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**IN THE COMPETITION**  
**APPEAL TRIBUNAL**

Case Nos: 1342/5/7/20,  
1409/5/7/21(T), 1410/5/7/21(T)

Salisbury Square House  
8 Salisbury Square  
London EC4Y 8AP

Wednesday 5th October 2022

Before:  
The Honourable Mr Justice Marcus Smith  
Peter Anderson  
Michael Cutting  
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Sportradar AG and Another

Claimants

v

Football DataCo Limited and Others

Defendants

And

Soft Construct (Malta) Limited and  
Others

Interveners

AND BETWEEN:

Football DataCo Limited

Claimant

v

Sportradar AG and Others

Defendants

AND BETWEEN:

Betgenius Limited

Claimant

v

Sportradar AG and Others

Defendants

**AND**  
**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INTELLECTUAL PROPERTY LIST (ChD)**

Claim Nos: IL-2021-000002, IL-2021-000003

**Before:**

The Honourable Mr Justice Marcus Smith  
(Sitting as a Judge of the High Court of England and Wales)

**BETWEEN:**

Football DataCo Limited Claimant

v

Sportradar AG and Others Defendants

**AND BETWEEN:**

Betgenius Limited Claimant

v

Sportradar AG and Others Defendants

**A P P E A R A N C E S**

Ronit Kreisberger KC, Alistair Lindsay, Alan Bates, Ciar McAndrew, Robert Howe KC, Barnaby Lowe (instructed by Sheridans appeared on behalf of Sportradar AG & Another)  
Kassie Smith KC, Thomas Sebastian, Will Perry, Lindsay Lane KC and Henry Edwards (instructed by DLA Piper UK LLP appeared on behalf of Football DataCo Limited & Others)  
Tom de la Mare KC, Tristan Jones, Timothy Lau, Ian Mill KC, Hollie Higgins (instructed by Macfarlanes LLP appeared on behalf of Genius Sports Group Limited & Another)  
Conall Patton KC, Greg Adey (instructed by Reynolds Porter Chamberlain LLP appeared on behalf of Soft Construct (Malta) Limited & Others)

Wednesday, 5 October 2022

(10.00 am)

THE PRESIDENT: Ms Smith, good morning.

MS SMITH: Good morning.

THE PRESIDENT: Before you begin, we have a point that we would like to put on the record. It arises out of something that I mentioned yesterday and, having considered matters overnight, I think we would like to stress it again, either to give the parties an opportunity to corral the evidence in the record for our attention, or else to tell us that we are barking up the wrong tree. I think either service would be a valuable one.

Yesterday, Ms Kreisberger used the term "unassailable monopoly". Although it is not a term of art, we did find it an evocative and helpful, we think, phrase. There are many monopolies that go nowhere or are assailable, if I can rephrase Ms Kreisberger's term. Think of the valid patent over an invention that no one wants to use or even the patent over technology which, whilst useful, can be circumvented in design and that is not essential.

Now, Ms Kreisberger suggested that the rights conferred by the Agreement, capital A agreement, constituted an unassailable monopoly, and, of course, we

1 know that that is contested.

2 What is troubling us is how we differentiate between  
3 the unassailable monopoly right on the one hand versus  
4 the right that it would be nice to have on the other,  
5 but, although it is nice to have, one can live without  
6 it if absolutely necessary. We are going to leave on  
7 one side the valueless right because that is not this  
8 case. No one is saying that the data rights, the  
9 subject of the agreement, are valueless.

10 Now, there are obviously many factors that can go to  
11 answering this question. One of course is what A pays B  
12 for the right in question. Ms Kreisberger made the  
13 point yesterday about the sums that Genius were paid for  
14 the data that they had and could provide. But that does  
15 not, we suggest, provide a conclusive answer, and we  
16 suspect that it is really just a single factor to  
17 providing the answer to the question of whether there is  
18 an unassailable monopoly or not. So we have been giving  
19 some thought to the factors that we ought to bear in  
20 mind when trying to answer this question. What seems to  
21 us potentially significant is the nature of the services  
22 provided by bookmakers to punters, if I can use those  
23 terms, and what would cause the punters to turn away  
24 from a given bookmaker. It seems to us that if those  
25 factors can be attributed to having or not having the

1 data the subject of the agreement, then that will assist  
2 us in working out whether the rights under the agreement  
3 are must-haves or nice-to-haves.

4 So we are coming to the view that we need to know  
5 much more about the bookmaker/punter market in order to  
6 understand the market here in issue. We fully  
7 appreciate that the punter/bookmaker market is not the  
8 market here under consideration; it is not the market we  
9 are defining, but it does seem to us that it will have  
10 effects on how we understand the market that is actually  
11 in issue.

12 So we would quite like a reading list on this  
13 because we feel that we do not know enough about this  
14 aspect of the case and we are confident that the problem  
15 lies not so much in an absence of material but an  
16 absence of material that we ought to be reading. We  
17 stress again that we are not interested in the  
18 punter/bookmaker market generally, that is obvious, but  
19 in the significance of live data to that market. In due  
20 course, we would welcome submissions focused either on  
21 this evidence or on why it does not matter and why we do  
22 not need to worry about it.

23 So I just wanted to put that marker down because it  
24 is something that we considered overnight. There is no  
25 need to respond to it now, but at some point we would be

1 grateful either for the material or for an articulation  
2 as to why our worry about it is unfounded.

3 So, Ms Smith, I am sorry to interrupt you before you  
4 had even got going, but that is the fruit of some  
5 overnight thinking.

6 MS SMITH: Sir, I know this is always said but actually that  
7 was an extremely useful intervention so ... but I will  
8 not address it straightaway, although I think my -- the  
9 submissions I am proposing to make this morning do touch  
10 upon those issues, although possibly not giving you the  
11 reading list which we will work on.

12 Opening submissions by MS SMITH

13 Sir, I propose to open FDC's case on competition  
14 issues first. Subject to the Tribunal's agreement, from  
15 a very quick discussion this morning, we think it would  
16 be most useful if Mr de la Mare then opens for Genius on  
17 the competition issues, and Ms Lane and Mr Mill will  
18 briefly address the IP issues. I think --

19 THE PRESIDENT: Well, Ms Smith, you have -- if you are  
20 agreed as to process, then we will not push back.

21 MS SMITH: So, Sir, for the purposes of the competition  
22 case, you have FDC's submissions on Sportradar's  
23 Article 101 and 102 claims in the Tribunal and on their  
24 competition law defence to our High Court claims in our  
25 skeleton argument. In that skeleton argument, we set

1 out our initial case or our opening case on the relevant  
2 law and facts, and we will of course develop that case,  
3 particularly the legal case, in more detail in our  
4 written closing, after the Tribunal has had the benefit  
5 of hearing evidence from the factual and expert  
6 witnesses.

7 I do not propose to repeat what I said in my  
8 skeleton in opening, particularly not the legal points.  
9 Similarly, I am not going to respond to every point made  
10 in Sportradar's opening. We do not accept a number of  
11 those points, but again, we will address the Tribunal on  
12 them in closing insofar as necessary.

13 What I will do in opening is I will ask the Tribunal  
14 to take a step back and focus on how this industry  
15 works, how the relevant products are actually bought and  
16 sold in this industry and, in the light of that economic  
17 reality and the objective factual context, to focus on  
18 what effect, if any, the FDC/Genius agreement has had.  
19 We say, and we will show during the course of the trial,  
20 that when the Tribunal looks at the evidence, and in  
21 particular the objective data, it will see that the  
22 agreement has had no detrimental effect on competition  
23 dynamics, on competitive dynamics, or consumer welfare,  
24 but instead the agreement is wholly consistent with and  
25 supports normal competition on the merits.

1           So, in summary, in this opening I propose to do the  
2 following. First, I am going to take you back to  
3 Sportradar's complaint that it made to the CMA in 2015,  
4 in which it predicted, on the basis of expert evidence,  
5 what would happen if and when the agreement which had  
6 then recently been entered into between then FDC and  
7 Perform, gave rise to the true exclusivity which  
8 Ms Kreisberger, Sportradar's counsel, described in her  
9 submissions yesterday. Second, I will show you, I will  
10 explain that, on the agreed objective facts, the  
11 vertical foreclosure effects that Sportradar predicted  
12 would happen as a result of this true exclusivity, which  
13 they say now has arisen under the Sportradar --  
14 FDC/Genius agreement, that those have not happened.  
15 I will explain how that result is not surprising given  
16 how products are bought and sold and how competition  
17 works in this industry.

18           I will show you that Sportradar's case now boils  
19 down to the following. First, having to rely on  
20 unrealistically narrow market definitions limited to  
21 in-stadia LLMD. That is in stadia live league match  
22 data. It needs to rely upon those unrealistically  
23 narrow market definitions in order to make good any of  
24 its theories of harm or asserted anti-competitive  
25 effects. We say those are market definitions which



1 subvert reality and bear no relation to how this  
2 industry works.

3 The second aspect of Sportradar's case is to develop  
4 a narrative based on material, selectively extracted  
5 from disclosure, of sinister goings-on and what  
6 Ms Kreisberger described as "a Faustian pact" yesterday  
7 between FDC and Genius and a narrative of bad faith,  
8 sham negotiations between Genius and potential  
9 sub-licensees.

10 So if I can take you first to Sportradar's complaint  
11 to the CMA in 2015 which was supported by a report from  
12 Dr Niels' firm, Oxera. That is in bundle H, tab 26,  
13 which for those working from the hard copy bundle is  
14 volume 3 of 58 {H/26/1}. If I can ask you to turn in  
15 that, H/26, to page 3 {H/26/3} where the executive  
16 summary is set out. I am not going to read it out, but  
17 you will see the summary at paragraph 2, "The subject of  
18 [the] complaint ..." and the assertion that:

19 "... FDC is seeking to prevent data operators such  
20 as Sportradar from gaining access to [the] clubs for  
21 [the stadia] for the purposes of collecting live match  
22 data ... [and it is] seeking to establish a monopoly in  
23 that data for itself and its ... subcontractor ..."

24 Then, in paragraph 3, it sets out the position of  
25 FDC and refers to the agreements which are said to:

1            "... purport to confer exclusivity for the purposes  
2 of data collection [and] exploitation ..."

3            If I could just ask, then over the page at (b), the  
4 agreement between FDC and Perform {H/26/4}. Then  
5 I would ask you to note what is said at paragraph 4:

6            "FDC has adopted a range of aggressive tactics  
7 against Sportradar and other rival data operators to  
8 enforce the upstream and downstream exclusivity  
9 restrictions by preventing those operators from gaining  
10 access to UK Clubs. These aggressive tactics have  
11 involved ... targeting ... scouts ..."

12            They have set out the details at annex 2. Annex 2,  
13 for your note, is at pages 125 to 139 of this bundle.

14            What is said in that annex, particularly  
15 paragraph 36 on page 139 {H/26/139}, is that essentially  
16 the scouting here is -- the objective of that strategy  
17 is to effectively exclude scouts. So an effective  
18 scouting strategy.

19            Then if I could just ask you to look at paragraph 6  
20 {H/26/4}, what the striking feature of this case is,  
21 converting an established competitive market into  
22 a single operator monopoly. Then, at the end of the  
23 last sentence of that paragraph:

24            "If its conduct is left unchecked, there is a real  
25 risk that FDC will succeed in eliminating all

1 competition in the relevant data markets."

2 Then in paragraph 8 on page 5 {H/26/5}, Sportradar  
3 makes a submission that there will be serious customer  
4 and consumer detriments.

5 So what we have here is what Sportradar's counsel  
6 yesterday described as a true monopoly. She described  
7 reliance -- she placed much reliance yesterday on what  
8 she described as this true monopoly and she  
9 distinguished it from simple contractual exclusivity,  
10 you will remember, at pages 13 to 14 of the transcript  
11 {Day1/13-14}. She explained that there were three  
12 distinguishing features between what she called a true  
13 monopoly and what was simple contractual exclusivity.  
14 First, a lengthy period of exclusivity; two, effective  
15 scout-spotting; and, three, no sub-licensing. Each of  
16 those elements is present in the hypothesis presented in  
17 Sportradar's complaint to the CMA. So it is  
18 illuminating, I say, to see what Sportradar said then  
19 would happen as a result of such a true monopoly. If  
20 I can ask you, in that regard, to turn to page 53 of the  
21 bundle {H/26/53}, at tab 26. Page 53, paragraph 132:

22 "The focus of this complaint is the vertical  
23 foreclosure effects which will result if the FDC  
24 Agreements are enforced."

25 So if the agreements result in a true monopoly.

1            "In [that situation] if Sportradar is completely  
2            excluded from upstream access to Live League Match Data,  
3            significant foreclosure effects will arise in the  
4            downstream markets for supply of that data. Sportradar  
5            anticipates that, were Perform [in that instance] to  
6            become the only source of Live League Match Data,  
7            a significant proportion of [Sportradar's] bookmaker  
8            customer base, especially UK bookmakers, will switch  
9            away from Sportradar/other operators in favour of  
10           Perform, given the essential [for which read "must  
11           have"] nature of Live League Match Data ..."

12           They rely on the Oxera report in that regard.

13           Then they go on to say in paragraph 133 these  
14           effects are:

15           "... likely to be particularly problematic for the  
16           smaller/independent segment of the bookmaker market  
17           (which accounts for 60% of Sportradar's customer base)  
18           which tends to rely on a single data feed ..."

19           So these effects are going to be particularly  
20           problematic for small, single sourcing bookmakers, and  
21           again, that is based on Oxera's report.

22           Then finally, paragraph 134:

23           "... the creation of [this] monopoly ... will result  
24           in downstream markets for the supply of data/betting  
25           products to bookmakers, in particular the UK bookmakers,

1 being substantially distorted in favour of Perform."

2 Then they specifically quote from the Oxera report:

3 "If Sportradar (and competitors) were no longer able  
4 to include the Live League Match Data [that is in-stadia  
5 LLMD] in their offering, there would be a high  
6 probability of many bookmakers shifting their entire  
7 demand to Perform."

8 So that was the evidence that they put, and that is,  
9 if I may say so, a classic case of vertical foreclosure  
10 effects.

11 Now, Sportradar and Oxera argued that this  
12 foreclosure of Sportradar from the midstream market  
13 would result in detrimental effects for bookmakers,  
14 including in the form of higher prices, reduced quality  
15 and reduced innovation. That is at paragraph 137 for  
16 your note {H/26/54}.

17 Then, importantly, if I could ask you to look at  
18 paragraph 140 on page 55 {H/26/55}, the bookmaker higher  
19 prices would be, "will be passed on to end-consumers  
20 which will mean lower winnings, fewer free bets ..."  
21 et cetera. So there is an explicit case of, as one  
22 would expect, consumer welfare detriment.

23 THE PRESIDENT: As a matter of interest, it is quite  
24 a difficult thing to track, but has there been any  
25 effort at tracking this?

1 MS SMITH: Mr de la Mare will no doubt come back to this,  
2 but it is a striking absence of any evidence from  
3 Sportradar's case now on the effect on punters, despite  
4 them having said there will be substantial consumer  
5 welfare detrimental effects. No evidence on that at all  
6 from Sportradar.

7 So if I could turn to what we do have or what we can  
8 see in these proceedings now on the evidence and start  
9 by noting the following. All the experts, experts for  
10 Sportradar, FDC and Genius, agree that there has been  
11 sufficient time now, since May 2019, when the FDC/Genius  
12 agreement was signed, to observe its effects in the  
13 relevant markets. That is joint expert statement,  
14 paragraph 4.23. They also all agree that if the  
15 agreement is anti-competitive, effects should be  
16 observed in the form of harm to Sportradar. That is the  
17 joint expert statement, paragraph 4.35. As you will  
18 have seen, in the CMA's complaint, such harm was  
19 predicted by Sportradar to consist primarily in vertical  
20 foreclosure effects and Sportradar's bookmakers  
21 switching -- Their bookmaker customers switching to the  
22 holder of the exclusive rights, then Perform, now  
23 Genius.

24 But what are the effects we see of this true  
25 monopoly, the true monopoly created by the FDC/Genius

1 agreement on Sportradar first?

2 In that regard, the following facts are also  
3 uncontroversial and agreed by the parties' experts and  
4 they are set out in paragraphs 4.45 and following of the  
5 joint expert statement. So the following facts are  
6 agreed. As of 2021, Sportradar continues to be the  
7 largest sports data and sports betting services supplier  
8 globally. It has revenues for live data and live odds  
9 significantly in excess of those received by Genius.  
10 Moreover, and perhaps more importantly, Sportradar's  
11 live data and odds revenues have increased since the  
12 FDC/Genius agreement was signed.

13 To get a feel for this, can I ask you to turn to  
14 Dr Padilla's second statement, bundle {F/7/10}. These  
15 figures are confidential, but you can see what we are  
16 talking about. I do not think any -- well, none of this  
17 is disputed. Page 10, figure 1, at the top of that  
18 page, you see there Genius' and Sportradar's -- Genius  
19 is on the left, Sportradar is on the right -- live data  
20 and odds revenues from 2017 and 2018, before the  
21 agreement was signed, through to 2021. Just to give  
22 you -- I hope you have got the colour copy there,  
23 although the colour is slightly deadened by the high  
24 confidentiality highlighting. The dark blue is live  
25 data and odds revenues for football generally. The

1 light blue is live data and odds revenues for all other  
2 sports betting data. Then the tiny lines of red on the  
3 top of each of the columns is the Three Leagues data,  
4 live betting on Three Leagues matches.

5 Then if I could ask you to turn to page 21 in the  
6 same bundle {F/7/21}. Again, you see at figure 2  
7 a confidential graph, but it gives you Genius' and  
8 Sportradar's annual global revenues overall. You can  
9 see the comparative picture there. The dark blue is  
10 revenues from live betting and live odds data and the  
11 light blue are other revenues from other services  
12 offered by the companies. So you will see that  
13 Sportradar's -- sorry, then, if I can ask you to turn to  
14 page 22 {F/7/22}, where -- figure 3, we have the figures  
15 and we have the graphs for Genius' and Sportradar's  
16 bookings -- so the number of bookings as opposed to the  
17 revenues -- the millions of bookings between 2017 to  
18 2021. You will see from that that Sportradar's live  
19 data and odds bookings, that is the number of events  
20 booked by bookmakers -- sorry, a lot of booking there,  
21 but the number of events booked by bookmakers, taken by  
22 bookmakers from Sportradar and from Genius.  
23 Sportradar's bookings have also increased since the  
24 FDC/Genius agreement was signed in 2019 and they  
25 continue to be significantly in excess of the bookings



1 figures achieved by Genius.

2 Now what you can see from that figure 3 is that not  
3 only have Sportradar's annual global bookings for all  
4 in-play sports events increased since the FDC/Genius  
5 agreement was signed, its annual global in-play football  
6 events have also increased, particularly 2020, but even  
7 as regards 2021 versus 2019. They have increased. The  
8 figures are contained in the annexes to Dr Padilla's  
9 statement but I will not take you to those given the  
10 time available this morning. Their bookings for in-play  
11 football events have also increased and exceed those  
12 achieved by Genius.

13 Now, Sportradar say, "Do not worry about that, look  
14 at the shares of bookings between Sportradar and  
15 Genius". Sir, if I could ask you in that regard to turn  
16 to Dr Majumdar's first report, which is in bundle F --

17 THE PRESIDENT: Just pausing there.

18 MS SMITH: Yes.

19 THE PRESIDENT: Figure 3, the millions being referred to is  
20 number of bets rather than the quantity?

21 MS SMITH: Well, it is not number of bets because that would  
22 have to be measured at bookmaker level.

23 THE PRESIDENT: Right, I see.

24 MS SMITH: It is the number of events taken from the  
25 suppliers by the bookmakers, which they will then

1           incorporate into their bets. So the data is the number  
2           of matches for which data was booked. I think it is  
3           number of matches rather than points of data.

4       THE PRESIDENT: Okay.

5       MS SMITH: So the number of, say -- say, and one event is  
6           one Premier League football match, you book, as  
7           a bookmaker -- you book, you say to Genius, "I would  
8           like to take your data for the upcoming  
9           Premier League -- I am going to get this wrong and  
10          Mr de la Mare can correct me -- the upcoming  
11          Premier League match between Brighton and Manchester  
12          United -- both Premier League, there we go, brilliant --  
13          I am going to take data from that match from you,  
14          please, Genius, today, tomorrow, next week". So they  
15          book that, that is a booking for one event, and they  
16          take the data from Genius for that one event, that one  
17          match, one tennis match, one baseball match, one  
18          volleyball match. That is a booking for an event. So  
19          it is millions of events taken -- bookings taken by  
20          the bookmakers from Genius and Sportradar.

21       THE PRESIDENT: Right.

22       MS SMITH: So, yes, shares between Sportradar and Genius.  
23          Can I ask you to turn to Dr Majumdar's first report,  
24          bundle {F/10/138}? Before looking at these figures, can  
25          I ask the Tribunal to bear in mind that these are the

1 relative shares between Sportradar vis-a-vis Genius.  
2 One should bear in mind that Sportradar and Genius are  
3 only two of a number of SDSBS suppliers who operate at  
4 the midstream level, selling in-play betting data and  
5 odds to bookmakers. As we know, there are other  
6 participants at that mid-level, Perform, IMS, other  
7 SDSBS suppliers.

8 But looking just at their relative shares, if  
9 I could ask you to look at table 24, which is on  
10 page 138. Table 24, again it is confidential, so I am  
11 not going to ask you to look at it -- sorry, I am not  
12 going to read it out. But if you look at that table,  
13 you will see that Sportradar's annual global bookings  
14 for all sports events and all football events continue  
15 substantially to exceed those for Genius. Sportradar's  
16 annual global bookings for Premier League games, so the  
17 most important games you will see in the FDC data set,  
18 continue to exceed -- even after the FDC/Genius  
19 agreement comes into force, they continue to exceed  
20 those of Genius, even though we know, or we are told  
21 that Sportradar no longer have access to in-stadia live  
22 league match data for Premier League games. So they  
23 have to rely upon off-tube live league match data for  
24 Premier League games. Nevertheless their share of  
25 bookings for those games still substantially exceeds

1 those achieved by Genius.

2 Now, the one area where Genius has increased its  
3 share of bookings versus Sportradar since the FDC  
4 agreement is as regards Three Leagues overall,  
5 specifically other lower tier three league matches.  
6 I will come back to the significance of that, in our  
7 submission.

8 While we are in this report, if I could also ask you  
9 to turn back to page 133 {F/10/133}, again  
10 a confidential table, but ask you to note table 21.  
11 What that shows you -- again I will not read out the  
12 figures -- but it shows you that both Sportradar and  
13 Genius have gained new customers since the FDC/Genius  
14 agreement was signed. They have both gained new  
15 customers. We know, just breaking down the data  
16 a little more, not this data but the data that you will  
17 be shown from other sources during the course of the  
18 trial, we know that as regards single sourcing  
19 bookmakers, so those smaller bookmakers who only have  
20 a contract with one supplier, Genius or Sportradar,  
21 Sportradar has not lost any of its single sourcing  
22 customers since the FDC/Genius agreement was signed. It  
23 has not lost any of those single sourcing bookmaker  
24 customers as a result of being deprived of in-stadia  
25 LLMD. In fact it has gained 23, and we will address in

1           due course the significance of that number. But that  
2           is, for your note, Dr Padilla's first report,  
3           paragraph 240.

4           Turning them from the single sourcing bookmakers to  
5           the larger multi-sourcing bookmakers, so these are  
6           people like William Hill, who have contracts with --  
7           they are vast companies -- have contracts with at the  
8           very least both Sportradar and Genius to buy betting  
9           data from them. So they are what has become known as  
10          multi-sourcing bookmakers, tend to be larger in size.  
11          Various analyses have been carried out of those  
12          multi-sourcing bookmakers, including Dr Majumdar's  
13          analysis of Sportradar's 20 largest customers.  
14          Dr Majumdar's analysis of the data shows that as -- 40  
15          and 20, I will just deal with the 20 first -- as of  
16          2021, Sportradar had not lost any of its 20 largest  
17          multi-sourcing customers. In fact, those customers had  
18          increased their overall spend with Sportradar since  
19          2018. That is Dr Majumdar's first report, F/10 again at  
20          page 131, so two pages back {F/10/131}. If I could ask  
21          you, because it is partially confidential, to read to  
22          yourselves paragraphs 460 to 462.

23          THE PRESIDENT: Yes. (Pause).

24          MS SMITH: Then if I could ask to turn to page 132, the next  
25          page {F/10/132}, just you will see the figures set out

1           in figure 5. That is the live data and live odds  
2           revenue, we see from the heading what it is. The  
3           heading I see is confidential, but you will see from the  
4           heading what that figure shows.

5           THE PRESIDENT: Yes.

6           MS SMITH: Then if I could ask you to turn to page 135 in  
7           that bundle, Dr Majumdar's first report, {F/10/135}, and  
8           if I could ask you to read -- again because I see some  
9           of it is confidential, I am just checking the latest  
10          position on what I can and cannot read out --  
11          paragraphs 478 through to 481. If I could just ask you  
12          to read those paragraphs.

13          THE PRESIDENT: Yes, of course. (Pause).

14          MS SMITH: The summary that is on page 136 {F/10/136}, for  
15          those who are working from the -- yes, the bullet points  
16          there are crucial, and I cannot read out the numbers so  
17          I would ask you to read those bullet points to  
18          yourselves. (Pause).

19                 So the high point of Sportradar's case on the  
20          objective data is that it says Genius' share of live  
21          data and odds revenues from these customers, Sportradar  
22          customers, has increased between 2018 and 2021. This is  
23          what it calls its "share of wallet argument", although  
24          I note Sportradar still retains the majority share of  
25          combined spend from these customers, and its revenue has

1 increased from these customers since the agreement.  
2 Sportradar says, "No, no, no, the important point is  
3 that Genius has gained share from Sportradar".

4 So the true monopoly imposed by the FDC/Genius  
5 agreement has not caused Sportradar's customers to  
6 switch. What we see on the objective data, all we see  
7 on the objective data is that some of the customers,  
8 some of Sportradar's customers, who multi-source, who  
9 buy bundles of data from both Sportradar and Genius,  
10 have bought more data from the bundle they obtained from  
11 Genius and less data from the bundle they obtained from  
12 Sportradar. But we see, quite clearly, Sportradar  
13 remains a strong and effective competitor to Genius and  
14 others in the supply of the bundles of sports data and  
15 sports betting services.

16 Now, the fact, we say, that Genius has taken some  
17 business from Sportradar is wholly consistent with  
18 competition on the merits. As a result of the  
19 FDC/Genius agreement, Genius did gain a valuable anchor  
20 right, a tier 1 right, an exclusive right, which enabled  
21 it to compete more effectively with Sportradar. But  
22 that is not anti-competitive foreclosure; that is  
23 competition on the merits.

24 Now, so much then for the effects of the FDC/Genius  
25 agreement on Sportradar. What about its effects on the

1 structure and operation of the markets more generally?  
2 Again, the following facts are uncontroversial. At the  
3 midstream level of these markets, all sports data and  
4 sports betting services suppliers, including the major  
5 suppliers, Sportradar, Genius, Perform and IMG, continue  
6 to compete to supply their bundles of services to  
7 bookmakers. Bookmakers' choice of suppliers has not  
8 been reduced.

9 At the upstream level, these suppliers compete to  
10 procure sports data rights from sports bodies such as  
11 FDC. Sportradar, Genius, Perform, IMG and others  
12 compete to obtain the exclusive data rights to sports  
13 competitions, such as the Three Leagues, UEFA Champions  
14 League, the Italian, Spanish and French league football,  
15 ATP tennis and US-focused sports, such as major league  
16 baseball and NBA basketball.

17 At the downstream level, there is no suggestion that  
18 competition between bookmakers has in any way been  
19 affected. I will come to the points about price, but  
20 there is no suggestion that competition between  
21 bookmakers is anything other than vigorous. As I said  
22 initially, when I first opened, as for effects on  
23 consumer welfare, there has been a resounding silence  
24 from Sportradar on those issues. Sportradar has led no  
25 evidence that punters are suffering from increased



1 prices, reduced choice or quality, contrary to what they  
2 asserted would be the case in their complaint to the  
3 CMA.

4 Sportradar's case on effects has shrunk to two  
5 arguments. Those are, first, that prices charged by  
6 Genius to bookmakers for in-stadia LLMD have increased,  
7 and, secondly, that bookmakers have been, and I quote,  
8 "forced to accept bundles of Genius content which they  
9 did not want in order to obtain supplies of in-stadia  
10 LLMD". Sportradar put it rather dramatically at  
11 paragraph 56 of their skeleton {A/1/24}, and I quote:

12 "[Sportradar] [sic] exploits customers by hiking  
13 prices and foisting unwanted content on them."

14 Now, I will come back to each of those points, but  
15 it is enough for now to say that we will show during the  
16 course of the trial --

17 MS KREISBERGER: Genius, not Sportradar.

18 MS SMITH: I am sorry. Genius. Indeed, I read out wrongly  
19 my note. "Genius exploits customers by hiking prices  
20 and foisting unwanted content on them". Freudian slip.  
21 I will come back to those points, but it is enough for  
22 now to say that we will show neither of those assertions  
23 stand up to scrutiny.

