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5 **IN THE COMPETITION**

Case No: 1527/7/7/22

6 **APPEAL**

7 **TRIBUNAL**

8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Friday 9th June 2023

13
14 Before:

15
16 Ben Tidswell
17 The Honourable Lord Richardson
18 Derek Ridyard

19
20 (Sitting as a Tribunal in England and Wales)

21
22
23 BETWEEN:

24 **Proposed Class Representative**

25
26 **Alex Neill Class Representative Limited**

27
28 v

29 **Proposed Defendants**

30
31 **Sony Interactive Entertainment Europe Limited; Sony Interactive Entertainment**
32 **Network Europe Limited; and Sony Interactive Entertainment UK Limited**

33
34
35
36 **A P P E A R A N C E S**

37
38 Robert Palmer KC, Fiona Banks & Antonia Fitzpatrick for Alex Neill Class Representative
39 Limited (Instructed by Milberg)

40
41 Daniel Beard KC, Charlotte Thomas & Gayatri Sarathy for Sony Interactive Entertainment
42 Europe Limited and Others (Instructed by Linklaters)

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(10.30 am)

THE CHAIR: Mr Beard, good morning.

Submissions by MR BEARD (continued)

MR BEARD: Sir, members of the Tribunal, good morning. I am just going to pick up where I left off yesterday. We were discussing methodological issues in relation to Mr Harman's approach, in particular his second report, and just to reiterate the basic points. We say that there is a lack of clarity about how matters are being dealt with.

THE CHAIR: Mr Beard, I am so sorry to interrupt you.

MR BEARD: Please.

THE CHAIR: I have just realised we don't have -- we are signed out of our system and so to the extent we are going to be looking at any electronic documents --

MR BEARD: Yes, I am going to go to --

THE CHAIR: I am sorry, could you just give us a second --

MR BEARD: Of course absolutely.

THE CHAIR: -- and I am sure we can fix that. I am so sorry to --

MR BEARD: No, no, no.

THE CHAIR: -- stop you in flow but it's probably better now than later on.

MR BEARD: No. (Pause)

THE CHAIR: It looks like it might be a minute. I mean how long -- oh, we are in. I am in anyway. I don't know whether ... I think it's going to be sorted out, so why don't you keep going, thank you, I am sorry about that.

MR BEARD: I will keep going. I was going to go quite fast into some documents (several inaudible words).

LORD RICHARDSON: I should be able to access them on my own computer so --

1 **MR BEARD:** Okay. That's kind.

2 Just to go back to the two broad points that I am making about the methodological
3 concerns, there is a lack of clarity about how matters should be dealt with, not just
4 what but how, and clearly with real specificity, so that we can actually have
5 a practical route through. We are not trying to resolve everything now, we
6 understand that, but in relation particularly to the excessive pricing abuse allegation,
7 we need to understand how it is we are going to resolve these points because just,
8 to take a step backwards, all of this material is focused primarily on the excessive
9 pricing abuse.

10 Now I know Mr Palmer says: well, I would use it if I were permitted to run the other
11 abuses as well. But, of course, what we've said is the (audio distortion) that you can
12 run and excessive pricing abuse against a closed system, on the basis that he's
13 articulating in legal terms on the basis of United Brands. So in a way, that might
14 have been the easier answer to the question that was posed yesterday about where
15 do other abuses lie in relation to a closed system.

16 Obviously, an excessive pricing abuse can lie against a closed system without you
17 getting into refusal to supply case law. Indeed, we've got one here. I was being a bit
18 obtuse when I answered, sir, I am sorry about that. But that is an obvious candidate
19 here.

20 So all I say about closed system continue to pertain you can still make an allegation
21 which is using a different set of criteria for abuse which is the United Brands criterion
22 or criteria because there are two limbs to it and there wouldn't be an argument about
23 refusal to supply in regard of that.

24 So clarity about how matters are to be dealt with with real specificity and I want to
25 identify a few key points which we say are really missing from that. Then it's
26 a corollary of that in some respects, that we have these anticipated vague but vast

1 shopping lists of material that will be sought in order to support these matters.

2 Again, I am not trying to resolve disclosure issues today at all. What we are talking
3 about is how do we have a focus in this case and an organisation that shows us
4 a roadmap enabling us to see the points along the way where we will need to have
5 disclosure discussions, what they are to do with and so on.

6 Let me pick up four points where we say how this is to be dealt with is really not clear
7 from Mr Harman's new, revised approach that he's put forward in his second report.

8 The first of them, you won't be surprised, perhaps, to hear, is how to actually deal
9 with two-sidedness because, of course, in his report, there is a section, chapter 4,
10 which is all about two-sidedness. But when you actually come to look at how it is
11 that aspect is to be considered within the process that he is broadly outlining, there is
12 a glaring omission and that glaring omission is that there is no consideration as to
13 how you deal with questions of indirect network effects or network effects generally.

14 Indeed, in all of the material to do with process, there is no reference to network
15 effects or indirect network effects particularly. That really matters. I am going to just
16 take you, if I may, to the BGL case just for a moment which is in the authorities
17 bundle 2. Are you now logged in?

18 **THE CHAIR:** Yes.

19 **MR BEARD:** Excellent. It was not merely a filibuster, waiting for the IT to come
20 through. If we go to BGL which is authorities bundle 2, starting at -- it will be -- 1112
21 is the title page. But I actually just want to take you to two passages in it because
22 this case was about platforms and two-sidedness. There's an extensive discussion
23 of issues of two-sidedness in here. The platform there was a price comparison
24 website, where the two sides were wanting to draw in insurers on one side, who
25 posted their material on the site, and customers on the other, that bought the
26 material.

1 | Where I would like to pick it up is at 1162. This is really just a passing reference.

2 | **THE CHAIR:** I am not sure that reference is right.

3 | **MR BEARD:** I am so sorry, I said authorities bundle 2.

4 | **THE CHAIR:** It's in one.

5 | **MR BEARD:** I meant authorities bundle 1, my apologies. I'm probably somewhere

6 | midway through some terrible European case.

7 | **THE CHAIR:** I was. So this is --

8 | **MR BEARD:** 1162.

9 | **THE CHAIR:** This is 1162, so paragraph 90.

10 | **MR BEARD:** Yes, we are back in CAT territory here.

11 | **THE CHAIR:** Thank you.

12 | **MR BEARD:** All I wanted to do is take you to paragraph 90, "Process in the context

13 | of two-sided markets or platforms". Here, it's just a helpful reference that we see.

14 | So this is a case where the focus was on two-sidedness and you'll see the quote

15 | from the seminal Rochet and Tirole paper is made there, about two-sidedness being

16 | a "term of economic art, a degree of uncertainty in concept", but this article has

17 | talked about two-sided markets and overview.

18 | You'll see the quote there and this is where we've emphasised and I think

19 | Dr Caffarra has emphasised, why one thinks about video games as being the

20 | paradigm. The seminal article about this was talking about them as the exemplar.

21 | The passage I wanted to take you to which is of more substantial relevance for the

22 | purposes of analysing Mr Harman's methodology is actually at 1182, paragraph 117.

23 | **THE CHAIR:** Yes.

