increase is a cost that would be passed on by the home insurance provider to those persons acquiring home insurance policies, paid by the insured in the form of increases to the Premiums charged in respect of concluded home insurance policies.

(6) Because the Commission constitutes only a portion of the cost of providing insurance incurred by home insurance providers, the extent to which Premiums would increase would be smaller than the 5% to 10% increase of the Commission increase. Decision/§5.28 concludes:

> "Even if the rate of pass-through of a commission fee increase by a hypothetical monopolist [price comparison website] was 100%, there would be a relatively small, less than 2-4% [1.8-3.5%] increase in retail prices on average for consumers following a 5-10% increase in commission fees. This is because commission fees account for less than 40% [35%] of home insurance retail prices on [price comparison websites] on average."

(7) Such an increase in Premiums would, the CMA found, not be enough to cause consumers to move away from the (monopolist) price comparison platform to other channels. It is, of course, very difficult to test for this because:

(i) It is difficult to detect, not being separately identified as commission.

(ii) The increase would not necessarily be paid by the consumer using the hypothetical monopolist's Price Comparison Services.[137]

(iii) The resulting increase in Premiums is small when compared to a SSNIP applied to Premiums themselves. It is significantly smaller than that generally contemplated by a standard SSNIP test and not a *significant* increase from the perspective of the consumer at all.

Hence, the market as defined in Decision/§5.2.

96. We consider that it is helpful to set out the market as defined by the CMA – and the broader context within which that market, so defined, sits – in diagrammatic form. This is done in Annex 2 hereto, which:

(1) Sets out the market as defined in the Decision. This market is coloured grey and black in Annex 2, but this distinction does not reflect the conclusion in the Decision that this is a case of a single market.[138] The reason we differentiate within this single market is because the CMA itself differentiated (within the single market it defined) between Price Comparison Services provided to consumers (coloured grey) and Customer Introduction Services to home insurance providers (coloured black). However, the market for PCW Services for Home Insurance comprises the grey and black shaded areas.

(2) Sets this market – that is, the market for PCW Services for Home Insurance, as defined by the CMA – into broader context.

(3) Reflects both New Business and Renewal Business. As we have explained in paragraph 9 above, save for first time purchasers of Home Insurance Products (which are by definition New Business), there is a degree of fluidity as between Renewal and New Business, and (on the definitions used by the CMA, which

[137] Indeed, as we shall see, the Decision postulates no increase in Premiums offered via price comparison websites as compared to home insurance products sold via other channels. That is because of the operation of nMFNs. We will come to the role the Decision attached to nMFNs in due course.
[138] See paragraph 87 above.

we have adopted) Renewal Business may be converted into New Business if a consumer switches insurer.

(e) Treatment of Narrow Most Favoured Nation Clauses

97. The nature of these clauses was described in paragraph 20(1) above. As was noted, in contrast to wMFNs,[139] which oblige a home insurance provider to provide (to the price comparison website) the lowest (or equal lowest) prices on offer anywhere for that particular product, whether on other price comparison websites or elsewhere, nMFNs prevent the home insurance provider in question from undercutting the prices quoted by it on the price comparison website on its own website or other direct marketing channels.

98. As we have described, the Decision concludes that the indirect effect of the increase in Premiums caused by the SSNIP would be insufficient to cause consumers of Price Comparison Services to move away from the services provided by the hypothetical monopolist price comparison website. However, the CMA also concluded that the presence of nMFNs in the contracts between the hypothetical monopolist price comparison website and the home insurance providers subscribing to that website meant that, even following the (limited) increase in Premiums of 1.8% to 3.5%, the potential constraint from the direct channel for new business sales would be "limited in practice".[140]

99. This is because, even if the increase in Commission postulated by the SSNIP could be passed on by the home insurance provider onto the Premiums charged by it – and so quoted by it – on the price comparison website, there would be no differential between the Premiums quoted on the price comparison website and those quoted on the home insurance providers' direct channels. The operation of the nMFNs (which the Decision found to be prevalent in the market) would preclude this.[141] A home insurance provider could not lawfully (i.e., in accordance with its contractual obligations) increase the Premiums quoted on the price comparison website to above those quoted by that home

[139] Considered in paragraph 20(2) above.
[140] Decision/§5.85. The reasoning is based on the operation of nMFNs, to which we will come.
[141] This was not contentious.

insurance provider elsewhere.[142] This, of course, would prevent the home insurance provider from recovering the increased Commission via the purchasers of home insurance using price comparison websites by quoting a higher price on the price comparison website than on other channels used by the home insurance provider.

100. The Decision puts the point in the following terms:[143]

> "[nMFNs] are very common in contracts between [price comparison websites] and home insurance providers, with the vast majority ([92 – 100%]) of sales made through [price comparison websites] in 2017 were by providers covered by [nMFNs]…As a result of these clauses, any retail price increase on a [price comparison website] by these providers (e.g., in response to a commission fee increase) will need to be matched by a similar retail price increase on a provider's online direct channel, unless the provider is already setting higher prices on its direct online channel than on the [price comparison website]."

101. The existence of and prevalence of nMFNs was, therefore, a further reason why the CMA defined the relevant market in the way that it did.

(2) The criticisms advanced by Compare The Market

102. Compare The Market – in the Notice, in its submissions, and by way of the expert evidence adduced by it – articulated a number of criticisms of the CMA's approach. The essence of these criticisms was twofold:

(1) It was contended that the manner in which the SSNIP was applied to gauge consumer reaction to an increase in price was defective. Compare The Market contended that in order properly to assess substitutability, a material as opposed to an immaterial increase in price needed to be hypothesised. The indirect effect considered by the CMA in the Decision was simply too small and too insignificant to serve as an appropriate test for the constraints that might exist on the hypothetical monopolist. Dr Niels was forthright in his criticisms of the CMA's approach; he was, understandably, much more guarded in how he considered the CMA might have gone about defining the market. We consider that he was right to be cautious in this regard, for not only are the present

[142] Because there are – on this hypothesis – no other price comparison websites (there is only one, provided by the hypothetical monopolist), it follows that in the world of the hypothetical monopolist there is actually no difference between a wMFN and a nMFN.
[143] Decision/§5.86.

circumstances relatively novel, the question of precisely how markets are to be defined when seeking to assess anti-competitive effects is ultimately one for the Tribunal.

(2) It was contended that the CMA's inclusion, in its process, of nMFNs, rendered the CMA's entire exercise of market definition redundant. What, Compare The Market asked, was the point of postulating a SSNIP when it could have no possible effect on consumers, because there would be no differential between the Premiums quoted by home insurance providers on direct channels and the Premiums quoted by home insurance providers on the monopolist price comparison website?

Compare The Market's criticisms of the approach to market definition were more detailed and granular than this: we do not propose to lengthen an already long Judgment by quoting extensively from them, but we have them well in mind.

103. There was a third criticism advanced by Compare The Market, which we mention only to dismiss. Compare The Market contended that the CMA had failed to take into account the fact that other price comparison websites, not presently offering PCW Services for Home Insurance, might easily do so. In the Notice, the point was put as follows:[144]

> "…the CMA did not consider the more likely supply side response, which is that [price comparison websites] with strength in other product areas would focus attention on expanding into home insurance. Such market players would not necessarily require significant investment in order to attract consumers: instead they would seek to cross-sell to their existing customer base using their existing [price comparison website] service and brand…"

104. In its written closing submissions, the CMA characterised this argument as "nonsensical",[145] and we essentially agree. Whilst, of course, market definition should involve a consideration of all aspects of the market, including the supply side, Compare The Market's contention served only to undermine the purpose of Hypothetical Monopolist Test. Compare The Market's contention was effectively punctured in the trenchant words of Dr Walker:[146]

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[144] Notice/§110.
[145] See paragraph 225.
[146] Transcript Day 7/pp.125 to 126 (cross-examination of Dr Walker).

> "So what you are hypothesising here is the hypothetical monopolist who raises prices, who will try to think what the competitive constraints are, then you seem to be hypothesising – I have never heard it discussed this way before – hypothesising that firms also owned by the hypothetical monopolist, because they are party to that group, acting as competitive constraints on the hypothetical monopolist. So what you have is the same firms undermining themselves. I mean, I am sorry Mr Beard, this is pretty incoherent. Supply-side substitutability is all about understanding whether there are other firms out there, who do not currently provide the product, but could do so very quickly…To ask whether, for instance, Confused motor could suddenly enter the market for home insurance, no, Confused is in the market for home insurance."

(3) Approach to Ground 1

105. As we have described,[147] this is an appeal "on the merits", where the question of market definition is squarely raised in the Notice, but where it must be recognised that market definition involves a significant degree of judgement and where (we consider) the CMA is entitled to an ample margin of appreciation before this Tribunal can or should interfere. This is simply to emphasise that we must be satisfied that the CMA has erred in a material respect before we can say that its definition of the market was "wrong".

106. We propose to approach Ground 1 in the following way:

(1) First, we return to consider the essential purpose of market definition and the manner in which this Tribunal (and so a regulator like the CMA) ought to approach the question of market definition: Section F(4) below.[148]

(2) Secondly, we consider the nature of two-sided markets. As we have already noted, and as the Decision clearly recognised, two-sided markets present particular difficulties when it is sought to define them: Section F(5) below.

(3) Thirdly, we set out the various respects in which – standing back, and viewing the matter in context – we consider that the market, as defined by the CMA, simply does not accord with the economic reality as recorded by the CMA in its own Decision: Section F(6) below.

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[147] See paragraphs 41*ff* above.
[148] We recognise that we have set out the CMA's approach to market definition in the abstract already (paragraphs 87 to 89 above), and that we have, in essence, agreed with it. Nevertheless, the point is of sufficient importance for us to re-visit it as part of our analysis of Ground 1.

(4) Fourthly, we set out how we consider two-sided markets ought to be defined, and we set out our own conclusions as to market definition: Section F(7) below.

As is clear from the foregoing, it is our conclusion that the Decision gets the definition of the relevant market (or markets) wrong, and that this is an error that is well-beyond the material. To that extent, it follows that Ground 1 succeeds, in the sense that we consider the definition of the market contained in the Decision to be wrong, and will (for that reason) re-visit and (if possible) re-decide the question. That does not, however, mean that the Decision must, as a matter of inevitability, be set aside. To this extent, Ground 1 does not – of itself – get Compare The Market "home" on its appeal. The most that can be said is this, quoting from the Notice:[149]

> "The CMA's market definition analysis suffered from multiple conceptual errors, resulting in it posing itself the wrong question, as well as multiple failures to follow sensible analytical norms to properly assess the available evidence. This has resulted in a very narrow market definition, which was not reliable as a basis for the analysis of effects that rested on it."

(4) The essential purpose of, and the approach to, market definition

(a) Essential purpose

107. Ferro says this about market definition and its purpose:[150]

> "It seems fair to say that, unless you are remotely familiar with the present reality of competition law, you might not guess that you would have to define markets just from reading the competition provisions of the TFEU, much less that defining them would involve the highly complex mechanism we know today. So why do we define relevant markets? What goals are pursued?
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> Market definition in competition law serves different mediate and immediate goals. Ultimately, and even though this issue tends to be overlooked, market definition is essential for the very justification of the limitation of private economic initiative and of contractual freedom which is the inevitable result of competition law. Since these are fundamental rights, or components thereof or analogous thereto (depending on the legal order), the EU and the [Member States] cannot impose restrictions which are not justified by an overriding principle and subject to a test of proportionality. The sacrifice imposed by the restriction of those rights must be outweighed by the collective benefits arising from the protection of the interests promoted by competition law.
>
> One cannot apply this proportionality test without market definition. The restriction of a company's unilateral behaviour is predicated upon demonstrating that it holds a

[149] Notice/§118.
[150] Ferro, *Market Definition in EU Competition Law*, 1st ed (2019) at 29. This text was not in the materials before the Tribunal, but the passage we have cited says nothing controversial.

> significant amount of market power. The prohibition of a merger depends on demonstrating that it could have a negative effect on competition. It would not be justified to prohibit a collective practice which has an insignificant effect on the market. One needs to draw the limits within which to weigh the costs and benefits of allowing or prohibiting certain behaviours."

108. Ferro thus, correctly, sees market definition as a means of assessing constraints on market power and hence as an appropriate jurisdictional control against competition law overreach. Thus, by way of example, in a merger, one of the questions that arises is whether a "relevant merger situation"[151] has resulted or may be expected to result in a "substantial lessening of competition within any market or markets in the United Kingdom for goods or services".[152] Unless a merger causes a substantial lessening of competition, so understood, the merger cannot give rise to an "anti-competitive outcome".[153] We have summarised a complex regime in a few words, and the dangers of over-simplification are obvious: but the importance of market definition in determining whether there exists (the potential for) a substantial lessening of competition is obvious.

109. Similarly, the Chapter II Prohibition requires consideration of whether an undertaking has a dominant position: a dominant position exists within a market and, again, market definition is an extremely important element in limiting the jurisdictional ambit of competition law intervention. Unless an undertaking is dominant in a particular market, there can be no abuse of a dominant position.

110. Whilst the importance of the process of market definition is clear, the manner in which it is deployed is, we would suggest, rather context sensitive. In other words, precisely what is being defined turns on <u>why</u> the definition is needed. The process of market definition is different[154] according as to whether the market is being defined in the context of an abuse of dominance case or in case of an alleged anti-competitive agreement or any one of the many other cases where market definition matters, such as mergers.[155] Here, we are solely concerned with the role market definition plays in the

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[151] See section 35(1)(a) of the Enterprise Act 2002, "relevant merger situation" itself being defined in section 23 of the same Act.
[152] See section 35(1)(b) of the Enterprise Act 2002.
[153] See section 35(2) of the Enterprise Act 2002.
[154] See, for example, the General Court's decision in (T-111/08), *Mastercard Inc v European Commission* (EU:T:2012:260) (2012) 5 CMLR 5 at [171], upheld by the CJEU on appeal.
[155] They are helpfully listed in Whish and Bailey, *Competition Law*, 10th ed (2021), pp.24 to 26.

case of the Chapter I Prohibition. We set out the Framework or process for assessing the existence or otherwise of an anti-competitive effect in paragraph 29 above. To re-cap, having identified the relevant agreement or provision that is said to constitute a restriction on competition, it is necessary to ascertain the context within which the effect of that agreement or provision is to be gauged. That context is the "market", which must be "defined" for this purpose. Market definition thus constitutes a chain or step in a sequential process that we have called the Framework.

111. More importantly, for present purposes, market definition – indeed, the entire process of assessing whether an anti-competitive effect exists – is something of an iterative one also.[156] A regulator may very well get a sense that "all is not well" and suspect an infringement of the Chapter I Prohibition or some other aspect of competition law. The process of moving from a suspicion worth investigating to a conclusion will be littered (if the process is properly undertaken) with trial and error. The following example arose in the course of closing:[157]

> "…Suppose you are concerned about a competition abuse in the market for baked beans. It would be pretty stupid to start investigating the market for cough mixture in order to work out what the nature of the abuse was in baked beans, so there is a certain common sense as to where you look…But it becomes much harder if you are, let us say, looking at an abuse in the aspirin market and you might have a very hard question working out whether aspirin is the only product and it is the rival aspirin products that are only relevant or whether you need to look at paracetamol. That is something which you can only answer by considering, in some rational way, what the consumer alternatives are. If I put the price of aspirin up, will people flock to paracetamol or not? That is a question which is much harder, and that is the true market definition question. You are not talking about baked beans and cough mixture, you are talking about things which are difficult to differentiate…"

The point is that some products (when one is talking about the "product market") can be excluded from consideration relatively straightforwardly. Other products can only be excluded after careful consideration, which will include a consideration of precisely what is being bought and sold, and why. Reverting to the aspirin/paracetamol product market, and speaking purely hypothetically, if the purpose of buying these medicaments is pain relief, then it is difficult to resist the conclusion that the product market ought to include both products. But if (and again, we are simply engaged in a thought

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[156] The iterative nature of the process is well illustrated by the Commission Notice on the definition of relevant market for the purposes of Community competition law, Notice 97/C 372/03 (the **Commission Notice on Market Definition**).

[157] Day 12/pp.206 to 207 (Intervention by the President during CMA closing submissions).

experiment) aspirin is implicated as a prevention against heart-attack as a blood-thinner, whereas paracetamol is not, a good case might be made for excluding paracetamol from the relevant product market.[158] However, this process must be undertaken without reference to whether one market definition makes a finding of infringement more likely than the other. That would involve ceasing to use market definition as a tool and instead to use it impermissibly to steer the outcome of the very investigation it is merely supposed to inform.

112. Following on from this, the process of market definition therefore is, or should be, outcome neutral. It is intended to identify the relevant context in which the anti-competitive effects of the agreement or provision that is said to constitute a restriction on competition can be assessed. It should not be skewed so as to pre-determine the outcome. In particular, the process should not have regard to negative (or, indeed, positive) effects. Naturally, these effects are the very essence of why alleged infringements are looked into, and condemned or justified. But before that can be done, their context must be determined, and that is the point of market definition in the context of the Chapter I Prohibition.

113. We appreciate that in the context of regulatory decision-making, this approach presents very real difficulties: a regulator like the CMA will not, unless there is a serious purpose, publish a decision that concludes there has not been an infringement. Generally, a published decision will involve a finding of infringement, and an anterior definition of the market that enables such a conclusion to be drawn. We should be clear that we do not regard the fact that most published decisions find an infringement as an instance of "confirmation bias", nor as evidence of a pre-determined outcome.[159] It is simply a consequence of the regulatory process which the CMA initiates.

(b) Approach

114. Informed by these points, the approach to market definition should, we consider, be as follows:

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[158] This is, of course, a thought experiment, not a finding of any kind. All the circumstances would need to be considered, such as the impact of other intended uses by consumers on sales.

[159] Although it would probably assist any reviewer of a decision if the CMA were to show something of its workings or process of reasoning, rather than simply articulating without more the outcome.

(1) Market definition, at least in the context of the Chapter I Prohibition,[160] is a tool that – if it is to work – must be outcome neutral. If the outcome is skewed towards or against a finding of infringement, then a potentially useful tool is being abused.

(2) The term "market definition" is a dangerous one if it is understood to mean an attempt to grapple with, or state unambiguously, the notion of a market in a particular context. We anticipate that such an exercise is one where many economists (and, indeed, competition lawyers) could fruitlessly disagree. The Commission Notice on Market Definition puts the point as follows (emphasis added):

> "2. Market definition is a tool to identify and define the boundaries of competition between firms. It serves to establish the framework within which competition policy is applied by the Commission. The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure. It is from this perspective that the market definition makes it possible *inter alia* to calculate market shares that would convey meaningful information regarding market power for the purposes of assessing dominance or for the purposes of applying [the Chapter I Prohibition].
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> 3. It follows from point 2 that the concept of "relevant market" is different from other definitions of market often used in other contexts. For instance, companies often use the term "market" to refer to the area where it sells its products or to refer broadly to the industry or sector where it belongs."

(3) The CMA has adopted equivalent guidance, originally published by its predecessor body, the Office of Fair Trading (**OFT403**)[161] which states: [162]

> "Market definition is not an end in itself but a key step in identifying the competitive constraints acting on a supplier of a given product or service".

(4) Market definition only involves consideration of two dimensions: the product and the geographic. Only one (the product) is relevant in this case.[163] The Commission Notice on Market Definition says this:

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[160] We stress again that we are only considering market definition in this context.

[161] The Office of Fair Trading, *Market Definition: understanding Competition Law* (OFT403), December 2004. Adopted by the CMA Board and in the Decision at §5.7.

[162] OFT403, paragraph 2.1 and the Decision at §5.7.

[163] The nature of a geographic market is considered in paragraph 8 of the Commission Notice on Market Definition, but we consider it no further.

> "7. …"Relevant product markets" are defined as follows:
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> "A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use."

(5) When considering the relevant product market – which is the only aspect we here consider, the relevant geographic market being uncontentious – it is important to bear in mind precisely what it is that is being bought and sold and why. As the Commission Notice on Market Definition observes, the purpose of defining a relevant product market is to identify the products or services which are sufficiently close substitutes to the focal product so as to exercise a competitive constraint on the price of the product or service under consideration.[164] The test is often stated to be whether there is a "sufficient degree" of interchangeability between them, so far as the specific use of such products or services are concerned.[165] Substitutability is not assessed solely by reference to the objective characteristics of the products or services at issue. The competitive conditions and the nature of supply and demand in the market must also be taken into consideration.[166] In *Aberdeen Journals v Director General of Fair Trading*, [2002] CAT 4, the Tribunal, summarising the relevant principles from the case law, said:

> "96. The … relevant product market is to be defined by reference to the facts in any given case, taking into account the whole economic context which may include notably (i) the objective characteristics of the products; (ii) the degree of substitutability or interchangeability between the products, having regard to their relative prices and intended use; (iii) the competitive conditions; (iv) the structure of the supply and demand; and (v) the attitudes of consumers and users.
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> 97. However, this check list is neither fixed, nor exhaustive, nor is every element mentioned in the case law necessarily mandatory in every case. Each case will depend on its own facts, and it is necessary to examine the particular circumstances in order to answer what, at the end of the day, are relatively straightforward questions: do the products concerned sufficiently compete with each other to be sensibly regarded as being in the same market? Are there other products which should be regarded as competing in the same market? The key idea is that of competitive constraint; do the other products alleged to form part of the same market act as a competitive constraint on the conduct of the allegedly dominant firm?"

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[164] *British Telecommunications plc v. Office of Communications*, [2017] CAT 25 at [113].
[165] C-85/76 *Hoffmann-La Roche v Commission* (1979) (EU:C:1979:36) at paragraph 28.
[166] C-332/81 *NV Nederlandsche Banden Industrie Michelin v Commission of the European Communities* (1983) (EU:C:1983:313) at paragraph 37.

(6) Accordingly, it is important to consider why a given good or service is being bought (when considering demand side substitutability, as we are here) in the first place. This is an important question, that can be lost sight of. To revert to our aspirin/paracetamol example, if the reason why (in this hypothetical case) aspirin is being purchased is to thin blood and not alleviate headaches, then paracetamol is not a relevant substitute and to include it in the product market definition would be an error. If, on the other hand, the reason why aspirin is being purchased is precisely to relieve headaches, then the exclusion of paracetamol from the product market definition needs to be considered far more carefully. Thus "demand side substitution" (namely, the extent to which customers are able to switch to alternative products, in the event of an increase in price) is generally regarded as the most important factor in determining the relevant product market, since it constitutes the most immediate constraint on suppliers of a given product or service.[167]

(7) In both the Commission Notice on Market Definition and OFT403, various techniques are mentioned for determining demand side substitutability, one such technique being the SSNIP test. This test is part of the Hypothetical Monopolist Test, under which it is assumed that there is only one supplier of the product in question,[168] the hypothetical monopolist. The purpose of the Hypothetical Monopolist Test is to provide an objective conceptual framework for market definition, by eliminating certain variables, notably competition between the suppliers (or buyers) of the focal product. In that way, if a SSNIP results in marginal customers moving away from the focal product to an alternative product, that cannot be said to be because of competition between suppliers (or buyers) of materially the same focal product. Rather it is an indication that the monopolist is constrained in setting its prices by the possibility of losing business to the supplier of an alternative product. Of course, the level of switching must be significant enough to prevent a monopolist from profitably sustaining prices sufficiently above competitive levels (the "critical loss" is the tipping point – which is the smallest percentage of sales which, if lost, would

[167] As recognised by the Commission in its Notice on Market Definition at paragraph 13.
[168] Products, of course, embrace both goods and services.

render any SSNIP unprofitable).[169] The Department of Justice and Federal Trade Commission 1992 "Horizontal Merger Guidelines" state:

> "A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximising firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a "small but significant and non-transitory" increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test."

We set out these Guidelines[170] not because they are controversial, but because it is necessary – given the dispute on market definition that came before us – for this Judgment to spell out its terms of reference with as much clarity as it can.

(8) It is important that market definition not be over-analytical or over-dependent on expert evidence. It is necessary that the law be predictable to those persons who are subject to it, so that their behaviour can conform without the need for regulatory intervention. It may be that a market is sufficiently technical to require technical expert evidence as regards the product and its uses, but (as a general proposition) we do not consider that this Tribunal will always be assisted by solely expert economic evidence on questions of substitutability. It is incumbent on the parties to consider and establish the probative value of expert economic evidence on this issue. Although we appreciate that market definition is, from time-to-time, referred to as a science, we consider such a description to unduly accentuate the technical aspects of what ought to be a common sense exercise of judgement, informed substantially by an understanding of the thinking of the persons in the market in question.

(9) The importance of judgement – as opposed to a slavish following of what are, at most, helpful subsidiary analytic tools – is demonstrated by the well-known "Cellophane Fallacy":[171]

> "It is necessary to enter a word of caution on the hypothetical monopolist test when applied to abuse of dominance cases. A monopolist may already be charging a monopoly price: if it were to raise its price further, its customers may cease to buy

[169] See OFT403, paragraph 3.4.
[170] In fact, there are quoted in Niels, Jenkins and Kavanagh, *Economics for Competition Lawyers*, 2nd ed (2016), §2.34.
[171] Whish and Bailey, *Competition Law*, 10th ed (2021), p.28.

> from it or switch to alternative products. In this situation the monopolist's "own-price elasticity" – the extent to which consumers switch from its products in response to a price rise – is high. If a SSNIP test is applied in these circumstances between the monopolised product and another one, this might suggest a high degree of substitutability, since consumers are already at the point where they will cease to buy from the monopolist; the test therefore would exaggerate the breadth of the market that would exist in normal competitive circumstances…"

(10) The short point is that in defining a market it is necessary to be alive to the realities of the case, including as to anti-competitive distortions already present in the market. There is no reason to consider that the Cellophane Fallacy – or some similar solecism – cannot be made when defining the market for the purpose of the Chapter I Prohibition.

(5) Two-sided markets

(a) Nature

115. Two-sided markets present an additional complexity, which the Decision frankly acknowledges.[172] We propose initially to consider the nature of these "markets" without reference to the question of "market definition". We make significant reference to the *Support study accompanying the evaluation of the Commission Notice on the definition of relevant market for the purposes of Community competition law* (the **Support Study**), published in 2021, and which was referred to at the hearing. We do so not because it provides an answer to the question of market definition, but because it sets out in a single document a great deal of the current thinking in this area.

116. We set out Rochet and Tirole's definition in paragraph 90 above. The Support Study provides the following definition:[173]

> "…Multi-sided markets involve several user sides of a platform interacting. Interdependence between the users on the various sides of the market characterises multi-sided markets. Two-sided markets, the simplest type of multi-sided markets, only involve the interaction between two agents on each side of the platform. Broadly speaking, a two-sided market is one in which: 1) two sets of agents interact through an

[172] See the quotations from the Decision at paragraph 91 above.
[173] At p.38.

> intermediary or platform, and 2) the decisions of each set of agents affect the outcomes of the other set of agents, typically through an externality[174]."

117. The essence of a two-sided market is the interaction between agents through the intermediating platform. As the Support Study notes, "[a]t the heart of the interdependence between the various market sides are direct and indirect network effects":[175]

(1) Direct network effects are present when the value of a product or service received by a user fluctuates (either directly or inversely) with the variation of the number of the product/service's users.[176] The Support Study provides the following example:[177]

> "Concretely, a telephone service or a social network (Facebook, Twitter, Instagram) or communication service (e.g. Skype or WhatsApp) is all the more valuable for the individual user, the more users make use of this service…"

(2) Indirect network effects occur when a platform or service depends on the interaction of two or more user groups, such as producers and consumers, or buyers and sellers, or users and developers. This would be the case, for example, where if more people from one group join the platform, the other group receives a greater value amount. The presence of indirect network effects characterises multi-sided platforms and only markets with two or more sides can achieve indirect network effects.

Take the free newspaper – a simple, and old-fashioned, example of a two-sided market, where the "free" nature of the newspaper is funded by advertising revenue. The "platform" – the newspaper – serves two different users. Readers, who read the newspaper's content, and advertisers, who pay to access the readers' attention. The more readers, the more valuable the newspaper is to the advertisers (and the more they are likely to pay). Advertising revenue is, of course, the driver for many electronic platforms (Google, Facebook, etc) whose

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[174] An "externality" can be defined as an unpriced cost or benefit arising from any activity which does not accrue to the person or organisation carrying out the activity. See under "externality" in Black, Hashimzade and Myles, *Dictionary of Economics*, 3rd ed (2009)

[175] Support Study at 38. These direct and indirect network effects are what is alluded to when referring to "an externality".

[176] Support Study, p.38.

[177] Support Study, p.38, footnote 21.

services (be it search engine or social media) are provided (for free) to those consumers who wish to use those services.

118. It is possible – and in some cases, even desirable – to parse these effects more closely. Thus, there may be "uni-directional" effects (where the effects run in one direction only) or "bi-directional" effects (running in either direction over the platform).[178] One such effect, which is troubling to those used to analysing "traditional" markets and to which we will revert, relates to the pricing strategies that (often) exist in these markets:[179]

> "A further characteristic of two or multi-sided markets, aside from the abovementioned interdependence, is that pricing strategies in these markets are not akin to those of single markets. Understanding the potential pricing strategies of digital platform providers is key to grasping how two-sided or multi-sided markets compete among themselves and with one-sided markets. This is because a fundamental aspect of the business model for multi-sided market industries is the optimal pricing structure which must be set so that the division of revenues brings both parties on board. Katz and Shapiro point out that in two-sided markets the product may not exist at all if the business does not get the pricing structure right. Parker and Van Alstyne and Rochet and Tirole argue that in two-sided platforms the price structure to get both sides on board and to optimise usage of the platform is usually asymmetrical, with prices on one side substantially above those on the other side (e.g. Facebook charges users zero, while it charges advertisers). Pricing structures vary depending on cross-side demand elasticities and the relative extent of the network effects, with the intuition being that the existence of inter-group network effects frequently implies that, in order to attract a group of users, the platform needs to subsidise the other group of users totally or in part. Internalising[180] the two-sided inter-group externalities allows a platform owner serving the two sides to price more efficiently, in the presence of demand curves which shift outward with positive cross-side network effects. At one end of the spectrum, one platform side is charged low or zero prices. The other side pays. This cross-subsidisation is an optimal strategy from the viewpoint of the multi-sided platform. For instance, Adobe's portable document format (PDF) did not succeed until Adobe priced the PDF reader at zero, substantially increasing the sales of PDF writers…"

119. The nature of the interaction between the different sides of a multi-sided platform has also been the subject of analysis. Thus:

(1) Distinctions have been drawn between "trading platforms", where transactions are concluded (transaction markets), and non-transaction markets concerned essentially with advertising.

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[178] See Support Study, p.39.
[179] Support Study, pp.39 to 40.
[180] See under "internalizing externalities" in Black, Hashimzade and Miles, *Dictionary of Economics*, 3rd ed (2009): "Any method of getting those producing external costs or benefits to take account of them in their decision-making. Examples include merging agents that are affected into a single entity or imposing taxes so that private costs and benefits reflect social costs and benefits…".

(2) Another label is that of "matching platforms" or market-makers, where users on different sides of the platform are brought together. The Support Study says this at page 40:

> "Online dating services are a good example of multi-sided platforms where two user groups interact. Together with property platforms and payment card systems, online dating sites constitute so-called "matching platforms", which Evans also calls market makers. Matching platforms are those where positive externalities from the presence of the other user group accrue to each of the two groups, i.e. there are bilateral indirect network effects. In the case of a video game system, e.g. Playstation, the console producer – Sony – is the intermediary, while game developers and consumers are the two sets of agents: here neither consumers nor game developers are interested in being on the platform if the other side is not."

We anticipate that the range of analytical tools that can be deployed when seeking to understand "two-sided markets" is both vast, and vastly controversial. We provide a sample of the thinking here, because it seems to us that this thinking has done a great deal to inform the approach to market definition, as undertaken by competition authorities and other regulators.

(b) Market definition

120. Given the variety of multi-sided markets, their different network effects and pricing strategies, it is unsurprising that the Decision has stressed the different approaches that have been taken by different competition authorities when defining markets.[181] Thus, the CMA has regarded itself as free to choose which approach is "appropriate" in the given case.[182] In terms of predictability of outcome, such an approach does not commend itself, and in our judgement imports into the tool of market definition judgemental factors which are not relevant at the stage of market definition, but which fall to be considered later on in the process for discerning anti-competitive effects that we have described.[183] In short, we consider that the approach to market definition in the case of two-sided markets – both as reflected in the Support Study and in the Decision – needs to focus on the essential and seek to avoid the confusion that occurs when irrelevant factors are imported:

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[181] See, e.g., Decision/§5.16, quoted in paragraph 91 above.
[182] Decision/§5.17.
[183] See paragraph 112 above.