24 In fact, we will show, on the evidence, that prices  
25 for bundles of data -- for bundles of data, which is

1           what bookmakers buy, have actually gone down since 2018,  
2           when you consider it on -- you consider the prices on  
3           a more realistic revenue per event basis. Secondly, we  
4           will say that selling content in bundles is simply part  
5           of normal practice in this industry.

6           What we say is the vertical foreclosure effects  
7           predicted by Sportradar have not come to pass. We say  
8           this is unsurprising. Why? Because the award of  
9           exclusive rights to Genius under the FDC/Genius  
10          agreement reflects normal competition in this industry.

11          Such exclusive arrangements are ubiquitous. They  
12          are also efficient given the way in which this industry  
13          operates, and in particular, the way in which the  
14          products at issue, sports betting data, is bought and  
15          sold. As I have said and as you will see from the  
16          evidence, bookmakers do not buy individual data rights  
17          from SDSBS suppliers, such as Genius and Sportradar.  
18          They buy portfolios or bundles of data and odds which  
19          cover a broad range of sports -- not just football, all  
20          sports -- and typically, they commit to buy thousands of  
21          events a year.

22          THE PRESIDENT: Just pausing there, Ms Smith, and going back  
23          to Majumdar 1, page 138 {F/10/138}, I just want to get  
24          my unit of account clear in my mind. At  
25          paragraph 491 --

1 MS SMITH: 91.

2 THE PRESIDENT: 491, yes. Dr Majumdar refers to "bookings".

3 MS SMITH: Yes.

4 THE PRESIDENT: You have just been referring to purchasing  
5 of data for matches.

6 MS SMITH: Yes. I am sorry, yes.

7 THE PRESIDENT: No, no, no, that is fine. I just want to  
8 get clear in my mind, when one is talking about  
9 a booking, is one talking about a single data point in  
10 a single match or what is it we are talking about?

11 MS SMITH: I think, as I tried to explain earlier, I am  
12 sorry, booking I think equates to event.

13 THE PRESIDENT: Right.

14 MS SMITH: So what the bookmakers buy is they say -- they  
15 enter into a contract with Sportradar or Genius, and you  
16 will see these in the evidence, where they buy  
17 a bundle of, say, 10,000 events a year. Though each  
18 event is a separate football match, tennis match,  
19 basketball match, whatever. They commit under their  
20 contract to buy a minimum number of events per year.  
21 Then, on a day-by-day basis, they -- that is the  
22 contract they enter into. Then on a day-by-day basis,  
23 they say to Genius, "I want to book this particular  
24 event with you for next week, I want to book this  
25 Premier League match that is happening next week with

1           you". Single source bookmakers obviously always book it  
2           from their one supplier. Someone like William Hill will  
3           decide whether they want to book that particular match  
4           from Genius, Sportradar, Perform or whoever they have  
5           their contracts with. So during the course of the year,  
6           they will say, "Okay, Premier League match next week,  
7           I am going to book that event with you". That is  
8           booked, and then they obtain all the data for that one  
9           event, that one football match from that supplier, and  
10          it goes towards the minimum commitment of, say, 10,000  
11          events that they have contracted to buy each year from  
12          that supplier.

13                 A really important point in this case, I cannot  
14                 stress enough, which, again, barely featured in  
15                 Sportradar's counsel's opening, is the nature of how  
16                 products are bought and the fact that, for the vast  
17                 majority of suppliers, SDSBS suppliers' revenues are  
18                 accounted for by multi-sourcing customers. Customers  
19                 who have more than one contract with Sportradar and  
20                 Genius. They can choose, on a day-by-day basis, who  
21                 they are going to buy the particular event from, having  
22                 committed to a minimum commitment from each of their  
23                 suppliers.

24          MR CUTTING: Sorry, can I ask a question, just while it is  
25                 in my head?

1 MS SMITH: Yes.

2 MR CUTTING: This may be the wrong time, in which case you  
3 can answer it later.

4 These contracts between the bookies and the  
5 mid-market, are they multi-year contract or are they  
6 year by year? What is the general nature of them?

7 MS SMITH: I think they are -- I mean, we will take you to  
8 some of them. I think it depends. I think we see both.  
9 But there is generally -- and the evidence -- you will  
10 see the evidence on this. But, as I recall -- I do not  
11 want to generalise -- generally, it depends again on the  
12 particular bookmaker, but I think someone like  
13 William Hill will have a -- I might get this wrong, but  
14 certainly there is a minimum commitment for each year.  
15 There is a real spread: some are annual, some are  
16 multi-year. But we will look at some of those in the  
17 evidence I think.

18 MR CUTTING: But the inference of that then is that, if we  
19 take this table --

20 MS SMITH: Yes.

21 MR CUTTING: -- some of the bookings in 2020, with  
22 Sportradar, even of EPL games, might be in fulfillment  
23 of contracts that were entered into prior to the  
24 agreement.

25 MS SMITH: Well, yes. But one needs to bear in mind, and

1           again I will give you the source for this figure,  
2           I think it is either Premier League or Three Leagues  
3           events account for 3% of bookings. So when you are  
4           looking at a bookmaker with, say, the larger  
5           multi-sourcing bookmaker who has undertaken to have  
6           a minimum commitment from a number of different  
7           suppliers per year, they can choose where they get that  
8           small proportion of Premier League matches from.  
9           Because the Premier League matches will form, and we  
10          will show you, a very small proportion of the minimum  
11          commitment that each bookmaker has bought -- has  
12          undertaken to buy from the suppliers.

13       MR CUTTING: Okay.

14       MS SMITH: So there is effectively the possibility and  
15          the -- not just possibility, but the reality of  
16          bookmakers switching their purchases, not just of  
17          Premier League events, but other events that they have  
18          committed to buy between suppliers. So they do not  
19          commit to buy 10,000 Premier League events a year, they  
20          commit to buy 10,000 events a year, which cover, and you  
21          will see from the contracts appendices of a huge number  
22          of sports, I think it is on average 20 different sports,  
23          let alone competitions, 20 different sports per  
24          contract.

25       THE PRESIDENT: So it is actually much more fluid I think

1           than I had preconceived it to be.

2       MS SMITH:   Yes.

3       THE PRESIDENT:   So if one looks at the total universe of  
4           bookings and moves away from relative figures to  
5           absolute figures --

6       MS SMITH:   Yes.

7       THE PRESIDENT:   -- you have got something like, let us say,  
8           100,000, which theoretically you could offer odds on if  
9           you were buying them all.

10      MS SMITH:   Yes.

11      THE PRESIDENT:   But you do not do that, partly because no  
12           doubt you want to focus on the events that are of  
13           interest.

14      MS SMITH:   As a bookmaker, when you say "you", you are  
15           talking about the bookmaker.

16      THE PRESIDENT:   As a bookmaker.  I am interested in why the  
17           bookmakers -- so the bookmaker will have views about  
18           what the punters are interested in placing money on.

19      MS SMITH:   Yes.

20      THE PRESIDENT:   They will form that view, what you are  
21           saying, in quite a short-term way.

22      MS SMITH:   Yes.

23      THE PRESIDENT:   So the notification is not "I would like to  
24           have all 40-odd Premier League matches", you do not say  
25           that in advance, you say that a week in advance rather

1           than a year in advance?

2       MS SMITH:  What you would -- just plucking some figures from  
3           the air, as a bookmaker, you would plan to offer --  
4           again, I will get the figures wrong, but you may plan to  
5           offer bets on 100,000 events a year, different sports.  
6           You have entered into contracts with, say, three  
7           suppliers of data with a minimum commitment in each of  
8           those contracts to buy 10,000 events from each of them.  
9           You can buy more from them, but you cannot go under the  
10          minimum commitment.  So you have a plan to offer 100,000  
11          events a year, you have a minimum commitment, 10,000  
12          events from each bookmaker.  You choose, based on  
13          a number of different criteria, during the course of  
14          that year, who you are going to take the data for each  
15          event from.  You will do that by reference to a number  
16          of different criteria: the quality of the data, the  
17          price of the data.  So you may have different deals with  
18          each of the different suppliers as to what you pay per  
19          event under your contract.  So you might decide, "Well,  
20          for this hugely popular Premier League match that is  
21          coming up next week, I want the quickest data I can  
22          possibly get so I am going to buy it from the person who  
23          can give me the in-stadia LLMD.  But on another match  
24          that is coming up that is not quite so important, that  
25          I do not think is going to have so much betting on it or



1 punters are not going to be quite so engaged, I am happy  
2 to buy it cheaper somewhere else. So I will use my  
3 minimum commitment -- or happy to buy it cheaper  
4 off-tube, from off-tube someone else, who can supply it  
5 to me off-tube, slightly -- slightly slower. So I will  
6 make a judgment and I will buy on the basis of those  
7 judgments and the prices I have negotiated and the  
8 bundles that each of those suppliers who I have got  
9 contracts with can give me".

10 So that is basically how it works.

11 So, as I have said, just going back to -- it was  
12 a very useful question -- again, you always say that but  
13 it actually was -- because what I was trying to say was  
14 that the bookmakers do not buy individual data rights,  
15 they buy these bundles. We have looked at the  
16 contracts, our experts -- well, Dr Majumdar and  
17 Dr Padilla in any event have looked at the contracts in  
18 a lot of detail, and you will see from the evidence that  
19 a tiny number of bookmaker contracts, single figures out  
20 of hundreds, relate to football data only. Most relate,  
21 the vast majority relate to all sports. None of the  
22 contracts disclosed by Genius or Sportradar are  
23 contracts with bookmakers to supply Three Leagues live  
24 league match data alone. None of them. Let alone  
25 in-stadia LLMD alone. In-stadia LLMD is not bought and

1 sold in any proper meaning of the word.

2 Further, and again very importantly, sports data and  
3 sports betting services suppliers do not generally  
4 charge any distinct price for LLMD, so they do not price  
5 the different events in their bundles differently. They  
6 generally agree a price for a minimum commitment for  
7 a certain number of events, 10,000 events, per year with  
8 the bookmaker. The bookmaker says "I will pay you X  
9 million, or whatever it is, thousand, for these 10,000  
10 minimum events per year and then I will pay you extra  
11 for any -- on a revenue per event basis for any further  
12 events that I book from you during the course of the  
13 year".

14 THE PRESIDENT: Right. In that marginal case, the --

15 MS SMITH: Yes.

16 THE PRESIDENT: -- for the extra event, there is no  
17 differentiation in terms of the price charged for the  
18 event?

19 MS SMITH: In the vast majority, and again I do not think  
20 I can read the numbers out, but in the vast majority of  
21 cases, no. Single digit number contracts out of  
22 hundreds of Genius contracts indicate a distinct price  
23 for LLMD, but in the vast majority of cases, bundles are  
24 normally priced on a simple per event basis.

25 THE PRESIDENT: Okay. But you will know, as a bookmaker,

1           the sort of data you are buying, in other words whether  
2           it is off-tube or whether it is live in each case.

3       MS SMITH: Yes. So you will know -- okay, so you will know,  
4           "I can get live Three Leagues data from Genius". You  
5           will know, "I can get now ..." -- and I do not think  
6           this is confidential because -- you will know that,  
7           "I can get live UEFA championship match data from  
8           Sportradar", because they have recently entered an  
9           exclusive agreement with UEFA to gain access to their  
10          live data.

11       THE PRESIDENT: Yes.

12       MS SMITH: So in that case, Genius have to use off-tube, but  
13          Sportradar can use live. So as a bookmaker, you will  
14          say, "Right, well, I know I can get a particular live  
15          exclusive -- a live data exclusively from one bookmaker  
16          and get other live data exclusively -- sorry, from one  
17          supplier, I can get other live data exclusively from  
18          other suppliers". It is not just football. You will  
19          see, in particular from the annex 1 to Genius' factual  
20          narrative, which I will take you to -- I will come back  
21          to it if I may, but it shows you the spread of exclusive  
22          rights across the market, which are owned by a number of  
23          the different suppliers.

24       THE PRESIDENT: I see. I think it would be helpful, not  
25          now, but if you could provide us with a few no doubt

1 H references to contracts that we could just have a look  
2 at.

3 MS SMITH: Yes, I think we will probably be taking  
4 the witnesses to some of those contracts, but we can  
5 certainly get you a reference.

6 THE PRESIDENT: Yes, we would quite like to prime the pump  
7 before we get to the witnesses.

8 MS SMITH: Yes, of course. We can do that.

9 THE PRESIDENT: That would be helpful.

10 So just sticking --

11 MR DE LA MARE: We have got a list, my Lord, that we can  
12 hand up; a spread of the contracts.

13 THE PRESIDENT: That would be very helpful, Mr de la Mare.  
14 Thank you.

15 The final question on table 24, if we look at 2021,  
16 English Premier League figures, and I am not going to  
17 read them out, but we see the percentage for Sportradar.  
18 That would be off-tube data?

19 MS SMITH: Yes.

20 MR DE LA MARE: That is correct, my Lord.

21 MS SMITH: 100% I think.

22 MR DE LA MARE: It is 100%.

23 MS SMITH: Yes.

24 MR DE LA MARE: Well, I am going to be showing you some  
25 figures later that show that all of the EPL data

1 collected by Sportradar is off-tube.

2 THE PRESIDENT: Is off-tube.

3 MS SMITH: Yes.

4 MR DE LA MARE: What is more, what you must take into  
5 account when reading that figure is obviously we do not  
6 have the off-tube numbers from the other operators in  
7 the market.

8 MS SMITH: Because all the other operators of course will  
9 also only be able to supply off-tube.

10 THE PRESIDENT: The final question on this, I promise, if we  
11 asked for absolute rather than percentage figures, we  
12 would be able to get those?

13 MS SMITH: They may already be in an annex which I should  
14 know, but I --

15 THE PRESIDENT: I suspect they are buried somewhere.

16 MR DE LA MARE: Yes.

17 THE PRESIDENT: I am grateful.

18 MS SMITH: I am sure they are already. There are a number  
19 of annexes to Dr Majumdar's report and I have to admit  
20 I have not gone through the minute detail of all of  
21 them, but they are there.

22 So, as I have said, sports data and sports betting  
23 services suppliers include a variety of different sports  
24 betting data and odds in their portfolios that they  
25 offer to bookmakers, which comprise exclusive and

1 non-exclusive data, data sourced officially on  
2 an exclusive and non-exclusive basis and also officially  
3 off-tube.

4 This is how they compete with each other, those  
5 suppliers. They offer differentiated bundles to the  
6 bookmakers and that differentiation is driven by  
7 exclusivity over the data rights. The exclusive rights  
8 to important sporting events are seen absolutely by  
9 suppliers as what you will see from the documents  
10 described as a "customer acquisition tool". There is no  
11 doubt that there are important anchor rights. But as  
12 you will see from the evidence, there are a number of  
13 important anchor rights, not just the FDC data. Each of  
14 Genius, Sportradar, Perform and IMG hold their own range  
15 of different major exclusive content and they supply it  
16 to their customers as part of their portfolios. I did  
17 say, and I now will take you to annex 1 of Genius'  
18 factual narrative which is at bundle {A/13/46}.

19 I am, again, not going to read this out in any  
20 detail because at least the figures I think are  
21 confidential and I am not sure that all the figures are  
22 agreed. The spread of who owns which rights, however,  
23 I think -- I will be corrected if I am wrong -- is  
24 agreed and it is public knowledge in fact. So you will  
25 see down the left-hand side, and unless you are

1 a massive sports fan, unlike me, you will have to work  
2 out what all the acronyms stand for, though you probably  
3 know it all already. But you will see all the various  
4 sports data rights, and we will be taking you, during  
5 the course of proceedings, to these other important  
6 competitions. So you will see, for example, that  
7 Sportradar now holds the rights to the UEFA Champions  
8 League, the National Hockey League, the international  
9 cricket ICC, ITF which is tennis, Major League Baseball,  
10 NBA -- I will get this right -- is basketball and I just  
11 recently lost the NFL to Genius. So it is not just  
12 Genius and Sportradar, it is Stats Perform and IMG.  
13 What might be striking from this table is just how many  
14 of these exclusive rights are owned by Sportradar versus  
15 Genius; given the position they are taking in these  
16 proceedings, it is interesting.

17 But, Sir, what you can see from that table, however,  
18 is the grant of exclusive licences to what are known in  
19 the industry as tier 1 and tier 4 anchor rights is  
20 normal in this industry.

21 The FDC/Genius agreement is just one example of such  
22 an arrangement. What this table also shows you, if you  
23 look at some of the figures, and you will hear evidence  
24 to this effect during these proceedings, is that sports  
25 bodies are increasingly becoming aware of the value of

1           this data, the value of the data which their events  
2           generate, and they are seeking to realise that value by  
3           selling exclusive rights to that data. Now, in this  
4           regard, it is important, in my submission, to remember,  
5           or to bear in mind both the nature of that data and the  
6           fact which is undisputed by the experts that sports  
7           bodies, such as FDC, are entitled to realise the value  
8           in that data. So taking the example of my client, FDC.  
9           FDC is owned by and exists solely in fact to seek to  
10          realise the value in the live league match data on  
11          behalf of the Three Leagues; ultimately, the football  
12          clubs. It is the leagues and the clubs who organise  
13          matches, who buy the players, at vast sums, who buy the  
14          players and organise the matches which drive the  
15          interest of punters who then place bets on those  
16          matches.

17                 The football clubs have property rights, some  
18                 disputed, as to who can -- and they can control who  
19                 enters the stadia to watch the matches. They can  
20                 control what people do while they are in the stadia.  
21                 The clubs have barred unauthorised collection of data  
22                 during matches, data in which they have I think  
23                 intellectual property rights. The clubs do this in  
24                 order to create a revenue stream from that data and that  
25                 revenue stream sits alongside all the other revenue



1 streams that they realise together to cover the costs of  
2 running these football matches and running the football  
3 clubs.

4 Now, Sportradar's claim is that the revenue  
5 effectively that FDC generates through realising the  
6 value in this data through the FDC/Genius agreement is  
7 illegitimate. On Sportradar's case, to quote from their  
8 skeleton argument, these revenues are monopoly profits,  
9 including an exclusivity premium which have been, and  
10 I quote, "extracted" by foreclosing competition in the  
11 midstream market and forcing bookmakers to buy high --  
12 pay higher prices for more content. But what FDC and  
13 Genius have done by entering into the agreement is not  
14 by any means unusual. Exclusivity for tier 1, important  
15 anchor rights, is ubiquitous in this sector. Everyone  
16 now, save for the solitary Bundesliga, on which  
17 Sportradar place much reliance, everyone else has  
18 decided that the optimal licensing structure for data  
19 arising from the sports matches which sports bodies  
20 organise is exclusive licensing.

21 THE PRESIDENT: Just to understand the table, it may be  
22 Mr de la Mare is the person to answer this, looking at  
23 the Bundesliga, why are the grids for 2023 onwards  
24 coloured grey, and the previous bit labelled "No  
25 exclusive data rights".

1 MR DE LA MARE: Because it is not clear -- yet to be  
2 awarded.

3 THE PRESIDENT: You do not -- oh I see.

4 MS SMITH: We do not know what they are going to do in the  
5 future.

6 THE PRESIDENT: Yes, they have --

7 MR DE LA MARE: Particularly apposite I suspect with the PGA  
8 tour, given everything that is going on there, but yes,  
9 that is the reason.

10 There is one correction we are going to have to make  
11 to this table, it is material, we will be handing up  
12 a revised version, where you have "Serie A" coloured for  
13 2018 through to 2021 as IMG, the economic reality there  
14 is that the rights were held by my clients under  
15 a secondary licence from IMG, because IMG did not  
16 effectively have any interest in exploiting those  
17 rights. That is obviously highly material to a lot of  
18 numbers in the bundles, in the expert reports, when you  
19 are comparing figures from 2017 to 2022, because there  
20 are two material changes in those periods, our  
21 acquisition of FDC rights, but also our acquisition of  
22 the Serie A rights.

23 THE PRESIDENT: Right. So just mentally we ought to be  
24 putting a line --

25 MS SMITH: That should be grey.

1 THE PRESIDENT: -- through IMG.

2 MR DE LA MARE: It should be -- we will hand up a revised  
3 submission.

4 THE PRESIDENT: No, no, that is very helpful, thank you.

5 MS SMITH: So what you can see, and I am just drawing  
6 a broad -- making broad statements on the basis of this  
7 table, but what you can see is that exclusive licensing  
8 of sports data rights is common practice. It is not  
9 niche or marginal. But even outside the sports data  
10 sector, there is nothing, we submit, in the least  
11 unusual in the exclusive licensing of rights. In  
12 practical terms, an exclusive licensee takes the place  
13 of the original rights holder. A licence effectively  
14 involves a change in the identity of the rights holder.  
15 But in the normal course of things, an exclusive licence  
16 will not alter the structure of a market or competitive  
17 dynamics in that market. It is imperative that  
18 Sportradar identifies precisely what takes this  
19 particular exclusive licence outside the norm.

20 Now, it is worth pausing here for a moment to  
21 address one particularly troubling submission that was  
22 made by Sportradar's counsel yesterday. That is the  
23 submission which is recorded at pages 108 to 109 of the  
24 transcript {Day1/108-109} by reference to the *Arriva*  
25 judgment and the Premier League Commission decision,

1 that it is, and I quote:

2 "A generally applicable rule of competition law  
3 that:

4 "'The grant of exclusivity for a long period to  
5 a ... downstream provider of rights has a distortive  
6 effect on competition ...'

7 "Therefore," she said, "no analysis of effects is  
8 necessary."

9 She said it was an object infringement. Now, I will  
10 develop our arguments on the law, but suffice it for now  
11 to say that we say that is clearly incorrect. Even from  
12 the face of the decision that you were taken to  
13 yesterday. If I can go back to the CJEU -- sorry,  
14 the Commission decision, I think it was in  
15 Premier League, which is at {L/101/10}. So you will  
16 recall, if you have that -- sorry.

17 First of all, the point should be made that this was  
18 not, as I understand it, an object case under  
19 Article 101. The Commission -- sorry, the CJEU I think  
20 was -- it is Commission, was considering effects. But  
21 in any event, if you look at paragraph 26 -- sorry, if  
22 we could go back to page 9 where paragraph 26 starts and  
23 look down at the bottom of the page {L/101/9}, and they  
24 are talking here about foreclosure problems.

25 THE PRESIDENT: Yes.

1 MS SMITH: If you carry on they say:

2 "The FAPL has so far sold exclusive live [then the  
3 next page] TV rights in packages that were comparatively  
4 large in relation to that which would be sold by an  
5 individual club and to the demand from many broadcasters  
6 on the market. This is likely to create barriers to  
7 entry on downstream television markets in the  
8 United Kingdom leading to access foreclosure in these  
9 markets."

10 Et cetera.

11 Then they go on to say, "Given the importance of  
12 football ..." and they come to other conclusions.

13 But reading paragraphs 26 through to 30 in your own  
14 time, you will see that it was not the exclusivity that  
15 was the problem in this case; it was the size of the  
16 exclusive packages sold and the various features of that  
17 market, including the nature of downstream demand, which  
18 led the Commission to conclude that the way in which  
19 these packages were structured, the large size of the  
20 exclusive packages, were likely to create barriers to  
21 entry and foreclosure effects. That can be seen if you  
22 turn to paragraph 36. Sorry, I do not have a page  
23 reference for that, I think it is either 11 or 12  
24 {L/101/12}. Paragraph 36, page 12, the remedies that  
25 were committed to, the commitments that were accepted.

1           The remedy, and I will just summarise that, you can  
2           read that in your own course, but in the Commission, the  
3           remedy and the commitments that were accepted was not to  
4           award packages on a non-exclusive basis. It was to  
5           split up the exclusive data into smaller packages so  
6           that the buyers of those smaller packages of data --  
7           there could be a number of buyers of the smaller  
8           packages of data who could then use that, the exclusive  
9           packages, to compete effectively with each other.

10           That is wholly consistent with -- I think I have got  
11           time to take you to a judgment of the Restrictive  
12           Practices Court, the predecessor to this court, some of  
13           us may remember it, some of us may even have appeared in  
14           front of it, those very aged members of the Bar. If  
15           I could take you to bundle {L/28}. It is a judgment of  
16           the restricted practices court in televising  
17           Premier League football matches and that was cited in  
18           footnote 51 of our skeleton. If you can go to page 139  
19           {L/28/139} in that report. Unfortunately, the  
20           paragraphs are unnumbered but if I could just ask you to  
21           read the second paragraph, first full paragraph on that  
22           page, 139, through to over the page. Just to summarise  
23           what that says, effectively it recognises that  
24           exclusivity is a way in which, in this case,  
25           broadcasters compete with each other. That is what is

1           happening, we say, in these markets. Pages 139 and,  
2           just over the page, 140.

3           THE PRESIDENT: So the beginning of "We think ..."

4           MS SMITH: Page 139:

5                     "From what we have said at an earlier stage of this  
6                     judgment it will be apparent that we accept that  
7                     a principal means by which broadcasters compete ... is  
8                     the differentiation of their programmes and that the  
9                     acquisition of exclusive rights ... is a highly  
10                    important means of providing differentiation."

11                   (Pause).

12                    If perhaps you could stop about halfway down  
13                    paragraph 140, before the paragraph that starts "Our  
14                    conclusion ..."

15                    Well, you could read the conclusion as well, but  
16                    stop at section 9 of the judgment.

17           THE PRESIDENT: Yes, thank you.

18           MS SMITH: So just as the grant of exclusive rights was  
19                    a way of differentiating bundles of content in the media  
20                    market, we say it is also -- which encourages  
21                    competition, we say that is the nature of the markets in  
22                    this case and we will show that the exclusive grant of  
23                    the FDC rights was consistent with that competition and  
24                    that there are, going on to a slightly different point,  
25                    important competitive constraints at each of the levels

1 of the markets in this case.

2 If I can just summarise what those important  
3 competitive constraints are.

4 THE PRESIDENT: Yes.

5 MS SMITH: At the upstream level, starting at the top, FDC  
6 offered the in-stadia live league match data to the  
7 market in a competitive tender, which Genius won. In  
8 any event, but nevertheless, FDC's ability to exploit  
9 that data and, in particular, the price which it can  
10 obtain on the market for that data is constrained,  
11 first, by the availability to SDSBS suppliers of  
12 off-tube data as an alternative to the in-stadia LLMD,  
13 off-tube LLMD as an alternative to in-stadia LLMD, and,  
14 second, it is constrained by the fact that other tier 1  
15 rights are alternatives for SDSBS suppliers when they  
16 are constructing a differentiated portfolio that they  
17 can offer to bookmakers.

18 For example, we will see from the contemporaneous  
19 documents when we take -- go through -- when we  
20 cross-examine the witnesses, that Sportradar, no doubt  
21 in common with other SDSBS suppliers, takes a strategic  
22 approach to deciding which tier 1 exclusive rights it  
23 will bid for. It takes a strategic approach as to which  
24 of the rights it will include, which exclusive rights it  
25 will include in its portfolio offering to bookmakers, on



1 the basis that it can replace one set of tier 1 rights  
2 with another similar property and that it only needs  
3 a certain number, a spread, of tier 1 exclusive rights  
4 to differentiate its bundle offering to the bookmaker  
5 customers.

6 Now, also, at the time of the FDC tender, you will  
7 see that Genius -- and you have seen it from the annex 1  
8 table, Genius had very few tier 1 or anchor rights that  
9 it was able to offer to the bookmaker market. Obtaining  
10 the FDC rights would appear to have been important to  
11 it. By contrast, Sportradar had more tier 1 rights in  
12 its portfolio already and so you will see that the FDC  
13 rights were not so strategically important to it. You  
14 will see that that is reflected in the discussions that  
15 took place internally in Sportradar as to what it should  
16 bid in the tender process and the relatively low bid  
17 which it ultimately made for those rights. That  
18 conduct, we say, is wholly inconsistent with the FDC  
19 rights being somehow uniquely must-have for SDSBS  
20 suppliers, which is what Sportradar has to prove in this  
21 case.

22 So that is the upstream level.

23 At the midstream level, Genius' ability to exploit  
24 the in-stadia live league match data is similarly  
25 constrained, first, by the fact that, as you have

1           already seen a little of the data but we will show you,  
2           off-tube LLMD is an alternative to in-stadia LLMD, even  
3           if not a perfect substitute. It is a competitive  
4           constraint. It exercises a competitive constraint on  
5           in-stadia LLMD. That is particularly the case for  
6           smaller single sourcing bookmakers, those who only enter  
7           into a contract with a single SDSBS supplier, and  
8           Mr Lampitt himself. Sportradar's witness, Mr Lampitt  
9           says, at paragraph 66 of his second witness statement --  
10          for your note, we will not go to it, {E/3/22} -- that  
11          these smaller single sourcing bookmakers are, and  
12          I quote, "unlikely to incur the significant cost and  
13          resource burden of switching SDSBS suppliers in order to  
14          obtain more expensive in-stadia LLMD, even if it is  
15          slightly faster than the off-tube data [as read]"

16        THE PRESIDENT: That is because of the difficulty  
17          integrating the data stream --

18        MS SMITH: Or the costs that would be required to integrate  
19          a data stream with a number of different suppliers. So  
20          you --

21        THE PRESIDENT: Yes, so difference implies cost.

22        MS SMITH: Yes, you weigh up the costs versus the quality of  
23          what you are going to get, together with the fact that  
24          the higher quality in-stadia LLMD may be higher -- may  
25          be higher priced than the lower quality off-tube

1 element.