24 | **MR BEARD:** So 117:

25 | "The essence of a two-sided market is the interaction between agents through the

26 | intermediating platform. As the support study"

1 This is the support study from the European Commission in relation to market
2 definition which has a review of literature in relation to these matters that was being
3 cited here:

4 "At the heart of the interdependence between various markets sites are direct and
5 indirect network effects."

6 So what is being identified here is the critical importance of direct and indirect
7 network effects as an aspect of two-sidedness. It says:

8 "One, direct network effects are present when the value of a product or service
9 received by a user fluctuates (either directly or inversely) with the variation of the
10 number of the product/service's users. The support study provides the following
11 example: Concretely, a telephone service or a social network or a communication
12 service is all the more valuable for the individual, the more users make use of this
13 service."

14 Now that's obvious. If there's only one person with a telephone, it's really just an
15 ornamental paper weight, it does not provide any function. The more people are
16 connected to the network, the more value it has. In the context of computer games
17 and video games, of course where you are talking about multiple player games, the
18 more people you can play against, the more there can be a direct network effect
19 benefit.

20 That's just one example in the context of this industry, where direct network effects
21 arise.

22 So just to take an example, if you are into your FIFA (audio distortion), you want to
23 play matches against people all over the place instantly. The more people that are
24 playing FIFA, the more matches will be immediately available to you, for example.

25 That's just a glib example. I would like to say that's not evidence, I think the court
26 can probably take judicial notice of that.

1 At 117(2):

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

9 Then it gives the free newspaper example, where advertisers will only come in if the
10 free newspaper has lots of readers.

11 Obviously, this is an interesting concept. The reason I am emphasising it is actually
12 a little bit explained in the next paragraph over the page at 118:

13 "It's possible in some cases, even desirable, to parse these effects more closely" -
14 and the Tribunal is talking about one-directional effects, bidirectional effects and so
15 on. "One such effect, which is troubling to those used to analysing "traditional"
16 markets and to which we will revert, relates to the pricing strategies that (often) exist
17 in these markets. A further characteristic of two or multi-sided markets, aside from
18 the abovementioned interdependence, is that pricing strategies in those markets are
19 not akin to those of single markets. Understanding the potential pricing strategies of
20 digital platform providers is key to grasping how two-sided or multi-sided markets
21 compete among themselves with one-sided markets."

22 Mr Harman, I think, would accept that and he talks about that issue in his chapter but
23 if we go down that quote, what it identifies is the fact that people who are dealing
24 with two-sided markets may end up with asymmetric pricing on both sides and it
25 says:

26 "Pricing structures vary depending on cross-side demand elasticities and the relative

1 extent of network effects, with the intuition being that the existence of inter-group
2 network effects frequently implies that, in order to attract a group of users, the
3 platform needs to subsidise the other groups of users totally or in part. Internalising
4 the two-sided inter-group externalities allows a platform owner serving the two sides
5 to price more efficiently, in the presence of demand curves which shift outward with
6 positive cross-side network effects."

7 Now, of course, I am accepting this is not straightforward language, not at all. I am
8 not suggesting that we need to get into this in detail here. But the key thing is that
9 the indirect network effects that you are talking about, in other words, in video
10 gaming, wanting to attract customers on one side so you get publishers producing
11 games on the other, means that if you shift the prices and incentives on one side,
12 that can have effects on the way in which demand operates on both sides of the
13 market.

14 You get ramified effects across the platform and those can be iterative, so you
15 change a bit. If you push your prices of games up, you might lose consumers at that
16 point. Fewer gamers want to come in, there are fewer customers to sell to. They
17 may want to push their prices up. I am not saying that is the model.

18 **MR RIDYARD:** Can you spell that out a bit more concretely for us, to make it a little
19 clearer in our minds. How does the indirect effect work? How might it work?

20 **MR BEARD:** The indirect effect might work in a range of ways which is why I am
21 cautious about how it impacts because you might have situations where because of
22 changes in pricing of games to customers, if those prices went up, you would end up
23 with fewer customers. At that point you would have a problem with the potential
24 demand for publishers to publish games on your system and you would think about
25 the incentives you had to give to the publishers, in order to ensure that they
26 published enough games of enough quality frequently enough and so on.

1 On the other hand, if you have a situation where customers are coming in because
2 you offer a whole range of benefits, then in those circumstances, you may well be
3 able to charge more effectively to publishers, in circumstances where you have built
4 a system which is terribly attractive to customers and, therefore, you've got
5 a justification for the commissions you are charging in those systems.

6 So the point is that the demand that shifts in relation to the network effects you are
7 talking about, can alter how you pitch your prices on both sides.

8 **MR RIDYARD:** Just to be clear, the prices we are talking about here, you are saying
9 if the price of games goes down, you get more people buying Sony games and that's
10 good news for developers because they say: well that's a more important platform for
11 me to make sure I get my games to work on, so that might potentially affect the deal
12 Sony then strikes with the games --

13 **MR BEARD:** Yes, it could do.

14 **MR RIDYARD:** So it's that price -- I am just trying to understand the prices we are
15 interested in.

16 **MR BEARD:** It more complicated here. I have simplified it because I'm only dealing
17 with two prices. Of course, on the consumer side, with a video games platform, you
18 have two prices, you have prices of games and prices of consoles and that's where
19 the indirect network effects analysis becomes particularly complicated because you
20 are pricing a system, effectively -- we are back into razors and razor blades,
21 potentially, but you are pricing a system on one side, you are trying to deal with the
22 indirect network effects of assessments in relation to all of that package and
23 balancing it against the other side, in circumstances where, obviously, you have --
24 leave aside market definition, even if you talk about it as out of market constraint,
25 you have an issue with publishers, for example, thinking: well I will go off and put my
26 efforts into publishing on a different system rather than on PlayStation and so on. So

1 you have a whole range of complexities.

2 The point I am making is not to try and resolve this, for a moment.

3 **MR RIDYARD:** I was not seeking to -- I was just trying to get in our minds -- that's
4 why I asked the question yesterday about razors and razor blades, maybe because
5 clearly there is an issue there as regards how you balance those two elements of the
6 system.

7 **MR BEARD:** Yes.

8 **MR RIDYARD:** But that problem exists for Gillette and Wilkinson Sword but they
9 don't have this other effect which you are suggesting comes through through the
10 deal, the richness of the deal Sony can do with the developer because that's the
11 price --

12 **MR BEARD:** I am not saying that's exactly how it works (Overspeaking).

13 **MR RIDYARD:** Just to understand which is the other price that we are talking about
14 in the system, it's the price that Sony strikes with the game developer.

15 **MR BEARD:** The game's commission can be seen as a price -- I mean that's what
16 Dr Caffarra articulates in her reports, is that the game commission can be seen as
17 a price on the other side.

18 I was going to come on to another issue that's missing here which is there's another
19 potential price that is being articulated for the purposes of the counterfactual by
20 Mr Palmer in the course of submissions which is a royalty payment in relation to
21 these matters.

22 So the point I am making is it's of the essence of the consideration of two-sided
23 markets and platforms that you have to think about the way in which indirect network
24 effects and direct network effects because actually they interact here as well, but
25 indirect network effects operate in relation to assessment of pricing.

26 Here, on one side for customers, you've got two sets of pricing you are dealing with

1 that you have to factor into this analysis. On the other side, you've at least got the
2 commission fee pricing. But Mr Palmer is now raising a possible other price which is
3 a royalty price to be included on the other side in relation to the analysis.

