IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1433/7/7/22

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 30th January 2023

Before:

The Honorable Mr Justice Smith
Derek Ridyard
Timothy Sawyer CBE

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Proposed Class Representative

Dr Liza Lovdahl Gormsen

v

Proposed Defendants

Meta Platforms, Inc. and Others

A P P E A R AN C E S

Ronit Kreisberger KC, Nikolaus Grubeck, Ben Smiley & Greg Adey (Instructed by Quinn Emanuel Urquhart & Sullivan, UK LLP) on behalf of Dr Liza Lovdahl Gormsen.

Marie Demetriou KC & David Bailey (Instructed by Herbert Smith Freehills LLP) on behalf of Meta Platforms, Inc. and Others.

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Monday, 30 January 2023

(10.29 am)

Housekeeping

MR JUSTICE SMITH: Ms Kreisberger, good morning.

MS KREISBERGER: Good morning.

MR JUSTICE SMITH: Before you begin, just a few housekeeping matters. First of all, although these are public proceedings taking place in person, they are also being live streamed and, although that live stream is being transcribed and recorded by my order, it should not be photographed, transmitted or otherwise broadcast by anyone else and a failure to abide by that would be a serious infringement of the rules.

Secondly, as a matter of form, I think we should probably say that we all have a degree of interest, though that interest is varying, in the services offered by entities like Meta. I don't think, unless anyone wants to, we need to go into the details but we, all of us, have various forms of internet, social media connections and it's probably as well to get that on the record, even if it's a matter of no importance to anyone except ourselves.

Thirdly, and, again, just to put it on the record, I think you should know that I was speaking at a talk given by BIICL a few months ago, at which Dr Gormsen also was present, so I heard what she had to say about, in particular, this action and she heard what I had to say about collective proceedings generally, emphatically not discussing this action. We were both there; we didn't speak one to the other, but you should know.

Fourthly, I have an engagement in Cambridge on Wednesday which begins at 6 o'clock. Now, that would imply, if I don't cancel, a conclusion of these proceedings at probably 2 o'clock or 2.30. Now, if the parties can live with this, we can make up

the two hours by sitting early and late between now and 2.30, let us say, conclusion on Wednesday, so we could run 5 o'clock today and tomorrow, we could sit at 9.30 tomorrow and, again, sit earlier on the Wednesday which would, I think, by my reckoning, get us an extra three hours which makes up for the two hours.

MS KREISBERGER: Sir, I'm grateful for the indication. I have spoken to Ms Demetriou and we agreed that, actually, this case could be completed within the two days, so I don't anticipate there would be a need to sit early or late and, indeed, I am hoping that we won't be calling on the Tribunal on Wednesday morning at all. We could always have it in reserve, should things not run to plan, but my hope is to conclude my submissions today and Ms Demetriou will address you tomorrow, leaving time for my reply.

MR JUSTICE SMITH: Well, that's very helpful to know. In which case, thank you for that comfort. I'm very grateful to you both.

That may be affected by the next two points which were flagged in the letter that the Tribunal sent, but perhaps a little bit elliptically when we sent a letter on 23 January.

I think it would probably help the parties if before you launch into your respective submissions, we just set out our areas of concern in a little greater detail so you can know exactly what is worrying us and you can either tell us those worries are well-founded or you can tell us that they're not, depending on where you're coming from.

But to start with the obvious, we have obviously no problem in assuming dominance on the part of Facebook. We note Meta's reservation on the point but we think that it's probably best for all concerned simply to say Meta are dominant, knowing that that is an assumption and that will be hotly fought at trial, but I don't think there is much to be saved by saying "alleged dominance" or "dominance that is going to be hotly fought

at trial." We all know where we stand on that and let's save the qualifications unless they really matter.

Subject to the point raised in our letter, which I'm going to stress again, we also have no problem in assuming abuse, again on the same basis. Obviously, we are in the very early stages of these proceedings and the key question from our point of view is not who's right and who's wrong. That's for much later. It's whether we can be comfortable in setting up a really quite significantly large form of proceeding, knowing that there will be trial and it is really that question of triability that I'm going to articulate now because we do have a problem with the dovetailing of the pleading, the complaint in the pleading, and the remedy sought.

So basically, the damages sought are either the excess profit calculated over what Meta should have charged, that level either being an appropriate return on capital or what users say they should have paid, so one has either less profits or user valuation and the damages are the excess over those two points against what Meta, in fact, recovered.

Now, we consider that there is a difficulty in correlating the computation of damages with the abuse alleged that produces an award that is actually compensatory of the class and we know that there are three bases on which the claim is put. I'm going to treat the other trading condition problem as a kind of makeweight. That may be unfair to it, but I'm going to focus on the unfair terms part of the case and the unfair prices part of the case.

So starting with the unfair terms case, this is a situation where the class has suffered loss because Meta extracted, in abuse of a dominant position, more data than it should have done.

Now, a compensatory award, it appears to us, would be the damage suffered by the class as a result of that excess data being released, rather than the profit made by

Meta through its anti-competitive conduct and there is Court of Appeal authority for that, I tried to engineer a form of recovery in BritNed v ABB that was not compensatory in that sense and I was overturned in the Court of Appeal, so there is clear law in this area. It may be distinguishable, but I will want to hear on that.

So we think there is a mismatch between the unfair terms case and the claim to excess profits, in that these are not compensatory damages at all.

There is a further question, less significant but we will raise it anyway, which is whether there is a loss capable of being represented in a class action at all. One might say that this is a situation where the loss suffered by each subscriber to Facebook, in terms of the amount of knowledge that is unleashed in breach of the wishes or desires or interests of the subscriber, is so subjective that this is actually not a class loss at all.

We suspect the answer is that this isn't a Lloyd v Google case. It's a different jurisdiction in any event, but you can prove a class loss in some way and then distribute the damages administratively to the class by way of criteria that are articulated, but we do think that there is an issue in how you assess the loss to a class member of having their data excessively extracted, if I can call it that way.

So that's the unfair terms case.

The unfair price case: we, at the moment, see this as a United Brands type case and, if you're going to make good an abuse on this basis, you're going to have to do more than simply say there is an excess of return over cost and you're going to have to do better than saying that there is an excess of return over something like the WACC. Neither of these are relevant. They go into the melting pot, but the fact is that United Brands is a rather more sophisticated assessment of abuse than simply saying you are earning profits over and above your reasonable costs.

Now, it might be said that this is a free product and the rules apply differently to free product and, of course, we want to hear both parties on that, but at the moment we

are seeing this as, effectively, a barter situation. A gives B data in return for access to a social media platform; B gives A access to the social media platform in return for A's data and we think that we're going to have to have a test that identifies how we can say that the bargain on one side is so unfair as to constitute an abuse to the person who is overcharging and how one approaches what is excessive in that context is something that we have real difficulty with.

We note that there is no strike-out application in this case. I am moving now from substantive points to procedural ones. We have some difficulty with how the Microsoft Pro-sys test fits in this context. In other words, we would like to know what we're supposed to do if we come to the conclusion that the Microsoft test isn't satisfied. It doesn't seem to us that it follows that we can strike it out; we're not actually sure what we're supposed to do if we come to the conclusion, and I know that we will be arguing about this, that that test is not satisfied.

So those are, in a not so short nutshell, the concerns that we have. We obviously do take the point that questions like funding are important, but we see them as very much subsidiary to these points. It seems to us that, as I said at the beginning, clarity as to how we try this matter is the key to certification. Vagueness has an enormous price in terms of the unnecessary work that the parties do going forward and in terms of how this Tribunal manage the litigation and vagueness is something that we are determined to eliminate.

We have no problem in points being highly contentious. We have no problem in certifying points that might be said to be weak. That's all a matter for trial. What we are not going to certify is something where we don't know what it is we need to put in place, so that in a trial X months hence, we actually don't know what we are trying and that really is the reason we have unpacked our concerns or questions of the substance. It's not because we want to get into the merits; we don't. We want to

understand what it is that we need to put in place to ensure that we can properly resolve this dispute if it comes to trial.

I apologise for taking so long but, Ms Kreisberger, I will now hand over to you.

MS KREISBERGER: Thank you for the articulation of the questions. That has been received loud and clear. Happily, I hope I am right when I say these submissions I have prepared for today do address those points which came out very clearly from the questions from the Tribunal in correspondence last week, so hopefully by the end of the day, the Tribunal will have firm answers to those questions.

Sir, if I may, just a few points of housekeeping.

MR JUSTICE SMITH: Of course.

MS KREISBERGER: We have electronic and hard copy bundles. Personally, I am using a combination of the two. First time I am using electronic bundles in a hearing, but I will do my best to give references that address either, if the Tribunal is working on a combination, unless you tell me that you're only working on electronic bundles, sir, members of the panel.

MR JUSTICE SMITH: I fear it's going to be a mixture. I myself am working on paper. You have a mixture as well --

MS KREISBERGER: I will hit all the points. There is a core bundle and a confidential bundle. I will be giving references to the core bundle, so that those without access to the confidential bundle can follow, unless of course, I am referring to material that's only in the confidential bundle. As it happens, I don't think that arises. We have addressed timing.

A small point: in my skeleton argument we refer to Meta qua defendant and Facebook qua platform. I'm not sure we entirely understand the position pre-disclosure in any event but that is my broad approach. I may need leniency if they're not always entirely perfectly separated.

Submissions by MS KREISBERGER

MS KREISBERGER: Sir, with that, I will move to my submissions. I propose to structure them in six parts. First, some introductory remarks and themes.

Secondly, the legal framework, which I think we do need to look carefully at, given in particular, the Tribunal's questions, including but not confined to the Microsoft test.

Thirdly, the pleaded abuse. Bearing in mind, sir, your remarks this morning, I do intend to go quite carefully through the components of abuse so it should be absolutely clear, and in doing so, address the fourth question in the letter, on pricing.

My fifth [sic] topic is the quantum methodology and Meta's criticisms of it and the Tribunal's concerns.

Fifth are the arguments on suitability and cost benefit which I think can be addressed quite briskly.

And lastly, there is the amendment application which I'm happy to address now, but I'm in the Tribunal's hands as to whether they would prefer to deal with that at a later stage, either within the hearing or even another hearing but I'm very happy to address you on that. It's a brief point.

MR JUSTICE SMITH: How contentious is it? If there is going to be very little said by Ms Demetriou in response, then we will deal with it now. If there is more to it, then I think we probably ought to save it for later.

MS DEMETRIOU: I think that it's contentious in the sense that we don't think that the PCR has yet met our point because, essentially, the point, if it's helpful for me, just in 30 seconds, to elaborate it, is that the claim is based on non-business users. That's how the claim has been formulated. We explained that you can't -- it's difficult to tell whether a user is a business user or not because a user signs up and some of them may use it for business and the response has been: well, we will just have everyone

and we say, well, that doesn't work because your claim doesn't account -- it's not a claim on behalf of business users which raises very different considerations because they obviously get different value from using the platform.

So we say, just to say: well we don't mind if business users are included, doesn't meet the substance of the point and we have suggested a way forward, but that hasn't been accepted, so I think it's contentious to that extent.

MR JUSTICE SMITH: Well, that's helpful. Ms Demetriou, provided we don't give any kind of imprimatur to the proposed amendments until we give judgment, it makes sense, I think you're agreeing with this, for Ms Kreisberger to address us on a best case. So we won't formally give permission to amend because that does make some sort of implication as to substance of the case, but we will say that Ms Kreisberger can proceed on the basis that she puts her case at its highest, which includes the amendments, and we will then deal with the matter. You will obviously come back on the true case, the highest case, and we will deal with it in our judgment. If there is substance in it, then we will say the amendments will have to, you know, be revisited again.

If, on the other hand, they are proper, then we will make the order but we won't have arguments now about the ins and outs of amending. We just we want to address the real beef between the parties.

MS DEMETRIOU: Sir, that seems extremely sensible, if I may say so. The only point, I suppose, is that the amendment would need to be determined before any CPO were made. Of course, we're saying that a CPO shouldn't be made but if the Tribunal is against us on that, it would have to be determined before it were made.

MR JUSTICE SMITH: Indeed. There is a certain sequencing --

MS DEMETRIOU: Yes.

MR JUSTICE SMITH: -- which will have to be respected but that really does follow

the view we take on the substance of the point. So, yes, we will clearly have to make sure that these steps post-judgment are appropriately followed through, but what those steps might be, and Ms Kreisberger could lose on everything, in which case you don't get an order anyway. She could win on everything, in which case there will need to be a formal amendment order and then a CPO and no doubt an argument about costs. Well, it depends what we say in the judgment, so that's all I'm saying.

MS DEMETRIOU: Thank you.

MR JUSTICE SMITH: Grateful.

MS KREISBERGER: Sir, with that, I turn to the application. It's Dr Lovdahl Gormsen's application made in the usual way, under section 47B of the Act and CAT rule 75.

The matters in dispute between the parties relate to whether the claim is eligible for inclusion in collective proceedings under rule 79 and, in particular, whether her experts' quantum methodology satisfies the low threshold for certification under what's known as the Microsoft test. As the Tribunal observed this morning, there is no application for strike-out or summary judgment before you today, nor could there be.

The proposition at the heart of this case is that Meta's data practices violate the prohibition on abuse of conduct by dominant firms. Now, that proposition also forms the basis of cases being pursued against this corporate giant by competition authorities and private claimants around the globe. They include the CMA, the European Commission, the German FCO, the US FTC and a class action in the Northern District Court of California, all of them pursuing cases which, to some degree or another, resemble the claim at hand. So it's fair to say that this is a hot topic in the cutting edge field of platform antitrust and it's the cause of much ink being spilt and many lively discussions at panels, BIICL being one of them.

Now, this is how the CMA describes in summary terms the distortive effects of Meta's conduct and we rely on that. This is at authorities, tab 38, page 2173. That's volume 4

of the authorities bundle. I pick it up at paragraph 11:

"Third, competition problems result in consumers receiving inadequate compensation for their attention and the use of their personal data by online platforms. Although many online services are currently provided free of charge in a well functioning market, consumers might be offered a reward for their engagement online or offered a choice over the amount of data they provide or adverts they receive. We found that the profitability of Facebook has been well above what is required to reward investors, with a fair return for many years. In 2018, we estimated that the costs capital for Facebook was around 9 per cent, compared to actual returns on capital of around 50 per cent for Facebook.

"We would expect these excess profits to be shared more freely with consumers in a more competitive market.

"Fourth, limited choice and competition also have the consequence that people are less able to control how their personal data is used and may effectively be faced with a take it or leave it offer, when it comes to signing up to a platform's terms and conditions. For many, this means they have to provide more personal data to platforms than they would like."

So there is unquestionably a case for Meta to answer at trial and, indeed, the president has already given a ruling to that effect in the context of these proceedings, in relation to the service out application and, as you know, Meta makes no challenge to the merits.

MR JUSTICE SMITH: Yes, though to be clear, were Meta minded to make a challenge, given that they weren't heard when I ordered service out, they would be entirely free to take whatever points they wished.

MS KREISBERGER: Happily, we're not in that world.

MR JUSTICE SMITH: No, I understand.

MS KREISBERGER: Now, we also know that Meta has reaped vast rewards as a result of this conduct. Worldwide revenues are estimated to be almost $56 billion in 2018. That's through the monetisation of data through targeted advertising. I will just give you a reference to the bundle. We don't need to go there, I will later. That figure is in a judgment in the class action in Northern California. That's at authorities tab 53, page 3553 and that's volume 5 of the authorities bundle, just so you have it.

Now, the CMA estimates that figure for the UK to be around 2.75 billion in 2019, so these are the numbers we're talking about. So in the light of that, there can't be any doubt whatsoever that personal data is an extremely valuable commodity to Facebook.

So when Meta protests before you today that, if the Tribunal finds that its data practices are abusive, nonetheless, there is no loss to users or that the loss defies quantification, one of my main themes today, I would invite the Tribunal to treat those claims with profound scepticism. The loss is substantial, but it is also quantifiable and I will come back to that.

And not least because I'm going to show you that Meta has itself been extremely vocal about the value of this data and doesn't seem to have encountered any problems at all in putting a value on it, quantifying it, and I will be taking you to that evidence today.

MR JUSTICE SMITH: Ms Kreisberger, it may help if I give you sort of an initial reaction to the two points you've made there. It's well-known, because the courts have said it many times, that the mere fact a loss is difficult to quantify is no barrier to it being assessed and, whilst we take on board the subjective value that a given subscriber to Facebook may place on his or her personal data, that subjectivity, and the fact that it's quite hard to translate into pounds, isn't going to be an insuperable barrier to recovery.

That being said, the equation of the loss, assuming there has been an excessive

milking of data and the Meta profits, well, as we said earlier, we don't see the correlation there. So in a sense, the second of your two points, subject to what Ms Demetriou says about that, is rather less difficult for you, I think, than the first.

MS KREISBERGER: Yes, understood, and just to reassure you, sir, I have that point in mind. I obviously don't want to jump ahead, but what I do plan to do, sir, perhaps I will just foreshadow it now, is take you through, briskly, the steps involved, which will be abuse, which one hopes will be established at the moment of quantification. So the abuse finding, which then takes you to causation, in other words, what was the data which was monetised unlawfully -- so you immediately translate abuse into the portion of data that is affected by the abuse and then you go to quantum and I will show you how the quantum methodology is tailored to do precisely that. So three steps.

Sir, with that, I will turn to the particular question of certification. Now, we're quite fortunate to be before you today, two years on from Merricks. Unlike earlier CPOs, where the work was still to be done, we now have the benefit of a rich seam of judicial guidance on the correct approach from this Tribunal, the Court of Appeal and the Supreme Court, and I will take you through that, but we know, and I know you have well in mind, that certification does not engage questions of merits and, sir, you made that point in Boyle. but I am going to develop that point, given the question you asked. Now, we also have extensive guidance, of course, on the Microsoft test and how it applies to your review of the quantum methodology. Again, just to foreshadow it now and none of this will be a surprise to members of the Tribunal, the watch words are the low bar. Importantly for this case, the quintessentially hypothetical nature of the quantum methodology which should raise issues, not answers, so we do need to be a little careful and, as ever, the broad axe is waiting to be wielded at trial.

Now, as I said, I'm going to show you that Mr Harvey's quantum methodology easily

surpasses that hurdle. Now, really speaking to the point you raised, sir, the essential task for Mr Harvey at trial will be to quantify -- we will come back to this theme, I think, time and again -- quantify the value of that data which has been unlawfully monetised by Facebook as a result of the abusive conduct.

That's the game, quantifying that data, the value, and I'm going to show you that his methodology is robust. In fact, he has done more than simply set out a mere blueprint, as suggested in the authorities. He uses a suite of techniques. They're well-established. They look, sir, as you've already foreshadowed, at profit, excess profits and user valuation.

But importantly, and this is the message I want to make sure hasn't been obscured, he is relying on real world evidence about the value of data which moves us on from the ROCE-WACC analysis that I know you have in mind, so he will be using honed, targeted techniques to value the data at hand, not simply the broad-brush ROCE-WACC. That's just the starting point.

But, at the same time, despite this well-honed methodology showing that the exercise is a tractable one, what he's done is correctly and necessarily preserved latitude because, as of today we -- which, you know, the PCR hopes to be the inception of these proceedings, we don't know the contours of the ultimate finding of abuse. So of course, Mr Harvey can only set out a methodology which is potentially applicable, whatever those contours will be. We get to quantum because there is a finding of abuse but we don't know which elements will be upheld by the Tribunal.

So those contours will determine which data has been unlawfully handled by Facebook and so which data goes in the quantum bucket. So those are my introductory remarks, which I hope give a flavour of the points that will arise.

So with that, I will turn to the legal framework.

MR JUSTICE SMITH: Just as a matter of interest and related to your contours,

I appreciate it's early days, but do you envisage a single trial on merits and quantum, or would you be aiming to split off one from the other? And whatever you say, even if it's nothing, is not in any way binding, it's just to get a sense of how you see the difficulties.

MS KREISBERGER: I'm grateful and, given it's not binding, I don't think I need take instructions. This has been in the forefront of my mind, looking at these issues. It seems to me rather clear that you have to split off quantum. I think to put the burden on the Tribunal, the composite trial which would require the Tribunal to hear evidence on all permutations, would be a very heavy burden on the Tribunal but would also be really inefficient. So I think you have to do abuse first and then quantify the harm. It's an apt question, if I may say so.

Sir, with that, I propose turning to the legal framework. Taking, first, the question of no determination of the merits, so that will be my first point, the merits question, I will then address you on the Microsoft standard and the inter-relationship between the two. So that's your third question in the correspondence.

So I will take you through the authorities with some care, because I think your question calls for it. So pre-set number 1 is the Tribunal must not address the merits of the pleaded claim which is triable, in deciding whether to certify. Now, we look at the test for certification. One of two conditions for certification is eligibility. Eligibility is defined at section 47B(6) of the Competition Act. Perhaps we should just turn that up because one really must always start with the statute.

That's at authorities volume 1, tab 7/85, subsection 6, at the top of the page:

"Claims are eligible for inclusion in collective proceedings only if the Tribunal considers that they raise the same, similar or related issues of fact or law and are suitable."