(1) We remind ourselves that we are concerned with substitutability. A product can either be a good or a service, and it is supplied by someone to someone else. Conventionally, one would use the terms **Buyer**, **Seller** and **Product**, and we shall do so here: but it is important to bear in mind – particularly in two-sided markets – that a Product may be provided for nothing, and that the meanings of the terms Buyer and Seller may, for that reason, be a little unnatural. Nevertheless, these are the terms we will use.

(2) We refer to the Product whose substitutability is being tested or assessed – and which will be subjected to the Hypothetical Monopolist Test or the SSNIP – as the **Focal Product**, because it is the focus of the inquiry. For the purposes of assessing product substitutability, it is necessary to be very clear exactly what Focal Product the Buyer is acquiring and the Seller supplying.

(3) It is also necessary to be aware of the manner in which the Focal Product is provided by the Seller to the Buyer. This interface (for want of a better word) between the Buyer and the Seller, whereby the Focal Product is acquired (by the Buyer) and supplied (by the Seller) is extremely important in understanding the true nature of the Focal Product. The interface is particularly important where what is being acquired/supplied is a service, for the interface itself may form a part of the service. We will use the term **Interface** to describe this relationship between Buyer and Seller, but we would note that in this case the term is equivalent to the term channel, that we (and, indeed, the CMA) defined in paragraph 7 above. As we noted in paragraph 7 above, "[t]he Decision refers to the various different ways in which insurance products can be sold as channels".

(4) As we have seen,[184] two-sided markets tend to be defined as markets interlinked or interacting with each other through a common platform. It is because of the common platform that there is interaction between two or more markets, with the resultant network effects that we have described. None of this is very helpful in terms of getting to grips with the question of product substitutability with which we are concerned. It seems to us that things are analytically clearer, given the question we are concerned with (which is the question of the substitutability

[184] See paragraphs 115*ff*.

of a Focal Product in a market), if we seek to eschew all reference to markets and network effects. We will simply refer to the "thing" providing these links or interactions as the **Platform**.

(5) To descend, for a moment, to the specific, the present case concerns a Platform that is Compare The Market's price comparison website. Referring, once more, to the diagram at Annex 2, the Platform in this case is represented by the combination of Box 2A and Box 2B, which describes the two sides of the single market defined by the CMA at Decision/§5.2. The Platform faces in two directions, because Compare The Market is supplying two Products (i.e. services). Each Product has a different group of Buyers or potential Buyers. The Buyers of these Products are those in Box 1 (Buyers of Price Comparison Services) and those in Box 3 (Buyers of Customer Introduction Services). Although the Decision defines only a single market – the provision of PCW Services for Home Insurance – the representation in Annex 2 is actually broadly consistent with the analysis in the Decision. The Platform, which is in this case Compare The Market's price comparison website, is the Seller of both of these Products, represented in Box 2A (Seller of Price Comparison Services) and Box 2B (Seller of Customer Introduction Services). The Decision[185] describes price comparison websites as platforms with <u>two</u> supplies provided off them: what we shall refer to as the market for Customer Introduction Services;[186] and what we shall refer to as the market for Price Comparison Services.[187]

(6) We consider that the Decision falls into error in eliding these two Products (and the Buyers and Seller acquiring/supplying them). We accept that the Platform operates as a "matching platform", bringing together consumers and home insurance providers. But we do not understand why that classification impels a process and a conclusion that involves only one exercise in substitutability (or, to use the wider, more misleading term, market definition[188]). There are two Products in play, and it seems to us that each of them constitutes a Focal Product

[185] Decision/§5.2
[186] See paragraph 95(1)(i) above.
[187] See paragraph 95(1)(ii) above.
[188] As we have described, assessing the substitutability of the Focal Product, as defined by the CMA, forms one element or parameter in the process of market definition.

in relation to which substitutability must be assessed. It follows – if the language of market definition is to be used – that there are two markets to be defined.

(7) We should stress that the fact that we are using the labels "Price Comparison Services" and "Customer Introduction Services" should in no way be read as an endorsement of the description of these Products in the Decision. For reasons that we will come to, we consider that not only does the Decision err in its approach to assessing Focal Product substitutability (the point presently under consideration), but also that the Product described in the Decision as "Price Comparison Services" is also wrongly defined in itself (a point we will come to in due course).

(8) The point is that there are two quite different Focal Products being supplied (admittedly, by the same Seller, the price comparison website) to two quite different sets of Buyers (consumers and home insurance providers). By using "PCW Services for Home Insurance" as the (only) Focal Product,[189] the Decision conceals this fact. The consequence is that, when it comes to the application of the Hypothetical Monopolist Test, the constraints that exist separately, distinctly, and above all differently in relation to each Focal Product are wrongly conflated.

(9) Each Focal Product ought to be considered separately, within the market definition Framework we have described, because different substitutes may exist in relation to each. We are confident that not to do so is liable to lead to error, precisely because it fails to pay proper regard to the fact that the substitutes for each Product sold by the Seller (here, Compare The Market) may very well be different. As we stated earlier, the purpose of defining a relevant product market is to identify the products or services which are sufficiently close substitutes so as to exercise a competitive constraint on the price of the Product.[190] It is perfectly possible for the competitive constraints to vary according to the Product under consideration: indeed, that will, in our judgement, likely be more often the case than not.

[189] See, for instance, see Decision/§§5.2 and 5.12.
[190] See paragraphs 114(5) above.

(10) When this approach was put to Dr Niels, he disagreed with it. His view was that there was a single market,[191] but even if there were two markets, "you have to look at both sides anyway":[192]

> "I think, regardless of whether you do it as two markets or as one, even if you take your approach of saying: no, it is two markets, but you have the platform in the middle, you cannot get away from the complexities, from the interlinkages, the interaction on the demand side between the two sides."

We agree that it is impossible – and would in principle be wrong – to disregard the interconnections and network effects that arise out of Buyers linked by a Platform when seeking to determine whether there is an infringement of the Chapter I Prohibition (or whether what is an infringement can be justified). But unless great care is taken to demonstrate exactly why and how these network effects matter for the purposes of establishing relevant product substitutability, to seek to incorporate these complexities at the stage of market definition is: *(i)* to distort what is intended to be a relatively straightforward tool; and *(ii)* ignores the fact that market definition forms part of a broader process (the Framework), and that these complexities are more appropriately considered at the later stage when assessing harmful effects. In short, we agree with Dr Niels that "you cannot get away from the complexities"; but we disagree with him if he was suggesting that the market definition stage of the Framework process is where they should be taken into account. All we are concerned with, we reiterate, is substitutability for the Focal Product (the geographical market not, as we have said, being relevant).

(11) The complexities of a two-sided market should not distort the process whereby – after defining the market – the regulator will consider whether a finding of anti-competitive conduct and infringement of the Chapter I Prohibition is justified. Once the market has been defined, the context for consideration of infringement has been laid out, and the regulator may be confronted by: *(i)* multiple adverse or non-beneficial effects; and/or *(ii)* one or more positive or beneficial effects. As to these:

[191] Day 4/p.119 (questions by the Tribunal).
[192] Day 4/pp.119 to 120.

(i) In the former case – multiple adverse or non-beneficial effects – the anti-competitive effect of each needs to be considered. That simply means multiple, no doubt very much related, strands of investigation.

(ii) In the latter case – one or more positive or beneficial effects – the competition authority will have less interest in investigating these,[193] but they can and should be deployed in defending an alleged competition law infringement. Unlike the United States, competition law in this jurisdiction does not in the same process "balance" positive and negative anti-competitive effects.[194] The position in the United States is described by Whish and Bailey in the following terms:[195]

> "Section 1 of the US Sherman Act 1890 characterises some agreements as *per se* illegal, whereas others are subject to so-called rule of reason analysis: application of the rule of reason requires a balancing of the pro- and anti-competitive effects of an agreement. Where there is a *per se* infringement it is not open to the parties to the agreement to argue that it does not restrict competition: it belongs to a category of agreement that has, by law, been found to be restrictive of competition. There is an obvious analogy between an agreement that is *per se* illegal under the Sherman Act and one that is restrictive of competition by object under [the Chapter I prohibition]. However, there is an important difference between section 1 of the Sherman Act and [section 2 of the Competition Act 1998] in that, even if an agreement has as its object the restriction of competition, that is to say that it infringes [section 2] *per se*, the parties can still attempt to justify it under [section 9 of the Competition Act 1998]. This possibility does not exist in US law, since there is not equivalent of [section 9] in that system."

Whish and Bailey were here considering "by object" infringements, but the analysis of the differences between the US and EU (and, by analogy the UK) systems also holds good as regards "by effect" infringements. The UK regime does not permit the "balancing" of pro- and anti-competitive effects at all. If a "by effect" infringement of the Chapter I

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[193] It may be that the benefit of an infringing provision is so clear that further investigation is not pointful. Such questions are clearly value judgments for the competition authority.

[194] It might be said that the doctrine of "objective necessity" involves such a balancing exercise, but that is not the way this doctrine has traditionally been understood. As Whish and Bailey, *Competition Law*, 10th ed (2021) at pp. 139 to 140 make clear, the "defence" of "objective necessity" is really an instance of the conditional benefits rule. If a legitimate purpose can only be achieved at the cost of what would otherwise be an infringement of the Chapter I Prohibition, then the Chapter I Prohibition may be capable of objective justification. If the infringement is "severable" from the legitimate purpose, then the defence will not run.

[195] Whish and Bailey, *Competition Law*, 10th ed (2021) at p.132. Whish and Bailey are here analysing the framework under Article 101(1) and 101(3) TFEU, the equivalent sections under the Competition Act 1998 being sections 2 and 9.

Prohibition is established, then there is an infringement, unless the provisions of section 9 of the Competition Act 1998 are engaged. In substance, this might be regarded as a distinction without a difference, but in terms of process and analysis it is hugely significant. A regulator is perfectly entitled to find a "by effect" infringement on the basis of an infringement of the Chapter I Prohibition, and bears the burden of proof in this regard; on the other hand, where a section 9 defence is invoked, the burden of proof falls on the person asserting the benefit.

(iii) It follows that the sort of analysis that took place in the US Supreme Court's decision in *Ohio v. American Express Co* is inappropriate here.[196] This was a dispute between various states and credit card companies (on the one hand) and American Express (**Amex**) on the other, claiming that Amex's "anti-steering" provisions, contained in its agreements between Amex and merchants accepting Amex cards as payment for goods and services, were anti-competitive. The purpose of the anti-steering provisions was to protect Amex's business by preventing merchants from persuading or influencing customers to use some other method of payment, because merchants' costs were greater in the case of Amex transactions than in the case of other transactions. By a majority, the Supreme Court held that for the purposes of analysis, there was one market (a "credit-card" market), and not two markets, one for merchants and one for cardholders. For the majority, Thomas J analysed with care the nature of the market before the court, and noted the different business models as between Visa and MasterCard on the one hand, and Amex on the other:[197]

> "Amex competes with Visa and MasterCard by using a different business model. While Visa and MasterCard earn half of their revenue by collecting interest from their cardholders, Amex does not. Amex instead earns most of its revenue from merchant fees. Amex's business model thus focuses on cardholder spending rather than cardholder lending. To encourage cardholder spending, Amex provides better rewards than other networks. Due to its superior rewards, Amex tends to attract cardholders who are wealthier and spend more money.

[196] 585 US (2018). This decision was not cited to us by the parties, but it serves as a good illustration of the issues that were contentious before us.
[197] At p.6.

> Merchants place a higher value on these cardholders, and Amex uses this advantage to recruit merchants.
>
> Amex's business model has significantly influenced the credit-card market. To compete for the valuable cardholders that Amex attracts, both Visa and MasterCard have introduced premium cards that, like Amex, charge merchants higher fees and offer cardholders better rewards. To maintain their lower merchant fees, Visa and MasterCard have created a sliding scale for their various cards – charging merchants less for low-reward cards and more for high-reward cards. This differs from Amex's strategy, which is to charge merchants the same fee no matter the rewards that its card offers…"

Hence the "anti-steering" provisions. The Supreme Court applied its "rule of reason" approach,[198] but in doing so needed to define the market. The Supreme Court took the "it depends" approach that is evident also in the Decision, holding that sometimes it was appropriate to consider both sides of the platform as two separate markets, and sometimes appropriate to consider all sides of the platform as a single market.[199] The court concluded that this was a case of a single market:[200]

> "But two-sided transaction platforms, like the credit-card market, are different. These platforms facilitate a single, simultaneous transaction between participants. For credit cards, the network can sell its services only if a merchant and cardholder both simultaneously choose to use the network. Thus, whenever a credit-card network sells one transaction's worth of card-acceptance services to a merchant it also must sell one transaction's worth of card payment services to a cardholder. It cannot sell transaction services to either cardholders or merchants individually…To optimize sales, the network must find the balance of pricing that encourages the greatest number of matches between cardholders and merchants.
>
> Because they cannot make a sale unless both sides of the platform simultaneously agree to use their services, two-sided transaction platforms exhibit more pronounced indirect network effects and interconnected pricing and demand. Transaction platforms are thus better understood as "suppl[ying] only one product" – transactions."

Thomas J considered that this approach was necessary "to accurately assess competition",[201] and concluded that the anti-competitive effects alleged had not, in this case, been made out. It is unnecessary to consider this aspect of the opinion further. Two points can be noted: first, even in

[198] Described at pp.9 to 10.
[199] At p.12.
[200] At p.13.
[201] At p.14.

the context of US law, this was a controversial approach, and this was only the majority opinion. There was a powerful dissent. Secondly, and much more importantly, the framework of analysis in the US is – as we have described – very different to that in the UK, and the US approach (whatever its merits in the context of US law) is simply not suited to the framework for assessing an infringement of the Chapter I Prohibition under UK law.

(iv) Under UK law, market definition provides a part of the analytic Framework. If, at the market definition stage, one moves away from the Product that is being acquired/supplied and fails to explore what it is that is being bought and sold, potentially important details will be lost, and the process of analysis becomes obscure rather than pellucid. Uncertainty is the highly undesirable outcome.

(6) An "unreal" market definition

(a) Introduction

121. We have set out how we consider an infringement of the Chapter I Prohibition ought to be demonstrated by the CMA in order to be capable of a robust defence on appeal. We have made clear that we agree neither with the CMA's market definition in this case, nor with the process by which it was derived. We are conscious, however, that in conducting an investigation, the CMA is entitled to a significant margin of appreciation; and that whilst the Tribunal has an "on the merits" jurisdiction in this case, the CMA's assessment, particularly if it turns on questions of judgement, ought only to be departed from where there has been a material error.[202] We do not consider that it is open to us to allow Ground 1 of the appeal simply because of the disagreements that we have articulated unless such an error exists.

122. In this case, however, we consider that the CMA's market definition is, on the face of it, materially wrong. We consider that this goes beyond a mere difference between two

[202] See, generally, Section C above.

outcomes informed by equally valid approaches.[203] Indeed, we have reached our conclusion that the CMA has materially erred independently of the analytical approach to market definition that we have outlined above. The purpose of this section is to explain why the present is not a case of alternative approaches, each of them reasonable, where the CMA ought to "have its head"; but where, viewed entirely on its own terms, and in light of the findings made in the Decision, the CMA's market definition is not fit for purpose. There are a number of distinct, albeit related, reasons for this conclusion, which we set out in the following paragraphs.

(b) Inaccurate definition of the consumer side of the market

123. We return to the single market defined in Decision/§5.2.[204] The service supplied to consumers is described as a "Price Comparison Service". Thus, consumers "buy" Price Comparison Services from price comparison websites.[205] We have no doubt that, so far as it goes, this description is correct. But it is incomplete. As we have described, price comparison websites additionally provide an efficient and convenient means for the consumer to conclude a contract of insurance with a chosen home insurance provider if they wish to do so.[206] In other words, the Product supplied by the price comparison website involves (of course, at the option of both the consumer and the home insurance provider) a "matching" service.

124. There can be no doubt that the CMA was aware of this. Decision/§7.45(a) says this of the usefulness of price comparison services:[207]

> "*Ease of use* (the time and effort for consumers using the [price comparison website]), including navigating the website, the collection of data, speed of comparison results, and ability to click through to a provider's website and purchase easily…"

125. It may be that Decision/§5.2 is infelicitously worded, but we do not think so. Other aspects of the Decision – to which we will come – strongly suggest that whilst the CMA was clearly aware of this functionality (i.e., to buy insurance, as well as obtain price comparison), no particular weight was attributed to it. This was an error, because it

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[203] Although such a difference would need, in and of itself, to be justified. Equally valid but different approaches ought to lead to the same, and not different, conclusions.
[204] See paragraph 90 above.
[205] In Annex 2, these services are indicated by the grey shaded portions.
[206] See paragraph 69 above.
[207] Emphasis added.

meant that there was insufficient focus on the alternative channels for the purchase of home insurance products. We consider that the Product supplied to consumers should have paid regard to: *(i)* the Price Comparison Services; and *(ii)* the fact that the Price Comparison Services so provided enabled the swift conclusion of a contract of insurance, with the chosen home insurance provider, without the consumer having to engage afresh (by re-submitting data) with that particular home insurance provider.

(c) Failure to consider the significance of the other channels for the purchase of home insurance products by consumers

126. In our aspirin/paracetamol market definition example,[208] we emphasised the importance of understanding the use a consumer was putting to the Focal Product. In this case, the service provided by price comparison websites to consumers – prospective purchasers of home insurance products – is, as we have described, not merely a price comparison service but a facility (assuming the consumer likes the outcome of the comparison) to buy.

127. We refer once again to the diagram at Annex 2. Boxes 4, 5, and 6 set out other channels or Interfaces by way of which a consumer can purchase a home insurance product. None of these channels is identified as a potential substitute for the Focal Product within the market defined in the Decision, which is demarcated by the areas coloured grey and black in Annex 2. Given the evidence cited in the Decision, the exclusion of these channels or Interfaces between consumers and home insurance providers is remarkable and odd:

(1) It will be recalled that the Decision draws a distinction between new business and renewal business.[209] The Decision records that the proportion of new business by sales channel in 2015 and 2016 was as follows:[210]

Channel	**2015 (%)**	**2016 (%)**
Price comparison websites	50%	54%

[208] See paragraphs 111 and 114(2) above.
[209] See paragraph 8 above.
[210] See Table 2.2 in Decision/§2.34.

Underwriters' direct channels	30%	27%
Brokers' direct channels	10%	8%
Retail partners' direct channels	1%	1%
Others	8%	10%
Total	100%	100%

Clearly, price comparison websites are an important channel or Interface for the conclusion of new business. But direct channels are clearly, also, very significant. It would be odd in the extreme if a consumer did not regard the direct channels as a substitute channel for the purchase of home insurance products through price comparison websites.

(2) Of course, the data in the Decision shows a degree of fluidity between channels. A table at Decision/Annex I/§I.14 sets out the number of unique consumers who obtained quotations for home insurance products. The total number of unique consumers was 13,156,207 in the period September 2016 to August 2017:[211]

Source of quotation	**Absolute number of consumers**	**Percentage of consumers**
Consumers receiving a quotation from at least one price comparison website[212]	4,766,686	36%
Consumers receiving a new business quotation from at least one home insurance provider	2,264,317	17%

[211] See Decision/Annex I/Table I.1. The dataset collected by the CMA accounted for around 80% of home insurance policies sold through Big Four PCWs in 2017: see Decision/Annex I/I.II

[212] By definition, this will be new business. Price comparison websites, as we have described, do not do renewals.

Consumers receiving a renewal quotation from at least one home insurance provider	9,139,862	69%
Total	**16,170,865**	**122%**

There are, self-evidently, some 3,014,658 consumers who received quotations from more than one of these sources. That is why the total in the table exceeds the number of consumers by this amount.[213] The point is plain: a significant proportion of consumers were receiving, and therefore comparing and choosing between, quotations received via different channels.

(3) Switching channels, on the basis of price, would have been very likely. As the Decision itself notes,[214] demand was elastic both in the case of price comparison websites and direct channels.

(4) Most of the home insurance business transacted was actually renewal business: according to the Decision, in recent years, 74% of consumers renew and only 26% of concluded business is new business, as the Decision defines these terms.[215] It is important, however, to appreciate that there is, or is likely to be, a high degree of fluidity between the classes of new and renewal business. As we noted in paragraph 9 above, there is a difference to be drawn between "transactional" or "passive" renewals and "process" renewals. In the case of the process renewal, where (as we have defined it in paragraph 9(2) above) the consumer will have before them *(i)* a renewal price and *(ii)* an alternative price derived from some other channel (including potentially from a price comparison website) self-evidently the consumer will compare the prices they have obtained and there will be competition on price between the home insurance provider providing the renewal quotation and the home insurance provider providing the new quotation. Further, the diagram at Annex 2 applies *mutatis mutandis* to

[213] I.e., 16,170,867 (total consumers generating a quote) less 13,156,207 (the total number of unique consumers in the CMA's dataset) = 3,014,658. There is further analysis at Decision/Annex I, and in particular Figure I.4 in Annex I, which shows that whilst 54% of consumers obtaining a quote on a price comparison website only used price comparison websites, 46% also obtained quotes via other channels, like direct channels or renewal options, in addition to price comparison website.
[214] See paragraphs 77 to 79 above.
[215] See paragraph 9 above and Decision/§2.31.

renewals: the channels identified are equally available to a consumer when considering whether to renew their existing policy (or obtain a new one). The exclusion of renewal business from the market defined by the CMA is very difficult to justify, and in great need of explanation. There is no such satisfactory explanation in the Decision.

128. Ultimately, the Decision fails to see what it calls Price Comparison Services in their true and proper context, which is as an insurance intermediary.[216] Insurance is a transaction – a contract – concluded between the proposed insured and an insurer or underwriter. Although it is possible to conclude a contract of insurance directly between insured and insurer, the insurance market is marked out by the use of intermediaries or a whole series of different Interfaces, in particular involving the use of brokers.[217] These days, intermediaries come in all shapes and sizes: thus, the seller of a product will often seek to sell insurance also.[218] The price comparison website is a (relatively late) addition to the list of indirect channels or Interfaces by way of which insurance products can be sold. It is further important to appreciate that the business of insurance intermediaries – or indirect channels – depends on facing exactly the same two ways as the price comparison website does: there is the insurer facing side ("upstream" from the intermediary) and the insured facing side ("downstream" from the intermediary). The intermediary's business will succeed if the intermediary can successfully connect the downstream with the upstream markets, enabling or facilitating what both the insured and the insurer want: the conclusion of a contract of insurance. It is a failure to understand this dimension that is a hallmark of the Decision.

(d) A mindset as regards market definition that is not outcome neutral

129. We have stressed, on a number of occasions, that it is important that market definition does not pre-determine a finding of anti-competitive effect. Market definition is a tool that should not skew the outcome. We appreciate that a finding that the Chapter I

[216] As we noted in paragraph 11 above, seeking to draw a hard-and-fast distinction between price comparison services on the one hand and other indirect sellers of home insurance products on the other is more likely to obscure than clarify.
[217] See Annex 2, Boxes 5 and 6.
[218] If a consumer buys a holiday or books a flight, travel insurance will usually be offered; if a consumer buys a modestly expensive product – like a fridge or television – the seller will usually offer insurance as an additional product.

Prohibition has been infringed must include a market definition that is consistent with that outcome. Otherwise, the finding will – inevitably – be a fragile one. Those investigating an alleged infringement of the Chapter I Prohibition must be astute to avoid falling into the trap of adopting a market definition that leads to a particular outcome. It is a trap easily and innocently fallen into, particularly in the case of a novel phenomenon (at least in terms of competition law infringements) like a "two-sided market".

130. We fear that, in this case, the CMA fell into precisely this trap. This is evidenced both from the market definition in fact adopted and from the evidence of Dr Walker, who was extremely clear about the direction of travel in the Decision. Thus, there appears to have been no question, in the CMA's mind, that wMFNs were anti-competitive and that nMFNs were not anti-competitive. Dr Walker was referred to the Framework described in paragraph 29 above, and asked:[219]

Q: The President	…you see the starting point is to identify the relevant agreement or provision said to constitute the restriction on competition, and in this case it is the [wMFNs] that we are talking about. Obviously, when you are in the position of the CMA as a regulator, the clause under investigation is something of an iterative process, I anticipate?
A: Dr Walker	I do not think so, no. I mean, the fact that a [wMFN] is potentially anti-competitive was not an iterative process, I mean only to the extent of course it came up in private motor insurance and the Competition Commission banned them in private motor insurance.
Q: The President	So it was not a question in your mind that there might be other related provisions like a [nMFN] that could be pernicious, you simply accepted or proceeded on the basis that this was the only provision under consideration?
A: Dr Walker	There is a debate about [nMFNs], but I think it was – there is a genuine efficiency rationale for [nMFNs], unlike wide ones, and a number of competition authorities have decided that they are fine, whereas that is not true of [wMFNs].

This answer has at its heart the unspoken assumption that price comparison websites are competitively a good thing, and that there is, therefore, a "genuine efficiency rationale" for nMFNs – because they prevent direct channels from undercutting the Premiums

[219] Transcript Day 6/pp.112 to 113 (questions from the Tribunal).

quoted on price comparison websites. This may very well be the case, but to assume that this is in fact so is an error.[220]

131. Dr Walker was also asked about market definition, and how the CMA had gone about defining the market in the Decision:[221]

Q: The President	…We assess the agreement or provision in question in the context of the market in which that agreement or provision needs to be gauged – and that is trite?
A: Dr Walker	Yes.
Q: The President	But, just to be clear, though, do you see the role of market definition as informed by the theory of harm…?
A: Dr Walker	Yes, yes, I mean we do not define the level of the markets because it is a fun thing to do, we define them only because they allow us to gauge the competitive constraints that are acting on the parties whose conduct we are concerned about. So absolutely market definition is dealt with in the context of what is the theory of harm that we are concerned about. It is only a theory of harm, I mean, it is a theory, you know, you go through the market definition exercise relevant to that theory, and then you go through the effects analysis, and you come to a conclusion.
Q: The President	Again, I do not think anyone is disputing that market definition is an important component of the exercise. My question, I think, was – and I think you have answered it, but I will just say it again to check – I think you are saying that what is the definition of the market is informed by the theory of harm that you adopt?
A: Dr Walker	Yes, because you want to – you want your market definition to inform you about the competitive constraints that are relevant to that theory of harm, so, yes.
Q: The President	To what extent do you think it is wise to undertake exercises in market definition which you might think – given your theory of harm – are irrelevant, but because you do not know what you are going to find it is nevertheless important to consider them?
A: Dr Walker	Well, if they are not relevant to your theory of harm, then I am not sure why you would pursue them?

[220] A case can be made that nMFNs are actually themselves infringements of the Chapter I Prohibition. We know that the Commission paid by a home insurance provider in relation to business concluded through a price comparison website is high – about 35% to 40% of the Premium: see footnote 105 above. Obviously, this cost will be passed on to consumers in the form of higher premiums. nMFNs prevent home insurance providers from undercutting price comparison websites via their direct channels. In a counterfactual world without nMFNs, Premiums might be lower, but at the price of serious damage to the business model of the price comparison website. It should not be assumed that a contractual provision arguably necessary to the business model of a market participant like a price comparison website is inevitably a "good thing".

[221] Transcript Day 6/pp.115*ff* (questions from the Tribunal). Emphasis added.

Q: The President Well, my point is, are you assuming the question of relevance or irrelevance without investigation?

A: Dr Walker No, no, your theory of harm will tell you where the market power is that you are concerned about, so if you have a theory of harm relating to [wMFNs] and the ability of [price comparison websites] to use [wMFNs] to increase commission charges, **and therefore to increase retail prices**, then you need to think about what is – what are the constraints on [price comparison websites] in being able to raise commission charges. So that is your focal product, it is the [price comparison websites], and the focal product is the insurance services they sell for which they charge a commission, and then you need to see what are the constraints on that.

Now, at that point you are agnostic as to – you do not know what the answer is going to be. So, it might be, yes, you look at that, and actually, yes, you do need to look at a load of other stuff, or equally it might be you do your hypothetical monopolist-type thinking and actually find, no, no, it is quite a narrow market in which they can exercise market power. At that point, you have done market definition, you move on.

Q: The President Just to be clear about theory of harm, I think it arises out of the answer you have just given, but again I want to be clear, you are saying it is not merely the question of the anti-competitive effects of [wMFNs] that constitutes your theory of harm; it is the fact that they had an effect on the Commissions charged in the market, would that be right?

A: Dr Walker **Well, yes, the way [wMFNs] could have anti-competitive effects is by affecting Commission charges and therefore affecting retail prices.**

Q: The President When you are talking about the theory of harm, that is what you are talking about?

A: Dr Walker Yes.

Q: The President You are not talking about any other possible effects of [wMFNs]?

A: Dr Walker	**Well, I think we have got three or four different ways in which we think [wMFNs] could be harmful, although they all relate to commission charges.** You know, we think that they can relax the constraint on a firm in setting commission charges because they know that if that commission charge leads to higher retail prices, then all the other [price comparison websites] will also have to raise their retail prices, so we know that it relaxes the constraint there. We know it means that you cannot as a [price comparison website] enter or expand by saying to an insurer, okay, I will offer you a low commission rate if you price low on my [price comparison website] because the insurers cannot do that because of the [wMFNs]. **But these theories of harm, they are all related to commission charges, and the ability or the presence or absence of market power around commission charges, and of course it might be that we were in a different world in which we had done this analysis and we had found, no, [price comparison websites] do not have any market power over commission charges for a variety of reasons, fine, then we would not be here.**

132. We set out, in very summary form, the anti-competitive effects found by the CMA in the Decision, in paragraph 25 above. To recap, the CMA found that the wMFN Agreements had the appreciable effect of preventing, restricting or distorting competition by:

(1) Reducing price competition between price comparison websites. In other words, there was a lessening of competition as regards the Commissions charged by price comparison websites to home insurance providers.

(2) Restricting the ability of Compare The Market's rival price comparison websites to expand, enabling Compare The Market to maintain or strengthen its market power.

(3) Reducing price competition between home insurers competing on price comparison websites. In other words, there was a lessening of competition as regards the Premiums quoted to consumers on price comparison websites.

133. It is clear from Dr Walker's evidence – and, indeed, from the market definition adopted by the Decision – that if a lessening of competition as regards the Commissions charged by price comparison websites to home insurance providers can be shown, then a lessening of competition as regards the Premiums quoted to consumers on price

comparison websites can be presumed. The market definition adopted by the CMA enables the first effect (effect on Commissions) to be tested, but not the effect said to be consequential on that first effect (effect on Premiums). It may be the case that there are sufficient constraints on the Premiums charged by home insurance providers on price comparison websites, such that, even if there is an absence of competition as regards Commissions, there is no effect on Premiums. That is why the different channels or Interfaces for the purchase of home insurance products matter: it may be that if a home insurance provider increases the premiums quoted on the price comparison websites to which it subscribes, it will lose business not necessarily to other home insurance providers using the same sales channel or Interface, but to home insurance providers using other channels or Interfaces for selling their business. This is an illustration as to why the Hypothetical Monopolist Test assists in identifying possible constraints on anti-competitive behaviour: even if competition between price comparison websites is eliminated, such that home insurance providers can only list on one, because there is a monopoly, there may be constraints on Premiums (arising through other channels) that prevent Premiums from rising, even if the Commission charged by the hypothetical monopolist price comparison website goes up by the SSNIP.

134. There are many possible examples of such constraints. We will provide only one. Take the consumer who has received a renewal offer from their home insurance provider, and the renewal offer is £X. The consumer does not have to renew with that home insurance provider, but may look for alternative quotations. In other words, we are assuming a process renewal not a passive renewal. If so, that consumer may – on the figures we have seen – input their metrics into a price comparison website and seek a quotation. Naturally, home insurance providers will want to attract such new business, and they will be incentivised to "beat" the renewal price this consumer has already been offered, without actually knowing what that price might be. The renewal market, as it seems to us, is an entirely obvious constraint on Premiums quoted by home insurance providers on price comparison websites.

135. We make absolutely clear that we make no finding in relation to this possible constraint at all. The point that we are making is altogether more fundamental. If one approaches market definition with a presumption that a lack of competition as regards Commissions arising out of wMFNs will result in higher Premiums, then the market will be defined in a manner that fails to test for that which is presumed.

136. What is more, the existence of constraints on the Premiums home insurance providers can charge via price comparison websites may, in and of itself, affect Commission rates. Self-evidently, Commissions are a significant cost to home insurance providers, which will need to be recovered, most likely in the Premiums charged to consumers by those home insurance providers. If high Commissions make home insurance providers subscribing to price comparison websites less competitive on Premium than home insurance providers who do not subscribe to price comparison websites (and sell solely via direct channels), then this too will serve as a constraint on the level of Commissions. Again, we make no finding in this regard: we are simply saying that where anti-competitive effects are alleged, and there is no "by object" infringement alleged, those effects have got to be demonstrated, and a market defined that can serve as an appropriate testbed for the anti-competitive effect alleged.