4 **THE CHAIR:** I think to be fair to him, we raised it with him rather than him raising it
5 with us, but that doesn't mean (Overspeaking).

6 **MR BEARD:** I am sorry, I am not trying to attribute responsibility or blame in relation
7 to these things but it's an issue and so the point I am making is that when one is
8 considering how you assess this and what the methodology is -- that's all I am
9 dealing with here, I am not trying to resolve anything. What I am trying to do is
10 say: look, there is a methodology that's been set out by Mr Harman in his second
11 report and it is striking, it's nowhere referred to indirect network effects. It talks about
12 cross-subsidisation and it talks a lot about costs but that's not the same thing
13 because the interaction between the two sides can change the demand which is why
14 I took you to the slightly tortuous language of the support study that's quoted at 118.
15 Because it's not some kind of: oh, I've got a fixed cross-subsidisation issue that I
16 need to deal with. I need to be able to deal with how I say the indirect network
17 effects apply in the counterfactual.

18 That's just not there. We don't see it. The term is not referred to.

19 **THE CHAIR:** Mr Harman remains, I think, a little bit sceptical about the two-sided
20 market or its application. I think that's partly, I think, because he says, as
21 I understand, that there is a distribution market which has slightly different
22 characteristics. I don't think he's denying there's a two-sided aspect, at least to
23 some parts of this, but he says the distribution market operates more akin to a
24 vertical distribution rather than a two-sided market, so he's actually -- there is
25 a difference of approach there as well, isn't there? Which may explain his
26 scepticism.

1 **MR BEARD:** No, he says you should see distribution of games as being
2 a one-sided market and Dr Caffarra has articulated in her second report why that's
3 just wrong, you've got to take into account the two-sidedness.

4 But I also accept that that is a matter -- it's not quite ships passing in the night but
5 there's distinct divergence there.

6 **THE CHAIR:** Yes.

7 **MR BEARD:** So it may be that's the sort of issue that needs to be resolved in some
8 shape or form, sooner rather than later, as to how all these things are going to work.
9 But I am not presuming that, I am just dealing with whether or not we are faced here,
10 from Mr Harman's report, with a methodology that enables us to understand how,
11 with a degree of specificity, he is going to grapple with not only just a cost issue on
12 cross-subsidisation but the more dynamic aspect of this which is the indirect network
13 effects aspect which has to be taken into account wherever he is suggesting there
14 are excessive prices being identified. Because going back to the questions from
15 Mr Ridyard, if you are seeing excessive prices, as the PCR does, as being prices on
16 commission because that's what's pleaded -- I will come back to the variant
17 yesterday in a moment -- but if you focus on that, in those circumstances, you need
18 to make sure that when you are talking about a counterfactual, you are not just
19 taking a cross-subsidisation snapshot now, you are thinking about how do the
20 indirect network effects work in relation to the counterfactual.

21 **MR RIDYARD:** Maybe you are going to take us to Harman in detail but I mean there
22 is a complication here because on the one hand, he doesn't agree with the
23 two-sidedness thing and it's legitimate for him to have an argument with Dr Caffarra
24 about that in due course.

25 **MR BEARD:** Yes.

26 **MR RIDYARD:** On the other hand, he does have some openness and as I said, not

1 as much as you would like, but he does have some openness to the idea of
2 interaction between console pricing and game pricing.

3 **MR BEARD:** Yes.

4 **MR RIDYARD:** And how that plays out may be something that happens later on in
5 the process rather than now. But you are more focusing on the extent to which he is
6 open to the idea of the interaction between console plus game pricing on the one
7 hand, consumer pricing on the one hand, and the deal with the game developer on
8 the other hand.

9 **MR BEARD:** Yes, including any potential royalties. Exactly. That's precisely what
10 I am grappling with and I am grappling with it because if we actually go to Harman 2
11 because -- I am not going to go through each paragraph but it's worth just having
12 this. So it's starting at 473.

13 Here you have the section where he says:

14 "Financial performance of consoles and relevance of two-sided markets".

15 So, yes, of course you are right, Mr Chairman, that he continues to maintain
16 scepticism but what he's doing here is putting forward a methodology, he says, in
17 order to deal with the two-sidedness issue. We are saying this methodology just
18 doesn't work because it hasn't got a proper consideration of indirect network effects.

19 If we just turn through it. He has an introduction to Sony's position and Dr Caffarra,
20 relevance to the issues and then at 4.4 on 475:

21 "Financial performance of console hardware", which goes on for some period.

22 Then 481, at 4.5, "Brief comments on two-sidedness".

23 I think the scepticism point is probably encapsulated in 4.5.13 which is on 484. But
24 then what I am focused on, because this is what is relevant, I think, for what we are
25 dealing with in terms of the statutory provisions and the blueprint criteria, if we take
26 two points, is 488, "How this is addressed in my proposed methodology".

1 So what I am just doing is saying: well, okay, how do you propose to deal with it?
2 The point I am making here is he has over the page at 489, "An extension of my
3 analysis of the counterfactual commission rates." Then we go on through to 492, his
4 extension of the United Brands test. And the point I am making here is this is the
5 section where he says "This is how I am going to deal with the two-sided markets
6 issue", and I won't ask you to do the search but there's no reference to indirect
7 network effects, no reference to network effects at all here. And so what we are
8 saying is he's putting forward this methodology.

9 If he's going to go back to a position as two-sided markets don't matter at all and we
10 don't have to consider them, then we may well be in ships passing in the night
11 territory here and that would be wrong.

12 **MR RIDYARD:** Yes, but is the critical thing whether he uses the term direct or
13 indirect network effects or whether he actually substantively looks at the prices
14 relevant for assessing direct or indirect network effects?

15 **MR BEARD:** Of course it's the latter. I am not for a moment suggesting that it's just
16 done on the basis of that, but the problem is that if you look at this what you don't
17 have any sense of is any methodology for thinking about how does it work if the
18 demand on one side shifts when you shift the prices on the other side.

19 **MR RIDYARD:** When you say "the side", you mean you are talking about --

20 **MR BEARD:** Either way, it doesn't matter.

21 **MR RIDYARD:** -- publishers versus consumers?

22 **MR BEARD:** Yes, I am. Those are the two sides I am always dealing with when I'm
23 talking about the video gaming industry.

24 **MR RIDYARD:** I just say it because, as you say, it's a complicated picture and
25 there's also this interaction between consoles and games which are both on the
26 consumer side.

