Case No: 1262/5/7/16 (T)
IN THE COMPETITION APPEAL TRIBUNAL

Competition Appeal Tribunal
Victoria House
Bloomsbury Place
London
WC1A 2EB

Before:

MR JUSTICE MARCUS SMITH
MR PETER FREEMAN CBE,QC (Hon)and MR BRIAN LANDERS

_____

Between:

AGENTS' MUTUAL LIMITED
Claimant
and

GASCOIGNE HALMAN LIMITED (T/A GASCOIGNE HALMAN)
Defendant

_____

MR ALAN MACLEAN QC and MR JOSH HOLMES appeared on behalf of
the Claimant

MR PAUL HARRIS QC and MR PHILIP WOOLFE appeared on behalf of
the Defendant

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1 Wednesday, 15 February 2017	1 **Bundeskartellamt in terms of their analysis of analogous**
2 (10.00 am)	2 **situations. So, if you like, I put all that together**
3 MR DAVID PARKER (continued)	3 **then in order to make -- you know, in order to**
4 Cross-examination by MR MACLEAN (continued)	4 **understand how I interpret the findings of the cost per**
5 MR MACLEAN: Good morning, Mr Parker.	5 **lead. I think that's only a part of the overall story.**
6 **A. Good morning.**	6 **I think we need to look at the wider picture of the**
7 Q. Now, on your analysis both Zoopla and Rightmove's costs	7 **evidence.**
8 per lead rose, is that right?	8 Q. So you are suggesting that this time lag effect, the
9 **A. Yes, that's correct.**	9 time lag reaction by Zoopla, I think you are telling me
10 Q. But on your theory only Rightmove has any pricing power	10 there are some, what Norman Lamont once called "green
11 in the market which could have increased. Is that	11 shoots", showing that there are some detectable signs of
12 right?	12 that now happening, is that right?
13 **A. I'm thinking that Rightmove's position has been**	13 **A. Yes, in H2/2016.**
14 **strengthened and therefore I interpret that, the**	14 Q. On what basis are you able, on the basis of the evidence
15 **increase in Rightmove's costs per lead, as reflecting**	15 that you present, to exclude the possibility that
16 **that fact. I think Zoopla, there has been a -- its cost**	16 Rightmove isn't just a bit more lagged than Zoopla was
17 **per lead has gone up because the number of leads has**	17 in reacting to OnTheMarket's entry?
18 **dramatically reduced or substantially reduced, leading**	18 **A. Well, I think on the basis of the pure cost per lead**
19 **to that. But actually I predict that that then unwinds**	19 **data alone, one can't rule out that in the future**
20 **and then if you look at the H2/2016 figures you are**	20 **something else might happen but if one puts in -- puts**
21 **starting to see that happening.**	21 **this in the context of the underlying reasons why**
22 Q. So you get the same phenomenon for Rightmove and Zoopla,	22 **I expect a strengthening or weakening of the position**
23 namely an increase in costs per lead, but you have to	23 **and the third party evidence and the evidence on page**
24 offer some rather different explanation for Zoopla's	24 **views and visits and the evidence from OTM and Zoopla,**
25 increase, which you attribute to this time lag effect,	25 **and indeed Rightmove, all of whom say Rightmove's**

1 than you attribute to the same phenomenon for Rightmove	1 **position has been strengthened --**
2 which you attribute to a strengthening of its pricing	2 Q. But your empirical analysis, standing on its own two
3 power?	3 feet, can't rule out that possibility, can it? You have
4 **A. That's right, because for Rightmove I have -- well, for**	4 to pray in aid all this basket of other points?
5 **both parties I have other evidence about whether they**	5 **A. I think we should be clear what we mean by "empirical".**
6 **have a strengthening of position or a weakening of**	6 **Empirical is evidence; you are referring to a part of**
7 **position. I have evidence from total visits, I have**	7 **the evidential picture. My empirical analysis**
8 **evidence from page views and I have third party support,**	8 **encompasses the page views and visits data in terms of**
9 **and I put that together then in terms of what I draw**	9 **how house-hunters are responding. It covers the**
10 **from the cost per lead analysis and that is how**	10 **difficulties that Zoopla has had in closing the agent**
11 **I interpret the findings of that analysis.**	11 **base gap, so that Rightmove continues to have an**
12 Q. But your hypothesis is just fitting the explanation to	12 **advantage on the agents' side which leads to the**
13 the case that you want to advance, isn't it? You get	13 **strengthening of its position on the house-hunting side.**
14 the same phenomenon and you give, rather conveniently,	14 **There is the third party evidence, there is evidence of**
15 diametrically opposed reasons for Rightmove and Zoopla's	15 **disclosure, and there is the analogies with the OFT and**
16 cost per lead both going up. One it is because its	16 **the Bundeskartellamt decisions. All of that is**
17 position has strengthened and one it is because its	17 **empirical evidence. You are focusing on one part of the**
18 position has weakened. It is very convenient, isn't it?	18 **empirical evidence and it seems to me we need to take it**
19 **A. Well, I think it is consistent with the broad pattern of**	19 **in the round.**
20 **evidence that Rightmove's position has strengthened and**	20 Q. I am testing it because you use it to advance your
21 **OTM agrees that that's the case, if you look in various**	21 theory and I am suggesting to you that it doesn't bear
22 **of its documents. Zoopla's position has weakened;**	22 the weight that you seek to put on it.
23 **I think, that's a pretty common understanding. The**	23 **A. As I say, I place weight on the evidence in its totality**
24 **third party evidence supports that. It is consistent**	24 **and I build up a picture first from economic theory and**
25 **with the approach that was taken by the OFT and the**	25 **then I support it with various types of evidence, so**

1   **I understand your position and I disagree.**
2 Q. Take your first report, Mr Parker, please, bundle F,
3   page 94, paragraph 7.4.22 through to 7.4.24. That's
4   where you deal with the point I started with, the point
5   about Rightmove's cost per lead being higher and
6   Zoopla's cost per lead being higher. You deal with
7   Rightmove at 7.4.23 and then your explanation for Zoopla
8   is at 7.4.24. Is that right?
9 **A. Yes, that's right.**
10 Q. And at 7.4.22 you start with the acknowledgement, which
11   one might think is somewhat of an understatement, that:
12   "This isn't perfect methodology as it doesn't
13   control in a statistical fashion for other factors that
14   could be affecting the cost per lead over this period."
15   So you accept that one should ideally be proceeding
16   on the basis of a properly statistically valid exercise,
17   don't you?
18 **A. I think if one had the data on which to do so, then**
19   **I think that would be the ideal and I am very open and**
20   **upfront about that in my first report. But I think if**
21   **you don't have the data on any other facts you could**
22   **take into account, and we do only have a small number of**
23   **data points for this part of the analysis, and focus on**
24   **the cost per lead analysis, but as I say, there is a**
25   **variety of other types of empirical evidence that I am**

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1   **also considering --**
2 Q. You see, Mr Parker, I suggest to you that all that you
3   have done in this report, in offering your suggested
4   reasons in 7.4.22 through to 7.4.24, all that you have
5   done is to identify a difference between a predicted
6   trend and an actual observation and then you are frankly
7   guessing as to what the reasons for that might be in
8   relation to Rightmove on the one hand and Zoopla on the
9   other, aren't you?
10 **A. I don't think I'm guessing because, for the reasons**
11   **previously discussed, I start from the perspective of**
12   **economic theory and I think about how I think the market**
13   **is likely to work. I then look at some intermediate**
14   **predictions around the consequence or strengthening of**
15   **Rightmove's position that follows from the relative**
16   **weakening of Zoopla's agent base and the relative**
17   **strengthening of Rightmove's agent base and I find that**
18   **those predictions are supported. That gives me**
19   **confidence in the economic theory and that I then use to**
20   **interpret also the results of the cost per lead analysis**
21   **and as I note, I say here that I expect Zoopla's cost**
22   **per lead to start to -- the increase in that start to**
23   **unwind and that is what I have started to see in H2/2016**
24   **which is not contained in this report because the data**
25   **was not available at that point. But it is now**