That is then reflected, as we all know, in the Rules themselves. Rule 79(1) which is behind tab 6 of the same bundle, and the rule provides that:

"The Tribunal may certify claims as eligible for inclusion in collective proceedings, where having regard to all the circumstances, it's satisfied by the PCR that the claims sought to be included are brought on behalf of an identifiable class of persons, raise common issues and are suitable to be brought in collective proceedings."

So that is the statutory test for certification.

Turning to the authorities, the starting point is Mastercard v Merricks. That's tab 14 of the same bundle. It starts at page 390.

I should say, members of the panel, I am conscious that much of this is familiar territory, so I apologise if I am going over old ground but I think there is no substitute for going back to the judicial adumbration of the points.

So we start at page 419, paragraph 59, picking it up at the second sentence:

"First, the Act and rule -- "

This is, of course, the Lord Briggs judgment:

"First, the Act and rules make it clear that subject to two exceptions, the certification process is not about and does not involve the merits test. This is because the power of the CAT on application by a party or of its own motion to strike-out or grant summary judgment is dealt with separately from certification. The rules make separate provision for strike-out and summary judgment which applies to collective proceedings. There's no requirement at the certification stage for the CAT to assess whether the collective claim form or the underlying claims would pass any other merits test or survive a strike-out or summary judgment application."

And he goes on to refer to the second exception being where the opt-out procedure is challenged.

Now, the reasoning to that conclusory point is at paragraphs 45 to 54. They do merit reading in full and I'm going to come back to those. but I want to go up to paragraphs 53 and 54, where we see the reasoning. Halfway down paragraph 53:

"It is clear from the above citations that justice requires that the damages be quantified for the twin reasons of vindicating the claimant's rights and exacting appropriate payment by the defendant to reflect the wrong done. In the present context, that second reason is fortified by the perception that anti-competitive conduct may never be effectively restrained in future, if wrongdoers cannot be brought to book by the masses of individual customers who may bear the ultimate loss. There is nothing in the statutory scheme which suggests that this principle of justice, that claimants who have suffered more than nominal loss by reason of the defendant's breach should have their damages quantified by the court doing the best it can on the available evidence, is in any way watered down in collective proceedings ..."

Sir, that's the point you just made, in fact:

" ... nor that the gatekeeping function of the CAT at the certification stage should be an occasion when a case which has not failed strike-out should nonetheless not go to trial because of difficulties in the quantification of damages. On the contrary, the rights of consumers will never be vindicated, which is contrary to the purpose of the statute of the regime."

So the job at certification is obviously not to scrutinise merits. And perhaps just for your note, I could flag Lord Sales and Leggatt make the same point in their dissenting judgment. That's at paragraphs 157 to 158. Perhaps we will just go to there briefly. Two short passages. And we're in tab 14. It's page 448. They say this:

"There seemed to us, in the Court of Appeal's judgment, to be three particular criticisms made of the CAT's approach. One is that the CAT wrongly required the applicant to establish more than a reasonably arguable case or to be satisfied that the collective claim has more than a real prospect of success. In our view, this criticism is misplaced, in that it treats the assessment of whether the claims in question are suitable for an aggregate award of damages as if it were an assessment of whether

the claims are of sufficient merit to survive a strike-out application. However, as we have emphasised, the eligibility requirements, including the question of suitability for aggregate damages, are directed to ascertaining whether it is appropriate to combine individual claims into collective proceedings and not to the question whether the claims are sufficiently arguable, as a matter of their substantive merits, to be allowed to proceed.

"In particular, in relation to aggregate damages, the question for the CAT was not whether the claims had a real prospect of success; it was whether the proposed methodology offered a realistic prospect of establishing loss on a class-wide basis."

That's the really important passage. This turned in the context of this case, on whether there was or likely to be data available to operate that methodology.

So the dissenting judgment is on all fours with the main judgment on this point. They're ad idem, sir, and this one, just for your note, your judgment in Boyle is at authorities tab 26, page 1288 and at volume 2 at paragraph 21, sir, you made the very same point.

So I know that the Tribunal has well in mind that a higher burden shouldn't be imposed on the class rep than the individual litigant. Now, that is articulated at paragraph 45 of Merricks. That's at page 413 in the bundle, bundle 1, tab 14.

And it's the last sentence of that paragraph:

"It follows that it should not lightly be assumed that the collective process imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose."

So as we go through the various matters that arise today, one does actually need to be very careful not to trespass into merits, including on questions of quantum methodology, if they don't relate to the certification test.

Now, I will turn to the detailed legal principles we have on the Microsoft test in

a moment with Gutmann and now the McLaren judgment from the Court of Appeal but I think this is the appropriate juncture for me to address the Tribunal's third question, which asks about the inter-relationship between the Microsoft test and the strike-out jurisdiction.

Now, I will come back to the specific question about whether a triable claim can fail under Microsoft, but for now, I want to focus on the delineation between the two and how to enforce it, given that Merricks requires that the Tribunal should not trespass into merits when looking at rule 79, and so I'm going to suggest a pragmatic approach to keep us on the right side of the line -- I can't claim it as a novel thought, it was suggested by Merricks' counsel, Mr Harris, and we see that at paragraph 55 of Merricks. That's on page 418. At the top of the page:

"As Mr Harris, QC for Mr Merricks submitted, it is useful to ask whether the forensic difficulties which the CAT considered made the class claim unsuitable for aggregate damages, would have been any easier for an individual claimant to surmount."

His answer, with which I would agree, was that they would not be. So just practically speaking, I would suggest that the same method endorsed by the Supreme Court be adopted here, to avoid straying into the wrong territory.

And finally, I would like to show you McLaren on this point and that's volume 3 of the authorities bundle, tab 30, page 1578, and this is at paragraph 29. I am starting at the third sentence. This is a summary of what the Tribunal found:

"It started by acknowledging that the intensity of analysis by the CAT when considering certification of a methodology, was more than a symbolic scrutiny.

That's, of course, right:

"However, KK's criticisms of the proposed methodology go too far. There was no rule confining the concept of methodology to a particular econometric technique or to the expert evidence of economists. With limited exceptions, it was not the role of the CAT

to determine the merits of the case at the certification stage ..."

And here is the point I wanted to emphasise for you:

" ... and this included the merits and robustness of the methodology. Ultimately, if the class representative's expert evidence was successfully challenged at trial, the claim would simply fail."

So even on the question of methodology, one has to take care.

Now, that finding I should just draw your attention to is upheld in terms by the Court of Appeal and that's at page 1590 and it's the first sentence of paragraph 67. They're upholding paragraph 29 there, that I just took you to. The CAT's reasons. So that's upheld by the Court of Appeal.

So at risk of labouring the point, the upshot of all of that is that, when the Tribunal is looking at the PCR's intended methodology, it must ask itself this: is this a point which an individual claimant would need to grapple with? For instance, does it concern the competition law infringement itself or the methodology to establish the infringement, as distinct from questions relating to aggregate damages for the class? If it does concern infringement, then it's a question for another day; it's for trial.

Of course, as a matter of principle, that must be right, given that one is pre-disclosure at the earliest of stages, with the pleadings. So permissible challenges on whether the methodology is a plausible way of measuring class-wide loss, as opposed to questions of individual loss.

Now, as it happens, this isn't an academic point because a number of Meta's criticisms are actually about making good the abuse allegation. I will come back to that but those arguments were improperly made. So with that --

MR JUSTICE SMITH: What you're saying is there is a clear distinction to be drawn between the establishment of the substantive infringements and, assuming the infringement is established, the quantification of the loss that arises out of it.

So far as the first class, the existence of the infringement is concerned, provided the averment is appropriately pleaded -- in other words, you have a case that is sufficiently articulated which even if very weak, survives strike-out --

MS KREISBERGER: Precisely.

MR JUSTICE SMITH: -- that is the end of the matter, we don't get to process at all. Assuming that that low hurdle has been passed, you then look to the question of quantification of that infringement, on the assumption that the infringement is successfully made out.

At that stage, you are obviously not asking yourself will there be success or not because you're assuming, actually, there will be. What you are asking yourself is, is there sufficient clarity in the way the methodology for quantum has been framed, such that the Tribunal knows what it needs to put in place so that that method can appropriately be tried, so as to achieve, if it's successful, a robust outcome.

We're not bothered about whether it succeeds or not; what we are concerned with, however, is that if it succeeds, it achieves a meaningful result.

MS KREISBERGER: Sir, that's a crisp articulation of the position, save to say this: I would not precisely endorse the reference to sufficient clarity and so on, because what one risks obscuring there is the question that the Tribunal is asking: is the methodology implausible? That's a rather different question. I am conscious that questions about clarity might relate to case management going forward and the Tribunal wants to keep a tight grip on collective claims and how they're managed, but really, the only question on the basis of which the Tribunal could say this does not merit certification is if it finds the methodology to be implausible.

Now, of course, sir, when you talk about sufficient clarity, you need to understand what's being said in order to apply that threshold, but that is a very low threshold. Is the methodology incredible? If it's incredible, it fails. Anything above that threshold

survives. So it's deliberately low because one has a triable claim.

MR JUSTICE SMITH: Well, yes; we're agreeing on that. but plausibility has two facets, doesn't it? First of all, you may have a methodology which is just irrational. You say, for instance: I'm going to quantify my losses by reference to the migration patterns of starlings around Africa. That is something where I am quite sure there is a great deal of data about the migration patterns of starlings around Africa and I am quite sure that if it was required, you could produce volumes of data on this and we could establish to many decimal places, the migration patterns of starlings around Africa. It's just it wouldn't get you anywhere. So that is a methodology which is just not fit for purpose because it's not getting you to the result you need.

The second form of implausibility is where you have a perfectly rational way of going about it. You say: well, this is the loss we're trying to quantify and it isn't a bearing of no relationship to the abuse that we assume exists, it's actually encapsulating what it is you need to do. but you can't work out from the methodology how you're going to do it. In other words, we sit there saying: well, we hear what the claimants are saying about what their objective is. They want to get to this method or this end result by way of a figure, but we actually can't work out what we need to order by way of expert evidence or disclosure or whatever it is, to get to that result because we just can't understand the methodology.

Now, that's implausible in a different way. You might call one substantive implausibility and the other procedural implausibility but it seems to me that both need to be satisfied if you are to pass the Pro-sys test and since very few class representatives are going to be sufficiently bonkers to come up with a process that is substantively irrational, it's really how you're going to go about the quantification exercise. Even if it's weak, we're not worried about that, it's what do we do to put in place 18 months hence or less, an effective trial.

That's the sort of robust way I try and articulate the procedural side. What do we need to do to ensure that both sides have a fair shout at challenging the other side's case, so as to enable the Tribunal to reach a robust conclusion which will hopefully withstand the scrutiny of a higher court.

MS KREISBERGER: Yes. And, sir, I think that really attaches to the some basis in fact formulation that one finds in the Microsoft test itself. Is this a methodology capable of being applied to data. Happily, I'm going to show you that we have the data about user data to apply the methodology. Some of it is already in the public domain, so, fortunately, we're not in that theoretical world where it sounds good but it can't be applied. We're very far from that. I will come back to that.

So with that, sir, I do I think, have to take you to the passages of Merricks on Microsoft, so we have them in the forefront of the mind. Those passages are at page 411 of Merricks and it starts at paragraph 39. The Supreme Court said this:

"The leading case is Microsoft. For present purposes, there were two relevant conclusions."

Moving to the second, which is the relevant one, was that:

"The threshold for the establishment of the other conditions for certification was that there should be some basis in fact for a conclusion that the requirement was met. This low threshold was not a merits test applied to the claim itself, rather, the question was whether the applicant could show that there was some factual basis for thinking that the procedural requirements for a class action were satisfied, so that the action wasn't doomed to failure at the merits stage by reason of a failure of one or more of those requirements. The standard of proof at the certification stage came nowhere near a balance of probabilities."

Then moving on to paragraph 40:

"One of the many issues in the Microsoft case was whether the requirement for

common issues was satisfied. In a passage which has come to assume a central place in the submissions in this case, Rothstein J said this:In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis, so that if the overcharge is eventually established at the trial of the common issues, there is a means by which to demonstrate that it is common to the class. The methodology cannot be purely theoretical or hypothetical. It has to be grounded in the facts of the particular case in question. There must be some evidence of the availability of the data to which the methodology is to be applied. Subsequent decisions have fortified this low threshold. They warn against imposing an excessive burden on the provision of expert evidence about the likely availability of data at the certification stage, so one has to be careful. "In particular, because it necessarily preceded disclosure, which would become available after that. The some basis in fact test required only a minimum evidentiary basis and was not an onerous one. An appreciation of the legal requirements of the certification --"

Sorry, sir, I am now moving on. I am moving on down to paragraph 45, skipping over the parties' submissions:

"An appreciation of the legal requirements of the certification process and, in particular, their level of severity, needs to be derived from setting the express statutory provisions in their context, with due regard paid to their purpose. Collective proceedings are a special form of civil procedure for the vindication of private rights, designed to provide access to justice, where ordinary forms of individual claim have proved inadequate. The claims which were enabled to be pursued collectively could or, at least in theory, be individually pursued under the protection of the overriding objective. It follows that it should not lightly be assumed that the collective process

imposes restrictions upon claimants as a class which the law and rules of procedure for individual claims would not impose."

Going down to paragraph 47:

"Where, in ordinary civil proceedings, a claimant establishes an entitlement to trial in that sense, the court does not deprive the claimant of a trial merely because of forensic difficulties in quantifying damages. Once there is a sufficient basis to demonstrate a triable issue, whether some more than nominal loss has been suffered, once that hurdle is passed, the claimant is entitled to have the court quantify their loss almost ex debito justitiae."

Going down to paragraph 48:

"A resort to informed guesswork rather than or in aid of scientific calculation, is of particular importance, when, as here, the court has to proceed by reference to a hypothetical or counterfactual state of affairs."

Which, of course, is the position we're in.

Paragraph 49 refers to the important principle of entitlement to quantification, notwithstanding forensic ability which has stood the test of time. That's the point you make, sir.

And finally, if I could just ask you to read paragraphs 50 and 51 for completeness.

MR JUSTICE SMITH: Yes, of course.

(Pause).

Yes.

MS KREISBERGER: Sir, I particularly emphasise for you there that one is necessarily in the territory of making broad assumptions for the purposes of the quantum methodology. And one does that, safe in the knowledge that the broad axe awaits at trial.

Now, these themes are further elucidated by the Court of Appeal in the Gutmann

judgment. That's at authorities bundle 2, tab 27, page 1297. That's where the judgment begins. Now, before I turn to the passages, I should say of course, the Microsoft review is not toothless, otherwise it would be superfluous. There would be no point, but what one sees coming out of Merricks is that the low bar arises out of the fact that claimants injured by competition law wrongdoing are entitled to compensation ex debito justitiae.

So if I could ask you to pick up this judgment at page 1315, starting at paragraph 51. The Court of Appeal refers here to the important issue as to the level of granularity and detail the CAT is required to demand of the methodology advanced by class reps for certification and compliance with Microsoft.

Then they give their observations on the Microsoft test:

"First of all, it is not a statutory test. There is no magic to it. It articulates a common sense approach. The Tribunal has a broad discretion. This is evident from the following terms used in the test: sufficiently credible or plausible, some basis in fact, a realistic prospect of establishing loss on a class-wide basis, the methodology cannot be purely theoretical or hypothetical, grounded in the facts of the particular case, some evidence of the availability of the data. The words 'sufficiently':some':used twice in the test':grounded':realistic' and 'purely', highlight both the discretion conferred upon the CAT to make a value judgment but also the relevant nature of the exercise.

Secondly [and now this is an important one in the context of this case], “[t]he test is counterfactual. The methodology is based upon a counterfactual model of how the market would have operated, absent the abuse. It's quintessentially hypothetical and for this reason, will use assumptions and models and frequently regression analysis, so it is not a fair criticism to say it is hypothetical. Equally, the CAT will expect to see some factual basis for the assumptions and models deployed, hence also the reference to the methodology not being purely theoretical or hypothetical,” not purely

so.

Third point, of course the absence of disclosure is highly relevant:

"The methodology of certification comes prior to disclosure. It's necessarily provisional and might properly identify refinements and further work to be carried out after disclosure and often there is a distinct information asymmetry between a claimant and a defendant which might be exacerbated in aggregate damages in top down cases, where the relevant information might predominantly be in the possession of the defendant."

We're certainly in that situation.

"At the certification stage, all that might be possible is to advance a methodology identifying what might be done following disclosure."

Again, they stress some evidence of the availability of the data. Very low bar. It's a light touch review.

"Issues, not answers. The CAT is concerned to identify the issues and gauge whether the methodology proposed for determining those issues is workable at trial."

Again, I think that picks up, sir, your point, when the issues are tested and might lead to different answers, some in favour of defendants:

"Because of this, the CAT will wish to assess whether, if the defendants do win on some issues, the methodology is capable of being adjusted so as to reflect only partial victory by the class."

I'm going to address you on that point in relation to the methodology here:

"Intuition and common sense. Judges are expected to use their common sense."

He refers there to the CAT arriving at a conclusion it considered was common sense or informed guesswork on the facts of Gutmann. The validity of this approach has been repeatedly endorsed, of course:

"The breadth of the axe and the nature of the claim. In forming its judgment, the CAT

will bear in mind that at trial it's armed with a broad axe. It can fill gaps and plug lacunae in the methodology. The axe-head is adjustable and can expand and retract to meet the nature of the case."

Now, this is a point I want to draw out for you. There might be less work for it to do in a case of a relatively straightforward counterfactual than in the case of a more complex one. In the present case, the counterfactual might be relatively straightforward. At risk of oversimplification, it's the journey from the start point within London, A, to the boundary, B, and onwards to destination C, a consumer with a travel card is not charged for the A to B leg. So that's your counterfactual, the A to B charge, that's the unlawful overcharge.

In this case, there exists quite a lot of data. Then if I move down towards the end of the passage:

"However, in a claim by, say, indirect consumers in a pass-on case, the amount of available hard data might be far less at the certification stage. The CAT might, therefore, be less demanding at the certification stage, in the knowledge that the axe head can be expanded to facilitate the achievement of practical justice at later stages of the litigation."

Sir, I rely on that today in particular because there, the Court of Appeal is saying: you already have this low bar set by the Microsoft test, but the Tribunal should be less demanding where the counterfactual is not straightforward. Well, certainly it is fair to say, with a little understatement, that the counterfactual here is not straightforward and therefore the bar drops, the Tribunal should be less demanding. Having said that, the methodology that I will take you through easily surpasses that but nonetheless, the legal test sets the bar at a very low level.

Turning back to the themes, the axe and liability:

"The appellants argued that the broad axe didn't apply to liability. This misunderstands

the purpose of the axe. It's not a substantive principle of law, as much as a description of a well-established judicial practice, whereby judges eschew artificial demands for precision and the production of comprehensive evidence on all issues and instead, use their forensic skills to do the best they can with limited material to achieve practical justice. It was a term coined long before the introduction of the overriding objective."

We move down:

"The common law takes a pragmatic view of the degree of certainty with which damages must be pleaded and proved. The duty of the judge to do the best possible with the evidence available, applies as equally to issues of causation and loss as it does to other issues relating to quantum."

Another important point:

"The test is about practical justiciability. Canadian case law suggests that when a decision is taken as to the methodology proposed, the CAT is seeking in broad terms to determine whether that methodology will advance the resolution of the issues at trial and enable the court to determine the loss."

Again, it resonates, sir, with your comments:

"We agree that a central consideration for the CAT when scrutinising a methodology under the Microsoft test, is to decide whether it is workable at trial, but always bearing in mind that the CAT has the power to wield its broad axe and work in a relatively rough and ready way, with assumptions and common sense intuitions and that it can permit or require adjustments prior to and at trial."

And the last is, of course, the height of the bar:

"In Merricks, Lord Briggs, for the majority, stated that the threshold for certification was not onerous, not least because it had to be formulated in advance of disclosure. We don't demur but it is necessary to put this in context. The court was not intending to indicate that the Microsoft test was toothless [as I observed, of course that can't be

the case] or that the CAT would not closely scrutinise the methodology for the purpose of obtaining certification. Aggregate damages regime represents a paradigm shift in the dynamics of tortious recovery. A defendant subject to an award is required to disgorge the total loss flowing from its breach."

I will come back to that comment:

"This contrasts with the pre-existing position whereby a dominant undertaking exploiting its position through the imposition of, say, unfair prices on consumers, was in practice, immunised from the adverse consequences of its breach by the lack of any realistic ability or incentive for a small consumer to take on the dominant firm. The introduction of the collective action and aggregation mechanisms reversed the landscape and has, in consequence, materially heightened litigation risk for undertakings. The CAT, therefore, plays an important gatekeeper role in certifying claims and will always vigilantly perform that function. It will seek to strike an appropriate balance between the right of the class to seek vindication and the right of defendants not to be subject to a top down claim, unless it is a proper one to proceed."

Of course, there is work to be done to meet the test. It's not a meaningless test.

Now, while we're in the judgment, could I ask you to just move down to page 1322, paragraph 75, halfway down, because I rely on this point. The Court of Appeal says there that "The determination of the correct counterfactual will be an issue for trial." And then (inaudible) but I don't think that's ground-breaking but it is important.