(e) The problems with the CMA's approach to market definition

137. We described the CMA's approach to market definition in this case in Section F(1) above. That approach involved the use of a traditional Hypothetical Monopolist Test and SSNIP to define (as a single market) both the market for Customer Introduction Services (to home insurance providers) and the market for Price Comparison Services (to consumers). A SSNIP was applied to the Commissions charged by the hypothetical monopolist price comparison website, and that (single) SSNIP was used to ascertain the substitutes that might or might not be available to the Buyers (i.e. consumers and home insurance providers) either side of the Platform.

138. We have no issue in a SSNIP being applied to Commissions charged to home insurance providers, in order to see whether such an increase in price would drive home insurance providers to use a substitute to the Customer Introduction Services provided by price comparison websites in general, and Compare The Market in particular. This is – if we may say so – an entirely "vanilla" use of the Hypothetical Monopolist Test.

139. However, we have – as is clear from the foregoing discussion – considerable issues with the "indirect" SSNIP that is used to test substitutability on the consumer of home insurance products side of the Platform (which the Decision, wrongly we consider, regards as Buyers of Price Comparison Services as opposed to Buyers of Home Insurance Intermediation Services, as defined at paragraph 144(1) below):

(1) The CMA's approach makes the impermissible assumption that the channels available to purchasers of home insurance products are the same as, or can be equated to, the channels available to home insurance providers. Thus, Decision/§5.18[222] states:

> "In the present case, [price comparison websites] "match" home insurance providers, which want customers to be introduced to them, and consumers, who want to search, compare and purchase home insurance. The options that are available for consumers to search for and compare home insurance, and to access insurance providers to purchase home insurance, are limited to the same channels that are used by providers to source customers (including [price comparison websites] and providers' online and offline direct channels). This means that the same potential constraints should be taken into account from the perspective of each side of the platform when assessing the constraints on a hypothetical monopolist platform."

This is an assumption that does not inevitably hold good, and which (for that reason) must be tested. We will consider the question of substitutability in the context of a SSNIP when we conduct our own market definition in due course: for the present we will only say that whereas a consumer, a purchaser of home insurance, will be very well able to decide whether to renew or purchase through a direct channel or purchase through a price comparison website, a home insurance provider will have a far more constrained choice: unless the home insurance provider subscribes to multiple price comparison websites, the demand stemming solely from those websites will be lost, and will not (necessarily) be obtained through the insurer's direct channel. In short, whereas "multi-homing" is a luxury for the consumer buying insurance, it is a business critical decision for the home insurance provider. A home insurance provider will be correspondingly disinclined simply to abandon a price comparison website, even if there is a SSNIP. In other words, the issues of demand side substitutability are completely different, and must be tested for separately.

(2) The CMA's approach involves testing substitutability in a limited way on the consumer side by a very attenuated SSNIP. What is postulated is not a SSNIP to

[222] Quoted in paragraph 94 above, but we set it out again here.

the "free"[223] service provided by price comparison websites, but a 1.8% to 3.5% increase in Premiums. There are a number of difficulties in a SSNIP so applied:

(i) First, the SSNIP is too low properly to test substitutability. A SSNIP is a thought experiment, intended to allow a product market to be defined. It postulates – contrary to what is the case in the real world – a "hypothetical monopolist", who applies the SSNIP to their monopolised Focal Product. The point is to see whether the Buyers, faced with this price rise, will stay or go to substitute products in sufficient quantities to make the SSNIP profitable/unprofitable to the monopolist. It is essentially pointless to try to manufacture a "real world" SSNIP, where the SSNIP is based on how much of a SSNIP to Commissions home insurance providers would pass on to their consumers. The CMA's test confuses market definition with anti-competitive effect.

(ii) Secondly, it is rather unclear how the "indirect" SSNIP postulated by the CMA would actually manifest itself. The Decision is unclear on this,[224] and it may be that the Decision is postulating an increase in Premiums to home insurance policies generally, not just those policies sold through price comparison websites. If that is the case, given that consumers do not pay for price comparison services directly or in any transparent way, such a SSNIP is internally inconsistent.[225] How can one ascertain substitutability between channels of insurance product acquisition or Interfaces if the prices of all those products, howsoever purchased, increase by the same or similar amounts? Even if – which is by no means clear to us – the Decision is postulating an "indirect" SSNIP only on home insurance products sold through price comparison websites, the extent to which that SSNIP would be evident to consumers is far from obvious. We consider that a "hidden" or non-transparent price increase

[223] There is, of course, no such thing as a "free lunch", and the CMA found that price comparison websites' Commissions are a relevant factor in home insurance providers' setting of Premiums: see Decision/§7.130. As such, we suspect that the costs of subscribing to a price comparison website are paid for by the purchasers of home insurance products through increased Premiums.
[224] See Decision/§5.28, quoted in paragraph 95(6) above.
[225] Of course, we accept that Commissions will be passed on through Premiums somehow. But that is part of the assessment of potential anti-competitive effects, not the function of market definition.

– whilst undoubtedly something a regulator or competition authority ought to be concerned about – is not an appropriate tool for market definition, given that the whole point of the tool is to test the sensitivity of consumers to price.

(3) We fully accept that applying a SSNIP to a "free" product is a difficult question in itself, and that is a matter we will be returning to.

140. We therefore conclude that the first of the two, broad, criticisms articulated by Compare The Market, namely that the manner in which the SSNIP was applied to gauge consumer reaction to an increase in price was defective, is well founded. We now turn to the second criticism – the inclusion of nMFNs in the assessment.

(f) Inclusion of Narrow Most Favoured Nation Clauses in the assessment

141. This point only arises if the CMA's overall approach, of applying an "indirect SSNIP", is correct. Since we have concluded that it is not, this point can be dealt with quickly. If a SSNIP is to be applied indirectly by way of a hypothesised increase in Commissions being transmitted to Premiums for home insurance products, we can see that a difficult question arises as to whether, when considering if intended purchasers of home insurance products would move from the price comparison website to another channel for their purchase, should nMFNs be taken into account?

142. However, this simply serves to underline the untenable nature of the approach in the Decision. At this stage of analysis, the question is not "What are the adverse effects of anti-competitive pressures on Commissions arising because of wMFNs?" We fully accept that this is a question that must be considered, but not at the market definition stage. All that is being considered is the framework or context, i.e. the market, in which that question should be debated. And that market is defined by reference to a test of substitutability concerning a hypothetical monopolist itself based on price sensitivity. A test, therefore, that removes that price sensitivity by stipulating that the prices of alternatives will be the same, is not worthy of consideration. It is simply not fit for purpose. The second, broad, criticism advanced by Compare The Market is, therefore, also well-founded.

(7) Market definition in this case

143. We conclude that the market definition adopted in the Decision is an unfit tool for analysing the anti-competitive effects found in the Decision. We do not say that these effects do not exist, nor that they cannot be found, even on the basis of the approach set out in the Decision. But it is necessary to re-do the market definition exercise, so that these matters can properly be evaluated. It is necessary, at the very least, to understand the extent of the divergence between the market as defined in the Decision, and that defined by us.

144. We must first ask whether it is even possible for us to re-do the market definition in the way we consider to be necessary. We have, unsurprisingly given the nature of the process before us, been unable to carry out any further investigations, and the evidence that we heard was directed to attacking and defending the Decision, rather than to the re-doing of an exercise already done in the Decision. Nevertheless, having carefully reviewed the various (unchallenged) factual findings made in the Decision, we consider that it is possible robustly to re-do the exercise in market definition. We can do so briefly, because we can base ourselves on the very helpful and careful findings in the Decision:

(1) For the reasons we have given, we consider that the substitutability of two Focal Products falls to be considered separately:

(i) Market definition in the case of one Focal Product involves consideration of a hypothetical monopolist price comparison website selling Customer Introduction Services to home insurance providers: see Box 2B in Annex 2.

(ii) Market definition in the case of the other Focal Product involves the same hypothetical monopolist price comparison website selling price comparison services with the option of buying insurance from the home insurance providers. We are going to refer to these services not as Price Comparison Services – that is, as we have noted, an incomplete description of the service – but as **Home Insurance Intermediation**

Services, which captures more closely the service that price comparison websites actually provide to consumers.

(2) We are thus considering substitutability in relation to two Focal Products:

(i) *Customer Introduction Services.* This is the product as described in Box 2B in Annex 2, and is the same as that described in the Decision.

(ii) *Home Insurance Intermediation Services*. This is a reference to the product described in Box 2A in Annex 2 (being the CMA's articulation of the "consumer" facing side of their defined single market), but the nature of the service provided is broader than the Price Comparison Services considered in the Decision (although Home Insurance Intermediation Services may include these Price Comparison Services).

(3) We will begin with the Customer Introduction Services sold to the home insurance providers, and will apply the Hypothetical Monopolist Test to this service. As we have noted, the price for such services is the Commission, and it is straightforward to apply a SSNIP to this price. Although the Decision does apply a SSNIP to the Commissions that would be charged by the hypothetical monopolist, there is actually very little consideration of what would happen if such a SSNIP were to be charged. Decision/§5.25(a) states:

> "*Providers.* In response to a common commission fee increase across all [price comparison websites], providers might decide to stop or reduce their use of [price comparison websites] as a channel, especially if such an increase were to make the [price comparison website] channel less profitable than other channels for attracting and selling to some or all consumers ("direct impact" of the commission fee increase."

(4) The Decision does not expressly decide that home insurance providers would or would not have moved away from price comparison website if there was a SSNIP to Commissions, but concludes that "outside options" of home insurance providers were "unlikely to constrain a hypothetical monopolist of PCW Services for Home Insurance such that a 5-10% increase in commission fees would be rendered unprofitable."[226] The implied decision is that the direct

[226] See Decision/§5.51.

channels are not real substitutes for price comparison websites, and that the market for Customer Introduction Services is limited in terms of substitutability to the services provided by price comparison websites. In other words, if there was a SSNIP to the Commission, this would be profitable to the hypothetical monopolist. We are confident this is what the CMA decided because the Decision assumes that the increase in Commissions would be passed to consumers buying home insurance products.[227] That necessarily implies that most home insurance providers would continue to subscribe to price comparison websites, the SSNIP on Commissions notwithstanding.

(5) Whilst it is possible to cavil with the manner in which this conclusion has been set out in the Decision, if we have correctly described what the Decision found, we agree with the substance of that conclusion. We consider that the market on the home insurance provider side of the Platform is properly defined as limited (again, referencing Annex 2) to Box 2B: i.e., to the provision of Customer Introduction Services to home insurance providers by price comparison websites. Our reasons for reaching this conclusion are as follows. Commission is only payable where a contract of insurance is concluded. No Commission is payable where no business is concluded. The reason home insurance providers tend to subscribe to several price comparison websites and do not only rely on their direct channels must be because of a hard-nosed evaluation that they will lose business if they do not subscribe. If it was the case that this business (or a large part of it) could, as easily, be acquired through a home insurance provider's direct channel, then we anticipate that most home insurance providers would not hesitate to ditch their subscription to price comparison websites. Yet, as we know from the Decision, many home insurance providers subscribe to multiple price comparison websites. We do not consider that the perceived need to subscribe to a price comparison website would change if there were a SSNIP on Commissions.

(6) We stress that in carrying out this assessment, we presume the existence of nMFNs. We do so because these are – as the CMA has found – very prevalent

[227] See Decision/§5.28 quoted in paragraph 95(6) above. The assumption is that 100% of the SSNIP would be passed on to consumers.

in the market and it would be unrealistic to ignore them.[228] We stress, however, that in presuming the wide-spread existence of nMFNs we are making no kind of finding (one way or the other) as to their legitimacy. nMFNs prevent home insurance providers from undercutting price comparison websites on their own direct channels, and exist in order to prevent this. The pro-competitive rationale is that price comparison websites need this sort of protection to exist, and that may be right. It is, however, nothing to the point for present purposes.

(7) Turning then to the other side of the Platform, the consumer side, which concerns the provision of Home Insurance Intermediation Services to consumers. This service is "free", and that renders application of a traditional SSNIP impossible. A 5% to 10% increase to a zero price is no increase at all; and absolute increase (e.g., £1 per comparison) is, in percentage terms, infinite. It is, therefore, necessary to approach the application of a SSNIP-equivalent with greater than usual care.

(8) The manner in which a SSNIP can operate in these circumstances has been the subject of a great deal of academic debate. One suggestion is to carry out a SSNIP equivalent, such as a small but significant degradation of service.[229] We do not make any findings as to the feasibility of this approach, given that we heard no evidence as to the conduct of any such test and its likely outcomes. However, we do note that it may be very difficult to specify the nature of the degradation that is to be hypothesised to the Focal Product; and very difficult to gauge what would be the reaction of consumers to such a degradation in service – qualitative evidence would need to be gathered.[230] We heard no evidence in

[228] We have considered whether, in taking this approach, we are falling into the same trap as the CMA did – as articulated in paragraphs 141 and 142 above. We do not consider that we are. The approach of the CMA served to eliminate the effect of the SSNIP by rendering Premiums on direct channels no lower than Premiums on price comparison websites so far as the consumer was concerned. Here we are considering the extent to which home insurance providers will be affected by a Commission-based SSNIP, and we ought to consider the operation of such a SSNIP in the market as it exists. The fact is that nMFNs – in this context – actually make no difference to the higher Commission rate being postulated.

[229] E.g., a SSNDQ – a small but significant non-transitory decrease in quality.

[230] The point about price is that it is an objective measure of the value someone places on something. That is one of the functions of price, and why the SSNIP refers to price and not some other quality. That is the problem with a test based on quality: quality is a very subjective thing, and very difficult to use as a test for substitutability. Suppose one were to hypothesize an adjectival reduction in quality (e.g. less money spent on advertising by the hypothetical price comparison website) or even a substantive reduction in quality (e.g., results produced in random order and not in ascending order of price): how would the effect on demand be measured? It is, we would respectfully suggest, much harder than seeking to discern the effect on demand of a SSNIP.

this regard, and the Decision (as we have described) takes a different course. Another possibility would be to try to assess the price that is in fact paid for the service (no service being truly "free"), and to increase that. This is more attractive as a proposition, but is unworkable in this case. That is because the cost of the "free" service lies in the Commissions charged by price comparison websites to home insurance providers, which home insurance providers then pass on to their consumers as part of the Premiums they charge. So, the cost of the service is borne: *(i)* by those who purchase home insurance products, and not by those who use price comparison services, but do not buy; and *(ii)* by persons who may have bought a home insurance product through a different channel. In short, there is a twofold mismatch between the SSNIP to the Focal Product and the presumptive Buyers of that Focal Product. There is no reason why a home insurance provider must recover its costs from the specific sale of the Product in relation to which those costs have been incurred. Indeed the prevalence of nMFNs makes such a nexus highly improbable. So, postulating an increase in Premiums for home insurance products is a fundamentally pointless test of substitutability. The increase in price in no way tests the sensitivity to price of the actual users of the Home Insurance Intermediation Services.

(9) We consider that the best way – in this case, at least – of defining the product market is to hypothesise some kind of charge to the consumer for using the price comparison website. This could either be an absolute charge for using the service (e.g., £2 per comparison or an annual subscription of £5 for unlimited use[231]) or an element in the Premium charged to such consumers only that specifically itemises the cost of the service (e.g. 5% of the Premium is attributable to the price comparison service).[232] We fully appreciate that one must be extremely careful in hypothesising a price for what is ostensibly a "free" product, and we stress that this charge – however it is framed – should not be translated across the market to differently sold products by virtue of nMFNs. The SSNIP-equivalent we are considering must, in order to work, be specific to the use of

[231] We should stress that whilst it is helpful to imagine specific situations, these are all infinite increases to a zero price. Extraordinary care needs to be taken, for this is not a SSNIP. It is a very significant variant.
[232] This latter price would have to assume non-application of nMFNs, otherwise the test is rendered pointless. In other words, there would be a lower Premium (by the amount of the itemised charge) on products sold through direct channels.

the price comparison website by the consumer. Unpacking this SSNIP-equivalent test a little further:

(i) There will be a reason why price comparison websites do not charge for their Home Insurance Intermediation Services. Of course, absent the Hypothetical Monopolist Test, one reason why, e.g., Compare The Market does not charge will be because its competitors – the other Big Four PWCs – themselves do not charge. Were Compare The Market to levy a charge, it would likely lose a great deal of business to its competitor price comparison websites. This would be of concern, given the network effects that exist between the market for Home Insurance Intermediation Services and the market for Customer Introduction Services: the departure of a significant number of consumers would cause a chain reaction whereby the loss of consumers triggers a loss of home insurance providers willing to quote on the price comparison website, which in turn triggers a further loss of consumers.

(ii) The Hypothetical Monopolist Test seeks to identify substitutes other than the Focal Product, and so hypothesises (in this case) a single, monopolist, price comparison website. The first question that must be asked is whether such a monopolist would itself still price the Home Insurance Intermediation Services at zero. If this would be the case, then one inference that might be drawn is that the competitive pressure from other channels – given the network effects that subsist between the market for Home Insurance Intermediation Services and the market for Customer Introduction Services – is as strong as that coming from other PCWs.

(iii) The other possibility is that the reason for the zero price lies solely in the network effects that subsist between the market for Home Insurance Intermediation Services and the market for Customer Introduction Services. As we have said, in order for a price comparison website to function, there needs to be sufficient consumers on the one side to make the participation of home insurance providers worthwhile, and sufficient home insurance providers to make the participation of consumers

worthwhile. In other words, the viability of both markets depends upon network effects. In this case, it would appear that charging home insurance providers through Commission, but not (overtly) charging consumers for the Home Insurance Intermediation Services they receive is the optimal way in which these particular networks operate, and that remains the case even where a hypothetical monopolist is presumed.[233] In these circumstances, we consider this significant variant on the SSNIP test (and, for the reasons we have given, it is not a SSNIP in the normally understood sense) is the most useful test to apply in the case of a service that would be provided by the hypothetical monopolist for no price. We will leave it to others to state an appropriate acronym and (whilst stressing the difference in the test we are applying) will continue to use the term "SSNIP" hereon.

(iv) This test, as we have stressed, needs to be subject to a particularly careful sense check. Whilst it is important (because context matters) to be conscious that one is considering two-sided markets when conducting an assessment of substitutability,[234] it must be borne in mind that the purpose of imposing a SSNIP test is not to gauge network effects, still less to understand the interrelationship between the Buyers linked by the Platform. The point of imposing a SSNIP on Home Insurance Intermediation Services is (assuming the hypothetical monopolist) to test for substitutes for these Home Insurance Intermediation Services.

(10) Applying this test to the Home Insurance Intermediation Services provided by the hypothetical monopolist, and drawing on the other findings made in the Decision about the use of alternative channels by consumers and their sensitivity to price, we have no doubt that all channels or Interfaces for the purchase of home insurance products constitute substitutes to the Home Insurance Intermediation Services. We consider that a SSNIP imposed in relation to one of these channels – Home Insurance Intermediation Services offered by price comparison websites – given the sensitivity of consumers to price, would render

[233] This is by no means always the case. See, for greater depth of analysis, Evans and Schmalensee, *Matchmakers*, 1st ed (2016), which was also cited in the *Amex* decision considered above.
[234] Again, paragraph 29 above.

the SSNIP uneconomic from the point of view of the hypothetical monopolist, even disregarding any "chain reaction" (as set out in paragraph 144(9)(i)above).[235] Consumers will of course require price information, but other channels provide this. Thus, we consider that a SSNIP would cause sufficient migration of consumers away from Box 2A and to the alternatives set out in Boxes 4, 5, and 6 so as to render the SSNIP unprofitable to our hypothetical monopolist, simply considering the market in which Home Insurance Intermediation Services are sold. Moreover, because these additional channels are part of the relevant market it follows that renewal business is also part of the relevant market.

(8) Postscript: defining markets separately

145. We are very conscious that it was the consensus of all of the economists who gave evidence before us (that is, Dr Niels, Ms Ralston and Dr Walker) that two-sided markets needed to be regarded as a whole, and that network effects could not be disregarded. In particular, all three economists took the view that the markets in this case (that is, using our terminology, the market in which Home Insurance Intermediation Services were provided and the market in which Customer Introduction Services were provided) were most appropriately defined as a single market.

146. The economics literature suggests that two-sided markets can be analysed as either a single market or two separate markets. However, when it comes to market definition, to treat them as a single market runs the risk that the analysis of the degree of substitution will be incomplete, and that a single SSNIP on one side of the market is insufficient to test the competitive constraints on the other. As the Support Study notes, and with which we agree:

> "It is appropriate to look at both market sides regardless of whether a single market or a multi-market approach is chosen."[236]

[235] As we have described, the fact that we are dealing with markets connected by a Multi-Sided Platform, such that reduction in demand on one Platform Linked Market (here the market for Home Insurance Intermediation Services) might very well have an effect on another Platform Linked Market (namely, the market for Customer Introduction Services). When assessing the effect of a SSNIP on substitutability on one market, these adverse network effects must be disregarded.
[236] Box 1, page 51.

147. We consider that, as a general precept, the markets in which the different Focal Products provided by Platforms are sold should always be assessed separately. In this way, an outcome neutral assessment of the true position obtains. We say this for the following reasons:

(1) We agree that network effects exist between the Buyers existing on the various sides of the Platform. It is obvious that such network effects exist, and need to be taken into account. However, given the Framework for the assessment of infringements of the Chapter I Prohibition that we have outlined in paragraph 29 above, they are primarily relevant to the later stage of assessing harmful effects. They are relevant at the "market definition" stage only if (and to the limited extent that) they inform the issue of demand-side substitutability.

(2) Market definition is an important and very useful tool for understanding substitutes to Focal Products. The nature of the demand for the Focal Product supplied to each distinct group of Buyers needs to be understood before entering into the entirely separate question of how the markets in which these Focal Products are sold operate. If one regards the Buyers of different Focal Products as a single group, or elides different Focal Products, an immediate analytic uncertainty is introduced. What are, in fact, separate Products provided to different groups of Buyers are wrongly conflated, and the potential significance of substitute products (which may not or may not all be provided through Platforms) is lost. The present is a case in point. The conclusion that other channels for the sale of home insurance products to consumers do not form part of the market in which Home Insurance Intermediation Services are provided by price comparison websites flies in the face of the findings in the Decision and, given those findings, is perverse.

(3) Once the process of market definition has been undertaken, it is possible to articulate a theory of harm, and to consider the counterfactual.[237] At this stage, depending upon the nature of the theory of harm, effects become relevant. We will – when we come to consider Grounds 3 to 6 – consider how the interrelationship between the markets we have defined affects the theory of harm

[237] I.e., stages (3) and (4) of the Framework set out in paragraph 29 above.

set out by the CMA, and we do not propose to anticipate this. Rather, we will provide a separate, and entirely hypothetical, example as to how effects come into play in the Framework:

(i) Suppose a theory of harm based upon the zero price at which Home Insurance Intermediation Services are sold by price comparison websites. The theory of harm might be articulated as a kind of margin squeeze, where other insurance intermediaries (e.g., brokers as set out in Box 5 of Annex 2) are driven out of the market, because they charge consumers for their services, and price comparison websites do not.

(ii) The argument that this constitutes some kind of infringement and breach of the Chapter I Prohibition could, no doubt, be made out. We say nothing about its prospects of success.

(iii) But, quite clearly, even if an infringement of the Chapter I Prohibition were found, it would in theory be possible to justify the zero price under section 9 of the Competition Act 1998 or Article 101(3) TFEU. The justification would deploy the importance of what would be called positive effects: it would be said that a zero price to customers seeking Home Insurance Intermediation Services was the only way to maintain the Customer Introduction Services Market, and that the viability of the Platform would be prejudiced if zero pricing of Home Insurance Intermediation Services were not permitted. Again, we say nothing about the prospects of this argument – it was not before us – but it is an illustration of how we see effects being relevant to the legal analysis as to whether there is, or is not, an infringement of the Chapter I Prohibition.

(9) Conclusion on Ground 1

148. We conclude that Ground 1 is correct, in that the market definition adopted by the CMA in the Decision is wrong substantially for the reasons articulated by Compare The Market and as we have described in this Section. We have reached this conclusion paying appropriate deference to the CMA's position as an expert regulator that has a

significant margin of appreciation in terms of how it assesses questions of economic analysis or economic fact such as this.

149. That said, we do not consider that Compare The Market's success in relation to Ground 1 necessarily means that the Decision is wrong. Market definition is a tool and the fact that it has been misapplied in this case, whilst this weakens the Decision, does not necessarily mean that the outcome found by the Decision is not correct.

G. GROUND 2: EFFECTIVE COVERAGE

(1) Compare The Market's contentions

(a) Introduction

150. As has been described, the CMA placed some stress, in the Decision, on the fact that this was not a case of a single wMFN, but a case where there were multiple wMFNs, one in each of the wMFN Agreements. The CMA's point was that in considering the effect of wMFNs it would be an error simply to ask whether a single clause had an appreciable effect on competition.

151. In opening, Mr Beard, QC explained that Compare The Market had no issue with a cumulative approach being taken. He illustrated this by reference to the *Langnese* decision.[238] He noted:[239]

> "…for those that have not necessarily enjoyed the long history of competition law, epic fights at a European level, this was all part of a long-running litigation saga about exclusivity in relation to ice creams and whether or not ice cream producers could effectively ensure exclusivity for the provision of their ice creams in particular shops. In other words, that they did not sell any other types of ice cream there.
>
> This was particularly important because, at the time, Mars was seeking to enter the market with its Mars branded ice creams, the Mars Snickers and so on, and it was strongly objecting to the way in which these exclusivity arrangements operated.
>
> So, what a number of the incumbents had done was enter into a series of exclusivity agreements with particular resellers of ice cream. What was being said was that, essentially, when you are considering whether or not Mars is being foreclosed from the market, being made unable to penetrate the market, that you take into account the effect

[238] Case T-7/93, *Langnese-Iglo GmbH v. Commission of the European Communities*, EU:T:1995:99.
[239] Transcript Day 1/pp.130-131 (opening of Mr Beard).

> of that network of agreements. You do not just take into account each individual one and ask whether each individual agreement has an appreciable effect on competition.
>
> What you do is you look at the network of them and that is widely accepted as the correct way to consider issues of foreclosure."

152. Turning to the decision in *Langnese*, the CJEU said exactly that at paragraph 99:

> "As to whether the exclusive purchasing agreements fall within the prohibition contained in Article 85(1) of the Treaty, it is appropriate, according to the case-law, to consider whether, taken together, all the similar agreements entered into in the relevant market and the other features of the economic and legal context of the agreements at issue show that those agreements cumulatively have the effect of denying access to that market for new domestic and foreign competitors…"

153. However, Mr Beard contended that this approach posited that the agreements in question were "implemented and effective".[240] What could not be ignored, he said, were factors suggesting that the network of agreements was not really working or only working to a very limited extent.[241] Thus, paragraph 119 of the Notice states:

> "The Decision errs further in asserting that when assessing effects, the CMA is entitled to rely on the formal terms of the clauses in existence to identify the extent of [Compare The Market's] so-called "network" of agreements containing [wMFNs]. In circumstances where contrary evidence from individual insurers has been provided showing no effect for particular contracts, that cannot be ignored in the determination of the alleged cumulative effect of the "network"."

It was Compare The Market's contention that "it is not the theoretical formal coverage, but the evidence of actual *effective coverage* that requires to be considered".[242]

(b) Determining "effective coverage"

(i) Introduction

154. According to Compare The Market, the process of determining "effective coverage" – as opposed to "formal coverage" – involved a chiselling away at the monolithic network of the 32 wMFN Agreements relied upon by the CMA, so as to produce a far smaller number of agreements, with (inferentially) a far diminished effect when compared to that attributed to the wMFN Agreements by the CMA. In the following paragraphs we

[240] Transcript Day 1/p.132 (opening of Mr Beard).
[241] Transcript Day 1/p.131.
[242] Paragraph 127 of the Notice.

set out the various points that Compare The Market made in relation to "effective coverage".

(ii) Home insurance providers not subject to Wide (or Narrow) Most Favoured Nation Clauses

155. As a preliminary point, Compare The Market stressed that there were a large number of home insurance providers – Direct Line and Hiscox, for example – who did not sell their branded home insurance products via price comparison websites at all.[243] Such home insurance providers would not be bound by wMFNs or nMFNs as regards the Premium charged for these particular home insurance products.

(iii) Network effects of Compare The Market's Wide Most Favoured Nation Clauses

156. Turning then, to those home insurance providers subscribing to Compare The Market's price comparison service:

(1) Around 60 home insurance providers used price comparison websites as an indirect means of selling home insurance products. Of these, around 45 subscribed to Compare The Market's services.[244]

(2) Of these 45, only 32 had a wMFN in their agreement with Compare The Market. The remainder (13 home insurance providers), we assume, did agree to a nMFN. Although we asked,[245] neither party was able to assist as to why some home insurance providers subscribing to Compare The Market were subject to wMFNs and why some were subject to nMFNs. It appears simply to have been a matter of negotiation between Compare The Market and each home insurance provider.

(3) Of the 32 home insurance providers who did agree to be subject to a wMFN, the CMA in the course of their investigations leading up to the Decision did not

[243] Transcript Day 1/p.143-144 (opening of Mr Beard). It is important to understand exactly what is being said here. Taking Direct Line as an example, the "Direct Line" brand is only sold directly and not through price comparison websites. But the home insurance provider that sells Direct Line's products, sells differently branded products through (amongst other channels) price comparison websites.
[244] Transcript Day 1/p.144 (opening of Mr Beard).
[245] Transcript Day 1/pp.144-145 (question to Mr Beard).

make any inquiry of 15. As regards these 15, Mr Beard made the following submission:[246]

> "In any event, in relation to the 32, rather than the other members of the 45 we were just referring to, in relation to the 32, I think it is probably most sensible to start with the 15, where the CMA have no evidence in relation to whether or not those [home insurance providers] took into account, changed their strategy, or did anything to comply with the [wMFNs] that were in their contract[s]. They obtained no information in relation to the 15. 15 of the 32.
>
> Now, the CMA says: "Well, it was entirely proportionate not to make enquiries of 32 insurers". I will leave the Tribunal to make an assessment of the proportionality over a 3-year investigation of gathering evidence from all 32 insurers, but it did not contact 15 of them.
>
> Now, the CMA says that does not matter, because it was not reasonable and proportionate to contact all of them. "We can still keep referring to 32 as part of this network of [wMFNs] in respect of which there was effective coverage". We simply do not accept that is correct. You cannot in circumstances where the burden is on you, as the CMA, to prove that these contractual arrangements had an adverse effect on competition, effectively to presume that these 15 were being affected by the terms of the [wMFNs], you cannot do that. You had to make inquiries of some sort.
>
> Just go back to the very simplest situation: is there doubt about whether or not those [wMFNs] in those 15 home insurer's contracts made any difference to them? Yes, there is obviously an enormous doubt in relation to it, because the CMA gathered no evidence in relation to them."

(4) It was, thus, the essence of Mr Beard's submission, that instead of referring to a network of 32 wMFN Agreements, the CMA should only have referred to a network of 17 wMFN Agreements.[247] As we shall see, Compare The Market contended that this number should be reduced still further, for reasons that we will come to.

(5) Of the 17 remaining home insurance providers subscribing to Compare The Market, the CMA discerned "no observable impact" in relation to six.[248] The Notice observes that "[t]he CMA's own analysis [in the Decision] recognises that many insurers were not influenced by the presence of a [wMFN] in their contract.[249] Paragraph 129.2 of the Notice provides:

> "[The CMA] accepts at Annex L to the Decision that during the Relevant Period the [wMFN] had no "observable impact" in relation to a six further insurers:

[246] Transcript Day 1/pp.145-147 (opening of Mr Beard).
[247] I.e., 32 – 15 = 17.
[248] Transcript Day 1/p/150 (opening of Mr Beard).
[249] Paragraph 129 of the Notice.

> Liverpool Victoria ("LV="), Zurich, Ageas, M&S Bank, Co-op and Allianz. These suppliers represent some eight per cent of [price comparison website] sales in 2017…and again should be excluded from the effective coverage."

Although we are here setting out Compare The Market's contentions, and not the CMA's defence to those contentions, it is helpful here to set out paragraph 120 of the CMA's Defence:

> "[Compare The Market]'s second category comprises six providers on whom the [wMFNs] had no "observable impact". As explained above, however, the absence of an *observable* impact on individual providers' behaviour is not conclusive of whether the network of which their [wMFNs] formed a part had an appreciable effect on competition. All of the providers in question set prices that were generally consistent with their [wMFN] obligations and in some cases there is evidence that their strategies may in fact have been different in the absence of those obligations. Thus, excluding providers from the network on the basis contended for by [Compare The Market] would be wrong and would lead to an incorrect assessment of the competitive effects."