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1   available.
2 Q. I was going to ask you some questions, Mr Parker, about
3   whether the what you would call -- or, as it were,
4   the price paid to my clients by those agents that
5   voluntarily chose to list on OnTheMarket is something
6   that you treat as an adverse effect on competition. But
7   I read yesterday's transcript, which confirmed my
8   recollection that I think yesterday you resiled from the
9   suggestion, or any suggestion, that the harm, as you
10   would put it, caused to those agents who signed up with
11   my client was anti-competitive harm as opposed to merely
12   harm. Is that right? Is that your position?
13 **A. I would take issue with the word "resile" --**
14 Q. Never mind the word "resile".
15 **A. Well, in 7.5.6 and 7.5.7 I spell out quite clearly that**
16   **I think the anti-competitive effect, or one of the**
17   **anti-competitive effects, is because the entry of OTM**
18   **with the OOP rule has reduced the competitive pressure**
19   **on Rightmove. That is the main anti-competitive effect.**
20   **I think there is a source of competitive harm, which is**
21   **due to OTM just being very much out of money in terms of**
22   **its value for money proposition --**
23 Q. So you do suggest it is part of anti-competitive harm,
24   do you?
25 **A. No, I'm saying that is separate. That is in my previous**

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1   **paragraph at 7.5.6. I say:**
2   **"The entry of OTM with the OOP rule has been**
3   **detrimental for all agents from a cost per lead**
4   **perspective."**
5 Q. All right.
6 **A. I also have commented about the distortion of**
7   **competition that arises because agents are essentially**
8   **forced to choose one over the other and that leads to**
9   **them giving up an option from which they previously were**
10   **getting surplus.**
11 Q. That I think means we are going to have to take the
12   slightly slower route to port then, Mr Parker. I will
13   come back to that in a minute, but let me deal with
14   something else first.
15   You accept, don't you, that the results of your
16   analysis are not statistically significant?
17 **A. Yes, that is correct. On conventional evidence of**
18   **statistical significance, that is absolutely right.**
19 Q. And if we take bundle G, page 60, page 57, this is the
20   joint statement.
21 **A. Page 57, sorry?**
22 Q. That is right. Sorry, yes, page 60. It is proposition
23   57. You get proposition 57 at page 59 and I want to go
24   to your commentary on that in a moment, but proposition
25   57, you agree that "Rightmove's cost per lead has

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3 (Pages 6 to 9)

1   increased following the entry of OTM and this increase
2   can be equated with enhanced pricing power relative to
3   the counter-factual in which OTM would not have entered
4   at all".
5   And that is one of the key debates between you and
6   Mr Bishop. He disagrees with that view but that is your
7   position, right?
8   If you go over the page in your comments do you see
9   the paragraph beginning:
10   "I note that Mr Bishop argues that my results are
11   not statistically significant."
12   "I note" -- now, in fact he is not arguing. He is
13   merely observing the truth that your results are not
14   statistically significant, isn't he?
15   **A. Yes, and I say two sentences later I accept that my**
16   **analysis does not meet this level of statistical --**
17   Q. Yes. You say:
18   "I note that the conventional level of statistical
19   significance requires a hypothesis 90 or 95 per cent
20   likely to be true. I accept ..."
21   I am not sure that is quite the right terminology
22   but let's move on.
23   "I accept that my analysis does not meet this level
24   of statistical confidence."
25   And then you make a number of other points,

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1   including (ii), that:
2   "This indicates that the likelihood of Rightmove
3   having increased its prices is greater than
4   50 per cent."
5   **A. Yes.**
6   Q. That is your position, is it? That is your evidence?
7   **A. Well, the fact that I have estimated an increase means**
8   **that it's more likely that Rightmove has been able to**
9   **put up its -- or Rightmove's cost per lead has**
10   **increased, and a more than 50 per cent chance and less**
11   **than -- if the factual and counter-factual were exactly**
12   **the same then there would be a 50 per cent chance each**
13   **side because this is inevitably a -- there is an element**
14   **of uncertainty around both of these. But the fact that**
15   **I have estimated an increase means that there is a more**
16   **than 50 per cent chance that there is genuinely an**
17   **increase and a less than 50 per cent chance that there**
18   **is zero or a decrease.**
19   Q. And that is a statistically valid analysis, is it, you
20   suggest?
21   **A. That is what the statistics are telling you.**
22   Q. Is it? Right, let's just explore that.
23   **A. Let me finish, perhaps, please.**
24   Q. Let me just explore that.
25   MR HARRIS: Sir, with respect, the witness hasn't finished

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1   his answer.
2   THE CHAIRMAN: Complete your answer, Mr Parker, and then
3   Mr Maclean ...
4   **A. I was about to say the conventional level of statistical**
5   **confidence that one would have from a statistical**
6   **analysis would require one to be 90 or 90 per cent**
7   **likely that we have tested a particular hypothesis. In**
8   **this situation I accept that this part of my analysis**
9   **does not meet that level of statistical confidence.**
10   MR MACLEAN: It doesn't even meet the 50 per cent level as
11   we will see in a moment, Mr Parker. Bear with me. So
12   you suggest, notwithstanding that your analysis isn't
13   statistically significant, that nonetheless you
14   presumably are inviting the Tribunal to treat your
15   analysis as having some substantial evidentiary value,
16   are you?
17   **A. I'm inviting them to take it in the round with the other**
18   **evidence that I present.**
19   Q. So your counter-factual predictions consist of a central
20   estimate which is surrounded by a range of statistical
21   confidence, is that right?
22   **A. That's correct.**
23   Q. And the range of statistical confidence we can think of
24   as a range of uncertainty?
25   **A. Yes, that's also correct.**

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1   Q. And your central estimate has a wide range of
2   statistical confidence or uncertainty around it, that is
3   why it is statistically insignificant, as we are agreed?
4   **A. It has --**
5   Q. At 90 or 95 per cent per cent confidence?
6   **A. Yes, that's correct.**
7   Q. But your position is that the central estimate still
8   indicates a difference between Rightmove's actual and
9   counter-factual "prices"?
10   **A. That is the central estimate, yes, that's right.**
11   Q. And the central estimate is the mid-point of the range
12   of uncertainty?
13   **A. That's correct.**
14   Q. And you say that's then equivalent to saying: well, the
15   likelihood of Rightmove having increased its prices is
16   greater than 50 per cent?
17   **A. That's correct.**
18   Q. So if we go to bundle G, that is essentially what you
19   are saying on pages 60 and 61, is that right?
20   **A. Yes.**
21   Q. That is not the way that economists or statisticians
22   typically use tests of statistical significance in their
23   work, is it?
24   **A. Well, as I say, the conventional level is 90 to**
25   **95 per cent, but when one has a very small number of**

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4 (Pages 10 to 13)

1   **data points you are often, whatever is going on, whether**
2   **it is -- there may be an economically significant answer**
3   **which is statistically insignificant.**
4   Q. Are you familiar with the European Commission's best
5   practices for the submission of economic evidence and
6   data collection for article 101 and 102 and merger
7   cases?
8   **A. I am.**
9   Q. Would you turn to bundle E. I think, sir, it is E/3 but
10   it is at the back of the E bundle. I think it must be
11   E3. I don't know what has happened to the tabs but it
12   is page 1196. It should be the last document I think.
13   THE CHAIRMAN: Yes.
14   MR MACLEAN: So the European Commission has set out in this
15   document best practices and if we look at page 1204,
16   please, Mr Parker.
17   **A. Sorry, which page?**
18   Q. 1204.
19   **A. Yes.**
20   Q. There is a simple description in footnote 16 of
21   a statistically significant result:
22   "A statistically significant result is one that is
23   unlikely to have occurred by chance. In hypothesis
24   testing the significance level is a criterion used for
25   rejecting the null hypothesis."