2 Now, in fact Mr Lampitt explains in paragraph 93 of  
3 his second witness statement, and again I quote:

4 "Smaller bookmakers are more likely to tolerate  
5 slightly slower feeds of LLMD for financial reasons [as  
6 read]."

7 That is his evidence.

8 But moving from the smaller single sourcing  
9 bookmakers we will show you that the availability of  
10 off-tube LLMD is not just an alternative for those  
11 smaller single sourcing bookmakers, it is also  
12 a relevant consideration for the larger multi-sourcing  
13 bookmakers. I have shown you Dr Majumdar's evidence on  
14 Sportradar's largest multi-sourcing customers, which,  
15 for your note, is at his second report -- sorry, this is  
16 a different material I would like to take you to, if  
17 I may. I think I have not shown you this. This is  
18 about Sportradar's 40 largest multi-sourcing customers  
19 which appear in his second report, which is at  
20 bundle {F/13/26}.

21 So he analysed in his first report the 20 largest  
22 multi-sourcing customers. He has expanded his analysis  
23 in his second report to the 40 largest multi-sourcing  
24 customers. He addresses them on page -- it starts, I am  
25 sorry, I apologise, it starts on page 25. If we go back

1 to page {F/13/25}, the top bullet point. He explains he  
2 has considered Sportradar's largest 40 multi-sourcing  
3 customers as of 2018 and he has analysed the extent to  
4 which those customers, Sportradar's existing 40 largest  
5 customers, sourced from Genius any live sports betting  
6 data at all and any English Premier League live sports  
7 betting data. He finds the following, effectively that  
8 a substantial proportion of those largest multi-sourcing  
9 customers either did not source any live data from  
10 Genius at all, so bought all their live data from  
11 Sportradar, or did buy some live data from Genius but no  
12 Premier League live data from Genius, which again  
13 suggests they must have sourced it off-tube from someone  
14 else, if not Sportradar, someone else off-tube, and  
15 a number of them also sourced some Premier League data  
16 from Genius, which would have been in-stadia LLMD, but  
17 more from Sportradar, which would have been the off-tube  
18 material.

19 So for those multi-sourcing customers, which form  
20 a significant proportion of the 40 largest of  
21 Sportradar's multi-sourcing customers in 2021, we say  
22 in-stadia LLMD was clearly not must-have and off-tube  
23 was an alternative. But it does not just stop there, it  
24 is not just off-tube. Constraints come from, as well,  
25 the fact that even for those larger bookmakers who

1 choose, "No, I must have the faster in-stadia LLMD",  
2 they are not prepared -- take the multi-sourcing  
3 bookmaker who is not prepared to buy off-tube LLMD,  
4 "I must have that in-stadia LLMD", but the price that  
5 Genius can charge for that, its ability to exploit its  
6 exclusive right to the in-stadia LLMD is constrained by  
7 other factors. It is constrained by the fact that even  
8 those bookmakers who will not stand for the off-tube  
9 multi-source portfolios of data from a number of  
10 different suppliers.

11 So if Genius seeks to exploit their exclusive hold  
12 over the in-stadia LLMD, those bookmakers can discipline  
13 Genius by buying lower volumes of the other sports  
14 events in their bundle from Genius and obtaining those  
15 data from other suppliers. So there are a number of  
16 constraints on the ability to exploit the exclusive  
17 data.

18 So how does Sportradar make its case in light of  
19 these facts? First, they ask you to ignore the  
20 competitive constraints that arise at both the upstream  
21 and midstream levels and instead to define a narrow  
22 market, which narrow markets at both the upstream and  
23 midstream level which are confined to in-stadia LLMD  
24 only. Moreover they ask you to narrow your focus and  
25 looks only at those markets.

1           Those narrow market definitions are not only  
2           necessary for Sportradar to make out their case on FDC's  
3           dominance upstream under Article 102, they are also  
4           necessary midstream in order for them to make out their  
5           case on anti-competitive effects at the midstream level.  
6           They ask you still to focus just on a narrowly defined  
7           market of in-stadia LLMD.

8           But before I explain why I say that, it is worth  
9           reminding ourselves how this Tribunal should approach  
10          the exercise of defining relevant markets. You will  
11          recall, or at least some members of this Tribunal will  
12          recall, your recent judgment in BGL Holdings and the  
13          approach to market definition that was set out in that  
14          judgment. Given the approach that Sportradar is taking  
15          in this case, it is worth spending a moment going back  
16          to that judgment, which is authorities bundle {L/98}  
17          which is volume 6 of 8. So it is tab 98. If I could  
18          ask you to start --

19          THE PRESIDENT: Sorry, tab 98 did you say?

20          MS SMITH: Yes, it is in volume 6 of 8, authorities bundles,  
21          tab 98, if we could start on page 65. {L/98/65}.

22          THE PRESIDENT: I think we have different numbered bundles,  
23          I am afraid. That is all right, we are in file 10.

24          MS SMITH: Okay. Apologies. I thought I was being helpful,  
25          but there we go.

1 THE PRESIDENT: No, that is fine. Which paragraph?

2 MS SMITH: Tab 98, page 65, paragraph 114. Could I ask you  
3 to read paragraph 114, particularly subparagraphs (1),  
4 (2), (3) and (5) and then (8). For some members of the  
5 Tribunal this will be familiar. (Pause).

6 Then could I ask you to turn to page 73 and  
7 paragraph 120 {L/98/73} and particularly the warning  
8 there that an approach to market definition that:

9 "... imports into the tool of market definition  
10 judgmental factors which are not relevant at the stage  
11 of market definition, but which fall to be considered  
12 later on in the process for discerning anti-competitive  
13 effects ..."

14 Is not a helpful approach. If I could highlight  
15 that.

16 Then, if I could finally ask you to turn to page 81,  
17 subparagraph (iv), and that is actually paragraph 120,  
18 subparagraph (11), sub-subparagraph (iv) on page 81  
19 {L/98/81}.

20 THE PRESIDENT: Let me say it is not my template!

21 (Pause).

22 MS SMITH: Sir, now might be the time, looking at the time,  
23 for a quick break for the transcription writer.

24 THE PRESIDENT: Yes, we have been going since 10 o'clock.

25 MS SMITH: We have. I hope -- I will make the greatest

1 effort to finish within about half an hour, 45 minutes  
2 after the break.

3 THE PRESIDENT: Thank you very much, Ms Smith.

4 MS SMITH: I will do my best.

5 THE PRESIDENT: We will rise for ten minutes and resume at  
6 11.40. Thank you.

7 (11.28 am)

8 (A short break)

9 (11.43 am)

10 THE PRESIDENT: Yes, Ms Smith.

11 MS SMITH: Sir, I was making submissions on Sportradar's  
12 market definition and its case that, at both the  
13 upstream and the midstream level, there is a market for  
14 in-stadia LLMD only. Now, the basis for that narrow  
15 market definition is set out in Dr Niels' reports as  
16 being the following. First, he argues, in-stadia LLMD  
17 is must-have for bookmakers. Second, he argues that  
18 off-tube LLMD is not a sufficiently close substitute for  
19 in-stadia LLMD, which leads him to the conclusion that  
20 in-stadia LLMD is in a market of its own at the  
21 downstream level. He then, however, relies upon what he  
22 describes as "derived demand" to come to the conclusion  
23 that it is also in a market -- thus, he says, in  
24 a market of its own at a midstream level and upstream  
25 level.



1           We will of course explore this with him in  
2 cross-examination, but just by way of introduction, if  
3 I can show you his first report, which is at  
4 bundle {F/1/14}. This is the executive summary and  
5 I will ask you to read his conclusions on relevant  
6 markets which are contained in paragraphs 1.38 and 1.39.

7 I am sorry, F/1 --

8 THE PRESIDENT: F/1/18, is it?

9 MS SMITH: Is F/1 the -- yes, {F/1/18}, apologies. All my  
10 references are probably wrong then, apologies. 18.  
11 Apologies. The executive summary, yes, paragraph 1.38  
12 and 1.39. So that is the line of reasoning I just  
13 outlined.

14 THE PRESIDENT: Yes.

15 MS SMITH: So those conclusions are developed in section 3  
16 of his report where he addresses market definition. We  
17 say his approach in that section, which I am not going  
18 to take you through, is either based on what he  
19 describes as "quantitative evidence", the only  
20 quantitative evidence in any of his reports, which we  
21 say shows nothing more than that betting on UK football  
22 is popular in the UK. That is section 3C.1 of his first  
23 report {F/1/36}. Apart from that -- that is the only  
24 quantitative evidence, as I said -- he relies on  
25 "qualitative evidence", as he describes it. What that

1 actually is, is selective quotes from various documents  
2 in Genius' disclosure. Those are sections 3C.2 {F/1/43}  
3 and 3D {F/1/49} of his report. Documents that refer to  
4 UK or Three Leagues data as being "must-have", in  
5 quotations, or "important", when of course we do not  
6 know what the authors of those documents meant by those  
7 terms.

8 Now, yesterday, Sportradar's counsel said, that is  
9 page 103 of the transcript {Day1/103:23}, and I quote:

10 "... the litmus test is what ... bookmakers think  
11 they need to have ..."

12 With respect, that is not correct. The litmus test  
13 is not what bookmakers say they need to have in email  
14 negotiations; it is what, in our submission, they  
15 actually buy and sell.

16 Now, Dr Niels reaches his conclusions on market  
17 definition in his first report based solely on the line  
18 of reasoning that I outlined to you, football bettings  
19 is a must have at downstream level, plus off-tube not  
20 being a substitute for in-stadia LLMD, plus --

21 THE PRESIDENT: Just picking you up on your point, litmus  
22 test is not what they need but what they actually buy  
23 and sell.

24 MS SMITH: Yes.

25 THE PRESIDENT: Fair enough, but subject to this

1           qualification: that what they are able to buy and sell  
2           may be limited in the sense that the product range  
3           across the market may be subject to constraints that  
4           they do not want to have.

5           MS SMITH:   Yes.

6           THE PRESIDENT:   For instance, it may be that all of the  
7           vendors of data have minimum buys which one can imagine  
8           a bookmaker might say, "I would rather be able to pick  
9           and choose without minimum constraint", so there one  
10          could see a mismatch between what the bookmakers buy and  
11          sell -- buy -- or what is sold to them, and what they  
12          would want to buy.   So there is --

13          MS SMITH:   My Lord, yes, perhaps it was an unworthy --  
14          a comment unworthy -- an unworthily flippant comment,  
15          unnecessarily flippant comment.

16          THE PRESIDENT:   No, no, I am not disagreeing with --

17          MS SMITH:   The point I am simply making is that what  
18          bookmakers say in the course of negotiations, "I must  
19          have that data, what are you talking about?" really does  
20          not take us anywhere; it is commercial negotiations.   We  
21          do not know what they have said, we are not going to be  
22          cross-examining them.   You cannot base a market  
23          definition report on that sort of data, but we will --  
24          data -- we will address that with Dr Niels.

25                 What is important are the conclusions in his first

1 report are based solely on that line of reasoning and  
2 the concept of derived demand. If I could just ask you  
3 to turn to paragraph 3.96 of his report, which sets out  
4 his conclusions on market definition. I hope it is  
5 {F/1/59}. 3.96. Paragraph 3.96. So you will see the  
6 extent of his reasoning in his first report on market  
7 definition. For your note, that is repeated at  
8 paragraphs -- I will not take you to them -- 3.107 and  
9 3.108.

10 Now, that is the full extent of his reasoning in the  
11 first report.

12 Now, even leaving to one side the problems with the  
13 basis for his conclusions that in-stadia LLMD is  
14 must-have for bookmakers and that off-tube is not  
15 a sufficiently close substitute, his subsequent  
16 conclusion, because in-stadia LLMD is must-have  
17 downstream, there are therefore markets upstream and  
18 midstream, is puzzling enough, we would say,  
19 particularly because Dr Niels agrees with the following  
20 two propositions that appear in the joint expert  
21 statement. First, it is incorrect as a matter of  
22 economics to presume that a must-have feature of  
23 a downstream market necessarily determines the scope of  
24 that market or markets at a different level of the  
25 supply chain. He also agrees with the proposition that

1 market definition downstream does not necessarily flow  
2 through to market definition midstream or upstream. He  
3 will no doubt rely on derived demand, but it is  
4 difficult to see how he can assess this derived demand  
5 without assessing how sports betting data is actually  
6 bought and sold at the midstream and upstream levels,  
7 which he does not do.

8 His second report, he focuses -- he moves his focus  
9 somewhat from these concepts of must-have to -- and  
10 derived demand to what he describes as a SSNIP test. We  
11 do not accept that it is a proper SSNIP test, but  
12 leaving that to one side for the moment, if I could ask  
13 you to turn to his second report, which is, I hope, at  
14 {F/2/15}, paragraph 3.2, page 15. Fingers crossed.  
15 Yes, we have the correct references. Paragraph 3.2. We  
16 have there the original reasoning set out in his first  
17 report, the derived demand and reasoning and the  
18 must-have and not sufficiently close substitutive of  
19 off-tube LLMD. But he introduces what I have said is  
20 this SSNIP test.

21 First of all, page 16 {F/2/16}, if I could ask you  
22 to read paragraphs 3.7 to 3.11. (Pause).

23 So paragraphs 3.7 to 3.11 he does what he says is  
24 a SSNIP test on upstream. Then if I could ask you to  
25 read paragraphs 3.12 to 3.14 {F/2/17-18}, which is where

1 he says he carries out a SSNIP test at the midstream  
2 level. (Pause).

3 So you will see from paragraph 3.13 {F/2/17}, he  
4 refers to Genius being able to increase prices by virtue  
5 of obtaining exclusivity, and you will see from  
6 footnote 35, which is on page {F/2/18}, that in support  
7 of that assertion, he refers to section 5B.2 of his  
8 first report.

9 THE PRESIDENT: Yes.

10 MS SMITH: That section is not his market definition section  
11 but his analysis of effects. So what he is doing is  
12 saying -- he is using what he says are the  
13 anti-competitive effects in order to define the market.  
14 Now, we do not accept that the material upon which he  
15 relies as regards price increases is either reliable or  
16 that it says anything useful about the application of  
17 the SSNIP test, and we will explore that in evidence  
18 with the witnesses.

19 But by the time we get to Sportradar's skeleton  
20 argument in these proceedings, its market definition  
21 relies solely on these alleged price increases, the  
22 upstream market definition at paragraph 79(a) of its  
23 skeleton argument, and the midstream market definition  
24 at paragraph 79(b) of its skeleton argument. It only  
25 refers to what it says are SSNIP tests, what it

1 describes as real-world evidence, so-called natural  
2 experiments which can be used to define the relevant  
3 markets. So in effect, Sportradar is seeking to use  
4 conduct which might be problematic if the parties had  
5 market power in order to establish market power.

6 Now, quite apart from the sheer circularity of those  
7 arguments, we say that Sportradar's case on in-stadia  
8 LLMD being in a market of its own flies in the face of  
9 the reality in this industry. It ignores the  
10 competitive constraints imposed on in-stadia LLMD by  
11 off-tube LLMD and other anchor sports rights, or tier 1  
12 sports rights, at both the upstream and midstream  
13 levels.

14 Now, whether those constraints exist within a wider  
15 market, correctly defined, as we say they do, or whether  
16 they arise outside Sportradar's narrowly defined market,  
17 they are still constraints on FDC's and Genius' market  
18 power. The case law is clear, and if necessary, we will  
19 go back to it, that in looking at these issues,  
20 competition issues, competitive constraints both inside  
21 and outside the market are relevant. You cannot ignore  
22 the competitive constraints by seeking to define  
23 an unreasonably, we say, narrow market. You need to  
24 look at these competitive constraints in order to carry  
25 out any proper assessment of competition.

1           Yesterday, the president raised an analogy with my  
2           learned friend, that of four competing entertainment  
3           channels offering online content to the market. In that  
4           regard, can I ask you to look at Dr Niels' second  
5           report, paragraphs 2.5 to 2.6 {F/2/4}, I hope. No, it  
6           is not. Okay. {F/2/7}, paragraphs 2.5 to 2.6. Sorry,  
7           my references are everywhere. Can I ask you to read  
8           paragraphs 2.5 and 2.6? (Pause).

9           THE PRESIDENT: Yes.

10          MS SMITH: So there, Dr Niels gives this example of  
11          streaming platforms where they compete on a portfolio of  
12          products and seek to gain a competitive edge by offering  
13          exclusive anchor products. He says, in terms,  
14          competition can work well in such markets. However, he  
15          says how he, as I understand it, seeks to differentiate  
16          this case from those sort of markets is because he says  
17          in-stadia LLMD is must-have. So, presumably, his line  
18          of reasoning is that exclusivity is a problem when the  
19          content is must-have because if, for example,  
20          subscribers must have access to Squid Game, they have to  
21          have that programme, they have no choice but to  
22          subscribe overall to Netflix, who will be able to --  
23          Netflix then will be able to foreclose their  
24          competitors. But even if, which we do not accept,  
25          in-stadia LLMD is must-have for punters and therefore



1 bookmakers, the analysis here -- Dr Niels' analysis  
2 ignores, fails to recognise a fundamental difference  
3 that in this market the supply of sports betting data is  
4 an intermediary market.

5 What I mean by that is, even if in-stadia LLMD is  
6 must-have for punters, so even if a punter says, "I need  
7 to be able to bet on this match", again this is  
8 hypothetical, Premier League match which is -- and the  
9 bet is based on in-stadia LLMD or the bookmaker says,  
10 "I need to be able to offer this bet on in-stadia LLMD",  
11 even if it is must-have at that level, the in-stadia  
12 LLMD is not necessarily must-have for suppliers. This  
13 is because bookmakers can and do multi-source.

14 Bookmakers can obtain the necessary content. If they  
15 have to have in-stadia LLMD, they can get that from one  
16 SDSBS supplier. They will obtain other attractive  
17 must-have data from other suppliers. That is how the  
18 suppliers compete. It is exactly like, we say, it is on  
19 all fours with this example of the streaming platforms.

20 Now, I said I would, in the last ten minutes or so,  
21 I said I would return to Sportradar's three theories of  
22 harm in this case which we say also depend on its narrow  
23 in-stadia LLMD midstream market definition being  
24 correct.

25 THE PRESIDENT: Just to unpack your last submission a little

1 bit. You are obviously right, we are talking about  
2 a market that is not directed to the ultimate consumer,  
3 if you take the punter as the ultimate consumer, but  
4 what the provider to that ultimate consumer, the  
5 bookmaker, will have to buy is going to be hugely  
6 dependent upon what the ultimate consumer wants.

7 MS SMITH: Yes.

8 THE PRESIDENT: So if there is a tiny minority of punters  
9 who want live data, they will just be treated as  
10 idiosyncratic eccentrics who can go elsewhere or  
11 nowhere.

12 MS SMITH: Yes.

13 THE PRESIDENT: It is not worth worrying about. So in order  
14 to inform the demand of the bookmaker, you have got to  
15 make certain assumptions about what the punter group is  
16 going to want and really we are only talking about live  
17 data and its importance because it appears to be  
18 something that is of significance to those punters who  
19 want in-match betting, and it appears to be that there  
20 are -- they are not an idiosyncratic minority, they are  
21 a large portion of the market --

22 MS SMITH: I would pause there because we do not have that  
23 information at all.

24 THE PRESIDENT: Well, that is something which we are, for  
25 that reason, interested in because clearly --

1 MS SMITH: We do not have that information. We have  
2 information that people like betting on UK football. We  
3 do not have any information about whether or if they  
4 need to bet on bets that are based on in-stadia LLMD.  
5 What we have is we have evidence that a substantial  
6 number of small single sourcing bookmakers operate on  
7 the market offering bets to punters without any access  
8 at all to in-stadia LLMD. We have evidence that  
9 a number of multi-sourcing bookmakers buy off-tube as  
10 well as in-stadia LLMD. So assume that there is this  
11 punter -- we do not know whether there are a number of  
12 them or -- if there is just one idiosyncratic punter who  
13 for whatever reason says, "I need to place a bet that is  
14 based on in-stadia LLMD", he has a number of bookmakers  
15 he can choose from and he can --

16 THE PRESIDENT: Well, yes, but -- of course that is right,  
17 but the bookmakers are not going to worry about a single  
18 punter.

19 MS SMITH: No.

20 THE PRESIDENT: They are going to be concerned about groups  
21 that are material.

22 MS SMITH: Yes.

23 THE PRESIDENT: It is in meeting that demand that they are  
24 going to buy the components necessary to satisfy it. So  
25 that is why we started off this morning saying we want

1 to know more about the market --

2 MS SMITH: I take that on board.

3 THE PRESIDENT: So that is the starting point.

4 Now, the point that I am following on from is, if  
5 one has got a demand that needs to be satisfied by the  
6 importation of live data, then of course the question  
7 arises as to how easy it is to buy that data in.

8 MS SMITH: Yes.

9 THE PRESIDENT: That leads us to an understanding or need to  
10 understand the constraints that exist in buying data,  
11 because it is clearly not the case in the data market,  
12 what the bookmakers buy from data providers, it is  
13 clearly not the case that you can simply pick and choose  
14 from a range of bookings and freely pick one versus the  
15 other, because you have got not just price as  
16 a constraint, you have also got minimum buys and the  
17 ability to switch or the disability to switch streams  
18 because the data streams are apparently different from  
19 each data provider, so you have got to incorporate  
20 a different feed in there. So there are a number of  
21 limits on the ability simply to substitute one data  
22 stream for another which are not actually necessarily  
23 tied into exclusive contracts.

24 MS SMITH: Oh, yes.

25 THE PRESIDENT: There are limits which we perhaps need to

1 explore that exist apart from the question of  
2 exclusivity.

3 MS SMITH: Yes, and one of the questions that we will need  
4 to explore is the significance or otherwise of those  
5 constraints.

6 THE PRESIDENT: Indeed.

7 MS SMITH: Also how those constraints work on -- the reality  
8 is, yes, there is one supplier of in-stadia LLMD in the  
9 market, just as there is one supplier of in-stadia UEFA  
10 Championship League rights in the market, one supplier  
11 of all the other rights that you have seen.

12 THE PRESIDENT: Yes.

13 MS SMITH: So if you absolutely have to buy those, you have  
14 to go to one person to buy them. The question is, does  
15 that allow the holder of those rights to exploit that  
16 data?

17 THE PRESIDENT: But it is not as simple as the bookmaker  
18 saying, "Well, we have got ..." -- if we take last  
19 weekend -- "We have got the Manchester derby, we have  
20 got City against United, a match of great interest, we  
21 obviously are going to need data. Given that it may be  
22 a high goal-scoring event, we are likely to want the  
23 best data, live data ..." --

24 MS SMITH: As few shut-downs as possible, yes.

25 THE PRESIDENT: "We will want to buy the best data". But it

1 is not simply a choice between "Do I pay X for live data  
2 or X minus a certain amount for off-tube data", because  
3 of these other constraints like minimum buys. So in  
4 a sense those inform the substitutability question,  
5 which we probably need to be alive to before we ask that  
6 question.

7 MS SMITH: Yes, and I think we will see from the expert  
8 evidence that Dr Majumdar and Dr Padilla have done what  
9 they can with the data available. There is  
10 a significant amount of data from contracts and purchase  
11 data et cetera, et cetera, and they will have to seek to  
12 ask you to draw some inferences from that data because  
13 obviously we cannot get into the minds of everyone and  
14 exactly what is happening every time a bookmaker buys  
15 data for a particular event. But there is a large  
16 amount of objective data available which our experts  
17 have sought to try to show the constraints, or at least  
18 the results of -- the effect of the grant of the  
19 FDC/Genius agreement on how the purchases are made. We  
20 will show you, I hope, that the effects are by no means  
21 consistent with a story of anti-competitive foreclosure  
22 or any sort of exploitation because of the way in which  
23 the competition works in the market and the constraints  
24 that are placed on it that I have outlined, but this is  
25 evidence which you will no doubt want to explore with

1 the experts because it is a very -- it is a complex  
2 market. It is an interesting and complex market. So,  
3 yes, there is data out there and I hope we will be able  
4 to show you, not now because we are only on Day 2, but  
5 perhaps at the end, in five weeks' time, we will be able  
6 to show you what we say the data -- where it should lead  
7 you.

8 THE PRESIDENT: Yes. No, thank you.

9 MS SMITH: Just to finish off hopefully in the last  
10 five/ten minutes I have got left, Sportradar's three  
11 theories of harm. We say they also depend on their  
12 narrow definition of the midstream market being confined  
13 to in-stadia LLMD. Their first is that they say they  
14 are foreclosed from a narrowly defined market from the  
15 supply of in-stadia LLMD, but we say that is just  
16 a simple restatement of the fact that Genius has the  
17 exclusive right to distribute in-stadia LLMD as a result  
18 of the agreement. As I have explained, it nevertheless  
19 remains a strong competitor in the supply of SDSBS  
20 services.

21 Their second theory of harm is that they argue  
22 exclusivity means higher prices for bookmakers. That  
23 phrase was repeated a number of times by counsel for  
24 Sportradar yesterday, but the first question you need to  
25 ask yourselves, in my submission, Sir, is: higher than

1           what?

2           In order for any such assertion of higher prices to  
3           be useful for an assessment of competition, there must  
4           be an objective competitive benchmark against which  
5           those prices are measured, but Sportradar has not done  
6           that. Sportradar's argument on higher prices is based  
7           on Dr Niels' pricing analysis, which we will explore  
8           with him, in section 5B of his first report.

9           For present purposes, it is sufficient to say that  
10          we will argue that this pricing analysis is  
11          fundamentally flawed for a number of reasons. It  
12          compares prices allegedly charged by Genius after the  
13          FDC agreement with those charged by it during  
14          the Perform agreement, which is clearly not  
15          a competitive benchmark. In any event, as Sportradar's  
16          counsel said yesterday, Dr Niels has had to estimate  
17          prices for in-stadia LLMD because there are no  
18          observable prices charged for in-stadia LLMD. We will  
19          show those estimates are wholly unreliable.

20          Furthermore, Dr Niels has only sought to estimate  
21          prices actually charged by FDC for three of its  
22          customers. There is no suggestion that those customers  
23          are representative of Genius' customers generally or  
24          even its UK bookmaker customers. The evidence is that  
25          Genius' revenue per event, as we will explain, is the



1 proper metric for any analysis of pricing effects when  
2 data is sold in bundles is revenue per event, and that  
3 fell significantly after the FDC/Genius agreement.

4 The third effect relied upon by Sportradar is that  
5 Genius has engaged in what they have described as  
6 anti-competitive leveraging, using its market power in  
7 this narrowly defined market for in-stadia LLMD so as to  
8 force bookmakers to take other, and I quote, "unwanted  
9 content". Thus, one assumes, because if you are going  
10 to make out a leveraging case, you have to prove this,  
11 that it adversely affects competition in related  
12 markets. But as I have explained, selling content in  
13 bundles is simply normal practice in this industry and  
14 there is no evidence of adverse effects on competition  
15 in any related markets.

16 Finally, I return to the narrative woven by  
17 Sportradar's counsel yesterday of bad faith conduct and  
18 knowing anti-competitive foreclosure and exploitation by  
19 FDC and Genius. I will not spend much time on this.  
20 Sportradar extensively quoted from internal Genius  
21 WhatsApp messages and chats which took place, in  
22 particular during its secondary supplier negotiations  
23 with Sportradar and with Perform, in order to prove that  
24 Genius was engaging in bad faith -- Sportradar put its  
25 case that high yesterday -- bad faith, sham

1 negotiations, in order to lock in its customers,  
2 foreclose the market to Sportradar, and then use what it  
3 has described in its skeleton as a hermetically sealed  
4 monopoly in order to exploit those customers by hiking  
5 prices and foisting unwanted content on them. That is  
6 paragraph 56 of Sportradar's skeleton.

7 During the course of these proceedings, you will no  
8 doubt be taken to many more of such documents, and you  
9 were taken to quite a few of them yesterday by  
10 Sportradar's counsel in opening. However, you will be  
11 shown also internal documents produced by individuals  
12 working for Sportradar where they have also expressed  
13 themselves in ill-advised and intemperate ways, to put  
14 it coyly. For example, Sportradar documents where they  
15 describe their own position as dominant or super  
16 dominant in certain cases, where they say they engage in  
17 scouting at Three League matches solely to make Genius'  
18 life as difficult as possible.

19 So there are equally these documents on both sides  
20 of the case. But at the end of the day, we say such  
21 documents are of very little help to this Tribunal. It  
22 would make all our lives a lot easier if, for example,  
23 dominance could be proved on the basis that someone says  
24 they are dominant in a WhatsApp message. It would make  
25 my life a lot easier. But unfortunately the exercise is

1 more complicated than that and we would ask the Tribunal  
2 to look beyond the hyperbolic language that has been  
3 used in this case and the unfortunately expressed  
4 internal communications. Instead, we say the Tribunal  
5 should be concerned with the reality of how these  
6 markets operate and what is shown by the objective  
7 factual data, and that is what we, from our side, will  
8 be asking the Tribunal to do during the course of the  
9 next few weeks.