157. Compare The Market's response to this – as expressed in opening by Mr Beard – was that these six providers should be excluded from the "effective coverage" because there was no evidence to support an anti-competitive network effect so far as these six were concerned:[250]

> "Well, we are trapped in the same fallacy. We have no observable impact by reference to these agreements, but so long as we sum them as part of a wider network, then somehow they count towards an appreciable effect.
>
> Now, that maths does not work. None of the case law supports that approach and it does not fundamentally suggest that in relation to these six, the agreements in question were having any effect. If they are not having an effect in relation to these six home insurance providers, then, in those circumstances, there is simply no basis to be counting that towards some kind of overall adverse effect on competition, which is what the CMA needs to prove."

158. Compare The Market identified further categories of home insurance provider (some overlapping with other categories) which, Compare The Market contended, ought to be excluded from the scope of "effective coverage" and which rendered the Decision's repeated reference to the "32 insurers" both wrong, and undermining of the Decision as a whole. Thus, Mr Beard took the Tribunal to evidence which the CMA had used, in the Decision, to support its conclusion of anti-competitive effect, and contended that this material was "tenuous". That may be the case: but it seems to us that (whatever the

[250] Transcript Day 1/pp.150-151 (opening of Mr Beard).

merits of the other points raised) this point goes to the evaluation of the "effects" found by the CMA in the Decision, rather than serving to exclude a particular agreement from consideration altogether.[251]

159. Compare The Market's contentions regarding "effective coverage" were supported by the evidence of Ms Ralston. It is to that evidence that we now turn.

(iv) The evidence of Ms Ralston

160. In Section 5C of Ralston 1, Ms Ralston considered the CMA's reliance (or apparent reliance) in the Decision on the network of 32 wMFN Agreements (or 32 home insurance providers bound by the wMFNs in those wMFN Agreements) and took issue with the CMA's finding or conclusion that "[t]he 32 insurers were unable to quote lower prices on rival PCWs".[252] Ms Ralston's point was that this entirely failed to take into account the fact that "not all insurers adhered to [Compare The Market's] [wMFNs]…".[253] Ms Ralston considered that in the case of any wMFN, "[t]he correct first step in assessing whether insurers would have acted differently absent [Compare The Market's] [wMFNs] is to consider which insurers were *actually influenced* by their [wMFNs]."[254] Ms Ralston's point was that the approach in the Decision was, in essence, circular:[255]

> "…the CMA's own approach appears to be circular:
>
> In its coverage analysis, the CMA refers to its subsequent effects analysis, to support its findings that [Compare The Market's] [wMFNs] had network effects, and that therefore all insurers with [wMFNs] were influenced by their [wMFNs], even if they have stated or behaved otherwise;
>
> However, in its effects analysis, the CMA refers to its findings on market coverage, as one of the reasons [Compare The Market's] [wMFNs] were likely to have had an appreciable effect on competition."

161. In her report, Ms Ralston examined the extent to which the 17 home insurance providers referenced in paragraph 156(4) above were in fact influenced by the wMFNs, looking

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[251] To be fair to Mr Beard, he was addressing not merely Ground 2, but other grounds of appeal at this point: Transcript Day 1/p.143. Mr Beard's analysis of the granular material is at Transcript Day 1/pp.152*ff* and Transcript Day 2/pp.7*ff*.
[252] See, for instance, Decision/§9.4(a). There are other instances throughout the Decision, e.g. at Decision §9.14.
[253] Ralston 1/§5.18.
[254] Ralston 1/§5.20
[255] Ralston 1/§5.21.

at both qualitative and quantitative[256] evidence. Ms Ralston described her process (in general terms) as follows:

> "5.31 In this section, I set out my assessment of the extent to which insurers were influenced by their [wMFNs]. I do so by drawing on the qualitative evidence from the 17 (of the 32) [wMFN] insurers, that the CMA spoke to or requested evidence from, which describe the extent to which the [wMFNs] in their contracts influenced their pricing behaviour.
>
> 5.32 I also analyse the empirical evidence regarding insurers' pricing behaviour (at least, for the 15 of these 17 insurers for whom sufficient data was available) to assess whether this supports their description as to the influence of their [wMFNs]…
>
> 5.33 If the qualitative and empirical evidence, overall, suggests that an insurer was not influenced by its [wMFN] during the Relevant Period, then I consider that it is more informative to exclude that insurer from the market coverage. Where the evidence is mixed, I have taken a conservative approach and included the insurer in the market coverage."

162. Thus, Ms Ralston considered how the various home insurance providers in the network self-described the influence of the wMFNs on their Premiums and market behaviour,[257] taking account of other qualitative factors (like "enforcement" conduct by Compare The Market against that particular home insurance provider),[258] and then "assessed whether the insurer's pricing behaviour is consistent with its qualitative statements".[259]

163. Ms Ralston's overall conclusions on this point as regards all 32[260] Agreements were as follows:

> "5.114 …I have undertaken a detailed analysis to assess the likely influence of the presence of a [wMFN] in each insurer's contract and find that, in 2016, 14 of the 28 active [home insurance providers] with a [wMFN] in their contract (accounting for 10% of the relevant market) were not influenced by it. As such, I consider it more informative to exclude these insurers from an assessment of effective coverage. This granular analysis of the influence of [Compare The Market's] [wMFNs] is particularly relevant in the present case given the ambiguous effects on competition found in the economic literature and the partial nature of market coverage.
>
> 5.115 Of the remaining 14 active [home insurance providers] with [wMFNs] in their contract in 2016, 11 (accounting for 1% of the Relevant Market) were not asked to provide evidence by the CMA. As such it is unclear whether their [wMFNs] influenced their pricing behaviour or not.

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[256] Ms Ralston used the term "empirical", which we take as meaning the same as "quantitative".
[257] Ralston 1/§5.35.
[258] Ralston 1/§5.36.
[259] Ralston 1/§5.37. Ms Ralston applied the three tests more specifically described in Ralston 1/§5.37.
[260] In fact, Ms Ralston only enumerates 31 home insurance providers. We are not sure how the 32nd went missing (it may be to do with time frame) but we do not consider that this discrepancy matters.

> 5.116 Finally, this leaves three insurers (AXA, Aviva and Grove & Dean), accounting for 2% of the Relevant Market in 2016 and 3% in 2017, that I have included on a conservative basis."

164. Ms Ralston was cross-examined on her report as regards "effective coverage".[261] As to this:

(1) Ms Ralston readily accepted that her assessment was based on a mixture of both qualitative and quantitative evidence.[262] She also accepted that her classification was non-duplicative: Ms Ralston only classified a home insurance provider once, either as within or without the "effective coverage".[263] Essentially, Ms Ralston examined the pricing data available in relation to each home insurance provider[264] and then considered this in light of the qualitative information available to her, so as to reach a conclusion about "effective coverage".

(2) Ms Ralston considered that, even without conducting a counterfactual evaluation, it was possible to say that the behaviour of certain home insurance providers would not have been different, even if (in accordance with the counterfactual assumption) there was no wMFN in the agreement that particular home insurance provider had with Compare The Market. It was possible to exclude certain home insurance providers from the "effective coverage" simply by using Ms Ralston's econometric (or empirical or quantitative) analysis as regards that single home insurance provider:[265]

> **Q: Ms Demetriou** To be clear about this, what you are doing with test 2, constraint test 1, is you are observing the real world behaviour of the [home insurance provider] in question during the Relevant Period. Yes?

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[261] Transcript Day 8/pp.11*ff*.
[262] Transcript Day 8/p.12
[263] Transcript Day 8/p.14. Ms Ralston's process was, in fact, rather more complex than this, involving an assessment of the home insurance provider's conduct by reference to one or more of three criteria. This is detail that we do not set out in this Judgment.
[264] As Ms Ralston explained, her analysis "is very transparent and shows every month of behaviour. So we can immediately see if there are any changes in behaviour, so whilst I cannot rule various possibilities out, you could start to see some patterns. So, if you have a hypothesis that [Compare The Market] had done something, you could look at the data and say does that match my hypothesis?": Day 8/p.21. Ms Ralston's data source was an analytics company known as Consumer Intelligence, which the CMA did not consider reliable (and which Ms Ralston disputed) (Day 8/p.23)). As we understand it, Consumer Intelligence acts as a "dummy" consumer, seeking multiple quotations for home insurance products on the same terms through different channels, and then compares the Premium quotes produced. Ralston 1/Section 7B.
[265] Transcript/Day 8 pp.17*ff*.

A: Ms Ralston Yes.

Q: Ms Demetriou So you are not drawing or you cannot draw any conclusion from that data as to whether that behaviour might have been different in the counterfactual, can you?

A: Ms Ralston I think you can. I think this is part of the picture. The theories of harm about [wMFNs] revolve around them creating a relative price restriction between the [price comparison website] so that the insurer wants to reward another [price comparison website] who has offered lower commissions, for example, by discounting on that other [price comparison website], and so this is – but the [wMFN] is, you know, creating this relative price restriction, but if we are seeing that the insurers are pricing materially cheaper on [Compare The Market] or strictly cheaper, not up to this price restriction, this price floor or price ceiling, I can infer that they are – especially when they have made statements to the effect that they did not care for the [wMFN] or it had no impact, I think it is reasonable to infer that they would not have behaved differently in the counterfactual where there was no [wMFN].

Q: Ms Demetriou Okay, so what you are drawing on, you are making inferences based on their actual pricing behaviour and on what they have said and on theories of harm, yes, you are making inferences from those three strands, that is what you have just said?

A: Ms Ralston Yes.

Q: Ms Demetriou But let me put to you a more specific question. Let us assume that in a counterfactual world without any [wMFN] there was more vigorous price competition, yes, so we are assuming that, and it is possible in principle, is it not, that a [home insurance provider] which you see in the real world pricing more cheaply on [Compare The Market] might not have priced more cheaply on [Compare the Market] because other [price comparison websites] in that counterfactual world were able to compete more effectively by offering lower commission fees. That is possible, is it not?

A: Ms Ralston This is my first step of analysis. It is looking at whether there is a direct influence. I look for broader effects in the effects analysis.

Q: Ms Demetriou I know, we are going to come to that. I just want to at the moment look at this strand. What I am establishing at the moment is by looking at the pricing information alone you cannot reach robust conclusions as to what would have happened in the counterfactual, and in fact observing that [Compare The Market] is pricing more cheaply may be reflective of the softening of competition found by the CMA, no?

A: Ms Ralston I do not see why an insurer [pricing] more cheaply on [Compare The Market] is consistent with any softening of competition.

Q: Ms Demetriou Well, Ms Ralston, relative to a counterfactual world in which without [wMFNs] there was more vigorous price competition, and the other [price comparison websites] were able more easily to compete on price. In those circumstances, they may have competed more effectively and what you may have seen is something different.

A: Ms Ralston No, because then they would be pricing at the limit, and they would not choose to – the insurer on [Compare The Market] would not choose to price more cheaply on [Compare The Market]. It would be wanting, as you have just explained, to offer lower prices on the other [price comparison websites].

Q: Ms Demetriou It may be that the other [price comparison websites] in this real world are not able to compete very effectively, which is why [Compare The Market] would steal a march, but had they been able to compete more effectively in a world without the [wMFNs] they may have come in much lower, so then you would have seen a different picture. That is possible, is it not, Ms Ralston? But you are drawing on all three strands of evidence, as you say, to make inferences. The point I put to you, observing the data, that is possible, is it not?

A: Ms Ralston It is possible.

(3) An understanding of Ms Ralston's approach can be gleaned from an example in Annex 4 to her report, regarding Ageas, a home insurance provider subscribing to Compare The Market:

> "A4.33 Ageas' pricing behaviour was inconsistent with its [wMFN], at least in certain months. As shown in the figures below, Ageas does not appear to have priced consistently with its [wMFN], at least for portions of the Relevant Period. As set out in the figures below, for three of the 12 months for which there is sufficient data to analyse, Ageas priced more than 50% of risks more expensively on [Compare The Market] relative to Confused, and more than 25% of risks more expensively on [Compare The Market] relative to GoCompare.
>
> A4.34 The CMA acknowledges that Ageas states that it was not influenced by its [wMFN]:
>
> > Ageas stated that it has never sought to adhere to [Compare The Market's] [Wide Most Favoured Nation Clause] and told the CMA it had "verbally communicated to [Compare The Market] on or around the date of the [PMI] Order that it did not consider any [wMFNs] in contracts between the parties to be effective.
>
> A4.35 Nevertheless, the CMA includes Ageas in its calculation of market coverage on the basis that, "despite Ageas's views", the clause was **"binding"** on Ageas throughout the Relevant Period" (emphasis added). This is not the case. As summarised above, my pricing analysis shows that Ageas did not always price in a

way that was consistent with its [wMFN] and, as such, its [wMFN] cannot be said to have been binding on Ageas.

A4.36 Overall, taking the qualitative and empirical evidence together, I consider it more informative to exclude Ageas from the assessment of effective coverage."

(4) There are a number of difficulties with this approach, which it is appropriate to touch upon now, but which we will expand upon when determining this ground of appeal:

(i) In the first place, the questions Ms Ralston was asked to deal with – "Is a given home insurance provider "in" or "out" for the purposes of "effective coverage"" – come dangerously close to the expert expressing a final view on a matter that is actually one for the Tribunal. The key question – to which we will return – is what is meant by "excluding" a home insurance provider "from the assessment of effective coverage".

(ii) Secondly, and relatedly, such an approach would mean that instead of being able to factor in qualitative points, like a given home insurance provider behaving inconsistently with a wMFN, the "exclusion" of a particular home insurance provider means that the circumstances concerning that particular home insurance provider are removed from consideration altogether.

(iii) Thirdly, obliging Ms Ralston to base her conclusions on qualitative assessments placed her – as an expert – in a very difficult position.[266] At the end of the day, the weight to be attached to qualitative evidence must be for the Tribunal, unintermediated by expert opinion. (Matters are very different, of course, where the point is a quantitative one: on matters of econometric analysis the Tribunal is greatly assisted by, and welcomes, expert evidence.) The difficulties Ms Ralston was labouring under emerge in the following exchange:[267]

[266] See, for example, the cross-examination of Ms Ralston at Day 8/pp.55 to 64*ff* (on Ageas) and at Day 8/pp.64*ff* (on OneCall). As regards OneCall, it is very clear from the cross-examination of Ms Ralston (e.g., Day 8/pp.71*ff*) that giving weight to the qualitative evidence was a difficult matter for an expert economist to undertake.
[267] Transcript Day 8/pp.76*ff*

Q: The President Ms Ralston…[y]ou have a variety of sources of data. You have your econometric analysis?

A: Ms Ralston Yes.

Q: The President You also have the statements by the participants in the market as to what they did or thought they were doing at the time?

A: Ms Ralston Yes.

Q: The President When these point in the same direction, no problem, you can reach a conclusion because all of the evidence is pointing in the same direction. The problem arises when you have the evidence pointing in different directions, as here.

Would it be fair to say that your approach is to accord primacy to the data that you have mined over the more general, anecdotal, statements, as you might characterise them, of the market participants, as simply your view as an expert of the weight that is to be accorded to these divergent pieces of evidence?

A: Ms Ralston Two or three years ago, I would have just agreed. I have spent more and more time on this case, reading more and more of the factual evidence, so I would not put hierarchy there in a general statement. I have explained with OneCall why I have put more or less weight on different statements, but I do not think I would make a sweeping statement that I generally disregarded the factual evidence.

Q: The President I would not go so far as to say "disregard". I was really trying to work out the weight you are according to these things?

A: Ms Ralston I would put more weight on the empirical stuff in the round, yes.

Q: The President This may be a question you just cannot answer, because memory is a difficult thing, but have, to your recollection, there been any cases where you have disregarded the data in favour of the statements of a market participant, in other words where you have inconsistency, but you have gone with the…

A: Ms Ralston I cannot recall that, so perhaps that is a fair approach. Fair description of my approach.

(iv) Fourthly, and finally, Ms Ralston did not take into account the fact that the wMFNs in the wMFN Agreements were <u>legally binding</u> obligations on the home insurance providers party to them. We will return to the

question of whether a legally binding obligation that is disregarded can constitute an "effect" in due course.[268] We would only say, at this stage, that it seems to us far from self-evident that the existence of such an obligation can be discounted.

(5) These are all concerns, which we will return to, regarding Ms Ralston's evidence on this point. We would only wish to add – because Ms Ralston gave her evidence carefully, clearly and with every desire to assist the Tribunal – that to the extent these concerns amount to criticisms, they are criticisms of the questions that Ms Ralston was asked to address in her report, rather than criticisms of her approach as an expert witness.

(2) The findings in the Decision

165. Section 8 of the Decision is entitled "CTM's use of Wide MFNs". The Decision finds, in Section 8, that the wMFNs in the wMFN Agreements adversely affected the nature of the competition described in Section 7.[269] The conclusions in the Decision are stated at Decision/§8.2:

> "The CMA finds that:
>
> (a) [Compare The Market's] [wMFNs] prevented the relevant providers from quoting lower prices on [Compare The Market's] rival [price comparison websites] and [Compare The Market] was therefore protected, as a matter of contract, from being undercut by the prices they offered on other [price comparison websites]…
>
> (b) [Compare The Market's] [wMFNs] were integral to [Compare The Market's] competitive strategy in home insurance and effective in achieving its objectives, and [Compare The Market] behaved accordingly. [Compare The Market] believed that, in the absence of its network of [wMFNs], it would be subject to greater price competition, increasing pressure on commission fees and reducing profits…
>
> (c) Providers had strong incentives to comply with [Compare The Market's] [wMFNs]. In addition to providers taking their contractual obligations seriously, [Compare The Market] was an important source of new business and it communicated to providers the importance it placed on compliance, including by monitoring and enforcing its [wMFNs]…
>
> (d) There was widespread compliance by home insurance providers with [Compare The Market's] [wMFNs] during the Relevant Period. Most home insurance providers adopted pricing strategies that were consistent with [Compare The Market's] [wMFNs]

[268] Ms Ralston was cross-examined on the question of consistency of rule-breaking (but not the importance of the rule itself, whether broken or not) at Day 8/pp.62-63.
[269] The substance of which we have considered in Section E above.

> and, in particular, providers accounting for a significant proportion of sales on [Price Comparison Websites] specifically took into account [Compare The Market's] [wMFN] in determining their pricing strategies.
>
> (e) [Compare The Market] systematically monitored providers' pricing on other [price comparison websites] and escalated its enforcement process to resolve non-compliance with its [wMFNs], including against both large providers and small providers…
>
> (f) [Compare The Market's] network of [wMFNs] covered home insurance providers accounting for over 40% of home insurance policies sold through [Compare The Market] and approximately 40% of home insurance policies sold through the [price comparison websites] in 2016 and 2017…"

Although Section 8 runs to some 83 pages, there is no need to expand upon these conclusions, which are repeated at Decision/§8.195.

166. Section 8 describes how the wMFN Agreements were effective in the market, in the sense that a material number of persons were bound by them, and complied with them; and that Compare The Market attached importance to its counterparties abiding by their contractual obligations.

(3) Discussion and disposition of Ground 2

167. By the time of closing submissions, it was not clear to us how far Compare The Market was pressing Ground 2 of its Notice as a separate, self-standing, ground of appeal. In paragraph 122 of Compare The Market's written closing submissions, it was said that "Grounds 2, 5 and 6 can be seen together as challenges to the CMA's use of so-called "qualitative" evidence. Grounds 3 and 4 concern the use and relevance of economic evidence which the Decision (and the CMA in its pleadings) says should be entirely ignored".

168. We propose to consider the evidence as to "effects" generally in Section H below and – to be clear – will consider the significance (if any) of Ms Ralston's assessment of the extent to which individual home insurance providers bound by Compare The Market's wMFNs were in fact influenced by those provisions.

169. If Ground 2, properly understood, was merely an attack on the qualitative evidence relied upon by the CMA, then we would (and will to the extent necessary) consider that when ascertaining whether the CMA has found sufficient anti-competitive effects to

justify the Decision. We consider – at least as pleaded and as presented in opening – that Ground 2 goes beyond such a limited attack. As pleaded, the appeal asserts that certain insurers "should be excluded from the effective coverage".[270] That point was continued by Mr Beard in opening,[271] and in Ms Ralston's evidence, where again she repeatedly said in Ralston 1 that certain home insurance providers should be excluded "from the assessment of effective coverage".

170. We refer to the Framework of analysis set out in paragraph 29 above. We read Ground 2 as a contention that the relevant agreements for consideration at the first stage of inquiry – identifying the relevant agreement or provision – are not the wMFNs in the 32 wMFN Agreements, but a much lesser number. That is how the CMA understood the position also.[272] We do not consider that Ground 2 can sensibly be read as a stylistic objection to the manner in which the Decision is expressed. What Ground 2 is suggesting is a binary "in" / "out" in relation to each relevant home insurance provider, with a preponderance of home insurance providers being "out" rather than "in".

171. We regard such a proposition as untenable, for the following reasons:

(1) Having identified wMFNs as the provisions said to constitute a restriction of competition, we consider that the CMA was entirely right and justified in considering collectively all of the wMFNs in all of the wMFN Agreements, without (as a pre-condition to its analysis) parsing each wMFN Agreement to determine whether, viewed individually, any given wMFN in and of itself constituted a restriction of competition.

(2) Of course, we are not saying that the setting of Premiums (whether by way of quotation or final agreement) by individual home insurance providers is irrelevant. We will – as we have already stated – pay due regard to Ms Ralston's individuated analysis in due course. But to use that individuated analysis as the basis for excluding a particular home insurance provider altogether from the analysis is completely to miss the point. We doubt very much whether such a course would be defensible in the case of any generic clause (i.e., one used in

[270] See, purely by way of example, paragraphs 129.1 and 129.2 of the Notice.
[271] See paragraph 153 above.
[272] See paragraph 271 of the CMA's written closing submissions.

multiple agreements between an alleged infringer and its counterparties), but it is particularly so in the case of wMFNs. That is because wMFNs are intended to have some network effect. More specifically:

(i) The point of a wMFN is to prevent *Insurer A* from setting its Premiums lower than they appear on *Price Comparison Website Z*. This has effects both in relation to *Insurer A*'s pricing on its direct channels, but also in relation to *Insurer A*'s pricing on *Price Comparison Websites X* and *Y*. Thus, a single wMFN may have effects on multiple other parties, apart from simply *Insurer A* and *Price Comparison Website Z*.

(ii) The network effects are increased where *Price Comparison Website Z* concludes wMFNs not just with *Insurer A*, but with *Insurers B*, *C* and *D* also.

(iii) Further, the larger the proportion of insurers who are subject to a wMFN, the greater the potential impact of their pricing behaviour on that of insurers who are not themselves bound by a wMFN.

An individuated assessment of the pricing behaviour of individual home insurance providers runs the risk of missing these effects, and this, we consider, is the point Ms Demetriou was putting to Ms Ralston in the passage quoted in paragraph 164(2) above. The point was also made (differently, but to similar effect) by Professor Ulph during the course of Ms Demetriou's oral opening:[273]

> **Q: Professor Ulph** I just want to make sure I understand the nature of this network argument. The way I think about it is that if there is a network of agreements in place, we think about it in the current context and we think that the effect on competition is: well, that is going to produce some kind of uniform pricing effect, it may well be the case that any one given [home insurance provider], the agreement it has with [Compare The Market], it just waves its hands and says: I am going to ignore that agreement. I am going to price how I want.
>
> So, the network argument, as I understand it, is that if all the other [home insurance providers] are complying with their agreements and are pricing uniformly, because that is the best competitive response to the fact that everybody else is pricing

[273] Transcript Day 2/pp.171*ff*.

uniformly, even though its own individual agreement is not determining its behaviour.

Is that the essential case that you are arguing? Is that what you mean by the network effect?

A: Ms Demetriou Yes. Exactly. Yes, I am very grateful for that intervention, Professor Ulph. So we agree with that and we think – I am making two points on the network. I am making a legal point, which is the one I am on at the moment, but there are two complementary points.

The legal point is that the cases do not require a competition authority…so, where a competition authority has found that there is a network of similar agreements, that cumulatively have an effect on competition, it is not required to examine every single one of those agreements to work out whether or not there was compliance for the whole period. So that is not how the law has proceeded.

The second point I am making is that there is a good reason for that and the reason follows – is consistent with respect with the point that you have just put to me – which is that even if a particular counterparty, in this case, a [home insurance provider], says: well, we did not actually think that this agreement made any difference to us, you cannot conclude from that that it had - that the network effect was reduced. You just simply cannot do that, it is not evidentially robust to do that.

I am going to come back to that point when we are looking at the decision.

So there is a legal point and also a point of – an evidential point, as it were.

Of course, we say nothing, at this stage, about the evidence of such network effects. All we are saying is that an individuated exclusionary approach is not justified on the facts of this case.

(3) We would also sound a general note of caution about using the fact that there is non-compliance with a provision in an agreement by a given party as a basis for suggesting that such non-compliance means that there can be no anti-competitive effects. Contracts are made to be followed, and in our judgment competition law should be slow to dismiss as ineffective, and so irrelevant to an effects analysis, what are binding obligations that are – at the very least – <u>capable</u> of being enforced.

172. As we have noted, matters had moved on by the time of closing submissions. Thus, paragraph 221 of Compare The Market's written closing submissions states:

> "[Compare The Market] makes two key points in relation to coverage:
>
> (a) First, the fact that where similar agreements operate in the same way, they should be considered cumulatively, does not mean you assume that all such agreements were complied with or affected parties' actions.
>
> (b) Second, coverage is only a starting point for the assessment of the counterfactual not an end in itself. Thus, the Decision's repeated references to "32 [home insurance providers]" as if there were blanket coverage, is not a proper basis for any conclusions or inferences to be drawn in relation to the counterfactual in circumstances where there is other evidence of the causative effect (or lack of it) in relation to the [wMFNs]."

We do not dissent from this. Indeed, there is much to agree with. But this paragraph does not express the pleaded substance of Ground 2.

173. Both parties relied on the following statement by the President during the course of opening submissions:[274]

> "I just want to ensure that there are not any sort of straw figures being set up because I think my understanding of the debate between the two is that we end up somewhere in the middle. I mean, if Mr Beard was running the argument that you look in a granular way at each [home insurance provider] and say you have not established your case on effect in relation to this [home insurance provider], therefore we put a line through it and just disregard it and we can go through them on a sort of one-by-one basis and knock them out and the network that you can argue from is what is left, I do not think I would be particularly sympathetic to that sort of argument. But, equally, if the CMA came with the investigation into one [home insurance provider] and said: We looked at this one [home insurance provider], they told us this, we can extrapolate from this one example the network and how it works in the market…I think you would be getting a similarly cool response from us. So, is it not a question of looking at the thing in the round and seeing what the network is in light of all the evidence?"

174. Having considered the manner in which the Notice is framed, we have concluded that Ground 2 does amount to a contention that a line should be put through a number of wMFN Agreements or home insurance providers subject to wMFNs for the purposes of considering anti-competitive effects. That being the case, for the reasons we have given, we are very unsympathetic to the argument, which we consider to be clearly wrong. Accordingly, Ground 2 is dismissed.

175. As we have observed, there was some back-tracking by Compare The Market in relation to this ground of appeal, and we consider that the statement set out in paragraph 173

[274] Transcript Day 2/p.177.

represented a statement of approach that both parties were happy with[275] and is one that we will adopt when considering the anti-competitive effects of the Agreements in this case.

H. GROUNDS 3 TO 6: NO BASIS FOR AN "EFFECTS" CONCLUSION

(1) Introduction

176. Paragraph 122 of Compare The Market's written closing submissions suggests that Grounds 3 to 6 are closely related. The preceding paragraph (paragraph 121) says this:

> "Grounds 2-6 of the [Notice] challenge the CMA's finding of an effects-based infringement in a number of ways. In essence, all of them are looking at different facets of the CMA's failure to discharge the burden of proof to show that there is an appreciable effect on competition:
>
> (a) Ground 2 criticises the repeated use of a homogenous approach to coverage for the purposes of an effects assessment in the face of evidence that in fact the effective coverage of the clauses, i.e., the extent to which they had a causative impact on the behaviour of [home insurance providers] is plainly overstated.
>
> (b) Grounds 3 and 4 set out why econometric analysis in relation to retail pricing, commissions and, as sub-species of effects on pricing, [promotional deals], is both meaningful and helpful in trying to understand whether there is an appreciable adverse effect on competition.
>
> (c) Grounds 5 and 6 consider whether the counterfactual assessment by the CMA had a proper evidential basis and proved causation of an appreciable adverse effect. In doing so, they identify a number of key errors in the CMA's approach."

177. We agree that Grounds 3 to 6 are sufficiently closely related and thus may be considered in this single (albeit rather long) section. We have – for the reasons we have given – dismissed Ground 2, but to the extent Ground 2 disclosed evidence relevant to Grounds 3 to 6, we take it into account here.

178. Our approach is as follows:

(1) In Section H(2) below, we set out the anti-competitive effects found in the Decision. We have done so in summary form earlier in this Judgment: it is now appropriate to set out these findings in a little greater detail.

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[275] The passage is quoted favourably by both Compare The Market (paragraph 222 of its written closing submissions) and the CMA (paragraph 273 of its written closing submissions).

(2) In Section H(3) below, we identify and unpack the Decision's theory of harm. We do so in particular in light of the different market definition that we have adopted. The different market definition means that the theory of harm adopted in the Decision focuses incompletely on matters that are relevant because of the way we have defined the market. It is necessary to bear this in mind when considering the implications of Compare The Market's success in relation to Ground 1. The fact is that Ground 1 has succeeded to the extent that we consider that the market definition found in the Decision is materially wrong; but Ground 1 has failed, in that we decline to allow the appeal on the basis of Ground 1 alone. But the fact that we have not concluded that the Decision should be set aside on the basis of Ground 1 alone should not blind us to the significance of our conclusions when considering the later stages in the sequence of the Framework.

(3) As we have stated, this is an infringement "by effect" case, and not an infringement "by object" case. As will become clear, a great deal of what is said in the Decision to justify the findings of "by effect" infringements operates at the level of theory, supplemented largely by qualitative materials. We will consider the sufficiency of this evidence later. Section H(4) below addresses a number of points necessary to bear in mind when considering the fact that this is a "by effect" and not a "by object" case.

(4) Section H(5) considers the implications of the CMA's repeated contention that it was not, in the Decision, under any obligation to quantify the extent of any anti-competitive effect found.

(5) Section H(6) considers, in general terms, the evidence relied upon, and not relied upon, by the CMA in the Decision. This is a necessarily long section, for the approach of the CMA was to focus on qualitative evidence rather than quantitative evidence, whereas the approach of Compare The Market was the reverse. Furthermore, Compare The Market made a number of quite fundamental criticisms of the evidence adduced by the CMA, which it is necessary to address.

(6) Although the Decision differentiates between a general effect on Commission and Premium levels caused by wMFN and the effect of wMFNs on promotional discounts, the Decision's conclusions as to anti-competitive effect elide the conclusions reached in respect of what are, in our judgment, very different effects. We consider that it is necessary to differentiate between effects on Commission and Premium levels generally and effects on promotional discounts. The nature of this distinction is set out in Section H(7) below. Section H(8) then deals specifically with the effects of wMFNs on Premium and Commission levels and Section H(9) (whilst taking into account our conclusions on the effect of wMFNs on the general level of Premiums and Commissions in Section H(8)) deals specifically with promotional discounts.

(2) The Decision's findings

(a) Introduction

179. We have summarised the anti-competitive effects found by the CMA in paragraph 25 above. To recap, the CMA found that the wMFN Agreements had the appreciable effect of preventing, restricting or distorting competition by:

(1) Reducing price competition between price comparison websites.

(2) Restricting the ability of Compare The Market's rival price comparison websites to expand, enabling Compare The Market to maintain or strengthen its market power.

(3) Reducing price competition between home insurers competing on price comparison websites.

180. The CMA must show that if the wMFN Agreements did not exist in the relevant markets – as considered above – the competitive position would appreciably be improved in these respects. We appreciate that we are holding the CMA to a market definition the CMA has not adopted or promulgated. That is the price that the CMA pays for Compare The Market's success on Ground 1. We have been obliged to remake the finding of market definition, in order properly to consider Grounds 3 to 6. The alternative would

be to allow Grounds 3 to 6 without further consideration, because the CMA would have failed to establish any anti-competitive effects, given its failed definition of the market.