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1   **A. Yes, that's right.**
2   Q. "The p-value is the probability of obtaining a test
3   statistic at least as extreme as the one actually
4   observed, assuming that the null hypothesis is true. If
5   the obtained p-value is smaller than or equal to the
6   significance level, than a null hypothesis is rejected
7   and the outcome is said to be statistically
8   significant."
9   That is all basic statistics, correct?
10   **A. That's right.**
11   Q. So a result that is unlikely to have occurred by chance
12   is by convention one that has a confidence level of
13   95 per cent; is that right?
14   **A. Yes, 90 or 95 per cent are the standard levels that are**
15   **   used.**
16   Q. And if you glance at paragraph 34 we see that point in
17   the middle of paragraph 34, the sentence beginning "In
18   the description"; do you see?
19   "In the description of the results, the emphasis
20   should be on statistically significant findings to the
21   5 per cent level, ie 95 per cent confidence."
22   Yes?
23   **A. Yes, I see that.**
24   Q. And then it goes on to say in the next sentence:
25   "However, finding significance around the

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1   10 per cent level, ie 90 per cent confidence, should not
2   be ignored, in particular where the coefficient of
3   interest is economically significant and the sample size
4   is small."
5   Do you see that?
6   **A. Yes, I see that.**
7   Q. So the lowest acceptable standard of economic certainty
8   usually employed by economists, it would be 80 per cent,
9   wouldn't it? That would be a very unusually low
10   statistical threshold of confidence.
11   **A. That would be very low but it doesn't get away from the**
12   **   general proposition that if you find a positive result**
13   **   it is a more likely than not outcome.**
14   Q. We will see about that, Mr Parker.
15   **A. And I also point perhaps to the bottom of footnote 17:**
16   **   "However, when the sample size is small it is not**
17   **   uncommon to obtain results that are economically**
18   **   significant but statistically insignificant."**
19   **   It is clear that we have a very small sample size**
20   **   and that's what we have to deal with. We need to put**
21   **   the evidence that we have in the full picture with all**
22   **   the rest of the evidence. I also note that there's lots**
23   **   of other points in this document about setting out clear**
24   **   hypotheses.**
25   Q. Yes, let's look at --

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1   **A. "Very often simple but well-focused measurement of**
2   **   variables will provide an important insight into the**
3   **   significance of particular factors and occasionally more**
4   **   advanced statistical and econometric techniques may**
5   **   provide more useful evidence."**
6   Q. Where is that, Mr Parker?
7   **A. This is paragraph 14.**
8   Q. Right, 14. Look at 18, would you, please?
9   **A. Yes, okay.**
10   Q. "An economic or econometric report ..."
11   So you are really very familiar with this document,
12   aren't you?
13   **A. Well, I have had a look at it, yes.**
14   Q. And 18:
15   "An economic or econometric report should explicitly
16   formulate not only the hypothesis to be tested (the null
17   hypothesis) but also the alternative hypothesis or
18   hypotheses under consideration so that rejection of the
19   null hypothesis can be properly interpreted."
20   You accept that that's the appropriate way to
21   proceed, don't you?
22   **A. Well, I accept that that is the way that one generally**
23   **   proceeds when one is doing a large statistical analysis**
24   **   with a lot of data. That's how one does it.**
25   Q. That is what Mr Bishop has done here, isn't it? If you

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5 (Pages 14 to 17)

1   take Mr Bishop's second report, bundle E, tab 2, so this
2   is the report, page 57, paragraph 134, and the null
3   hypothesis is that there is no difference between
4   Rightmove's "prices" in the actual in 2016 and its
5   "prices" in the counter-factual forecast, right?
6   **A. That's right, and that is implicit in the analysis that**
7   **I do. So whilst I don't explicitly set that out, my**
8   **conclusions are essentially consistent with that being**
9   **the null hypothesis and then the alternative hypothesis.**
10   Q. And Mr Bishop tests that null hypothesis by examining
11   whether the actual "price" in 2016 falls within the
12   range of uncertainty around your estimate and we can
13   reject the null hypothesis if it doesn't fall within the
14   range of uncertainty, can't we?
15   **A. Well, we can -- on the statistical confidence of**
16   **95 per cent we can reject the null hypothesis that**
17   **there's a difference.**
18   Q. Or indeed 90 per cent if we were applying a 10 per cent
19   level of confidence?
20   **A. I think that's absolutely right. But it still goes to:**
21   **it is still more likely than not because it may be**
22   **55 per cent, it may be 60 per cent. The fact that I get**
23   **a positive result means that it is more likely than not.**
24   Q. As Mr Bishop explains, he can't reject the null
25   hypothesis at the 95 per cent confidence level and you

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1   accept that that's correct?
2   **A. I do.**
3   Q. In fact, using Mr Bishop's corrections of your cost per
4   lead data the null hypothesis would only be rejected at
5   a level of confidence of 46 per cent, wouldn't it?
6   **A. Well, I don't think that can be right because he comes**
7   **out with a positive finding in his table 4 and the fact**
8   **that he comes out with a positive finding means that it**
9   **must be more than 50 per cent, so if you look on page 45**
10   **of his report he's made some -- in his table, that table**
11   **there ...**
12   Q. All he's doing here is taking your table 34 and
13   correcting the numbers. That is all he's doing. He is
14   not advancing any positive case. He is just correcting
15   your numbers, Mr Parker.
16   **A. That's correct, but if you just let me make the point.**
17   **All those numbers continue to be positive and the**
18   **weighted average is positive, in particular the**
19   **Rightmove number is positive, and the fact that it's**
20   **positive means that it is more likely than not --**
21   Q. It doesn't.
22   **A. -- that it is positive.**
23   Q. But it doesn't, Mr Parker.
24   **A. I don't understand the basis on which you are saying**
25   **that.**

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1   Q. So it is becoming clear. You confuse a statistical
2   standard -- 95, 90 per cent confidence, whatever the
3   confidence level is -- with the legal standard of
4   balance of probabilities. But the two are different,
5   aren't they? The balance of probabilities is a legal
6   hypothesis test, asking the question: is such-and-such
7   an allegation, is such-and-such a fact more likely to be
8   true or not? But statistical confidence is a binary
9   procedure, isn't it? Either you rule out the null
10   hypothesis, either you rule out the result is due to
11   chance at a certain level of confidence or you don't.
12   That is what it's all about?
13   **A. That is not quite right. What you do is you say, in**
14   **conventional approaches: how confident do I need to be**
15   **in this result for me to pass a particular threshold of**
16   **confidence? Where we are saying, we've set**
17   **a hypothesis, a benchmark of 95 per cent confidence,**
18   **you're having to say and you are setting out that I need**
19   **to be 95 per cent confident that this hasn't resulted**
20   **from chance --**
21   Q. That doesn't mean it is 95 per cent likely to be true,
22   does it?
23   **A. So let's look at if the hypothesis is the**
24   **counter-factual is here and my best estimate is above**
25   **the counter-factual, it is more than either because**

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1   **you -- let's imagine the counter-factual is a bit**
2   **unclear. That's the bit which is a bit uncertain.**
3   **There is 50 per cent of the probability of that**
4   **counter-factual is above that counter-factual,**
5   **50 per cent of the probability of that counter-factual**
6   **is below that counter-factual, the fact that I have**
7   **ended up with a finding that Rightmove's cost per lead**
8   **is above the counter-factual means that it's more likely**
9   **than not.**
10   Q. No, it doesn't, Mr Parker.
11   **A. More than 50 per cent --**
12   Q. It doesn't.
13   **A. I don't understand the basis on which you are saying**
14   **that at all.**
15   Q. All you are doing in the statistical exercise, you are
16   trying to rule out whether the result you have obtained
17   is due to chance or not, right?
18   **A. By setting a threshold of probability and confidence**
19   **that that result has arisen. So the conventional level**
20   **is to say: there's a 95 per cent probability that that**
21   **result hasn't occurred from chance. And here we are**
22   **saying actually there's -- well, actually you are saying**
23   **there is a 5 per cent chance that it's -- a 5 per cent**
24   **probability that it's arisen from chance, 95 per cent**
25   **probability that it is a genuine result, and here I am**

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6 (Pages 18 to 21)

1 **saying there is a probability it has arisen from chance**
2 **but it is less than 50 per cent, so it is more likely**
3 **than not.**
4 Q. No, on your analysis, because we only reject the null
5   hypothesis at a confidence level of 46 per cent, the
6   numbers that you have come up with are consistent with
7   occurring by chance on more than 50 per cent of
8   occasions?
9 A. **No, I think you have got this the wrong way round. If**
10   **that's right, the 46 should be compared with the 5, so**
11   **the 46 is in fact a 54 per cent chance of it having**
12   **arisen -- there is a 54 per cent chance that in fact**
13   **Rightmove's cost per lead is higher. The 46 per cent**
14   **you are referring to I think matches up to the**
15   **5 per cent in the 95 per cent confidence, 5 per cent**
16   **chance that it's arisen by chance. You are saying there**
17   **is a 46 per cent possibility it has arisen by chance but**
18   **a 54 per cent possibility, ie more likely than not, that**
19   **it is a genuine result.**
20 Q. It is not the same as the more likely than not. It is
21   just the level at which you are applying whether you can
22   rule out the result having occurred by chance.
23 A. **Statistics is all about more likely than not. That is**
24   **the whole purpose of statistics and in this case if you**
25   **are putting to me that there is a 46 per cent chance**