10 So those are my opening submissions.

11 THE PRESIDENT: I am grateful, Ms Smith, thank you very  
12 much.

13 Mr de la Mare, it is you next.

14 MR DE LA MARE: Will you give me a minute just to get  
15 something to lean on?

16 THE PRESIDENT: Of course.

17 (Pause).

18 Opening submissions by MR DE LA MARE

19 MR DE LA MARE: I want to start with identifying what  
20 I submit are going to be the key themes in this case as  
21 both the factual and expert evidence unfolds. I am not  
22 going to follow the landscape my learned friend  
23 Ms Kreisberger went through and the architecture of the  
24 pleaded case. I want to identify the spinning plates  
25 you need to keep your eyes on throughout this evidence.

1           There are, in my submissions, four themes. Let me tell  
2           you what I say they are in summary before I explore each  
3           of them.

4           The first theme, and this really echos what my  
5           learned friend Ms Smith said, is that it is critical to  
6           this case to understand how portfolios work and it is  
7           critical to understand the differences and the nuances  
8           between multi- and single sourcing and how it works in  
9           the market in question.

10          Understanding the dynamics of multi-sourcing and  
11          single sourcing is the key to understanding the  
12          correctness or not of my learned friend Ms Kreisberger's  
13          must-have analysis and the foreclosure effects that she  
14          predicts. Now, what you are going to see is that some  
15          bookmakers, predominantly medium-sized and small ones,  
16          single-source and that seemingly accounts for  
17          substantially less than half of the sales of data by  
18          revenue, but it accounts for a large number, at least in  
19          the case of Sportradar, of their customer base. Most  
20          sales occur to bookmakers medium and large scale who  
21          multi-source. Straightaway I should say, once you have  
22          multi-sourced, you are integrated for good for the  
23          sports that you have taken. So the point my Lord made  
24          earlier about there being a constraint only exists up  
25          until the point that you conclude a package to supply

1           those sports.

2           THE PRESIDENT: It is sport-specific, is it?

3           MR DE LA MARE: It is sport specific. So you integrate for  
4           football or you integrate for volleyball. It is a data  
5           exercise where effectively you are mapping databases  
6           across from one data provider to another so that they  
7           know that, if you refer to Saka, you are referring Saka  
8           then followed by his first name, it is equally -- you  
9           get the ... it is a data-mapping exercise; very fiddly,  
10          takes some time, but once it is done, it is done for  
11          that sport.

12          The reason that these nuances matter is that  
13          understanding single-sourcing is critical to  
14          understanding the overclaim that in-venue LLMD is  
15          must-have. Were that true, any and all single-source  
16          bookmakers would have migrated in precisely the way that  
17          Dr Niels and Ms Kreisberger, the authors of the  
18          complaint and the report that backed it up, confidently  
19          and unconditionally predicted to the CMA in 2015. That  
20          did not happen, as we shall see from the evidence.

21          Equally, understanding how multi-sourcing works is  
22          critical to understanding the portfolio dynamics in the  
23          relevant product market. The forensic challenge my  
24          learned friends face is persuading the court that these  
25          large, well-resourced, multi-national bookmaking

1 companies, with access to a range of rival services, are  
2 going to be somehow foreclosed in how they buy from the  
3 bundles, and then, having accepted a bundle, which  
4 matches they select from it.

5 What the evidence will show is that each SDSBS  
6 provider has their own rival tier 1 content in and  
7 outside football that they use as attractors. Now, what  
8 was striking about my learned friend Ms Kreisberger's  
9 skeleton argument and her submissions is that she wants  
10 this case to be only about the discussion of the  
11 must-have nature of the FDC rights. She wants you to  
12 put aside and ignore entirely the fact that there are  
13 other must-have or crucial rights in the market,  
14 notwithstanding the fact that that is critical to  
15 understanding how these markets work and, in particular,  
16 how portfolios work. So that is all central.

17 The second theme, and again this echoes what my  
18 learned friend Ms Smith said, is that ultimately this  
19 case is going to turn on actual data, and yet, when you  
20 strip it away, the claimant's case is entirely  
21 qualitative. There is no material quantitative analysis  
22 at all and what qualitative evidence there is, is either  
23 cherry-picked or, as Ms Smith illustrated very nicely by  
24 reference to pricing, it is predicated upon logical  
25 fallacy. She explained to you how the pricing case has

1           been used to infer significant market power. You will  
2           see exactly the same thing in relation to leveraging.  
3           The critical part of Mr Niels' analysis of market  
4           definition is that we attempt leveraging, ergo we must  
5           be dominant. Logical fallacy, as I will explain.

6           The third theme is that Sportradar, for all their  
7           criticisms about the fact that we do not have our  
8           general counsel or Mr Locke giving evidence about  
9           the Perform WhatsApps et cetera; they are the party, the  
10          claimant, with the burden of proof, that has failed to  
11          lead relevant witnesses and relevant evidence. There  
12          are four holes in their case, four evidential holes that  
13          I will explain. The first evidential hole, in summary,  
14          is a hole about their actual coverage of events both at  
15          FDC and other top tier football. What they did,  
16          did they off-tube, did they in stadium coverage, how  
17          did they gather data, with what strategy and with a view  
18          to doing what with the data? That is a complete hole.

19          The second hole, beyond some very high-level  
20          generalisations, is about what they intended and  
21          actually did in terms of sales of that data. You will  
22          search in vain for any evidence explaining what sales  
23          they have made of the off-tube materials that they  
24          gathered; it is simply not there. Yet there is  
25          a substantial story on that very subject. It is that

1           hole, effectively, that Dr Niels' third report, produced  
2           last night, is finally attempting to plug.

3           Then you have, most surprisingly --

4   THE PRESIDENT:   Just pausing there, Mr de la Mare, I asked  
5           earlier about the table 24 in the report about  
6           bookings --

7   MR DE LA MARE:   Yes.

8   THE PRESIDENT:   -- and whether the percentage for 2021 was,  
9           on Sportradar's part, off-tube, and you said yes. Is  
10          that simply an inference from the fact that --

11   MR DE LA MARE:   No, we can substantiate that --

12   THE PRESIDENT:   You can -- right.

13   MR DE LA MARE:   -- from a spreadsheet that we have been  
14          given that details, for both of the relevant Sportradar  
15          entities, there is an entity called Betradar and another  
16          entity called RTS, we have had their complete bookings  
17          records for all the matches in all the events, whether  
18          they are in stadium or off TV. We have effectively  
19          calculated them and totted them up and we will hand you  
20          a table that shows that for the entirety, bar a few  
21          matches, of the recent coverage of EPL, the Premier  
22          League, it is all off-tube. It also shows, and I will  
23          not get into any competition-specific details because  
24          that is supposedly sensitive, it also shows the extent  
25          of coverage in other tier 1 events with similar levels



1 of per match revenue in relation to them, in some cases,  
2 the Champions League game appreciably higher per match  
3 revenue than the Premier League, and the overwhelming  
4 message from that table is, it is all taken off-tube.

5 So that data is absolutely critical, that is the  
6 first hole. The second hole was the sales data.

7 THE PRESIDENT: Yes.

8 MR DE LA MARE: The third hole is the hole that you, Sir,  
9 have identified which is the entire subject of consumer  
10 benefit. There is simply no evidence to tell you that  
11 there is any consumer harm at the end of the day in this  
12 case at all. We suggest that what the evidence shows,  
13 quite compellingly, is that there is effectively a value  
14 transfer from the bookmakers for this data which is  
15 highly valuable to them upstream to the sports rights  
16 holders. Why? Because they are finally getting paid  
17 for their IP. I will come back to that. Huge hole, no  
18 consumer benefit case. When remembering consumer  
19 benefit, remember there were two sets of consumers in  
20 play. There is the betting consumers, but there is also  
21 the consumers of the football product that is staged and  
22 funded with commercial revenues like this. There is  
23 a synergy between the two because, honestly, bookmakers  
24 are reliant upon there being a high quality, highly  
25 competitive, ergo unpredictable, ergo attractive for

1           betting purposes, football competition on which to bet.  
2           That is one of the triumphs, I think we can all agree,  
3           about the English Premier League, that it is so very  
4           tight anyone can lose to anyone.

5           THE PRESIDENT: So what you are submitting is the point that  
6           I raised yesterday I think with Ms Kreisberger, that  
7           there is a nexus between the event that is watched and  
8           the betting. You can of course bet on something that  
9           you are not watching --

10          MR DE LA MARE: Yes.

11          THE PRESIDENT: -- but what drives the betting market is the  
12          interest in the event itself.

13          MR DE LA MARE: I think it is what Basil Fawlty would have  
14          called "a statement of the bleeding obvious", but there  
15          is in the very first H bundle a very learned regression  
16          analysis by an American academic who does a regression  
17          analysis to show the obvious proposition that what you  
18          can see, you bet on, and you want to see what you can  
19          bet on. That is the dynamics. Visibility is a critical  
20          part of having an attractive betting product.

21                 Now, the fourth hole -- and it is a very surprising  
22          one given Mr Lampitt's role -- the fourth hole is in  
23          relation to how the various parties set about bidding  
24          and pricing for the rights. The reason for that -- it  
25          is a surprising hole -- is that the availability of

1 off-tube is obviously a highly relevant consideration in  
2 deciding what to bid for any rights at any point in  
3 time. If it is a constraint on what you bid for the  
4 rights, it must reflect the fact that, downstream,  
5 off-tube itself is acting as a constraint on what you  
6 can recover for people given the differential between in  
7 stadium and off-stadium. So, if you like, the rights  
8 contracts are almost a valuation of the relative  
9 exclusivity of the content in question. There is  
10 nothing in Mr Lampitt's witness statement or any of  
11 Sportradar's evidence on that topic, notwithstanding the  
12 fact that they have paid very large sums indeed --  
13 I will not go into the particular sums until we go into  
14 close -- for other tier 1 properties.

15 So the witnesses and the relevant evidence is  
16 missing. In fact we would go so far as to say that,  
17 when you put those four omissions together, this is not  
18 Hamlet without the prince, this is Hamlet without the  
19 Danes.

20 Then our last theme is this: this is a case of IP  
21 infringement. That is the substance of what is going on  
22 in this case. It could be very simply tested. What  
23 defence does Sportradar or any other SDSBS provider  
24 have? They have all in stadium scouted at some point  
25 or, rather, they are all sinners to some extent

1 I expect. Nothing is going to turn on that. But what  
2 defence do they now have, after the TRP case, to a claim  
3 that they have breached either rights in relation to  
4 databases if they scrape or rights in relation to  
5 confidential information if they take in-stadium data?  
6 They are both IP claims. There is no defence unless  
7 there is a competition law defence, as Mr Mill and  
8 Ms Lane will explain.

9 The fact that this is an IP case is a very important  
10 part of the context of this case because this is  
11 a market that has, in the space of time covered by this  
12 litigation, starting if you like back in 2015 with the  
13 complaint -- it has transitioned to one in which it is  
14 recognised that sports events organisers have legally  
15 enforceable intellectual property in relation to their  
16 events which they can monetise. We have moved, to use  
17 Sportradar's language -- somewhat euphemistic I would  
18 suggest -- we have moved from an open-source model for  
19 data-gathering in relation to sports events to  
20 a rights-based model. That is a highly pertinent factor  
21 for all kinds of reasons, for data analysis, for changes  
22 in prices, for competition law analysis, as I will  
23 explain.

24 So those are my four themes, let me unpack them.

25 THE PRESIDENT: Just to ask a question about your fourth

1 point, the monetisation of IP, would you say that that  
2 is something that we need to take carefully into account  
3 when considering the history of the market in the sense  
4 that --

5 MR DE LA MARE: Absolutely.

6 THE PRESIDENT: -- prices may have varied not because of an  
7 abuse of dominance or collusion or anything like that,  
8 but simply because the owners of these rights have  
9 become more savvy, let us say, about monetising them?

10 MR DE LA MARE: Absolutely right. There is a general strong  
11 inflationary trend for the price recovered for official  
12 rights, whether it is tier 1, tier 2, tier 3. They  
13 have, if you like, adopted the Steve Burton model. You  
14 are going to see him described in some of the Sportradar  
15 internal communications as the champion of this. He  
16 was, when he was at Couchmans, substantially responsible  
17 for the design of the official rights model, which he  
18 persuaded a number of different sports bodies to adopt,  
19 much to Sportradar's chagrin; and every time that  
20 happened, that sport, whether it is -- just to make one  
21 up from the top of my head because I am not allowed to  
22 mention any specifics -- whether it is Iraqi football or  
23 Belgium netball, it does not matter, the minute they  
24 transition to an official rights model, they begin to  
25 exclude scouts and ask for payment for their data. That

1 creates a completely changing trend in the market where  
2 the objective is to build up a range of exclusive  
3 products into your package and to exclude everyone else.

4 The market has fully transitioned, fully  
5 transitioned -- I say that advisedly -- to an official  
6 rights model. How do we know that? I am going to show  
7 you the current form of Sportradar's rights strategy and  
8 they now do exactly what they criticise us for doing.  
9 Exactly the same thing: acquire tier 1 rights, seek to  
10 build a portfolio, leverage as many sales of that  
11 portfolio to your customers as possible. That is the  
12 strategy, that is what everyone is doing in the market.  
13 When you go back to the table that you were shown,  
14 exhibited to the factual narrative, that is why there is  
15 a regular turnover of the tier 1 properties, because  
16 people are competing to those properties which come up  
17 almost every year, different properties become  
18 available, to recalibrate or improve the quality of  
19 their portfolio.

20 So, firstly, single- versus multi-sourcing  
21 portfolios. You know, as Ms Smith has explained to you,  
22 that, with a few half-hearted frills, this case has now  
23 boiled down to complaints about leveraging excessive  
24 prices. There are some complaints about quality, I am  
25 not going to waste time addressing those. They are

1 unreal and I will address them fully in close.

2           What is critical to understand about single-sourcing  
3 is this: single-sourcing -- and this is clear from  
4 Sportradar's own documents -- tends increasingly to  
5 align with outsourcing of function, outsourcing of  
6 bookmaker function. It is not just that you buy your  
7 data from a single source, it is that you buy first of  
8 all the live odds setting, that was the first trend in  
9 the market, and then, secondly and increasingly, you buy  
10 risk management services. What that means is  
11 effectively that you are buying in somebody who has the  
12 benefit of scale to manage the risks on the book, to lay  
13 the bets et cetera, to help you with whether or not  
14 effectively your margins are correct, whether or not you  
15 are exposed to risk on large bets et cetera, all of that  
16 is outsourced.

17           The service for instance that Sportradar offer on  
18 that front is called MTS, managed trading services.  
19 What it means is that the small bookmakers are  
20 increasingly brands or marketing operations. That is  
21 how Sportradar describes them. When they decide what  
22 services to buy, including data, the conversation is not  
23 just about data. They are buying a basket of services  
24 from the provider in question, and so their  
25 sensitivities are not just moved about the price of the

1 data or the latency implications of the data, it is also  
2 moved by the quality of the odds product and the quality  
3 of the outsourcing. It is that package as a whole that  
4 tends to inform decisions as to whether or not to  
5 single-source.

6 Multi-sourcing clients, by contrast, who tend  
7 towards the larger end of the market, well,  
8 multi-sourcing is often aligned with internal odds  
9 setting and internal risk management. In other words,  
10 if you are Bet365, you still set your own odds and you  
11 still set your own risk management. You do not buy in  
12 those services from an intermediary. Those large  
13 clients tend to be what are called data roaming clients.  
14 They only buy data. But data roaming clients invariably  
15 are multi-sourcers.

16 Now, this distinction is critical to understanding  
17 how it is that Genius even got on to the market because  
18 one of the extraordinary things about the context is,  
19 2015, the time of the complaint, Genius is not even on  
20 the scene. It is not even named other than as  
21 a software provider, as anyone who is a relevant  
22 participant on the market. That is because the  
23 archeology of these two companies is very different.  
24 Sportradar in its archeology is a data collection  
25 company that has built its market position upon



1 acquiring rights to sports that are very difficult to  
2 scout, for whatever reason, and/or building its own huge  
3 unrivaled -- its internal documents describe it as  
4 a barrier to entry -- physical scouting network, much of  
5 it unofficial. Whereas Genius, back in 2015, was  
6 a technology company, specialising in odds setting, and  
7 its first entry into this market was via effectively the  
8 Perform agreement, in its secondary supply, was  
9 providing odds services to Perform's customers in  
10 circumstances where Perform was not providing those  
11 services. So Perform was doing the data-only bit and  
12 Genius was doing the live odds bit. That is why the  
13 legacy, if you like, of Perform customers are data-only  
14 customers.

15 But the distinctions are of course very important  
16 for the buying decisions and it is important therefore  
17 to understand why different types of bookmakers make  
18 different decisions. It is a distinction that emerges  
19 very clearly from Sportradar's own internal documents.  
20 Now, when I take you to the internal documents of  
21 Sportradar, what I would suggest are probably the most  
22 helpful category of documents are the  
23 in-the-cold-light-of-day, objective, independent,  
24 externally commissioned documents. There is  
25 a surprising number of those because, as these companies

1 have grown, they have all gone through various different  
2 funding rounds. Their businesses have been submitted to  
3 and audited by external companies and the risks, market  
4 shares, dangers, strategic weaknesses, all of that for  
5 these companies have been systematically assessed.

6 I think one of the things that is going to be very  
7 helpful for us to produce to you is a custom bundle with  
8 all of those types of materials, for both Sportradar and  
9 Betgenius collated, because you have the likes of  
10 McKinsey, JP Morgan, Deloitte, all pouring over and  
11 investing very considerable effort in parsing the  
12 operation of the businesses. To answer a question you,  
13 Sir, raised, also conducting very extensive surveys of  
14 bookmakers and customers as part of the market  
15 intelligence for them explaining how the companies work.  
16 So those internal, still substantially qualitative  
17 resources, I would suggest, are the first place to pick  
18 at, understanding how this market works and worked.

19 Then there is a second category of documents that is  
20 very helpful, which are the internal Sportradar  
21 documents explaining their own rights to acquisition  
22 strategies, what they are going to bid for, which  
23 content they want and why, what it is going to do to  
24 their portfolio, what their strategy is there.

25 A very good example of that is the document at

1 {H/1447}. Now, the difficulty we have with all of these  
2 general strategy documents is that they have all been,  
3 I think, completely shaded for confidentiality,  
4 literally the entire documents. So I am not going to be  
5 able to read any of this document to you. But if  
6 I could ask you, first of all, to look at page 11 of  
7 this document, you will see a very helpful diagram that  
8 makes the point that I have just described {H/1447/11}.  
9 Without reading any of the content of the diagram, you  
10 will see how the different tiers of the bookmaker  
11 market, analysed by Sportradar itself -- with tier 1 at  
12 the top being the large bookmakers, tier 2 being the  
13 mid-scale bookmakers, tier 3 being the small-scale  
14 bookmakers -- you will see the different factors that  
15 are assessed for each category as being, if you like,  
16 the selling points that confer price leverage for the  
17 particular customers in question.

18 You will see mentioned in the side lines "Portfolio  
19 approach", that cannot be confidential but it says  
20 that -- I will not read what it says under it. It does  
21 not look very confidential to me. "Optimisation",  
22 "Embed with Tech", et cetera. That shows, right from  
23 the get-go, the point I am making about the differences  
24 between single sources and multi-sources. Of course,  
25 once you appreciate that the single-source customers are

1 increasingly taking live odds in MTS et cetera, you will  
2 appreciate that in relation to that cohort of customers,  
3 Sportradar is in effect in competition with the turnkey  
4 providers because that is, in essence, exactly the same  
5 service that a turnkey service provider provides.

6 What is unusual is this: Sportradar is the only one  
7 of the four or five major SDSBS providers with a range  
8 of content sufficiently wide to offer its own in-house  
9 single-source offering. It is the only one of the four  
10 or five that is a single-source provider without buying  
11 any content from anywhere else. Genius' range of  
12 products is not wide enough to do that; IMG's is not.  
13 That is why there are all the other aggregators. That,  
14 along with the consistently noted marker of 40% market  
15 share or more, in the separate but related markets of  
16 live data and live odds -- and I will show you  
17 references to that in due course -- is a strong  
18 indicator of its actual or borderline dominance on these  
19 markets.

20 Now, historically, what happened was that because  
21 some 60% of their customers were single-sourcers, they  
22 ran off to the CMA with their "Well, they are all going  
23 to switch" thesis in the original complaint. The very  
24 fact that that has not happened first of all  
25 demonstrates how the case that we have to meet has

1 changed, because single-sourcing is all over the pleaded  
2 case and yet it peters out in both Mr Lampitt's evidence  
3 and Dr Niels' reports, because there is no mention of  
4 vertical switching as a source of harm in either of  
5 those documents. It has just been quietly abandoned.  
6 But more than just being quietly abandoned, it also  
7 undermines the thesis that in-stadium content is  
8 a must-have for all, or all UK, bookmakers. So that is  
9 the single-sourcing piece.

10 Now, you have got the general shape of what happens  
11 in relation to multi-sourcers. Everyone gets or tries  
12 to get their own tier 1 content or their highly  
13 desirable tier 2 content. They build the portfolio  
14 across as many sports as they can and they hawk it to  
15 each of the bookmakers. The evidence is absolutely  
16 clear that there is an array, even within -- and it is  
17 a narrow one and we do not accept should be made -- but  
18 even within European football there are a number of  
19 estates that are described as tier 1 content. There is  
20 lots of synonyms used for this. It is described as  
21 "must-have" in the documents, it is described as  
22 "crucial" in the Sportradar documents, but "crucial"  
23 means -- and I will show you why I say that -- the same  
24 as "must-have". These layman terms are used liberally,  
25 because the documents are not drafted by competition

1 lawyers, to connote highly desirable input for  
2 bookmakers. Various different things are described as  
3 being "must-have". You have must-have sports; football  
4 is an obvious must-have sport because it is the most  
5 popular sport to bet on around the world.

6 There are events or competitions within the sports  
7 that are described as "must-have". You see the EPL, not  
8 the whole FDC content, the EPL, La Liga, UEFA Champions  
9 League matches et cetera, Serie A and Ligue 1, all being  
10 described as tier 1 must-haves or crucial sports.

11 You even see and there is a spreadsheet of peculiar  
12 dullness that identifies certain matches within certain  
13 competitions as being must-have. You know, derby  
14 matches where you would expect a particularly high level  
15 of betting interest or things like that. Obvious ones  
16 like the FA Cup Final or semis.

17 THE PRESIDENT: Just pausing there, let us take a non-UK  
18 crucial league, to what extent will that be of interest  
19 to UK-based bookmakers? Is the market international?  
20 Is there a nexus between UK punters and UK events and  
21 Spanish punters and Spanish events? Or is it --

22 MR DE LA MARE: Obviously there is a correlation between the  
23 punters in those countries and the likely interest in  
24 things that they are going to bet on and, obviously, in  
25 the UK, people who follow football are more likely to

1 bet on the EPL, or the SPFL if you are north of the  
2 border. People in Belgium are likely to bet on the  
3 Belgium league, et cetera, so obviously there is that  
4 national affiliation. That tells you nothing about who  
5 the bookmakers are that are servicing that demand and it  
6 tells you nothing about the attitude of bookmakers who  
7 have large multi-national operations, because what is of  
8 equal importance is the revenue attracted by those  
9 competitions beyond the national boundaries, if you  
10 like.

11 The EPL is peculiarly successful through its  
12 international broadcasting contracts and achieving  
13 eyeballs, but so too is La Liga; so too is Serie A; so  
14 too to a lesser extent is Ligue 1. There are  
15 international revenues connected with that and the  
16 problem with this recent tilt -- and it is that, because  
17 on the pleaded case there is complete agnosticism as to  
18 what the geographical market is, it is either UK or  
19 regional -- it is now a positive case that it must be  
20 a UK market. That was never the evidence or the pleaded  
21 case, but the problem is that the large bookmakers, who  
22 are the real target of this plea, are multi-national  
23 operations. William Hill or Bet365 et cetera look at  
24 the volume of demand for betting on a particular  
25 competition across their brands because they are buying

1           their data for their brands. That is the first problem  
2           with it.

3           The second problem, the reason why there is no  
4           evidence is that no one has suggested this is a material  
5           distinction in terms of bookmakers, is that where  
6           a bookmaker is located says nothing about where its  
7           customer is. You asked yesterday a very good question  
8           about the regulatory set-up and we will provide you with  
9           an answer to it. But just because a bookmaker is in the  
10          UK and has a UK onshore gaming licence does not mean  
11          that there are not other people who may have offshore  
12          gaming licences paying UK gaming duty for their UK  
13          customers, who are actively targeting UK customers.  
14          There is a whole history of litigation about it. The  
15          Gibraltar gaming litigation that went to the CJEU, all  
16          about the gaming duty that was charged upon EU operators  
17          in Gibraltar and Malta et cetera, who were targeting the  
18          UK market. So just because you are in Benelux or  
19          Switzerland does not mean that you are not targeting UK  
20          customers. So we do not begin to understand how any of  
21          that works.

22          Your intuition, with respect, which is that this is  
23          an online activity with limited friction and therefore  
24          sets wide geographical markets is completely correct.

25          THE PRESIDENT: Sorry to interrupt, an unrelated question,



1 but just so that we understand why it is that a large  
2 bookmaker would multi-source, it is not to have, as it  
3 were, redundancy or not primarily to have redundancy; it  
4 is mainly to be able to pick and choose which particular  
5 data stream is best suited for which particular event.

6 MR DE LA MARE: Absolutely, because the tier 1 content is  
7 like the feathers on a mackerel that get the shoal  
8 feeding. What you are really trying to sell is your  
9 tier 2 and tier 3 content. Because the bookmakers'  
10 business, the way they make their money, is in having  
11 something to bet on every hour of every day of every  
12 year. Football is not on all the time. When you cannot  
13 bet on football, you will bet on something else. The  
14 money, the events sold, the revenue, is all in the lower  
15 tier, what is called "longtail" or filler content, which  
16 is what you are trying to sell, that is where the action  
17 is at. That is why Bet365 is called Bet365. They want  
18 you to bet 365 days of the year. That is the game, to  
19 get people punting. The first way you get them through  
20 your shop window is through having the EPL content, or  
21 the tier 1 content. It is also significant in terms of  
22 revenue per matches, but it pales into insignificance  
23 compared to the rest of the content which is why there  
24 are literally hundreds of thousands of events on sale,  
25 of which the 4,000-odd events from FDC are a tiny

1 fraction.

2 So if we look again at this 1447 document {H/1447},  
3 you will see certain things. First of all, at page 5  
4 {H/1447/5}, you see a definition of what the word  
5 "crucial" means. I cannot believe that this is  
6 confidential, and unless Ms Kreisberger objects I am  
7 going to read it out --

8 THE PRESIDENT: No, we will read it ourselves, I think that  
9 is probably easiest.

10 MR DE LA MARE: Can you look at the various headings for  
11 "Licensed", "Open Source", "Owned", "Electronic" and  
12 then the different categorisations of data, "Crucial",  
13 "Requested", "Longtail", "Volume". You will see  
14 "Crucial" is a synonym. Then over the page, on page 6  
15 {H/1447/6}, you see the types of content categorised.  
16 At the top is "Crucial" and there is a contrast between  
17 the dark brown box, which is licensed crucial content,  
18 and then the unlicensed content, which is effectively,  
19 in the case of football, the off-tube offering. Can  
20 I invite you to read -- it is very hard to read --

21 THE PRESIDENT: It is very hard to read.

22 MR DE LA MARE: It is very hard to read indeed, that is why  
23 I take my glasses off and literally put my head next to  
24 the page, but in particular the second of the two boxes  
25 and what it says there. The second of the lightly

1 shaded boxes under the heading "Open-source (data only)"

2 THE PRESIDENT: Beginning with the word "Maximise"?

3 MR DE LA MARE: Correct. (Pause).

4 Then you can see at page 7, it is the same table  
5 shrunk even smaller, impossible to read but it is the  
6 same table, but with then various arrows explaining the  
7 strategic considerations. Can you look at what is said  
8 in relation to "Crucial". Then page 9 {H/1447/9}, in  
9 the slide headed "1.6a Licensed content". You can skip  
10 over AV for the moment, though note that "AV" and "Data"  
11 often go together because one of the important things  
12 that is happening in this market is you look to sell  
13 alongside AV or what are called visualisations at the  
14 same time.

15 Look what is said here, and then you have got the  
16 diagram I have showed you.

17 Then you skip over 12 and 13 because these are the  
18 must-have properties for AV.

19 Then at 14, you have a list of the tier 1 soccer  
20 properties and the tier 1 tennis properties.

21 {H/1447/14}. Then tier 2 and then basketball et cetera.

22 I should emphasise that this particular document is  
23 before UEFA tendered its rights and it is before the  
24 association of European football leagues, which had  
25 previously operated a non-exclusive model, got together

1 the 19 leagues in its content and offered that on an  
2 exclusive basis. So it is before all of that.

3 Then if you look at slide 15 {H/1447/15}, "Ongoing  
4 shifts in the data market ...", you can see the point  
5 I have already made about what competitors are doing on  
6 the market in general and the general trends. Then in  
7 particular on that slide, look at what is said about  
8 pricing leverage: "... becomes increasingly  
9 significant -- how do we protect our pricing leverage."