1 **MR BEARD:** Yes, absolutely. It's not that we are trying to -- we are not trying to
2 reach judgment about how simply -- what level of complexity there is in these things.
3 What we are saying is you've got to not only be taking a sort of counterfactual
4 analysis based on a particular cost cross-subsidisation issue, as he's focused on
5 here, you've actually got to be considering in relation to these things, if you change
6 the counterfactual price on one side, how does that actually ramify, given you have
7 these indirect network effects? We just don't see it there.
8 The clue would be you would have some language but we accept he does not have
9 to specifically refer to it in order to be properly considering it but we don't see it there.
10 That's the issue. Since it's fundamental to the project he says he's dealing with, that
11 seems to us to be problematic. It's a gap in the methodology.
12 As I say, the second issue -- so I wanted to talk about indirect network effects not
13 being considered and identified properly in the methodology. Then part of that is
14 a second issue which is the royalty point because I don't go back over the fact that
15 the existence of a royalty reinforces the points I was making about the two abuses
16 yesterday, but it has to be recognised that this royalty issue is being considered,
17 wherever it comes from, and that needs to be factored in and, of course, there's
18 nothing there on this.
19 In a way, what is going on here is it's not the same as but it is in the same type of
20 problem that was identified in Gormsen, where what needs to be provided here is
21 a methodology addressing the point that Sony is making in relation to two-sidedness
22 of video gaming. He can't say: it's not my problem. So he is saying: okay, I have to
23 engage but the methodology is just unclear as to how this is engaged with.
24 Let me move on whilst we are in here. 494. We then have the counterfactual pricing
25 of games.
26 **THE CHAIR:** Is this your third point now?

1 **MR BEARD:** Yes, this is the third point. I have done indirect network effects
2 particularly, royalty, counterfactual pricing of games. Really, the issue here arises
3 because it appears to be the claimant's case that, actually, the prices charged in
4 relation to the games are themselves excessive.

5 We've got copies of the transcript. It was part of an exchange between the
6 Chairman and Mr Ridyard and Mr Palmer yesterday.

7 **THE CHAIR:** We have the transcript.

8 **MR BEARD:** You have the transcripts.

9 **THE CHAIR:** Yes, thank you.

10 **MR BEARD:** Thanks. Now you will recall it's page 49 in the version I have.

11 **THE CHAIR:** Yes.

12 **MR BEARD:** So if you recall, this was in the context of the point that's been made
13 that since Sony controls the retail price under the GDPA, the point that was being
14 made by Dr Caffarra was Mr Harman's analysis really just doesn't grapple with the
15 fact that even if the sharing of the commission were to be varied, why does that
16 matter in terms of the overall price of the game? Because if Sony is optimally pricing
17 at the moment, why wouldn't it optimally price in any event and just end up with
18 slightly less, effectively, and the game developer with slightly more?

19 Of course, that's critical for a claim brought by consumers rather than publishers in
20 this context.

21 The question is posed by you, Mr Chairman:

22 "THE CHAIR: So you are saying that the counterfactual that is being advanced
23 would itself amount to an abuse?

24 **MR PALMER:** You can't defend an allegation of excessive pricing to say excessive
25 pricing in a different way which we are not currently doing and rely on that as your
26 counterfactual."

1 Then, Mr Chairman, you get into it being somewhat more complicated.

2 Then Mr Palmer says:

3 "We make three points here. The first point is the price charged to consumers would
4 still be excessive and the underlying value of the games has not changed."

5 Now I took you yesterday to how this is pleaded as excessive commissions but this
6 is a different case. This is an excessive pricing case in relation to game pricing.

7 Now if that is now a limb of either the PCR's case or the PCR's defence to the points
8 that are put about retail pricing, there's nothing in Mr Harman's report dealing with
9 this. That, again, is a gap. That's actually a gap as to what is going to be dealt with
10 but it's certainly a gap as to how it's going to be dealt with. The chapter in his report
11 that deals with counterfactual pricing of games is not grappling with that.

12 **THE CHAIR:** That's not surprising, is it? We are in a slightly different territory here.
13 You may be right that it has consequences but we are in the territory where it's been
14 deployed as an argument and response to something that's come out --

15 **MR BEARD:** No, I completely accept that but it's one of these examples of because
16 of the way -- there is a lack of clarity about how this is going to work. It comes out in
17 the course of exchanges about a response to a very clear point that we have put
18 forward repeatedly, that the GDPA says it's Sony that sets the retail prices and the
19 response is: no, no, no, don't worry about that, this is still an excessive price.

20 **THE CHAIR:** Certainly, putting aside how we've got here, it does make sense, if
21 that's a point that's going to be taken, that it's clearly articulated and that we
22 understand how it's to be dealt with.

23 **MR BEARD:** I don't need to take it further than that. You have the point in relation
24 to it. But what I am saying is because of the lack of clarity about how all of this
25 works in terms of the story on excessive pricing and what the defences are, we end
26 up suddenly bumping into these things that are, potentially, quite fundamental points

1 along the way.

2 **THE CHAIR:** You are saying that, actually, there's an element to which this just has
3 not been thought through to all the different angles?

4 **MR BEARD:** Yes, and I think it's important just to draw attention to this. If we go to
5 Dr Caffarra's first report which is in this bundle at, electronically, 629 -- sorry, no,
6 that's not the right reference, 626.

7 Sorry, 626, hard copy; 629, electronic. You see that what is said here -- I mean this
8 is a report that was served some time ago and, of course, Mr Harman is responding
9 to that. But Dr Caffarra is setting out very basic economic principles. This isn't some
10 refined argument about these points. What it's saying is: you are customers coming
11 along and making a claim in relation to these matters. You have to explain why it is
12 that the customer prices would be different, in circumstances where we can set the
13 retail prices.

14 The answers end up being things like: ah well, somehow you can't maintain the
15 prices unless there's collusion between Sony and publishers. And as Dr Caffarra
16 explains in her second report at paragraph 32, that just isn't necessary or right at all
17 because it can be in the mutual best interests, indeed it would make sense for it to
18 be in the mutual best interests of publishers and Sony, to maximise the reasonable
19 price they can charge for games, in order to maximise their income.

20 **MR RIDYARD:** We understand that argument but I think as came out yesterday, it
21 depends on a number of facts being established, including the nature of the deal with
22 the publisher, whether it is a wholesale price or whether it's a profit share and it's
23 quite fundamental differences.

24 **MR BEARD:** Look, I am sorry, I don't want to pretend there aren't other issues
25 sitting in the background. Sir, you articulated the issue very fully yesterday. It's
26 recognised these are matters that would be the subject of an argument, but I am just

1 dealing with the fact that this was set out really clearly on the basis of clear
2 provisions in the GDPA and yesterday, we are finding there's a whole story about
3 excessive pricing in relation to games that is being put as the defence here.
4 There's nothing dealt with in any of the expert material and that's highly problematic
5 and it's not because somehow we've held back on the story and it only came out
6 later. That's the only point I am making here.

7 If we then go back to Mr Harman's second report. I was just picking up on
8 counterfactual pricing of games. Again, I am not going to work through it all in detail.
9 But then we have at 505 electronically, 502, the counterfactual commission rate on
10 benchmarks. Again, we say that the way in which this has been done, it's flawed in
11 two fundamental ways and a proper account of how these things are dealt with really
12 needs to be provided.

13 The first is -- and this is where this issue about: we understand difficulties that PCRs
14 have in relation to evidence at this stage in the process. But Mr Harman relies
15 heavily on what was provided to him which was testimony of a Mr Sweeney, who
16 runs Epic Games, in litigation in the US. That testimony from Mr Sweeney
17 suggested that, actually, there were significant problems with the levels of
18 commission being charged by Apple in relation to the Apple app store.