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1 **this has arisen from chance, there is a 54 per cent**
2 **chance it is a genuine result, ie it is more likely than**
3 **not.**
4 Q. I am suggesting to you that on your own data, the
5   findings you have arrived at could have arisen by chance
6   for more than 50 per cent of the occasions.
7 A. **I am afraid that's just wrong. Because the prediction**
8   **that I have is above the counter-factual it follows**
9   **directly from that that the chance of it being above the**
10   **counter-factual is more than 50 per cent because the**
11   **central estimate is above the counter-factual. So I am**
12   **afraid that's just not correct.**
13 Q. You are inviting the Tribunal to proceed on the basis as
14   you would suggest on the basis on your own case that the
15   null hypothesis gets rejected at a 46 per cent level of
16   confidence. You say: well, that's the same as showing
17   that the results did not derive by chance on 54
18   occasions out of 100 and therefore you should accept
19   this evidence as evidentially of value?
20 A. **I'm suggesting to the Tribunal that we should look at**
21   **the evidential pattern in the round -- go back to the**
22   **points I made earlier -- of which this is one point and**
23   **I think this is more likely than not that we are seeing**
24   **Rightmove strengthening its position.**
25 THE CHAIRMAN: Mr Parker, perhaps you can help us on why it

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1 is that statisticians take a very high level of
2 confidence as an assessment of the reliability of
3 statistics, and whether that is 80 per cent or whether
4 it is 90 or 95 per cent, it is significantly above the
5 50 per cent balance of probabilities threshold. Is it
6 because one needs to filter out, as it were, the noise
7 of coincidence? Is that why one has such a high level
8 or why would you say it is?
9 A. **I think that is right. I am not completely sure of why**
10   **that has ended up being the convention but that has been**
11   **the convention. I think something to bear in mind here**
12   **is that because we only have a small number of data**
13   **points it will be the case that there is noise inherent**
14   **in the fact that there are only a small number of data**
15   **points and so I think we need to look at the evidence**
16   **that we have and take it in the round of which this is**
17   **some.**
18   **I think applying a level of statistical confidence**
19   **that is really designed for looking at larger -- when**
20   **you have larger samples of data and trying to filter out**
21   **there whether you have noise or not, I am not sure it is**
22   **particularly meaningful in a world where I have**
23   **recognised from day one that we have a very small number**
24   **of data points for this particular part of the analysis.**
25   **So as I have said, I accept that it doesn't meet the**

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1 **conventional levels of statistical confidence and**
2 **I think it would be great if we had a lot more data but**
3 **we don't, so I think we should really go with what we**
4 **have, put it in the round and decide what weight to**
5 **place on it.**
6 THE CHAIRMAN: That is the question, I suppose, because I am
7   assuming that statisticians are rational and sensible
8   people and assuming the European Commission is
9   a rational and sensible institution. So if they are
10   taking a confidence level of, let us say 90 per cent and
11   that is a conventional test as to whether one can rely
12   on statistics or not, surely we have to be asking
13   ourselves: why are they adopting such a line, and if
14   they are adopting such a line, which clearly they are,
15   is anything below that likely to be so unreliable that
16   we would be erring into danger in relying on it? So it
17   does seem to me a question of some importance that we
18   understand the reason why one has this conventional
19   measure.
20   So I think it would help if you could explain your
21   understanding of first of all why one has these high
22   levels of confidence as a criteria for statistical
23   correlation, and then why in this case you feel able to
24   say that a much lower level of confidence is something
25   which we should nevertheless take into account.

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7 (Pages 22 to 25)

1   A. As I say, I am not completely familiar with the
2   convention that has arisen. I think it probably arises
3   from a desire, when one is doing this sort of analysis,
4   to try to be very confident about one's findings.
5   I note that in different contexts, particularly where
6   one has different levels of data, one tends to use
7   different thresholds. So you may recall, was it last
8   year or the year before there was great excitement about
9   the finding of the Higgs boson and there, this is as
10   I understand it in the large Hadron Collider, there's
11   all these collisions and they wanted to try and work out
12   whether some of them indicate the presence of the Higgs
13   boson. They have an enormous amount of data and the
14   level of statistical confidence they used there was
15   something like 99.9999 per cent. Because if you have
16   spent billions of pounds and have an enormous amount of
17   data you really want to be absolutely sure.
18   Here we have a handful of data points, so the
19   statistical significance is much easier to achieve if
20   you have a lot of data. So it is the case that with
21   a small amount of data one should place appropriate
22   weight on the results when one -- if you have a small
23   amount of data it's always going to be more difficult to
24   draw conclusions from that. In my view, I think we
25   should take this analysis in the round with the rest of

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1   the evidence, which I think points in a way that the
2   data then supports. But we are where we are in terms of
3   the data we have, so I think that's as much as I can
4   help you with I think.
5   THE CHAIRMAN: Mr Parker, let me ask you this: you have
6   stressed, quite rightly, and so has counsel, the limited
7   number of data points that we have. Is the problem with
8   a low confidence rating the fact that if one had
9   a couple more data points to throw into the mix they
10   could potentially make a massive difference to your
11   assessment of probability? In other words, if one has
12   a vast pool of data, one might get a couple more results
13   and even if they were widely divergent they wouldn't
14   make much difference because one has that weight of
15   data. Whereas if one has very limited data points one
16   can get a dramatic shift in outcome simply because of
17   a relatively minor divergence in one or two of those
18   additional points. Do you see what I'm saying?
19   A. Yes, I think that is exactly right. And that's why, as
20   we have just been discussing, the likelihood here of
21   this being the result is 54 per cent rather than
22   95 per cent.
23   THE CHAIRMAN: But isn't that the problem, though? Because
24   if one, say, hypothesised a further couple of data
25   points into the future and said that they showed

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1   a negative rather than a positive, your analysis would
2   be significantly below the 50 per cent, depending on
3   what they were?
4   A. Depending on what they were and at the moment we don't
5   have sight of those data and our only -- all we can do
6   is, if you like, there is a 50/50 chance that that data
7   will either strengthen or weaken the result but the
8   result is more than 50 per cent at the moment. So
9   I totally accept that there could be data that comes in
10   the future of which we are not -- that we don't know
11   that could weaken the result. I think it is equally
12   likely that there is data which could strengthen the
13   result and actually it seems to me that the economic
14   theory and the other empirical evidence would suggest
15   that the data that comes is more likely to support the
16   result because there's good reasons to expect the result
17   that we have today and why that's likely to be the same
18   result in the future. But I accept if you just look at
19   this analysis by itself I would agree with you, but
20   I think we need to put it in the round with the other
21   evidence.
22   THE CHAIRMAN: Is that what the confidence threshold is
23   getting at or is that an element of what the confidence
24   threshold is getting at, that if one looks at potential
25   future results the extent to which they can undermine

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1   the validity of the exercise is limited? Whereas in
2   this case, as I think you are very fairly accepting,
3   they could make a massive difference?
4   A. Yes, that's -- I think that's exactly right.
5   THE CHAIRMAN: I am sorry, Mr Maclean.
6   MR LANDERS: Presumably the opposite applies if you had one
7   less, if the analysis is in six months segments. If you
8   had started it six months later you would have come up
9   with a figure that would have been different one way or
10   the other, possibly significantly different.
11   A. Yes, possibly. I don't think the counter-factual line
12   would be very materially affected by the omission of the
13   first data point, so I don't think that would make
14   a very big difference. I mean, I think we would be
15   talking about the still more likely than 50 per cent but
16   are we 53, are we 55? We'd be probably in that sort of
17   area I would suspect.
18   MR FREEMAN: Can I have my ha'penny worth? It has always
19   struck me as one of the most difficult areas of
20   statistical evidence in legal cases. Would you agree
21   with this proposition: that lawyers would find
22   a probability of 90 per cent extremely convincing and
23   economists find it at the bottom probably arguing
24   possibly probative threshold and that is the sort of
25   paradox we have to deal with. Are you inviting us to

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8 (Pages 26 to 29)