You will be pleased to hear the final authority on these points is at the third volume of the authorities bundle, tab 30, page 1563. That's where it begins. If I could ask you to move down to page 1573. So this is the Court of Appeal judgment in the recent McLaren case and here, the Court of Appeal is making the point that proportionality and practicability govern and also there is no bright line between methodology and

data.

Could I ask you to read paragraph 18.

(Pause).

MR JUSTICE SMITH: Yes.

MS KREISBERGER: Again, making the point that a gap in data might ultimately affect recovery, but it shouldn't trouble the Tribunal too much at the certification stage. Ultimately, better to press ahead than exclude a methodology for which there may very well be data, but if not, the time for it to fall flat is at trial. but, again, happily, I'm not in that position.

So those are the applicable legal principles. As I said, it's a rich seam. We have the benefit of sound guidance, so in the light of that, I would like to turn back to the Tribunal's question about the inter-relationship between that test and strike-out.

Now, it must be right that one can envisage a hypothetical case which involves a triable claim on the merits, in other words the ingredients of the infringement are properly pleaded, but you might have a methodology that is deficient, so it fails in some way and that would be, we're envisaging in this hypothetical scenario, on a matter which is not a pleaded ingredient of the case.

So to give an example, the pass-on methodology might be obviously deficient in some way, but that's not an element of the case that one would ordinarily reflect in the pleaded case, so it's not relevant to strike-out but it does arise in relation to the methodology for assessing aggregate loss. So, in theory, it's possible to have a triable claim that, nonetheless, fails because the methodology is implausible, incredible. but, as I have said, that hypothesis is very far removed from the present case, where we have a triable claim on abuse and it will be supported by a quantum methodology which is -- and I will take you through that -- carefully tailored to measure the harm arising out of the abuse. but we should approach that with all the principles laid down

in Merricks and Gutmann in mind, not to distort the landscape to the disbenefit of the proposed class representative.

MR JUSTICE SMITH: I appreciate you say this isn't your case but let's suppose we have a situation where the Merricks strike-out standard is met, by which I mean you can't strike it out, but the Microsoft process standard is not met, such that for whatever reason, you can't grasp how the quantum is being articulated, for whatever reason. What does the Tribunal do in that case?

MS KREISBERGER: Well, if it falls below the threshold, it's not a certifiable case, it's not eligible for certification within the meaning of the rules and section 47B, so that is the end of the matter for that case.

MR JUSTICE SMITH: So we just dismiss the application.

MS KREISBERGER: Unless -- I mean, it's a little difficult to speculate in a vacuum. If there is an obvious remedy, then the class rep can go away and have another go.

MR JUSTICE SMITH: Yes, I mean, my question, really, is that, actually, failure to meet the Pro-sys test is, in this regard, remarkably like strike-out, in that this Tribunal is not in the business of striking out a claim without giving the opportunity to amend, to cure the problem.

Equally, if the Microsoft Pro-Sys test fails, then it seems to me that the first touch of the ball of the Tribunal should be not to dismiss the application but also not to allow it, but to stay the matter, to enable the question to be rectified.

If the rectification doesn't appear, or appears unsatisfactorily, then, well, you don't strike it out but you do what is the same thing, you refuse the application. So I mean, I appreciate you say you are a million miles away from that but Ms Demetriou will be saying that you are well within this, so what we are keen to establish is what we do in that eventuality. And the reason I'm asking is because, speaking entirely for myself, I find the Court of Appeal's decision in McLaren extremely hard to follow, because

what you have there is the Tribunal saying, "We're going to certify. Both the strike-out and the Pro-sys tests are met, the matter can go to trial", and what the Court of Appeal says, "Well, we're very happy with the certification bit but please think again about the process bit", and I just don't understand that, because you're telling the Tribunal to do something but I have absolutely no idea what, and so I'm just seeking to get my ducks in a row here in case Ms Demetriou is right and you are wrong and what we would do, and I am laying this out so that you can push back if you want to, what we would do is we would say 'You're stayed. We will have an argument about costs. If you want to, you can come back and deal with whatever improvements need to be done in your quantification methodology. If you don't, then we will dismiss the application but you will have time to put your house in order.

MS KREISBERGER: Sir, I am, of course, not going to push back against your suggested approach. It's right that the Supreme Court stresses a point you made, sir, which is if you don't certify, then there is no vindication of the rights of justice and compensation for the class, so that's where they're coming from. It's because that's an existential problem for certification of the class that the standard is very low.

But if I were to find myself in the unhappy position of not having met that extremely low threshold which is meant to be applied in a non-demanding way when counterfactuals are hard, then I would, of course, welcome the opportunity to remedy any defect.

MR JUSTICE SMITH: Well, that's very helpful, Ms Kreisberger, if I may say so and, Ms Demetriou, just to be clear, we will be delighted to hear from you as to what we should do on your case. If the issue doesn't arise, it doesn't arise but we would like to have an understanding of where each party is coming from, in the eventuality that the Pro-sys test fails, in other words, you succeed in your arguments because at the moment, it does seem to us quite difficult to understand what it is we're supposed to

be doing about that.

Thank you.

MS KREISBERGER: Sir, I am about to move on to the pleaded abuse. I wonder if now would be a good time for a transcriber break?

MR JUSTICE SMITH: Yes, Ms Kreisberger, we will rise for 10 minutes and resume at ten past midday.

(11.58 am)

(A short break)

(12.10 pm)

MS KREISBERGER: Sir, it's quite obvious from the discussion we have had so far that I do need to address you on merits. There are three particular reasons why I want to do that.

The first is to respond to question 4 in the letter, which raises questions in relation to excessive pricing.

The second, I have foreshadowed that a number of Meta's criticisms stray into areas of merits. That's impermissible. They must be disregarded.

And the third is that the nature of the abuses is key to understanding the quantum methodology. Now, I wrote that sentence before I heard what you had to say this morning but I think we're agreed on that point and, in particular, I'm going to emphasise the need to preserve latitude at this stage, given the multiple possible permutations of an abuse finding which correlates to the multiple possible permutations of the counterfactual. It depends on the abuse.

Now, mindful of what you had to say this morning, sir, I want to set out my stall at the outset, so you have it in mind as I take you through the components of the pleaded claim, and I will do that carefully. It is this: this is not an excessive pricing case in any traditional sense. It is, in fact, an animal of a different stripe.

MR JUSTICE SMITH: Just to be clear though and forgive me for interrupting what is intended to be an overview but if we take the first two ways in which you put your case, which is unfair terms and then unfair prices, do you say that the same process of quantification applies to each? In other words, that Mr Harvey needs to serve up a same process of quantification for each part of that case or does it differ according to which bit succeeds?

MS KREISBERGER: It differs. I think it will be more effective for me to answer that question in detail once I have taken you through the pleaded abuses but, standing back, the overall question will be which elements are abusive. Is it transparency, is it the unfair bargain which you referred to? Once you know what's abusive, you can then say: ah, okay, our competitive counterfactual or our non-abusive counterfactual looks like this. It involves transparency about the terms or it involves a fair bargain and from that, we can measure the harm which resulted from the abuse.

So the overall methodology adapts itself to whatever elements of abuse are in the ultimate finding which is why you were quite right, sir, to raise the procedural point. You need to know what your abuse is. but I will show you why the methodology makes the question of quantification tractable, whatever elements find their way into an abuse finding, because you will have a counterfactual that has potentially, one doesn't know, qualitative as well as quantitative characteristics, but ultimately, all roads lead to the question: what portion of the data or perhaps all of it, was unlawfully monetised? That's the question at the end of the day, which is why you have to go through abuse, causation. Causation is what portion of the data was unlawfully monetised and then quantum is actually quite straightforward. So all roads lead to the question of, in the counterfactual, would Facebook have been entitled to monetise any of this user data? It may be that all monetisation is unlawful, or there may be a slice of it, a portion of it that's unlawful.

MR JUSTICE SMITH: If your formulation of the quantification exercise (audio distortion) monetised, (audio distortion) would that cause you problems?

MS KREISBERGER: No, I am forever slightly worried about using the wrong terminology when it comes to data. There are technical definitions to these terms under the law of data protection, which I'm not concerned with.

The distinction may be -- again, one is now in the hypothetical world and speculating -- "used" might refer to what Facebook does with data to run a social network service. That might be okay.

For instance, first party data, on platform data, which is given up willingly by the user and used in the social network. Just for argument's sake, that might be okay, so using it for the network and that's why I picked the term "monetisation" quite carefully because what we're talking about, what we say is the unlawful data practice is the grabbing of the data for the ad business, to generate ad profits. That's the usage.

MR JUSTICE SMITH: I see that. You framed the question (audio distortion) point 1. Point 2, you need to quantify to identify what portion of the data was unlawfully monetised. Now, you have the word "unlawfully" in there, so I don't see why you can't have "used", because you're already saying --

MS KREISBERGER: You're quite right, sir. You're quite right.

MR JUSTICE SMITH: Let me say why I am pushing back on the use of the term "monetise", because, and I am sure you will be coming to this, I do not see any immediate correlation between the loss to the class and the gain to Meta. And you are quantifying the former and Meta gets to hang on to the other because we're talking about compensation, not restitution or extraction of unlawful profits.

MS KREISBERGER: Can I just address that, then?

MR JUSTICE SMITH: No, no, whenever you wish, because I think it is quite fundamental to the way we, at least, are seeing your claim. If I have that wrong, then

we do need to know.

MS KREISBERGER: That's why I think it's important that I simply foreshadow what I will be saying about that which is that it comes back again to the question of the competitive counterfactual. And I will be dealing with this in relation to excess profits above a reasonable rate of return. In a competitive -- let's take a hypothetical example again. All data that was unlawfully used -- let me rephrase that. The data which was unlawfully used is all the data, so we don't have to worry about there being some portion of the data. The unlawful usage extended to all data shared by users.

In a competitive counterfactual, the commercial value to Meta, the amount that Meta, the sum which Meta monetised as a result of the universe of data, that will be driven back to users in a competitive counterfactual and this is what the CMA says in its market study in terms and I will take you to that.

So in that scenario, the commercial value, that number that we have, what it's worth to Meta, gets driven back to consumers, to users, and that, in principle, is a matter of economic theory that should be everything above your rate of return. So if that's your counterfactual, and that's just one, the commercial value is a very useful metric for working out what would be the compensation that is driven, what is the value that is driven to the class in the competitive counterfactual from which the abuse is eliminated.

MR JUSTICE SMITH: Now, that's very interesting. What I think you're saying is that in a world of perfect competition, you are of course right because what will happen is that there will be free entry of any number of rivals to Facebook, who will have no barriers to entry or exit. They come in and they compete and the price is driven down so that it subsists at cost, plus a reasonable rate of return. That's in a world of perfect competition.

Now, your counterfactual isn't what would happen in a world of perfect competition, is

it; your counterfactual is what would be the case if the abuse of conduct of which you complain did not occur and it is that which we are quantifying, not what could happen in a world of perfect competition.

MS KREISBERGER: I'm not sure that's a particularly helpful distinction for us today because we're speculating about the counterfactual, but I'm not sure that the scenario you've labelled perfect competition actually depends on competing platforms.

Let's say that you have a world where Facebook has to be entirely transparent about what it's really doing with the data and it is required to engage in a fair bargain. I'm slightly cautious about having this debate before I have taken you through the pleaded abuse of --

MR JUSTICE SMITH: I really don't want to take you -- as long as you know what --

(Overspeaking)

MS KREISBERGER: I'm grateful.

MR JUSTICE SMITH: -- then take matters in your own route, but I think you're going to have to articulate what, taking your case at its highest and assuming it succeeds, what your counterfactual actually is.

MS KREISBERGER: Now, I can answer that without delving into the detail. Taking the case at its highest, and I will show you where the CMA say this, value is driven back to the user side and, in principle, that could be all profits above a reasonable rate of return.

In a sense, it doesn't matter how you get there. Is that through competing platforms or one platform that has to behave in a non-abusive fashion, but a competitive scenario, if it is related to all the user data, might involve all those profits going to the user side of the equation.

And certainly, as we stand here today, that cannot be excluded as a possibility.

MR JUSTICE SMITH: It sounds odd coming from the mouth of a Competition Tribunal

, but I'm not actually that interested in what is a competitive scenario. What I think we're interested in is what you say is an infringement of competition law and what we are in the business of assessing are the damages which flow to the class, were that infringement not to have been.

So markets can be non-competitive for a whole variety of reasons. It's incumbent upon you to articulate what those reasons are and we will then, having understood what, at its highest, your counterfactual is, try to quantify it and we're not in the business, of course, of quantifying it today, but we are in the business of trying to work out what your methodology for quantifying it is.

So take, for instance, your case regarding unfair terms. The counterfactual is what would fair terms be and then you assess the difference in pounds, shillings and pence between the actual, where the infringement was, and the hypothetical or counterfactual, where the infringement has gone.

Now, all we're doing, though, is hypothesising not a perfectly competitive market or even a generally competitive market. What we are hypothesising is a market that is competitive in the way that you say it should be, given what you're alleging. So you can't, I think, say: generally speaking, in a competitive world, it would look like this. You have to say: this is what you, Meta, have done wrong. This is your infringement. These are the consequences.

MS KREISBERGER: I accept all of that and that's on all fours with what I am going to say to you. It remains the case that putting my case at its highest, using the term "non-abuse counterfactual", which actually, I think is the term we use in the skeleton argument, because I have this point in mind, putting it at its highest value, profitability above a reasonable rate of return, whatever that rate of return is, would be driven to the other side of the market in the non-abusive counterfactual. One permutation, putting the case at its highest but I would like, if I may, to address you on other

possibilities.

It is undeniable but we have to keep it open at the moment, but I see the usefulness --

MR JUSTICE SMITH: No, of course we are very conscious that come liability, you may succeed on all -- but for my part, just for my part, I think I do need to understand a little bit more about your case at its highest, particularly in respect of the unfair terms.

MS KREISBERGER: Understood.

MR JUSTICE SMITH: The way I see it and it may be I have it completely wrong, is that if your unfair terms, which is the extraction of data unlawfully succeeds, the counterfactual is that that data is not extracted, but all you're then doing is then quantifying the loss to the class of that data having been extracted when it should not have been.

MS KREISBERGER: Sir, you have the point. That is the case.

MR JUSTICE SMITH: Very good. In which case, I don't understand why the profitability or otherwise of Meta on this part of the case matters at all.

MS KREISBERGER: If I could take it in stages and come back to you.

MR JUSTICE SMITH: No, no, of course --

MS KREISBERGER: That's very helpful.

MR JUSTICE SMITH: I'm quite sure you can tell me where I missed a trick.

MS KREISBERGER: I'm grateful.

So we start with the pleaded abuse. That's at claim form paragraph 91. That's core bundle, tab 1, page 37.

So the allegation of abuse is that Facebook abused its position by imposing unfair terms, prices or other trading conditions on users.

Now, that's a category of abuse laid down by statute. If I could just ask you to turn up section 18 of the Competition Act. That's in the authorities bundle, bundle 1, tab 7, page 78. Paragraph 2:

"Conduct may, in particular, constitute such an abuse if it consists in directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions." So you see the claim form directly mirrors the statutory abuse. That's the statutory head of abuse.

MR JUSTICE SMITH: Yes, I don't think that's helping you, because section 18.2(a) is not a pleading.

MS KREISBERGER: That's Chapter II.

MR JUSTICE SMITH: Yes. What it is is it's an articulation of what may constitute infringement.

MS KREISBERGER: I am simply --

MR JUSTICE SMITH: I have no problem in 91 mirroring 18 but a pleading is intended to set out the facts and matters that constitute --

MS KREISBERGER: I'm going to move to the particulars. Yes. That's simply to say that's a statutory head of abuse. That's all one is saying there.

Now, if I could ask you to turn to paragraph 121 which addresses your question, sir. That's at page 47 of the core bundle. Now, you see there:

"The facts and matters pleaded above infringe Chapter II, as through its imposition of terms and conditions, Facebook imposed unfair prices and other unfair trading conditions on its users. Since those facts and matters had the combined effect of exploiting users, they can be treated as comprising single infringement. Further or alternatively, Facebook's conduct encompassed the following elements of unfair conduct which individually and/or together, infringed [they are] the unfair data requirement, the unfair price and other trading conditions."

So those are the three distinct elements. And the pleading goes on to give particulars under each of those headings. The unfair data requirement is addressed at paragraphs 123 to 125.

So the allegation is that, at 123:

"Facebook exploited its dominance by imposing, as a condition of access to its network, T&Cs which gave rise to the unfair data requirement. The unfair data requirement was disproportionate ..."

And I'm going to come back to that:

" ... and/or not necessary for the attainment of the commercial objective of providing a personal social network or social media network because the nature, extent and/or scope of personal data which Facebook obtained, extended far beyond the type of data required to offer social networking."

And that data was taken for the purposes of Facebook's activities on the advertising market which generated these vast revenues:

"Users were harmed [that's 125]. It was imposed on users on a 'take it or leave it' basis: Users who wished to access Facebook had no choice but to give Facebook access to their personal data, including types of personal data which are highly sensitive and were therefore required to accept insufficient privacy protections from the platform. Throughout the claim period, users had no available alternatives ... "

because of Facebook's unique position, there were no substitutes, and there was no ability to opt out adequately or at all out of personal advertising, in exchange for not giving up their data, or to opt in to personal advertising.

So I'm going to come back, sir, to the relevant legal principles engaged here but I just want to set out the particulars of the pleaded case.

The unfair price is pleaded at --

MR JUSTICE SMITH: Just to encapsulate this, the infringement is the extraction of data over and above what is needed for the attainment of Facebook's commercial objectives?

MS KREISBERGER: Correct, on a take it or leave it basis.

MR JUSTICE SMITH: Yes, so we have a spectrum. We have at point zero on the left-hand end, zero, no data extracted at all. At the other extreme, we have the data actually extracted by Facebook, which, let's say, is 100 and somewhere in the middle, we have a point where some data is properly extractable in order to provide the commercial objectives to provide a personal social network. Let's put that at 40.

So the harm that we are quantifying is the unnecessarily extracted data that lies between 40 and 100?

MS KREISBERGER: Correct, and I said I would come on to legal principles because it sits with the legal approach but the test is one of proportionality. So that part of the data which was disproportionately extracted, that's the bit you're quantifying. That's the causation part.

MR RIDYARD: It's unnecessary because it's not needed to provide the service.

But given that the service is provided at no cost to the consumer, something has to fund the people who do the coding or whatever it is that provides the service and that's advertising, isn't it?

MS KREISBERGER: That will be a factual question where one talks about reasonable rates of return. So it may be that a portion of the data has been unlawfully extracted and the data which is lawfully extracted is within lawful profitability and that funds the service, but all one is looking at -- one has to be very careful at the abuse stage, to look at the question of what was unlawfully extracted. And, of course, Meta will be arguing, you know, "We need to do this to run our business and targeted advertising is absolutely central", and the Tribunal will need to determine what is proportionate in the factual circumstances of this case.

Now, of course, these questions aren't up for assessment today because we're firmly in merit. The appropriate question is the aggregate loss question. The PCR's case, well, that will be tested at trial on the merits as to what is a proportionate level of data

extraction. That will be the central question which the Tribunal will need to determine. Sir, I think Mr Ridyard is positing a case where, if all data extraction is unlawful, is there a problem? Well that will come out in the wash. That will be a factual matter for consideration.

MR JUSTICE SMITH: What Mr Ridyard is quite rightly articulating is a point which I'm sure Meta will be pushing, which is that the two sided nature of the market and the fact that this is an only superficially free product is rendering the spectrum that I have articulated to you rather more complicated because it may be that the amount of data that is the, as it were, fair data requirement, the counterpoint to the unfair data requirement but the fair data requirement, is actually much more extensive than my 40 because you need to extract that data in order to monetise what is, to the subscriber, a free service.

So it may be that consideration of the two sided market moves my 40 to 60, or to 70 or to 100. Who knows. As you say, that's a matter for trial. but the basic point which is that one has to define a borderline to be determined at trial of what data constitutes unfair data requirements versus what constitutes fair data requirements, is the issue and the issue following on from that is having defined the borderline, wherever it might be --

MS KREISBERGER: And that's a causation issue.

MR JUSTICE SMITH: Maybe. I'm --

MS KREISBERGER: So abuse under this heading, we're looking at unfair data requirement --

MR JUSTICE SMITH: Yes.

MS KREISBERGER: -- is the unfair data requirement disproportionate? That's the question for determination, to work out whether it's abusive. If it's disproportionate, the unfair data requirement is abusive. Which data was used unlawfully by Meta

through its imposition of the unfair data requirement, now we value it?

MR JUSTICE SMITH: I think all you've done there is articulated the parameters of the counterfactual scenario. In other words, you know what has been extracted. That's your unfair data requirement. So all that's happened on my spectrum is you've worked out what it is that is wrong and the next step is to assess what that wrong costs in order to make it good, and that's where I come -- I'm sorry to bang the drum again -- to the importance of assessing the loss to the subscriber, as opposed to the gain --

MS KREISBERGER: And I will come back to that.

MR JUSTICE SMITH: -- to Meta.