10 You will see what is said in (i) and (ii) on that  
11 bullet.

12 Now, this is exactly the same strategy that we are  
13 criticised for and yet it is the same strategy that  
14 Sportradar sold its company to the market. If you go to  
15 bundle {H/1405}, this is a confidential information  
16 memorandum and we can pick it up at page 62 {H/1405/62}.  
17 See under "Relationships", see under the fourth bullet  
18 point:

19 "Do not have a choice but to deal with us ..."

20 Under relationship with customers.

21 Then page 63 {H/1405/63}, it lists by tier all the  
22 various different sports rights. Some familiar and less  
23 familiar entries here, it is slightly more tilted  
24 towards the American tier 1 rights because they were  
25 effectively raising money in the States.

1           Then page 64 {H1405/64}, if you would read the first  
2 three paragraphs about the portfolios: this is not  
3 confidential so:

4           "[The] content portfolio can be classified into  
5 different tiers. Tier 1 content is the most popular for  
6 customers and viewers. [It] includes major sports.  
7 Tier 2/3 content are regional or high volume sports  
8 events that would not attract the worldwide  
9 audience[s] ..."

10          "Tier 1 content is used as a key sales criteria and  
11 is a mix of international and customer specific regional  
12 content the present time. This is used as a customer  
13 acquisition tool ..."

14          If you go down to the bottom of this particular  
15 page, you will see what is described in relation to the  
16 portfolio strategy. It is exactly the same business  
17 model.

18          Page {H/1405/67}, 3.5.3, "Contracts with rights  
19 holders" analyses the critical contracts floating in and  
20 out of operation.

21          Page {H/1405/81}, you get the proclamation that US  
22 growth is driven by the strategic rights. I can show  
23 you quite a few documents to make exactly the same point  
24 and indeed probably will have to at some stage, but  
25 where we get to, on any fair reading of the documents,

1 is that my learned friend's clients' strategy is  
2 identical save for a couple of factors. First of all,  
3 the tier 1 rights they have hitched their wagon to are  
4 just different rights. They now have a tier 1 property  
5 in football, UEFA. The second difference is that they  
6 have only recently converted to the official rights  
7 model in football. That is because, hitherto, their  
8 approach to the market has all been about sports in  
9 which you can obtain factual exclusivity. Because they  
10 have been interested in factual exclusivity, they have  
11 bought exclusive rights in sports like tennis. Let me  
12 explain why that is significant. In tennis and in  
13 basketball, the sport itself generates the data that is  
14 sold. It is generated by the umpire entering the data  
15 on the umpire's system to record whether or not a tennis  
16 player has just hit an ace and is 40/15 up in the game.  
17 That is what generates court siding as a phenomenon,  
18 where you put somebody on the side of the court who  
19 relays the information to the betting market quicker  
20 than the umpire enters it into the system. That is what  
21 court siding is about.

22 But tennis then produces massive economies of scale.  
23 Because the data is produced by the umpire, you do not  
24 need to police the sport or populate the sport with  
25 scouts. Because an event like the ITF or the ATP

1 happens all round the world, there are now I think  
2 something like 1,000 ITF tournaments, it used to be  
3 about 500, in lots of different countries with lots of  
4 different matches within the tournament, it is obviously  
5 a daunting proposition to replicate by reference to  
6 a dedicated scout the infrastructure that you get with  
7 the umpire. So it is a very, very high barrier to  
8 entry.

9 Then of course, tennis, and this goes to a question  
10 Mr Cutting asked, tennis is a market in which  
11 predominantly a lot of the betting is on points markets.  
12 Who is going to win the next point? Latency is inimical  
13 to points markets; it makes it very hard to make an  
14 off-tube product for tennis. It is certainly not easy  
15 to make one for points markets. Whereas for football,  
16 a much lower-scoring, at least before Erling Haaland got  
17 going, a much lower-scoring sport, much more  
18 slower-moving in relative terms, you can offer all the  
19 markets using an off-tube product, it is just that you  
20 have to run a slightly higher betting acceptance delay  
21 in relation to it.

22 You see immediately then that, in relation to  
23 tennis, once you have bought the official rights, you  
24 have factual exclusivity because it is very, very, very  
25 hard for anyone to replicate your offering, which is

1           why, when you look at the table of rights values that we  
2           have produced, you will notice the figures we have set  
3           out in that report in relation to the three tennis  
4           properties: the ATP, the ITF and the WTA. They are  
5           eye-catching. I will say no more than that at the  
6           moment.

7           Genius' strategy has been to come at the problem  
8           from a completely different perspective. Genius' manner  
9           of accessing the market has been through legal  
10          exclusivity, through the exclusivity in relation to the  
11          IP and acquiring official rights by putting in an  
12          official stadium collector, effectively replicating what  
13          the umpire would otherwise do, and excluding anyone  
14          else, as they are lawfully entitled to do so, from  
15          collecting the data. But until 2020/2021, Sportradar  
16          were fighting at every stage against the official rights  
17          model being extended to football. Why? Because they  
18          had built their own unofficial scouting network, which  
19          was a barrier to entry, and this was an existential  
20          threat across football, if the official rights model  
21          stuck in football, as it has. The problem is they are  
22          being excluded left, right and centre from the Iraqi  
23          football, the Palestinian football, the Italian Serie B  
24          football et cetera because people do not want data  
25          scouts and they want to be paid for the data. That is



1 the basic problem that they have.

2 THE PRESIDENT: Mr de la Mare, is that a convenient moment?

3 MR DE LA MARE: Yes, my Lord.

4 Given we have got a little bit squeezed by my  
5 learned friend, a tiny bit, might it be possible to  
6 start maybe ten minutes earlier?

7 THE PRESIDENT: Not a problem.

8 MR DE LA MARE: I am grateful.

9 THE PRESIDENT: We will resume at 1.50.

10 You have mentioned a couple of times going into  
11 private session. I hope that the parameters of that  
12 have been worked out between the parties because, as you  
13 will know, I am quite keen that we have --

14 MR DE LA MARE: I understand that. It is something of  
15 a moving feast because a lot of the cross-examination  
16 I would like to conduct is by reference to documents  
17 like the one I have just been showing you.

18 THE PRESIDENT: Yes.

19 MR DE LA MARE: The redactions in relation to them are  
20 changing which makes it very difficult. It also makes  
21 it very difficult, and I have well in mind your request  
22 for cross-examination bundles, but with a moving feast  
23 on confidentiality, I am afraid that is just impossible  
24 to deliver. So we will do our best. I think there are  
25 going to be certain topics that will require

1 cross-examination in private, but a lot of it I can  
2 explore with the witness by reference to general  
3 propositions with the actual concrete facts on the page.

4 THE PRESIDENT: Well, that is helpful. Just to give an  
5 indicator to all concerned, we are very happy to have  
6 material protected so that it is referred to  
7 elliptically or by invitation to read out, that works  
8 less well with witnesses. For our part, we will likely  
9 draw a significant distinction between prose and  
10 figures. Prose, I think prima facie is going to be  
11 susceptible of reference in open court and will require  
12 some explanation as to why it is being protected.  
13 Figures, we are prepared to protect, but it seems to us  
14 that that is something that can be protected by saying  
15 "Read the figure, do not say it out loud", and we would  
16 hope that the witnesses are not going to be  
17 discombobulated by such a process. If they are, we will  
18 rethink. But I hope that is helpful guidance.

19 MR DE LA MARE: That seems a remarkably sensible rule of  
20 thumb. Can I suggest one other basic rule of thumb  
21 which is, absent numbers in contracts, because old  
22 contract prices still have resonances for current  
23 contracts and current renegotiations, but old documents,  
24 particularly old strategic documents, must be even more  
25 strongly treated in accordance with that presumption.

1           What your strategy was in 2014 and, for that matter,  
2           what levels of off-tube you were collecting in 2014 or  
3           what levels of off-tube you were selling in 2014, 2015  
4           et cetera, none of that can sensibly be confidential.

5           It is really only recent -- the last year or  
6           two years -- that seems to have any material market  
7           sensitivity.

8       THE PRESIDENT:   Indeed.  No, that is a point that is well  
9           made and I accept that.  But I think, given the  
10          description of the market that we are exploring in open  
11          court, frankly, the broad brush strategy of all of the  
12          players in the market is going to be blindingly obvious  
13          to anyone --

14       MR DE LA MARE:   Yes.  I do not mean to make a sort of, you  
15          know, whataboutery point.  It is not.  We have largely  
16          declassified, if I can say that word, our equivalent of  
17          these documents.  Our equivalent of these documents  
18          contain much more in open than the Sportradar documents.  
19          I know Sportradar are looking at this again and I am  
20          sure we will get more in open and we will reach  
21          hopefully a more than agreed position.

22       THE PRESIDENT:   I am grateful.  I thought I would make that  
23          indication because you had mentioned on a couple of  
24          occasions going into private.  We are receptive to that,  
25          but not that receptive.  I suppose that is the message

1 I am trying to convey.

2 We will resume then at 1.50. Thank you very much.

3 MR DE LA MARE: I am very grateful.

4 (1.05 pm)

5 (The short adjournment)

6 (1.50 pm)

7 THE PRESIDENT: Mr de la Mare.

8 MR DE LA MARE: I am probably guilty of a bait-and-switch,

9 my Lord, I should confess straightaway, which is that,

10 having got you in ten minutes earlier, and you having

11 sat half an hour earlier, it looks like the heat has

12 gone out of the application for further evidence. So

13 I do not think it is going to take anything like as long

14 as suggested, which means of course I am then going to

15 take liberties by using the time.

16 THE PRESIDENT: As long as we do not have an argument and

17 save the time, then I am very happy to extend you those

18 liberties.

19 MR DE LA MARE: I of course have Ms Lane and Mr Mill

20 breathing down my neck, of which I am most aware.

21 You will have found a package of goodies on your

22 desk. I am going to explain what they are in the

23 balance of my submissions so please keep them to hand.

24 Anyway, we were talking about portfolios and we got

25 to the point where it is common ground, it is common

1 ground on the pleadings, that all the SDSBS operators  
2 operate by reference to portfolios. They all sell  
3 bespoke bundles to bookmaker customers. No bundle is  
4 the same. There may be different sports, different  
5 numbers of events, different prices. The pricing  
6 formulation, typically, the evidence shows, is either by  
7 reference to a GGR number, so the bookmaker agrees that  
8 if they take a particular event they will pay  
9 a percentage, 5/10/15, whatever it is, per cent of GGR  
10 generated by that event; or, more commonly, I think  
11 particularly so recently, they pay a fixed sum to get  
12 access to a number of events. If you do not take the  
13 full number of events, that is up to you, but then the  
14 implied per event sum goes up, and then there is what is  
15 called overage if you take above and beyond that  
16 particular number.

17 The important thing to note about those fixed fees,  
18 and it is a very important one as the evidence develops,  
19 is that they are proxies for GGR calculations. So a GGR  
20 calculation is a classic IP-type royalty; I am taking  
21 a royalty on the products that you made using my  
22 intellectual property. But bookmakers are not very keen  
23 on sharing their GGR, not least because it shows to the  
24 very people selling them the data exactly what the data  
25 is worth, what the addressable market is, so there is

1 a negotiation. Where the industry seems to have landed  
2 at is very often they pay the fixed event -- fixed price  
3 per number of events calculus.

4 It is important not to lose sight of the fact though  
5 that that price is not a widget price. It is still  
6 a proxy for GGR and therefore the larger the bookmaker  
7 or the larger the revenue that is supported by that  
8 particular set of events, the larger the fixed price is  
9 likely to be. Gross gaming revenue: GGR.

10 Equally, if the value of the data goes up, let us  
11 say because, as there has been thanks to Ray Winstone on  
12 the telly, an explosion in in-play betting and the value  
13 of the proposition goes up, consequently the value of  
14 the data goes up. You would expect prices to rise  
15 reflecting that fact. So that is the portfolios.

16 But, as Ms Smith emphasised this morning, it is very  
17 important not to lose sight of what happens next because  
18 that is not the end of competition on the market at all.  
19 You do not just sit back after selling your minimum  
20 commitment. All that the portfolio is doing is  
21 effectively setting an umbrella for the subsequent  
22 relationship, enabling access to the relevant sports in  
23 question because you will have integrated in order to  
24 provide them to the bookmaker. There is then subsequent  
25 dynamic competition as to which events from which

1 bookmakers will be taken in circumstances where there  
2 are overlapping offers, as there will be when there is,  
3 for instance, an off-tube offering for any football  
4 competition to compete with an in-stadium offering.

5 A simple example: suppose I am a very big bookmaker  
6 with very big potential volumes and I am concerned at  
7 a general level about bet acceptance delays for my  
8 biggest matches because, effectively, it is an  
9 opportunity cost for my revenue. Suppose I am getting  
10 a low flat price or implied price from the deal I have  
11 done with Sportradar or Perform, or I have agreed a low  
12 GGR for my football package, because all they have at  
13 that stage is off-tube data and that was the position  
14 for Sportradar in relation to its football offering. No  
15 tier 1 offering until UEFA, only off-tube -- appears(?)  
16 to be in the stadium.

17 Suppose I am coming up to the limit of my minimum  
18 take commitment to Genius and I do not think certain  
19 upcoming EPL games are particularly interesting or  
20 likely to attract peak betting volumes. Brentford/Knot  
21 Forest is not going to sell well in my view. What  
22 I might do in choosing from the weekend's ten EPL  
23 fixtures is decide to take six from Sportradar or  
24 Perform or six between them, between the different  
25 off-tube packages available, but only four from official

1 rights and book accordingly. A large but not so large  
2 or a medium-sized bookmaker that multi-sourced might  
3 decide in those circumstances to take all ten from  
4 off-tube, reaching a view as to its likely levels of  
5 betting on the match or the fact that, let us say, the  
6 operator is a Thai bookmaker, and in Thailand there is  
7 a slavish following for Leicester City, means I might  
8 make an exception for the Leicester City match.

9 Each bookmaker, by reference to what it is doing on  
10 a particular day, what are the circumstances in the  
11 market, whether there is a particular grudge match,  
12 whether Jamie Vardy's team is playing Wayne Rooney's  
13 team or whatever, something that is likely to generate  
14 betting interest, will make their own decision. It is  
15 like a decision between white bread and seeded batch,  
16 and you will make different decisions as to what you  
17 want on what particular days.

18 That is effective substitution and that is dynamic  
19 competition after the conclusion of the various  
20 contracts. Of course the contracts all overlay, insofar  
21 as you are making an off-tube offering, and the bundles  
22 in question, from which the events are taken, are  
23 themselves dynamic. So if you have concluded an  
24 agreement, let us say for two years with a particular  
25 bookmaker, and in the intervening period you acquire



1 more rights, that may give access to a different set of  
2 rights than prevailed at the origins, and then that will  
3 either generate a renegotiation or, when the contract  
4 comes up for renewal, a different price, because they  
5 now have a substantially different bundle.

6 THE PRESIDENT: That freedom to choose is likely to be quite  
7 affected by the number of purchases that you have to  
8 make as minimum buys. In other words, if you have got  
9 a contract which obliges you to pay for 10,000 and you  
10 are only ever going to have that number of events, then  
11 your flexibility to choose has an implied cost because  
12 you will be paying for something which you do not use.

13 MR DE LA MARE: Well, exactly. So in agreeing your minimum  
14 take, you are going to be looking at the portfolio of  
15 content and predicting which of that content you are  
16 going to want. You are not going to just at that stage  
17 be looking at the tier 1 content because the tier 1  
18 content for all of the operators is a time and fraction  
19 typically of the minimum commitment. You are going to  
20 be looking at the tier 2, tier 3, tier 4 content. Do  
21 I want more European basketball, which is, you know, on  
22 at less convenient scheduling times? Do I want access  
23 to some summer football competitions? Summer football  
24 can be particularly valuable if it is in Kazakhstan or  
25 wherever it is because you can stage football at a time

1 when it is not being staged elsewhere in the world. It  
2 is exactly these considerations that inform the buying  
3 decision. The bookmaker will look at the entire  
4 portfolio of content and try to predict how much of that  
5 content they will then want.

6 So, stepping back, the data of what actually sells  
7 within the package after the contractual relationship or  
8 the umbrella agreement has been concluded is critical to  
9 understanding how the market views the data in terms of  
10 substitutability. It is also the mechanic that applies  
11 continued pressure to ensure things like quality of  
12 service, and I mentioned that the claims about sort of  
13 the lazy monopolists, the sort of Hofner v Macrotron  
14 type arguments that are surfacing in the pleadings, are  
15 ridiculous. They are when you step back and ask  
16 yourself this question, is what Genius or is what  
17 Sportradar selling an FDC service? No, it is not. It  
18 is football, or more realistically, it is a whole range  
19 of different sports. Are you going to sit on your  
20 laurels in those circumstances, based on a view that  
21 someone wants access to 380 Premier League games? Of  
22 course you are not because you continue to compete  
23 through the bundles and through the purchases made  
24 through the bundles for the quality of your service  
25 overall. It is an argument that looks like it has been

1 picked by a lawyer from a textbook when you go through  
2 the evil effects of monopolisation. It is completely  
3 divorced from the reality of how these portfolio markets  
4 operate and how the SDSBS providers compete with each  
5 other.

6 So that is my first theme.

7 The second theme, it is all about the data. I have  
8 relatively little to add to what my learned friend  
9 Ms Smith said here, other than this observation. At  
10 every stage in Dr Niels' reports and analysis, at every  
11 stage in the expert evidence, material deployed is  
12 essentially qualitative. There is virtually no  
13 quantitative analysis in any respect other than the  
14 statistics in relation to the popularity of football.  
15 You will have the first of my hand-ups, this particular  
16 sheet (Indicates), you see exactly the same technique in  
17 my learned friend's submissions yesterday in Dr Niels'  
18 report. Because time and time again the popularity of  
19 UK football and the fact that UK football holds strong  
20 leverage or things like there is quotes from slides,  
21 public materials, internal documents, is equated with  
22 the popularity of in-venue LLMD, and they do not equate.  
23 The central flaw in the quantitative materials, the  
24 statistics about the popularity of football et cetera  
25 that runs through Dr Niels' report, is that at no stage

1 does he even acknowledge, still less attempt to  
2 identify, what proportion of that betting and demand is  
3 serviced by off-tube content. It is a pretty basic  
4 problem.

5 But beyond that there is no quantitative material.  
6 There are logical fallacies. You have had the pricing  
7 fallacy from Ms Smith. There is exactly the same  
8 logical fallacy in relation to leveraging, substantial  
9 portions of section 3 of his first report say, "I infer  
10 that there is significant market power effectively  
11 because Genius has attempted to leverage. Because you  
12 have attempted to leverage, you would only do that if  
13 you had significant market power, ergo it is a must-have  
14 product". That is completely fallacious, not least  
15 because leverage can occur in at least two ways that are  
16 completely unobjectionable. I can leverage within the  
17 same market as a sales technique, you go to a fishmonger  
18 and you ask for a piece of fish and the fishmonger says  
19 you can have this piece of fish and this other piece of  
20 fish for this price, that is leveraging, it is called  
21 bundling. It is BOGOFs for wine or case prices when you  
22 buy different things of the same product class in the  
23 same thing, that is leveraging within the market.

24 You can also have leveraging between a market. You  
25 buy a fridge and someone says, "You will have to buy

1 this cookware too". That is completely unobjectionable.  
2 It may be a very good sales technique exploiting the  
3 perceived desirability of the product to a particular  
4 customer, but it is completely unobjectionable if you do  
5 not have market power. You cannot use that very  
6 technique to infer the existence of market power. It is  
7 a classic logical fallacy of correlation.

8 But beyond that, the only quantitative analysis you  
9 will find in the reports are the materials my learned  
10 friend Ms Smith took you through, the careful analysis  
11 of Dr Majumdar and Dr Padilla, the 20 customers  
12 analysis, the 40 customers analysis, the switching  
13 analysis, the volumes of data in fact sold. There is no  
14 grappling with that material at all until the report we  
15 had yesterday, which we will deal with in due course.

16 Even more surprisingly than that, there is no  
17 factual evidence from Sportradar grappling with the  
18 actual facts in relation to what it has sold by way of  
19 off-tube and to whom, what it has collected and to whom.  
20 I will come back to that, that is my third theme.

21 So in this case, time and time again, I am afraid  
22 you are going to have to come back to the data, and when  
23 you do, you are going to see a very consistent picture.  
24 Let me take the must-have proposition and the  
25 non-substitutability of off-tube together as an example.

1           There are other examples that can be given. The first  
2           and simplest proof of the substitutability or the  
3           operation of off-tube as a competitive constraint is the  
4           fact that Sportradar sells appreciably more events  
5           relating to the EPL than we do. You have seen the  
6           figures already this morning. One and a half times more  
7           events than are sold by us. That is even before -- and  
8           it is the point I impatiently jumped up to make -- even  
9           before you factor in the fact that Perform and other  
10          operators on the market, whose data we do not have, must  
11          themselves be selling off-tube if they have an off-tube  
12          operation as the evidence suggests they do.

13                 So the ratio between in-stadium data and off-tube  
14          data is at least one to one and a half and it may be  
15          substantially lower than that.

16                 The second simple proof is that those sales align  
17          with the claimant's actual coverage and its actual  
18          practices. Those have been to collect off-tube data in  
19          preference to in-venue data across much of -- and I will  
20          frame it in great generality and come back to the  
21          spreadsheet in your clip -- much of the tier 1 football  
22          properties. That is in circumstances where, in relation  
23          to the EPL, there was limited scouting undertaken by  
24          Perform and in relation to the other tier 1 properties  
25          little or no scouting at all. I will show you documents

1 to show that effectively there was no scout-spotting in  
2 a number of those other tier 1 competitions.

3 So, effectively, what you can deduce from that is  
4 that the scouting algorithm operated by Sportradar, if  
5 you like, has been this: take it off-tube first, if you  
6 can get a product of acceptable latency; go in-venue  
7 only if there is no off-tube available or the off-tube  
8 that is available is too unreliable or too latent. It  
9 was that way round, not the other way round. Not go  
10 in-venue first because that is the key product. Only if  
11 you cannot go in-venue go off-tube.

12 The third simple proof, Ms Smith referred you to it,  
13 is that Sportradar have appreciably increased, not lost,  
14 increased the number of single-source customers that  
15 they have despite not having in-venue data.

16 The fourth point is that the evidence we will show,  
17 and we are assembling it in response to Dr Niels' most  
18 recent report, that even in relation to the largest  
19 customers, the 19 on the slide or the top 40 customers  
20 et cetera, the evidence there is going to show -- and we  
21 have summarised it in this first note -- that even  
22 there, even there, Sportradar sells appreciable  
23 quantities of off-tube data. That is point one. Point  
24 two: the totality of the requirement in relation to EPL  
25 data is not taken either from Genius or indeed Genius

1 plus Sportradar for all of those customers. The acid  
2 test is this, there are 380 games every season, if it is  
3 a must-have, you would expect the entry column for  
4 Sportradar, once you have adjusted for the number of  
5 feeds, because different brands may have different  
6 supplier relationships within the same company, the  
7 number of games does not equate to 380 for my clients.  
8 Sometimes it is only 180, 200, 250, and the number in  
9 the Sportradar column does not add up to 380 when you  
10 put the two together, which means they must be taking  
11 off-tube somewhere else as well.

12 Now, that is kryptonite for the arguments put  
13 against us, because the arguments put against us, even  
14 on the belatedly introduced -- and I will have a moan  
15 about the pleadings later -- the price  
16 discrimination-type analysis, it just does not work even  
17 there. Even there, periodically, people vote with their  
18 feet and they substitute with off-tube data.

19 The position is even more stark when you get down to  
20 the bottom, to the tier 3 small customers, who are  
21 completely content to take off-tube data bundled with  
22 live odds services and managed trading et cetera.  
23 I should add, in relation to managed trading, for  
24 managed trading services being provided, who is running  
25 the bet acceptance question? The answer is the person



1 providing the managed trading services, which means that  
2 it is Sportradar that is running the bet acceptance  
3 question. Notwithstanding that, we have got no evidence  
4 about how that has actually worked.

5 So until yesterday, there was no quantitative case.  
6 We have now had this pitch towards UK bookmakers and you  
7 have heard what I had to say about that this morning.  
8 We will address it in due course. There does seem to be  
9 at least a very substantial risk of overreach on the  
10 part of the desk analysis conducted by Dr Niels as to  
11 who the customers are in the 23 or in the 40, whether or  
12 not they are substantially facing UK betters or punters,  
13 but we will cross that bridge in due course.

14 But certainly what we can say is the argument that  
15 you were given yesterday by my learned friend that,  
16 "Well, of those top 40 who are UK bookmakers who buy  
17 LLMD from Genius, they account for 98% of the market",  
18 that is thoroughly misleading if it is intended to  
19 convey the impression, which it seemed to be, that those  
20 bookmakers accounting for the 98% do not buy any  
21 off-tube from Sportradar. You will not see a column in  
22 Dr Niels' spreadsheet about whether or not they buy from  
23 Sportradar, just whether they buy from Genius. It is  
24 even more misleading if it is intended to connote that  
25 they buy all of their LLMD from Genius. They do not.

1 Our preliminary investigations shows as much.

2 What is more, when you look beyond the bookings, and  
3 the bookings at the moment seem to be working out at  
4 around a ratio of one to four, so one booking from  
5 Sportradar for those top customers to every four  
6 bookings with Genius --

7 MR JONES: EPL.

8 MR DE LA MARE: EPL, Mr Jones reminds me. When you pull  
9 back from just looking at the EPL and you look at the  
10 effect on overall bookings, to examine the foreclosure  
11 argument, the leveraging argument, the position is  
12 stark. 3.2 million bookings with those customers, with  
13 Sportradar, as against 1.7 million bookings with Genius,  
14 with those customers. That does not look like  
15 foreclosure to me.

16 So even this quantitative case fresh off the press  
17 does not really pass muster. We are still in a position  
18 where we have not even got to a plausible answer to this  
19 basic question: why is something that is a must-have  
20 from the perspective of the bookmaker alone a must-have  
21 from the perspective of the SDSBS provider? Do we  
22 really have to accept the proposition, for it is the  
23 logical consequence of the proposition that every SDSBS  
24 provider has to have access to equivalent content for  
25 all tier 1 properties? Of course not. The only way

1           then, once you have rejected that, that the argument  
2           articulated by the other side makes any sense is if,  
3           sitting above tier 1 properties, there is some kind of  
4           tier 0 property, the one ring to rule them all,  
5           the super property, the super estate, FDC, the one and  
6           only content that absolutely everyone has to have  
7           absolutely all the time. Of that, there is not a trace  
8           of evidence in the documents.

9           When you look at the Sportradar documents, you look  
10          at the Genius documents, all the tier 1 properties are  
11          treated in much the same fashion. Indeed, when we get  
12          to the Sportradar documents, we will see that on their  
13          analysis, if there is any schedule or schema of value,  
14          it is the tennis properties that have the highest value  
15          and not the football properties.

16          So the argument collapses in the face of the actual  
17          evidence, both the independent and objective qualitative  
18          evidence rather than the cherry-picked materials and the  
19          actual analysis of the data.

20          Now, I should say lastly something about pricing.  
21          My learned friend Ms Kreisberger had a lovely line about  
22          reverse Corleones, I think she called them, really nice  
23          line. The problem is, in the Godfather, the real offer  
24          is one that you cannot refuse, so you have accepted it.  
25          Once you have accepted it, if it is a price, it is

1 a price that is concluding a contract. A reverse  
2 Corleone, an offer which, by my learned friend's  
3 definition, cannot be accepted, is on no level a price;  
4 it has not been accepted. It is completely irrelevant.

5 That is, in a nutshell, the essence of the entire  
6 analysis of Dr Niels and my learned friends. They point  
7 to a negotiating tactic or a position in the negotiation  
8 and they say, "Well, that is the price", in  
9 circumstances where -- and this is the purpose of one of  
10 the documents in the clip we have handed up to you -- if  
11 you go through the totality of the negotiations in  
12 relation to the particular bookmakers and you go beyond  
13 the initial offers, you will see a consistent pattern of  
14 push-back against the opening proposal and contract  
15 formation in materially different terms to that  
16 originally proposed. In other words, the buyers exert  
17 their countervailing buying power, they negotiate, they  
18 negotiate on price and on number of events. That is the  
19 story you need to look at, not where negotiations for  
20 each customer starts but where it ends. We have  
21 extracted for the same 19, because we understood that it  
22 was the 19 that was the focal point for my learned  
23 friend's skeleton argument, we have extracted in the  
24 table, hopefully helpfully, the before and after  
25 position in relation to whether or not there was

1 a contract and whether or not the contract had a minimum  
2 take or benchmark in it and what it was.

3 It is important to note a couple of things. First  
4 of all, a lot of the customers in question were not ever  
5 or were not ever materially Sportradar's customers to  
6 begin with. That is because their business was and is  
7 skewed towards servicing to the mid- and lower end of  
8 the market. It was skewed towards servicing SMEs and  
9 small providers. It had a disproportionate share of  
10 that and a disproportionately small share of live data  
11 customers. So the starting point is different.