19 If I could just turn you back to his first report, where, for instance, he quotes it -- it's at
20 paragraph 6.4.30 which is on 392 hard copy, 395 electronic. You'll see there 6.4.30.
21 This is in the context of the initial discussion of excessiveness, citing this
22 Mr Sweeney about: oh, how distribution costs are low and the mark-up by Apple is
23 vastly too high. To be fair to Mr Harman, he says: look, I am not saying that I know
24 everything about this evidence. He is quite careful at 6.4.32. He doesn't say this is
25 the be all and end all.

26 But there's a fundamental problem with relying on this material at all because

1 Mr Harman, it appears, was not provided with the judgment in Epic/Apple which
2 followed on from this testimony. That's one of the things that caused real concern.

3 If we could go to authorities bundle 2 at 1213. I am confident this is authorities
4 bundle 2, not 1. The American material gone in with the European.

5 **THE CHAIR:** So that's 1216?

6 **MR BEARD:** Electronically, yes, absolutely. There are a couple of reasons why this
7 matters. The first I will take you to is just at 1235. I am sure Mr Harman's approach
8 to this sort of evidence might well have been very different if he'd considered this:

9 "Project Liberty. At the end of 2019 Tim Sweeney conceived of a plan called "Project
10 Liberty" which was a highly choreographed attack on Apple and Google. The record
11 reveals two primary reasons motivating the action. First and foremost, Epic Games
12 ...(reading to the words)... of the oncoming Metaverse."

13 Now that comment alone would cause any sensible independent expert to say: hang
14 on a minute, I just can't place weight on the assertions that are being made by these
15 sorts of people. But it's actually more than that because if we go on to the
16 conclusion of this case -- so what was being alleged was this commission that Apple
17 charged which was identified as 30 per cent, was unfair and excessive and these
18 were commissions that shouldn't be charged.

19 I will cut through to the conclusion which is at 1401. I won't go through all the
20 reasoning. This is the concluding order:

21 "On the complaint in favour of plaintiff, Epic Games, on tenth count, for violation of
22 California's unfair competition law and in favour of Apple on all other counts."

23 So there was one particular unfair competition law in Californian law that was found
24 to be not complied with. But "in favour of the defendant, Apple Inc, on all other
25 counts." So 30 per cent commission being charged by Apple. The conclusion of this
26 court was: no, there's no unfairness here. I am not going to go through all the

1 reasoning, it was about market definition, it was about all sorts of things. But the
2 upshot was a counterclaim by Apple that says: you owe us many millions of dollars
3 because you have not been paying us the 30 per cent, and that was ordered. Now,
4 again, if you are an expert dealing with these things and you are saying: I am going
5 to consider counterfactual commission benchmarks and I am going to consider
6 material that was put forward in the course of those proceedings, it was imperative
7 that Mr Harman was fairly provided with that material.

8 We say that's a significant problem in the way that these issues of counterfactual are
9 to be dealt with because you are skewing the comparison and there's a second
10 aspect here, which is the comparison with PCs because we say, and I recognise this
11 will be a matter for further submission in due course, but comparing PCs and the
12 commissions charged in relation to games on PCs to those that are charged through
13 closed systems, is comparing apples and pears.

14 So we recognise that's going to be a fight to be had in due course but because of
15 these issues, because of the perspective that's being put forward in section 6, this
16 counterfactual commission rate benchmarks and how this is addressed in my
17 proposed methodology, we say needs to be properly revisited and needs to be
18 articulated on the basis of all of the relevant material that should have been available
19 at the time.

20 **MR RIDYARD:** For now though, we know that if there's an excessive pricing case,
21 sooner or later we'll have to look at comparators and it's possible you may disagree
22 with the other side about which the relevant comparators are. I don't know what
23 more is Harman required to do now?

24 **MR BEARD:** In putting forward a comparison in terms of methodology, he needs to
25 give recognition of account of the relevant factors that are to be taken into account,
26 in deciding what is and isn't a relevant comparator. In doing that, of course, what he

1 doesn't do is look at the openness of the system and the issues that arise in relation
2 to PC which would make it different.

3 But it's not just that, it's also the comparison he's drawing with other non-PC systems
4 and, in particular, the position in relation to the evidence that was given in Epic/Apple
5 that was used, where we say: well hang on a minute, you can't rely on that sort of
6 material.

7 Again, it's a problem. We recognise it's a problem of a different type from the ones
8 we've identified otherwise, but what it does is it indicates the problems with this
9 methodology overall and the importance, therefore, of spelling out how this
10 methodology is going to work.

11 Of course, this isn't just an abstract issue in relation to the structure and how we get
12 to trial, it's also important because the vagueness and the omissions here also
13 impact on what it is and when we should be looking for disclosure of particular sorts.

14 Because Mr Harman attaches to each of his reports -- both of them have, essentially,
15 a shopping list of disclosure. That's in appendix D to Harman 1 and then appendix C
16 to Harman 2. I will just give you the page references to those.

17 If you can turn them up if it's of use. Harman 1 appendix D is at electronic 442.
18 Then the additional material is at 520 which is appendix C.

19 You'll see that -- I mean it's a vast, vast shopping list being put forward there. In
20 order to manage this, we say the Tribunal needs to ensure there are not gaps. Not
21 gaps in relation to indirect effects, not gaps in relation to royalty excessiveness
22 issues that are coming out in this process. It needs to ensure that when we are
23 thinking about issues to do with comparative commissions, that we are looking at
24 sensibly sourced comparators, so we have a proper indication of where relevant
25 disclosure could be sought, should be sought by Sony or, indeed, by the PCR in
26 relation to these matters.

1 But that is why we say there are important gaps. There is a lack of clarity as to how
2 this is going to be dealt with in terms of the methodology in relation to excessive
3 pricing. Yes, there are going to be a lot of fights, we anticipate, down the line, in
4 relation to a range of issues but what we need to do is ensure that we can have
5 a clear route map here and we don't have it because of these key omissions.
6 Instead, what we are left with is a very extensive demand by Mr Harman. Now no
7 doubt Mr Palmer will say well we'll make our applications in due course and you can
8 argue about them, but we need to make sure we are not arguing on the basis of
9 shifting sands. That's precisely what we've seen over the last couple of days. We've
10 seen a change in relation to the position of the treatment of console markets. We've
11 seen references to royalty coming out in discussion. We've seen references to
12 excessive pricing in relation to games coming out. That's exactly what we cannot
13 continue to have. We need the clarity and we need the clarity in relation to the
14 treatment of indirect effects analysis that Mr Harman is proposing, as well in relation
15 to these matters.

16 Unless I can assist the Tribunal further, those were the points on methodology.

17 **THE CHAIR:** No, thank you, that's very helpful. Mr Palmer.

18 **Reply submissions by MR PALMER**

19 **MR PALMER:** I am grateful to Mr Beard for focusing the points on methodology this
20 morning. The question that was asked yesterday by Mr Ridyard was: what more do
21 you want? And certainly by the end of yesterday, we felt on our side at least, we
22 hadn't really heard an answer to that.

23 The question that was articulated by the Chairman yesterday was also: what are you
24 saying is the correct course from here? Is this a case where you are saying you
25 really can't certify this claim because there are such glaring deficiencies in the
26 methodology, we have no way forward, or is this a case where case management,

1 properly applied, can ensure that these areas of legitimate dispute between the
2 experts can be managed, to ensure that the ships don't pass in the night? And, of
3 course, it's our submission that we are firmly in that territory and having heard, now,
4 articulated points on methodology from Mr Beard, we are still very much in that
5 territory.