MS KREISBERGER: Yes, I'm grateful.

MR JUSTICE SMITH: The question is different when one comes to the unfair pricing allegation and we will try and do a similar exercise with that, which is why I asked at the outset why, or whether your methodology for quantification was different, as to the infringement that you are alleging because, the way I see it, there's a big difference between the unfair data requirement and the unfair price.

MS KREISBERGER: Let's go to that, if I may. So unfair price is at 127, page 49. So the pleading provides:

"By making access to its platform contingent on users giving up access to their valuable personal data, Facebook demanded an unfairly high price or payment in kind for the provision of social networking services. Conversely, by taking that valuable personal data without paying for it and offering only social networking services in return, Facebook offered an unfairly low purchase price for valuable personal data, in particular."

Now, these are the hallmarks of the unfair pricing abuse:

"The incremental cost to Facebook of offering the network is very low. The very high revenues generated by Facebook's advertising activities. These revenues indicate

that the economic value of the data is high. Thirdly, by virtue of its commercialisation of users' personal data, Facebook earned substantial excess profits which are profits earned over and above those profits which a firm would have made in a competitive market. In the circumstances, there is no reasonable or proportionate relation between the economic value of the data and the economic value of the personal social network, nor is there any reasonable relation between Facebook's costs of providing the network and its revenues from data and users had no option to accept."

And you see there, sir, at 128:

"In a competitive market [so here one is looking at infringement] users would have received recompense for giving up their personal data in amounts which were proportionate to the commercial value of that data."

So that was the point I was making:

"For example, rival service providers might have offered users a share of the profits derived from monetising their personal data with advertisers or the ability to transfer their data to other providers for monetisation or equivalent services that didn't require users to provide their data."

That's your potential competitive counterfactual against which you address the unfair conduct.

MR RIDYARD: Are you assuming that the value of the data would be the same in this competitive counterfactual? Because if there are four Facebooks, then I can understand those Facebooks would be bidding against one another to get my data. On the other hand, if there were four Facebooks, they wouldn't have such market power over advertisers and, therefore, there wouldn't be so much rent to be redistributed. So I think -- can you just comment on how you see the counterfactual?

MS KREISBERGER: It's too early, really, to comment on that. We're simply not in a position, pre-disclosure, to elaborate on whether the counterfactual might involve

competing networks or a single network conducting itself in a non-abusive manner. I'm, at this stage, unable to answer that question.

MR RIDYARD: but you're asking us to think about the damage, what the damage is --

MS KREISBERGER: but that's a separate part of the analysis.

MR RIDYARD: Well, you say that, but the damage involves comparing an actual with a counterfactual and if you don't know what the counterfactual is, it's hard to get your head round what the damage is even trying to do, let alone how you do it and that's one of the difficulties, isn't it?

MS KREISBERGER: It is and we don't shy away from that, but when I get to quantum, I will be showing you that the commercial value to Facebook is essentially a proxy for measuring user harm in the actual world. So when you say "What was the price?" Well, commercial value -- I'm not too keen to jump ahead into quantum while we're on abuse, but when one comes to look at quantum, you have the commercial value to Facebook as a proxy for user harm. I will come to that.

What, let's say, users are being paid in the counterfactual for their data, well we will have to run the numbers to work out what the harm is between the actual world, where users are giving up a large amount of data which is monetised to generate vast revenues and a competitive world which might involve competing platforms making payments. We will have to do that calculation of comparing the actual with the counterfactual to work out the harm, but as far as the abuse is concerned, these are permutations of a fair price world which we don't live in, in the actual world.

MR JUSTICE SMITH: (Audio distortion) I'm not sure you can detach the quantification exercise from the abuse. So looking at the opening words of paragraph 127, you say that Facebook demanded an unfairly high price or payment in kind.

Now, that's very close to the barter scenario that I was putting to you at the beginning.

MS KREISBERGER: It is.

MR JUSTICE SMITH: The fact is that you didn't accept that this was a United Brands case.

MS KREISBERGER: Yes.

MR JUSTICE SMITH: And my short question is that, although I accept that most of the factors, probably all of them listed in 127(a) through (e), play a part in working out what is an abusive price and so are relevant to United Brands, they're not, in and of themselves, enough because the fact that a price is sitting above cost or sitting above a reasonable return on capital, does not make it abusive and I'm very cautious about phrases like -- well, frankly, loaded phrases.

If I were putting lines through words in your pleading, I would be putting a line through "valuable" before "personal data", and I would be substituting something else for "unfairly high price" because I think they're sending the wrong signals. A price can be unfair and yet not abusive.

MS KREISBERGER: No, it cannot be. No. but there we are.

MR JUSTICE SMITH: I think we've got --

MS KREISBERGER: That's the nub. What I am very keen to do is to show you the legal test.

MR JUSTICE SMITH: Well, okay. Where are you going to take me, if you're not taking me to United Brands?

MS KREISBERGER: I can tell you the cases. It's DSD, it's Deutsche Post, it's Gutmann and it's German Facebook and there is a legal test and it's proportionality and I'm very keen to show you that because I see it's very important.

MR JUSTICE SMITH: Yes, it is.

MS KREISBERGER: I'm not saying United Brands is completely irrelevant but United Brands is a very specific methodology. Price cost comparison under limb 1, comparators under limb 2. It's a specific technique for identifying when prices are

excessive. I'm not relying on that test. We referred to it in the pleading, but we make the point in the pleading that there are other methods.

United Brands doesn't work, for the reason, sir, you have highlighted, which is the price is zero, a notionally free price.

MR JUSTICE SMITH: That's why the barter analogy --

MS KREISBERGER: Absolutely.

MR JUSTICE SMITH: -- resolves it.

MS KREISBERGER: but that's why I need to show you cases, European authority on unfair pricing which is not within the United Brands jurisprudence. It's a different seam of jurisprudence, so I think it's quite important that I show you that --

MR JUSTICE SMITH: I agree.

MS KREISBERGER: -- because that's the case.

MR JUSTICE SMITH: but let me just foreshadow this: if you have identified a route which reaches a different outcome to the route that will be reached by United Brands, then I have some difficulty with that.

MS KREISBERGER: It's a different methodology.

MR JUSTICE SMITH: Okay, a different methodology is fine but if you are getting remarkably different outcomes by one route than the other, then something has gone wrong, I think.

MS KREISBERGER: For instance, the Flynn judgment, which you will be familiar with --

MR JUSTICE SMITH: Yes.

MS KREISBERGER: -- the English authority on these questions, makes the point in terms at paragraph 97, where it set out the legal principles, that unfair pricing is the head of abuse and I'm going to come on to it, but that means reaping rewards that you wouldn't have reaped in conditions of workable competition. So there you have it,

that's the abuse.

Excessive pricing is one form of that abuse and that's because you're applying a specific price cost methodology, where you have a positive price and you can do that. Not saying we will have a vastly different outcome. I am employing a different set of techniques because. otherwise, one might find oneself in a world where abusive practices of this sort which don't involve a monetary price would be outside the scope of competition law which can't be right.

MR JUSTICE SMITH: No one is saying that. All we're saying, all I'm saying is that when you are dealing with a zero priced good and, frankly, that is misleading, not a zero priced good --

MS KREISBERGER: Correct, it is a zero monetary value.

MR JUSTICE SMITH: -- it is data for access, with no additional payment.

MS KREISBERGER: Quite.

MR JUSTICE SMITH: That's all it is. but that involves quantifying what each side is giving or giving up.

MS KREISBERGER: Absolutely.

MR JUSTICE SMITH: Right. So what you are doing by inserting the term "valuable" before "personal data" is putting the cart before the horse because that is a question which is at issue.

MS KREISBERGER: We have cited in the pleading the value of the data which is the 56 billion, so it's simply referring to the number.

MR JUSTICE SMITH: What we're talking about here is we need to understand how it is that the data is valuable, not, again, to Meta but to the person giving it up. And that's the harm. What you're saying is "I have got something which I value enormously. You are forcing me because I want something else, to give it up for less than it is worth", but you can't assume the value.

MS KREISBERGER: but what we are doing is we wield the broad axe.

MR JUSTICE SMITH: Right.

MS KREISBERGER: So you look for real world metrics to value the data.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: It would be a very strange assessment if you close your mind to the real world metric as a part of the analysis, not the full extent of the analysis, which is the monetary value derived by Meta from the data. That is a key metric for what this data is worth. It's part of the exercise.

Now, I'm going to come on to this.

MR RIDYARD: And if there is a connection between the harm to me which is I am being violated by giving away my secrets and the profits that Meta happens to be making from selling my data, there has to be a connection between those two things, doesn't there, in order for your points to be valid?

MS KREISBERGER: The connection is the abuse is in the disproportionate nature of the bargain here. So you've given up a lot of data, you've lost control over it and you have something that is a very small value in return and that's within the scope of competition law. I will show you that.

MR JUSTICE SMITH: Ms Kreisberger, no one is pleading the scope of competition law. You don't need to argue that. Obviously it is. What is causing us difficulties is the ex ante supposition that this is, to the person giving it up, valuable data.

Value is a terribly difficult thing, but let us look at something other than Facebook. Let us look at -- The branded T-shirt. Now, I have no doubt that if I went into the market and just went for a white T-shirt, I could get it for a couple of pounds. If, on the other hand, I want a branded T-shirt, I want my Nike swoosh or my Adidas logo, I'm going to pay probably ten times as much. Now, this is nothing to do with the cost of producing the T-shirt. That's more or less the same. You have some additional costs because

Nike have got to push their brand and promulgate it, but at the end of the day, I am paying £50 for my Nike T-shirt, when its cost is broadly the same as the unbranded T-shirt that I get for a tenth of the price.

Now, all of this shows that value is an acutely subjective thing and what may be the case is that your subscriber to Facebook is saying: I value considerably, the access to a social media website. Now, I personally don't, I don't subscribe to Facebook but there we are, some people do -- a lot of them do. That's one side of the equation.

The other side is how much I value my own data. Now, again, I don't think it is a given that it is valuable to the person giving it up. Of course, I accept it's valuable to Facebook, to Meta, but that's not what the subscriber is giving up.

MS KREISBERGER: but that's not the test, sir, if I may say so. So I think it's an important point and this is pleaded.

MR JUSTICE SMITH: Okay.

MS KREISBERGER: So the abuse lies in the disconnect between the value of the social network provided to the user and the value of the data to Meta. User valuation at this point is not the only issue. That's why if one looks at the pleading, we apply the legal test here. There is no reasonable or proportionate relation between the economic value of users' personal data. The economic value is referring to how much Meta is flogging it for. That's the economic value of the data --

MR JUSTICE SMITH: Right.

MS KREISBERGER: -- and the economic value of the network. That's an unfair bargain. It's the disproportionality. That's the unfairness and that is an infringement. If you are a dominant, super dominant or monopolist player, striking that unfair bargain is unfair and, if I am right about that, there is an abuse. So at that point, one doesn't need to be concerned about user valuation because we're not compensating --

MR JUSTICE SMITH: Why is the Nike T-shirt branded with a monopoly brand,

because it's protected, why is it, when it is sold at ten times the rate of the unbranded T-shirt, not infringing competition law?

MS KREISBERGER: Well, I can't comment on the factual circumstances, but all I can tell you is that a dominant undertaking abuses its position if it charges unfair prices which are disproportionate to the economic value of the service provided.

MR JUSTICE SMITH: That is the case of the Nike T-shirt.

MS KREISBERGER: It may be.

MR JUSTICE SMITH: No, let's postulate. The branding is proprietary. No one else can put it on their T-shirts. The price of the unbranded white T-shirt is £3. The price of the branded T-shirt is £33. There is no difference, apart from the printing on the T-shirt. Some people are paying £33 for it. Why is that not extracting an unlawful monopoly profit from the person buying the branded T-shirt?

MS KREISBERGER: Well, retail is famously not characterised by monopoly or dominant players, so --

MR JUSTICE SMITH: Neither is the brand, which is the reason for the difference between the two.

MS KREISBERGER: but Nike may not have market power, because it's competing with Adidas T-shirts.

MR JUSTICE SMITH: I see.

MS KREISBERGER: So it's hard to see a useful analogy here, that if a dominant firm charges excessive prices or unfair prices it's abusing its dominant position and we have tests and methods and techniques for making that assessment, and certainly that's the approach being taken by regulators around the world in relation to Meta.

MR RIDYARD: If a dominant firm in a physical product charges an excessive high price, the harm to me as a consumer is kind of obvious, because I should be paying £5 for something and, because it's dominant, I am paying £50 for this thing.

MS KREISBERGER: Yes.

MR RIDYARD: So I'm losing my £45 every time I buy this product, so I can feel the pain and it's coming out of my bank balance. but in the scenario you're painting here with Facebook, I'm not paying anything, so there isn't that obvious connection between the profit to the monopolist and the loss to me as a consumer.

I take your point because there is a loss to me because I am giving up more data than I should be, but when I buy the physical product I lose my £45 every time I buy it. There is the connection in that £45 is ending up in the shareholders of the dominant company.

Here that isn't such an obvious connection because I am losing my privacy; I may not even care about that, in which case, even though it's making Meta loads of money, it doesn't bother me.

MS KREISBERGER: And the job at trial, and it is a question for trial, will be to persuade the Tribunal that the inequality of the bargain is what matters to the infringement finding. I mean --

MR RIDYARD: Sorry to interrupt, but you're specifically saying that the profits that Meta is making out of my data is something that contributes to my harm, so surely you do have to establish that that is the case in order to say that Meta's profits are a proxy for the damage that I have suffered by having my privacy violated.

MS KREISBERGER: So in that case, one is saying there is an abuse finding because we're on quantum then. So at that point, one is saying Meta has abused its dominant position by, let's say, demanding an unfair price and that's an abuse.

We now go on to quantify that abuse and we use a range of measures, measures which rely on user valuation which actually goes to address the concern you have; what value do people place on their personal data. but also real world metrics including the profits derived from the abusive conduct which, in a non-abusive counterfactual,

would in full or in part have been driven to users through --

MR RIDYARD: Through what? How?

MS KREISBERGER: Either whether it be competition or an environment in which the social network platform cannot abuse its position.

MR SAWYER: Then it's the advertisers that should be saying this is the abuse, we have paid too much; not the users, because they paid £55 to get this data when it should have been £5.

MS KREISBERGER: I do not think the advertiser bargain is in issue, because no one is --

MR SAWYER: That's where the abuse is surely, not with the individual?

MS KREISBERGER: No, the abuse lies in the amount of revenue generated by Meta for a commodity that's taken for free and it should be remembered -- and I haven't got on to this part of the case and that's the danger in jumping ahead -- part of the alleged abuse is that Meta has adopted practices designed to obscure what's actually going on and that contributes to the abuse.

They don't tell users, they make it very difficult for users to understand what's being taken from them and these are all elements of the pleaded abuse. So a non-abusive counterfactual -- I will come back to this -- may have a range of qualitative or quantitative features and we can't say today what they will be, but I emphasise if we're in a world where I have won on abuse and the price is unfair or the terms are unfair then we need to use data, real world evidence, to quantify the harm, including user valuation but also real world metrics of what the data is worth. And it would be a very odd quantification exercise to close one's mind to the value that is actually generated from the data, which might be driven to the other side of the market in a competitive counterfactual, or the competitive counterfactual will simply be the provision of less data.

MR JUSTICE SMITH: I see the time, but just to leave the two points which you may want to think about. First of all, Mr Sawyer's point that you can't leave the other side of the market out of account does seem to me to be one that is well-made. After all, if you have the abuse subsisting -- and I'm not for a moment suggesting that it does; I'm hypothesising -- if you have an abuse sitting on the other side such that actually Meta can charge what it likes to advertisers and, so if it had to pay for the data it would simply pass those costs on to the advertisers because it's so valuable, that may be a relevant question in assessing quantum, because you would find that actually whatever is charged to the subscribers of Facebook makes no difference at all to the profits being made by Meta through its sale of advertising data and, if that is right, you've almost got a circularity in your case which is quite damaging, so that's a point which one needs to understand and factor in. It goes to Meta's two-sided argument, the data point.

The second point is going back to my Nike example. I have to say I see your position as significantly weaker than the Nike T-shirt case because there is dominance because I am postulating a monopolised brand which people want, they can only get it from Nike, and they're prepared to pay a premium over it on my example.

The only difference as I see it, and please do explore it, is you can at least in the Nike example quantify the harm to the consumer because they're paying £33 rather than £3. You can't even do that in your case because you don't know what value the data is to the subscriber without looking to the profits on the other side.

But people to a bargain always think they're getting the better of it. That's why they enter into a bargain, and I don't see why you should assume that in this barter situation it is the subscriber who is inevitably worse off. That is assuming what you have to prove.

You may very well be right and every subscriber in the class is being fleeced by the

Facebook bargain, but part of your methodology surely has to be how are you going to establish two non-monetary values which are exchanged resulting in the zero monetary price and, at the moment, apart from the bare assertion that this is valuable data, I don't get how you're going to quantify it.

Equally, but for the bare assertion that the subscription to the Facebook social network is something that isn't very valuable, I don't understand how you're going to quantify that amount to the class, but you have to do both surely in order to understand that there is a mismatch in the bargain and that there is an unfairly high price, unless, as you say, you shortcut to the profits that are being earned by a dominant provider and say:well, those profits, because they are monopolistic means I can cut to the chase and say that they need to be disgorged.

Now, for my part I have some difficulty with that.

MS KREISBERGER: That's certainly not our case.

Of course, we are only able to look at this through the lens of quantum in the context of this application for certification and not to delve too deeply into merits question. So I don't want to allay your concerns in relation to how this translates to quantum; that's the question before you today.

But we, for the lunch break, note that these are not bare assertions. Paragraph 127 of the pleading is particularised and it's the application of the proportionality test to the particulars at paragraphs (a) to (d). That's the methodology.

MR JUSTICE SMITH: Thank you very much, Ms Kreisberger. I'm sure we will resume this very interesting debate at 2 o'clock.

(1.11 pm)

(The luncheon adjournment)

(2.00 pm)

MR JUSTICE SMITH: Ms Kreisberger.

MS KREISBERGER: Thank you, sir.

Sir, I wanted to come back to the Tribunal's question before I go back into my flow, if I may.

MR JUSTICE SMITH: Yes, of course.

MS KREISBERGER: And as I said, I will come back to the legal test which I think is important but just on the question of the valuation of the data, user valuation and, of course, I'm going to address you on that whole aspect of the quantum methodology, we will get there, but at the moment we're staying with the unfair pricing abuse and I think you wanted to understand how one justifies the term "valuable" in the pleaded claim, what's that based on.

And I wanted to come back to you on that and I will approach this with a bifurcated approach. First of all, it is a positive part of the PCR's case that this data is of subjective value to users but it's highly valuable as a matter of subjective valuation and if could just show you the sources for that proposition.

First of all, if I could ask you to turn up the CMA market study again. That's in authorities volume 4, page 2314. It's tab 38.

MR JUSTICE SMITH: 2314.

MS KREISBERGER: 2314, you see a number of bullet points summarising the point. It's the third bullet point and the CMA say this:

"Consumers want more control over their data. Most say they value their ability to control access to their data and only a small minority, 13 per cent, say they're happy to share their data in return for relevant advertising. Despite this, we have found consumer engagement with platforms' privacy policies and controls is generally very low. For instance, only a very small percentage of new users who registered with Facebook in February 2020 engaged with the ad preferences page over the 30 days from registration. We consider that the platforms themselves are largely responsible

for this situation."

So the CMA say consumers value the data, they value control. That's the first source. I should say I have four under the heading of subjective valuation.

The second is the ATT natural experiment. So I'm just going to introduce the point here. I am obviously going to be addressing you on that in detail in relation to the quantum methodology but the point for present purposes is that when Apple introduced the requirement to opt into tracking, having your data tracked across to third party websites and apps, most people didn't opt in. Two-thirds, it's around 60 per cent, didn't opt in, so that shows you that when given the choice, consumers place a value on holding on to their data, which they couldn't do, it's out of their hands, when there was no opt out, there was no option not to.

And actually, that really gives you a flavour of the abuse at issue because when you give people a choice, that's the action they take, a majority of them. A choice which they didn't have before. So you can't take the conduct in the abusive world as indicative of the value people place on their data.

And the quality of the offering, as it were, is not enough to get people's data, the quality of the Facebook offering. People will opt out, given the chance, or don't opt in, rather.

Now, I also want to make a point and then take you to the claim form. This is to Mr Ridyard's point, which was to ask: well, how were they going to run this business, given that the network is offered for free? Isn't this a wholesale attack on the business model? So I did want to just make the point so it's clear. There is no bar on running contextual ads and you'll see in the literature and the material, that's what Facebook used to do. Third party tracking or tracking, tracking of users, whether it's first party or third party data, that came later. That wasn't in the business model from the outset and they can monetise contextual advertising. That's distinct from tracking, and when we come back to the legal test, I will address you on proportionality. That's one

possible answer to the question of proportionality. It's through Facebook's practices that we're in a situation where this data is extracted for free, monetised very profitably with no payment made to the user, but it is the PCR's case that that is not central and necessary to the business model.