12 The end point is that notwithstanding the FDC  
13 agreement, Sportradar has increased the events it sold  
14 to these customers from half a million to 833,000 whilst  
15 Genius, which did have a relationship with these  
16 customers beforehand, but a muted one for the reasons  
17 I explained before because it was only selling live  
18 odds, at least in relation to FDC, it was selling the  
19 whole lot in relation to Serie A, it has increased its  
20 share from 561 to 1.4 million in relation to these  
21 customers. Again, that simply does not look, when you  
22 look at the facts in fair context, a fair before and  
23 after, to be anything like foreclosure.

24 So we ask you to treat the very, very sort of  
25 isolated points that are pulled together to make some

1 kind of pricing thesis with the very greatest deal of  
2 caution. You have got to look at all of the data and  
3 look at it in context. Even then there is nothing that  
4 begins to resemble quantitative evidence of the kind to  
5 support the case.

6 So if I can then proceed on to my third theme, and  
7 this is an important one, the missing witnesses and  
8 evidence. I mentioned this morning there are four areas  
9 of glaring omission. The first is in the area of actual  
10 practices of coverage of tier 1 football by Sportradar,  
11 both in relation to FDC matches and beyond. What you  
12 get in the evidence is some pretty abstract generalised  
13 propositions from Mr Lampitt about the nature and  
14 limitations of off-tube compared to in-venue and about  
15 latency, but no evidence at all -- not a line -- about  
16 what Sportradar themselves actually did in terms of  
17 coverage. So what is omitted entirely is its actual  
18 patterns of gathering off-tube and the decisions as to  
19 why they were doing so and in relation to what sales  
20 strategy or what purpose. It is just completely  
21 missing.

22 The fact that you collect something must show that  
23 you intend to sell it. You must have a strategy for  
24 selling it, for investing in the scouting operations.  
25 It costs about 100 quid or more to send a scout into the

1 stadium. It costs about 30 quid to have a scout  
2 scouting on the TV. There has got to be some rationale  
3 as to why you are doing one over the other. That must  
4 bear critically, those decisions, what you actually did,  
5 on whether or not you were treating the data as  
6 must-have or not. But the people who were responsible  
7 for making those coverage decisions, making those  
8 strategic decisions, fixing the actual practices of  
9 Sportradar, are not before the court.

10 Now, Mr Lampitt was no doubt aware of what was going  
11 on at some macro level. You see him copied in on some  
12 of the emails. But the main man for all of this, the  
13 man that the internal emails style as the coverage king  
14 of Sportradar, whose name is all over the emails, all  
15 over the disclosure about coverage, is Berkant  
16 Elieyioglu. There is lots of hearsay statements in  
17 Mr Lampitt's statement from Mr Elieyioglu, you had my  
18 complaints on a previous occasion about those hearsay  
19 statements. But the point is more fundamental than  
20 that, they have not led any evidence about what they  
21 actually did, and Mr Elieyioglu is the most obvious  
22 person to do so, not least because he seems to have had,  
23 from the disclosure, some substantial reservations about  
24 Sportradar's strategy and, in particular, its failure to  
25 turn earlier towards the official rights strategy and

1 start buying official rights.

2 The person you do have coming to give evidence next  
3 Monday is Mr Perra, Andrea Perra. It is very confusing,  
4 there is two Perras in Sportradar. It is Mr Andrea  
5 Perra who answered to Mr Elieyioglu and seems to have  
6 been involved in some of the coverage decision making  
7 and certainly knows the operational details and we will  
8 ask him plenty of questions about that.

9 But his statement is a reply statement about a bit  
10 of a red herring issue about latency. He does not  
11 grapple with any of these issues about coverage at all.  
12 So we are going to have to explore all of that with him,  
13 without the benefit of a witness statement exploring it.  
14 That there is a story to be explored is apparent from  
15 the spreadsheet. I hope you have -- it is a Word  
16 document.

17 THE PRESIDENT: Yes.

18 MR DE LA MARE: There is no expert evidence sitting behind  
19 this. It is a purely mechanical exercise that has been  
20 applied to one of the documents in the disclosure that  
21 you can look at your leisure, {H/1654.6} the long list  
22 of bookings describing which Sportradar entity did them  
23 and whether they did them off-tube.

24 What we have simply done, one of our solicitors has  
25 had the thankless task of going through that and pulling



1 out all of the bookings for certain competitions and you  
2 have got the results summarised here.

3 I can refer in open court, because I think it is  
4 accepted not to be a matter of commercial  
5 confidentiality, to the position in relation to the EPL.  
6 Now, RTS. RTS is a coverage in-venue scouting  
7 specialist company that was acquired by Sportradar some  
8 time in 2014. So I think you can treat the 2014 figures  
9 as perhaps a legacy of what was going on beforehand.  
10 From 2015 onwards, you can see that, with the exception  
11 of 2017/2018, where there is a bit more double coverage,  
12 a mere complete pattern of zero in-venue scouting with  
13 the glaring exception of 2019/2020. Now, 2019/2020 is  
14 of course the year that my clients first obtained  
15 exclusive rights. What seems to have happened in that  
16 year is, for the first time, compared to zero the  
17 previous years, the stadiums are flooded with scouts.

18 But look at the other competitions. Now, these  
19 other competitions -- I will have to keep what I said,  
20 because apparently the details of on-tube and off-tube  
21 in these competitions is said to be confidential,  
22 I cannot say I understand why, but there we have it.

23 You have the data for the champions league and,  
24 again, we have done it by season and year, but in  
25 particular we have broken it out by reference to the

1 champions league knock-out stage and the group stages.  
2 Now, if you are a football fan, you will know that the  
3 champions league I think has nine phases, the first five  
4 of which are preliminary competitions to decide who gets  
5 into the group stages. There is always a hope for  
6 a plucky Scottish team or a plucky national champion  
7 from the Netherlands to fight their way through  
8 qualification and get into the group stages before they  
9 are eliminated by Barcelona or Bayern Munich. That is  
10 not what we are talking about. We are talking about the  
11 group stages, the eight gangs of four and the matches  
12 they generate. These are the second-most  
13 revenue-intensive football fixtures after the knock-out  
14 stages. Sorry, the knock-out stages are the most  
15 revenue intensive. The group stages are the second-most  
16 revenue intensive.

17 Look at the patterns in relation to these matches.  
18 I will not say what they contain but I think you can  
19 probably work it out for yourself. That is at a time  
20 when, as we understand it, there was no material  
21 impediment, certainly there was no circumspection on  
22 Sportradar's part about in-venue scouting.

23 Then look at the qualification stages. Again, you  
24 see a pattern there.

25 Then we come on to La Liga and Serie A. La Liga

1 I think is the next highest of the national competitions  
2 after EPL in terms of revenue per match. You can see  
3 the patterns in relation to La Liga by season. Serie A  
4 is the third. Again, looking at the seasonal numbers,  
5 you can see a spike at some stages in relation to some  
6 of the patterns and that spike may coincide with when  
7 exclusive rights in relation to that competition inured  
8 to my client's benefit. Then Ligue 1 completes the  
9 piece.

10 That is the data of actual coverage. We have had to  
11 piece that together in a kind of forensic exercise. You  
12 will not find anything in my learned friend's skeleton  
13 argument about any of that. But it tells a story. It  
14 tells a story that effectively, across the tier 1  
15 competitions, the algorithm was off-tube first, scout  
16 second. So that is the first omission: coverage.

17 The second area of omission is we have absolutely no  
18 evidence from anyone connected with sales of EPL or  
19 other scouted data. So no one speaking to how the  
20 content obtained in this spreadsheet was actually sold  
21 and to whom and at what price and pursuant to what  
22 strategy. Once again, we have some very high level and  
23 largely anecdotal evidence in Mr Lampitt's evidence  
24 about sales, but no one addressing the actual patterns  
25 of what was sold to whom. The kind of thing that should

1 underpin Dr Niels' response but does not.

2 We equally have no one at Sportradar talking about  
3 their portfolio strategies and what rights they are  
4 buying in to support their portfolio strategies and  
5 their sales strategies. Again, we have to piece that  
6 together from their internal documents. Now, all of  
7 that, we know who the relevant witness is, we know who  
8 was in charge of the team, it was Mr Eduard Blonk. He  
9 is effectively Matt Stephenson's counterpart. We do not  
10 have any evidence from him or his sales team, even  
11 though it was him calling all the shots about when the  
12 stadia were flooded with scouts and whether effectively  
13 fire sale prices of off-tube data were offered, as they  
14 were at least contemplated, and they seem to have been  
15 offered to customers, as a response to the award of the  
16 contract to my clients. So again, we have to piece all  
17 of that together.

18 Now in relation to that, at least we have the fact  
19 that Mr Lampitt is copied into many of those emails.

20 But all of that silence makes the sudden  
21 protestation yesterday from Sportradar that we have not  
22 got a single bookmaker before the court a little bit  
23 difficult to understand, because that is the third hole.  
24 It is the claimants who have the burden of proof, the  
25 claimants are having to establish deleterious effects on

1 competition on consumers and there is not a jot of  
2 evidence on the subject of harm.

3 It is completely absent. The closest we get to it  
4 is some evidence about bet acceptance. But even that  
5 does not join up to whether or not bet acceptance delays  
6 periodically that might occur across the portfolio of  
7 bets of an enormous bookmaking operator might translate  
8 into unacceptable products for consumers.

9 As I mentioned, it is a bit odd that there is no  
10 evidence because they make betting acceptance decisions  
11 themselves under their managed trading platform. They  
12 make it for the bookmakers that they are providing  
13 managed trading to.

14 So we do not have any evidence about that.

15 What we certainly do not have is any evidence at all  
16 that any of this has resulted in higher prices for  
17 consumers or in deteriorated services. What seems to  
18 have been happening is that, effectively, if there has  
19 been an increase in the asking price for official data  
20 rights by the market as a whole, that that has been  
21 absorbed by the bookmakers in their very large margins,  
22 not least because -- and I do not want to get into the  
23 hoary old area of passing on, because God knows we could  
24 do with a competition case where we do not have to talk  
25 about passing-on -- in circumstances where the cost of

1 the data is of an almost marginal input into the  
2 operating costs of the bookmakers. It is less than 2%.  
3 That is what the evidence is in the expert evidence.

4 So the idea that that is not just going to come off  
5 the very healthy profits and effectively, ultimately,  
6 result in a value transfer to the person whose IP it is,  
7 namely FDC and the clubs that they represent, is  
8 difficult to accept, at least without some form of  
9 quantitative evidence, and of that there is none at all.

10 So then we have the last omission and it is in some  
11 ways the most surprising, because Mr Lampitt's role is  
12 effectively as the man facing the sports governing  
13 bodies. He is the person that manages the relationship  
14 between Sportradar and the governing bodies. He sells  
15 integrity services. That means he is selling them  
16 services to spot illicit patterns of gambling on their  
17 matches. He is negotiating the rights in question, the  
18 rights negotiations. He is the person at the front of  
19 that, working on the commercial input from Mr Blonk and  
20 his team and inputs from Mr Elieyioglu and his team as  
21 to what the coverage is and what their outside options  
22 are. But does he in any way condescend to any  
23 discussion about how they factor in decisions about  
24 off-tube into what they pay into the rights? Virtually  
25 not at all. We have a paragraph dealing with UEFA where

1 he says, and it is a fairly strange thing to be saying  
2 given what he says in the rest of his case, that the  
3 reason that the UEFA contract is priced lower than the  
4 FDC contract is because it is smaller and all of the  
5 content is available off-tube. But beyond that, there  
6 is nothing at all. Yet there have been these agonising  
7 meetings which I am going to show you in the course of  
8 cross-examination tomorrow, where they work out whether  
9 or not a property is a must-have or not, how much of it  
10 is off-tubeable and what to pay for it in those  
11 circumstances. All of that, as I suggested this  
12 morning, bears directly upon the extent to which  
13 off-tube operates generally in the market as  
14 a constraint of the value of football rights, and in  
15 particular, as a constraint in the context of this  
16 particular set of rights where the tier 1 rights, the  
17 EPL rights, are all off-tubeable and/or have been  
18 completely off-tubed.

19 So four big holes and, as I said, it leaves you with  
20 Hamlet without the Danes.

21 Last theme, and this is me really being a warm-up  
22 act for the IP firepower in some ways that is yet to  
23 come. You would be forgiven from the way that this case  
24 has been presented for thinking that this is somehow  
25 a tale of two completely separate parts that do not

1 speak to each other. There is the IP case and the  
2 competition case and they are both in their nice little  
3 silos and boxes and they do not need to speak to each  
4 other.

5 Well, quite apart from the fact that there is little  
6 or nothing left of the IP case made by Sportradar, and  
7 you can hear Ms Lane and Mr Mill take down the last  
8 straggling vestiges of argument on that front, this case  
9 is really all about IP actually. It is about  
10 a competition law argument being set up as a defence to  
11 an infringement of IP and/or IP-making opportunities.  
12 The critical -- I will explain what I mean by that in  
13 a second. But the critical thing about IP, usually lost  
14 sight of, is that IP has exclusivity baked into it.  
15 That is the essence of IP and that is just as true of  
16 a database right or of confidential information as it is  
17 of any other form of intellectual property. That leads  
18 to an essential difference about the story that the  
19 parties have been telling the world or themselves.  
20 Sportradar wants to compartmentalise this case and to  
21 pretend that there is no IP in play. That has been  
22 evident in their strategy and in their argumentation  
23 from the outset. Look, for instance, at the complaint  
24 to the CMA, {H/26/45}, where they say in terms there is  
25 no IP protection in the data.



1           Now, if we are right in relation to TRP and the  
2 confidential in-stadium data, there is IP protection in  
3 relation to the in-stadium data. It is evident in their  
4 scout training materials from 2015. Look, for instance,  
5 at {H/24/7} where the scouts are trained to say  
6 effectively that there is no IP.

7           "No IP right attaches to data itself (no  
8 copyright)."

9           That is the line the scouts that are sent into the  
10 stadiums are told to say.

11           It is true in relation to the standard scout letter  
12 that they are given to hand out when they are caught in  
13 the stadium. If you look at {H/94/7}, you will see that  
14 standard letter. {H/954/7}. That is right. Thank you.  
15 There is the standard letter. It is worth noting that  
16 this is a letter drafted in exactly the same terms for  
17 whatever competition the scout is caught at. We know  
18 that Sportradar scouted well beyond the Three Leagues in  
19 football. You will remember from our skeleton argument  
20 there is a reference to the Cliftonville FC match in  
21 some lower echelon of Northern Irish football, where  
22 presumably the scout, when caught, presented a letter  
23 like this. This was a generic argument effectively to  
24 the effect that there is no protectable IP, nothing  
25 wrong here.

1           It is evident in Dr Niels' insistence time and  
2 again, since 2015, that this is a case where there is no  
3 natural monopoly. That is the phrase he uses. You can  
4 see that in the report exhibited to the complaint and it  
5 has been consistently ever since. So {H/26/90},  
6 paragraph 2.3. That is the world view that Sportradar  
7 occupies and from which their expert comes from. We  
8 come from a different world view. We come from a world  
9 view in which a well-organised sport generates, even in  
10 relation to data, vast amounts of protected data, the  
11 databases, and that database right had to be established  
12 by litigation by FDC against Sportradar, which was  
13 scraping until that point in time, and a vast number of  
14 IP-generating opportunities. What do I mean by that?  
15 Well, the golden rule in IP -- again, I will get  
16 corrected by these two if I get this wrong and I will  
17 get slammed down -- is that there are certain rules  
18 governing authorship and creation. If you make -- and  
19 I used to do a bit of music litigation, I picked it up  
20 from somebody sitting next to me. If you provide the  
21 facilities for making a musical recording, you are the  
22 first owner of copyright.

23           If you organise a concert in a stadium, then  
24 the organisers are the owners of copyright or can agree  
25 between them and the management of the band who will own

1 the copyright in relation to the performance, and they  
2 will police that IP-making opportunity by stopping crowd  
3 members taking film or making recordings, they are  
4 bootlegs. That is why, in your terms and conditions,  
5 your access to that potential IP-generating forum is  
6 controlled by the terms and conditions, and they say if  
7 you break the terms and conditions, the IP in any  
8 recording that you make will belong to whoever it is  
9 that is the relevant party agreed between the  
10 organisers.

11 That is why there are terms to exactly that effect  
12 in all of the ticket conditions about making films. It  
13 is exactly the same in relation to data. This is an  
14 IP-generating opportunity that results in the creation  
15 of protected databases and also pertains to protected  
16 confidential information. That is why the attempt at  
17 nice distinctions on the part of Sportradar between its  
18 case and SCM are illusory. The reason that they want to  
19 enter the stadium is to make their own IP, to make their  
20 own databases which will then be protected from  
21 scraping, and they wish to be released from the  
22 operation of the law of confidence. That is why we say  
23 this case is in substance about infringement and the  
24 approach that therefore should be adopted is the  
25 approach that a competition court adopts in relation to

1 a case about IP infringement.

2 There are a number of relevant operative principles  
3 that are of relevance. Now, it is necessary to say  
4 something about the IP in question because it does  
5 affect the competition analysis. The database right is  
6 a peculiar type of right because its predicate for  
7 subsistence is the investment in the collection of the  
8 data. That means that the field of protection conferred  
9 is linked to that particular investment. It is why  
10 I can, with access to the relevant materials, make an  
11 identical database to someone else by drawing upon the  
12 same data and collecting the data for myself.

13 That is why, if Sportradar chooses to make  
14 a database from what they have observed off-tube, that  
15 resulting database will benefit from database  
16 protection, because they have made the investment in the  
17 scout who collects the data. It just happens to be  
18 3 seconds, 4 seconds, 5 seconds, whatever it is, after  
19 the same investment has been made by my clients.

20 So, unlike broadcast copyright or something like  
21 that, you cannot effectively stop the existence of  
22 a very similar product from emerging in due course. You  
23 can of course protect your product against scraping and  
24 that is very important because scraping is endemic in  
25 this industry.

1           Then in relation to confidential information, the  
2 law is very clear. You can control access to a place in  
3 relation to which valuable information is obtainable,  
4 and through that control you can prevent somebody else  
5 exploiting that information before it becomes public.  
6 That is the whole philosophy of TRP that you will hear  
7 about from my learned friends.

8           Now, if you put those two IPR together, as recently  
9 confirmed by the TRP decision, it means that any  
10 organiser of a sport or an event generating data of  
11 value to a bookmaker or anyone else for that matter, can  
12 exploit that value through intellectual property. It  
13 means that there is real force behind the label  
14 "official data". It is more than merely self-serving  
15 nomenclature, there are enforceable rights that sit  
16 behind it, and in reality they are no different to the  
17 rights for concert organisers to prevent bootlegging.

18           It also means, contra to what Dr Niels has said, is  
19 that we are not in a situation of a natural monopoly.  
20 We are in the situation of a recognised legal monopoly  
21 in relation to at least those activities over IP, the  
22 database, the confidential information and the  
23 opportunities that they present.

24           That is why we say in our skeleton argument, when  
25 you are approaching questions like must-have and the

1 whole philosophy of this case, that the reasoning in the  
2 IP cases as to when IP is a must-have is of direct  
3 bearing in the present case. You cannot skirt it by  
4 saying, "No, no, I want access to the stadium", because  
5 that is really ignoring the substance of what is going  
6 on.

7 It also affects, as I indicated beforehand, the  
8 competition analysis for a number of reasons. Firstly,  
9 it affects the context of assessment because in the  
10 period we are concerned with, the market has moved from,  
11 at least part of it, certainly the substantial part  
12 constituted by Sportradar, moving from an open source  
13 model, which is, we would say, an infringement model, to  
14 a model predicated on the recognition of official  
15 rights. That is extremely important when you look at  
16 evolution from 2015 onwards.

17 THE PRESIDENT: When you say infringement model, your  
18 position then is that the terms and conditions in the  
19 ticket prohibiting the deployment of the data, they have  
20 always been there?

21 MR DE LA MARE: Yes. They have. Since time immemorial.  
22 2001. There we go. Time immemorial for me. They are  
23 an adjunct of what any good IP lawyer would stick in,  
24 concerned as they were at all stages about maximising  
25 the revenue of these football clubs.

1           Of course the original focus was probably on  
2 broadcast rights but the wording has always been there,  
3 sufficient to capture what has been going on in this  
4 case.

5           That context is effectively one in which there has  
6 been a battle between the open sources and the official  
7 rights people and, put aside this case and the  
8 must-haves, broadly speaking, the official rights people  
9 have won. Unless you have got a competition law  
10 argument in relation to one tournament being  
11 a must-have, you are going to have to cough up if you  
12 cross someone's official rights in relation to  
13 a competition.

14           So if I send the scouts in to the Northern Irish  
15 football league next time or wherever else it is that  
16 I cannot say it is a must-have, you are going to have to  
17 pay for that privilege because that is an infringement.

18           That is why, incidentally, Sportradar has been  
19 looking acutely at equity investments in various sports.  
20 I will not say what they are. Because that way you get  
21 ownership of the rights in question and avoid this very  
22 problem. So it is a very important fact that the  
23 upstream market as a whole was transitioning to  
24 recognition of and monetisation of official rights to  
25 ensure that the value from the betting generated by

1 those sports competitions was transferred back to the  
2 organisers and stagers of those events. As I have  
3 mentioned already, it is also part of the context of the  
4 escalating rise of prices for official rights, which was  
5 evident even in those slides I showed you this morning.

6 The second reason that the IP context is relevant is  
7 because it is an important factor going into portfolio  
8 pricing. Because if all the official rights are  
9 increasing in value, the difficulties in discerning  
10 causation in price rises are self-evident, because if  
11 the packages are changing materially between any  
12 particular point in time, if I was charging X per event  
13 in 2017 and I am now charging Y per event in 2023 but  
14 the underlying package has fundamentally changed, I have  
15 added in Serie A and FDC and I have taken away La Liga  
16 or whatever it is, you have a basic causation problem of  
17 working out what is being paid for what value. Which is  
18 why the whole issue of pricing is completely hopeless in  
19 the way that Dr Niels apportions it. He simply assumes  
20 effectively that any price increase in between the  
21 periods are attributable to the FDC agreement.

22 The third reason that it is relevant is that value  
23 transfer is relevant to the consumer benefit arguments  
24 for the reasons I described previously. There are two  
25 sets of consumers in play, not one: there are the



1 consumers of football and the consumers of betting.

2 They may be the same people, they may not be.

3 Then the fifth and final reason that is important,  
4 and we have set out the relevant law in our skeleton  
5 argument, is because of the legal analysis that pertains  
6 in a competition case in relation to exclusive  
7 licensing, and in particular, the application of what is  
8 called the limited licence theory. That basically says  
9 licences, exclusive licences of IP, are unproblematic in  
10 competition terms absent a clear case of dominance.

11 Why? Because if I am licensing IP from one person to  
12 another, there is no change in the exclusivity that  
13 originally pertained to and attached to the intellectual  
14 property in the first place. Effectively, it is a test  
15 of vertical integration. You can just imagine that it  
16 never happened. Has anything changed? No, there has  
17 been no change at all. A licence does not change  
18 anything as to the exclusive power of the content in  
19 question. That is exactly the critical reason why my  
20 learned friend Ms Smith is quite right to emphasise the  
21 critical nature of this market as an intermediary  
22 market, because time and time again what you should do  
23 to test the force of the thesis being identified by my  
24 learned friend Ms Kreisberger is just to imagine  
25 a notional vertical integration between FDC and my

1 client. Imagine FDC took its product direct to the  
2 market. That is very illuminating, in my submission.

3 Take my Lord's film library example which I would  
4 like to think you borrowed from paragraph 84 of our  
5 skeleton argument.

6 THE PRESIDENT: Subliminally no doubt.

7 MR DE LA MARE: Subliminally. Because we make exactly that  
8 analogy. The closest proxy to this case, and the reason  
9 why supermarkets are not helpful, supermarkets do not  
10 have any IP knocking around. Film libraries or music  
11 libraries are all about bundles of IP and they are sold  
12 in block. That is what happens. What is critical when  
13 you conduct the mental vertical integration exercise is  
14 this: you appreciate that what is in substance happening  
15 is that this data is being sold to every bookmaker on  
16 the market who wants it. It could not be further away  
17 from the FA -- the Premier League broadcasting scenario,  
18 because the vice in that case was that exclusivity was  
19 conferred on the retail-facing broadcaster, that then  
20 used the popularity of football to leverage in the  
21 market conditions in which it then existed.

22 Those market conditions were themselves highly  
23 germane to the analysis. If you can think back to the  
24 early days of Sky, you had to get a satellite installed  
25 in your house. You had to sign up generally in order

1 that they could recoup the costs of the satellite  
2 technology and the boxes and the installation et cetera,  
3 you generally had to sign up for a two-year contract or  
4 something of that kind. Football was the great charge  
5 product for pay TV to get people to go in. Obviously if  
6 you could leverage the power of football through having  
7 an exclusivity in football, that would have substantial  
8 distorting effects in the market facing the consumer.

9 This case, Bet365 does not have any exclusivity from  
10 the product from FDC or my client; it is sold to all of  
11 the bookmakers. There is no distortive effects on that  
12 market whatsoever.

13 There is actually only one agreement, and you are  
14 going to see it in due course, and it is not one of my  
15 clients' agreements, there is only one agreement that  
16 confers exclusivity on a large bookmaker in relation to  
17 a valuable product. We will come to that in  
18 cross-examination. That is a critical feature of this  
19 case. Because if you go back to the film library  
20 analogy, the example we came up with was not Squid Game,  
21 because it is jolly good but there is only one series.  
22 The best analogy we could come up with was the Marvel  
23 film library, a really large number of films, incredibly  
24 popular, incredibly well attended, incredibly well  
25 viewed, incredibly profitable. You would think

1 something approaching an analogy of a must-have or  
2 something that you really want by way of highly  
3 desirable content, if you were a retail broadcast  
4 platform like Amazon or Netflix or Virgin TV when it  
5 sells films. But far from there being the exclusivity  
6 in relation to Marvel films, the intermediary is selling  
7 the very desirable Marvel films to everyone and that  
8 just brings no foreclosure problems with it whatsoever,  
9 and it breaks up the entire analogy to the FAPL decision  
10 which is really the foundation of most of the harm  
11 thesis.

12 So we think that analogy, carefully used, is very  
13 important, coupled with the realisation that this is an  
14 intermediary market, coupled with the mental thought  
15 exercise of imagining what vertical integration would  
16 look like.

17 So where do we get to when you put all those themes  
18 together? What I would suggest is really revealed is  
19 that you are faced with a case of successful and  
20 pro-competitive entry into the data market by Genius.  
21 Genius was not really even present in relation to data  
22 collection in 2015. Notwithstanding the Perform  
23 agreements which are said to suffer from all the same  
24 vices as the FDC agreement, Genius has managed to enter  
25 into the market through good strategy and it is offering

1 effective competition in conjunction with the uptake by  
2 the sporting bodies of a legal exclusivity model. That  
3 legal exclusivity model is now endemic; it is now  
4 a structural feature of the market and it makes all  
5 arguments about object infringement utterly hopeless.  
6 Because, as you have seen, everyone applies the same  
7 strategy, even Ms Kreisberger's clients are now fully  
8 paid up members of the tier 1 portfolio model and the  
9 leverage it confirms. So it can hardly be an object  
10 infringement for one and not for everyone. It is either  
11 an object infringement for everyone or it is not.

12 But of course it is not an object infringement  
13 because there is nothing that suggests that exclusive  
14 licensing of IP is some kind of fundamental problem.  
15 The limited licence thesis answers that.

16 What Sportradar is really objecting to at the end of  
17 the day is not foreclosure, it is objecting to the fact  
18 that its prior and very effective barriers to entry, the  
19 carefully crafted landscape of factual exclusivity which  
20 it built its strategy around, has crumbled and it is now  
21 engaged in a battle for the acquisition of tier 1 and  
22 other exclusive rights for which it will have to pay  
23 more money than it paid beforehand and that it has  
24 a previously dominant, or on the cusp of dominance  
25 entity is having to change its strategy in order to meet

1           these new market conditions. That is called competition  
2           and that is what it has effectively faced and that is  
3           what it is complaining about as ultimately Dr Majumdar  
4           and Dr Padilla both point out. What is occurring in  
5           this market is symptomatic only of effective and  
6           vigorous competition.

7           THE PRESIDENT: Thank you very much, Mr de la Mare.

8           MR DE LA MARE: Sorry, I meant to say something about the  
9           application. We have reached an agreement that the  
10          application can go in so long as we have the opportunity  
11          to put in our own answering evidence in relation to  
12          theirs. We need seven days for RBB to do a full job on  
13          that. There is a lot to be done. I must indicate also  
14          our basic unhappiness -- I need to have a moan. We do  
15          not understand why this material was presented the day  
16          before yesterday, not least because we have looked at  
17          the metadata of the spreadsheets and they were all  
18          created on either the 9th or the 20 something 6th of  
19          September. So quite why it has taken so long for this  
20          data to be provided to us, we do not know, and no doubt  
21          we will get an explanation in due course.

22                 Is that a convenient moment for a break, my Lord?

23           THE PRESIDENT: Yes, indeed.

24           MR DE LA MARE: I have got Mr Jones in my ear about  
25          something we might need to come back to you about. Can

1 I listen to what he has to say while we take the  
2 shorthand writing break?

3 THE PRESIDENT: We will do that. It is 3 o'clock, we will  
4 rise for ten minutes and resume at 3.10.

5 Thank you very much.

6 (2.59 pm)

7 (A short break)

8 (3.13 pm)

9 MR DE LA MARE: The received wisdom of those who sit behind  
10 me is that it might be helpful if Mr Jones explains a  
11 couple of points of detail on the table that we handed  
12 up, not least since they are his.