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1   accept that when you get down to the 50s your
2   statistical 50 per cent, 51 per cent, 52 per cent is the
3   same as the legal balance of probabilities, more likely
4   than not test because that is what you are putting to
5   us. Is that your view?
6   A. I think that would be the statistical interpretation
7   that it is more likely than not that Rightmove's factual
8   cost per lead is about the counter-factual.
9   MR FREEMAN: That is a statistical finding.
10   A. So that is a statistical finding. It is more likely
11   than not.
12   MR FREEMAN: And we have to decide whether it is more likely
13   than not.
14   A. As I understand it, that's the test that you apply but
15   I would say this is not the only evidence in the case.
16   MR FREEMAN: No, but you agree with my observation about the
17   90 per cent?
18   A. Yes.
19   MR FREEMAN: Bad for economists, incredibly good for
20   lawyers, very rare too.
21   Thank you, Mr Maclean.
22   MR MACLEAN: Thank you, Mr Freeman.
23   Mr Parker, what the discussion you have just been
24   having with all the members of the Tribunal does,
25   I suggest to you, is merely underline, to pick up the

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1   Chairman's first point, precisely why statistics
2   requires any scientifically valid conclusion to be
3   well-founded to a high degree of confidence such that no
4   safe conclusion can be drawn until one has the data
5   which shows conventionally to 95 per cent, sometimes to
6   90 per cent to a confidence level a particular outcome.
7   What you are doing is swimming around in territory
8   where at best you say it is 54 per cent, I suggest to
9   you it might be somewhere between 46 and 54 per cent but
10   you can't go any higher than just above on your case
11   50 per cent and that's just not a scientifically valid
12   conclusion at all?
13   A. Well, as I say, that is not the only basis on which
14   I draw my conclusions. And I think one needs to take
15   all the evidence in the round. One needs to have an
16   understanding from an economic theory as to what we
17   think might be going on and then you look for the
18   empirical evidence in a range of empirical evidence to
19   see whether your predictions from economic theory are
20   borne out. I think my predictions from economic theory
21   are that Rightmove is strengthened, Zoopla is weakened
22   and OTM is not an adequate replacement for the loss of
23   competition from Zoopla. I think that follows directly
24   from the OOP rule. You see a lot of empirical evidence
25   that supports that. This is one part of the picture

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1   that is consistent with that. I don't think it is
2   sensible to split this off into its own category because
3   it's all -- all of this is a piece.
4   Q. Mr Parker, I am going to move on to my final topic.
5   I don't know whether my late maths teacher would be
6   proud or not of 30 years later my grasp of statistics.
7   I am going to move on to my last point, Mr Parker,
8   which is to look at your alternative counter-factual.
9   Let's assume for the moment in your favour, a rather
10   heroic assumption I suggest, that this alternative
11   counter-factual has any relevance at all?
12   A. Sorry, this is my counter-factual 2?
13   Q. Your counter-factual 2. It is where my client enters
14   market but without the OOP rule. Right, that is the
15   counter-factual?
16   A. Yes.
17   Q. And you assume, let's take your first report,
18   bundle F/99 at paragraph 7.7.2, in your counter-factual
19   number 2 that Zoopla's and Rightmove's propositions
20   would have remained unchanged, right?
21   A. I think they would have remained broadly unchanged, yes,
22   that's right.
23   Q. You say "you think". That is your assumption?
24   A. It is, but that assumption is drawn from -- if we recall
25   figure 2, people were listing on Rightmove and Zoopla

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1   beforehand and that, the fact that they were listing on
2   them suggests that they were getting surplus, ie they
3   were getting value over and above the cost that they
4   were paying and therefore if OTM enters without the One
5   Other Portal rule there is no reason for an estate agent
6   to come off either Zoopla or Rightmove because they are
7   getting value from both.
8   Q. So we are --
9   A. So it is an assumption but it is based on economic
10   theory and so --
11   Q. I am not trying to fight with you, Mr Parker. I am just
12   trying to agree with but you are a very hard man to
13   agree with at times.
14   So the assumption underpinning your alternative
15   counter-factual is that Zoopla and Rightmove's
16   propositions would have remained unchanged and you have
17   just explained you think that is a well-founded
18   assumption. I don't want to get into that.
19   You note that OTM, my clients, got a very high cost
20   per lead, right?
21   A. That's correct.
22   Q. And that would presumably be no lower in
23   counter-factual 2 where my client entered without the
24   OOP rule than it does in reality having entered with the
25   OOP rule?

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9 (Pages 30 to 33)

1   **A. Well, without the OOP rule it's quite possible they**
2   **might have attracted more agents because agents wouldn't**
3   **have had to give up some of the surplus that they got**
4   **from either Zoopla or Rightmove and so they may well**
5   **have been more attractive to estate agents and gained**
6   **more agents. If they had more agents they would have**
7   **had more house-hunters. If they had more house-hunters**
8   **they would have generated more leads, and it may be that**
9   **their cost per lead would have come down. I don't know**
10   **whether relative to where it is today, so I don't know**
11   **whether that's the case.**
12   Q. You don't know?
13   **A. But it may well -- given their current levels of success**
14   **if those are not materially changed then, yes, the cost**
15   **per lead in this counter-factual for OTM wouldn't have**
16   **materially increased.**
17   Q. But in your counter-factual 2 where my client enters
18   without the OOP rule Rightmove and Zoopla's positions
19   would both have been unchanged as against the other
20   counter-factual; is that right? That's what you are
21   saying in 7.7.2. In other words, any agent that
22   continued to list with Rightmove and Zoopla would have
23   been no better or no worse off in counter-factual
24   number 2; is that right?
25   **A. Yes, I think that's right. I don't see a reason for**

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1   **that to change particularly.**
2   Q. Your position is if you are on Rightmove and Zoopla and
3   OTM enters the market with no OOP rule and you stay put
4   with Rightmove and Zoopla nothing has changed. That is
5   your hypothesis.
6   **A. In relation to Rightmove and Zoopla, that's right.**
7   Q. So any agent with Rightmove and Zoopla is no worse off
8   but any agent who chooses to list with OnTheMarket
9   either in addition to or instead of Rightmove and Zoopla
10   would be worse off in your framework because they would
11   face a higher price, wouldn't they, what you proxy for
12   price?
13   **A. They would be paying for a portal which is not**
14   **delivering very good value for money but what they won't**
15   **also be incurring is the detriment that they currently**
16   **incur under the one other portal of the surplus they**
17   **lose from no longer listing on Rightmove or Zoopla.**
18   Q. But they would in your analysis be worse off, wouldn't
19   they, simply by joining OTM compared to Rightmove or
20   Zoopla because they would be facing a higher cost per
21   lead than Rightmove or Zoopla have?
22   **A. Well, they would have been paying for a proposition that**
23   **wasn't terribly attractive. As I have said, I don't**
24   **think that is a competitive harm. I think it would be**
25   **an unfortunate outcome for them that, as in the factual**

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1   situation people have signed up on long-term contracts
2   for something that isn't providing value but, as I say,
3   I am not equating that with competitive harm.
4   Q. But you do equate it with competitive harm because what
5   you are doing is combining the cost per lead with
6   Rightmove and Zoopla and OnTheMarket and you are saying
7   that the overall average cost per lead has gone up ergo
8   there's competitive harm. But the same would apply in
9   your counter-factual number 2 as soon as a single agent
10   joined OnTheMarket, wouldn't it?
11   **A. As I say, it is not competitive harm. I think I have**
12   **agreed with that and it follows from 7.5.6 and 7.5.7 of**
13   **my report. So these agents would have signed up for**
14   **a new proposition that in this world would not be giving**
15   **them a very good value for money and they may well have**
16   **signed up for five years and that to me is just**
17   **unfortunate.**
18   Q. But you have got to say it is not competitive harm
19   because you have got to accept, as you do, that your
20   counter-factual 2 is unambiguously pro-competitive,
21   a new entrant with no restraint like OOP. That must be
22   pro-competitive and you accept that it is, right?
23   **A. Yes.**
24   Q. But on your analysis which is based on average cost per
25   lead if you stay on Rightmove and Zoopla, no change. If

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1   you go to OnTheMarket, you are going to have a higher
2   cost per lead which looks like harm. So you have to
3   say, well that's not competitive harm, that's just harm
4   because if you don't say that then you're left in the
5   absurd situation of your counter-factual 2 showing an
6   anti-competitive effect, aren't you?
7   **A. Well, you are a hard man to agree with, Mr Maclean,**
8   **because I do agree that's not anti-competitive harm.**
9   Q. All this does, what it demonstrates is that the price
10   effects that you derive from your analysis arise and
11   arise only from the loss of agents by Zoopla. That is
12   what drives the whole analysis?
13   **A. Well, the adverse competitive consequences of the OOP**
14   **rule are that the several thousand agents that have**
15   **signed up with OnTheMarket have left Zoopla in large, in**
16   **very large part and that weakens Zoopla's attractiveness**
17   **to house-hunters and with the consequences of**
18   **strengthening's Rightmove's position. So the**
19   **anti-competitive harm follows from the OOP rule.**
20   Q. No, it doesn't. That is exactly the point. What you
21   cannot show is that the loss of agents is caused by the
22   OOP rule as opposed to simply my client's competitive
23   entry into the market. That is your fundamental
24   problem?
25   **A. Well, let's look at -- if we look at figure 12 in my**