(b) The counterfactual situation

181. It is important to stress that the counterfactual situation considered in the Decision postulates the absence of the wMFN Agreements, but not the absence of nMFNs. The Decision states:[276]

> "…the CMA finds that it is likely and realistic that providers subject to [Compare The Market's] [wMFNs] would have had only [nMFNs] in their contracts with [Compare The Market] in the counterfactual. Accordingly, the key difference between the Relevant Period and in the counterfactual is that in the counterfactual no home insurance provider would be contractually prevented from quoting lower prices on rival [price comparison websites] than on [Compare The Market]."

(c) Findings

(i) Introduction

182. On repeated occasions, the Decision states that the "CMA has assessed what is likely to have happened in the absence of [Compare The Market's] [wMFNs]".[277] That assessment is set out in Section 9 of the Decision, which – drawing upon Section 7 (entitled "Nature of Competition" and described in Sections B and E above) and Section 8 (entitled "CTM's Use of Wide MFNs" and described in Section G above) – sets out the Decision's findings as to "The Appreciable Effects of CTM's wide MFNs".

183. The Section finds that the wMFN Agreements had five anti-competitive effects. They are summarised in Decision/§9.4. We consider them in turn below.

*(ii) **Anti-competitive Effect 1**: Reduction in home insurance providers' incentives to lower prices, including by way of promotional deals*

184. Decision/§9.4(a) finds that the home insurance providers, who were Compare The Market's counterparties to the wMFN Agreements, were unable to quote lower prices (for the same business) on Compare The Market's rival price comparison websites. If,

[276] Decision/§6.2.
[277] See, for example, Decision/§6.4.

on any given rival price comparison website, a home insurance provider reduced the Premiums offered, whether by an actual reduction in price or by way of promotion, then an equivalent price reduction had to be funded on Compare The Market. This reduced home insurance providers' incentives to lower their prices.

185. The anti-competitive effect found in our view, therefore, can be characterised as the absence of a downward pressure on Premiums set by home insurance providers on price comparison websites.

(iii) ***Anti-competitive Effect 2****: Reduction in rival price comparison websites' incentives to lower their Commissions charged to home insurance providers*

186. Decision/§9.4(b) finds as follows:

> "[Compare The Market's] rival [price comparison websites] were prevented from gaining a competitive advantage over [Compare The Market] for quotes from the 32 [counterparties to the wMFN Agreements] (unless an insurer was willing to take the risk of breaching its [wMFN]). [Compare The Market's] rivals therefore had reduced incentives to lower their commission fees or otherwise seek to incentivise the 32 insurers to offer them lower prices."

187. Whereas Anti-competitive Effect 1 focuses on home insurance providers' incentives to lower Premiums,[278] Anti-competitive Effect 2 focuses on the incentives as they operated on competing price comparison websites. As we have described, the Commissions charged by price comparison websites are substantial.[279] Price comparison websites might be inclined to take a "hit" on Commission, reducing it, if that enabled them to offer better Premiums on their website, for – as has been described – consumers will be attracted to price comparison websites offering the lowest Premiums. If the benefit of a reduction in Premium to any given price comparison website will (by virtue of the wMFN Agreements) inevitably be conferred on Compare The Market, then such price comparison websites would have less incentive to take a "hit" on Commission to effect a reduction in Premium.

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[278] Save where the contrary is stated, when we refer to a lowering of Premiums, we are saying nothing about whether this was by way of promotional deal or more permanent reduction. We are simply considering a lowering of the Premium, howsoever effected, and whatever the duration.

[279] The CMA found that commission fees account for 35% of home insurance retail prices on PCWs on average: Decision/§5.28.

188. This anti-competitive effect therefore entails a two-fold and related set of effects. In order to reduce Premiums, Commission rates might be forced down. In our view, the Decision therefore records a related effect of an absence of a downward pressure on Commissions and a related absence of a downward pressure on Premiums, both of which are linked.

(iv) ***Anti-competitive Effect 3****: Insulating Compare The Market from competition*

189. Decision/§9.4(c) finds as follows:

> "[Compare The Market] relied primarily on its network of [wMFNs] to ensure it had the lowest prices from the 32 insurers, rather than competing on the merits with other [price comparison websites] for such prices. [Compare The Market] typically benefitted from any reduction in retail prices achieved by its rivals, without the need to lower its own commission fees or provide some other benefit to the insurers. In addition, [Compare The Market] was able to increase its commission fees without the insurers covered by its [wMFNs] being able to fully reflect that increase in the prices they quoted on [Compare The Market] compared to the prices quoted on other [price comparison websites]. By contrast, absent [Compare The Market's] network of [wMFNs], [Compare The Market] would have increased incentives to compete more strongly against rival [price comparison websites] to secure lower quotes from the 32 insurers, including by lowering its commission fees."

190. This amounts to a finding that the wMFN Agreements had the effect of partially insulating Compare The Market from competition from its rival price comparison websites, with the result that Compare The Market had less incentive to take a "hit" on Commission, so as to reduce the Premiums it could offer.

191. To this extent, Anti-competitive Effect 3 is the "flip-side" of Anti-competitive Effect 2 (and Anti-competitive Effect 1). However, the first sentence of Decision/§9.4(c) contains something of a *non sequitur* in so far as it states that Compare The Market did not compete on the merits with its rivals, rather it relied on wMFNs. It is not founded in self-standing evidence recorded in the Decision (i.e., that Compare The Market did not compete hard), and was a conclusion strenuously resisted by Compare The Market in its submissions to us.

192. Equally, the suggestion that an increase in Compare The Market's Commission precluded home insurance providers from being able to fully reflect that increase in the prices they quoted on Compare The Market compared to the prices quoted on other price comparison websites makes assumptions as to how home insurance providers pass on

their costs. We see no reason why home insurance providers would necessarily seek to recover this particular cost from a specific class of policy, namely those concluded with Compare The Market.[280]

193. In substance, however, and subject to these qualifications, the anti-competitive effect found in the Decision is, again, in our view may be characterised as the absence of a downward pressure on Premiums and Commissions.

(v) ***Anti-competitive Effect 4****: Inability of rival price comparison websites to expand*

194. Decision §9.4(d) finds:

> "[Compare The Market's] rival [price comparison websites] were restricted in their ability to expand because they were unable to secure a price advantage over [Compare The Market] from the 32 insurers. [Compare The Market] was therefore able to use its network of [wMFNs] to maintain or strengthen its market power."

195. In this instance, the anti-competitive effect is an adverse pressure on rival price comparison websites such that they did not or could not expand in the manner they would have done absent the advantages that the wMFNs conferred on Compare The Market.

196. Anti-competitive Effect 4 appears to be a consequence of Anti-competitive Effects 1, 2 and 3. The Decision does not identify specific evidence or make specific findings in relation to this effect, and it seems to us that it stands or falls depending on the outcomes of our consideration of Anti-competitive Effects 1, 2 and 3. In short, we regard Anti-competitive Effect 4 as "parasitic" on these anterior effects. We will not, therefore, consider it separately in this Judgment.

(vi) ***Anti-competitive Effect 5****: Effect on home insurance providers subscribing to price comparison websites generally*

197. Decision §9.4(e) finds:

[280] Thus, costs may be recovered through Premium charged irrespective of channel or even from Premiums charged in relation to an entirely different class of business (e.g., travel insurance or motor insurance).

> "Because the 32 insurers competed less strongly on price, other [home insurance] providers were subject to less competitive pressure and therefore competition on retail prices between all insurers competing on [price comparison websites] was reduced."

198. This anti-competitive effect is consequential on the others: because the home insurance providers who were counterparty to the wMFN Agreements – and also the rival price comparison websites to whom these home insurance providers subscribed – were not sufficiently incentivised to reduce Premiums or cause them to be reduced, competitive pressure on other market participants was itself attenuated. The anti-competitive effect, in our view, may be characterised as the absence of a downward pressure on Premiums across all home insurance providers subscribing to price comparison websites, irrespective of whether they were party to wMFNs.

(3) The Decision's theory of harm

199. Given that we have adopted a significantly different market definition to that adopted in the Decision, it is appropriate that we frame the theory of harm – that we understand the Decision to be putting forward – in light of that market definition. The counterfactual that we are considering is the case where none of the wMFNs were present in the wMFN Agreements, and that they were replaced by nMFNs. In these circumstances:

(1) The key – indeed, the only – constraint which home insurance providers subscribing to Compare The Market would have been released from was the inability to price lower on other price comparison websites subscribed to. Thus, in the counterfactual case, the same product could be priced differently across multiple platforms (subject to the nMFN), whereas in the actual case, whilst there could be some price differentiation, the lowest price offered on any platform would also have to be offered to Compare The Market.

(2) As a result – according to the reasoning in the Decision – in the counterfactual, home insurance providers subscribing to Compare The Market would be able to offer lower prices on other rival price comparison websites, and this would drive prices down (or at least be an influence in this direction) across the sales of home insurance products via price comparison websites and – again according to the Decision – across the market for the sale of home insurance products generally.

(3) Furthermore, because home insurance providers would be freed from this constraint, both they and the price comparison websites to which they subscribed would have further incentives to agree "bespoke" or "one off" deals, whereby a price comparison website agreed to take a "hit" on Commission, in return for more advantageous Premiums offered to that price comparison website alone. This would result in downward pressure on Commissions, and further or additional downward pressure on Premiums. It may be that this sort of "bespoke" or "one off" deal would most often be reflected in limited promotional discounts agreed between a home insurance provider and a price comparison website, but we do not consider the Decision's theory of harm to be so limited.

(4) As a result, it would have been possible for price comparison websites to compete more effectively against Compare The Market and (as we have already noted) there would have been a general downward effect on Premiums.

200. This, we consider, is the theory of harm resulting in the effects alleged by the CMA, which it must prove before us – the burden being on it – on the balance of probabilities.

201. There are further points – which militate against the probability of the theory of harm – that we should articulate, because they are not flagged in the Decision and – so far as we can see – are not tested for. It is important that these aspects – which largely arise because of the market definition we have adopted – be articulated:

(1) The first of these is the existence of the constraints of *inter*-brand competition between home insurance providers subscribing to price comparison websites. Thus, there are clearly a number of home insurance providers who subscribe to one or more price comparison websites, who are not constrained by the wMFNs here in issue (including some who subscribe to Compare the Market).

(2) The second is the existence of the constraints of *inter*-brand competition between home insurance products offered across all of the channels we have described in Annex 2. There is, as we understand it, no constraint arising by way of either nMFNs or wMFNs on an offer of renewal. In other words, a renewal offer could be priced lower than a price quoted on a direct channel or on a price

comparison website. Direct channels would also serve as a constraint on Premiums, subject of course to the effect of nMFNs. nMFNs would prevent undercutting of Premiums on price comparison websites by direct channels, but these nMFNs are not part of the CMA's theory of harm.[281]

(3) The third is the extent to which the nMFNs which, so the Decision accepts, prevailed throughout the market as between home insurance providers and price comparison websites operated so as to produce the same effect as the wMFNs in the Agreements. The extent to which the counterfactual case is different from the actual case is not, in fact, considered in the Decision. This appeared to be accepted by Dr Walker:[282]

> **Q: Professor Ulph** There are, I think, two distinct questions here. One is a question of whether [nMFNs] are themselves harmful and, as you said, there are reasons why competition authorities regard them not to be.
>
> The second question, which is, if we are considering the harm done by all the anti-competitive effects generated by [wMFNs], does the presence of [nMFNs] affect our understanding and conclusions about the harm being done by the [wMFN], would you agree that that is a separate question, distinct from the question whether [nMFNs] in themselves are harmful?
>
> **A: Dr Walker** Well, I think you can only look at whether [nMFNs] on any agreement are harmful in the context of looking at the counterfactual and the counterfactual in this case has [nMFNs] in place. Clearly, [nMFNs] are highly relevant to the effect of wide ones, because of the effect they have on the constraints between [price comparison websites] and direct sales.

The point is that even if it is presumed that nMFNs are not in themselves anti-competitive (and we make that assumption because that is the approach taken in the Decision), the question of their effect in the counterfactual still arises and appears not to have been tested for by the CMA.[283] We, naturally, are in no position to do so, but it seems to us at least possible that a multitude of nMFNs between multiple home insurance providers and multiple price comparison

[281] Decision/§2.57 provides that nMFNs fall "outside the scope of this Decision" and thus the CMA made no finding as to whether these clauses were anti-competitive.
[282] Transcript Day 6/p.114.
[283] Although the CMA refers to possible effects of the nMFN in the abstract, it does not do this as part of any counterfactual analysis, nor does it test for those effects: for example, see Decision/§§5.85, 5.97 and 5.100.

websites might render the removal from the scene of the wMFNs in the wMFN Agreements of limited effect.

(4) In this regard, we were referred by both parties to a paper authored by Bjørn Olav Johansen and Thibaud Vergé entitled 'Platform Price Parity Clauses with Direct Sales'.[284] Professor Ulph asked both Ms Ralston and Professor Baker about this paper, and in particular the proposition that if all price comparison websites impose nMFNs on all providers, the outcomes in terms of commissions and retail prices charged is exactly the same as where only wMFNs are in place:

Q: Professor Ulph[285]	So would you agree that one application, taking all these results together, is that there are circumstances under which, compared to the counterfactual of a world in which there is extensive use of [nMFNs] by all [price comparison websites] against almost all providers, compared to that counterfactual, there may be circumstances under which […] the [wMFNs] creates no harm?
A: Ms Ralston	Yes, and I have seen Thibaud Vergé, one of the authors, and that is his main conclusion from this, that [wMFNs] are not necessarily bad, but if they are bad then they are no worse than [nMFNs].
Q: Professor Ulph[286]	I understand that we do not have a case in which we are trying to rule on the anti-competitive effects of [nMFNs], and I know the CMA's case is that they do not regard [nMFNs] as being themselves anti-competitive or creating anti-competitive harm, but given that they are in the counterfactual we do need to take them into account in thinking through what the likely effects the [wMFNs] would have. Would you agree with this?
A: Ms Ralston	Yes, we should think – that is the counterfactual they have defined, is one with [nMFNs] so we should look for incremental effects.
Q: Professor Ulph[287]	Then if I can come to the follow-on questions I wanted to ask you, if we take all those results together in the paper, the three theorems that I took Ms Ralston through, do you agree that one implication in order to understand the effect of [wMFNs], it matters greatly whether the counterfactual is one of no MFNs of any kind or of a situation in which there is an extensive

[284] Bjørn Olav Johansen and Thibaud Vergé, 'Platform Price Parity Clauses with Direct Sales' (2017) University of Bergan Working Papers in Economics 01/2017.
[285] Transcript Day 9/p142, lines 8 to 19.
[286] Transcript Day 9/p143, lines 11 to 22.
[287] Transcript Day 10/p137, lines 21 to 25, and p138, lines 1 to 8

	network of [nMFNs] between virtually all [price comparison websites] and virtually all [home insurance providers]?
A: Professor Baker	The answer is no, I do not agree, and it is because I do not find this model applicable to understanding the industry that we are dealing with, and I would be happy to explain why.

(5) Whilst the Tribunal accepts that all theoretical models are based on simplifying assumptions that may not be applicable in particular contexts, and that Professor Baker identified a number of such assumptions in his answer to Professor Ulph, neither the Decision nor Professor Baker's Report sought to analyse or explain why the conclusion drawn by Johansen and Vergé (to the effect that, in certain circumstances, wMFNs may generate no impact on Premium or Commission over and above that generated by the pervasive use of the nMFNs) did not apply in this case.

(4) A number of general points regarding "effects" in the present case

(a) Introduction

202. This is an infringement "by effect" case, and not an infringement "by object" case. A great deal of what is said in the Decision to justify the findings of "by effect" infringements operates at the level of theory, supplemented by largely qualitative materials. This approach to "by effect" infringements in the Decision means that it is necessary to bear in mind a number of rather general points concerning the distinction between "by effect" and "by object" infringements.

(b) Why are these not "by object" infringements?

203. The Decision does not find that the wMFN Agreements have as their object the prevention, restriction or distortion of competition. By object infringements are reserved for certain types of co-ordination between undertakings which can be regarded, by their very nature, as being harmful to the proper functioning of competition. Because "by object" infringements require no investigation of their effects, the scope of by object infringements should be limited to coordination which reveals in itself a sufficient

degree of harm to competition[288] with the result that there is no need to examine its effects.[289]

204. There are said to be three justifications for the control of "by object" infringements without any kind of "by effect" control or double-check:[290]

> "Advocate General Kokott's Opinion in *T-Mobile* includes an interesting discussion of why Article 101(1) makes a distinction between object and effect restrictions. First, the classification of certain types of agreement as restrictive by object "sensibly conserves resources of competition authorities and the justice system". The fact that a competition authority does not need to demonstrate, for example, that a horizontal price-fixing agreement produces adverse economic effects relieves it of some of the burden that would otherwise rest upon it. Secondly, the Advocate-General pointed out that the existence of object restrictions "creates legal certainty and allows all market participants to adapt their conduct accordingly" adding that, although the concept of restriction by object should not be given an unduly broad interpretation, nor should it be interpretated so narrowly as to deprive it of its practical effectiveness. Thirdly, she pointed out that, just as a law that forbids people from driving cars when under the influence of alcohol does not require, for a conviction, that the driver has caused an accident – that is to say proof of an effect – so, in the same way, Article 101(1) prohibits certain agreements that have the object of restricting competition, irrespective of whether they produce adverse effects on the market in an individual case; such agreements will be permitted, therefore, only where the parties can demonstrate that they will lead to economic efficiencies of the kind set out in Article 101(3), and that a fair share of those efficiencies will be passed on to consumers. The authors of this book agree with this analysis, subject to the caveat that the object box should contain only those agreements that properly belong there."

205. The agreements that "properly belong"[291] in the "by object box" must be those agreements or forms of collusion which can generally be characterised, as a matter of theory or in the abstract, as harmful to competition. Cases where the agreement or the collusion may have – in theoretical or abstract terms – a variety of outcomes not all of which are anti-competitive or undesirable are not suited for the "by object box", but must have their anti-competitive effect established.

(c) Theory and "by effect" infringements: the "relevant" effects in this case

206. Anti-competitive Effects 1 to 5 – described in paragraphs 183*ff* above – are not said to be "by object" infringements, but they are justified or explained in theoretical terms.

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[288] See Case C-67/13P, *Groupement des Cartes Bancaires v. Commission* (2014) EU:C:2014:2204, at paragraphs 49 and 57.
[289] Cases 56&58/64 *Consten and Grundig v Commission* (1966) ECR 299, EU:C:1966:41 at paragraph 342.
[290] See Whish and Bailey, *Competition Law*, 10th ed (2021) at p.127.
[291] See the discussion in Whish and Bailey, *Competition Law*, 10th ed (2021) at p.127.

That is entirely as it should be: as we described in paragraph 29(3) above, "[t]he essential usefulness of a theory of harm is that it enables there to be focus on the evidence that supports these allegedly harmful effects. Without a theory of harm, it is very difficult, if not impossible, to focus the inquiry". There may be a link between the cogency of the theory of harm and the weight of the evidence required to establish it,[292] but the crucial point about the theory of harm is the focus that it provides in terms of identifying the evidence that is required to make it good. In the present case, the critical issue in relation to Anti-competitive Effects 1, 2 and 3 is whether the existence of the wMFNs in the wMFN Agreements prevented, restricted or inhibited: (i) home insurance providers from offering lower Premiums on price comparison websites (including, but not limited to, Compare The Market's website) and/or (ii) competition in relation to the levels of Commissions offered by price comparison websites so as to facilitate decreases in Premiums quoted.

207. Anti-competitive Effects 4 and 5 range more widely than simply focussing on Premiums and/or Commissions. Thus:

(1) Anti-competitive Effect 4 refers to an exacerbation of Compare The Market's market power in a manner adverse to competition, but is essentially parasitic on the other effects found.

(2) Anti-competitive Effect 5 refers to a kind of "umbrella" effect, where the Premiums quoted by home insurance providers not subject to the wMFNs in the Agreements nevertheless have quoted higher Premiums than they otherwise would have done had those home insurance providers party to the wMFN Agreements not been subject to the wMFNs contained within them.

208. It is the effect of an absence of downward pressure on Premiums and/or Commissions that is central to the Decision and that has to be proved by the CMA. These are the consequences of the theory of harm articulated in Anti-competitive Effects 1, 2 and 3 and are what we would call "relevant" effects – the effects that CMA must prove existed. Anti-competitive Effects 4 and 5 would appear to be consequences of these other effects,

[292] It is unnecessary to explore this further. Our competition law does not contain a form of "rule of reason". As Whish & Bailey note (at 142-143) our competition law is structured rather differently to that of the anti-trust law of the United States, which does have a "rule of reason".

and we are not conscious of any evidence having been specifically directed to these specific effects.

(d) The alleged effects in context

209. It is worth asking two further questions, as the answers assist in consideration of the grounds of appeal. First, why the Anti-competitive Effects were not, and are not appropriately, framed as "by object" infringements? Secondly, why might the effects alleged by the Decision not, in fact, have occurred? We consider these two questions in the following sub-paragraphs. The questions are, to an extent, interlinked:

(1) The CMA regards nMFNs as either beneficial or necessary because they prevent the home insurance provider from undercutting, on its direct channels, the Premiums quoted on the price comparison websites that home insurance provider might subscribe to. The risk to the price comparison website's business is obvious: home insurance providers have every interest in undercutting price comparison websites in favour of their own, direct, channels. Indeed, the cost of selling home insurance products through price comparison websites is significantly more expensive because of the Commission charged on business concluded through the price comparison website. Thus, the purpose of nMFNs is to prevent the price comparison website from being undercut by the direct channel of the subscribing home insurance provider, and consequently the home insurance provider being able to "free-ride" on the price comparison website's efforts to attract customers to it (for example, by investing in advertising).

(2) The purpose of wMFNs is both similar and different to that of nMFNs. The purpose is, again, to prevent undercutting, but not only by the subscribing home insurance provider's direct channel, but also by the other channels (like rival price comparison websites) through which the subscribing home insurance provider might seek to sell its home insurance products.

(3) As has been described,[293] the vast majority of home insurance providers will "multi-source" (i.e., list on more than one price comparison website). Such price

[293] See paragraph 80 above and Decision/§7.16.

comparison websites obviously compete with each other, and one way of competing (there are obviously others) is to ensure that their website reliably quotes the "best" price from any given home insurance provider. This, indeed, is the justification advanced by Compare The Market for its use of wMFNs.

(4) This is not – as both sides stressed and accepted – an Article 101(3) TFEU or section 9 of the Competition Act 1998 exemption case. However, it is an explanation as to why the "object box" is perhaps not appropriate. There are two other relevant factors:

(i) First, it appears to be the case that wMFNs were the subject of negotiation with subscribing home insurance providers. We know nothing about such negotiations, but it is clear that a significant minority of home insurance providers subscribing to Compare The Market's services were not subject to the wMFN Agreements.[294] Of course, the majority were, but we do not consider that we can properly infer any kind of pressure emanating from Compare The Market obliging these home insurance providers to sign up to these clauses. There may have been a number of commercial reasons why they considered it in their interests to sign up to wMFNs, but we have not heard evidence about this.

(ii) Secondly, it is important to bear in mind that (as Compare The Market repeatedly, but correctly, asserted) wMFNs only inhibit *intra*-brand competition or the ability to price differentially. They do not inhibit *inter*-brand competition.

(5) The fact that wMFNs only serve to restrain competition between channels selling the same (home insurance) product is a point that we consider does need to be borne in mind when considering the evidence of the alleged effect of the wMFNs. The fact is that the most a wMFN can achieve is the elimination of *intra* brand competition or (better put) price differentiation by a home insurance provider. Other forms of competition between home insurance providers are not

[294] See Annex 1.

affected. Significantly, it is these forms of competition that are excluded from the CMA's definition of the market. In particular, they include:

(i) *Competition from passive renewals.* We described passive renewal business and new business in paragraphs 8 and 9 above. Price comparison websites will be interested in converting renewal business into new business, and the existing home insurance providers will be similarly interested in retaining their customers. Hence the competition. Many existing customers of home insurance providers passively renew, without even considering the alternatives. The existing home insurance provider will want to encourage this (by rewarding loyalty, perhaps, providing a good service, but also by relying upon and encouraging the inertia of these consumers to seek alternatives). The price comparison website will want to encourage consumers to try other channels and other products. The main way of doing this will be by advertising since, by definition, passive renewing consumers will not actually be using price comparison websites, and will not otherwise see the Premiums on offer.

(ii) *Competition from process renewals.* There will be more overt competition between what we have called "process" renewal business[295] and new business transacted through price comparison websites. This occurs where the consumer <u>does</u> consider alternative policies sold through alternative channels, including through price comparison websites, but where (having, to the extent the consumer chooses, explored these) the consumer nevertheless opts to renew with their existing home insurance provider. In such cases, the consumer <u>will</u> engage with other channels of sale (the direct channel of another insurer or, perhaps more likely, a price comparison website). The extent to which the consumer chooses nevertheless to renew will depend on a combination of factors. No doubt the Premium will be highly significant, but so too will be the effort that will have to be undertaken (in answering questions to enable a quotation to be provided) in order to obtain a quotation for new business.

[295] See paragraph 9(2) above.

Neither of these two forms of competition were sufficiently considered in the Decision, because of the market defined in the Decision.

(iii) *Inter-brand competition on price comparison websites.* So far as new business is concerned, it is trite and a finding of the Decision that price comparison websites will want to offer as much range as possible, in the form of home insurance products emanating from different home insurance providers. It is this that differentiates the price comparison website from the insurer's direct channel. Put another way, a price comparison website having but one subscribing home insurance provider will be substantially the same as that home insurance provider's direct channel. The great virtue of price comparison websites is just this – it enables the consumer, with less effort, to "scope" the market and to place their business with their insurer of choice at minimal effort. There is thus, through competition between price comparison websites in terms of the policy options they offered, enhanced inter-brand competition between home insurance providers.

Although this is a form of competition that falls within the market as defined by the Decision, it is not a matter that receives a great deal of attention in the Decision.

210. In short, this discussion serves to demonstrate two things. First, why wMFNs would be inappropriately placed in a "by object" box; and, secondly, why the Decision needed to, and why we must, focus with particular care on what effects must be demonstrated. The point can be illustrated in other ways:

(1) Suppose wMFNs were ubiquitous, contained (as a matter of course) in every agreement between every price comparison website and each subscribing home insurance provider. The outcome would be the elimination of *intra*-brand competition across different channels (which might be said to be a "bad thing") but the upside would be that competition between home insurance providers would be sharpened: users of price comparison websites would be assured that across all price comparison websites, the quotation from *Home Insurance Provider A* would (all other things being equal) be the same. All involved parties

– home insurance providers, consumers and price comparison websites – would instead have their focus on *inter*-brand competition.

(2) Suppose – going to the other extreme – the total outlawing of wMFNs. This would make it "open season" for differential pricing, and would open the door to powerful home insurance providers to favour one price comparison website over another, by offering cheaper quotations or promotional deals through a single price comparison website. The ability to conclude wMFNs inhibits this sort of conduct.

211. None of this is to suggest that the CMA's Decision is wrong. The purpose of articulating these issues is: *(i)* to underline the importance of careful market definition; and *(ii)* to emphasise the importance of a careful focus on the relevant effects. Of course, these two points are closely interlinked. It is because – as we have concluded – it is possible for the Decision to be upheld notwithstanding a defective market definition that we make these points now, and with such emphasis. Had the market definition been properly framed, then these matters would have been better taken into account. That said, we are not persuaded that simply because the market definition is deficient, the Decision cannot stand.

212. So far, we have been proceeding on the basis that the wMFNs in the Agreements were entirely effective. For various reasons, that will not have been the case. We consider this next.

(e) "Effectiveness" of Wide Most Favoured Nation Clauses

213. The effect – as articulated in the Decision – of the wMFNs is, of course, the subject-matter of this appeal. But there are a few points, apart from and anterior to, the effect on Premiums and/or Commissions that we should articulate:

(1) We heard a great deal about the home insurance providers party to the wMFN Agreements potentially ignoring or disregarding the wMFNs in those wMFN Agreements. Certainly, some of the material referenced by Ms Ralston[296]

[296] Ralston 1/§5,31-5.105. See also paragraphs 159 to 163 above.

suggested, at least, that some home insurance providers party to the wMFN Agreements might, for some or all of the Relevant Period, have breached the wMFNs in those wMFN Agreements. To this extent, of course, any anti-competitive effects would not be felt. We do not consider that it would be appropriate to permit breaches of these provisions to side-step (if otherwise appropriate) a finding of a "by effect" infringement. To the contrary, we consider that it is important to proceed on the basis that, if compliance according to the strict letter of the wMFNs would result in anti-competitive effects (even if, because of the breach of contract, these were potential and not actual effects), then these should be taken into account. That is because: *(i)* we consider that competition law authorities should generally proceed on the basis that legally binding agreements are liable to be complied with; *(ii)* monitoring compliance as part of an investigation is onerous, and should not be required of a competition authority; *(iii)* legally binding obligations can always be enforced – and there was evidence of some enforcement action by Compare The Market; and *(iv)* the conduct of a non-compliant home insurance provider might nevertheless in some way be affected by the (legally) binding obligations it had assumed, even if that party was acting in breach of contract.

(2) That said, we are very conscious of the limits of wMFNs and in particular the extent to which they actually do constrain differential pricing on the part of home insurance providers even if they are complied with by those who are subject to them. As to this:

(i) wMFNs only apply in the case of Premiums for money or money's worth. In other words, promotional discounts that do not go to price are unaffected by wMFNs. We proceed on the basis that monetary promotional discounts will be covered (although that, in itself, is a difficult area), but that non-monetary promotional discounts will not be.

(ii) wMFNs only apply to prevent differential pricing in respect of the same home insurance product. As we have described, the price of home insurance products is peculiarly dependent on the risk that the consumer presents, which risk can only be evaluated by reference to the information that the consumer (the proposed insured) provided to the

home insurance provider (the proposed insurer). Where different information is elicited (for instance, through different questions posed by a home insurance provider) the rating of the risk will be different. We would doubt whether a wMFN would bite in circumstances where the same home insurance provider, offering generically the same product, rated the price for that product differently, not because of any difference in the level of cover or excess point, but simply because the material disclosure in relation to the risk was different. It is very difficult to gauge the extent to which such differences in questions asked affected the operation of wMFNs, but there was clear evidence before us that the questions asked of consumers differed from channel to channel (including as between price comparison websites). Thus, in a response dated May 2019 to a section 26 Competition Act 1998 notice from the CMA, Compare The Market volunteered that "[t]here may be a number of reasons why different prices are returned: for example, differences in question sets […] can result in a lower price being returned by the same [home insurance provider] for the same customer on another [price comparison website]".[297]

214. We appreciate that the two points we have just identified are each possible and possibly partial, rather than complete, explanations as to why a quantitative effects analysis might produce a "nil" return in terms of actual effects. In the case of the first point, we consider that this would be a case of a potential impairment of competition. In the case of the second point, we consider that this would be a case where there was no impairment, whether actual or potential. We make these points to underline the acute difficulty of proving effects in this case.

215. In light of these points, we consider a point made repeatedly by Ms Demetriou in the course of her submissions on behalf of the CMA: namely that the CMA was under no requirement to quantify the extent of the anti-competitive effect.

[297] This document (and other similar responses) were put to Ms Ralston during cross-examination: Transcript Day 8/pp.28 to 29.

(5) The CMA is under no obligation to quantify the extent of the anti-competitive effect

216. We should say, at the outset, that we consider this point to be right. The CMA is under no obligation to say: "There was an effect and the Premiums quoted, but for that effect, would have been 2% lower." We do not understand Compare The Market to dispute this. Quantification of effect is, in reality, not the province of a regulator or competition authority, but more the province of the private action – often consequential on a regulatory decision – where damages are claimed. The CMA is not concerned with the quantification of damages consequent upon a found infringement: it is concerned with the infringement itself.

217. But that does not permit the CMA to say, without more, that whilst there is a "by effect" infringement of competition law, that effect is undetectable. It is one thing to say that an effect, whilst detectable, cannot be quantified. It is quite another to say that an effect cannot be detected at all. Yet this was the substance of Ms Demetriou's position on more than one occasion during the course of the hearing. During the course of Ms Ralston's cross-examination, the following exchange took place:[298]

A: Ms Ralston	…I saw that the CMA agreed that [Compare The Market's] [wMFNs] did not have a directly observable impact on its behaviour which is what I am testing for in coverage.
Q: Ms Demetriou	Yes, but you appreciate, do you not, Ms Ralston, that when the CMA is finding that there is no directly observable impact, it is not saying there is no influence. You appreciate that, do you not, that that is the CMA's case. The fact that there might not be a piece of evidence saying "We are pricing consistently with the [wMFN] because of the [wMFN]", that does not mean that the CMA has not found or has not concluded that the [wMFN] has had an impact on the market dynamics or on this particular [home insurance provider]…

218. Ms Demetriou was cross-examining Ms Ralston on the significance of her evidence that Premiums quoted by home insurance providers subject to the wMFN Agreements did not appear to suggest compliance with those clauses. For the present, all we would note is that:

[298] Transcript Day 8/pp.52-43 (cross-examination of Ms Ralston).