13 THE PRESIDENT: Very good.

14 Mr Jones.

15 Opening submissions by MR JONES

16 MR JONES: Sir, I have said I will take no more than  
17 two minutes. I will try to do that.

18 Part of the background also is, firstly, we think  
19 these are extremely helpful and we want to make sure  
20 that you see them in that way as well, especially given,  
21 secondly, the number of late nights that those behind me  
22 had to spend putting them together, which might not be  
23 apparent just from looking at them. There is just two  
24 that I wanted to go back to if I may, please.

25 THE PRESIDENT: Of course.

1 MR JONES: The first is the table per annum contractual  
2 bookings benchmarks.

3 THE PRESIDENT: Yes.

4 MR JONES: I appreciate some of this will be repetitive of  
5 what Mr de la Mare said, but just for clarity, on this  
6 table you see the 19 bookmakers, they are the 19 which  
7 were highlighted in the skeleton argument from  
8 Sportradar. So this was obviously put together at  
9 a time when we thought that was the case we were  
10 meeting. There is, however, quite a strong overlap  
11 between those 19 and the ones which now feature in the  
12 list of the UK-focused bookmakers. So this will remain  
13 relevant. You will keep in mind that the 19 were  
14 Genius' targets so the 19 were taken from a Genius  
15 document which had a focus group of 19 bookmakers. So  
16 it is not necessarily representative of Genius' success  
17 more widely, we might need to look at that, but that is  
18 what the 19 are.

19 On this table you see the benchmark bookings in the  
20 contracts with those 19 bookmakers. Why do I say  
21 benchmark? It is because some contracts have a minimum  
22 in them and other contracts have slightly different  
23 formulations which are essentially expectations between  
24 the parties. There might be penalties for taking more  
25 or less. There are many different variations. We have



1           called them benchmarks essentially to show what the  
2           expectation is. If you look at the second column, it  
3           says "Sportradar pre-FDC agreement". What that means is  
4           the benchmarks in the contracts with each of those 19 in  
5           whichever contract was signed before the FDC agreement.  
6           So it was therefore --

7           THE PRESIDENT: For benchmarks, one could -- I have been  
8           using the phrase "minimums" or things like that.

9           MR JONES: You could use "minimums". The only reason I am  
10          not is that it is -- it does not quite capture --

11          THE PRESIDENT: It doesn't quite-- no I see--

12          MR JONES: -- there are some contractual minimums, but there  
13          are some where you have something slightly different.

14          THE PRESIDENT: Yes.

15          MR JONES: For example, a specified number and a price for  
16          that specified number, but then in the contract some  
17          mechanic, in case you go above or below the specified  
18          number. So it is not always --

19          THE PRESIDENT: No, I understand. That is helpful. But  
20          what you are saying is there is some form of contractual  
21          mechanism which regulates price to, as it were, bulk.

22          MR JONES: Exactly.

23                 So we have got the contracts which were  
24                 pre-agreement and therefore actually in force at the  
25                 time of the FDC agreement. We have then looked at the

1 next contract which was signed, as it were, after the  
2 FDC agreement so that you can see what the change is.  
3 Of course the change is most marked in the Genius  
4 columns on the far right. But Mr de la Mare highlighted  
5 to you the bottom rows showing the totals because they  
6 go up on Sportradar and on Genius' and, as I said, this  
7 relates to Genius' 19 focused bookmakers. If we have  
8 time we might do a different exercise for the new ones  
9 which have been identified, but that is what this shows.

10 In the footnotes of the back, so you were asking  
11 about contracts, we will get some example contracts,  
12 I think is probably the easiest way of giving an  
13 overview of contracts. But in case it is useful, we  
14 have also footnoted references to all the contracts that  
15 have these benchmarks in them with the bundle  
16 references, so you could go to it and follow ...

17 That is that table.

18 The other one which I wanted to look at was the 19  
19 bookmakers summary of negotiations document.

20 Again this relates self-evidently to the 19  
21 bookmakers. The background to this is that Sportradar  
22 in some of its submissions to you has dipped in and out  
23 of a couple of the negotiations that Genius had with its  
24 bookmaker customers and you have a quote here and  
25 a quote there about what was said in the negotiations.

1           Now, a lot of the detailed negotiations and the  
2 records of those negotiations is in the bundles and so  
3 one could try to piece together as much as possible the  
4 entirety of some of these negotiations, and we may need  
5 to do some more on that in due course. But what this  
6 document does is not that. This document tries to give  
7 a much more simplified view. We have located where we  
8 can, of which almost always we have been able to, the  
9 opening proposal, which, as it happens, always came from  
10 Genius, and we have then tried to draw out the main  
11 terms of the opening proposal and contrast that with the  
12 final agreement, essentially just to show at  
13 a high-level what movement there was. The basic point  
14 is there was always movement. Sometimes there was a lot  
15 of movement.

16           Occasionally we have put in a couple of points  
17 during the course of negotiation where we thought it was  
18 necessary to make the chronology clear, if there was an  
19 important change during the course of it. But it is  
20 really opening and closings. So I hope that that helps  
21 make use --

22       THE PRESIDENT: That is very helpful. Thank you very much.

23           Further submissions by MR DE LA MARE

24       MR DE LA MARE: It might be I should also say something  
25           about cross-examination, since I am going to be doing

1 the bulk of the cross-examination, at least initially,  
2 with Mr Lampitt tomorrow and the day after. I think we  
3 should put this marker down. You have heard my concerns  
4 about the four areas of evidence of non-coverage in the  
5 witness statement. There are a vast number of topics to  
6 cover with Mr Lampitt because, effectively, he  
7 replicates the evidence from the five main witnesses,  
8 Mr Ford for FDC and my four witnesses, and there are  
9 a whole bunch of other topics he does not cover. It is  
10 going to be impossible, with respect, to put every  
11 document that might be put to him. You have seen the  
12 size of the H bundles and he does feature pretty  
13 prominently in most of them. I just wanted to put two  
14 markers down really, with respect. The first is  
15 Ms Smith and I are a little bit concerned about whether  
16 or not we can get it all done in two days, we have a lot  
17 of questions to put to Mr Lampitt. Obviously, we will  
18 to have to keep an eye on that as matters progress.

19 The second concern, I think it would be helpful to  
20 have an indication from the Tribunal in relation to  
21 this, and I am sure a certain indication Ms Kreisberger  
22 has been looking for her cross-examination of our  
23 witnesses, where I suspect she faces similar time  
24 compression problems, is that I hope that the Tribunal  
25 will not expect us to put every document that could and

1           should be put, because that is a Sisyphean task; it is  
2           impossible.

3       THE PRESIDENT: To take those points in reverse order: no,  
4           we do not expect every point to be put. We are not  
5           going to operate that kind of formality; in practice, we  
6           rarely do. But clearly you know the areas that matter,  
7           the areas that are contentious. That is where you will  
8           have to focus your fire. Particularly if time is short,  
9           you will not want to go for the uncontroversial or easy  
10          shots. It is the difficult areas that matter. But we  
11          are not going to be drawing inferences based upon  
12          shortness of time and cases not put. That is not the  
13          way we do things.

14                 In terms of time required, there are almost always  
15                 likely to be questions that we have for the witness as  
16                 well, but there is a limit to how far we can extend the  
17                 court day given, whilst I am very prepared to extend the  
18                 sitting day when it is just counsel and the Tribunal's  
19                 tiredness that needs to be borne into account, the  
20                 position is very different when one has a witness, and  
21                 I do not think we can really go beyond a normal court  
22                 day and be fair to the witness.

23       MR DE LA MARE: As I understood it, Sir, you were proposing  
24           on Thursday, because we are starting at 11.00, to sit  
25           until 5.30.

1 THE PRESIDENT: Well, indeed, but that is still a normal  
2 court day. It is just it has been pushed off a little  
3 bit, but we are not starting at 10.30, we are starting  
4 at 11, and we can stretch things. But we cannot go as  
5 unreasonably long as we might because of the witnesses.

6 I do see we have Monday as a non-sitting day.

7 I cannot now remember why that is a non-sitting day.

8 MR DE LA MARE: I am not sure we ever knew.

9 THE PRESIDENT: Do we know why?

10 Well, I am sure I will be reminded out of court why  
11 that might be a blank, but that could be a potential  
12 overspill.

13 MR DE LA MARE: Yes, obviously, one does not want to have,  
14 if it can be avoided, a witness under oath over the  
15 weekend.

16 THE PRESIDENT: No.

17 MR DE LA MARE: We do have the advantage that Mr Lampitt no  
18 longer works for Sportradar and therefore we do not have  
19 that situation where it is particularly acute with  
20 a person under oath over the weekend is a source of  
21 instructions. So I suspect you are going to want to  
22 keep that under rolling review, but then we do have the  
23 option from what you have just been saying, Sir, to go  
24 into Monday. I think -- I have got reams of questions,  
25 I know Ms Smith has as well. I think that is probably

1           realistic.

2           In terms of Mr Perra and Mr Fryba. Mr Jones is  
3 going to be pretty brief with Mr Fryba. I have got  
4 quite a few questions for Mr Perra because I think he  
5 might be the most appropriate person to put a good deal  
6 of questions about coverage to, rather than Mr Lampitt.  
7 He is closer to the horse's mouth, and that may relieve  
8 some of the burden in relation to Mr Lampitt, but we  
9 still have that basic problem. I thought I should flag  
10 it.

11   THE PRESIDENT: No, I am very grateful.

12           Ms Kreisberger, nothing that we have been discussing  
13 causes you any cause for concern in terms of the  
14 timetable? I mean, if we think about using Monday, that  
15 will not cause your side any problems? I say that  
16 because I would want to hear from you if there were to  
17 be issues.

18   MS KREISBERGER: Yes, thank you for that, Sir. What

19           I cannot -- who I cannot speak for at the moment is  
20           Mr Lampitt, for instance.

21   THE PRESIDENT: No, indeed.

22   MS KREISBERGER: So I do not think there will be any  
23           problems from the team before you, but obviously,  
24           witness availability I do not know about. But, Sir,  
25           I did want to address you on this additional material

1           that we have seen for the first time from Genius, these  
2           tables. I think a version was also sent across last  
3           night, but we have not had an opportunity to digest what  
4           was sent across.

5           THE PRESIDENT: We will come to that in a moment. But  
6           I wonder if you would not mind, when we rise today,  
7           raising with Mr Lampitt his availability on Monday.  
8           I will ensure that we check that I have an understanding  
9           as to why Monday is clear. I am sure it is clear for  
10          a reason, but if that reason has evaporated, then we  
11          ought to consider using it. But we do need to know that  
12          position fairly quickly because it will affect the  
13          approach that counsel cross-examining takes with the  
14          witness.

15          MS KREISBERGER: Yes, understood. Could I just take  
16          instruction for a moment.

17          THE PRESIDENT: Of course. (Pause).

18          MS KREISBERGER: My team are making enquiries.

19          THE PRESIDENT: I am very grateful to you. That is very  
20          helpful.

21                 Well, we will try and get an answer to that,  
22          Mr de la Mare, as quickly as possible, but I think  
23          I really do not want anyone rushing their  
24          cross-examinations, because in a sense the evidence is  
25          the most important part of trials. I mean, submissions



1           are very, very useful in drawing together the evidence,  
2           but one does need to get the evidence in first.

3       MR DE LA MARE:   Yes.

4       THE PRESIDENT:   So we will try and proceed along those  
5           lines.

6           Just before we move on to the question of additional  
7           evidence, we have looked at seven days and that brings  
8           us within good time before the experts come in, so for  
9           ourselves we are happy with that, but again, that is  
10          something I want to check with Ms Kreisberger --

11       MR DE LA MARE:   It gives Dr Niels plenty of time too.

12       THE PRESIDENT:   Well, that too.

13       MR DE LA MARE:   What I discussed with Mr Bates, who was the  
14          interlocutor on this point, is that we should be trying  
15          to encourage the experts to talk to one another so that  
16          we can get the material if possible into a common form  
17          that is possible in some of these spreadsheets.

18       THE PRESIDENT:   It goes without saying that the more that  
19          can be agreed in terms of the factual mechanics, the  
20          better, so that we can focus on the differences in  
21          opinion as to how the data is to be interpreted rather  
22          than what the data actually is.  That is always helpful  
23          for the Tribunal.

24          So Mr de la Mare, is there anything else by way of  
25          housekeeping?

1 MR DE LA MARE: No.

2 THE PRESIDENT: Ms Kreisberger, then, seven days, does that  
3 work for you?

4 MS KREISBERGER: It does. So just to be clear, that would  
5 cover the material now served by Genius that Mr Jones  
6 just took you through.

7 THE PRESIDENT: Sorry. We are first of all talking about  
8 seven days for Genius to respond to the material that  
9 came from Dr Niels --

10 MS KREISBERGER: Yes, so --

11 THE PRESIDENT: -- and now you are --

12 MS KREISBERGER: I am asking that sauce for the goose --  
13 yes. I do not want to have a moan like Mr de la Mare.  
14 I just want to make sure that we have an opportunity to  
15 respond to this new material which Dr Niels will also  
16 need to have a look at. We simply have not had an  
17 opportunity to. We have just been shown this.

18 THE PRESIDENT: My understanding is that this material is  
19 not new material in the sense that it is not originating  
20 new evidence. It is extractions from stuff that is in  
21 the record, so to that extent there may be a difference  
22 between that which Dr Niels produced and that which has  
23 been produced here. That said, our view is we would  
24 rather have stuff in than out and I am not going to make  
25 any formal direction in relation to what is extraction

1 of material but you obviously should feel free to  
2 respond as you think appropriate. We will keep an eye  
3 on fairness in terms of when matters are adduced. No  
4 doubt you will be producing different spins, if I can  
5 use that word neutrally, on the factual material right  
6 the way through to closing. The weight we attach to  
7 that will be affected by the ability of the other side  
8 to respond to it. So if you produce a new spin in the  
9 course of your closing submissions, chances are we will  
10 look at it with a fairly sceptical eye because the other  
11 side will not have a response.

12 So, yes, if you are going to produce a response to  
13 this material during the course of the trial, well, of  
14 course, please do so, and we will hear very carefully  
15 any objections, if any, when that is done. But I am not  
16 going to give a direction as to when you should do it  
17 by.

18 MS KREISBERGER: I appreciate that. I think in practice we  
19 would be looking at the same seven-day period which  
20 would seem fair.

21 THE PRESIDENT: Yes. Well, that is a helpful indication and  
22 I am sure Mr de la Mare, Mr Jones, have taken note that  
23 there is going to be something coming in.

24 MR DE LA MARE: That is absolutely fine. Everyone can mine  
25 the evidence for whatever they want to produce by way of

1 helpful summary table to the Tribunal, and doing it in  
2 advance is probably a better idea than doing it at the  
3 last minute.

4 THE PRESIDENT: Indeed. Very good. In that case ...

5 MS LANE: I hesitate to stand up.

6 THE PRESIDENT: No, I think the housekeeping has gone away  
7 now or been dealt with. Ms Lane, over to you.

8 Opening submissions by MS LANE

9 MS LANE: Excellent.

10 We are winging our way to the High Court notionally  
11 and I am going to call my Lord "my Lord", I am  
12 notionally putting on my wig and gown. I am apologising  
13 in advance for the fact that I fear my submissions will  
14 not reach the level of sophistication of the competition  
15 law submissions that we have heard. But the good news  
16 is we do not need sophistication for the private law IP  
17 claims because we say the case that we bring is  
18 extremely clear and essentially the defence which has  
19 been advanced is very, very thin, almost non-existent.

20 Now, just so that my Lord understands the way in  
21 which we are going to divide our submissions, Mr Mill is  
22 going to deal with breach of confidence, which my Lord  
23 will appreciate is one of the two causes of action that  
24 we bring in the High Court side of the case, and I am  
25 going to deal with unlawful means conspiracy. Both of

1 these causes of action are based on what we are calling  
2 the attendee terms and the attendee terms are comprised  
3 of the ground regulations and also the terms and  
4 conditions of entry for specific clubs, and I will come  
5 on to explain that in a little more detail in a minute.

6 In relation to the attendee terms, helpfully, there  
7 have been some pretty major admissions made by  
8 Sportradar, both in its defence and in its skeleton  
9 argument on the High Court side of the claims. I want  
10 to start off by looking at Sportradar's skeleton  
11 argument which is in bundle {A/6/3} and in particular at  
12 footnote 5. What we see from footnote 5 which starts:

13 "It also follows, and the Ds accept, that if SR's  
14 CAT claim fails, then the upstream exclusivity afforded  
15 to Genius under the Agreement is not an unlawful  
16 restriction of competition and the Attendee Terms which  
17 implement that exclusivity are not unlawful."

18 Then follows an important sentence:

19 "If that is the case, SR accepts that it must stop  
20 sending scouts into stadia in order to collect LLMD in  
21 breach of valid terms of entry."

22 So essentially what is being said here is that there  
23 is a breach of the attendee terms, subject of course  
24 always to the competition law defence and I should also  
25 have pointed out at the beginning that Mr Mill is going

1 to deal with the interaction between the competition  
2 case and the High Court claim, and point out that the  
3 competition law case can never actually be a defence to  
4 these High Court claims. So I am going to leave him to  
5 deal with that.

6 But we can see a bit more detail about the attendee  
7 terms from the pleadings and I am going to ask my Lord  
8 to turn those up in bundle B at tab 11 first of all,  
9 which are our re-amended particulars of claim. It is  
10 {B/11/5}. At the bottom, I hope my Lord can see  
11 a heading, "The Attendee Terms"?

12 THE PRESIDENT: Yes.

13 MS LANE: Then over the page {B/11/6}, what is explained is  
14 that first of all clubs utilise ground regulations which  
15 contain provisions to prevent the collection of what we  
16 call here the FDC data, by attendees at matches  
17 organised by the Three Leagues. It then explains at  
18 paragraph 18 that they are displayed prominently at the  
19 grounds and also at points of sales for tickets.

20 Then what is set out at paragraphs 19, 20 and 21  
21 are, first of all, the Premier League ground regulations  
22 for the 2019/2020 season, then the EFL ground  
23 regulations for the 2019/2020 season and, finally, those  
24 for the Scottish leagues. They are set out in detail  
25 there, but I was going to ask my Lord to turn up the

1 Premier League ground regulations actually in bundle H.  
2 It is volume 13, tab 346 {H/346}. Then I think behind  
3 tab 346 there should be a tab 346.4 {H/346.4/1}. The  
4 reason for turning them up is so that my Lord can see  
5 them in context and also so that I can just cover  
6 a point that is taken in the Sportradar skeleton about  
7 a ground regulation that we do not cite actually in our  
8 pleading. So my Lord should see there at the beginning,  
9 you have the definitions of ground, match and material  
10 in bold and:

11 "Material' means any audio, visual and/or  
12 audio-visual material and/or any information or data".

13 Then over the page {H/346.4/2} we have got, first of  
14 all, at the bottom of the second page, clause or  
15 regulation 16, which is a prohibition -- well, it starts  
16 by having a permission on the fact that you can bring  
17 your mobile phone and other mobile device into the  
18 grounds.

19 But then there is a clear proviso or prohibition  
20 that they can only be used for personal and private use  
21 and:

22 "... for the avoidance of doubt and by way of  
23 example only, that shall not include the capturing,  
24 logging, recording, transmitting, playing, issuing,  
25 showing, or any other communication of any Material

1 [which we have just looked at] for any commercial  
2 purposes."

3 Secondly:

4 "No Material that is captured, logged, recorded,  
5 transmitted, played, issued, shown or otherwise  
6 communicated by a mobile telephone or other mobile  
7 device may be published or otherwise made available to  
8 any third parties including, without limitation, via  
9 social networking sites."

10 So, as I understand that, you can phone your mum or  
11 your mate to say a goal has been scored, but what you  
12 cannot do is log a load of data on your mobile phone and  
13 send it and use it for commercial purposes.

14 Moving on to regulation 19 {H/346.4/3}, there is  
15 then some further prohibitions which repeat in pretty  
16 similar words:

17 "Save as set out in paragraph 16 above, no person  
18 ... may capture log [et cetera] material in relation to  
19 the Match ... [and they cannot] bring in any equipment  
20 or technology which is capable of [doing all those  
21 things and] the Club reserves the right to reject you  
22 from the Ground in circumstances where you breach this  
23 paragraph 19."

24 So we say it is crystal clear from that and it would  
25 be crystal clear to the scouts that there is



1 a prohibition on collection of data.

2 We should, since we have got the bundle open, just  
3 look briefly at regulation 26 because this is mentioned  
4 in Sportradar's skeleton argument at paragraph 31  
5 {H/346.4/4}. In particular it is relied on because it  
6 starts by saying, and this is the only bit that is  
7 actually cited in Sportradar's skeleton, that:

8 "... the Matches for which the tickets have been  
9 purchased are public ..."

10 However, the clause goes on to say and make clear  
11 that the purpose of telling the spectator attendee that  
12 the match is public is that -- in order to point out  
13 that the attendee has no expectation of privacy with  
14 regard to their actions or conduct at matches. So, in  
15 our submission, it is not, by that clause, telling you  
16 that the data is free to be collected and used, and that  
17 is very clear.

18 Indeed, if we now go back to the pleadings but move  
19 on, I am going to show my Lord in a minute the  
20 admissions that we have got in relation to these clauses  
21 in Sportradar's defence. But before we do that --  
22 again -- sorry, bundle {B/11/9}, after the citation here  
23 of the ground regulations from the Scottish leagues, we  
24 then have a reference to the ticket conditions at  
25 paragraph 22. So, again, there displayed prominently at

1 point of sale for tickets is the assertion at  
2 paragraph 23. Then by way of example, we have got some  
3 Premier League home match ticket conditions for the  
4 2019/2020 season set out there.

5 In a minute, I will come back to where there is some  
6 more evidence of the ticket conditions and my Lord can  
7 read what those conditions are over the page {B/11/10}.  
8 Importantly, at 2.2, towards the end of that clause:

9 "All access to the Ground pursuant to a Home Match  
10 Ticket shall be for the purposes of private enjoyment of  
11 the Match only, not for any commercial purpose (and no  
12 authorisation is given or implied in respect of the  
13 carrying out of any commercial activities)."

14 We then, in the following clauses, have some similar  
15 wording about not using your mobile phone or any other  
16 device to capture data. Furthermore, if my Lord goes  
17 down to the bottom of page 11 {B/11/11}, you have  
18 something on the reverse of your ticket telling you not  
19 to collect data.

20 Just to finish on this pleading, if we now turn to  
21 page 15 {B/11/15}, at the bottom of the page there is  
22 a heading "Breach of Attendee Terms and trespass". Over  
23 the page at paragraph 35, we have pleaded out some  
24 specific breaches in relation to the specific scouts who  
25 have been joined as representative defendants in

1 relation to specific matches they attended and the  
2 breaches are pleaded then at paragraphs 36 and 37.

3 THE PRESIDENT: Yes.

4 MS LANE: Now, the response to all of this is found in  
5 Sportradar's defence, which is in the next tab, so  
6 {B/12}. We can start I think at page 4 {B/12/4}. It is  
7 starting at paragraph 20 under the heading "The Attendee  
8 Terms". There is an admission at paragraph 20(a) that  
9 the ground regulations contain provisions to prevent the  
10 collection of LLMD by spectators. There is an admission  
11 as to the contents of the ground regulations that we  
12 have just looked at. Then at paragraph 21, there is an  
13 admission about the ticket conditions containing  
14 provisions to prevent collection of LLMDs by spectators  
15 and an admission of the specific pleaded Premier League  
16 ticket conditions.

17 We then come to paragraph 23 and we see what are the  
18 defences that are being relied upon {B/12/5}. First of  
19 all, it says, paragraph 11 above is repeated and that is  
20 the paragraph that says that, as pleaded in the CAT  
21 claim form, the ticket conditions are said to be  
22 unenforceable.

23 THE PRESIDENT: So that is the competition law defence.

24 MS LANE: So that is the competition law defence. Also, at  
25 subparagraph (b), it is said that the restrictions are

1 severable.

2 THE PRESIDENT: That is not a defence, that is simply an  
3 assertion that if there is a problem with the  
4 provisions, one can put a blue pencil through them and  
5 leave the rest of the contract un--

6 MS LANE: Yes. Indeed, and that is a point that, as  
7 I understand it, Mr Mill is going to touch upon.

8 Therefore, it says over the page, at page {B/12/6}:

9 "Accordingly, in each case the Scout ... was ...  
10 entitled to attend and watch the Match ..."

11 But it is then admitted that:

12 "... subject to the foregoing, the Attendee Terms  
13 are contractually binding ..."

14 So in other words, subject to our competition law  
15 unenforceability point and the severance point, it is  
16 accepted that the attendee terms, unsurprisingly one  
17 might think, that the attendee terms are contractually  
18 binding.

19 Then it is also accepted at paragraph 29, which is  
20 on page {B/12/8}, that the examples given in the  
21 particulars of claim, those are the specific breaches by  
22 specific scouts, are admitted subject to the points made  
23 in paragraph 23. That is the paragraph we have just  
24 looked at.

25 Then, finally, on the pleading, paragraph 33(c) is

1 important because it is admitted that Sportradar scouts  
2 were aware of the contents of the ground regulations and  
3 ticketing conditions and that FDC had appointed Genius  
4 as its exclusive licensee, because Sportradar brought  
5 these matters to their attention {B/12/9}. So in other  
6 words Sportradar and the scouts were both aware of the  
7 attendee terms and the fact that there were exclusive  
8 rights residing in FDC and then Genius as its exclusive  
9 licensee.

10 So this is why I say, in some ways, this is very  
11 straightforward because it is accepted that there are  
12 contractual terms. It is accepted that the contractual  
13 terms prohibit collection of LLMD by spectators and  
14 subject to the competition law defence therefore, there  
15 is a breach of contract by the scouts when they collect  
16 data from matches.

17 I also, just for completeness, wanted to let my Lord  
18 know that in bundle J my Lord can find all the terms and  
19 conditions that were available on clubs' websites for  
20 the ticket conditions for the 2021/2022 season. So what  
21 my Lord will see from that is that there is a range of  
22 ticket conditions, some simply point out the ground  
23 regulations and therefore, as a bare minimum, you have  
24 the ground regulations, and some are more sophisticated,  
25 more akin to the type that we saw the Premier League

1 ticket conditions in 2019/2020. But they are all there  
2 in evidence should it become necessary to look at them,  
3 but I am assuming for the purpose of opening, my Lord  
4 does not want me to take --

5 THE PRESIDENT: No, I do not. Just though so that I am  
6 clear, the two matters -- I do not want you to open them  
7 fully but I would like to get a feel for what I need to  
8 be deciding. There is a question about sampling I think  
9 in terms of the different ways in which the grounds are  
10 held and there is also a question I think of standing,  
11 about whether this is a claim you can bring. I mean,  
12 I have seen reference to those. If those points are  
13 live, then I would like to know about it. If they are  
14 not live, then obviously I do not need to worry.

15 MS LANE: Yes, I think I can assist with both of those  
16 points.

17 THE PRESIDENT: I am grateful. If it is for Mr Mill,  
18 then --

19 MS LANE: No, I think they are probably both for me. So in  
20 relation to sampling, there is what is currently a draft  
21 consent order because it has not been made yet at  
22 bundle {D/24}, but that was before my Lord, as  
23 I understand it, at the PTR. What that does is  
24 essentially divides all the ticket conditions into  
25 categories, those are the ticket conditions in bundle J,

1 and so therefore shows my Lord what the position is for  
2 this current season, 2021/2022. Well, maybe that is  
3 last season, but anyway for that year. For that year,  
4 my Lord has all the ticket conditions that can be found  
5 on websites so in a sense there is not a sample because  
6 it is everything for that year.

7 Where sampling comes into play or might come into  
8 play is with the 2019/2020 season. For that season, as  
9 my Lord may recall from the PTR, what we have got is six  
10 different clubs and in fact they are the clubs with  
11 the particular particulars of breach that we just looked  
12 at in, whatever it was, paragraph 35. So for that  
13 season, we have only got the ticket conditions for those  
14 clubs rather than for every single club in the  
15 Three Leagues.

16 In my submission, whilst there is an order saying  
17 that my Lord can look at this sample to make certain  
18 findings of fact, it may well be that my Lord does not  
19 need to make specific findings of fact about what the  
20 position was in 2019 other than appreciating that there  
21 were ticket conditions which prohibited spectators from  
22 collecting data as to which there is not any dispute.

23 In my submission, and perhaps this is a matter for  
24 Mr Mill, the only reason the precise terms and  
25 conditions might matter is in relation to the

1 severability point where my Lord might want to look at  
2 the different types of terms and conditions and say,  
3 well, in this case, one can use a blue pencil and in  
4 this case one cannot. That is the ticket conditions.