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1   report, page 65, DP1, which is tab F.
2   Q. Figure 12, yes?
3   A. Figure 12, yes. So we have near parity for the first
4   three periods, H2_2013, H1_2014, H2_2014 between
5   Rightmove and Zoopla, so people have signed up for both
6   Rightmove and Zoopla. It would seem a reasonable
7   inference to make that people are only signing up with
8   these firms if they're getting value ie the price they
9   pay is less than the value they expect to receive from
10   them and all of a sudden in H1_2015 Zoopla suddenly
11   loses 4,000 or so agents, net agents.
12   Q. Because my client is competing with them?
13   A. Because of the OOP rule.
14   MR MACLEAN: Thank you very much, Mr Parker. Those are my
15   questions.
16   THE CHAIRMAN: Mr Maclean, I am just trying to unpack the
17   last point you were putting to witness. I think what
18   you were putting to him was that the analysis
19   demonstrated in figure 12 could arise with or without
20   the OOP rule. That is the point you were putting.
21   MR MACLEAN: Yes.
22   THE CHAIRMAN: The witness obviously didn't accept that but
23   your position is that you could have exactly the same
24   picture in figure 12 without the OOP rule.
25   MR MACLEAN: Whether it be the same picture is another

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1   across portals and you see you say:
2   "I am just trying to find the picture. If you look
3   at my figure 33, DP1."
4   A. Yes.
5   Q. Just moving over on to page 51 you are talking about the
6   shifting in the lines if there are systematic
7   differences. Then at 51, line 6 you are talking about
8   differences in relative quality of lines compared to the
9   counter-factual. You go on to say in 8:
10   "But it wouldn't change the outcome which is the
11   difference between Rightmove versus Rightmove in the
12   counter-factual."
13   Do you remember the topic that was being explored in
14   the hot tub?
15   A. Yes, I do.
16   Q. Can I just show you, please, your DP1, figure 33, if you
17   could please turn that up.
18   A. Yes.
19   Q. I find that on bundle page 93 in F. It is F, tab 1,
20   page 93. Mr Parker, can you just explain what is shown
21   by the dotted lines in figure 33? There is one in the
22   Rightmove line and there is one in the Zoopla line.
23   What are those and what do they mean?
24   A. So the dotted lines are the counter-factual predictions.
25   They are essentially a trend line through the first data

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1   matter, but the point was that, what I was putting to
2   the witness was that his analysis is driven by the loss
3   of agents from Zoopla and what he can't distinguish is
4   whether the loss of agents by Zoopla is caused by
5   competitive entry or by the pernicious, as he would have
6   it, OOP rule.
7   THE CHAIRMAN: So what you are saying is his analysis is
8   neutral as to cause. That is the case you are putting.
9   MR MACLEAN: He can't demonstrate the cause he needs to
10   demonstrate, yes.
11   THE CHAIRMAN: Thank you. Mr Harris.
12   Re-examination by MR HARRIS
13   MR HARRIS: Can Mr Parker be handed the transcript bundle.
14   Mr Parker, I have two short points that arose during the
15   hot tub session that I would like to deal with and then
16   I have about six or seven short points from Mr Maclean's
17   cross-examination.
18   A. Of course.
19   Q. Could you have a look, please, in Day 8, that is
20   yesterday, at page 50 of the transcript. I think you
21   may have them in fours but I only have them in twos so
22   I am looking at page 50 of Day 8.
23   A. Yes, I have that.
24   Q. I am picking it up at line 19 where you are talking
25   about differences in the relative quality of leads

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1   points and I look -- and then my analysis says -- that
2   is my best estimate of the counter-factual. My analysis
3   then proceeds to say, well, what do I observe in the
4   factual situation in H1_2016 relative to my
5   counter-factual prediction, and I find that there is
6   a difference and the difference is in the factual
7   situation the actual cost per lead is greater than the
8   counter-factual prediction.
9   Q. Thank you. Moving on then to the second thing from the
10   hot tub. If you move in the transcript, please, to
11   page 63 now.
12   A. Yes.
13   Q. Just picking it up you can see this is Mr Bishop
14   speaking. His entry is on page 62. He begins at
15   line 20:
16   "I think I would agree with that analysis."
17   Do you see over at page 63, line 3 he says:
18   "Now going forward the OTM has entered. I don't
19   know whether it is going to be successful or not.
20   I don't think anyone really knows."
21   Do you see that?
22   A. Sorry, which page are we on, please?
23   Q. 63 of yesterday's transcript.
24   A. Yes, I see that.
25   Q. You see at line 3?

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1   **A. Yes.**

2   Q. He is talking about going forward:

3   "I don't know whether it is going to be successful

4   or not. I don't think anyone really knows."

5   Have you performed any analysis of the future

6   effects of the OOP rule?

7   **A. Yes, I have. I have looked in particular at section 10**

8   **of my report.**

9   Q. Is page 117 of DP1?

10   **A. That is page 117, yes.**

11   Q. Very, very briefly what do you say that shows in section

12   10 of DP1?

13   **A. Section 10 of DP1 considers whether I expect OTM to grow**

14   **and develop as a competitive force in the market over**

15   **time. I think it is unlikely that it will do so. My**

16   **most likely scenario is that it struggles to attract**

17   **further agents essentially for two reasons. First,**

18   **because it's I think quite well known in the market that**

19   **it doesn't have an attractive proposition in terms of**

20   **cost per lead and second, because maintaining the OOP**

21   **rule is a deterrent to agents joining OnTheMarket**

22   **because by signing up to OnTheMarket they have to give**

23   **up one of their existing portals if they're listing on**

24   **both or they have to give up the option of listing on**

25   **a second portal in the future if they are only listing**

1   **on one. So either way there's a restriction. It is**

2   **probably a greater restriction on that agent if it's**

3   **already listing because it has to give up something for**

4   **which it presumably has value at the moment.**

5   **In those circumstances I think that OTM will**

6   **struggle to attract material numbers of future agents**

7   **and I have looked at the agent growth that it has had**

8   **and despite some heavy discounting starting**

9   **in October 2015, as I understand it, that did lead to**

10   **some new agents joining but the growth pattern is such**

11   **that there has been further stagnation at a slightly**

12   **higher level, just above 6,000, and that's now starting**

13   **to come down.**

14   **So what I expect is given that there are long-term**

15   **contracts in place for the vast majority of OTM's agents**

16   **it continues to have a material agent presence but**

17   **I don't think it will be very compelling for**

18   **house-hunters. The fact that it has a material agent**

19   **presence and will do for the next few years means that**

20   **Zoopla will continue to have a large number of agents**

21   **which it simply finds extremely difficult to recapture**

22   **because doing so would require Zoopla to persuade them**

23   **to come off Rightmove and so I think that wedge will**

24   **continue.**

25   Q. Were you able to take your future looking analysis any

1   further in your second report?

2   **A. I was. I looked at whether -- what one could draw from**

3   **the likely level of marketing spend that OTM has**

4   **available in terms of its future success. So we know**

5   **that marketing is important, it is driving customers to**

6   **visit certain websites. I think it can only get you so**

7   **far because obviously once a house-hunter has visited**

8   **a website they will then have a direct impression of the**

9   **quality of the website rather than some perceived**

10   **impression from marketing. Nonetheless, I think it is**

11   **helpful.**

12   **I have looked at what I think OTM can afford to**

13   **spend on marketing given its need to repay its members**

14   **their loans over the period and I find that whilst**

15   **I expect some future growth in OTM's share of total**

16   **visits I don't expect that to be very large. I think**

17   **that where they are currently at around the**

18   **4-ish per cent market, they might get to the**

19   **6/7 per cent market by January 2020. So I expect them**

20   **to continue to be very small.**

21   Q. Thank you. Moving on now. So that is the hot tub. Can

22   you move forward in the transcript now to page 100.

23   This is shortly after or relatively shortly after you

24   started to be cross-examined by Mr Maclean. Do you see

25   that picking it up on page 100 Mr Maclean is asking you

1   a question at line 17 about the standard competition

2   concerns in vertical situations?