And I wanted then to take you to the claim form and it's paragraph 51. So this is tab 1 of the core bundle, page 16. Actually, it starts on page 15. This also addresses the point that it wasn't ever thus. In fact, Facebook changed its position on privacy as time went on. So the pleaded allegation is:

"Over time, Facebook gained market power. Its conduct and T&Cs moved from an initial emphasis on user privacy towards providing less privacy protection, without adequately communicating this to consumers. In the early period of its operation, Facebook placed significant emphasis on user verification and portraying its services as maintaining the privacy of those using its services and their personal data. Users had to register using their real world identities and to validate these via an email address issued by an organisation. User pages were presented as private. Connections with friends required both parties' express approval. This encouraged users to share more and more sensitive data on the platform which was of greater value to Facebook. Mr Zuckerberg talked about the fact that at the beginning, no one wanted a public page on the internet, that seemed scary but as long as they could make their page private, they felt safe sharing with their friends online. Control was key. With Facebook, for the first time, people had the tool they needed to do this. That's how Facebook became the world's biggest community online.

"But then as Facebook gained market power, privacy protections offered to users were degraded, without those degradations being made in a transparent way. For example, Facebook failed to inform its users of the scope of personal data it had begun permitting third parties, such as app developers, to access third party tracking.

Similarly, new features, such as the beacon or the like button, often entailed much more extensive tracking of user activity than first indicated by Facebook.

"In contrast to Facebook's public statements, the T&Cs captured the deterioration in privacy protections. For example, whereas the 2009 data policy provided that Facebook collects only a relatively brief list of information from the user's device or browser, more recent iteration set out a much more extensive list of device information collected."

So it wasn't ever thus. It's not a given.

Then I had one other reference, again to the CMA market study. This is at page 2334. This is, again, staying with subjective user valuation. The CMA say this:

"Consumers place importance on their ability to control access to their data. A 2006 survey by the European Commission found that 96 per cent of UK consumers thought that it was important that their personal information on their computer, tablet or smartphone could only be accessed with their permission."

So these are all data points, evidence in support of the PCR's proposition that users subjectively value their data. They have never been given a choice before and it's the absence of choice which facilitates this unfair bargain. When given the choice, you start to see the true valuation of this commodity.

Now, that is subjective valuation. I also want to address you on the point about the commercial value of the data to Facebook and how that fits in in relation to abuse as well as quantum. And I want to make two points here.

The first is that it is a relevant metric for abuse because the case that is being put is that the value which Meta generates from the data in the actual world would, in the counterfactual world, be shared with the user. So those are the profits, that in an abusive world, sit with Meta and, in a non-abusive world, would be shared with users.

Now, as I debated with Mr Ridyard, I'm not in a position today to tell you what the applicable counterfactual would be, whether that's through different platforms competing or a Facebook that cannot abuse its position and so can't engage in these unfair practices. If one takes the platforms competing, it may be that they compete on price. It's an incentive, to incentivise the user to hand over the data. That is how Facebook's profitability is relevant to the question of abuse. It's a relevant metric as to what's been taken.

Now, a different way of putting this point, my second point, is that, and you will appreciate lack of knowledge is a key part of the case, if you put it to users, if you tell them what they're giving up to Facebook and then you tell them how much money is generating from that data, you might expect the user to say, "I would like a part of that. I hadn't appreciated that I was giving up this commodity of great value to this trading party. We're entering into a bargain. I am giving it up and I see that it's very valuable to my counterparty. I would like that value to be shared with me in a fair way."

So even then, the value to Facebook is relevant to the valuation of the data in the abuse setting.

Now if I could perhaps just --

MR JUSTICE SMITH: Are you saying that the class don't know this?

MS KREISBERGER: We are saying that -- so a part of the case is that the class or members of the class do not understand what they're giving up, both as to the nature of the data, the extent of the data, the use which is being made of the data and the amounts generated by Meta.

Now, some members in the class may know, may understand, but you will recall that part of the abuse as pleaded relates to the lack of transparency, relates to Meta's public statements which misrepresented the position on privacy. So the lack of transparency, the lack of knowledge, that's all a part of the abuse and, really, one

needs to be a little careful and, of course, at trial, we will need to grapple with these points but now, at certification, dissecting the different elements of abuse has a certain artificiality about it because they feed into one another.

MR JUSTICE SMITH: I agree with you that we are not in the business here of working out whether you're going to win or lose a trial. We're in the business of setting up the elements by which, for better or worse, you make good your claim.

Now, the state of mind of members of the class is necessarily an individual thing which is, in itself, a fairly powerful indicator against a collective proceeding. Now, there are, do not get me wrong, extremely powerful indicators in favour of the collective proceeding but don't you, as the class representative, owe it to the Tribunal to say, "Look, we have a range of different views in the class, inevitably, as to what they know is going on", because these are complex things and people will have different views. "Here is how we are going to establish what we say our case is, that there is an undervaluation of the data that is being provided", or, put it the way you're putting it, Meta is reaping enormous rewards out of something that you don't know the true value of. It's possibly the same question. I'm not sure it is but we don't need to argue about that.

So how are you going to make that good; are you going to sample, are you going to provide surveys, does that need to be laid down here and now, so that we know what it is that you are going to be adducing to prove your case and so that the other side can work out how they're going to attack it?

Because we can't say: leave it to trial. We can't, on Day 1 of trial, say: well you say that the class don't understand what it is they're giving up. Surely we need to have very early on an understanding of how you're going to make this good. I'm not caring whether you win or lose but don't we need that laid down with a high order of precision?

MS KREISBERGER: With respect, I don't think so sir.

MR JUSTICE SMITH: No, okay.

MS KREISBERGER: Because these are evidential matters and we have to be very careful not to jump ahead on these questions on merits.

Let me give you an example which I have already given you. When you say "Are you saying some of the class didn't know?", I mean, there is data on this but one of the best data points is the ATT example. You're going to be hearing quite a lot about that from me today. When given the choice, two-thirds of the users did not opt in to third party tracking. That gives you a very good idea of the state of knowledge before, when they had no choice.

MR JUSTICE SMITH: Okay, well let's stick with that as an example, then. Clearly you can set out a list of data points which support your case, but is that how you're going to make it good --

MS KREISBERGER: Not necessarily.

MR JUSTICE SMITH: -- at trial?

MS KREISBERGER: There is an important point here, actually, that really is skipping ahead, that state of knowledge is not relevant to quantum and I will show you that.

So when you get to measuring the harm, whether people knew or not is not to the point when it's simply looking at what is the value of the data that was taken unlawfully. So I can give you that comfort because we're meant to be talking about matters of quantum methodology today, but state of knowledge is not a central question on quantum methodology.

When it comes to the pleaded allegation that Facebook's terms and conditions are a complete labyrinthine and no one understands them, well I have some public domain evidence that I can give you on that, but we don't know what's in Meta's disclosure as we stand here today, so I would invite extreme caution as to setting out road signs for how we manage the litigation in a way that is very different from an individual claim.

The PCR will, of course, engage with these matters but the question for you today is, is there some sort of problem with the methodology for aggregate loss? And these questions don't arise.

Does that help you, sir?

MR JUSTICE SMITH: With me, what I'm afraid is that in saying it will all emerge, you are effectively pulling the teeth, such as they are, of the Pro-sys test. If we're trying to work out how you're going to establish a certain fact, well you may say that, actually, the state of mind of the class doesn't matter for a particular point. Well, that's fine. If that's your case, then provided it's arguable, that's great.

But if you are saying it matters and some things must matter to your case, we want to know how you're going to make it good and I don't think it's enough to say: well, we will get disclosure from the other side. I think you have to say: well, what disclosure are we going to be looking for? It may or may not assist your case but you can't just say: we're going to go through Meta's data, looking for something that we think will help; you have to say: we will be wanting disclosure, we will be wanting the court's assistance to establish this body of data which we say is going to win us the case.

Now, you may well be right or wrong about that, I don't care, but we do need to be able to baseline what it is that over the next 18 months, when we get to trial, we're going to be doing. And that, it seems to me -- and do push back, because that, it seems to me, is the essence of the Pro-sys test. It's not can you prove it or can't you; it's how do you propose to do it so that we don't, in three months' time or whenever, have the most almighty row about disclosure, where Meta say: we have no idea what it is we're supposed to produce because the case hasn't been articulated.

So I think that's a certain level of comfort that the Tribunal is, well, entitled to.

MS KREISBERGER: So I think there will be a number of sources. If one is taking that example of state of knowledge, there will be a number of evidential sources,

particularly coming out of the regulators as well, who are looking at this and there are statements in the market study already as to what users did or didn't understand. but, of course, the class representative, the PCR, wants to undertake a user valuation exercise which will address or could address these questions. So that will also be an important source to derive evidence as regards to what users did or didn't know and I'm going to come on to address you as to how that will deal with the fact that users may not have understood what was being taken from them.

MR JUSTICE SMITH: It may be the difference between us is very slight, but to what extent will you push back if we say: look, you're going to have to say in an exhaustive list, not an open list, how you're going to do this. In other words, if you are saying: we will prove this by way of a survey conducted by our expert, that's the way we're going to do it, and maybe you have two or three other things which you say will be material, but if we said there is a numerus clauses here, that if you want to add something else in post-certification, you have to apply, effectively, to amend, is that something which you say is going beyond the process or something that can form part of the certification process?

MS KREISBERGER: Can I just take instructions?

MR JUSTICE SMITH: Yes.

(Pause).

MS KREISBERGER: Sir, I think the position is we're very open to sensible case management proposals that would make this litigation tractable for the Tribunal. In terms of sources of data, that is set out in Mr Harvey's two reports, so that would be a very good starting point. A lot of thought has been given to that, so in terms of what are we expecting to see in disclosure, we have set that out, so that would be a good starting point and, as ever, one would need to take a stage by stage iterative approach as the disclosure comes out to what more is needed, but I can take you to those

references, to the data, if that would be helpful as we go through.

MR JUSTICE SMITH: I don't want to take you too much out of your way and we have read Mr Harvey's reports. I think it's more how far we can appropriately -- and the emphasis on the word "appropriately" -- cut back your wiggle room in the future, so that one has a degree of certainty about how not only is the case going to be tried but how we are going to manage the processes going forward. Because what I think this Tribunal can't countenance is a kind of open-ended disclosure exercise, where the parameters are so uncertain that one spends days arguing about the disclosure exercise and both sides incur enormous costs in concretising, crystallising the vagueness.

Now, I appreciate you can say Meta have the deepest of pockets and can afford to do this but, frankly, I'm not sure that's an answer that we would give very much weight to. This process has to be manageable for what are very difficult cases, not merely because they are intrinsically detached from fact, as ordinary litigators would call them. Survey evidence is not something that one would have in an ordinary bilateral dispute, so there is that complexity and there is also the problem that you are dealing with a class rather than individuals which, in itself, imports difficulty.

Now, none of that is to say you don't get past certification, indeed, that point us towards certification. What I think the process is getting at is a much more rigorous articulation of what you need to do up to trial, so that we manage costs, we manage timing. The sort of things that you don't have to discuss in bilateral litigation because you know that if the pleading says "A misrepresented something to B", well one party is going to have to call A, the other party is going to have to call B and the Tribunal will hear the evidence. You don't need a hearing like this to work it out because people know. Here though, you're saying: well maybe it's a market investigation by the CMA, maybe it's a survey, maybe it's disclosure. Well, yes, maybe it's all of these things but my sense

is that the reason the Canadians have articulated this particular test is because a far higher order of control is required which requires more specificity now, not because we're trying to assess the merits, but because we're trying to control the process.

So that's articulation of where I am coming from and I think maybe for later on but the extent to which you say that is overreaching on our part and misreading or giving too many teeth to the process is something we would obviously want to hear from you on.

MS KREISBERGER: Thank you, sir. I think if I may, I will come back to you on those questions but, of course, the PCR would be very enthusiastic about proposals that make the litigation manageable and tractable and keep costs down, so we would certainly be in favour.

Sir, just to end on data as a valuable commodity, I think I should take you to our claim form which is core bundle 1, tab 1 at page 55 which cites Lloyd v Google and Lloyd v Google confirms that personal data, information about a person's internet browsing history, is a commercially valuable asset.

MR RIDYARD: That's not the same as saying that giving up my personal data costs me money, is it? Giving up my personal data may make Meta money but it doesn't necessarily cost me money to do so.

MS KREISBERGER: but, sir, that's not the relevant question. The question is not whether it costs you money. The question is whether the bargain is unfair.

MR RIDYARD: but when you have a look at damages, it is necessary, isn't it, to make some connection between what's being unfairly extracted from me and how much I can claim and what damage that causes me?

MS KREISBERGER: Absolutely and as I started out in this section, it is a positive part of the case that this data is valuable to users and I gave you those different pieces of evidence like the ATT example, the CMA's findings that find users do value their data and when they're given a choice, they value it so much that they hold on to it,

they don't give it up to Meta.

MR RIDYARD: When they're given a choice but it's not a costly choice, is it? If I am offered a chance to tick a box saying not to share the data, it doesn't at the same time, say: if you do that, we're going to degrade the quality of the service that you get or -- so it's a sort of one way bet, isn't it?

MS KREISBERGER: Let me give another example. If I were to give you something that's of no worth to me at all because I was given a T-shirt for free, coming back to the T-shirt example, and I give it to you and I find that you've flogged it for £100, I say to you: that's an unfair bargain, you should have paid me for that T-shirt. It didn't cost me anything, but I ascribe a value to it now that I know that it's very valuable to you.

MR RIDYARD: You might say that but I might not want to give you the money.

MS KREISBERGER: You might not but it's not to say -- I think you have to think differently about cost when one is talking about data. The cost is the loss of control over the data. The cost is the degradation in privacy protection which is precisely why Meta made public statements competing on this parameter of competition, "we protect your privacy", and that's how they gained market power and when they achieved, essentially, monopoly, privacy protections were degraded. So privacy has a value to users. It is a cost, it's just not the kind of cost that one thinks about when one is talking about T-shirts or other products.

MR RIDYARD: I understand that, but I'm still not sure what the connection is between that cost to me as an individual and the value that someone else happens to make out of that.

MS KREISBERGER: So, again, once you accept that -- unpackaging the points, the Tribunal will first need to be with me on the proposition that this is an abuse because the bargain is unfair. So let's assume for argument's sake and we have to assume this for argument's sake because certification concerns quantum, not merit,

so we assume for argument's sake that you have found that the bargain is unfair because it's disproportionate.

At that point, you say the user has been harmed through the unlawful extraction of the data and then the job is to quantify that value and we have a range of techniques, some of which look directly to user valuation, but the other metric does look to the commercial value to Facebook because that is the value that would be returned to the user in a competitive scenario. So that's the connection.

MR RIDYARD: To make that last connection there, don't you have to describe the competitive scenario and if it was four Facebooks competing against one another to get my data, then I can easily -- I can sort of see how that might set up a market for my data and I would sell it to the highest bidder, other things being equal. So that would be the mechanism whereby this money would get extracted by me from these competing social network providers.

But don't you need to sort of draw together that mechanism before we can make the connection?

MS KREISBERGER: No, because that's not the job at the stage of just pleading the claim.

MR RIDYARD: I think this is part of the difficulty that we're trying to sort of grapple with, to what extent do we need to understand the story. I know we can't answer the difficult question but don't we need to be clear what the question is? And I think if the counterfactuals are just sort of left hanging as one of 50 different possible things, it's very hard to say what the question is, let alone what the answer to the question is.

MS KREISBERGER: I think the question always comes down to valuing the data and all that the counterfactual tells you is what portion of the data was disproportionate and, therefore, unlawfully extracted and, therefore, that's what we're valuing.

MR JUSTICE SMITH: Is there an appropriate mind experiment? I know your claim

here ends in December 2019 and starts something, I think, September 2016. Would an appropriate mind experiment to get a grip on the counterfactual be to say: what would happen if the claimant class successfully injuncted as at that date, in 2016, Meta from using the data in the manner that is said to be an infringement of competition law, and ask itself: what would have happened had that injunction been given. In other words, what you do is you measure -- on the one side, you know what did happen because it's in the past; on the other side, what you do is you try to articulate what would have happened, had there been compliance with competition law, as you allege, by Meta. Would that give you a feel for the value of what we are talking about?

MS KREISBERGER: I think it's another way of putting the point that one needs to determine abuse before one can determine the quantum, because once you know what the abuse is, you can isolate the data that was unlawfully used, to use your terminology, sir, and it may be that there are quite simple distinctions. There is third party tracked data. There is first party tracked data and there is data, essentially, that's used for the social networking service and it may be that you end up in a place where it's the third party tracked data, for argument's sake, that was unfairly extracted and then the quantum exercise is to value that data using a suite of techniques.

But it may be as simple as that and one may get to there under any or all of the allegations of abuse. One may get to there because the lack of transparency is what enabled Meta to extract that data, for example, or it may be when you look at the price -- price very much in air quotes -- the unfair part of the bargain, the disproportionate part of the bargain was that third party tracked data and I should say that's the German FCO case.

MR JUSTICE SMITH: By taking the, as it were, hypothetical injunction, what you are doing is you are slightly reframing the question because what you are saying is that you should get a slice of the cake that is presently being consumed by Google [sic]

because --

MS KREISBERGER: Facebook.

MR JUSTICE SMITH: By Facebook, they have too much.

MS KREISBERGER: To compensate for the harm caused.

MR JUSTICE SMITH: Yes, that's the tie that I think I need help on and you will be coming to the law on that shortly, but suppose the hypothetical injunction resulted in a data usage that was consistent with the class or what the class say is lawful, so you don't get into problems about what they expected or what they didn't expect; you simply have a rule that says Meta can do this but no more.

MS KREISBERGER: Yes.

MR JUSTICE SMITH: In other words, going to our spectrum, they stop at 40, they can't go to 100 and then you ask yourself, as the counterfactual, what would have happened to Facebook's business if that had been the law.

Now, one anticipates that what would happen is that the excess profits would probably go down. They would have less data to sell. but it may be that that business was, in fact, unviable because they would make no money and they would be providing or incurring the costs for -- you're shaking your head. I'm not saying one or the other would be the outcome, what I am trying to do is frame the counterfactual question so that one can then articulate what evidence one needs to bring into play in order to answer it.

MS KREISBERGER: You're now into merits counterfactual because when you talk about unviability, that's going to feature as part of the unfairness test.

MR JUSTICE SMITH: Well, I'm not sure I'm in merits because I'm assuming you win.

MS KREISBERGER: We will be in a world --

MR JUSTICE SMITH: What I am doing is I am assuming that you get exactly what you want.

MS KREISBERGER: Mm.

MR JUSTICE SMITH: And isn't that the true counterfactual? The counterfactual is putting the claimant class in the position they would have been in had the tort never been committed.

Now, I have no idea where that takes you, but isn't that where we need the evidence to take us?

MS KREISBERGER: Sir, could I just take a moment?

MR JUSTICE SMITH: Yes, of course.

MS KREISBERGER: Sorry, sir, the point I was trying to make is you're positing a situation where I have won on abuse, but then you look at quantum and you find you're left with an unviable business but that will form part of the assessment on abuse because the practice won't be abusive if eliminating that practice leaves an unviable business because it won't be disproportionate.

MR JUSTICE SMITH: That may well be an argument for not hiving off quantum and having the whole thing heard together but nevertheless --

MS KREISBERGER: No, on the contrary, it will come out in the wash, so it will be addressed at the abuse stage and quantum really is just quantifying the unlawfully extracted data. If the test is applied, I think it would help, sir, if I went to the legal principles.

MR JUSTICE SMITH: I will shut up.

MS KREISBERGER: Not at all. Just on housekeeping, I see the time. Sir, you very kindly suggested sitting late today. I think that --

MR JUSTICE SMITH: 5 o'clock.

MS KREISBERGER: I'm grateful.

Sir, so just picking up, then, I thought it would be helpful to show you -- I'm just going to show you a couple of passages on price and then I will show you the pleading on

unfair conditions. I think I could take that quite briskly and then I want to show you what the legal test that would be applied at the merits stage is, if I may.

So if I could ask you to turn up authorities tab 53, page 3552, volume 5.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So that's 3552, under the heading "Consumers adequately allege causal antitrust injury". Now, this is a judgment from the Northern District Court of California in the class action against Meta in that jurisdiction and if we pick it up at line 9. If we go on to the next page, I just want to show you the heading on 3552. Then 3553, line 9:

"Consumers allege that their information and attention has material value because Facebook sells users' information and attention to third parties, including advertisers. Specifically, Facebook monetises user information through targeted advertising which generated most of the company's $55.7 billion in revenue in 2018. In other words, users provide significant value to Facebook by giving Facebook their information which allows Facebook to create targeted advertisements and by spending time on Facebook which allows Facebook to show users those targeted advertisements. If users gave Facebook less information or spent less time on Facebook, Facebook would make less money. Indeed, as consumers point out, Facebook describes its massive advertising earnings in terms of average revenue per user in its public filings. Facebook reported in 2019 that its RPU was over $41 per user in the US and Canada, thus there is no doubt the consumers' information and attention has material value."

And then if I could show you -- so that's how it's put in the US case and that's reflected in the judgment. If I could take you back to the market study --

MR JUSTICE SMITH: Just pausing there, this was just an interlocutory hearing.