(1) Ms Ralston's point was not that there was no "directly observable impact", but that such impact, as was observable, did not sit well with the theories of harm articulated in the Decision. This is a point we will be returning to: all we would observe for the present is that which is observed needs either to be consistent with the CMA's theory of harm or else shown to be of minimal or no weight.

(2) It is, of course, quite possible for no effects to be observable when conducting an effects analysis. As we have described, the allegedly harmful effect of an allegedly infringing agreement or provision is tested by reference to a counterfactual hypothesis, which imagines what the market would have been like absent the infringing agreement or provision. In many cases, that will involve – because of the hypothetical nature of the exercise – no observable effect in the "real" world. Of course, where there is the opportunity of observing the effect, it is likely that such observations will be probatively significant. Where there is no such opportunity, the robustness of the counterfactual will have to be examined with great care, because it is all too easy to discern an effect where – with perfect knowledge – none would in fact exist. Again, this goes back to the importance of market definition, which directly informs the nature and extent of the counterfactual.

219. Although the position was not altogether clear-cut in the CMA's filings before the hearing, it appeared to be common ground between the parties that this was a case of actual and not potential effects.[299] However, the borderline between actual and potential effects is always a difficult one, and we will endeavour to focus more on substance (i.e., the existence of an effect) rather than categorisation (i.e., whether an effect is best classified as actual or potential). As can be seen, even a case of actual effect involves a lack of "actuality" and a degree of "hypothesis".

220. This difficult question of the extent to which and manner in which effects are to be established was considered by Roth J in *StreetMap.eu Limited v. Google Inc*, where a helpful review of the authorities was conducted.[300] As to this:

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[299] Transcript Day 1/p.27 lines 24 to 25 (opening of Mr Beard); Transcript Day 2/pp.147-148 (opening of Ms Demetriou); Decision/§§9.1 to 9.6.
[300] [2016] EWHC 253 (Ch) at [86]*ff*.

(1) In Case T-219/99, *British Airways plc v. Commission*,[301] the Court of First Instance stated that "for the purposes of establishing an infringement of Article 82 EC [now Article 102 TFEU], it is not necessary to demonstrate that the abuse in question had a concrete effect on the markets concerned. It is sufficient in that respect to demonstrate that the abusive conduct of the undertaking in a dominant position tends to restrict competition, or, in other words, that the conduct is capable of having, or likely to have, such an effect". On appeal, the CJEU did not consider the point[302], but Advocate General Kokott said this in her opinion:

> "70. Significantly, BA itself states that it is not necessary in each case to establish *actual* anti-competitive effects of a rebate or bonus scheme on competitors. The burden on competition authorities, courts, and, in some cases, private complainants, in even attempting to establish it would in many cases be entirely disproportionate.
>
> 71. What is to be proved is, rather, the mere *likelihood* of the conduct in question hindering the maintenance or development of competition still existing in the market by means other than competition on the merits, thereby prejudicing the goal of effective and undistorted competition in the common market. With regard, therefore, to rebates and bonuses of a dominant undertaking, it has to be proved that they are *capable* of making it difficult or impossible for that undertaking's competitors to have access to the market and its business partners to choose between various sources of supply."[303]

(2) We appreciate that this was said in the context of a dominance case, not a collusion case, but the essential point holds good. It would unduly fetter courts, competition authorities and claimants in private actions if there was an absolute requirement to show an anti-competitive effect. Quite how an "effect" is established is going to be a matter for national procedural law and – broadly speaking – there are two ways of doing this:

(i) One can show to an absolute standard the likelihood of an adverse effect on competition; *or*

(ii) One can show to a standard of likelihood that there has been an adverse effect on competition.

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[301] (2003) EU:T:2003:343 at paragraph 293.
[302] Case C-95/04 P *British Airways plc v. Commission* (2007) ECR I-2331, EU:C:2007:166.
[303] Advocate General Kokott's Opinion in Case C-95/04P was delivered on 23 February 2006.

(3) The approach of the procedural law of this jurisdiction is to take the latter course: the adverse effect on competition must be shown to have occurred on the balance of probabilities. It would be setting the bar remarkably low if it was only necessary to show on the balance of probabilities a likelihood of an adverse effect on competition. As Roth J made clear in *StreetMap*,[304] the "mere possibility of anti-competitive foreclosure" cannot suffice: "the impugned conduct must be reasonably likely to harm the competitive structure of the market", which (in this jurisdiction at least) is a reference to the civil standard of proof.

(6) The evidence relied upon, and not relied upon, by the CMA in the Decision: factors going to weight

(a) General discretion of the CMA to decide how it will investigate and determine matters

221. It is for the CMA to decide how it will investigate infringements of competition law. The evidence it chooses to adduce in support of a finding of infringement is for it. This Tribunal will not second-guess such decisions.

222. It is for the Tribunal to review the CMA's decision, on the merits, but only through the prism of the grounds of appeal set out in the notice of appeal. If, in the Notice, it is suggested that the CMA erred in failing to consider relevant evidence, then it is at that point – and only then – that the CMA's choice of evidence will come under review.

223. The appeal discloses a number of issues in relation to the CMA's evidence. They are considered in the following paragraphs.

(b) Limited nature of the evidence referred to in the Decision

224. As the CMA recognised in the Decision, it is for the CMA to establish, on the balance of probabilities, the anti-competitive effects it found to exist, and which we have described above. Section 9 is the critical section of the Decision. As to this, there are a

[304] At [88].

number of concerns that it is necessary to articulate before considering the substance of the evidence relied upon:

(1) A great deal of Section 9 actually involves a re-articulation – or, less kindly, repetition – of matters considered and determined earlier on in the Decision. Thus, Decision/§§9.16*ff* deal with the widespread nature of the wMFN Agreements and the relevant counterparty home insurance providers' compliance with the wMFNs to which they were thereby subject. We do not in any way dispute the importance of these findings: in order for an anti-competitive effect to be found, the provisions said to be causative of that effect must (in some way) have an effect, otherwise they are (for an effects-based infringement) simply irrelevant. But:

(i) All this was said in Section 8; and

(ii) Whilst it is necessary to show that the wMFN Agreements were effective, in the sense that they had an effect, that says nothing about whether the effect was pernicious (anti-competitive) or not.

(2) A great deal of the analysis operates at the level of theory or (less helpfully) bare assertion. Thus, Decision/§9.8 states:

> "The CMA finds that during the Relevant Period, by preventing the relevant providers from offering lower prices on [Compare The Market's] rival [price comparison websites], [Compare The Market's] network of [wMFNs] restricted the ability of and reduced the incentives on providers subject to [Compare The Market's] [wMFNs] to compete on price by differentiating their prices across [price comparison websites]…"

With great respect, statements like this are not only once again repetitive of the findings in Section 7, but also either bare assertion or statements operating at the level of theory. This is not, as we have discussed, a "by object" infringement case – and rightly so.

(3) When it comes to factual evidence, Section 9 is light in the material it deploys. What is more, there is – even in Section 9 – a high level of repetition of this evidence. Mr Beard put it in the following way:[305]

> "What you see is a lot of those instances being recycled and recycled and recycled, as if they are somehow supportive of one another. I think it was Wittgenstein that said, you do not check the veracity of the news by buying a second copy of the same newspaper, and there is a degree to which that is what the CMA has been doing in relation to repetition of incidents within the long decision."

We consider that there is some force in this.

(4) Moving to consider the evidence relied upon in Section 9, the following points can be made:

(i) There is no significant reference to quantitative evidence. That is entirely unsurprising, because the Decision records that the CMA considered such evidence to be unhelpful. We will come this in due course.

(ii) There is a significant distinction to be drawn between evidence going to the effect of wMFNs on promotional discounts and evidence going to the effect of wMFNs on Premiums and Commissions more generally. It is easy to see why it is possible to adduce credible qualitative evidence that goes to the number or volume of promotional discounts: the decision whether or not to put in place a promotional discount is a matter for deliberation and specific negotiation between the home insurance providers and price comparison websites involved. On the other hand, it is very difficult for a home insurance provider or a price comparison website to provide specific qualitative evidence as regards the effect of the wMFNs in the wMFN Agreements on Prices or Commissions generally.

225. For these reasons, when we come to consider the question of effects, we will consider separately the effect of the wMFN Agreements on Premium and Commission generally, and thereafter the effect of these wMFN Agreements on promotional discounts.

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[305] Transcript Day 2/p.39, lines 21 to 25 and p. 40, lines 1 to 3 (opening of Mr Beard).

(c) A problem in understanding the CMA's case

226. The Decision is redolent with cross-references to the evidence on which the Decision is said to be based, but it is extremely difficult (or, at least, so we have found) to get a sense of the true nature of this evidence. Generally speaking, decisions should draw a hard-and-fast distinction between:

(1) Evidence.

(2) Analysis of that evidence or inferences being drawn from it.

(3) Conclusions of fact drawn from (1) and (2).

That enables the Tribunal properly to test the material on which the Decision is based.

227. Given the importance of the point, it is necessary to describe the efforts, during the course of the hearing, to get a sense of the evidence actually being relied upon by the CMA in support of its Decision:

(1) At the end of Day 2, after there had been extensive submission and discussion about "effective coverage", the President made a request for documentation:[306]

> "You are going to be taking us through the material regarding how [home insurance providers] and price comparators saw these clauses, but we wondered whether it would be possible to produce, say, a folder on [Magnum Opus II], the documents which you rely upon in support of your case regarding the effects on the market, and I say that because I, for one, would like to read the documents as they are – and I know they are referred to in the Decision, but what I would not want is for it to be said that we had missed something that we ought to take into account.
>
> I know you are going to take us through the most significant ones, but I think you ought to have the assurance that we are going to read everything that the CMA wants us to read and what I am going to suggest is that the CMA take the lead in framing, as it were, the adverse documents that they rely upon and that can be supplemented – but not subtracted from – by Compare The Market, so that they can insert any documents that they think we ought to read in the same light. So, Mr Beard will be inserting the equivocations, you will be inserting the absolutes.
>
> I wonder if that could be done in two forms, if the universe of documents could be done chronologically and also by entity, by [home insurance provider] or by price

[306] Transcript Day 2/pp.195-196.

comparator so that we can identify what the evidence is in relation to each particular entity as well as in the round because I think both exercises are going to be necessary.

Now I do not want to give anyone a massive job, but I anticipate – because this is actually the basis for the CMA's case – you probably have got a list of these documents somewhere or, if you have not, you can compile one relatively easily, but if that is not the case, do let me know, because I do not want to have the parties starting from scratch on a massive job."

(2) As is clear, the Tribunal saw this as very much an issue for the Tribunal alone: the Tribunal did not, at this stage, anticipate that either the CMA or Compare The Market would be under any difficulties in identifying the relevant corpus of materials. It was, at this stage, simply a question of identifying them for the Tribunal to read. That is clear from the following exchange between the President and Ms Demetriou:[307]

Ms Demetriou	Sir, I am sure it can be done. The question is when can it be done by. I am not going to be in a position to do it tomorrow.
The President	No, I do not think there is any particular rush, Ms Demetriou.
Ms Demetriou	No.
The President	I mean, we are going to be reserving this decision.
Ms Demetriou	Yes.
The President	So, if you need a fortnight to do it, then from our point of view, that is absolutely fine. It is just, I would not want it to be said, by either side, that we have not read and had the opportunity to incorporate into our judgment, documents that, quite understandably, you have not been able to take us to orally, which will be referenced in the [D]ecision. But the [D]ecision is 800-plus pages, and we do not want to miss points that you are making but are making in the course of what is a large amount of material.

(3) The issue arose again on the following day. The trigger for this was a submission, by Ms Demetriou, on behalf of the CMA, as to the significance (or, *pace* the CMA, insignificance) of witness evidence in this case. We will return to the argument that arose out of Leggatt J's decision in *Gestmin SGPS SA v. Credit Suisse (UK) Ltd* below,[308] but Ms Demetriou sought to augment the CMA's factual case by indicating an intention to adduce evidence that certain

[307] Transcript Day 2/pp.196-197.
[308] [2013] EWHC 3560 (Comm).

home insurance providers had declined to assist the CMA.[309] This provoked an objection from Mr Beard:[310]

> "Excuse me, if I might intervene. This is evidence being given from the bar. We have not seen any of this material before. Ms Demetriou is now suggesting she is going to waive privilege in relation to the enquiries made by the CMA in relation to witnesses.
>
> If she is waiving privilege in relation to that topic, she needs to waive privilege generally. She cannot pick and choose in relation to these matters. This is not a course that can be adopted at this point. We have had no opportunity to deal with any of these matters. It is the first time this has been put to us. This is an inappropriate use of evidence at the bar."

(4) The Tribunal made clear that it was not prepared to permit a limited waiver of privilege so as to enable further evidence to be adduced.[311] Ultimately, the Tribunal made clear that <u>if</u> the CMA wished to adduce new evidence, then an application would have to be made and – in that context – any questions of the width of waiver of privilege could be considered.[312] However, this led to an expression of concern on the part of the Tribunal that it was not just the Tribunal, but also Compare The Market, that might be unclear about precisely what evidence the CMA was relying on in support of the Decision.[313] Accordingly, the Tribunal somewhat sharpened its interest in the "documentary record":[314]

> "…I know that you are going to be producing the schedule of documents…that you rely upon. The documentary record, as it were. I am going to formalise that into a direction. The reason I am going to do that is because I think it is important that everyone knows what the CMA's case is and what we are evaluating and what Mr Beard is responding to.
>
> So I am not particularly fussed about a time, but you will have to produce what the CMA says is its documentary case. A list of documents in chronological order and by reference to person, and I want that schedule to be backed up by a folder of documents themselves. These documents shall not be redacted for confidentiality. We will keep it under wraps as something only for the Tribunal for the moment, but I do not want any highlighting or anything like that to identify confidentiality.[315]
>
> What I do want highlighted are the passages in those documents that the CMA relies upon, so that we can zone in on exactly what the CMA says its case is.

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[309] Transcript Day 3/pp.34-35 (opening of Ms Demetriou).
[310] Transcript Day 3/pp.35-37.
[311] Transcript Day 3/pp.35-42.
[312] Transcript Day 3/pp.66-68.
[313] Transcript Day 3/pp.43-47.
[314] Transcript Day 3/pp.63-64.
[315] There had already been enough difficulties through excessive markings up of matters that were confidential.

> I am making that a direction, because I want there to be no later debate about what is and what is not the CMA's case. It seems to me that it is important for the protection of everyone in this hearing."

That was not the end of the matter. Ms Demetriou raised concerns about the scale of this task[316] and Mr Beard about the timing "because we need it sufficiently in advance of closing".[317] There was some debate about whether this exercise might produce "new" documents: the Tribunal was very clear that this was not only not envisaged, but contrary to the process of a fair appeal. What was required was a clear articulation of the documents on which the Decision was based, so that the CMA's case could be understood.[318]

(5) The CMA sought to suggest that this was, in fact, a job that had already been done:[319]

> **Ms Demetriou** …The reality of this is that these documents are all in the F bundle on the system, and so the documents that are relevant and taken into account, so it will essentially be a reorganisation of that material, both chronologically and by [home insurance provider].
>
> **The President** One moment, let me just get the -- well, I mean, I suppose the question is simply this: if you are telling us that we need to read tabs 1 through 712, and that is the case, well, we will do it. But I think your case is a little bit more focussed than that, and it is that distillation, if it is such, that we are looking at.
>
> But you will obviously have to take your own course. We have done a lot of reading, but we have not, I think, strayed very far into bundle F, and obviously you are going to be taking us to some points.
>
> But the basis for my direction is that I want, set very clearly in a direction, a baseline, so that we can say, this is the CMA's documentary case. There are other parts to its case as well, but when it comes to the documents, this is the CMA's case. So that you cannot say, we did not take it into account, and Mr Beard cannot say: I do not know what the case was.

For a moment it appeared that the problem had resolved itself, in that the (electronic) F bundle could form the basis for the documentary record. The President noted:

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[316] Transcript Day 3/pp.64-67.
[317] Transcript Day 3/p.69.
[318] Transcript Day 3/pp.64, 66, 67, 70, 71.
[319] Transcript Day 3/pp.72-73.

> "…I mean, I have no idea what the volume of these documents are, but we are talking about 712 tabs. Now, even if each tab is a single document, that is two lever-arch files. Since I anticipate some are more than one page long, we are talking, probably, five, six lever-arch files, if we can move to the old money. We are, I think, all of us entitled to know exactly what we are tilting at."[320]

In fact, the F bundle comprised 36,000 pages or 120 lever arch files (assuming 300 pages a file).[321] There could be no clearer statement of the problem in ascertaining the proper factual basis for the Decision.

(6) In the end, the locking-down of the evidential position could not be achieved. Ms Demetriou came back to the documentary record a couple of days later:[322]

> "Sir, we want to assist the Tribunal, but the exercise is extremely extensive. Can I explain why? Because, from the CMA's perspective, the evidential basis for a finding of infringement is all set out in the Decision, so it is all there. The Decision does highlight, during the course of the narrative, the particular documents on which the CMA places emphasis, and the documents are all in the F bundle. So I do not think that portion of the F bundle is 36,000 pages, I think it is more like 9,000 pages, but they are all there.[[323]]
>
> Now, I do understand that 9,000 pages-odd is still a lot for the Tribunal to read. What we do want to do is order the documents, both chronologically and by [home insurance provider], and highlight the passages on which the CMA places reliance, because we can see that that is an easier way for the Tribunal to approach the documentation. But we do have a small team, and a team which is assisting on the appeal, and I do not think we are going to be able to do that in advance of our closing submissions without taking people, who are necessary for the appeal, away from their work.
>
> There is no fairness issue, may I say that, because of course [Compare The Market] have read the Decision and they have made the points on it and they have all the underlying documentation. So there is no additional document that we are going to be putting in this bundle. It is an exercise in re-ordering and highlighting, but it is extremely work intensive. We are going to do it, but will not be in advance of closing submissions without unfairly really taking people off the appeal."

(7) Of course, the Tribunal could not properly insist on such a course being taken, and the direction for a statement of the record constituting the CMA's case was abandoned from that point. After the appeal, both parties produced schedules and files of documentary material intended to assist the Tribunal, but the reality is that despite the superficial specificity in the Decision – it has 2,708 footnotes

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[320] Transcript Day 3/pp. 74-75.
[321] Transcript Day 3/p.76.
[322] Transcript Day 5/pp.110-111.
[323] The question which 9,000 pages were the relevant ones was never answered.

in its 794 pages – there is no meaningful corpus of material, capable of being considered, that constitutes the evidence on which the CMA relies, and which constitutes the foundation for the factual findings made in the Decision.

228. We do not consider that the fact that each and every document relied upon by the CMA in support of the Decision was before the Tribunal in the F bundle in any way mitigates the problem. Of course, it is trite that a regulator defending its decision cannot adduce new material that serves to defend the decision on other grounds. All the regulator can do is adduce material that is responsive to an attack, by way of appeal, on the decision.

229. The problem the Tribunal was grappling with was an altogether different one, illustrated by the size of Bundle F**,** being the electronic equivalent of many (120) lever arch files. This stood in sharp contrast to the relatively few documents we were actually referred to in the course of the hearing. As the foregoing paragraphs demonstrate, when we sought to have identified for us precisely the evidence on which the Decision was based, neither the CMA (nor Compare The Market – although this really was not a matter for Compare The Market) was able to assist. Short of chasing down the references to the documentary evidence in each and every footnote – and, as we have said, the Decision has 2,708 footnotes – and then analysing those references, it was not possible for the Tribunal to get any kind of grip on this underlying material; and we should be clear that chasing down each and every reference was not something that the Tribunal had time to do, nor something that would have been fair within the constraints of this appeal.

230. We should, if only for future practice, unpack the problems that this kind of approach occasions:

(1) We noted earlier[324] that the Decision does not really differentiate between *(i)* evidence, *(ii)* analysis of that evidence or inferences being drawn from it, and *(iii)* conclusions of fact drawn from *(i)* and *(ii)*. We stress that all three of the elements ought properly to have their place in any regulatory decision, but they need to be properly and separately set out.

[324] In paragraph 224 above.

(2) By way of example: a decision ought to articulate, as fact, certain propositions. These should appear as factual findings ("X is the case"), and the evidence on which they are based specifically referenced and (ideally) contained in an altogether separate part of the decision.[325] That evidence should not be "synthesised" but should be the primary material on which that particular factual conclusion is based.

(3) In this way, any points of disputed fact can, very rapidly, be understood. Equally, unsupported expressions of opinion or assertion will be exposed as such. Analyses and inferences from fact may themselves be factual (findings of fact built on findings of fact) and, if so, should be treated in the same way. But the reasoning from primary fact needs, if a decision is to hold water, to be clear and clearly set out. It is then possible to reach a conclusion on the facts so stated.

(4) The problem with the Decision is that it is impossible to identify the CMA's primary facts; and so impossible to understand the analyses and inferences from those facts. This issue is compounded by extensive repetition of generalised summaries of evidence (or assertion). As a result, the conclusions drawn in the Decision inevitably find themselves resting on shaky evidential foundations.

(5) Such presentation of the material does no justice to the very hard work and effort that has gone into the Decision, which we recognise. But neither is it fair to the subject of the Decision – here Compare The Market – nor to the Tribunal in reviewing the Decision for the basis of the various factual determinations made to be obscure. The fact is that unless the factual basis for a decision is properly stated, it can neither be properly attacked nor defended.

(d) A problem in testing the CMA's case

231. Apart from Ms Glasgow and the experts – to whose evidence we will come – the evidence that the CMA relied upon was entirely documentary. In some cases, the

[325] In other words, the factual material – whether documents or transcripts of interviews – should be produced, in original form, as an annex to the decision, and then referred to in the body of the decision, when factual findings are made. Thus, it would be possible to say "X is the case, and that is demonstrated by the documents at pages *a*, *b* and *c* of Annex Y."

documents in question were contemporaneous documents. These included, by way of example, internal Compare The Market Documents dealing with matters such as pricing strategy (including commissions and price discounting), and internal emails; similar internal documents relating to other price comparison websites and home insurance providers, and emails between them. But the majority of the documentary evidence to which we were referred comprised after the event statements of what home insurance providers and price comparison websites considered to be the case on certain points that were put to them. Many were responses from other price comparison websites and home insurance providers to formal notices issued by the CMA under section 26 Competition Act 1998 seeking responses to sets of questions relating to such matters as pricing strategy, factors affecting negotiations, wMFNs, and strategies concerning exclusive and promotional deals.

232. Courts and tribunals in this jurisdiction are well able to review and consider documentary evidence, and will attach significant weight to it, often in preference to the evidence of witnesses, no matter how honest and no matter how desirous they are of assisting the court. That is simply because of the frailty of human recollection. In the ordinary course, when assessing factual evidence, a court will have well in mind the approach of Lord Goff in *Grace Shipping Inc v. CF Sharp and Co (Malaya) Pte Ltd*:[326]

> "In such a case [where witnesses were seeking to recall events and telephone conversations of five years earlier], memories may very well be unreliable; and it is of critical importance for the judge to have regard to the contemporary documents and to the overall probabilities."

We consider that the same holds true of persons providing the CMA with their assessment as to how, as a matter of fact, wMFNs affected their conduct during the Relevant Period, and how their conduct might have been different had those clauses not been in place.

233. The CMA placed a great deal of emphasis on this material. It is necessary to understand how the CMA put the importance of this material, and how the Tribunal should weigh it. In opening, Ms Demetriou, for the CMA, said this:[327]

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[326] [1987] 1 Lloyd's Rep 207 at 215.
[327] Transcript Day 2/pp.127*ff*.

> "So what the CMA did in its investigation was to examine whether, on the balance of probabilities, these [wMFNs] did in fact have the adverse effects on competition, that the economic theory predicts they will have.
>
> In conducting its investigation, the CMA examined a large number of contemporaneous documents, including documents of Compare The Market, documents of its rival price comparison websites, documents of many of the insurers and it made, as you have seen, numerous requests for information and carefully considered the responses.
>
> The CMA's conclusion, having conducted this investigation, was that Compare The Market's [wMFNs] did in fact operate to soften price competition appreciably in the ways that I have summarised.
>
> The documents, as you have seen and as you will see, include many documents produced at the time, so contemporaneous documents, internal documents of both the [price comparison websites] and the [home insurance providers], and communications between them. Those documents demonstrate – some of those documents demonstrate – that the [wMFNs] had an actual effect on pricing strategy.
>
> So, people at the time, were saying, in contemporaneous documents, that the [wMFNs] were stopping them competing on price in ways that they would otherwise have liked to have done. We will see that, I want to take the Tribunal to those documents. In other words, there is contemporaneous evidence showing that the [wMFNs] inhibited attempts to compete on price.
>
> Now what is Compare The Market's response broadly in this appeal? Its response is to seek to persuade the Tribunal to ignore the contemporaneous evidence showing that there was an actual effect on pricing strategy, on a number of different bases…"

Ms Demetriou referred to a number of the attacks made by Compare The Market in her submissions following this quotation. She referred to the "effective coverage" argument that comprises Ground 2 as one way in which Compare The Market was seeking unduly to limit the evidence that this Tribunal should have regard to. We do not need to consider her submissions any further on this point, for we have already considered Ground 2, and rejected Compare The Market's submissions in this regard.[328] Equally, Ms Demetriou made the forensic point that Compare The Market had itself called no witnesses of fact. That is an entirely fair point to make, and we accept it, so far as it goes.

234. But Compare The Market's failure to call factual evidence cannot serve to bolster the documentary evidence adduced by the CMA.[329] To be clear, we cannot and will not

[328] See Section G above.

[329] See, for instance, *Durkan v. Office of Fair Trading*, [2011] CAT 6 at [109] to [110], and in particular:
"110. […] We reject the OFT's suggestion, made both at the hearing and in their letter of 6 August 2010, that because it was open to Durkan Limited to call Mr Goodburn as a witness for the purposes of cross-examining him and they decided not to do so, that Durkan is somehow restricted in the extent to which it can challenge what is recorded in the transcript of his interview. It is not the task of the Appellant to supplement the evidence relied upon by the OFT."

ignore the documentary evidence adduced by the CMA in support of its case. It obviously must be considered. What we are here concerned with is the extent to which that documentary evidence, if it is unsupported by witness evidence is, of diminished or lesser weight for that reason. This was a point made with some force by Compare The Market, and there have, over the years, been a number of statements by this Tribunal making exactly the same point. More particularly:

(1) We stress that witness evidence in relation to documentary evidence is not required simply in the case where there is a concern about the accuracy of that evidence or the honesty of the person writing it or whose views are recorded in it. We have no such concerns in the case of the documentary evidence adduced by the CMA. But even where there are no concerns about accuracy or honesty, this does not mean that cross-examination of a witness in relation to what they have said in evidence or contemporary documents they have produced is not important. To the contrary, it is generally extremely important, for documentary evidence is almost always helpfully coloured and given context and substance by a witness who can speak to that evidence.

(2) The CMA disputed this:[330]

> "…the short point I make on this, is that where the CMA has relied on contemporaneous documents and, by that, I mean "contemporaneous" in the true sense of the word, not meetings after the events with the CMA or responses to section 26 notices or witness statements, but actually the contemporaneous communications or internal documents of the companies at the time, and where those documents, on their face, allow a particular factual finding to be made or an inference to be drawn, those documents should be taken at face value and there is no need then to call a witness to provide any kind of gloss or explanation for them.
>
> […]
>
> Really, my short point, is where the CMA is relying on contemporaneous documents, and is not trying to say that those documents should be interpreted in a different way, but is rather trying to say they should be taken at face value, there is no need, there was no need, for the CMA to do that.
>
> […]
>
> But my point is it is not for the CMA, when it is relying on contemporaneous material, to have to call witnesses to back up that contemporaneous material when it is relying on what they say on their face…"

[330] Transcript Day 3/pp.24 to 26.

(3) To the extent that Ms Demetriou was seeking to frame a general proposition, we disagree.[331] Of course, such material is admissible, and will be considered on its merits. But it will not, automatically, be accorded weight or substance. The weight to be accorded to a contemporary document unsupported by a witness will depend on all the circumstances. That is precisely what Leggatt J said in *Gestmin SGPS SA v. Credit Suisse (UK) Ltd* ("*Gestmin*").[332] Having articulated the fragility of evidence based on human recollection,[333] a passage on which the CMA placed considerable reliance,[334] the Judge went on to say:[335]

> "In the light of these considerations, the best approach for a judge to adopt in the trial of a commercial case is, in my view, to place little if any reliance at all on witnesses' recollections of what was said in meetings and conversations, and to base factual findings on inferences drawn from the documentary evidence and known or probable facts. This does not mean that oral testimony serves no useful purpose – though its utility is often disproportionate to its length. But its value lies largely, as I see it, in the opportunity which cross-examination affords to subject the documentary record to critical scrutiny and to gauge the personality, motivations and working practices of a witness, rather than in testimony of what the witness recalls of particular conversations and events. Above all, it is important to avoid the fallacy of supposing that, because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

235. *Gestmin* was, of course, a Commercial Court dispute between two private litigants, whereas this is an appeal against the administrative (but *quasi*-criminal) findings of the CMA. Although it has been done on many occasions before, it is probably best to re-state the basis upon which qualitative evidence will be evaluated in this Tribunal:

(1) The burden of proof is on the CMA, which obliges the CMA to produce, before this Tribunal, evidence that supports the decisions it has made. The evidence that the CMA chooses to adduce will almost always be pre-determined by its approach during the investigative stages of the case. Thus, if (as here) the CMA has chosen to rely more on qualitative evidence than quantitative evidence, it will be difficult, on an appeal, for the CMA to "change tack" and shift to an approach where the decision is justified on quantitative evidence. Whilst we never say never, it seems to us that such changes of approach between the

[331] The point was debated in the course of opening (Transcript Day 3/pp.26 to 30), as well as in the written and oral closing submissions.
[332] [2013] EWHC 3560 (Comm).
[333] At [15] to [21].
[334] Transcript Day 3/p.23.
[335] At [22].

decision phase and the appeal phase will have to be capable of cogent justification.

(2) How the CMA's evidence is challenged is a matter for the appellant. The appellant can, if it wishes, simply put the CMA to proof, and challenge head-on the evidence adduced by the CMA. We will come to the implications of this in a moment: but it must also be noted that an appellant can, as here, adduce different evidence as a means of demonstrating that the CMA has got it wrong. In this case, both during the investigative and the appellate phases, Compare The Market's position was that – in addition to the frailties in the qualitative evidence that it said existed – the CMA's case was undermined by the quantitative evidence adduced by Compare The Market. Such quantitative evidence was in fact introduced during the investigative phase, and rebutted by the CMA during that phase. Evolutions or developments of that quantitative evidence were then deployed before us. Although we consider that it is best practice for an undertaking under investigation to put forward all of its points during the investigative phase, we stress that there is no bar on an appellant (as opposed to the CMA) in adducing entirely new evidence on appeal, provided this is articulated (and clearly identified) in the notice of appeal.[336] Of course, the CMA will be entitled to respond to such evidence, and often it will.

(3) Turning, then, to the evidence adduced by the CMA in support of its decision – the CMA's "positive" case – it is trite (as we have already noted) that the CMA bears the burden and must put forward its best evidence. It should not be heard to say – as was argued before us – that the CMA's evidence should be given weight because the appellant has failed to adduce evidence that it could have adduced to weaken such evidence.[337] The choice as to what evidence the CMA adduces is for it, and it is for the CMA to take a critical eye in relation to what it must do to make its case good.

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[336] This is, of course, the usual position in cases of judicial review, where the decision-maker cannot (properly) justify a decision on fresh grounds. However, the same is true – at least in this Tribunal – so far as merits decisions are concerned. At the end of the day, a decision has been made against the appellant, and it is that decision that is being tested. See, for example, *British Telecommunications plc v. Office of Communications*, [2011] EWCA Civ 245. See also, rules 9 and 21 of the Competition Appeal Tribunal Rules 2015.

[337] Paragraphs 234-237 above.