6 Let me go through each of the points which have been argued on methodology this
7 morning. First question was how to deal with two-sidedness and you will remember
8 that Mr Beard took you to BGL which was in authorities bundle 1, we established, at
9 page 1162.

10 **THE CHAIR:** Yes, paragraph 90.

11 **MR PALMER:** That was paragraph 90 -- I don't need to go to that. Then we went
12 on, I think, to --

13 **MR BEARD:** 117.

14 **MR PALMER:** -- 117. It must be more than that. Sorry, I'll check my reference. We
15 went on to 1183, that was it, and paragraph 117. You'll recall the explanation of
16 direct and indirect network effects.

17 It wasn't entirely clear what point Mr Beard was advancing in respect of direct
18 network effects. Obviously, this is an established system and has been -- it dates
19 back to the 90s and we are concerned only with the last six years, from 2022, by
20 which time it is an established system, with many users, rather than a nascent
21 project. But indirect network effects were his main focus. In that respect, he went to
22 paragraph 118 which does repay study because it explains both how Ms Caffarra put
23 the point in her first report and how Mr Harman has responded to it in the second
24 report.

25 So recalling, that explanation begins with:

26 "The characteristic of two-sided markets, aside from independence, is that pricing

1 strategies are not akin to those of single markets and understanding the potential
2 strategies is key to grasping how they compete amongst themselves and with
3 one-sided markets."

4 And further down, we are taken to:

5 "Pricing structures vary, depending on cross-side demand elasticities ...(Reading to
6 the words)... needs to subsidise the other group of users totally or in part.
7 Internalising the two-sided ...(Reading to the words)... from the view point of the
8 multi-sided platform."

9 You will recall the way Dr Caffarra put it in the first report was a failure to appreciate
10 that the console was sold at low zero or negative margins and they need to take that
11 into account by way of cross-subsidy. And that, of course, is precisely and directly
12 what Mr Harman has done in his methodology.

13 We are now hearing a further point which is being developed out of this which is
14 saying: what about the ramified effects across the platform and the interaction
15 between prices charged by publishers and prices charged to consumers? But all of
16 that, of course, is premised on the two-sidedness of the video games market which
17 Dr Caffarra was analysing and ignores the difference analysis that Mr Harman
18 provides in respect of the one-sided nature specifically, of the digital distribution
19 market. And that is what it explains in those chapters and that's what he takes
20 account of.

21 Even within that analysis, he is clear that he's going to take account of network
22 effects. Going to Harman 2, in identifying the central point of difference, we recall,
23 we anticipate, we have not yet heard Dr Caffarra on market definition, but of course,
24 we understand she disagrees with the market definition and the separation out of the
25 digital distribution market and the analysis of one-sidedness. It's in chapter 3 of
26 Harman 2 that Mr Harman addresses the methodology he is going to undertake to

1 identify the separate digital distribution market.

2 You see that at 468 of bundle A, where you see he introduces the point at 3.5.8, the
3 focus of his analysis in the merit stage, in respect of digital distribution markets:

4 "... will be to assess whether distribution is a distinct economic activity that
5 constitutes a separate and (potentially) contestable market, going through demand
6 and supply side considerations."

7 And then over the page at 470, he has a heading "Information to be obtained",
8 including information from third party sources.

9 At 3.5.13 on page 471(iv), we look at evidence on network effects and other
10 mechanisms for platform dependence available from public data sources. Taking
11 that into account at the very stage of identifying what he provisionally identifies is
12 a separate, one-sided market and that's upon which the methodology is based.

13 **THE CHAIR:** I can see that and, obviously, he's talking here about market definition
14 but you are saying he's not blind to the point.

15 **MR PALMER:** Yes.

16 **THE CHAIR:** I think the point being made, as I understand it, is by the time you get
17 to looking at the methodology for excessive pricing, say, it's really unclear as to what
18 he is going to do and how he's going to develop, at all, the question of indirect
19 network effects. So that's, I think, what is being said. In a way, I don't think we need
20 to get into the detail of whether he's actually said what he's said in here and how
21 much he's said about it. The real question is, back to this point about -- it may not be
22 a ships in the night point but there's an uncomfortableness about whether the
23 experts are going to end up engaging sensibly on this in the right way and
24 particularly it will drive, I think it must be right, as Mr Beard says, that it will drive
25 things like decisions on disclosure and focus of that.

26 So I think the practical question, if I may put it to you, is how do we actually get all

1 this into a nice clear shape, so that we do understand exactly what, particularly
2 Mr Harman, wants and needs, in order to be able to run the case that he appears to
3 accept needs to be addressed, even if it's not his primary case. Which is if there's a
4 two-sided market and there are going to be indirect effects, then how am I going to
5 deal with that?

6 I think that's the question. That's the real question I think we are interested in.

7 **MR PALMER:** Firstly, there is a number of layers to that answer, as to how that --
8 firstly, is this something that's addressed? The answer is yes, because going back
9 to 488, bearing in mind at this stage, when we get into the methodology, we have in
10 the backs of our minds all that dispute about the one-sidedness and, therefore, the
11 significance of those indirect network effects for this purpose. But, nonetheless, at
12 4.6.3(i), a review of actual business decision making regarding pricing of consoles,
13 commission rates and pricing of other products and services and, two, the
14 relationship between the console prices and commission rates and so forth.

15 **THE CHAIR:** Sorry, can you just -- I have lost where you are. Is that a page
16 reference?

17 **MR PALMER:** 488.

18 **THE CHAIR:** Yes, that's electronic. So it's 486, is it?

19 **MR BEARD:** 485.

20 **THE CHAIR:** Thank you, yes.

21 **MR PALMER:** I am so sorry, I assumed electronic.

22 **THE CHAIR:** No, it's my fault, I am making it more complicated than it needs to be,
23 I am sure but it's just I have marked this one up. So paragraph 4.6.3, okay, fine and
24 sub one, yes.

25 **MR PALMER:** The answer is reviewing actual decision making.

26 **THE CHAIR:** Yes, I think the objection is to the end of that paragraph, where it says:

1 "To establish, in fact, whether there's any relationship between ...(Reading to the
2 words)... commission rate."

3 I think Mr Beard is saying that's too narrow an enquiry and if you look at it properly,
4 you have to go wider than that. I think that's basically the point. I am not saying
5 whether he's right or not and I am certainly not saying -- I am not criticising
6 Mr Harman for not having got there because I can understand you are saying that's
7 the way it's unfolded.

8 **MR PALMER:** Yes.

9 **THE CHAIR:** You know Mr Beard would say it doesn't really matter, it should all be
10 dealt with, and I am more focused on if we have now got to the point where we all
11 know there is a point there and it may be one that Mr Harman attaches more or less
12 significance to than he does in this report, but he clearly is going to have to deal with
13 it or it's going to be --

14 **MR PALMER:** What he's done is he's examined, in particular, the relationship
15 between consoles and commission rates because that was the focus of --

16 **THE CHAIR:** Yes, I understand that.

17 **MR PALMER:** Things are moving on.

18 **THE CHAIR:** Exactly.