MS KREISBERGER: That is right. This is not a final finding, absolutely.

Paragraph 2.5 in the market study. So this is authorities volume 4, tab 38, page 2209.

Now, this is how the CMA puts the bargain:

"Although consumers don't pay money for these services, there is still an exchange that takes place between them and the platform. In exchange for searching the internet, watching videos, communicating with friends, consumers provide their attention and data about themselves. Advertising funded platforms are able to combine the attention of their users with contextual or personal information they have about them to serve highly targeted ads which are in high demand by advertisers. These exchanges are illustrated below. The importance of consumer attention and data in the digital advertising market is explained in more detail."

There you have their visual interpretation of the bargain, so I thought I should show you that. And I'm going to come back to the legal test but just to complete the pleaded case, if you could turn back to the claim form at core bundle 1, tab 1, page 50. This is the other unfair trading conditions.

Could I ask you to read to yourselves paragraphs 130 to 132?

MR JUSTICE SMITH: Yes, of course. **(Pause)**.

Yes.

MS KREISBERGER: So that's the allegation, essentially that users were kept in the dark about what was really going on with their data through various tactics employed by Meta.

Now, some of the relevant facts which that part of the pleading refers back to are at paragraphs 49 and 50. These are the pleaded factual allegations:

"Facebook's terms and conditions changed on a regular basis throughout the claim period, with users again forced to accept these changes or to abandon the platform, which was itself rendered difficult by limited data access and/or portability, as well as the lack of effective competition. At least in some cases, revised terms of business have been less favourable to users than previous iterations. The various T&Cs

imposed were onerous, opaque and difficult to understand, even for the most determined reader."

And you see there a description of their multi-layered document of significant length and complexity and the description at A of clicking through to various tabs.

And then at C:

"Assessing the readability of Facebook's privacy policy, for example as described by the New York Times as only Immanuel Kant's famously difficult critique of pure reason, registers a more challenging readability score than Facebook's privacy policy."

And Mr Zuckerberg acknowledged that the average person is unlikely to read the whole document and it's hard to say that people fully understand something when it's only written out in a long legal document.

MR RIDYARD: Are you saying that these sort of tricks or techniques are linked to Facebook's market power?

MS KREISBERGER: Yes.

MR RIDYARD: When you benchmark them against apps that do not have market power, you don't see these things?

MS KREISBERGER: Or in a world where Facebook had been competing.

MR RIDYARD: I am thinking about a benchmark you can actually make.

MS KREISBERGER: It's a function of market power.

MR RIDYARD: So for apps that don't have market power, they don't do these things.

MS KREISBERGER: Well, I need to take care because it depends on whether they are social networking apps but broadly, yes, that is the position. What one is saying is that it is only through its search for ubiquity, which is referred to in the pleaded case which it achieved very successfully, that Facebook can sit back, not compete on the level of its privacy protections as it did in the early days, but essentially obscured the true position and do these various things. So, yes, the holistic position is a function of

market power which would not be observed in a competitive market.

MR SAWYER: There is a question about whether the New York Times article, as we read, 150 privacy policies, that would have been (audio distortion) disasters, so it seems to your point that it's a general thing rather than market abuse.

MS KREISBERGER: These are points that I will need to persuade you of at trial but I'm showing you how -- I have to make good factual allegations at trial, but this is the pleaded case. There is no question that the case falls below a Merricks threshold. The question is quantifying the harm which flows from the pleaded abuse so, again, I think we need to be a little careful.

Also, one is not looking at each in isolation. The case is the full complement of the pleaded allegations as to the ways in which Facebook has conducted itself in order to engage in this unfair bargain.

MR JUSTICE SMITH: Yes, to be clear, you are saying that the complexity of the terms is in some way causative of the harm suffered by the class?

MS KREISBERGER: Correct.

MR JUSTICE SMITH: So you're discounting the possibility that users just agree without reading?

MS KREISBERGER: I'm not discounting any possibilities.

MR JUSTICE SMITH: Right.

MS KREISBERGER: So I have pleaded a number of positive allegations. They will need to be made good at trial, but you may not accept this one.

MR JUSTICE SMITH: Well, no, but I am trying to work out where it goes, because if it goes down the route that paragraph 50 suggests, namely that the T&Cs affected the state of mind --

MS KREISBERGER: Sorry, I'm in the line of the sun --

MR JUSTICE SMITH: Perhaps we could do something with the blinds.

(Pause).

Yes, grateful.

MS KREISBERGER: I'm very grateful.

MR JUSTICE SMITH: I'm so sorry, I should have spotted that earlier.

MS KREISBERGER: Thank you.

MR JUSTICE SMITH: Not at all.

So paragraph 50 seems to be suggesting that there is some kind of link between the opacity and onerous nature of the terms and conditions and the conduct of the class that you're representing today, want to represent today.

And my question is, how does that fit in to your case? So if it were the case that the vast majority of your class just don't read these things because they would rather read War and Peace than the conditions that Facebook have manufactured and they just click on the accept button in signing up, does that hold your case beneath the water line, does it carry on regardless? What's the probative importance of it? Because if it's the case that unless you can establish that these conditions were affecting the state of mind in a way that matters to your case, then we're going to have to pay some attention to how one establishes that because we're not going to have, however, million members of the class paraded through the witness box, saying that they didn't understand the terms and conditions. We're going to have to work out how we establish that.

If, on the other hand, it doesn't matter, then perhaps we ought to be pruning this away, not because it fails the merits test but because, to go back to the question of triability, there is an important link between the allegations that you make on infringement and the quantum that follows, if those allegations are made good.

So if establishing that the facts and matters in paragraph 50 make no difference whatsoever, then we would quite like to do without them.

MS KREISBERGER: That's not my position, sir.

MR JUSTICE SMITH: Where do they go? Why do they matter?

MS KREISBERGER: Perhaps one way of answering the question is returning to the thought experiment that I proposed initially. What would the individual claimant do? Now, in an individual claim, one would look at abuse, causation and quantum, although one wouldn't have to look at the evidence before seeing the defence, even. The position in an individual claim in relation to this pleaded allegation is, is this conduct -- let's call it obscuring the true position. When a dominant firm in Facebook's position obscures the true position as to privacy degradations and data practices, is that an abuse? And I'm going to take you -- I keep promising to take you to the legal test which I will do.

If I am right, it's an abuse. If it's an abuse, one then has to address causation. In order to address causation, we ask: what does the market look like without the abuse? In a market with transparency, full transparency, what level of data would be extracted in conditions of full transparency, where -- let's say users are told upfront: you have a choice and if you give up your data, this is what happens. The question of causation, the question frequently faced in damages claims -- here is what portion of data would not have been extracted but for the unfair trading term.

So, again, we get down to the question of what portion of data are we talking about. The easy case is, for argument's sake, third party tracked data, and it is right that the individual claimant would need to make good the allegation that the causative effect of this abusive term was to facilitate third party tracking. That will need to be made good on the evidence at some stage.

If the Tribunal accepts that allegation, then the exercise becomes valuing the data that was unlawfully taken as a result of this aspect of the abusive conduct.

Now, these questions and no doubt there will be a need to wield the broad axe, given

in particular, one is hypothesising about a counterfactual world and we're looking at the effect across the class, but these are not questions that the Tribunal would or should shy away from. They need to be addressed. They're not, in my submission, questions that should trouble you at certification, because they're not quantum methodology questions.

We will need to make good our case on the causative impact of this conduct, if held unlawful.

Sir -- and I didn't take you to 52(b). I just flag that the allegation of abuse also extends to quite high profile events, like the Cambridge Analytica scandal which involved incidents of Meta not acting with candour.

Those are the tripartite elements of the pleaded abuse. Now, I'm going to come back to your question about United Brands and explain why this isn't a United Brands kind of a case. It engages three legal principles. The first one I need not dwell on. The first is that conduct which directly prejudices the interests of consumers is within the scope of Chapter II. In other words, conduct that doesn't affect the structure of competition but impacts consumers. I can give you the reference, that's in the pleading. That derives from Football World Cup decision at paragraph 99(c). but that's the basis, they're all exploitative abuses. You don't need to identify an effect on the structure of competition.

Legal principle number 2, the basic test for unfairness under Chapter II is a proportionality test. I'm just setting out the principles. I'm going to show you that, but proportionality is obviously a very familiar tool for the courts.

Principle number 3, honing in on the unfair pricing abuse:

"A price is unfair and therefore abusive within the statutory meaning, when the dominant firm has reaped trading benefits which it could not have obtained in conditions of workable competition."

And that's in the Flynn judgment. I will just give the reference. Paragraph 97(1), authorities tab 13, page 342.

There is also a fourth principle that I don't think need detain us today which relates to conduct which falls outside competition on the merits which is also relevant to the sort of conduct I have just been addressing you on, misleading behaviour and so on.

Now, it is right that the Tribunal, this Tribunal, observed that the state of the law on unfairness, the law on unfairness, is in a state of development. That was an observation made in Gutmann. So these are matters that will be for submission at trial. Nonetheless, turning first to the principle of proportionality, the basic test is in the claim form at paragraph 102, page 41. That's core bundle 1, tab 1. The central test under section 18.2(a) is proportionality. Trading terms which are disproportionate are unfair within the meaning of Chapter II. The Commission's decision in DFD, which was upheld by the CJEU, states:

"Unfair commercial terms exist where an undertaking in a dominant position fails to comply with the principle of proportionality and the CAT observed that DFD involved the imposition of unfair prices or trading terms, where the users of the service had no alternative to paying the charges."

And that's taken from the Gutmann judgment.

So in a nutshell, the case is that Facebook's terms of trading were disproportionate and therefore abusive.

Now, I'm going to take you to DFD but the authority straddles both points, so turning to unfair prices, if I could ask you to turn up paragraph 106 in the pleadings:

"A dominant firm abuses its position by imposing unfair prices where it charges for its services, fees which are disproportionate to the economic value provided or when it reaps trading benefits which it would not have reaped in conditions of workable competition."

Now, the facts of DFD are set out at paragraph 107 of the claim form. DFD was a German waste recycling company. Could I ask you to read that passage to yourselves.

MR JUSTICE SMITH: Yes.

(Pause).

Yes.

MS KREISBERGER: So in DFD, the court did not apply United Brands, it looked at the approach to charging and it said: well, these fees are disproportionate to the economic value of the service provided. So that's the legal precept and the same principle was applied in Deutsche Post. That's at paragraph 109. In short, Deutsche Post was charging an international bank that was sending post from Holland full postage fees, even though Deutsche Post would get terminal dues from the Dutch operator, so it was a form of double recovery. If you would like an opportunity just to read paragraph 109.

MR JUSTICE SMITH: Yes.

(Pause).

Yes.

MS KREISBERGER: Of course, factually, very different cases but they establish the principle and these cases are back in the spotlight in a number of recent cases. The Tribunal refers to each of them in the Gutmann judgment, another case which directly involves the unfairness principle. There the abuse lies in the train companies' failure to make boundary fares generally available, so that consumers pay too much, as of course you know

and then relevant for our purposes, the Tribunal refers in Gutmann to the German FCO Facebook decision. Now, the FCO found -- it's currently under appeal -- that Facebook abused its dominant position by failing to give users a genuine choice over

whether Facebook could engage in unlimited collection of their personal data from non-Facebook accounts; third party tracking.

So my fundamental point here is that there is authority at the highest level in Europe which construes the statutory abuse that I showed you of unfair prices and other unfair trading conditions by reference to legal principles which are unconnected to the very specific United Brands test.

Now, on that, and I did foreshadow this but I think it's worth just going there, if we turn up the Court of Appeal's judgment in Flynn, which is on excessive pricing and does involve the application of the specific principle. That's at authorities bundle 1, tab 13, page 342 and I referred to this in my earlier submissions. 97, subparagraph 1:

"The basic test for abuse which is set out in the Chapter II prohibition, is whether the price is unfair. In broad terms, a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of normal and sufficiently effective competition, i.e. workable competition. A price which is excessive because it bears no reasonable relation to the economic value of the good or service is an example of such an unfair price."

It goes on to talk about the very specific United Brands methodology, the cost plus test and so on -- cost price test, I should say.

Now, I'm not saying United Brands or Flynn, that line of case law is completely irrelevant, and certainly aspects of the principles there will no doubt inform the approach ultimately taken, but I am saying that, to the extent that United Brands adopts, specifically, a test that implies, involves a cost price comparison, well, that's very difficult when you have a zero monetary price, and to the extent it looks to price comparators, that's also very difficult, given the way in which this market has been dominated by Facebook and Facebook's approach of offering the network for free on the basis of targeted advertising revenue is the way this now works, so we don't have

available price comparators.

So that's why the PCR's case, the pleaded case, is not tethered to the United Brands methodology. It just doesn't suit this type of platform antitrust case and there are two reasons for that. As I said, there is no monetary price being charged. United Brands is about bananas. It's just not tailored to this kind of case. And the second point I made is challenges around comparators which actually, we say, stems from Facebook's own conduct. It's a function of its abuse and it's worth just taking you there, back to the claim form, paragraph 45 at page 13, core bundle 1, tab 1.

The second half of the passage:

"Facebook arguably achieved ubiquity by virtue of its business model, offering its services for free and embarking on an advertising based revenue model that generated real money for Facebook at the expense of its users, who have paid nothing at all but lost control of their data."

In other words, Facebook queered the pitch once it had achieved market power. As I said, it competed in a rather different way early on, competing on privacy but its model, free platform, targeted ad revenue, became the model. So alternatives which could act as comparators haven't emerged and I was careful to draw out, in response to Mr Ridyard's question, that one is talking here about targeted advertising, as distinct from contextual advertising.

MR JUSTICE SMITH: Just going back to paragraph 97 of Flynn, you're not saying that in that paragraph, Lord Justice Green is resiling from the United Brands test? He's unpacking it, isn't he?

MS KREISBERGER: Absolutely. Yes, absolutely. No, and it's a very useful and authoritative statement of how that test ought to work but he does make the point that in the third paragraph, there's no single method or way in which abuse might be established and authorities or presumably private claimants have a margin of

manoeuvre. It's one test, United Brands, and if you go down that route, you have to apply it but there are other ways.

MR JUSTICE SMITH: Even United Brands doesn't specify a single test --

MS KREISBERGER: Absolutely.

MR JUSTICE SMITH: -- when he says other ways may be devised.

MS KREISBERGER: Absolutely but what we call the United Brands methodology are the two limbs.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: but it's baked in, absolutely baked into United Brands that there are different -- United Brands itself says there are other ways.

Now, at the risk of stating the obvious, this isn't a case like Flynn Pharma, where you can compare the drug price of Phenytoin capsules with the price of Phenytoin tablets, an obvious comparator. So that's why it is important to look at the overriding principle which Lord Justice Green lays down at 97(1):

"A price is unfair where the dominant firm has reaped trading benefits which could not have been obtained under conditions of workable competition."

That is the fundamental test that the PCR would be asking you to apply to these very different sets of facts.

And I took you to the particulars of the pleading on unfair price. That was at paragraph 127 of the claim form, that the particulars are low incremental cost, Facebook's ad business revenues which show economic value to be very high, the substantial excess profits and the absence of any reasonable relation between the economic value of the data and the value of the platform. Those are the pleaded particulars on unfair pricing.

Now, at this stage, I wanted to turn back to the Tribunal's question number 4 and I do again say it might be useful to have it in front of us. It's at correspondence bundle,

tab 38.3, page 260.06.

MR RIDYARD: What was the page number?

MS KREISBERGER: Sorry, 260.06 is what I have. I'm not using that copy.

I do come back to the theme that the Court of Appeal in McLaren warned against, the Tribunal being sucked into the merits at the certification stage. That was at paragraph 62 of McLaren. So I think we do need to take some care because we are clearly delving very deeply into merits which one would not do in the case of an individual claimant's claim.

But having said that, this is a very helpful exercise posed by this question, as it raises points I do want to address you on the methodology for quantum.

Now, I have already answered that part of the question which asks whether United Brands can apply to a free product which is, sir, what you pose there and it's not tailored to that situation. but the question also asks whether excessive profits can be defined as profits in excess of a reasonable return on capital. That's the formulation you use there, sir.

Now, I'm coming back again to my theme of the counterfactual. The answer is that identifying which portion of Meta's large profits are unlawful will depend on how the counterfactual is framed. Now, I do just want to bring out this point. In a vanilla excessive pricing case --

MR JUSTICE SMITH: Just to be clear, when you are referring to the counterfactual, you are referring to a counterfactual that you're not going to elucidate further because it depends upon the outcome of the merits trial?

MS KREISBERGER: I'm going to give you some examples though, some possible permutations.

MR JUSTICE SMITH: You can't give us the counterfactual that would pertain if the PCR's claim was completely successful, in other words, the high watermark?

MS KREISBERGER: Yes, I can do that. Well, I can -- I will address you on that in relation to quantum.

MR JUSTICE SMITH: Because, in a sense, isn't the starting point the high watermark --

MS KREISBERGER: Yes.

MR JUSTICE SMITH: -- and then we need to work out whether your proposed assessment for quantification can, as it were, be geared down, if you're not as successful as you would like to be.

MS KREISBERGER: Yes, I see. So the high watermark of the case must be that all user data has been unlawfully monetised -- extracted and monetised.

MR JUSTICE SMITH: All user data?

MS KREISBERGER: Yes. but has been unlawfully used for the purposes of targeted advertising.

MR JUSTICE SMITH: So there is no lawful use of data at all?

MS KREISBERGER: For the purposes of targeted advertising. So there's lawful use of data for the network and there's contextual advertising, but the tracking of user data which involves loss of control of data and so on, the tracking of the data for targeted advertising, that's the disproportionate -- so if one looks at it in proportionality terms, on the proportionate side of the line is the use of data for the social network to provide the service. Maybe -- it's certainly no part of our case that there is any problem with contextual advertising and that would generate monies for the platform, so those are two examples of proportionate use of data.

And as I say, that looks a lot like the platform in its early days before it achieved market power, but the disproportionate element is all tracking of user data.

To be clear, that's the very highest one could put the case. It may be that a portion of that data has been unlawfully monetised for the purposes of targeted advertising and

a clean example of that is third party tracked data, in which case the quantification exercise will apply to that data.

MR JUSTICE SMITH: So it all turns, really, sticking with your high watermark, on the precise meanings of a personal social network and/or a social media network because that is legitimate?

MS KREISBERGER: Yes, absolutely.

MR JUSTICE SMITH: Let me just -- those are defined terms and we need to track those back in your pleading and then we will understand what is the unfair data requirement.

MR RIDYARD: How do we know -- you talk about different categories of data, when you talk about the contextual and the targeted ads. How do we know what revenue is generated by those different categories? Because, crudely, is your story as long as the money is being used to pay for the software engineers, it's okay but -- it's a bit of a caricature but once it gets beyond that and it's just going to the shareholders, it's not okay?

MS KREISBERGER: I'm not sure that quite accounts for contextual advertising because that's an advertising business --

MR RIDYARD: That's my question, really, how do you know there is a correlation between -- at some point, whatever the advertising activity is, it's already paid for the costs of providing the service to me as a consumer and, therefore, it's just the rent and the rent is, if you like, the unnecessary bit which is just the manifestation of the abuse. So how do we know that that corresponds to these categories of advertising?

MS KREISBERGER: Well, for example, and obviously, we will want to see what Meta holds on this and we're in the dark, but I'm going to come on and I keep promising to address you on ATT because that gives us an actual number attached to the value of a portion of data which could actually be scaled up. So one of the key themes I want

to address you on, on quantification, is I don't want to leave you with the impression that the exercise is simply start with excess profits and whittle it down. That's not the exercise. That's an aspect of the methodology but we have real world data on what particular types of data is worth, namely third party tracked data, so we can work up from there.

MR JUSTICE SMITH: (Audio distortion).

MS KREISBERGER: To Facebook. Because we're talking here about Facebook's profitability.

Now, let me --

MR JUSTICE SMITH: To what extent, if at all, have you considered that there is value in the aggregation of data, in that what I, the individual supplier to Facebook, might regard as trite and irrelevant material that I'm more than happy to give up, which is very tendentious, but which when you scale it up to the millions, actually provides useful data to the person who does the scaling up. Is that something which is part of Mr Harvey's assessment of value to the individual supplier?

MS KREISBERGER: So I think I need to take you there to his approach but it's very important to emphasise that his approach includes user valuations of the data, as well as the commercial -- and he proposes in terms a triangulation of methodologies. So there's no aggregate value reflected in the user valuation of data and I will explain to you that user valuation might actually serve as a lower bound for recovery. In other words, commercial valuation could fall below that.

So it's not necessarily the case that aggregation gives rise to a higher number. It might give rise to a lower number. We don't know. We haven't performed the exercise, but user valuation -- this is why there is such great benefit to having, you know, more than one string to the bow -- user valuation doesn't reflect any aggregate value.

And we come back to --

MR JUSTICE SMITH: but is the (audio distortion) at all that -- is it or is it not or do you not know that if you multiply up the individual value of the class, you get to a smaller figure than the aggregate value to Meta of putting that data together?

MS KREISBERGER: The question doesn't arise on our approach because the approach depends on using the value to Facebook as a metric because those are the returns that would be shared.