3   **A. Mmm.**

4   Q. And you answer at line 23:

5   "That's the usual enquiry but the one other portal

6   is extremely unusual."

7   Then going over the page at 101, whilst we are still

8   on this topic, you start to give an answer about an

9   agent owned company:

10   "The key thing is that its agent owns and that those

11   agents are have having vertical relationships with..."

12   **A. Yes.**

13   Q. If you could just remind yourself of your answer there

14   so it finishes on line 20. Just read it to yourself,

15   please. (Pause)

16   **A. Yes.**

17   Q. Do you see you were going to turn to Mr Springett's

18   first witness and Mr Maclean generously says in line 22

19   that Mr Harris can take you to that. So I will take up

20   Mr Maclean's generous offer.

21   Is there a part of Mr Springett's first witness to

22   which you wish to refer in further elucidation of that

23   answer? Mr Springett's first witness is in bundle C at

24   tab 1.

25   **A. I think it is paragraph 12, page 4 of Mr Springett's --**

1   of that bundle. So we can see Mr Springett here is
2   talking about the economic phenomenon of network
3   effects, which I think everyone is agreed are present in
4   the portals market. We can see that in paragraph 12 he
5   says:
6   "A reduction of agent numbers results not only in
7   a direct reduction in subscription revenues but also
8   reduces the level of consumer traffic. This has the
9   effect of reducing the number of enquiries generated for
10   agents and thus reduces the perceived value for money of
11   the portal for agents. This has an impact on the
12   ability of the portal to retain agents both in terms of
13   listing and fees and inevitably on a portal's facility
14   to grow or maintain its agent membership."
15   So if we start from the top there, a reduction in
16   agent numbers, well, that is what Zoopla has faced as
17   a result of the One Other Portal rule and my report
18   essentially follows this logic, looks at the evidence
19   supporting that and I find that it's strong. So if you
20   like, Zoopla -- the effect of the One Other Portal rule
21   is for Zoopla to end up in this vicious circle and this
22   is really just the logic very pithily expressed by
23   Mr Springett that I set out in my report at somewhat
24   greater length.
25   Q. Thank you very much. Moving forward in the transcript.

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1   You were shown a document. If you see the transcript
2   at page 107 and 108, Mr Maclean took you to a Zoopla
3   presentation in November 2014 at bundle E/2, starting at
4   520. If you could please be shown that document again.
5   Right at the beginning or almost right at the beginning,
6   just after the index. You remember the front page and
7   the particular page in question was 540 of the bundle
8   numbering. As I say, you can see on the front page that
9   this is a document from November 2014 just so you know
10   what date we are talking about.
11   A. That's right.
12   Q. And do you see there that we were taken by Mr Maclean
13   and you to the overlapping circles on the right-hand
14   side and in particular the figure of 37 per cent being
15   the overlapping audience, of users' audience, as between
16   Rightmove and Zoopla, yes?
17   A. Yes.
18   Q. So that is just to put you where you were. Can I draw
19   your attention, since you were asked about the overlap,
20   to your first report, your figure number 23, which
21   I think you will find is on page number 77 of your first
22   report.
23   A. Yes.
24   Q. Does that also show an overlap between Rightmove
25   audience figures and Zoopla audience figures?

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1   A. Yes, it does.
2   Q. What is the date of this data pictorially presented in
3   a Venn diagram?
4   A. That's October 2016 so a couple of years further on
5   after OTM's entry.
6   Q. So Mr Chesterman's Venn diagram is pre-launch; is that
7   right?
8   A. Yes, that's correct.
9   Q. And this one is post-launch; is that right?
10   A. Yes, I think it's -- it seems to me that this data is
11   considerably pre-launch because it's the same source,
12   Nielsen, but it is January 2014.
13   Q. You are talking about Mr Chesterman's data?
14   A. Mr Chesterman's data, yes.
15   Q. So we have moved on in time, and what does this show you
16   about the size of the overlap, your figure 23?
17   A. So this shows that the proportion of the unique audience
18   on Rightmove, looking at Rightmove only in October 2016
19   was 46 per cent. The unique audience of Zoopla was
20   20 per cent of the total, and then the overlap between
21   Rightmove and Zoopla alone was 25 per cent. Whereas if
22   we compare that to Mr Chesterman's figures what we see
23   is previously there was 37 per cent of users looking at
24   both Rightmove and Zoopla and that level of overlap has
25   come down. I think I draw two things from that: one,

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1   that firstly there was competition happening between
2   Zoopla and Rightmove prior to OTM's entry because of the
3   overlap and now the level of overlap has declined and
4   that if you like is an example of where there is this
5   weakening in competition between Zoopla and Rightmove.
6   Q. Thank you. I don't need to take you to a page
7   reference. There were lots of references in the
8   cross-examination to third party analysts and in
9   particular Morgan Stanley and at one point you said "But
10   you haven't taken me, Mr Maclean, to those". Can I just
11   take you to those in your DP1, section 9.3 on bundle
12   page number 111.
13   A. Yes.
14   Q. Do you see that in particular you mention Morgan Stanley
15   at 9.3.3?
16   A. That's right.
17   Q. And is there any particular feature of that to which you
18   wanted to be taken or wanted to make a comment on but
19   you didn't have the opportunity?
20   A. So I think this is -- Morgan Stanley is making its
21   comments prior to the entry of OTM and it's saying it
22   thinks that there has been a market expectation that
23   Rightmove might have suffered from the entry of OTM but
24   they have done some analysis and they actually think
25   that the market is overreacting is what they say, but

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13 (Pages 46 to 49)

1 they say it seems to them much less likely than the
2 market expects that Rightmove will be adversely affected
3 and they explain why, because it has a strong leading
4 position and then network effects protecting it from
5 loss of suppliers, which I think has proved to be the
6 case.
7 Q. Thank you. You rightly point out that that is
8 pre-launch. Then, obviously I do not want to go through
9 all of them, you cite a Liberum report in 2016, and then
10 9.3.5, do you consider what UBS said in July 2016 to be
11 in any way relevant one way or the other as to relative
12 change in Rightmove?
13 A. Well, I think the UBS report suggests that Rightmove's
14 position has been strengthened and I think that is in
15 line with other industry analysts by analysis and what
16 one might expect from the other third party resources.
17 So I think it is all in line with that.
18 Q. Thank you. Just perhaps five more little things,
19 Mr Parker. So in the transcript now, so we can put away
20 Mr Chesterman's slides and I am now moving in the
21 transcript to page 129 and what is being talked about
22 there is Mr Bishop's figure 5 which can I invite you to
23 turn that up. It is in bundle E, tab 2, internal
24 page 66.
25   Just looking at the transcript you are being asked

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1 about these two lines -- well, not the OTM line at the
2 bottom, that wasn't mentioned, the one that you can
3 barely see, but the upper two lines and in the
4 transcript at page 129 at line 20 do you see that you
5 give an answer about -- Mr Maclean put it to you:
6   "Well, that's not a game-changing falling off
7 a cliff, the unique audience."
8   And you say:
9   "It shows a clear decline. So that seems to me to
10 be fairly clear evidence of a material adverse effect on
11 Zoopla."
12   Do you have that?
13 A. Yes.
14 Q. You weren't asked about the upper line. What, if any,
15 conclusions do you draw about unique audience share from
16 the upper line, the Rightmove red line?
17 A. I think the Rightmove red line has probably on balance
18 gone slightly upwards since the entry of OTM. So it was
19 at about 47 per cent prior to that and we see for the
20 majority of 2016 it has been at maybe 48/49 with
21 a couple of ups and downs.
22 Q. I see. So your view of this graph is that it shows
23 a material adverse effect on Zoopla because the line is
24 going down and a slight upward increase in the unique
25 audience share of Rightmove. Is that right?

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1 A. That's correct.
2 Q. Do you have any observation at all one way or the other
3 about the gap and the movement in the gap between the
4 two lines?
5 A. I think that is consistent with the general picture that
6 Zoopla has been weakened, Rightmove has been
7 strengthened, and also on this graph that OTM has had
8 a very limited effect on the house-hunters.
9 Q. Thank you. Moving on then, we are in transcript
10 page 132, this time at line 12 and 13 in particular.
11 A. Yes.
12 Q. And do you see that you are being asked questions about
13 detectable changes before and after the Zoopla merger
14 which was in 2012?
15 A. Yes.
16 Q. Can I draw your attention to your figure 38 in your DP1
17 which you will find on page 109 of the bundle?
18 A. Yes.
19 Q. In your view, and using Mr Maclean's words, does your
20 figure 38 show any detectable change before and after
21 the Zoopla merger has --
22 MR MACLEAN: I am sorry, the cross-examination was about
23 ARPA and figure 38 is nothing to do with ARPA. Figure
24 38 is cost per lead.
25 THE CHAIRMAN: I will allow it for the moment, Mr Harris.