5 The other aspect of the evidence where my Lord does  
6 not have chapter and verse for every single club because  
7 it would have been disproportionate is in relation to  
8 the ownership of the grounds and what the position is in  
9 relation to the ownership of the grounds. So in some  
10 cases, I think there are three categories, and this is  
11 relevant for trespass, which basically is not disputed,  
12 but so my Lord knows what the position is, there are  
13 some cases where the club owns its own grounds, there  
14 are some cases where it is a lessee of the grounds and  
15 there are a very small number of cases where it has  
16 a contractual licence. In the small number of cases,  
17 I think it is half a dozen or so, where there is  
18 contractual licence, we have got the terms of the  
19 contractual licence in evidence and we have also for the  
20 six representative clubs got the Land Registry documents  
21 which show whether they are an owner or a lessee of the  
22 grounds.

23 Now, that is all very interesting but, for reasons  
24 I am going to come on to when we come on to unlawful  
25 means conspiracy, I do not think it makes much odds,



1           because for the unlawful means conspiracy, my Lord  
2           has -- obviously, one of the things, got to be satisfied  
3           of is that there is an unlawful means, and we --

4       THE PRESIDENT: But breach of contract is unlawful means --

5       MS LANE: We have got a breach of contract, exactly. So  
6           whilst we also rely on breach of confidence and also  
7           trespass, and I think there is also procuring breach of  
8           contract against Sportradar and so on, in fact, if  
9           my Lord finds in favour on the breach of contract aspect  
10          and therefore bases the unlawful means conspiracy on  
11          that, it is unlikely to make any difference whether we  
12          can also succeed on trespass.

13       THE PRESIDENT: Ms Lane, you will not be surprised to learn  
14          that the Tribunal put before me the two drafts order  
15          that had been agreed. I looked at them very carefully  
16          and decided not to make them at this stage, because it  
17          seems to me that what was being done, I am sure with the  
18          best of intentions, was effectively fettering not the  
19          parties, but the Tribunal in the way it was minded to  
20          run the case. So, for instance, there was a paragraph  
21          dealing with separate judgments because I gave an  
22          indication at the PTR that probably the best way of  
23          dealing with the fact that we are hearing two separate  
24          actions together in front of different constituted  
25          tribunals probably rendered separate judgments sensible.

1           Now, that remains my view, but I am certainly not  
2           going to be making an order in that regard, telling  
3           myself to write separate judgments, because, first of  
4           all, I do not need an order to do that, and secondly,  
5           I may change my mind.

6           MS LANE: Yes.

7           THE PRESIDENT: Now, similarly, the question of sampling is  
8           one that I was pretty disinclined to make an order until  
9           I had understood exactly why one was sampling certain  
10          grounds, and that of course is informed by what actually  
11          is the list between the parties. Now, my understanding  
12          from the pleadings is that you are really just trying to  
13          make good necessary averments which arise out of the  
14          non-admission by the defendants to this claim in respect  
15          of your causes of action.

16          MS LANE: Certainly in relation to trespass, there is  
17          non-admissions, and so that is why then, potentially,  
18          one might have needed the evidence in relation to the  
19          precise land-owning position.

20          THE PRESIDENT: Yes.

21          MS LANE: As matters have transpired, and we are going to  
22          look at the Sportradar skeleton argument in a minute,  
23          all that seems to have fallen away. There is no section  
24          in their skeleton argument on trespass and why it might  
25          be said we have not got a cause of action in trespass.

1           It seems to essentially be accepted that we have a cause  
2           of action in trespass. So that is the position with  
3           regard to trespass.

4           In relation to breach of contract, we have these  
5           extensive admissions anyway and my Lord has all the  
6           material in relation to the 2021/2022 season. Should  
7           my Lord find that useful, it is there in bundle J.

8           JUDGE: Yes. Well, Ms Kreisberger, if I have to go through  
9           these factual questions, I of course will. I am not  
10          necessarily sure that sampling is the way forward, but  
11          if I need to slide into my judgment an examination of  
12          the various documents to work out whether there is or is  
13          not a proper cause of action in light of non-admissions  
14          I will do so. But I am pretty reluctant to do that if  
15          it is really just a technical point that is being run.  
16          Now, a non-admission is a non-admission, but is there  
17          actually a point here that I need to grapple with? Or  
18          are you simply saying we are putting the claimants in  
19          this matter to proof?

20          MS KREISBERGER: My Lord, I am going to have to come back to  
21          you on that.

22          THE PRESIDENT: No, that is fine.

23          MS KREISBERGER: Mr Howe is leading on the High Court claim  
24          so I --

25          THE PRESIDENT: Defer to him, of course.

1 MS KREISBERGER: -- defer to him on that.

2 THE PRESIDENT: Similarly, I think it would be helpful to  
3 understand whether the trespass point actually makes any  
4 difference. I mean, again, it is something I am quite  
5 prepared to go into but we have limited time. I have  
6 half an eye on costs. I really do not want to be  
7 requiring the parties to jump through hoops that, at the  
8 end of the day, do not matter. So if we are really  
9 talking about a competition law defence, which is the  
10 essential thrust of your case, I would rather be able to  
11 focus my thinking on that than cause the distraction to  
12 everyone by looking at things which, at the end of the  
13 day, are, after I have spent the time, open and shut.

14 Now, that is all I am going to say because I am in  
15 the parties' hands. If the issues remain live, even as  
16 non-admissions, then I will go into them.

17 MS KREISBERGER: That is understood.

18 THE PRESIDENT: But I would rather we stripped out of the  
19 case perfectly proper pleading points but ones which, at  
20 the end of the day, are not going to make any difference  
21 to the result. So I will leave it there. The only  
22 other point, and it may be that Ms Lane wants to take  
23 the lead on this, is the point that I saw in the  
24 footnote in the written submissions which was a point  
25 that the claimants are not the proper claimants to bring

1           these cases. I have not seen that in the pleadings but  
2           I may have missed it.

3           MS LANE: My Lord, I was going to come back to that and I am  
4           glad my Lord mentioned it again because I had actually  
5           forgotten.

6           The point on that essentially is that, if we were  
7           bringing a case of breach of contract, then the clubs  
8           would need to be party to the proceedings. But in fact  
9           we are bringing a case of unlawful means conspiracy and  
10          that is what I am going to turn to now.

11          THE PRESIDENT: I see.

12          MS LANE: So we do not need the clubs to be a party to the  
13          proceedings. My Lord, just briefly commenting on  
14          something my Lord said a moment ago to my learned  
15          friend, we ourselves have been thinking that there is so  
16          little defence put up, quite frankly, by Sportradar to  
17          the IP claim, subject to the points about can the  
18          competition law case be a defence, that we wondered why  
19          Sportradar did not do the decent thing and just said,  
20          "We accept that subject to the competition law case you  
21          have a good claim for unlawful means conspiracy and  
22          breach of confidence", we have been saying that to them  
23          in correspondence but, sadly, that has fallen on deaf  
24          ears, which is why I now have to turn to the very thin  
25          points that are put up in defence of the unlawful means

1 conspiracy claim.

2 So I am going to start with a very brief word on the  
3 law and I hope that it is helpful to say that there does  
4 not seem to be a substantive dispute on this. I am  
5 going to make that good just by very briefly showing  
6 my Lord first of all our skeleton argument at  
7 bundle {A/5/25}, and in particular there is a reference  
8 there at paragraph 93 to the summary by Mrs Justice  
9 Cockerill which we say is cited with approval in, among  
10 other cases, ED&F Man Capital. That provides a helpful  
11 precis of the main legal principles relating to unlawful  
12 means conspiracy.

13 If my Lord then turns in the same bundle to tab 6,  
14 {A/6/7}, what my Lord will see at paragraph 19 is  
15 a reference to a decision of Mr Justice Bryan called  
16 Lakatamia Shipping. At paragraph 79 of that case, which  
17 is set out in paragraph 19, there is in fact the summary  
18 by Mrs Justice Cockerill which my Lord can see from the  
19 footnote 10 is the same summary that we refer to, but we  
20 have referred to it in the ED&F case and they have  
21 referred to it in the Lakatamia Shipping case. So,  
22 gloriously, we are on the same page with the same  
23 summary of the law and that is good news, in my  
24 submission, and suggests that there is not any great  
25 dispute of law here.

1           Now, my Lord, I had planned to take my Lord to the  
2 relevant paragraphs of ED&F, but I am very conscious  
3 that I also need to leave time for Mr Mill. So I could  
4 take my Lord quickly through those paragraphs or I could  
5 tell my Lord what the paragraphs are for the note, just  
6 in case Mr Howe turns up at some point and has something  
7 to say about the law. The paragraphs that I wanted  
8 my Lord to look at are paragraphs 465 to 466, which are  
9 essentially a reference to the Kuwait Oil Tanker  
10 formation of the principles and also to Mrs Justice  
11 Cockerill's summation. Then also paragraphs 469 and 487  
12 to 489. The reason for those latter two references is  
13 they deal with the question of whether there is  
14 a combination and the question of intention to injure.

15           If my Lord turns now in the same document, that is  
16 the Sportradar skeleton argument, to paragraphs 42 to  
17 47, my Lord will see that there are three points taken  
18 in this skeleton argument about unlawful means  
19 conspiracy by Sportradar. First, it says --

20 THE PRESIDENT: Which tab is that? 42 to 47 did you say?

21 MS LANE: Yes, page 12, {A/6/12}. Does my Lord have that?

22 THE PRESIDENT: Yes, I do, thank you.

23 MS LANE: So there are three points in bold. The first  
24 point at paragraph 43, it is said that the defendants  
25 have not engaged in a combination or agreement. The

1 second, that none of the acts relied upon by the  
2 claimants were or are unlawful. The third, that none of  
3 the defendants intended to injure the claimants.

4 I am going to start by dealing with point 2 very  
5 quickly which is the argument that there is no unlawful  
6 means. We say, well, actually we have already seen that  
7 there is an unlawful means that is admitted which is --  
8 subject to the competition law point, which is the  
9 breach of contract. If my Lord looks up to  
10 paragraph 45, it is said the scouts have not engaged in  
11 breach of contract and/or trespass, but then it is clear  
12 from the next sentence that the defence to that is just  
13 the enforceability of what they call the anti-scouting  
14 provisions, but that is the attendee terms.

15 THE PRESIDENT: Yes.

16 MS LANE: So that is essentially an acceptance of the breach  
17 of contract and trespass case, subject to the  
18 competition law defence.

19 There is then, at paragraph 46, an argument about  
20 whether Sportradar has induced or procured the breach of  
21 contract but we do not need an additional unlawful  
22 means. We have got our breach of contract or trespass,  
23 we do not need to worry about whether we meet all the  
24 criteria for inducing or procuring breach of contract,  
25 although we would say clearly that we do.



1           Moving back to point 1, which is there is no  
2 combination or agreement, intriguingly this point is not  
3 even pleaded against Genius, it is only pleaded against  
4 my client. But, in any event, it is a bad point. So  
5 essentially, as my Lord will appreciate from the law as  
6 outlined by Mrs Justice Cockerill, and one can flick  
7 back to that on page 7 {A/6/7} and it is (i):

8           "It is not necessary for [all] the conspirators to  
9 ... join the conspiracy at the same time ... [they] must  
10 be sufficiently aware of the surrounding circumstances  
11 and share the same object for it properly to be said  
12 that they were acting in concert ..."

13           So the question is whether the parties are  
14 sufficiently aware of the surrounding circumstances and  
15 share the same object. We have got three points on  
16 this. First of all, Sportradar and the scouts all have  
17 the same object, which is to collect data from the  
18 Three Leagues. Secondly, they all know that that is  
19 contrary to the attendee terms. We have seen that  
20 admission in the Sportradar defence. Thirdly,  
21 Mr Lampitt gives some evidence in his second statement  
22 at paragraphs 50 to 60 about the co-operation between  
23 Sportradar and the scouts. I will not turn that up now  
24 but it is pretty clear that you have got to have  
25 co-operation if you are sending a scout into a stadium

1           who is then going to send the data back to the ranch --  
2           back to Sportradar, it is just impossible to see how  
3           that cannot amount to a combination. All we are given  
4           here essentially, in paragraph 43, is a recitation of  
5           what the authority says you have to have and it is  
6           asserted that they have not got it, without really any  
7           analysis of the facts.

8           Then moving on to point 3 which is intention to  
9           injure, this is where it might have been helpful to go  
10          through ED&F in a little more detail, but time is moving  
11          on. Critically, if we go back to the summary of  
12          Mrs Justice Cockerill, and that is back at page 8 this  
13          time of the same document {A/6/8}, (iii), there is case  
14          law in OBG -- in the shape of OBG v Allan, that in some  
15          cases there may be no specific intent but intention to  
16          injure results from the inevitability of loss. That is  
17          Lord Nicholls who said:

18                 "The defendant's gain and the claimant's loss are,  
19                 to the defendant's knowledge, inseparably linked. The  
20                 defendant cannot obtain the one without bringing about  
21                 the other. If the defendant goes ahead in such a case  
22                 in order to obtain the gain he seeks, his state of mind  
23                 will satisfy the mental ingredient of the unlawful  
24                 interference tort."

25          So the critical point here is that Sportradar's gain

1 is inseparably linked to loss to Football DataCo and  
2 Genius. As we have already seen, there was the  
3 admission of knowledge by Sportradar and the scouts that  
4 Football DataCo had appointed Genius as its exclusive  
5 licensee, that there was exclusivity. If we go back to  
6 paragraph 47, all that is said here by Sportradar in  
7 defence of this point is that:

8 "Causing harm to the [claimants] was neither the  
9 means nor the end of the [defendants'] actions;  
10 [Sportradar] acted with the intention of safeguarding  
11 its business and the scouts attended matches on behalf  
12 of Sportradar, [et cetera]." {A/6/13}.

13 What appears to be suggested here is that you need  
14 a predominant intention to injure but that is not right  
15 on the case law. It is good enough if Sportradar's gain  
16 is inseparably linked to loss to us and we say that that  
17 is clearly the case here.

18 My Lord, time flies when you are having fun and  
19 I fear that I have not left much time for Mr Mill, but,  
20 unless you have any questions, that was all I was  
21 proposing to say.

22 THE PRESIDENT: No, I have not. I think, before Mr Mill  
23 rises, I will just give an indication which I hope will  
24 assist Ms Kreisberger and her team. At the moment these  
25 are issues that are open, the claim is not, dare I say,

1           rocket science. I think I see it at the easy end of the  
2           spectrum in terms of understanding the law. If I have  
3           to decide these matters, then I will and my position at  
4           the moment is these are live and I will go through them  
5           and decide them.

6           Whether I am obliged to do so is a matter I am going  
7           to put firmly in Ms Kreisberger's court. If you want me  
8           to dial back any of the points, then you must be clear  
9           about that and I will react accordingly. But at the  
10          moment I am not going to make any ruling about sampling,  
11          I will take my own view about the preponderance of the  
12          evidence on the grounds and what inferences I can draw  
13          from the various materials that are in and I will,  
14          obviously, apply the relatively straightforward law to  
15          the facts as I find them in the material. So that is  
16          what I am going to do unless I am told by Sportradar  
17          that it is not necessary.

18          I hope that helps, Ms Lane, in terms of what you are  
19          going to have to do over the course of the next few  
20          weeks.

21          MS LANE: I am very grateful for that indication and I will  
22          leave it to Mr Mill to go through the breach of  
23          confidence.

24          THE PRESIDENT: Yes, Mr Mill.

25          MR MILL: I dare say my clients are entitled to take such

1           comfort as properly can be taken from my Lord's words.

2           THE PRESIDENT: Sauce for the goose is sauce for the gander.

3           MR MILL: Quite.

4           THE PRESIDENT: Yes, that is exactly right.

5                           Opening submissions by MR MILL

6           MR MILL: My Lord, very briefly then, the following words

7                           fell from the lips of my learned former pupil, at

8                           [draft] page 78 of this morning's transcript: "there is

9                           no defence to the IP claim unless there is a competition

10                          law defence". I know what my learned friend intended to

11                          say is that there is no defence to the IP claim

12                          irrespective of whether there is a competition law

13                          defence.

14                          Your Lordship will have seen our skeleton argument

15                          on that, but can I just briefly show my Lord how this

16                          point arises.

17           THE PRESIDENT: Yes.

18           MR MILL: We start with the pleadings and in the competition

19                          proceedings, so your Lordship has the origin of anything

20                          approaching a competition law argument, we go to

21                          paragraph 93, which is on page 45 of {B/1/45}.

22           THE PRESIDENT: Yes.

23           MR MILL: My Lord, your Lordship can read that to himself

24                          but, as I read that paragraph, that is a reference to

25                          justification for the grant to Genius of an exclusive

1 licence for five years. What they there say is:

2 "Reliance on any restrictions contained in such  
3 terms and conditions ... in order to give effect to the  
4 said unlawful abuse is, in turn unlawful ..."

5 So that is the way in which it was put at that  
6 point.

7 If we then turn to the defence to the High Court  
8 claim, it is paragraph -- I should apologise, you are  
9 going to have to look at our pleadings rather than FDC's  
10 pleadings, but there is no material difference here.

11 My Lord, paragraph 8, {B/17/3}.

12 THE PRESIDENT: Yes.

13 MR MILL: What paragraph 8 says is:

14 "... as pleaded in the CAT Claim Form, insofar as  
15 the Attendee Terms give effect to the unlawful  
16 FDC-Genius Agreement [et cetera et cetera] ... they are  
17 unenforceable."

18 The first point to make is that is not what I have  
19 just read out to you from the CAT claim form, so to that  
20 extent, that is a bad plea, but nonetheless one takes it  
21 on its merits, and therefore we replied to it and we  
22 replied to it in {B/19/4-6}, pages 4 to 6. I know  
23 my Lord has read this because of certain comments --  
24 well, your Lordship will have read them anyway -- but  
25 particular comments made which clearly go to the

1 question of nexus. Essentially, we have taken two  
2 points in paragraph 9 of the reply. The first is there  
3 is no nexus between the enforcement of our IP rights and  
4 the alleged unenforceability of the restrictions.

5 Secondly, although as your Lordship says, it is not an  
6 offence, we do raise a response to the suggestion of  
7 severance.

8 Now, my Lord, that was the end of the case so far as  
9 the pleadings were concerned, because of course we dealt  
10 with that in reply.

11 THE PRESIDENT: Yes.

12 MR MILL: One would therefore have expected in the skeleton  
13 argument of Sportradar for this trial to have a detailed  
14 rebuttal insofar as the points are being maintained of  
15 the points -- the positive assertions made in our reply.  
16 One looks in vain for that. Insofar as there is  
17 anything which I ought properly to draw to your  
18 attention in bundle A, it is in tab 1, which is the CAT  
19 skeleton and it is paragraphs 108 to 110 {A/1/50-51}.  
20 Paragraphs 108 to 110, under the heading "The attendee  
21 terms are void and unenforceable". Your Lordship will  
22 then see reference to various clauses of the FDC  
23 agreement and that is it. Nothing there about our  
24 positive case at all.

25 If you look at the skeleton which is in response to

1 the High Court claim, there is nothing more than lip  
2 service being paid to the pleading. There is, again, no  
3 analysis and no support for it. My Lord, one would  
4 therefore have expected Mr Howe, in opening this case,  
5 to have stood up and explained what their case is on  
6 these points. Mr Howe of course was conspicuous by his  
7 absence orally yesterday and he is conspicuous by his  
8 absence physically today, despite the fact that we are  
9 opening that part of his case or the part of the case  
10 with which he is specifically dealing.

11 My Lord, your Lordship will not be surprised to hear  
12 that our submission in brief is that the reason why that  
13 is the state of play is because there is nothing that  
14 can sensibly be said in response to what we say.

15 My Lord, we have, to be clear, set out our position in  
16 our skeleton which is at {A/4}, at paragraphs 30 and  
17 following, which is at pages 11 to 14 {A/4/11}.

18 A detailed, I would respectfully submit, analysis of the  
19 points that can properly be made, including a second  
20 point which I will come to in a moment. The first point  
21 is the point on nexus. My Lord, I heard your Lordship's  
22 question and I was able to feed the answer of 2001 and  
23 that is one of the points that your Lordship will see we  
24 rely upon. These terms and conditions have been in  
25 existence for years before this agreement and the



1 reference to 2001 is from the document at {H/1}.

2 My Lord, very briefly for your Lordship's note,  
3 I commend to your attention in terms of what the test is  
4 for nexus, in footnote 16 on the bottom of page  
5 {A/4/11}, the reference to Bellamy and Child, there is  
6 at footnote 501 a commendable way in which the matter is  
7 there expressed; that is {L/110/9}.

8 There is an alternative way of saying the same  
9 thing, footnote 17 overleaf, refers to Courage v Crehan,  
10 and my Lord, the way in which they put the case in that  
11 case is set out at line 6 and 7 on that page. Put  
12 another way, the restrictions neither spring from nor  
13 are founded upon the FDC/Genius agreement.

14 THE PRESIDENT: The point you are making is that, assuming  
15 the competition case goes against your clients, there is  
16 still an argument to be had about whether these terms  
17 fall away or are blue penciled out or not.

18 MR MILL: Well, there is an argument in the sense that they  
19 have raised an argument, albeit in very summary form.  
20 The submission I am making to my Lord is there is really  
21 only one side to that argument for the reasons we have  
22 set out and which are not gainsaid by the other side in  
23 any positive submission.

24 THE PRESIDENT: Sure. I see that rather more as a matter  
25 for closing than opening though.

1 MR MILL: Your Lordship is right and I apologise if I seem  
2 to be pushing unduly, but I am afraid that is our  
3 position and so I thought it was right to articulate it.

4 THE PRESIDENT: Okay.

5 MR MILL: My Lord, there is at paragraphs 33 and following  
6 {A/4/13}, the analysis of the question of severance and  
7 the test in Egon Zehnder. Your Lordship sees the way in  
8 which we put it if we need to deal with it, and  
9 effectively what we say is they cannot satisfy the three  
10 criteria in that case.

11 My Lord, there is a second point which arises, which  
12 is in paragraph 32 {A/4/12}, which says, well, even if  
13 the restrictions are unenforceable, we can still claim  
14 successfully for breach of confidence. Indeed, in the  
15 TRP case in which I appeared, one of the bases upon  
16 which we succeeded was breach of confidence on the part  
17 of the Tote, despite the fact that for historic reasons  
18 there was no contract which they were a party to which  
19 they had broken. It was particularly in those  
20 circumstances that it was appropriate that obligations  
21 of confidence should be dealt with and in that case  
22 successfully enforced.

23 My Lord, I have no idea what the other side's  
24 response is to that because we have not been told. But  
25 for your Lordship's note, that is our second point.

1           That was all I wanted to say on what could be termed  
2           the enforceability issue. I had just mentioned breach  
3           of confidence and the case of the Racing Partnership.  
4           My Lord, without taking your Lordship to it, the three  
5           elements that are requisite for a claim to succeed are  
6           set out in obviously *Coco v Clark*, and they are set out  
7           in the Court of Appeal in TRP at paragraph 44,  
8           {L/99/15}. They are not controversial, they are also  
9           set out in my learned friend's skeleton.

10           My Lord, the points that are taken in Sportradar's  
11           skeleton can be found at {A/6}, firstly at paragraphs 29  
12           to 34 which is pages 10 to 11 {A/6/10}. Your Lordship  
13           will see there that the point that has effectively been  
14           taken is that this was a public and open event and  
15           therefore did not have the necessary quality of  
16           confidence, and the skeleton relies upon what is said to  
17           be the decision of the majority of the Court of Appeal  
18           in the Racing Partnership as being supportive of that  
19           proposition. Rather embarrassingly, I have to tell the  
20           court, as I did, or else it would have appeared from our  
21           skeleton, that they have got that wrong. The majority  
22           were actually in our favour, which would be why SIS, who  
23           were the defendant in the case, sought permission to  
24           appeal the point to the Supreme Court.

25           If necessary, in closing, if the contrary is

1 maintained by the other side, I will explain why that is  
2 the case, but I hope that they will acknowledge that  
3 which is self-evidently correct, and therefore their  
4 point under the first element falls away.

5 Secondly, my Lord, paragraphs 36 to 39 {A/6/11-12}  
6 make points in relation to the second element and  
7 I should just briefly deal with those. The first point  
8 is the repetition of the wrong point under the first  
9 ground. That is paragraph 37, so I can pass over that.

10 My Lord, the second rather surprising point is that  
11 the claimants do not and did not have sufficient control  
12 over the collection and/or dissemination of such LLMD as  
13 to render it generally inaccessible.

14 My Lord, I rather thought that was inconsistent with  
15 the way in which Sportradar were putting their case  
16 yesterday about the unassailable monopoly and the sets  
17 of contractual provisions which gave rise to that, which  
18 included the ground terms and ticket conditions. So  
19 I am going to pass over that and the claimants can work  
20 out for themselves which argument they wish to prefer.

21 Then paragraph 39, finally, there is then an  
22 assertion that the defendants believe that the  
23 anti-scouting provisions were and are unenforceable.  
24 I am afraid that is also legally wrong. The question is  
25 an objective one, not a subjective one. We have set out

1 in our skeleton clearly why, objectively, an obligation  
2 of confidence arose. My Lord, there are numerous  
3 authorities for the proposition that it is objective,  
4 including the Racing Partnership in the Court of Appeal,  
5 where Lord Justice Arnold in the majority approved  
6 himself in the case of Primary Group.

7 My Lord, unless I can help you further.

8 THE PRESIDENT: I am very grateful, Mr Mill. Thank you very  
9 much.

10 Ms Kreisberger, your reply?

11 Reply submissions by MS KREISBERGER

12 MS KREISBERGER: Thank you, Sir. I will not exercise the  
13 right of reply on behalf of Mr Howe so I just want to  
14 make three very brief comments in response. The first  
15 is Mr Mill made some rather lively criticism of  
16 Sportradar and Mr Howe. His first point was that  
17 Sportradar did not open yesterday on the High Court  
18 claims. Sportradar is the defendant in the High Court  
19 claims, so we can respond to Mr Mill, not today, but we  
20 could not open as defendants yesterday. What I suggest  
21 is that Mr Howe takes ten minutes tomorrow, if that is  
22 convenient for the Tribunal, responding to these points.  
23 You have asked for confirmation as to what is still live  
24 so we can simply confirm that.

25 THE PRESIDENT: Ms Kreisberger, I do not think that is going

1 to happen. We have got quite a tight timetable, as we  
2 heard, in terms of the witnesses. Today and yesterday  
3 were for opening.

4 MS KREISBERGER: Well, my Lord, can I make this suggestion?

5 You have our written submissions.

6 THE PRESIDENT: I have your written submissions.

7 MS KREISBERGER: You have Mr Howe's skeleton and you have  
8 asked us to confirm a couple of points, and Mr Howe is  
9 very happy to do that tomorrow.

10 THE PRESIDENT: Well, Ms Kreisberger, I am not going to  
11 entertain any further submissions in opening because  
12 I do not want time to be lost tomorrow. I have  
13 indicated that I am going to proceed in a formalistic  
14 way in relation to the points that are live, in other  
15 words, I will regard myself as under an obligation to  
16 determine these questions unless I am told in clear  
17 terms that I do not need to. That is something which  
18 you can leave over until closing if you wish and tell me  
19 then, or you can do so in writing at any time between  
20 now and then. But in terms of my mindset, it is -- both  
21 on Ms Lane's and Mr Mill's part of the case, if I can  
22 describe them thus, there are certain issues that at the  
23 moment are live on the pleadings and I will deal with  
24 them.

25 MS KREISBERGER: I am grateful.

1 THE PRESIDENT: So you know where you stand and I know where  
2 I stand and the claimants in the High Court proceedings  
3 know where they stand.

4 MS KREISBERGER: I am grateful, Sir.

5 I do just need to then make one point for your note.

6 THE PRESIDENT: Yes, of course.

7 MS KREISBERGER: Mr Mill said that pleadings closed with  
8 the -- he showed you the pleadings with the reply.

9 THE PRESIDENT: Yes, he showed me the reply.

10 MS KREISBERGER: That is not correct.

11 THE PRESIDENT: Was there a rejoinder?

12 MS KREISBERGER: There is a -- so this is on the point that  
13 Mr Mill addressed you on in relation to the nexus  
14 between the competition claim and the attendee terms.  
15 For your note, Sportradar's amended response to the  
16 first defendant's request for further information dated  
17 5 February 2021, that is at tab 9, so that is {B/9}.  
18 The relevant page is 13, so that is {B/9/13},  
19 paragraph 12.1.

20 THE PRESIDENT: Yes.

21 MS KREISBERGER: So that sets out Sportradar's pleaded  
22 response on this issue.

23 THE PRESIDENT: Let me just look at that. (Pause).

24 Yes.

25 MS KREISBERGER: So then you have the full pleaded case,

1 Sir.

2 THE PRESIDENT: I am grateful.

3 MS KREISBERGER: I am grateful. Thank you.

4 THE PRESIDENT: Thank you very much, Ms Kreisberger.

5 Well, thank you all very much. We will resume not  
6 before 11 o'clock tomorrow. I hope it will be  
7 11 o'clock precisely, but I have given myself a little  
8 bit of wiggle room in case things drag out, but the  
9 parties, particularly the cross-examining parties, can  
10 be assured that if we start late, then we will ensure  
11 that you have a full day's worth to draw out  
12 Mr Lampitt's evidence.

13 So until tomorrow, thank you all very much.

14 (4.30 pm)

15 (The hearing adjourned until

16 Thursday, 6 October 2022 at 11.00 am)

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