(4) The Tribunal does not operate in accordance with the strict rules of evidence. If the CMA chooses – and this is the CMA's choice – to adduce only documentary evidence then so be it. The Tribunal will look at that evidence, and assess its weight. The Tribunal certainly does not expect the CMA to call each and every person it has interviewed for cross-examination for the sake of it. This Tribunal operates a proportionate and sensitive approach to the assessment of the evidence brought before it, and will not be formalistic. Compare The Market at times suggested precisely such a formalistic approach, contending that any ambiguity or doubt in a specific document must be resolved against the CMA and in favour of the appellant. Compare The Market relied upon – but in our judgment misread – the following passage in *Tesco v. OFT*:[338]

> "126. If, as is the case here, the Appellants contest the meaning or significance of a document relied on by the OFT, in the absence of any witness statement from the author of the document, the Tribunal has to consider the language used in the document and seek to determine what the author meant by it. The starting point will be that the author meant what they said and said what they meant. A document is not made in a vacuum, however, and should not be construed as if it had been; we have therefore read documents against the factual background known to the parties at the time. If the Tribunal's conclusion is that a document is unclear or ambiguous even when read in the light of the prevailing circumstances and other evidence, then any doubt as to the meaning of that document must be resolved in favour of the Appellants."

Compare The Market, quite understandably, emphasised the last words in this passage ("…any doubt as to the meaning of that document must be resolved in favour of the Appellants…"), but it is the words that we have underlined that are more significant. The evidence is to be viewed in the round. Points where oral evidence might assist are identified and considered, and (where oral or other evidence might be material) issues resolved against, rather than in favour of the CMA.

(5) The point was put similarly in *AH Willis and Sons Limited v. OFT*:[339]

> "66. As we stated in paragraph 19(3) above, difficult and important questions arise in relation to the "evidence" adduced by the OFT. We have already noted that the transcript of Mr Russ' interview with the OFT does not appear to have been satisfactorily reviewed by and attested to by Mr Russ (see paragraph 54 above).

[338] [2012] CAT 31 at [126] (emphasis added).
[339] [2011] CAT 13.

> Certainly, he has not endorsed the transcript with a statement of truth or even signed it.
>
> 67. More fundamentally, we have considerable doubts as to whether material contained in transcripts of interviews – even if reviewed and attested – is a satisfactory means of evidencing alleged infringements in cases of this kind. It is one thing to use a transcript of interview as evidence of relevant admissions by the interviewee; it is quite another thing to attempt to use it as evidence against a third party. In paragraph 81 of the Tribunal's decision in *Argos Limited v The Office of Fair Trading* [2003] CAT 16, the Tribunal observed that "notes of interview are not, in our view, satisfactory substitutes for witness statements". We agree. A witness statement will set out the relevant facts, will be attested to by the witness by way of a statement of truth, and will enable the witness to be exposed to cross-examination should the accuracy and/or truth of those facts be disputed. This is not to say that relevant interview transcripts cannot or should not be put before the Tribunal in support of a witness statement. It is simply that they are not a substitute for it.
>
> 68. We do not therefore agree with the suggestion in numbered paragraph 2 of the OFT's letter to the Tribunal dated 6 August 2010, and referenced to *inter alia* this appeal, that the preparation of a witness statement in circumstances such as the present would be "a complete triumph of form over substance". Where crucial facts are disputed it may in certain cases, and depending upon what if any other evidence is available, be very difficult to resolve the issues in the absence of evidence from a witness who has been deposed in the ordinary way and whose assertions are available to be tested in cross-examination by those who dispute them. Where central issues of fact cannot be resolved, the outcome may have to turn on the burden of proof. It is therefore all the more important from the OFT's perspective that there should be probative evidence before the Tribunal. Thus, even if the OFT has obtained witness statements in order to fortify its own decision-making process, once it becomes clear that there is a material dispute as to the facts on which its decision was based, the OFT should consider to what extent such statements are necessary or desirable in order to support those facts in an appeal, subject always to the provisions of rule 22 of the Competition Appeal Tribunal Rules 2003 (SI 2003 No 1372). It is, of course, not normally the role of the Tribunal to decide whether and if so which witnesses should be deposed or called to give evidence by any party…"

(6) It is telling that the notion that a regulator can simply adduce evidence that satisfies it, without being prepared to enable that evidence to be tested on appeal, has been debated for nearly 20 years, since *Argos*. We would only reiterate: <u>of course</u>, the CMA must satisfy itself that the decisions it reaches are right. We are sure that the CMA does this with care and enormous effort. In this case, many questions were asked, and doubtless many people interviewed. We are in no doubt that the CMA considers its decision to be watertight and robust. But the whole point of an appeal (and this is true whether the appeal is on the merits, as here, or by way of judicial review) is not for the Tribunal to be satisfied that the CMA <u>thinks</u> it has reached the correct conclusion, but for the Tribunal to be satisfied – according to the appropriate standard, which varies according as to whether the review process is on the merits or by way of judicial review – that

the decision should stand. In an appeal on the merits, that requires the CMA to satisfy the Tribunal that the Decision is correct, and that requires careful consideration of what evidence must be adduced. It is not enough to persuade the Tribunal that the CMA believes it is correct. The Tribunal does not need persuading on that point; but it is ultimately a point of limited relevance.

236. We will come to assess the evidence produced by the CMA in due course, but it may assist if we expand upon the distinction that we consider exists between evidence going to Premiums and Commissions generally and evidence going to promotional discounts:[340]

(1) There is, to our mind, a very clear distinction to be drawn between (i) qualitative evidence from home insurance providers and price comparison websites on the issue of the effect of wMFNs on promotional deals and (ii) qualitative evidence from home insurance providers and price comparison websites on the issue of the effect of wMFNs on the level of Premiums and Commissions.

(2) On the first topic, one can easily understand how a person in the industry would be able to speak, with authority, about the disincentivising effect of wMFNs on the agreement of promotional deals – and, as we will come to describe, Mr Beard made limited headway on this point with Ms Glasgow, the only witness of fact called by either side.

(3) On the second topic, it is actually very difficult to understand how a person, even very experienced in the industry, could say with any real authority that Commissions and Premiums across portions of the industry were affected by wMFNs, and it is significant that Ms Glasgow did not speak to this point. This is an area where either evidence from those senior persons able to speak to pricing strategy in the market was needed or else quantitative evidence needed to be deployed. Even as to the former, such evidence would be highly dependent on the questions asked, and (importantly) the potential witnesses' understanding or perception of them. That is particularly the case here where nMFNs were prevalent generally in the agreements between price comparison websites and

[340] We touched upon this distinction in paragraph 224(4)(ii) above, but it bears expanding upon.

home insurance providers, and the CMA's investigation was focused on wMFNs and not the effect of nMFNs. It is to the quantitative evidence that we now turn.

(e) Material the CMA did not deploy

237. We stress that it is for the CMA to determine how it makes out its case, and an appellant like Compare The Market, and indeed this Tribunal, should be extremely slow to suggest that the CMA might have approached a given evidential question differently. It is for the CMA to marshal the evidence that supports its decision, and for the decision to stand or fall on the cogency of that evidence. But that does not absolve the Tribunal from critically evaluating the weight of the evidence that is deployed. If that evidence is found to be wanting, the appeal will likely succeed, and it will be irrelevant to consider what additional material the CMA might have deployed, but did not in fact deploy.

238. Of course, where an appellant, as here, puts forward evidence of a nature not used by the CMA to support its decision – here econometric or quantitative evidence – the question <u>why</u> such evidence was not adduced by the CMA does arise. But we should note, for it was a point stressed by Compare The Market, that the CMA's non-adduction of econometric data (as opposed to deconstructing and contending to be of no account the econometric data from Compare The Market) does appear *prima facie* odd and difficult to justify:

(1) The wMFNs in the wMFN Agreements operated during the Relevant Period, but did not apply thereafter. Since considerable numbers of home insurance products were sold both during and after the Relevant Period, there would appear to be the makings of a natural experiment to understand the effect of the wMFNs in the wMFN Agreements on Premiums and Commissions. Such a "before and after" consideration at least *prima facie* lends itself to econometric analysis.

(2) It is worth noting that the CMA appears to have decided to base the Decision entirely on qualitative evidence and not at all on quantitative/econometric evidence. As pointed out by Mr Beard at paragraph 45 of Compare The Market's skeleton argument (and in his written closing submissions), this was in contrast to the CMA's reliance on econometric evidence in the context of wMFNs in the private motor insurance market, which the CMA used to demonstrate the impact

of its prohibition on wMFNs.[341] The only consideration of quantitative evidence in the Decision concerns an explanation of why the CMA rejected, as of no assistance, analyses done by Compare The Market.[342]

(3) During the course of the appeal, Compare The Market made much of the fact that the CMA did carry out econometric analysis in the context of wMFNs in the private motor insurance market.[343] Yet the Decision does not make any reference to the econometric analysis carried out by the CMA in the context of wMFNs in private motor insurance, even to justify exclusion from its consideration.

(7) Proving the effects case: a distinction between Commission and Premium levels and promotional discounts

239. For the reasons we have given,[344] it is appropriate to differentiate between Premiums and Commissions generally, and the extent to which it has been shown that an effect of the wMFNs in the wMFN Agreements was to inhibit competition in these regards, and promotional discounts. Accordingly, Section H(8) deals with Premium and Commission levels, whilst Section H(9) deals with promotional discounts.

(8) Effect on Premiums and Commissions

(a) The CMA's case

240. In paragraph 18 of its written closing submissions, the CMA articulated its case as follows:

> "The evidence before the Tribunal establishes that [Compare The Market's] network of [wMFNs] had adverse effects on competition. It is, moreover, clear that those effects were "perceptible" or "more than de minimis or insignificant". In summary:

[341] This was contained in a separate supporting paper to its digital comparison tools market study: CMA, "Digital comparison tools market study", Final report, Paper E: Competitive landscape and effectiveness of competition (2017), paragraphs 3.27-3.28: "The evidence we have gathered, and particularly our econometric analysis shows that the prohibition of wMFNs [in private motor insurance] has led to an increase in competition between [Digital Comparison Tools]" (emphasis added).
[342] See, for example, Decision/Annex K at §K3 and Annex R.
[343] Paragraph 271 of Compare The Market's written closing submissions.
[344] See paragraphs 225 and 236*ff* above.

18.1 The contemporaneous evidence establishes that [Compare The Market] itself considered that its [wMFNs] were effective. Unlike the other [price comparison websites], [Compare The Market] decided to maintain its home insurance [wMFNs] in the face of requests to remove them from [home insurance providers] and even though the CMA's investigation had required the removal of [wMFNs] with [private motor insurance] providers. It is implausible for [Compare The Market] now to seek to argue that its [wMFNs] were ineffective in the face of the clear evidence of its contrary view at the time.

18.2 [Home insurance providers] had strong incentives to comply with the [wMFNs] and there was in fact widespread compliance, with most [home insurance providers] pricing the same across [price comparison websites] or consistently pricing lower on [Compare The Market]. The [wMFNs] were contractually binding and [Compare The Market] monitored compliance with them and was prepared to take enforcement action. Given [Compare The Market's] market position and the [home insurance providers'] dependence on it for a large proportion of their businesses, enforcement action or indeed the threat of it was effective to achieve substantial compliance.

18.3 Evidence provided by the [home insurance providers] establishes beyond question that the [wMFNs] directly affected the pricing behaviour of sizeable [home insurance providers] which accounted for a significant proportion of [price comparison website] sales. This evidence, which includes direct contemporaneous evidence as well as responses to statutory requests, shows that these [home insurance providers] specifically factored the [wMFNs] into their pricing decisions, or were forced to do so following enforcement action by [Compare The Market].

18.4 The [home insurance provider] evidence is firmly corroborated by the evidence provided by other [price comparison websites]. This includes the cogent witness evidence provided to the Tribunal by Natasha Glasgow.

18.5 The evidence also reveals a clear effect on the numbers of [promotional discounts] entered into both during and after the Relevant Period, including by [Compare The Market] itself. This is significant in circumstances where [promotional discounts] were an important and effective method of price competition.

18.6 The adverse effects of the [wMFN] were, on any view, more than insignificant.

18.7 The effects found by the CMA were consistent with the adverse effects that are predicted by the economic literature. Although that literature predicts that, under some market assumptions, [wMFNs] might produce efficiencies, [Compare The Market] has not advanced a case that its [wMFNs] produced any pro-competitive effects and Professor Baker's unchallenged evidence is that the assumptions required for pro-competitive effects to eventuate are not present in this case."

241. It is necessary to unpack these contentions. We approach them in the following way:

(1) Promotional discounts (relied upon in paragraph 18.5 of the CMA's written closing submissions) are considered separately in Section H(9) below, for the reasons we have given.

(2) Compare The Market advanced no positive case that the wMFNs could be justified by their pro-competitive effects. We do not, therefore, specifically consider the point made in paragraph 18.7 of the CMA's written closing submissions, as the point does not arise before us.

(3) The point in paragraph 18.6 of the CMA's written closing submissions seems to us to essentially add nothing to the points made in paragraphs 18.1 to 18.4 of the CMA's written closing submissions, and is therefore not considered separately by us.

(4) That leaves the points articulated in paragraphs 18.1 to 18.4, which we consider specifically, and in turn, below.

(b) Compare The Market itself considered its Wide Most Favoured Nation Clauses effective

242. We consider this point to be correct, but irrelevant. We are prepared to proceed on the basis that wMFNs were effective, in the sense that they were substantially complied with by the home insurance providers who were subject to the wMFN Agreements containing them.[345] We are prepared to accept that Compare The Market monitored compliance with these clauses and – where there was material non-compliance – took steps to enforce. Indeed, this view informs, in part, our approach to the question of effective coverage considered above. We do not consider that it is an answer to an allegation of competition law infringement to say that there is no infringement because the clause in question was disregarded, when there would be an infringement if the clause in question was complied with.

243. Conversely, however, the mere fact that these clauses were effective – in the sense that they were complied with – is not sufficient to demonstrate an anti-competitive effect. The CMA must show – and the burden is on it – that there was such an effect. That involves doing far more than simply asserting that the wMFNs were "effective". Given the terms of the Decision, the CMA must show not merely any anti-competitive effect, but the anti-competitive effect found in the Decision. We have described these various

[345] See paragraph 213(1) above.

Anti-competitive Effects in paragraphs 182*ff* above, but in essence what must be shown is an inhibitory effect on Premiums and/or Commissions. It is nothing like enough for the CMA to make the following assertions (as is done in the written closing submissions):

> "22. The nature of [Compare The Market's] [wMFNs] is straightforward. They were a contractual term that prevented [home insurance providers] from offering lower prices on other [price comparison websites]. As such, they provided [Compare The Market] with a legally enforceable guarantee that [Compare The Market] would have the lowest or equal lowest prices as regards the [home insurance providers] to which they applied.
>
> 23. Nor is there any dispute as to the purpose of [Compare The Market's] [wMFNs]. In [Compare The Market's] own words, the "primary objective" of its [wMFNs] was to "use it as one tool to seek to ensure that it offered the best possible price to consumers/customers, **and hence to strengthen its competitive position vis-à-vis rivals** (emphasis added)."

Again, this passage seems to us to be entirely correct, but substantially irrelevant to the matters we have to decide here:

(1) As we have explained, the infringement found is not a "by object" infringement: it is a "by effect" infringement, where the effect found is a constraint on the downward movement of Premiums and Commissions. It is this constraint that must be proved.

(2) The fact that Compare The Market considered the inclusion of wMFNs in the wMFN Agreements to be to its competitive advantage is trite. Compare The Market was clear that it wanted to achieve the lowest prices in the market on its price comparison website, and that would undoubtedly be a competitive advantage. But it is not said to be objectionable "by object", and therefore the key question is whether there were anti-competitive effects, to which the points made by the CMA in the passage set out above provide no answer.

(3) Exactly the same is true of the innuendo – for that is what it is – regarding Compare The Market's failure to remove wMFNs when pressed to do so. Paragraph 26 of the CMA's written closing submissions provides:[346]

[346] The same point is made in paragraphs 27*ff* of the CMA's written closing submissions, in various different ways. Repetition does not make the point any stronger.

> "In contrast to GoCompare and Confused which removed their home insurance [wMFNs] once the writing was on the wall with private motor insurance, [Compare The Market] strenuously resisted efforts made by [home insurance providers] to persuade it to remove its [wMFNs]. What [Compare The Market] did mattered; it was the biggest [price comparison website] on the market by a considerable margin and its behaviour had a big impact on the competitive process, not just between [price comparison websites] but also between [home insurance providers]."

As to this:

(i) All this paragraph does is embody an *a priori* assumption that wMFNs are competition law infringing provisions. If it is assumed that wMFNs are a "bad thing", then of course Compare The Market's resistance to their removal can be characterised as the intransigence of a powerful firm in a market imposing its will on other, weaker, firms. But that is either an abuse of dominance case – never articulated – or else a point that only has force if one assumes what the point seeks to prove.

(ii) In short, one can only "read across" the prohibition of such clauses in the motor insurance market if it is possible to say that the case of the home insurance market is materially the same. That point has never been articulated by the CMA – it has never been said that the effects case is made good by the CMA's investigation into the private motor insurance market[347] – and it is easy to understand why: the argument comes very close to a "by object" assertion, where what would be alleged is that in any market involving price comparison websites, wMFNs are economically harmful and anti-competitive.

(4) We have, in paragraphs 203*ff* above, set out in brief why it is not the case that wMFNs are "by object" infringements. But it is also worth bearing in mind that the *a priori* assumption that wMFNs are a "bad thing" may additionally be invalidated by the failure to consider the effect of nMFNs, which the Decision simply assumes to be a legitimate part of the market. Again, this is a point that we return to.

[347] CMA, "Private motor insurance market investigation", Final report, (2014).

(c) Widespread compliance

244. This is the point made at paragraph 18.2 of the CMA's written closing submissions and expanded upon in paragraphs 35*ff*. The point again falls within the "right but irrelevant" category. We are quite prepared to assume or accept widespread compliance; but that does not prove the effects that the CMA claims the wMFNs caused.

245. We agree with the CMA that Ms Ralston's evidence regarding the pricing of home insurance providers in apparent breach of their binding wMFNs needs to be treated with caution. However, we consider that Ms Ralston's evidence does not demonstrate that wMFNs were disregarded, but that they were ineffective. It is necessary to expand upon this point:

(1) The CMA's criticisms were put to Ms Ralston in cross-examination, and are set out in paragraphs 270*ff* of the CMA's written closing submissions.[348] We agree that Ms Ralston's subjective (and non-expert) assessment of the qualitative evidence does not assist us, for the reasons given in paragraphs 164*ff*above. These are matters for us, not for an expert, no matter how competent or capable (and Ms Ralston was both).

(2) That leaves the quantitative evidence adduced by Ms Ralston of "non-compliance" by home insurance providers with their contractual obligations. As we have described, even if this were right, we are doubtful as to its relevance. It seems to us – for the reasons we have given – that breach of wMFNs should not prevent a conclusion of anti-competitive effect if compliance would have anti-competitive effects. So, for this reason, we do not accept Ms Ralston's evidence – not because it is necessarily wrong, but because it is nothing to the point.

(3) However, we are satisfied that there is a real likelihood that the apparent infringements of the wMFNs identified by Ms Ralston are not in fact breaches of contract at all, for reasons given by the CMA itself in the Decision. Ms Ralston's data was obtained from Consumer Intelligence, which obtains its data regarding Premiums quoted by home insurance providers by running the same

[348] They are referenced, *en passant*, in paragraph 38, where the analysis is described as "deeply flawed".

risk proposal across multiple channels. A mismatch between the price quoted by the same home insurance provider across multiple price comparison websites might be evidence of non-compliance, but there are other explanations. The Decision records:[349]

> "The CMA has also identified certain factors that affect the pricing data provided by Consumer Intelligence. In particular, these factors may lead to the same consumer generating different risk profiles through different [price comparison websites] and the direct channel, which may ultimately result in the same consumer receiving different prices for the same provider's product even if that is not the provider's intention."

The factors identified by the CMA that might result in such mismatches in the Premiums quoted are:

(i) *Differences in price comparison websites' default excesses*.[350] Thus, "[i]f a [price comparison website] specifies a higher default excess than other [price comparison websites], the retail price returned for a given consumer, for a given policy, will be lower on that [price comparison website]. This may create the appearance that a provider is pricing differentially when it is not doing so intentionally."

(ii) *Differences in price comparison websites' question sets*.[351] The Decision notes:

> "There may exist some variation in the questions used by different [price comparison websites] to generate a quote, leading to the same consumer generating different risk profiles across different [price comparison websites]. These variations are caused by some [price comparison websites] neglecting to ask questions included by others or by the format of the questions differing on each [price comparison website]..."

(iii) *Inconsistencies in data mapping*.[352] Inconsistencies may arise as a result of "differences in the data mapping used to collect information on consumers by each [price comparison website] and transfer this to providers for the purposes of generating a quote. Data mapping rules

[349] Decision/Annex O/§O2.
[350] Decision/Annex O/§O15(a).
[351] Decision/Annex O/§O15(b).
[352] Decision/Annex O/§15(c).

> applied inconsistently across [price comparison websites] will result in pricing differences for the same customer on each [price comparison website]."

We accept these points – which were not seriously challenged by Compare The Market – and consider, as a result, that they substantially undermine the point made by Ms Ralston regarding non-compliance by home insurance providers with wMFNs. However, the consequence of this is that the effectiveness of wMFNs is substantially undermined by the points identified by the CMA itself. The fact is that – certainly for the first two reasons identified – a home insurance provider can comply with its obligations and yet price more cheaply elsewhere (i.e., on other price comparison websites) than on Compare The Market. Thus, the effect of wMFNs as a tool for producing the lowest prices (or equal lowest prices) on Compare The Market is undermined. Of course, the home insurance providers may not, subjectively, have appreciated this, and so their conduct may still have been affected, but we consider that it cannot safely be said that wMFNs actually had the effect Compare The Market anticipated or wanted.

(d) Effect on Premiums and Commissions

246. Paragraph 18.3 of the CMA's written closing submissions asserts that it is "beyond question" that the wMFN affected the pricing behaviour "of sizeable [home insurance providers] which accounted for a significant proportion of [price comparison website] sales".

247. It is important to begin by noting that this is the wrong question. Of course, wMFNs affected, or were intended to affect, the conduct of home insurance providers that were subject to them. That is the point of a contractual obligation or fetter – to oblige someone to do something that they might not otherwise be inclined to do.

248. The point that the Decision needs to establish is whether there was a reduction on the incentive on home insurance providers to lower prices. It is important that we be clear about the anti-competitive effect that is being alleged:

(1) Is it simply that *Home Insurance Provider A* was constrained from quoting a lower premium on *Price Comparison Website X* by virtue of *Home Insurance Provider A*'s obligation to Compare The Market pursuant to a wMFN? If so, then the effect alleged is clearly made out. That is the very purpose of the provision, and *Home Insurance Provider A* was undoubtedly constrained in this way.

(2) We do not consider that this is the anti-competitive effect that the Decision finds. Indeed, we doubt whether it could be said that such an effect was appreciable. Rather, what the Decision is asserting is that when considering the competitive interaction of the home insurance providers in the market, there would be greater incentive to reduce prices – Premiums – absent the wMFNs in the wMFN Agreements than if they were present.

(3) That is an altogether harder question than the question of the effect of a wMFN on the individual subscriber to that clause, but it is the question that the Decision must answer in the affirmative if it is to stand. It is harder because it is not enough to say "I was constrained because I could not price lower on *Price Comparison Website X*". The same is true of Commissions.

249. The Decision is redolent with qualitative evidence that supports the proposition set out at paragraph 248(1) above: namely that the home insurance providers were constrained in their differential pricing, in that they could differentiate between price comparison websites in terms of Premium quoted but only provided the lowest Premium so quoted also appeared on Compare The Market.

250. Leaving, as we do, promotional discounts to one side, it is not clear to us whether (apart from promotional discounts) home insurance providers would elect to price differentially across different price comparison websites:

(1) We can quite understand why home insurance providers would want to differentiate between their own direct channel and all price comparison websites. Home insurance providers would want to be able to undercut price comparison websites, if only to save on the Commission they would pay to price comparison websites in relation to business concluded through price comparison

websites. That is why price comparison websites include nMFNs in their contractual terms, and why these nMFNs are so prevalent in the market.

(2) It is, however, much harder to ascertain from the Decision whether a home insurance provider, willing to quote a Premium of £X on *Price Comparison Website X* would want to quote a Premium of £X+10% on *Price Comparison Website Y*. The home insurance provider will want to appear as high in the rankings produced by all price comparison websites as possible, and will be constrained by competition from other home insurance providers from raising prices. In short, it is not clear to us why a home insurance provider would actively wish to price differentially across different price comparison websites: this is distinct from the question of whether (and to what extent) there was indeed any appetite for differential pricing.

(3) That is to leave altogether on one side other constraints which do not feature in the Decision's analysis, because of the market definition adopted in it. But, for the reasons set out in paragraphs 209(5)*ff* above, we consider that the prices offered on renewals would act as some kind of constraint on prices offered by home insurers, both through their own channels and through price comparison websites.

(4) There is little qualitative evidence in the Decision to suggest that home insurance providers would price differentially in order to sell more home insurance products, save through promotional discounts (to which we will come). The CMA's written closing submissions helpfully distilled the evidence from both home insurance providers and price comparison websites on this point. As to this:

(i) The CMA identified six instances "of the directly observable effects that the [wMFNs] had on the pricing behaviour of [home insurance providers]".[353] The six home insurance providers identified were: *(i)*

[353] Paragraph 41 of the written closing submissions of the CMA.

Legal and General;[354] *(ii)* Aviva;[355] *(iii)* AXA;[356] *(iv)* QMetric;[357] *(v)* OneCall;[358] and *(vi)* Grove & Dean.[359]

(ii) In a number of cases, the effect of the wMFNs was to constrain these home insurance providers in relation to promotional discounts that they might otherwise have entered into.[360] We do not disregard this material, but consider it in Section H(9) below, where we consider the effect on promotional discounts. Turning to the effect on Premiums and Commissions generally, it is clear that the wMFNs had some effect. Thus, QMetric was threatened with enforcement action in relation to the wMFN to which it was subject, which resulted in QMetric terminating a promotional discount[361] and reducing QMetric's prices on Compare The Market by "approximately 1%".[362]

(iii) As regards OneCall, the CMA's written closing submissions state:

> "OneCall told the CMA that:
>
> 93.1 the removal of the [wMFN] had changed the manner in which it was able to respond to commission fee reductions by [price comparison websites]: "If a [price comparison website] reduced our commission, this reduction would be passed on entirely to the consumer's premium for that specific [price comparison website]. This would not impact the premiums on other [price comparison websites]. Prior to the removal of [wMFNs], we wouldn't have been able to do this and the discount would have been spread across all aggregators. This has now allowed us to pass the full commission reduction on to consumers that have bought on that specific channel…";
>
> 93.2 prior to the removal, OneCall had been required to price the same across [price comparison websites]: "[d]ue to the presence of the [wMFN] in our contract, regardless of what commission we paid aggregators, we have had to offer the same prices to our customers. The changes have allowed us to work closely with [price comparison websites] to offer prices to our joint customers that are reflective of the

[354] Paragraphs 42 to 57 of the CMA's written closing submissions.
[355] Paragraphs 58 to 67 of the CMA's written closing submissions.
[356] Paragraphs 68 to 77 of the CMA's written closing submissions.
[357] Paragraphs 78 to 91 of the CMA's written closing submissions.
[358] Paragraphs 92 to 99 of the CMA's written closing submissions.
[359] Paragraphs 100 to 104 of the CMA's written closing submissions.
[360] See the CMA's written closing submissions at paragraphs 45 (Legal and General), 59 (Aviva), 72 (AXA), and 82 (QMetric).
[361] Paragraphs 81.3 and 82 of the CMA's written closing submissions.
[362] Paragraph 81.3 of the CMA's written closing submissions.

> commission we pay. As mentioned on earlier questions, this has resulted in volume uplifts and cheaper prices for our consumers…"

It is not possible to look behind these statements, and obviously we must accept them as true. There are, however, a number of points that we would have wanted to explore arising out of these statements by OneCall. As we understand this evidence, in the counterfactual world of no wMFN Agreements, OneCall would have factored into the Premiums it quoted across different price comparison websites the different Commissions charged by each price comparison website. Presumably, therefore, Commission would have been a variable in the ratings engine used by OneCall to calculate the Premiums it offered, so that the Premiums quoted for identical risks would be adjusted to reflect differing Commission rates. We have no idea how this would have been achieved. It seems to us that the manner in which costs like Commissions were passed on to consumers by way of Premiums is a matter of considerable significance, on which little specific evidence has been adduced. All we have are generalities.

(iv) In the case of Grove & Dean, the position is described as follows in the CMA's written closing submissions:

> "In March 2017, Grove & Dean applied a temporary £5 increase to its quotes on [Compare The Market] to reflect its higher commission fees. [Compare The Market] identified this through its systematic monitoring and, following a meeting with Grove & Dean, warned it of "the need to adhere to clause 4.9 of the agreement [the wMFN]". Grove & Dean noted internally that it had received a "ticking off" from [Compare The Market] and explained to the CMA that, as a result of [Compare The Market's] actions, it "removed the loading and continued to price consistently across all [price comparison websites] for home insurance".

This is a rather more concrete example where a specific loading was applied because of Compare The Market's Commission rates. Again, it would have been helpful to understand more of Grove & Dean's thinking: given the elasticity of consumer demand, it seems a fair inference that a £5 loading would mean that Grove & Dean would sell rather fewer home insurance products through Compare The Market, and the effect of the wMFN (had it been complied with) would appear to

have been to make Grove & Dean more competitive on at least this particular price comparison website.

(5) Turning to the evidence from price comparison websites, we accept that there was a great deal of evidence that suggests that promotional discounts were affected. This includes the evidence of Ms Glasgow, which we accept.[363] However, the CMA's written closing submissions say nothing about the general effect on Premiums and Commissions.

251. It would be wrong not to record that Compare The Market disputed much of what the CMA said in relation to the qualitative evidence.[364] The problem that we have is that it is impossible actually to evaluate, still less resolve, this difference of view for the reason given by Compare The Market in paragraph 137 of its written closing submissions:

> "There are very extensive and fundamental ambiguities (and contradictions) in the evidence relied upon by the CMA. As noted above, where ambiguities exist, the document must be read to favour [Compare The Market]. It was, of course, open to the CMA to use its powers to clarify any ambiguities but it failed to do so in relation to key evidence. Furthermore, by failing to call any witnesses from any [home insurance providers] whatsoever, the CMA entirely deprived [Compare The Market] and the Tribunal of the opportunity to test the evidence or clarify its meaning. This is not a matter of whether the CMA has a discretion as to its appraisal of the evidence, it is a question of ensuring that the evidence is clearly and fairly open to interrogation on any appeal on a full merits standard review."

Although we consider the statement regarding ambiguities to be over-stated, for the reasons given in paragraph 235(4) above, there is a great deal of force in this paragraph.

(e) The quantitative evidence

(i) Introduction

252. In her first report – Ralston 1 – Ms Ralston considered the effect of wMFNs on both Premiums and Commissions. We will consider her conclusions first in relation to Premiums and then in relation to Commissions.

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[363] See paragraphs 105 to 120.4 of the CMA's written closing submissions.
[364] See paragraphs 137*ff* of Compare The Market's written closing submissions.

(ii) Effect of Wide Most Favoured Nation Clauses on Premiums

253. In her report, Ms Ralston summarises the findings of Ralston 1 as follows:

> "1.39 In order to assess whether [Compare The Market's] [wMFNs] had an effect on retail prices, I consider three tests assessing whether [Compare The Market's] [wMFNs]:
>
> - reduced the proportion of risks that [home insurance providers] priced more expensively on [Compare The Market] relative to other [price comparison websites];
> - increased the proportion of risks that [home insurance providers] priced equally on [Compare The Market] relative to other [price comparison websites]; or
> - resulted in higher retail prices for consumers.
>
> 1.40 My analysis finds no evidence that [Compare The Market's] [wMFNs] had a statistically significant effect on any of these tests.
>
> 1.41 Although the CMA has raised concerns about the ability of my approach to capture the full-effects of [Compare The Market's] [wMFNs], these concerns are not well founded. They are not supported by the qualitative evidence provided by insurers and [price comparison websites] and I have carried out standard statistical techniques to test and control for these issues, which show that my analysis is robust."

254. Ms Ralston's analysis in this regard is intended as a direct challenge to the Decision's finding that there was an appreciable effect on Premiums.[365] It is worth noting at this stage that the quantitative evidence will compare the position between a market in which nMFNs are prevalent and the position pertaining with wMFNs. This is because it draws on comparisons between the position during the Relevant Period, and the position after that period when wMFNs were not in use. In other words, the quantitative evidence will address the incremental effect of the wMFN Agreements over and above the effect of nMFNs which still applied after the Relevant Period.

255. We will come, in due course, to the CMA's assertion that there can be an appreciable effect on competition without a statistically discernible effect on Premiums, but for the present we are simply concerned with Ms Ralston's analysis as to whether there was or was not such a discernible effect statistically.

256. Ms Ralston's analysis is at Ralston 1/§§7.4 to 7.42, and she sets out her conclusions in a table at Ralston 1/§7.46. As to this:

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[365] See Ralston 1/§7.1.