MR JUSTICE SMITH: So you are ignoring it?

MS KREISBERGER: Not ignoring it. In a competitive market the platform would be sharing returns which it enjoys through its data practices which reflect the fact that it's not dealing with one user, it's dealing with data from all of its users. So it's baked in, but it doesn't reduce the relevance of that sum because, as I explained, in a competitive counterfactual, that value which now accrues to Facebook and Facebook alone, would be shared, dissipated to the user side of the market.

So aggregation, if you like, if that has a value, it's nonetheless a value that should be shared. It's not irrelevant.

MR JUSTICE SMITH: Well, does that mean, then, that the value that the individuals of (inaudible) data recedes in importance?

MS KREISBERGER: They are both. They are measuring different things because we're operating with a broad axe. We are having to use these metrics and models and they're both very important. As I said to you, it may recede if it's right that the user valuation is higher than the commercial valuation, it may operate as a lower bound and the commercial valuation might fall away but at this stage --

MR JUSTICE SMITH: (Audio distortion).

MS KREISBERGER: Then one is -- well, I can't prejudge how Mr Harvey would treat the numbers.

MR JUSTICE SMITH: No.

MS KREISBERGER: He will be looking at both metrics and it may be that some compromise position -- I am concerned that we're moving very far away from what the Supreme Court has said is the job at certification which is to see that there is a model that's capable of dealing with the issues, but it's not appropriate now for me to make submissions as to what the outcomes will be --

MR JUSTICE SMITH: I'm not asking you to do that, but what I am probing is the extent to which the value is impacted and increased by the thing that Meta does which the class, by definition, cannot do, which is to aggregate, and so the hypothesis I am putting to you is suppose the individual data of a class numbering 1 to 10 million is a penny, because it's just footling stuff, just suppose, but aggregated in the hands of Meta it is actually worth £1 per subscriber because the laws of large numbers enable you to work out who's interested in what product and you can sell that data to the advertisers.

So suppose that mismatch on the two sides of the divide, the buyers and sellers of data. You are focusing on the Meta side to value the data that the subscriber is giving up.

MS KREISBERGER: I hope I haven't given that misimpression, because Mr Harvey is relying on both approaches.

MR JUSTICE SMITH: Okay.

MS KREISBERGER: Neither to the exclusion of the other, so they're both relevant metrics. He will be looking to perform the user valuation and taking account of the commercial value to Meta.

MR JUSTICE SMITH: Right. but you can't say how you are going to do that?

MS KREISBERGER: I will --

MR JUSTICE SMITH: You can't assist us on -- if there is such a mismatch, how he's going to deal with it.

MS KREISBERGER: I will just take instructions on that to make sure I answer the question accurately.

(Pause) So in very broad outline terms, I have answered the question as to what happens if the user valuation is higher, then the commercial one falls away, and you're positing the reverse situation and the answer would be that that is the value that should have been fed through to users in a competitive scenario.

So that could act as your lower bound.

MR JUSTICE SMITH: So you take the higher figure?

MS KREISBERGER: You take the higher figure. Now, it may be that that is not precisely how the broad axe works when you have two numbers but that is, in principle, the correct approach, that you take the higher figure because the objective is to ensure full compensation to the class and taking the lower figure will result in under-recovery. But the Tribunal will be looking at the outcome and the products of both methodologies in practice.

MR JUSTICE SMITH: Yes, but that's the reason I am troubled, because the broad approach you've articulated, you take the higher of the two; fine. That is something which has a very significant effect on the evidence that we need to control going forward. I'm not saying we want to know what that evidence is, but in terms of managing the process, how you say you are going to treat these different strands matters, according to what orders we make in the future about how to manage the case.

And really what I am leading up to is why can't you articulate the reason why it is said that the higher of the two is taken rather than the lower of the two, because it does seem to me a little bit strange that if it is Meta that is doing the aggregating, that is funneling all these diverse streams of data of, hypothetically speaking, not very valuable data -- I recognise that's something on which we would have to hear

evidence, but suppose that to be the case, but it's Meta that is doing the aggregating -- why, methodologically speaking, do you allow the Facebook side of the equation to trump the subscriber side of the equation?

Now, that's just a question which is nothing to do with outcome and who wins and how much has to be paid if you do win. It's entirely to do with understanding just what it is your case on quantum is.

MS KREISBERGER: So I come back to Mr Ridyard's example, where you have four platforms competing in a competitive scenario.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: Users value their data and, as we have seen, don't like to give it up if they have a choice, many users, so they need to be incentivised in a competitive scenario to give up their data and so those platforms who are all aggregating share, and this is sort of 101 of market forces at work, share the profits by paying more for the data.

So the user is benefiting to that extent from the fact, as in any commercial transaction, that the other party is monetising the commodity.

So it is right that if Facebook is able to generate very high profits out of the data in a world where it faces no or limited competition, that in order to compensate users for giving up their data to Facebook, it would have to pay -- for example, if we're talking about monetary payment, pay the users an appropriate amount which is based on the market in which Facebook is operating. That's the market where the data is a commercial commodity, a valuable commodity.

MR JUSTICE SMITH: So your counterfactual is, actually, not the world that will exist where the infringement does not take place; your counterfactual is, in fact, some kind of competitive market?

MS KREISBERGER: I'm not sure that's a distinction with substance because you

might have the same outcome in a world where you have a single platform but that platform is not allowed to abuse its dominant position.

MR JUSTICE SMITH: Well, yes.

MS KREISBERGER: So I was simply using the competitive scenario as one illustration.

MR JUSTICE SMITH: Yes. The trouble is, and this is why United Brands is such a tricky case, we don't know what would pertain in a competitive market because the market is dominant. We're assuming that. So what we do is we identify the abuse because dominance, in itself, is not an abuse. We identify the abuse and we say: what's the position if that abuse is stopped?

Now, that doesn't involve postulating any other competitors. All it involves is stopping the abuse that you allege is occurring through Meta's conduct. And that is the theme that we are valuing, that failure to comply with the law.

MS KREISBERGER: I think there is a conflation here between merits and damages. Damages, we're looking at the non-abusive counterfactual.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So if you're looking at -- if you're in vanilla excessive pricing, price of bananas, the non-abusive counterfactual is the price that would have been charged, absent the abuse. but if you come back to the case law on excessive pricing, how do you work out if a price is excessive? You compare it to the competitive price. So you do come back to the competitive scenario to work out whether abuse has taken place. And that's why I'm so keen here to maintain the three distinct strands of the logic.

There must be an abuse, causation and quantum. If the abuse is -- as I think you're positing, it's the bargain now, the unfair bargain, you must look to what data was unfairly taken, what was the causative effect of the abuse, that which was unfairly

taken. Let's say that's third party tracked data. Now we're into quantum, so we have identified the portion of data that needs to be measured, the value of which needs to be measured. Once you're valuing that data, you have two available metrics. One is user valuation and I will address you on that and the other is the value to Facebook, because absent the abuse, that value would be shared on the other side of the market.

(Pause).

MR JUSTICE SMITH: Is that a convenient moment?

MS KREISBERGER: It is, thank you, sir.

MR JUSTICE SMITH: Very good. We will resume at 5 to.

MS KREISBERGER: I'm grateful.

(3.44 pm)

(A short break)

(3.55 pm)

MS KREISBERGER: Sir, if I could turn to or carry on, I should say, with the theme of the counterfactual which you've heard a little about.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: What I would like to do on this is give you some examples of features that might find their way into a counterfactual, depending on the finding of abuse. I'm going to take you to just a few passages of the market study to show you that that's what the CMA has in mind when it talks about a more competitive market, and then I'm going to address you on why these are not insuperable obstacles for measuring quantum.

So the counterfactual might involve any of the following. I'm just going to list them, they're examples. It might involve fully transparent and comprehensible T&Cs, terms and conditions. Relatedly, it might involve some mechanism for ensuring that users

understand exactly what data they're giving up and for what purpose. It might involve not misrepresenting the position in public. It might concern Facebook's choice architecture, to use the tech jargon.

Now, the CMA have published an entire discussion paper on this. I'm not suggesting we go there now. Just so you have it, it's at tab 37 of the authorities bundle, volume 3. but what the CMA looks at there are settings and defaults in the design of the app or the website to see whether they harm consumers or the design of settings and defaults which don't harm consumers and don't erode their privacy. So choice architecture could be a key focus for a counterfactual.

Eliminating a take it or leave it deal for data, ensuring users have choice and, importantly of course, better returns to consumers. Whether that's four platforms competing or it's Facebook not conducting itself in an abusive manner, Facebook may still need to attract data to generate the targeted ad revenues and so be more likely to share its profits with users in the non-abusive counterfactual to incentivise data sharing.

And finally, the counterfactual might involve access to less data or more choice in that regard.

Can I show you what the CMA says about this. This is in the market study. That's tab 38, volume 4 of the bundle, page 2481, under the heading of "Poor returns to consumers", paragraph 6.24.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: "Although, typically, the platform's core services are offered ostensibly free of charge, in practice consumers are receiving the service in exchange for their attention and data which can then be monetised through digital advertising, notably personalised advertising. Lack of competition has a direct impact on the extent to which consumers have adequate control over how their data is used and if

they do decide to share it, are adequately rewarded for the use of their attention and data."

6.26, at the bottom of the page:

"In a more competitive market, we would expect it would be clear to consumers what data is collected about them and how it is used and, crucially, the consumer would have more control."

So that's the competitive scenario:

"We would then expect platforms to compete with one another to persuade consumers of the benefits of sharing their data or adopt different business models for more privacy conscious consumers. Platforms may reward consumers for their data through their products and services, perhaps serving fewer ads or offering rewards or additional services. It is difficult to specify all the different forms in which consumers might derive greater value in a more competitive market. However, one broad indication of the value that could currently be shared to a greater extent with consumers across the economy, whether directly through greater rewards and incentives or indirectly through the prices of goods or services being advertised, is the excess profits being earned by Facebook as a result of its market power.

Were it to face greater competition, we can expect that these substantial profits would be eroded and consumers would be better off as a result.

And then could I just ask you to move down.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: Sorry, I say down because I'm on an iPad. It's page 2486, 6.47.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: "We have identified a range of forms that consumer harm could take from the concerns we have identified in this market study, including reduced innovation and quality, higher prices of goods and services across the economy and

broader social harms. Our analysis of the revenues and prices Facebook is able to earn from digital advertising and its profitability, suggest that consumers could see substantial financial gain from a more competitive market. However, more importantly, we expect that a more dynamic and competitive market with a more credible threat of new entrants displacing the powerful incumbents, will increase the chance of transformative disruptive innovation coming forward."

6.50:

"Consumers would directly benefit from more competition which they will experience through more choice, better quality, innovative products and services and real control over how their data is used."

Sir, I'm not suggesting the counterfactual is an easy question. As the Court of Appeal said in Gutmann, it's a matter for trial, precisely because it depends on evidence and so on, and the broad axe will be wielded. I do want to remind the Tribunal that the Court of Appeal has said that the Tribunal should be less demanding at the certification stage, when the counterfactual is challenging, but I don't want to misrepresent the position.

It's right that this isn't an excessive pricing case where could you put a number on the overcharge and those are your counterfactual damages, the unlawful overcharge. but -- and you will remember in Gutmann, they talk about the pass-on example, it's an example of a challenging counterfactual. Whilst the counterfactual is a challenging question and it must be reserved for trial, my submission, my central submission to you is that Mr Harvey has advanced a proposed methodology which takes account of these unknowns and the uncertainties, but ultimately renders the question of quantum tractable and that's why it surpasses the plausibility threshold in Microsoft.

So let me turn to that now with the time left, so I can show you why that is. So, as I said, quantum methodology is engaged once we have a finding of abuse.

Procedurally, that's likely to be the best approach, sir, as you pointed out.

So when we approach the quantum methodology, we're in a world where Meta is an infringer, users are entitled to compensation as of right and the Tribunal will be wielding, adjusting and retracting its broad axe. That we know from the authorities. There will be the stages that we go through: abuse, causation and quantum. So one might envisage the trial on abuse only first. I certainly don't want to prejudge the process, which end causation comes out of, but the job will be to identify the abusive conduct; identify the harm caused by the abusive conduct. In this context, that almost certainly refers to the bucket of data which Meta has unlawfully monetised as a result of the abuse. As I said, that might relate to third party tracked data, and then quantify the harm.

Mr Harvey, as you know, has proposed two methodologies that he wishes to use in tandem, probably triangulating between the two: excess profits and user valuation. Each acting as a cross-check on the other and each deepening and improving the accuracy of the overall exercise and, as your question really highlighted, sir, very helpfully, ensuring against under-recovery, which, where we are now, at the beginning of the proceedings, is important that no methodologies are excluded which could provide a valuable function in ensuring against under-recovery. They need to be kept open, essentially.

Now, I will develop my submissions under six headings. First, an explanation of Mr Harvey's methods in relation to excess profits. More accurately, excess profits and empirical methods.

Secondly, I will come back to the fourth question that you posed in your letter, sir.

Thirdly, I will deal with Meta's three criticisms on that part of the methodology.

I will then turn almost certainly tomorrow, I think, to user valuation, an explanation of Mr Harvey's methods, the fifth question that you posed in the correspondence and

Meta's criticisms of that approach.

So that will take me through to the end of the section on the Microsoft challenge.

So excess profits. It combines two broad methodologies. Mr Harvey does intend to use the ROCE-WACC comparison as his starting point but what that really does is identify the potential universe of profits caused by the abuse, what you refer to as the highest possible case, but he will also use empirical methods which provide a powerful tool for valuing commercial data and it shows that commercial data can be and has been modelled to derive a value, including by Meta itself.

Now, starting with ROCE-WACC, if I could ask you to turn up Mr Harvey's report at core bundle, tab 4, page 283. Paragraph 3.23, Mr Harvey says:

"Facebook's excess profits derived from its alleged abusive behaviour are a measure of the aggregate harm to class members. This is because in the competitive counterfactual, one would expect that Facebook's excess profits would instead be shared with users, since Facebook's profits are derived from selling targeted advertising that's based on their personal data. Therefore, Facebook's profits are a reflection of the commercial value of its users' personal data."

And then he quotes the CMA, saying:

"We would expect these excess profits to be shared more freely with consumers in a more competitive market.

"To see why excess profits are a measure of the aggregate harm to class members, consider that in the competitive counterfactual, Facebook paid users for their data, all else equal, Facebook would be willing to pay users for their data up to an amount equal to its excess profits. That is Facebook would have the incentive to pay users to ensure they spent time on the platform up to an amount equivalent to their excess profits which is the point at which Facebook would earn the minimum required return. As such, Facebook's excess profits reflects the commercial value of personal data that

users would receive in the competitive counterfactual."

So, pausing there, you see why Mr Harvey is proposing to measure the commercial value of the personal data to Facebook.

Now, sir, to that extent, the parties are ad idem. If we go to Meta's skeleton, at core bundle, tab 15, page 717, paragraph 48. Now, this is Meta's attack on user valuation and we will get there, but what's said there is:

"What matters for the purposes of the pleaded loss is whether and the extent to which such data has a commercial value to Meta."

So to the extent that the Tribunal has expressed some misgivings about this, it should be said that it's not shared by the proposed defendant as the relevant metric.

MS DEMETRIOU: Sorry, I do need to clarify that. We are making a point based on the pleaded loss. We're not saying that the pleaded loss is correct. We're saying what's pleaded. The pleaded loss is the commercial value of data and so the point we're making is a different point to the one Ms Kreisberger thinks we're making.

MS KREISBERGER: Then if we could return to Mr Harvey's report, paragraph 3.25, he there refers to the CMA's market study and the reference there to:

"One broad indication of the value that could currently be shared to a greater extent with consumers across the economy, is the excess profits earned."

So that's the passage I took you to.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So it's the same approach.

Then if I could ask you to move forward to page 289, paragraph 3.46, you see this is where Mr Harvey sets out his factual methodology and he makes two points at the first bullet point. First of all, ROCE-WACC is simply a starting point and, secondly, in the underlined sentence at the start of that bullet point, what he's proposing to measure is that part of Facebook's profits that were directly generated through the user data it

collected and monetised:

"It is important to understand so that only profit derived from the abuse is taken into account."

Now, Mr Harvey is not suggesting that ROCE-WACC is a tool of exact precision. Nor is that the exercise at hand, particularly using our crystal ball at certification, but it has benefits as a broad measure of the overall commercial value of personal data as a whole, because it assesses Meta's overall profitability, allowing for a reasonable rate of return. One might have different views later on about whether WACC is the right measure for the reasonable rate of return, but the point is it gives one a broad universe of profitability that might be in the pot, subject to the abuse finding.

Now, Mr Parker says this in his report at paragraph 4.9. That's tab 5 of the core bundle, page 335. He says:

"The commercial value of users' data is determined by, amongst other things, the ability of Meta to use data to optimise the ranking and delivery of ads, advertisers' willingness to pay for advertising services from Facebook and Meta's costs of operating the Facebook platform."

We don't demur from that. So ROCE-WACC is your proxy for that exercise. It gives a useful indication of the universe of harm. but Mr Harvey has a second method under the broad heading of "Excess profits".

MR JUSTICE SMITH: Is that the method that follows on from the first or is that, as it were, independent of it?

MS KREISBERGER: It's complementary of it, so this is where I turn to -- I am still on excess profits, not user valuation, so we're still looking at the value to Meta. but what Mr Harvey sets out in his second report is that he proposes to use various empirical methods which directly measure the commercial value of the relevant category of data to Meta or, rather, the relevant portion of the personal data. So the first method and

I've mentioned it now a couple of times, is -- it relates to Apple's introduction in 2021 of ATT, app tracking transparency.

Now, the change in Apple's policy meant that iOS users and I have foreshadowed this, henceforth had to opt in to give apps permission to track their activity on other apps. So from then on, Facebook could only access its users' off-platform data, third party data on iOS devices, if they opted in. That was ATT.

Mr Harvey explains -- I will just give you the reference. It's paragraph 3.10 of Harvey 2, core bundle, tab 6, page 356. He explains that around 20 to 40 per cent of UK iOS users opted in to tracking and that figure, that range, comes from the CMA's mobile ecosystem market study. So that's where I got my two thirds from before. 60 to 80 per cent of UK users, iOS users, chose not to be tracked.

Now, as a result, Facebook experienced a significant reduction in its ability to access and monetise third party data from this category of users. So the beauty of this natural experiment that ATT offers us is that it makes the valuation of a certain type of personal data, this third party data, a tractable exercise, based on real world data. So I am coming back to Mr Ridyard's question, how might one do this exercise and isolate from other profits?

What we have here is -- Mr Ridyard will correct me if I am wrong but I think an economist would call this a clean data set. Now, Mr Harvey explains this in his second report. This is core bundle 6, page 358, paragraph 3.13. He says:

"The impact of the relevant change, in this example the introduction of the ATT framework on Facebook's profits at an aggregate level or at a per user basis, could provide an estimate of the value it derived from the relevant quantity of personal user data and the monetisation of that data."

And then he goes on to describe the different methods that he might use.

Ultimately, to perform this analysis, Mr Harvey will obviously need the data from Meta

but what I want to emphasise for today's purposes is that Meta has itself estimated the impact of Apple's ATT in a very public and vocal way.

Now, as you might imagine, Meta has been highly critical of this change. In fact, it's accused Apple of being anti-competitive in introducing it.

Meta predicted that it would take a $10 billion revenue hit as a result of ATT. If we go to paragraph 3.11 of Mr Harvey's report. That's on page 357. He says this:

"Facebook has been critical of ATT and estimated that the iOS changes will reduce its revenues by 10 billion. Meta Platforms Inc's 2022 Q3 earnings revealed a 4 per cent drop in revenues and a 19 per cent increase in costs year on year. It also reported that while ad impressions increased 17 per cent year on year, its average price per ad decreased by 18 per cent. Analysts have forecasted a 12.8 dollar loss of revenue to Facebook in 2022 alone because of ATT and substantial revenue losses to advertisers. Market observers have argued that Meta's stock slide shows ATT was a secular structural change in the digital ad market that absolutely should have a big impact on an affected company's stock price and that acute friction seen over the past few quarters by the companies most historically dependent on behaviourally targeted digital advertising, are primarily the consequence of ATT and not inflation or the war in Ukraine."

MR RIDYARD: Do you think that consumers were $12 billion better off?

MS KREISBERGER: Well, again, that's eliding the steps in the chain. If Meta is $12 billion worse off, that tells us that in a market where Meta doesn't track third party data, here it's just iOS users and we can scale it up.

MR RIDYARD: It would make less money.

MS KREISBERGER: It would make less money.

MR RIDYARD: Yes.

MS KREISBERGER: but if it wanted that data, it would have to incentivise users to

part with the data, so one way of approaching it is to --

MR RIDYARD: Be happy to make $12.7 million -- billion dollars to the consumer.

MR SAWYER: Just going on from that question, there's 12 billion less revenue but the consumers are no better off, as I see it. You've lost the revenue on the one side, the advertiser is upset. Everybody is upset, the consumers are no better off.

MS KREISBERGER: The consumers do not see the returns in that example but they haven't lost control of their data.

MR JUSTICE SMITH: The consumers are getting what you say they want.