19 **MR PALMER:** To answer your question, sir, how we now manage this, crystallise
20 these issues? The answer is we say we pass the bar for establishing the proposed
21 methodology which is a sensible one, we know there are disputes about it, the sense
22 of it. How do we crystallise the issues? Answer: Sony serves a defence, making
23 clear what their position is now, in respect of all of that. That is what formally
24 crystallises the issues.

25 We need certification to get to that stage, so I am asking -- my proposition, we've
26 passed the test of putting forward a sensible methodology. That doesn't mean

1 there's agreement on all aspects of the methodology, of course. That's not the
2 purpose. Yesterday, Mr Beard was complaining that he didn't have what he referred
3 to as a concrete blueprint through to trial. That is not the test, the test is: have we
4 got an initial blueprint?

5 **THE CHAIR:** Yes.

6 **MR PALMER:** Sir, you know that.

7 **THE CHAIR:** It's definitely --

8 **MR PALMER:** It acknowledges that issues can crystallise later on down the line,
9 with the service of the defence, so it can be clear where the battlelines are. That's
10 going to require, following that, a further CMC, where we can respond as to how we
11 are going to deal with the issues that have been raised between the parties.
12 Disclosure requests aren't made in this general form which Mr Harman has made.
13 That's not a disclosure application, that's an indication of the sources of materials
14 that he'll take into account in his methodology. It's not the disclosure application.
15 Disclosure applications are made with further expert evidence, explaining what's
16 going to be needed and, crucially, why, which includes, where necessary, further
17 explanation of the precise analyses the expert has in mind at that stage.

18 **THE CHAIR:** I think that's exactly the point. So I take the point about the defence
19 and, presumably, you may want a reply and that will crystallise some of these points.
20 So, hopefully, we'll then know what's in, if one can put it that way, what's actually in
21 contention. But then I think there's the further next step, isn't there? I think I would
22 be quite nervous about getting to a disclosure argument without having some degree
23 of alignment between the experts about what is the material that's going to be
24 needed in order to --

25 **MR PALMER:** I take that point.

26 **THE CHAIR:** So in other words (Overspeaking), it's really a long way of saying: I

1 think that disclosure is going to have to be expert-led and we're going to need to
2 have a -- this is all assuming we agree, just to be clear, this is all assuming we agree
3 to proceed and certify the case and so on. But if we get to that point, it needs to be
4 expert-led and that's a bit unusual and I appreciate that's not how you would do this
5 in an ordinary basic commercial litigation. Clearly, here, we are in a different world
6 because we are hearing all this in a certification hearing and I do appreciate there's
7 limits -- your submission that there's limits as to how far one can and should go on
8 that.

9 **MR PALMER:** (Several inaudible words due to overspeaking). What I had in mind,
10 but I can't remember, off the top of my head, members of the Tribunal, (several
11 inaudible words) the Tribunal had experience of Trucks and in the Trucks cases the
12 Tribunal ordered statements of methodology to support those applications for
13 disclosure and actively managed the case in that way.

14 That wasn't a class action, there are separate Trucks class actions but I am talking --

15 **THE CHAIR:** Yes, I don't think it matters whether it is a collective proceeding or not,
16 does it?

17 **MR PALMER:** (Several inaudible words due to overspeaking) damages claims by
18 BT, Royal Mail and subsequently others. But in those cases, that's how the
19 disclosure process was managed. It was expert-led, there were methodological
20 statements. Applications for disclosure were supported at each stage by relevant
21 expert evidence being provided as to how what was sought played into the
22 methodology and that allowed for further debate and it also allowed the meeting of
23 minds and the effort to ensure that those experts didn't pass in the night. There are
24 specific CMCs all about that.

25 There is a limit to how far we can go down this road because every time we further
26 explain our methodology, understandably and not unexpectedly, Sony will explain

1 why it's still deficient and why there are still problems with it and why they have
2 further points which they want to raise. So it's a matter for the Tribunal's judgment,
3 ultimately. You have a broad discretion here, subject to the broad axe, the broad
4 approach which is outlined by the Court of Appeal and so forth.

5 **THE CHAIR:** Yes.

6 **MR PALMER:** We say we've passed that test, there's a limit to how far we can take
7 it pre-certification. There's, self-evidently, issues which will continue to crop up and
8 will need to be dealt with but it's untrue to suggest that Mr Harman has been blind to
9 all these issues. He has specifically engaged with them, he's specifically developed
10 his methodology and that will be ongoing. So this is a matter for the next stage and
11 it will be assisted by the formal pleading of Sony's case now.

12 The second point which Mr Beard fastened on was the royalty payment which he
13 said Mr Palmer was raising. Or the Tribunal raised. It has been raised but not for
14 the first time. This is something you will recall I showed you yesterday in Harman 1
15 at A, hard copy tab 19, 390, electronic 393.

16 **THE CHAIR:** Yes.

17 **MR PALMER:** That figure, where it was specifically explained there's a difference in
18 model between physical and digital distribution and that there is a platform royalty.
19 You'll see at 6.4.20, Mr Harman noted:

20 "I may need to update my assessment in light of any disclosure provided by Sony on
21 the nature of its commercial arrangements and its commission rates or margin."

22 And those commercial arrangements clearly include whatever commercial
23 arrangements are behind, which we don't know, that platform royalty. But in respect
24 of that specifically, can I take you to Harman 2, page 493 electronic, page 490 hard
25 copy, paragraph 4.6.26 which is information to be obtained. This is in the context of
26 the methodology, set out in the extended methodology, 4.6.26(IV), the basis for the

1 royalty rate levied on sales of physical game discs.

2 So this is clearly something that Mr Harman has had in mind and says he needs to
3 understand what those commercial arrangements are. Mr Beard presents this point
4 as if it's all something Mr Palmer has decided to alight on and raise. Sony knows
5 what their royalty arrangements are, the basis upon which it is charged to physical
6 distributors, what the royalty specifically is in respect of and contractually relates to
7 and what it doesn't. We don't know any of that, it will need to be disclosed in due
8 course and it may well feed into the counterfactual analysis. We can't develop that
9 point any further at the moment.

10 **THE CHAIR:** Yes, so really you are saying he recognises that there's certainly
11 a feature of historic arrangement. The fact he's put it into his --

12 **MR PALMER:** (Overspeaking).

13 **THE CHAIR:** Let me finish, and the fact he's put it into the information to be
14 obtained means that he recognises what the historic implications are and they may
15 be reflected in the counterfactual, you say, but he can't take it any further because
16 he just doesn't know how it works.

17 **MR PALMER:** Yes. It's not (several inaudible words) physical media because these
18 games are still sold on discs.

19 **THE CHAIR:** Yes, I understand.

20 **MR PALMER:** We understand. Subject to disclosure, subject to being told different
21 by Sony, we understand that there's still a royalty being levied at the moment, not
22 just historically.

23 **THE CHAIR:** Yes, forgive me, I really meant historic in the sense of not being
24 counterfactual, that's not helpful wording.

25 **MR PALMER:** The traditional model before (several inaudible words) we can say.
26 It's for Sony to tell us more on that, not the other way around.

1 **THE CHAIR:** It's a good example, isn't it, of something that is going to develop and
2 is going to need to be dealt with. There's going to need to be some clarity about
3 what your position is, once you know about it and then, therefore, the crystallisation
4 of the issue and so on.

5 **MR PALMER:** (Overspeaking).