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1 MR HARRIS: Thank you. In your view does your figure 38
2 show any detectable change before and after the Zoopla
3 merger as regards Rightmove's position?
4 A. It does. So I think that prior to the DPG/Zoopla
5 merger, Rightmove was able to increase its cost per lead
6 substantially on a year to year basis. Following the
7 DPG/Zoopla merger I don't think there is a very -- there
8 has been essentially little change up until the last
9 period which is covered in my cost per lead analysis,
10 little change or perhaps a slight decline. I wouldn't
11 draw conclusions from the change in the levels because,
12 as I say, there was a difference in recording in 2013
13 but I think the change in the trend is -- the difference
14 in the trend is very clear.
15 Q. Thank you. I have three more short points from the
16 transcript and then two short points from this morning.
17   So turning in the transcript to page 136, please,
18 and this time an answer you were giving at line 22 about
19 evidence on the question of churn or, if you like,
20 agents leaving portals and you refer to your
21 paragraph 7.4.4, there is some churn for Zoopla.
22 I don't know actually, although you said it out loud in
23 the transcript, if I turn to your 7.4.4 in your DP1,
24 which is internal page 88, that figure that you
25 mentioned on the transcript, is that the same figure as

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14 (Pages 50 to 53)

1   is identified at 7.4.4(a) but if you like covered in
2   blue?
3   **A. That's correct.**
4   Q. And is that a pre or post-launch churn figure?
5   **A. That is a pre-launch churn figure and I also understand**
6   **that it's prior to agents leaving Zoopla, if you like,**
7   **to anticipate complying with the One Other Portal rule**
8   **in the future.**
9   Q. Is that a per month, a per day, a per week, a per year
10   figure, or what is it?
11   **A. I understand that's a monthly figure.**
12   Q. So would I be right in saying then that if it is around
13   that number per month and you multiplied it by 12 that
14   would give you around the churn figure pre-launch for at
15   least Zoopla of people actually leaving, churning?
16   **A. Yes, that is the right interpretation there.**
17   Q. Does an agent in your view actually need to leave, to
18   actually churn, in order to act as a competitive threat
19   to its portal?
20   **A. No, I don't think so. I think the threat is always**
21   **present of leaving and then the negotiation happens**
22   **about the portal trying to persuade the agent to stay by**
23   **giving them a price that allows the agent to have some**
24   **value whilst the portals get some value. So that both**
25   **sides get some value from the negotiation but the**

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1   **walk-away option, if you like, for the agent is always**
2   **present. They can always choose not to list on that**
3   **portal and if they choose not to list on that portal**
4   **they can list on another portal. So the threat is**
5   **always present and that's what's constraining the prices**
6   **of both Zoopla and Rightmove.**
7   Q. Page 166 now of the transcript, if I may. You are
8   giving an answer to Mr Maclean at lines 19, 20 and 21.
9   He is suggesting to you there have been changes in
10   Rightmove's website. Do you recall this?
11   **A. Yes.**
12   Q. And you say:
13   "I am not sure that from the bare statement here we
14   can draw anything about the quality of Rightmove's leads
15   over time."
16   Have you seen any evidence anywhere, Mr Parker,
17   showing that the quality of Rightmove's leads has
18   improved since the launch of Agents' Mutual?
19   **A. No.**
20   Q. Are you aware that Mr Bishop has presented any evidence?
21   **A. I don't think he has, no.**
22   Q. What would happen to your conclusions about Rightmove's
23   cost per lead if the quality of Rightmove's leads had in
24   fact deteriorated over time since launch?
25   **A. They would be strengthened.**

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1   Q. The last point in the transcript -- actually, no, we
2   have dealt with that so nothing left in the transcript.
3   In fact, just one final point then from this
4   morning. You were taken to what for me at any rate was
5   certainly personally speaking a very difficult document,
6   the Commission's if you like statistical guidelines.
7   I am now in E/3, starting at page 1196. Do you remember
8   this, "The best practices for the submission of economic
9   evidence"? I am not sure I can read out the entire
10   title. Do you recall that?
11   **A. Yes.**
12   Q. You were taken in particular to paragraph 34.
13   **A. Yes.**
14   Q. And you pointed out, didn't you, Mr Parker, the final
15   sentence of footnote 17, or the final two sentences?
16   **A. Yes.**
17   Q. I am interested in the final sentence in particular,
18   especially given the further elucidation of this topic
19   with the Chairman. It reads:
20   "However, when the sample size is small, it is not
21   uncommon to obtain results that are economically
22   significant but statistically insignificant."
23   We don't have the transcript but I noted down that
24   your evidence in response to Mr Maclean was that you
25   regard your data as part of your overall picture as

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1   being economically significant. Did I note that down
2   correctly?
3   **A. Yes, that's right. Taken in conjunction with the whole**
4   **evidence that's correct.**
5   Q. This is the last point, Mr Parker. Can you just explain
6   to us in your own words briefly how something can be
7   economically significant even though it is not
8   statistically significant within the 95 per cent levels
9   that are being talked about at paragraph 34?
10   **A. So it can be economically significant if an increase in**
11   **prices is substantial because -- well, if we look at,**
12   **say, a conventional SSNIP test if you can raise prices**
13   **5 per cent, say, above the competitive level that**
14   **suggests that you are for the purposes of the market**
15   **definition approach a hypothetical monopolist. So here**
16   **we have on my approach Rightmove being able to have**
17   **prices perhaps 13 per cent above the competitive --**
18   **above the counter-factual level. On Mr Bishop's**
19   **modifications of my analysis it is 6 per cent but these**
20   **are significant numbers and in a merger context**
21   **a 6 per cent price increase would be considered to be**
22   **extremely significant in my experience.**
23   MR HARRIS: Thank you, Mr Parker. I have no further
24   questions. I don't know if the Tribunal does.
25   THE CHAIRMAN: Just picking up on that last point, there

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1 must be a correlation between the economic significance
2 and the likelihood of the statistics being correct.
3 **A. Well, they are slightly separate concepts. One is the**
4 **level of the central estimate, 6 or 12 per cent, is that**
5 **at a level that would be concerning? And then there is**
6 **I think a separate question about how confident are we**
7 **that that is correct, robust, statistically valid and**
8 **so on? So I think the two matters are somewhat**
9 **separate.**
10 THE CHAIRMAN: Yes, so what you are saying is: if these
11 results are right then it is economically significant?
12 **A. Yes.**
13 THE CHAIRMAN: But if they are not, then it isn't?
14 **A. I think that's right, as I say, taking it all in the**
15 **round.**
16 MR LANDERS: Or is the implication that a lower rate would
17 still be economically significant and that lower rate
18 would be more statistically significant?
19 **A. Well, a lower rate could still be economically**
20 **significant, so my experience in a merger context is**
21 **once you start getting mergers that lead to predicted**
22 **price increases of more than 1 to 2 per cent, you're**
23 **starting to be in the sort of territory where**
24 **competition authorities will get concerned. It will**
25 **vary from a case-to-case basis, according to all the**

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1 **other factors in the round, but you could have numbers**
2 **lower than I and Mr Bishop have estimated that are still**
3 **economically significant in my view.**
4 MR LANDERS: But if we take the figure of 6 per cent being
5 significant at the level you have suggested, does that
6 imply that a figure of more than 2 per cent is more
7 likely statistically than the figure of 6 per cent?
8 **A. It's more likely, but not materially more likely.**
9 **I mean, it will be in the upper 50s. It's not**
10 **materially more likely. It doesn't get you to the**
11 **95 per cent if that's the question. That issue is still**
12 **a relevant issue.**
13 THE CHAIRMAN: Mr Parker, thank you very much. You are
14 released into the hands of Mr Harris who I believe has
15 some questions for you behind the scenes but thank you
16 very much.
17 **A. Thank you.**
18 **(The witness withdrew)**
19 THE CHAIRMAN: We'll resume then at 2 o'clock. Until then.
20 Thank you very much.
21 (11.22 am)
22 (A short break)
23 (The court adjourned until 10.30 am on
24 Monday, 20 February 2017)
25

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