MS KREISBERGER: On one view, which if they hold on to their data because in this actual world, Meta is not offering to pay them for this data.

MR JUSTICE SMITH: No, no, but the abuse you're alleging is the misuse of the data.

MS KREISBERGER: Yes.

MR JUSTICE SMITH: So the counterfactual is what is the loss to the consumer of the abuse taking place. Now, all you're doing here is requiring the unlawful profits, assuming you're right, of Facebook, to be disgorged to the consumer which is not compensatory damages in my understanding.

MS KREISBERGER: It is, it is.

MR JUSTICE SMITH: How is it?

MS KREISBERGER: Because as the CMA said, in a world where there is competition --

MR JUSTICE SMITH: Right, but the CMA is examining the market.

MS KREISBERGER: It's looking at Facebook.

MR JUSTICE SMITH: Yes, but you are making a much narrower allegation. You are not saying Facebook's abuse is not to be in a competitive market; you are saying Facebook's abuse is that they have extracted too much data and that they should be made to compensate for that.

Now, what we are seeing here is that the benefit to Facebook is many billions, if these figures are to be believed, but that tells us what about the harm to the consumer?

MS KREISBERGER: The harm to the consumer is the value of the data which Meta kept to itself as a result of its abuses.

MR JUSTICE SMITH: So in fact, what you want to have happened is you want the abuse or what you say is the abuse to continue, you just want to be paid for it?

MS KREISBERGER: I do not express any desire at all. We are making a claim for a particular period in time. If I am right that there was an abuse ongoing during that claim period, then wrongdoers must be brought to book, as Merricks tells us, and there must be compensation for harm suffered.

Now I am offering a practical tool for measuring the harm.

Now, I can show you -- actually, I'm going to move on, because I see the time. What I want to emphasise here is that when it suited its commercial purposes, Meta had no problem at all in ascribing a number to the value of the data, none at all. That was in the context of its battle against Apple. It went ahead and it worked out the value of the lost data. So, again, one possible permutation of the abuse finding is that Meta unlawfully used third party tracked data. That's the German FCO case against Meta. And you could see immediately how valuable the ATT tool kit would be to provide a valuation. As long as you're with me on the fact that we are now looking at the commercial valuation of the data, this is a good method, because it measures actual real world impact of the loss of the data.

Now, Mr Harvey sets out at paragraph 3.13 of his second report the various analyses he might perform on the ATT data and perhaps you could just cast your eye over subparagraphs (a) to (c).

MR JUSTICE SMITH: Yes.

Yes.

MS KREISBERGER: And he explains that even if the data, which he ultimately has to value, isn't the same as the ATT value, ATT nonetheless provides a meaningful source because he can extrapolate from that to measure other portions of data. It might be first party tracked data, which might ultimately be within the quantum bucket, and, of course, the broad axe will come in useful for that scaling up exercise, should that be relevant. Whether it's scaling up to Android devices, first party data, or some other form of data.

So this is an extremely valuable tool which gives a powerful empirically evidenced answer to the question of valuation. That's why ROCE-WACC is only positioned as a starting point, but this is a very important part of the tool kit.

Now, the second empirical tool -- I should just say, perhaps for your note, Mr Harvey does set out at 3.16(a) to (e), the type of data that he would need to perform that exercise. Sir, I think you might find that useful to refer to.

Now, the second empirical tool which he anticipates having at his disposal are internal forecasts by Meta which estimate the impact on its financial performance of possible changes to its service. Now, Mr Harvey posits that these may take the form of A/B tests of alternative platform designs, but they might also include the various regulatory risks faced by Meta around the globe which could result in enforced changes to its data practices.

Could I ask you to go forward to paragraphs 3.17 and 3.18 and I ask you to read those paragraphs.

MR JUSTICE SMITH: Yes, thank you.

MS KREISBERGER: So I have shown you that in its battle against Apple, Meta was able to quickly come up with a figure of estimated harm for the reduction in tracked data. If Meta did that for ATT, it seems reasonable to assume that a global platform like Meta would also have war-gamed the impact on it of possible future scenarios

which hinder its ability to monetise data. Indeed, there might be other internal studies of actual, not just potential, changes to its services that are less high profile than ATT, but it would seem a safe assumption that Meta has analyses regarding its monetisation of user data, changes in its ability to monetise data and they will prove, if I am right, highly informative data points for the quantum exercise at hand. So that's the second empirical tool in the tool kit.

Now, coming back once again to your fourth question, sir, in the hope that I can now, in the light of that, present a more precise answer. I hope that my exposition of Mr Harvey's quantum methods now addresses the question whether he intends to define damages as profits in excess of a reasonable rate of return on capital. That's not quite right. The highest case is profitability above some rate of return, whether it be WACC or some other rate, but quantum will only ever be measured at, ultimately, the value of the abusively monetised data. So while measuring profits above WACC gives the potential universe, it's certainly not the full extent of Mr Harvey's approach on the commercial value of the data.

ATT provides a clean data set. Internal analyses would be also very valuable and help us with the stages of the analysis once we have abuse, work out causation, measure the value of the data.

So my submission is that his commercial valuation methodology surpasses the low Microsoft bar. Far from being implausible, he has tailored it to the circumstances of the case and particularly he's offering up sources of empirical evidence that will inform this approach and he shows that it's tractable to value data. Meta have done it, it's a feasible exercise.

With that, I turn to Meta's criticisms of excess profits. I don't anticipate being able to get to the end of that section, but I will do my best to make headway.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So the first criticism that they make is that Mr Harvey's approach doesn't take account of the multisided aspect of the platform and that he assumes all benefits flow to users and is incapable of properly accounting for benefits which, in the counterfactual, would flow to advertisers rather than just users.

Now, let's go to Meta's skeleton. That's at core bundle, tab 15, page 710, paragraphs 25 and 26. Meta says this:

"It follows that any expert methodology in this case must be designed in a manner that is capable of assessing how all sides of the Facebook platform might be affected in the relevant counterfactual. Mr Harvey's excess profits approach does not meet that basic requirement because it assumes that all benefits would accrue to just one side of the platform."

So we see from that, Meta's position is, categorically, quantum methodology must look at all sides. That's incorrect. I hope that's come out of what I have said so far. There are two reasons why the methodology doesn't need to measure effects on all sides.

The first is by the time you get to quantum, you've determined the scope of the abuse. Once you know what the abuse is in the causation step, you can work out which categories of data were unlawfully monetised.

So, again, if the abuse looks like the German FCO case, third party data has been unlawfully monetised and then the job of the quantum exercise is to measure the harm to users which arose out of Facebook's unlawful monetisation of that data. That's what needs to be compensated. That's my first point.

My second point concerns Mr Harvey's basic approach to measuring harm to users and I come back here to one of the Tribunal's concerns. He measures harm by reference to what the data is worth to Facebook and on one view, that's an indirect measure of harm because you're not directly measuring the harm sustained, save for, I have explained, that in a competitive market, those returns would flow to users.

But it is also right that measuring commercial value to Facebook serves as a proxy of user harm and as an expert, one wants to use available real world metrics and proxies. That is consistent with the pleaded loss at paragraph 148, failure to give adequate compensation for the commercial value of the data, and Meta agrees that this is a correct approach in relation to the pleaded loss. I'm not speaking about any other case.

Now, to the extent that you are measuring the commercial value of the unlawfully monetised data to Facebook, it is wrong to say, as Facebook categorically does, that the methodology must assess effects on all sides of the platform. We go back to the ATT tool kit. That gives you a direct measure. The real world data on what the third party tracked data is worth to Facebook.

MR JUSTICE SMITH: Well, but also to the advertisers.

MS KREISBERGER: Yes, that's the payment -- that's been generated through payments by the advertisers.

MR JUSTICE SMITH: Look at it this way: we're assuming that Facebook is dominant. That's a given for the purposes of this hearing. We see that if there is an imposed restraint on Facebook, the Apple ATT policy which inhibits the data that Facebook can harvest from its subscribers, that the price it can command in the market goes down. That must follow, must it not?

MS KREISBERGER: To advertisers.

MR JUSTICE SMITH: Well, the price advertisers pay, ie the price that Facebook can charge goes down.

MS KREISBERGER: Or there may be less data monetised.

MR JUSTICE SMITH: They can't extract as much out of the advertisers. Now, aren't you assuming that there is no abuse by Facebook on the side of the suppliers in charging the prices that it is doing? Why can't the advertiser say, "You are dominant

in our market. No one else can provide us with this aggregation of data. You are extracting monopoly profit from us and look, you can see the monopoly profits you're extracting because when there is a limit imposed upon you on the data, we are prepared to pay rather less because the product is that much less valuable."

Now, that may or may not be the case, but it is certainly something that Mr Harvey is postulating does not exist, in his methodology. Would that be fair?

MS KREISBERGER: I will just take a moment, if I may.

(Pause).

I don't think I can help you on this one, sir, because it's not a feature of this case. If we come back to -- I mean, whether advertisers feel that they have also been overcharged, that would be a matter for an advertiser class action.

MR JUSTICE SMITH: Well, of course, you're right, but there are only so many times that excess profits can be paid away and the point, I think, that Meta are making is that any expert methodology must be designed in a manner that is capable of assessing how all sides of the Facebook platform might be affected in the relevant counterfactual. That's the point they're making and what I am putting to you is that for better or worse --

MS KREISBERGER: I think we need to be a bit careful. As I understand it, the point they're making is a ROCE-WACC point. So they're saying, if you're going to adopt the broad-brush and you start with profits above your rate of return and you take those, some portion of that, it may flow to advertisers in a counterfactual, but we are not chipping away at the universe of excess profits. Here, one is able to directly place the value that Facebook monetised the data for. There is no cause for deductions.

I may need to come back to you on an analogy.

MR JUSTICE SMITH: Yes, the point I am making is that Facebook is, as all two sided markets, are Janus-faced. It's buying data in and it's selling data out. One is the

purchase of data through the social media market. The other is the sale of advertising to the persons who want to know who's looking at what bits of the web at certain particular times.

So you have two markets which are effectively joined at the hip. Two different products which are joined at the hip. Now, one only makes one set of profits out of that and what I am putting to you is that, when one is working out whether there is an abuse and what the consequence of that abuse is, we can see from the very figures that you are putting to us that if you place a cap, a restriction on what Facebook can do with the data it is harvesting, i.e. it harvests less, it gets less from its advertisers. They're not willing to pay to the tune of about 10 billion as much as they were previously prepared to pay, so that data has value to them, which they're not prepared to pay.

So if you are postulating a situation where the use of this data is abusive, the advertisers are going to be saying: well, why should we pay for it? You can only carve the cake up so many ways.

MS KREISBERGER: but the data -- sorry, sir.

MR JUSTICE SMITH: What you're saying, and it may be right but what you're saying is that the excess derived from the unlawful use of this data that Facebook acquires is to be transferred in its entirety to the subscriber market and that the same unlawful data which obviously has value to the advertisers, well, they should continue to pay for it.

MS KREISBERGER: but that's why one always comes back to abuse, causation and quantum.

MR JUSTICE SMITH: It may be absolutely right, but it does seem to me that what is said in paragraph 25 as a general proposition, is right about the methodology.

MS KREISBERGER: Let me give you two points on that. If we actually -- let's first look at what Mr Parker says and then I will give you my second point. So Mr Parker

addresses this at core bundle, tab 5, page 328, paragraph 2.25.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: "By assuming [he says] the loss suffered by users of the Facebook service is the entirety of any alleged excess profits, Mr Harvey also assumes that there is no loss suffered by any other side of the market. There is no loss to advertisers and/or other business users. This amounts to an assumption that in the competitive counterfactual, prices and other aspects of the offer provided to advertisers or to business users are the same as in the factual market outcome."

That's a criticism which relates to the universe of excess profits.

Now, ultimately, sir, where does this criticism take us? If Facebook wants to argue that there should be some discount to the ATT amount, for example, well they can make that argument at trial, but there is nothing inherently implausible about Mr Harvey taking the value of the data which Facebook actually generated and using that as the basis for his valuation. That's what he's proposing to do.

Now, if they want to make theoretical objections based on abuses of dominance in relation to advertisers, it's not a question for us today. The methodology is sound. Meta said: this is what the data is worth.

MR RIDYARD: One way of looking at this would be to say that your whole case depends on the monopoly abuse continuing and the monopoly abuse against the advertisers. The reason there is such big rents is because Facebook/Meta has monopoly power over advertisers and that's why they're paying such high prices because they have no alternatives and you're wanting to lock that in and say: that's great, carry on monopolising the advertisers because that's okay, as long as that money doesn't go to Meta's shareholders but is paid to consumers instead.

MS KREISBERGER: So that's not an entirely fair representation of the case because it relates to a past period. The claim period is in the past, so the case is simply that

when you were extracting these high rents as a result of your market power, you generated this --

MR RIDYARD: From advertisers.

MS KREISBERGER: From the user data.

MR JUSTICE SMITH: The money comes from advertisers.

MS KREISBERGER: Absolutely.

MR RIDYARD: It comes in from advertisers.

MS KREISBERGER: but that is the fact of the actual world.

MR RIDYARD: Yes.

MR JUSTICE SMITH: All we're saying -- we're not saying you're wrong, but we are trying to understand the limits of the exercise that Mr Harvey's undertaken and it seems to us that one of the limits that you, or Mr Harvey, are postulating is that there is no abuse on the advertiser side. If there were, then you would have to carve the cake up rather differently.

Now, of course you're right, there is no claim before us by the advertisers and I strongly suspect that Meta are not going to be saying that "We have been abusing our advertiser market", whilst resisting a claim that they are abusing the subscriber market. but we have to work out whether your methodology is or is not capable of holding water and we really can't approve a methodology that doesn't at least look the question of over-compensation in the eye, and what you're saying is there is this excess profit, however you choose to define it, whether it's above WACC or something else. Let's take the Apple ATT figures. You have this slug of money that accrues to Facebook only because they're using data which you say has unlawfully been harvested. The advertisers are obviously paying for it. All we're putting to you is that it is an assumption of your approach that they are paying a proper price and that there is no suggestion that they are overpaying because, in the other market, Facebook is

abusing his dominant position.

MS KREISBERGER: It's rather overstating our position which is something different, which is that we have an abuse, it's resulted in the unlawful extraction of data. We have to find a way in order to do justice to compensate for that abuse and one of the available pieces of evidence is real world data on what Meta generated in terms of revenue and profits from that data. That's really all one is saying.

MR JUSTICE SMITH: No, but there's a final step, which is that you are not making any adjustment for the two sided nature of the market in which Facebook is operating.

MS KREISBERGER: Can I come back to you, sir, on that, with that --

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So I will just make sure --

MR JUSTICE SMITH: Just to be clear, the points that we're making is that when you have a two sided market and you are looking at the entity that sits as a participant in both markets, the profits that are being made accrue out of activities in both, and all you're saying, it may be right, all you're saying is that when you are looking at the class' harm, for purposes of working out the loss, you only need to consider one side of the market, not both.

MS KREISBERGER: And I am putting it to you in a somewhat different way, which is to compensate the harm, one can rely on the profits which Meta actually made which should be shared.

MR JUSTICE SMITH: Well, shared between Meta and one market side only.

MS KREISBERGER: Sir, I will come back to you if I may.

MR JUSTICE SMITH: No, of course, I don't want to tie you down where you don't want to be tied down.

MS KREISBERGER: I'm grateful. I do wonder, we have five minutes, I think I should perhaps carry on for --

MR JUSTICE SMITH: We have been interrupting you a great deal, Ms Kreisberger, so the suggestion that we would finish tomorrow is not something we're going to hold you to. It would be very nice but we absolutely don't want anyone to be cut back. So we will start, as planned, at 9.30 tomorrow. If we were to do that, do you need to go beyond 10.30 or --

MS KREISBERGER: Tomorrow?

MR JUSTICE SMITH: Tomorrow.

MS KREISBERGER: Yes, I'm afraid so.

MR JUSTICE SMITH: Yes. We will see how we go but we will certainly start at 9.30 but do carry on but when you reach a convenient point, we will finish.

MS KREISBERGER: I'm grateful.

Now, I did just want to make the point that if you look at Meta's skeleton on this multisided market point, they don't refer to the ATT natural experiment which is my key answer to it. So it's striking and, as I said, if Meta wants to argue to downward adjustments, then that's a matter that can be addressed at trial. It doesn't suggest that the methodology is implausible.

Now, Meta makes some other criticisms under this heading, so I'm still on this first floor concerning the multisided market.

They say, and this in fact does go to the point we were just ventilating, Mr Harvey says even as an attack on the ROCE-WACC excess profits measure, the objection that you must measure benefits to all users is not persuasive because there's good reason to think that benefits in the non-abusive counterfactual would flow to users only.

So this is the point we were debating. At very high level, more personal data is good for advertisers, better targeting of adverts and so on; bad for users. Less personal data is bad for advertisers, but good for users.

Now, Meta gives an example in the skeleton as to why Mr Harvey is wrong to make

that assertion. More data, good for advertisers. Less data, bad.

Now, if we go to that example, the example given by Meta, it actually supports what Mr Harvey says. So I would ask you to turn up paragraph 28 in the skeleton. That's at core bundle, tab 15, page 710.

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So they say:

"Consider a counterfactual scenario in which users provided less personal data to use Facebook. The plausible reaction of advertisers and Meta to such a scenario shows that one can't assume that only users would benefit. For example, advertisers might reduce their expenditure on Facebook's advertising services if Facebook receives less data."

That's the point you were positing:

"Meta's advertising revenues and profits from the Facebook service would be reduced as a result, without any payments to users or improvements in the service provided to users."

So profits go down:

"Meta would have lower revenues to invest in its services and, therefore, users might end up with an inferior Facebook platform to the one in the real world. The only benefit to users would be the value, if any, they place on supplying less personal data to use Facebook but this would be offset by the possible reduction in the value of Facebook to them."

So this is actually consistent with what Mr Harvey says at paragraphs 3.28 to 3.30 of his second report. That's at core bundle 6, page 361. If I could ask you to just cast your eye over those passages, down to 3.30.

(Pause).

MR JUSTICE SMITH: Yes.

MS KREISBERGER: So Meta is agreeing that the costs of more data collection are borne by users, whereas the benefits accrue to advertisers, so we're on the same page to that extent. The only additional point which Meta is making here is that the effect of a reduction in ad revenue, in a world where less personal data is given up, would be to degrade the platform.

Now, that's a factual claim. It would be up to Meta to make that good at trial, but it is contested by the PCR on the pleaded case. Not sure we need to go there now but CPO reply, paragraphs 15 to 18, addresses the claims Meta makes about its innovative tools and says they're overblown and, according to the FCO, mainly concerned with improving Meta's ad revenue.

So it's not accepted that there would be some reduction that would degrade the social network service.

MR RIDYARD: I'm just not clear what is being said here about the effect on advertisers. If there is less good data, it means advertisers pay less money because they get a less good advertising service, so what's the effect on advertisers?

MS KREISBERGER: The benefits -- so more data, better to advertisers, they get the benefit.

MR RIDYARD: but they pay more.

MS KREISBERGER: They pay for --

MR RIDYARD: For the benefit.

MS KREISBERGER: Yes, they pay for it, but they like more data, so it's good for advertisers. So benefits accrue to advertisers. There is no case before you of abusive charging to advertisers. Advertisers like data and want it and will pay for it.

MR JUSTICE SMITH: (Audio distortion) whether to make such a case. The point we're putting, and you come back to us tomorrow on this, the proposition we're putting to you is, irrespective of what Meta say, you are excluding that from the computation

of loss. You're postulating no claim by the advertising market that they have been overpaying due to Facebook's dominant position in the market.

MS KREISBERGER: Yes, and I will come back to you on that, sir. I think this might be an appropriate moment.

MR JUSTICE SMITH: It's as narrow as that. What we're trying to do is we're trying to understand Mr Harvey's methodology and that includes what he is doing about the other side of the market, or the other market, namely the sale of advertising services by Meta to advertisers and he may be right, he may be wrong, to slice the facts that way. On that, we have at present no view, but we do need to know, I think, what is being done, so that we can assess the methodology and that's nothing to do with what Google [sic] may or may not say -- sorry, I keep saying this -- Facebook may or may not say in the future. That's for the future.

What we're trying to do is understand methodologically what the PCR's position is.

MS KREISBERGER: Thank you, sir. I think if I may, I will come back to you further on that tomorrow.

MR JUSTICE SMITH: No, well we have significantly taken you out of your way and I apologise for that, but it has been very helpful from our point of view, if not the timetable's.

We will resume tomorrow. We're not going to hold the parties to their somewhat rash indication that we would finish tomorrow. It would still be helpful, but that's simply because of train strikes and abilities to get in and out of London, but the hard deadline will be 2 o'clock on Wednesday.

MS KREISBERGER: I think in fairness to Ms Demetriou, I think we will probably need to go into Wednesday.

MR JUSTICE SMITH: Well, obviously, both sides need to leave this courtroom having put their case and we will see how we go, but that's the position as far as we're

concerned.

Well, thank you all. Tomorrow morning, 9.30.

(5.05 pm)

(The hearing adjourned until 9.30 am on Tuesday, 31 January 2023)