(1) It is important to begin with an understanding of what is meant by something being "statistically significant" following a regression analysis of the sort conducted by Ms Ralston. A result is referred to as being "statistically significant" if it is unlikely to have been observed by chance. In regression analysis, this is normally assessed by calculating the likelihood of the estimated coefficient being observed if the true underlying coefficient is actually equal to zero. In other words, statistical significance assesses the extent to which there is no true effect between the variable associated with that coefficient and the dependent variable. The significance is reported as a "probability value" or "p-value". Significance is indicated by p-values that are close to zero, which denotes a low probability that the results obtained would have been observed if the true value of the underlying parameter were indeed zero. Standard thresholds are 10%, 5% or 1%.

(2) Thus, the analysis would support the CMA's theory of harm if it were to produce a coefficient, to a level of statistical significance, that would be a positive value. Ms Ralston's work produced coefficients that were not consistent with this, thus serving to undermine the CMA's contention that wMFNs caused Premiums to be higher than they would otherwise be. However, none of Ms Ralston's results were statistically significant, whether to a 5% level or to a 10% level.

(3) As Ms Ralston says at Ralston 1/§7.47, "my analysis does not support the CMA's provisional finding that [Compare The Market's] [wMFNs] prevented insurers from setting higher prices on [Compare The Market] relative to other [price comparison websites]. Contrary to the CMA's hypothesis, none of the specifications[366] find evidence that the disapplication of [Compare The Market's] [wMFNs] had [a] statistically significant positive effect on the proportion of risks priced more expensively on [Compare The Market] compared to all [price comparison websites]." On the other hand, all Ms Ralston was doing is seeking to prove a negative – that the CMA's finding was not supported statistically.

257. The CMA mounted a number of attacks on Ms Ralston's evidence:

[366] I.e. data and statistical analysis.

(1) In the first place, it was suggested that even if Ms Ralston was right in her conclusion, that conclusion actually took Compare The Market and the Tribunal no further. Paragraph 342 of the CMA's written closing submissions contends:

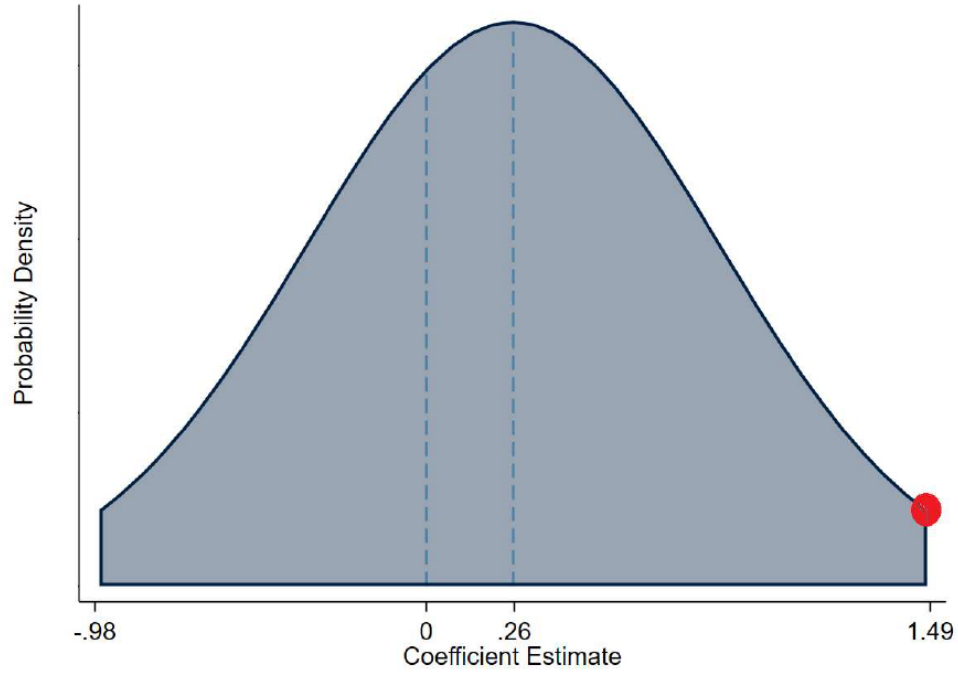
> "The CMA contends that there is a fundamental flaw in the assumption on which Ms Ralston's relative pricing analysis is premised (namely that if the removal of the [wMFNs] had an adverse effect on competition, it would necessarily result in a reduction in the proportion of risks priced more expensively on [Compare The Market] than on other [price comparison websites] after removal of the [wMFNs]). That assumption is not reflective of the CMA's theory of harm in this case. In particular, the CMA's position is that the proportion of risks priced more expensively on [Compare The Market] after the removal of [wMFNs] would not necessarily increase; it would all depend on how [Compare The Market] reacted to the removal of its [wMFNs]. It is likely that [Compare The Market] would have responded to increased competition in the market following removal of its [wMFNs] by reducing its own commissions, resulting in lower retail prices on [Compare The Market], in which case whether the nature of any change in the proportion of risks it priced more expensively would depend on how successful it was in competing on price with its rivals post removal of its [wMFNs]."

The point, in short, is that the downward pressure on Commissions charged by Compare The Market might render Ms Ralston's analysis correct but irrelevant: Premiums post removal of wMFNs would, indeed, be lower, only not relatively so.

(2) Secondly, and somewhat inconsistently with this point, the CMA suggested that "while the lack of statistical significance of the positive results did not enable her to reject her null hypothesis of zero, they also did not enable her to reject the possibility that the [wMFNs] did have an effect".[367] The CMA made this point

[367] Paragraph 330.5 of the CMA's written closing submissions.

by reference to Figure 5.1 in Ralston 2, which for convenience we set out below:



Note: This confidence interval corresponds to the model assessing the impact of CTM's wide MFN disapplication on the number of PDs across all HIPs.

Source: Oxera analysis.

Figure 1: Confidence interval for wMFN coefficient estimate

According to this curve, the most probable point of the curve suggests not zero change in Premiums, but a change of 0.26, which is marginal but supportive of the CMA's theory. However, the confidence that 95% of observations will fall within the curve shows a range of between -0.98 (not supporting of the CMA's case, indeed positively inconsistent with it) and +1.49 (more supporting of the CMA's case than the most probable point estimate). The CMA was, unsurprisingly, most interested in this latter point on the bell curve. It flies in the face of what this data means for the CMA to contend that there is any plausibility in this figure. Of course, its possibility cannot be excluded because it falls within the 95% confidence interval (or falls outside the 5% p-value), but that is really not very supportive of the CMA's theory of harm. We accept Ms Ralston's statement in Ralston 2 as the statement of a balanced and responsible expert:[368]

> "As the figure shows, the mass of the probability density lies in the central area of the diagram and the most likely value is the central estimate, which lies at the peak of the bell curve. As the confidence interval deviates further from the central value,

[368] Ralston 2/§5.102.

> the probability that the "true" parameter is captured at that point of the interval decreases. Moreover, the lower bound – which would instead suggest a pro-competitive effect of the [wMFN] – would be as "non-surprising" as the upper bound. Finally, an estimate of zero is approximately seven times more likely that the red circle selected by Professor Baker."

There is a reason why points on the bell curve should be rejected in favour of ranges: they provide a specious accuracy,[369] and it does Professor Baker little credit that he attempted to draw attention to the extreme end of the 95% probability bell curve.

(3) Thirdly, and inconsistently with both of these earlier points, the CMA deployed Professor Baker to conduct a wholly negative attack on Ms Ralston's work. We say "wholly negative" because Professor Baker claimed that the job simply could not be done, and so he had not done it.[370] Professor Baker also did not even attempt to grapple with those instances where a similar statistical exercise had, in fact, been carried out.[371] Rather, Professor Baker advanced a series of criticisms of Ms Ralston's approach and methodology. We do not propose to go through them, because we accept that there are intrinsic difficulties in any statistical analysis, such that they cannot be taken as providing the inevitable answer to any counterfactual case. Professor Baker helpfully highlighted these, and we accept that we must tread carefully in how far reliance can be placed on this sort of analysis. As Compare The Market itself noted, "no econometric model will be perfect, and…econometrics is not expected to be the only way of assessing effects."[372] We entirely agree: the information is a part of the evidence that we must take into account.

(iii) Effect of Wide Most Favoured Nation Clauses on Commissions

258. In Ralston 1, Ms Ralston summarises her findings as follows:

> "1.42 In order to assess whether [Compare The Market's] [wMFNs] had an effect on [price comparison website commissions], I conduct two analyses, both of which are robust to the CMA's comments:

[369] See the discussion in Smith, M, *Lawyers come from Mars, and economists come from Venus – or is it the other way round? Some thoughts on expert economic evidence in competition cases*, (2019) 18 Comp LJ 1 at 5-6.
[370] Compare The Market's written closing submissions at paragraphs 294 to 296.
[371] Compare The Market's written closing submissions at paragraphs 297 to 300.
[372] Closing submissions at paragraph 302.

- I analyse the effect of the disapplication of [Compare The Market's] [wMFNs] on its own commissions; and

- I present a market-wide model that estimates the effect of all [price comparison websites'] [wMFNs] on commissions more generally."

259. Ms Ralston states her conclusions at Ralston 1/§§8.20 to 8.24. Her conclusion, as in the case of premiums, is that "there is no evidence the [wMFNs] had an impact on the level of negotiated commissions" when looking at the effect of wMFNs on commissions in the period 2012 to 2018 across all price comparison websites,[373] and that "the disapplication of [Compare The Market's] [wMFNs] did not have an impact on the level of insurers' negotiated commissions" in the period 2012 to 2019 when looking at Compare the Market alone.[374]

260. In response, the CMA relied upon Professor Baker's evidence. His approach was to say that (for similar reasons to those that apply in relation to Premiums) "[t]he commissions data similarly do not allow the effects of the removal of [Compare The Market's] wMFNs to be determined with adequate precision to rule out economically significant commission reductions".[375] Professor Baker took particular issue with the fact that, when determining the effect of wMFNs on Commissions charged by all price comparison websites, only one year of data (2018) post-dated the removal of wMFNs. For this additional reason, the CMA submitted that little if any weight could be afforded to the results. For Compare The Market, Ms Ralston was able to use data from 2019 which was also available.[376]

(f) Conclusion

261. There is no reliable evidence to conclude that the existence of the wMFNs in the wMFN Agreements had any adverse effect on either Premiums or Commissions. Based on the material that we have seen, and that we have described in this Section H(8), we would wish to go further. We do not regard this as a case where the CMA has failed to meet the standard of proof (although that is the case). We consider that it is unlikely that the

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[373] Ralston 1/§8.22.
[374] Ralston 1/§8.24.
[375] Baker/§124. "[T]he all [price comparison website] commissions results are "plausibly unreliable" … and [Compare the Market] commissions results are "unreliable"".
[376] Ms Ralston conducted further analysis specific to Compare The Market at Ralston 2 /§5.118*ff* reflecting data for 2019 and 2020.

wMFNs here in issue had any effect on maintaining Premiums or Commissions at a higher level than they otherwise would have been. Accordingly, as regards this part of its theory of harm, Grounds 3 to 6 succeed.

262. We have reached this conclusion for the following reasons:

(1) As we have stated, we are here considering the anti-competitive effect on Premiums and Commissions of the wMFNs between 32 of the home insurance providers subscribing to Compare The Market's price comparison website and Compare The Market itself. We have rejected the suggestion – made in Ground 2 – that the inquiry ought to be narrower than these 32 clauses.[377]

(2) We should make clear, however, that we do not consider there to be any scope for contending that Compare The Market had sufficient market power to impose such clauses on its subscribing insurers. The Decision contains no such finding (which would be akin to an abuse of dominance case), and the fact is that a substantial minority of home insurance providers subscribed to the Compare The Market website without being bound by such clauses (although they were bound by nMFNs).[378]

(3) As to the qualitative evidence on which the Decision is principally based, we have set out some of the "high points" that were in the Decision and set out in the CMA's written closing submissions.[379] That evidence can best be described as "anecdotal". The evidence lacks depth (bald explanations, without detail, are the order of the day) and consistency with the CMA's theory of harm (thus, two of the anecdotes relied upon appear to show that the enforcement of wMFNs caused Premiums to fall, and not to rise). Much more seriously, however, is the fact that this evidence was untestable by both Compare The Market and the Tribunal.[380] In Section H(6) above, we have set out in detail a number of concerns regarding the qualitative evidence adduced by the CMA. The points

[377] See Section G above.
[378] See paragraph 156(2) and Annex 1. Some home insurance providers did seek to press the point before the CMA (referring to the wMFNs being "non-negotiable" and "required as a condition of trading", but the Decision does not make any finding in this regard, despite references to Compare The Market's market "power": see Decision/§5.217(a) and §8.54.
[379] See paragraphs 250(4) and 250(5) above.
[380] See paragraph 251 above, which records Compare The Market's point in this regard.

that have particular force in this context are: *(i)* that it was never clear – in particular, to the Tribunal, but also, inferentially, to Compare The Market – precisely what qualitative evidence the CMA was actually relying upon;[381] and *(ii)* it has not been possible to test this evidence in any way.[382] We use the term "anecdotal" to underline the fact that we regard this material as of very little weight. In itself – and even disregarding the other factors pointing against the CMA's theory of harm – this material is insufficient to discharge the burden that lies on the CMA.

(4) There are a number of other factors that all go to undermine an already inadequate case. These can be enumerated as follows. First, we do not consider that wMFNs are necessarily effective save in the most egregious of cases. Ms Ralston's evidence (which we have described in relation to Ground 2) suggested deliberate non-compliance with wMFNs. We have not accepted that evidence: but we do accept that the apparent infringements of the wMFNs identified by Ms Ralston in fact evidenced the limits to the effectiveness of wMFNs (even though these were contractually binding and rigorously enforced).[383] It seems to us to follow that wMFNs would only be effective in those rather limited cases where a home insurance provider went out of its way to discriminate against Compare The Market, by "loading" the Premiums it quoted on that price comparison website and no other.[384] In short, we remain to be persuaded that wMFNs were as effective as the CMA considered, viewing them simply on their own terms and without regard to other circumstances.

(5) But, of course, there were other circumstances. The second point we would note is that the Decision takes no account of the effect of the prevalent nMFNs. This is a point that was raised (by the Tribunal) during the course of the proceedings,[385] and the question is whether prevalent nMFNs would proxy the

[381] See Section H(6)*(c)* above. This point is underlined by paragraph 41 of the CMA's written closing submissions, which states: "The Tribunal is invited to read the entirety of the evidence set out in the Decision, particular (on this issue) the evidence in Sections 7, 8 and 9 and Annexes L and M" (emphasis supplied). We have, of course, read all of these parts of the Decision several times, but we have not (to be clear) trawled through each and every document referred to in the 829 extensive footnotes that form part of the text in Sections 7, 8 and 9 (Section 7 starts at footnote 538, and Section 9 ends at footnote 1367).
[382] See Section H(6)*(d)* above.
[383] See paragraph 245(3) which sets out the various reasons why wMFNs might be ineffective.
[384] See the case of Grove & Dean, which we have summarised in paragraph 250(4)(iv) above.
[385] See paragraph 201(3) above, which records the questioning of Professor Ulph.

effect of the wMFNs in the wMFN Agreements so as to undermine the CMA's theory of harm. In a competitive market – where home insurance providers are competing amongst each other, including in particular, by way of the Premiums they quote, the existence of prevalent nMFN obligations on these home insurance providers not to quote Premiums on price comparison websites that are higher than those on direct channels can, we consider, produce an essentially similar effect to the wMFNs here under consideration. We do not wish to overstate this point: the fact is that our concerns were unanswered, and we cannot and do not find that the nMFNs in this case did proxy the wMFNs. But the fact that the point was not addressed is, in our judgement, concerning and undermining of the CMA's overall analysis.

(6) The third point we would note is that this is a "by effect" and not a "by object" case. We consider there to be a relationship between the "objects" and "effects" of an anti-competitive agreement, in that the theoretical objection to a provision – whilst not enough to support a "by object" conclusion – can nevertheless buttress a "by effect" conclusion. In this case, however, we do not consider the theoretical argument against wMFNs to be particularly strong in the markets under consideration:

(i) We begin with the position of Commissions. The theory of harm in the Decision suggests that competition between home insurance providers subscribing to price comparison websites will be blunted by the presence of wMFNs, and that there will be a lessening of pressure on price comparison websites to lower Commissions in order to offer lower Premiums on their websites.

(ii) Although we appreciate that – pursuant to a wMFN - any lowering of Premiums on *Price Comparison Website X* would oblige a similar offering to Compare The Market, we do not consider (even looking at the competition between price comparison websites) that it necessarily follows that the pressure on price comparison websites to lower commission would reduce. We accept that, on the home insurance provider side of the market, the relevant market is that of Price Comparison Services, but as we have explained, the Decision's approach

places too much weight on the desire to differentially price and too little weight on inter-brand competition. Were a home insurance provider to offer the same low price across the price comparison website market, that may have a downward influence on Commissions generally, including those charged by Compare The Market. That downward influence would be augmented by the pricing behaviour of those home insurance providers not subscribing to Compare The Market or not being subject to Compare The Market's wMFNs.

Thus, even though this is the theoretically strongest part of the Decision's reasoning, it is not particularly strong or compelling.

(7) It is then necessary to consider the downward pressure on Premiums – and hence Commissions – caused by the competition on the consumer side of the market. The Decision materially understates the nature of that competition by getting the market definition on this side of the market comprehensively wrong. There will be competition in relation to Premiums – in relation to what is a highly price elastic market – from all of the channels for the sale of home insurance products that we have identified in Annex 2. Competition will not just stem from home insurance products sold via price comparison websites. In dismissing these alternative channels as constraints, the Decision then fails to consider such competition, and this is a significant problem when it comes to considering the essential persuasiveness of the theory of harm there articulated.

(8) What is more, for the reasons we have described, we consider that there would be significant competition (in particular *inter*-brand) between home insurance products offered through price comparison websites only.

(9) Finally, there is the fact that the quantitative evidence adduced by Compare The Market is entitled to some weight and is broadly consistent with our views both as to the theoretical operation of the market and the value of the qualitative evidence. In short, we find it altogether unsurprising that the econometric evidence tells as it does; and we consider the CMA's contention that there can be anti-competitive effects that are not discernible to be unarguable where both the theoretical and the qualitative underpinnings are as weak as they are.

263. For all these reasons, we conclude that the finding of an anti-competitive effect in this regard cannot stand, and to this extent, in relation to Premiums and Commissions, Grounds 3 to 6 of the appeal must succeed. We now turn to the questions that arise in relation to promotional discounts.

(9) Effect on promotional discounts

(a) Introduction: the significance of our conclusions in Section H(8) above

264. We have, for the reasons given in paragraphs 225 above, considered it appropriate to treat promotional discounts separately from the general effect of wMFNs on Premiums and Commissions. In this, we have bifurcated in our analysis matters which the Decision treated as one phenomenon. We consider that this bifurcated approach is necessary in order to do proper justice to the Decision, and properly and fairly to deal with the grounds of appeal.

265. Because this was not the approach of the Decision – even though a clear distinction was drawn between general effects on Commissions and Premiums and the effects on promotional discounts – it is necessary that we articulate why we have considered it necessary to take a more bifurcated approach (as we call it). Our reasons are as follow:

(1) For the reasons given in Section H(8), we have found that wMFNs have no appreciable effect on Premiums and/or Commissions. Without in any way seeking to repeat what we have already said, the basis for our conclusion is summarised in paragraphs 261 to 262 above.

(2) Given that the CMA did not contend before us at the hearing that this was a case of potential effect, but only a case of actual effect, it is difficult to resist the conclusion that – simply by virtue of our conclusions in Section H(8) – we are obliged to conclude that wMFNs had no appreciable actual effect on Premiums and/or Commissions through the intermediation of promotional discounts, even if the nature and quality of those promotional discounts was affected by wMFNs. The short point is that the theory of harm articulated in the Decision – namely that Premiums and/or Commissions were higher than they should have been – has not been made out. wMFNs have not been shown to have an appreciable

effect on either Premiums or Commissions. We consider that this is a complete answer to the findings in the Decision, and so conclude that Grounds 3 to 6 must succeed simply by reason of our conclusions in Section H(8).

(3) However, although the CMA did not contend (at least at the hearing) that this was a case of potential adverse effects on competition, we have been alive to the point.[386] We consider that there is a sufficiently material difference in evidential quality between the qualitative evidence adduced by the CMA in the Decision as regards promotional discounts when compared to the "anecdotal" (at best) evidence adduced in respect of general effects on Premiums and Commissions. It is for this reason that we consider it is appropriate to look at the potential effects of wMFNs on promotional discounts in a little greater detail. We begin by assessing the qualitative evidence that was adduced by the CMA in the Decision in this regard.

(b) Qualitative evidence adduced in respect of promotional discounts

266. There are three reasons why the qualitative evidence in respect of promotional discounts needs to be considered separately from the evidence that was adduced in relation to the general effects on Commissions and Premiums considered in Section H(8) above:

(1) The qualitative evidence is markedly more extensive and markedly more compelling, even with the limited cross-examination that was possible. Whereas it is extremely difficult for a witness of fact to make general statements about competitive pressures on price, it is very easy for a witness to explain why a promotional discount – which requires the conscious decision and agreement of both home insurance provider and price comparison website – did not go ahead or why promotional discounts were approved in lower numbers when wMFNs were in place than subsequently – or in the counterfactual.

(2) We consider that it is likely that a home insurance provider and a price comparison website (and we stress that for a promotional discount, the

[386] See CMA Defence/§37: "in the present case the CMA in any event did not limit itself "solely" to making findings about potential effects on competition. Rather, it found that [Compare the Market]'s network of [wMFNs] had actual effects on competition both between PCWs and between insurers competing on PCWs…"

agreement of both will be required) will be deterred or disincentivised from agreeing monetary promotional discounts by wMFNs. Assuming, as we do, that the home insurance providers subject to wMFNs will comply with them, any monetary promotional discount will inevitably entail a corresponding reduction in premium offered on Compare The Market, without necessarily (and absent negotiation) any reduction in Commission payable to Compare The Market. Consequently, any increase in profits that the home insurance provider might anticipate earning through the promotional discount will be offset by a reduction in profit that the home insurance provider earns through sales generated on Compare The Market. Similarly, the price comparison website contemplating offering a monetary promotional discount to a home insurance provider party to a wMFN Agreement will anticipate a smaller increase in sales because Compare The Market will receive the same Premium reduction.

(3) The quantitative evidence is not very compelling in the case of promotional discounts. The problem is that – unlike Premiums and Commissions, where "like for like" comparisons can be made – measuring the effect of wMFNs on promotional deals involves a high degree of subjectivity, which is inimical to robust econometrics. The problem arises out of the fact that it is very difficult to identify what effect is being measured. Is it the absolute number of promotional deals during and after the Relevant Period? Is it the total monetary value of promotional deals offered during and after the Relevant Period, taking account of their duration? Is it the total benefit to consumers of promotional deals, based upon policies concluded during and after the Relevant Period? Given the difficulty in even articulating the matters that are being measured is, to our mind, an indicator that quantitative evidence is not likely to assist.

We stress that none of these points makes any difference to our conclusions in Section H(8) above. In the context of promotional discounts, they go to an altogether different question, namely potential effects on market structure as opposed to actual effects on Premiums and/or Commissions.

267. We consider the evidence regarding the effect on promotional discounts of the wMFN Agreements to be significantly different, and altogether stronger, than in the case of Commissions and Premiums generally. Although there is no evidence that Premiums

and Commissions in general were affected at all,[387] we consider that the three factors identified above, taken together, point quite strongly to the existence of some kind of effect on promotional discounts.

268. The question, therefore, is whether this is a proper basis on which to uphold at least a part of the Decision. It is to that question that we now turn.

(c) A potential anti-competitive effect?

269. Given that the existence of potential, as opposed to actual, effects is not as we understand it the basis on which the Decision is defended, we doubt whether our consideration of potential effects can constitute a proper basis for upholding the Decision or even part of it. Nevertheless, because the points set out above are all points that featured in the evidence and in argument, we consider that it is appropriate to say why we do not consider even a potential anti-competitive effect to arise in this case.

270. In short, we do not consider that the competitive structure of the market was harmed, even potentially, through an effect on promotional discounts, for the following reasons.

(i) Factors relied upon by Compare The Market

271. Compare The Market contended that we should regard promotional discounts as pernicious and not beneficial. Compare The Market's submission was that promotional discounts (which would typically be advertised heavily) were devices intended to attract new business (as we have defined it), probably at the expense of renewal business. That, in itself, is pro-competitive. However, Compare The Market contended that having obtained new business through the attractions of "one off" promotional discounts, home insurance providers then took advantage of the passivity of consumers to ratchet up prices on renewal. This was referred to as "price walking".

272. The point being articulated by Compare The Market was that home insurance providers would – when offering promotional discounts – have close regard to the lifetime value (or LTV) of the consumers in question,[388] and would only offer promotional discounts

[387] Which is the outcome indicated by the quantitative evidence considered in paragraphs 252*ff* above.
[388] This is described in paragraph 83(3) above.

where this was justified by future expected revenue streams from those consumers. Although we can see the force in Compare The Market's submissions in this regard, we reject them. We consider that balancing the potential adverse effect of wMFNs against the potential adverse effects of promotional discounts because of "price walking" draws this Tribunal into precisely the sort of value judgment and balancing exercise that lies outwith the role of this Tribunal. The fact is that we are concerned with whether the Chapter I Prohibition has been infringed "by effect". If we are satisfied that that is the case, then there has been an infringement. If Compare The Market wish to contend that the effect of wMFNs on "price walking" is pro-competitive and so justifiable under Article 101(3) TFEU and/or section 9 of the Competition Act 1998, then that contention is open to them to make. But that contention has not been advanced in this appeal, and we consider that the question of "price walking" is a matter which we cannot and should not take into account.

(ii) wMFNs and promotional discounts involve voluntary decisions not to be interfered with without reason

273. We have noted that there is no finding that wMFNs were forced upon home insurance providers. The Decision is based upon the Chapter I Prohibition, and not on any kind of finding of abuse of a dominant position. Although the Decision contains many references to Compare The Market's "market power", it is difficult to see where those references go: at most, they buttress an argument that the actions of a powerful operator like Compare The Market are likely to have greater effect than that of a small and weak participant in the market. So far as it goes, that is a point we accept. But it in no way undermines the fact that there is no evidence before us to suggest that wMFNs were agreed on anything other than a voluntary basis. As we have noted, a significant minority of home insurance providers subscribing to Compare The Market's price comparison website were not subject to wMFNs in their agreements. Neither party could tell us why this was. There are various reasons why this might be. It may be that, in negotiations between these (13) home insurance providers and Compare The Market, these 13 were sufficiently strong so as to avoid being bound by a wMFN, whereas the 32 subject to the wMFN Agreements did not. Alternatively, it may be that the wMFN was commercially of little concern to the 32 or of less than concern than other terms under negotiation. We simply cannot say.

274. Contractual arrangements like wMFNs are fetters on the promisor. Absent specific factual findings, we proceed on the basis that such fetters are voluntarily entered into. By entering into the wMFN Agreements with Compare The Market, the home insurance providers in question limited their ability – in the manner we have described – to enter into other types of contract. Specifically, we can see why the existence of a wMFN fetter might constrain a home insurance provider from entering into promotional discounts with other price comparison websites if it was unwilling to offer the same discount on Compare The Market. But – on the facts as they stand – we see nothing anti-competitive or illegitimate in this. The constraint is simply a consequence of a bargain entered into, which *prima facie* ought to be respected.

275. It may be that the same point can be put differently. wMFNs and promotional discounts are both negotiated constraints between a home insurance provider and a price comparison website that affect the Premium that will be charged on one or more price comparison websites. In this – whatever their other differences – they are in quality the same. They cause certain, specific, Premium quotations to be different from what market forces, apart from such provisions, would cause them to be. But that is the way markets work – through the interaction between the price at which someone is prepared to sell and the price at which someone is prepared to buy. The fact that such interaction is affected by contractual agreement is both a necessary and inevitable part of the way in which markets work.

276. We do not consider that, for purposes of the Framework that we have described in paragraph 29 above, a "brightline" distinction between the wMFN Agreements (bilaterally agreed between Compare The Market and the 32 home insurance providers subject to the wMFN Agreements) and other forms of bilateral agreement concluded between, or capable of being concluded between, home insurance providers and <u>other</u> price comparison websites apart from Compare The Market can meaningfully be drawn.

277. The process set out in the Framework presupposes that the "offending" restriction can clearly be identified, and what is sought to be assessed is whether the market operates differently in light of the removal of that "offending" restriction. We are not confident that this process can properly be applied where what is being removed from the counterfactual case (viz, the wMFN Agreements) is in substance similar to what remains

(viz, the promotional discounts that were or could be agreed between home insurance providers and price comparison websites).

278. For all these reasons, we consider that Grounds 3 to 6 succeed in relation to promotional discounts also.

I. PENALTY

279. As we have noted,[389] Grounds 7 and 8 were advanced contingently, on the assumption that Grounds 1 to 6 all failed. Grounds 3 to 6 have succeeded, and it follows that the question of penalty does not arise, and that it would be otiose for us to consider Grounds 7 and 8 any further. We do not do so.

J. CONCLUSION AND DISPOSITION

280. For all these reasons, the appeal advanced under the Notice of Appeal succeeds, and the Decision is set aside. This is our unanimous decision.

Sir Marcus Smith
President

Bridget Lucas, QC

Prof. David Ulph, CBE

Charles Dhanowa OBE, QC (Hon)
Registrar

Date: 8 August 2022

[389] See paragraph 34 above.

ANNEX 1

HOME INSURANCE PROVIDERS SUBSCRIBING TO COMPARE THE MARKET

(paragraph 21 of the Judgment)

Home insurance providers 1 to 32 are identified as having Wide Most Favoured Nation Clauses in their contacts in Decision/Table 2.1 and Decision Annex/C.I.

Home insurance providers 33 to 45 are identified as having Narrow Most Favoured Nation Clauses in their contracts in Decision/Annex C.II.

	Home insurance providers subscribing to Compare The Market's price comparison website, whose contracts contained Wide Most Favoured Nation Clauses
1.	Ageas 50 Limited (Ageas)
2.	Allianz Insurance plc (Allianz)
3.	Autonet Insurance Services Limited
4.	Aviva Insurance Limited (Aviva)
5.	Axa Insurance UK plc and Swiftcover Insurance Services Limited (AXA)
6.	British Gas Services Limited (British Gas)
7.	CIS General Insurance Limited (Co-op)
8.	Deeside Insurance Brokers Limited (Deeside)
9.	Brightside Group plc
10.	Eldon Insurance Services Limited
11.	Endsleigh Insurance Services Limited
12.	Fresh Insurance Services Group Limited
13.	F Wilson (Insurance Brokers) Limited trading as Quoteline Direct (Quoteline Direct)
14.	Grove & Dean Limited trading as Performance Direct

15.	iGo4 Limited
16.	Insurance Dialogue Limited
17.	Intelligent Advisory Services Limited
18.	John Lewis plc
19.	Legal & General Insurance Limited (Legal & General)
20.	Liverpool Victoria Friendly Society Limited (LV=)
21.	Marks and Spencer Financial Services plc (M&S Bank)
22.	One Call Insurance Services Limited (One Call)
23.	Paragon Car Limited trading as Thamesbank Insurance Services
24.	QMetric Group Limited (QMetric)
25.	RAC Financial Services Limited
26.	Sainsbury's Bank plc
27.	Shop Direct Finance Company Limited
28.	Source Insurance Limited
29.	Swinton Group Limited
30.	Think Insure Limited
31.	T & R Direct Limited
32.	Zurich Insurance plc (UK Branch) (Zurich)
	Home insurance providers subscribing to Compare The Market's price comparison website, whose contracts contained Narrow Most Favoured Nation Clauses
33.	Automobile Association Insurance Services Limited (The AA)
34.	EUI Limited trading as Admiral

35.	NHI Limited Services trading as Avantia
36.	Barclays Bank plc
37.	UK Insurance Limited trading as Direct Line (Direct Line Group)
38.	esure Service Ltd (esure)
39.	Hastings Insurance Services Limited
40.	Lloyds TSB Insurance Services Limited Halifax General Insurance Services Limited (Lloyds Banking Group)
41.	Royal Sun Alliance plc trading as More Than (RSA Insurance Group)
42.	Neos Ventures
43.	Now4Cover
44.	Saga Services Limited
45.	Personal Finance plc (Tesco Bank)

ANNEX 2

FIGURATIVE REPRESENTATION OF THE MARKET(S) CONSIDERED BY THE CMA IN THE DECISION

(paragraph 96 and 120(5) of the Judgment)