6 **THE CHAIR:** You say you just can't do that now.

7 **MR PALMER:** We don't have repeated rounds of certification but, clearly, in order to
8 target disclosure and to seek permission from the Tribunal to adduce this or that
9 form of expert evidence, whatever it may be, we'll need to understand how the
10 territory lies, in a much fuller way than we do at the moment. There's obviously
11 informational asymmetry which we face.

12 **MR BEARD:** Just to be clear, our understanding was that these points on royalty
13 went rather further than that and into the counterfactual analysis and they weren't
14 just to do with physical matters but I think that's a matter --

15 **THE CHAIR:** I think Mr Palmer is acknowledging that.

16 **MR BEARD:** Yes --

17 **THE CHAIR:** I think -- no, I think that's fair, Mr Beard.

18 **MR BEARD:** No, no, that's fine. If he's acknowledging it, I have nothing further to
19 add.

20 **MR PALMER:** I am acknowledging that.

21 **THE CHAIR:** Again I think possibly asserting it --

22 **MR PALMER:** Yes --

23 **THE CHAIR:** Because you are saying --

24 **MR PALMER:** It may well be that the counterfactual will need to take -- if there is
25 a legitimate charge which would persist, even where there was, as there is in
26 physical media, competition for distribution between multiple outlets, if there is still

1 room for a legitimate royalty to be paid nonetheless to PlayStation, then that will
2 need to be factored in, but we don't know anything at the moment about the detail of
3 those arrangements and precisely how it operates. So it's something which will need
4 to be thought about in that counterfactual context.

5 The third point related to the counterfactual, and this goes into the arguments about
6 whether there will simply be a different sharing of the pie and how we are going to --
7 the first allegation that was made in respect of this is that we are suddenly running
8 a different case, it's said that they hadn't heard previously about, he said, the
9 excessive pricing case as formulated related, he said he'd shown us yesterday, to
10 excessive commissions and there's nothing in Mr Harman's report dealing with
11 prices.

12 This is not a fair or accurate representation of the way the case has been put. What
13 happened yesterday, in Mr Beard's account of the way the case had been put, was
14 to look at bundle A, page 90 electronic, page 87 hard copy, at paragraph 105. That's
15 what he took you to to support this proposition. He said: look, you can see that
16 under the counterfactual we are focused on the amount of commission being
17 reduced, so it's all about the excessive price of the commission.

18 He didn't take you on to paragraphs 131 and 132, which appear at page 95 hard
19 copy, 98 electronic, where it's made crystal clear that in terms of the damages being
20 claimed, based on that counterfactual, what is being sought is the difference
21 between the prices UK customers paid in the actual scenario for digital games and
22 in-game content during the relevant period and the prices UK customers would have
23 paid in the counterfactual scenario.

24 At 132:

25 "The prices paid in the actual scenario are assessed by applying a commission rate
26 of [a certain amount] to Mr Harman's estimate of the gross value of PlayStation

1 digital transactions derived from ...(Reading to the words)... and add-on content."
2 So what is clear is that our excessive pricing claim is based upon the fact that
3 consumers are paying too much and the reason they are paying too much is
4 because of the high commission rate charged, as a function, we say, of Sony's
5 market power specifically in the digital distributions market.
6 Now if, in response to this putative defence which is being developed, to say: ah, but
7 in the counterfactual, even if commission rates drop the prices wouldn't drop, we are
8 entitled -- because we would increase the price of the inputs, we are entitled to
9 say: well, that still results in a price which is too high for consumers, which is our
10 underlying point. What you have done, or what you are saying you would do, to get
11 round this issue is in itself a further or would in itself be a further abuse of market
12 power, seeking to artificially, we would say, raise the price of the input in order to
13 maintain the same price level.
14 Now we haven't got to the stage of articulating that case because Sony hasn't got to
15 the stage of articulating that defence. If it's articulated, we will need to respond to it.
16 But that isn't the position which we are addressing at the moment. It's something we
17 will have to address if it's raised and reply to.
18 But it does raise serious difficulties for Sony, we say, this putative defence, because
19 as I outlined yesterday it depends on some assumption that publishers are, across
20 the board, going to agree to increase the prices which have otherwise been settled
21 upon by the mechanism which you've seen, which one would expect to reflect
22 adequately covering their costs and return on their capital based on their expected
23 volumes of game sales at the time.
24 What's now being said is they are all going to be so happy with the volumes of
25 games which they are actually selling that they are not going to have any incentive at
26 all to push back and say: no, I don't want to increase my prices further. I would

1 rather my game was sold at a lower price -- at the same wholesale price for us so
2 that we can boost our volumes. Sony is just wishing all that sort of complication
3 away.

4 **THE CHAIR:** I don't think we need to get into the substance of the argument. I think
5 the point is not dissimilar to the royalty point which is, for slightly different reasons,
6 you are responding to an argument which is only articulated through expert reports
7 at the moment. You are entitled to see that pleaded. You will then have to respond
8 to that, but it is clearly going to give rise to -- if you are going to run an argument that
9 says the counterfactual that has been put forward by Sony amounts to an abuse in
10 its own right, you are going to have to decide whether that's going to be relying on
11 the same material as pleaded or different material. If it's different, you are going to
12 have to explain what you are going to do to make the case good.

13 **MR PALMER:** (Several inaudible words due to overspeaking) pleaded case
14 because, as far as we know, such conduct isn't happening at the moment. But we'll
15 obviously have to plead a response to the argument which is being said --

16 **THE CHAIR:** Yes.

17 **MR PALMER:** -- as to how the counterfactual would work.

18 **THE CHAIR:** Yes.

19 **MR PALMER:** So it's in a different category from the initial methodology of what our
20 criticisms are of the current factual position. Responses to counterfactuals come
21 down the line.

22 In respect of Mr Beard's last point, I think that was the benchmarks point, that
23 appears from bundle A, page 392, that's hard copy, 395 electronic,
24 paragraph 6.4.30. There is criticism of reliance on what Mr Sweeney had said at
25 a conference in August 2017.

26 Notwithstanding the caveats at 6.4.32, not only was it acknowledged that that was

1 not supported by specific evidence but in any event, about three lines up from the
2 bottom of that same paragraph:

3 "... limitations to this evidence being recognised, nonetheless it provides a relevant
4 yardstick from which to estimate a benchmark for Sony's costs of providing digital
5 distribution services".

6 It was being used only to that effect in the absence of any direct evidence of costs.
7 But of course it's not being suggested that this is going to be the basis, even
8 following disclosure, for analysing the costs. It's just simply again this very
9 provisional stage, taking such information as is available to the PCR in order to, on
10 a provisional basis, establish the sort of benchmark we might be looking at.

11 Now Mr Beard sought to pour scorn upon this reliance, saying somehow improperly
12 we hadn't provided further information contained in the judgment later on. That
13 wasn't evidence of course that was being given in that case but a judgment in
14 a related case brought by Epic. It's just worth taking that to hand again because
15 Mr Beard may have overstated the extent to which that court upheld the assertions
16 upon which he relies.

17 You will recall that there was reference in authorities bundle 2 at 1232 hard copy,
18 1235 I think electronic copy, which referred to a plan having been conceived at the
19 end of 2019. You'll recall that what was relied upon in fact was a statement made in
20 conference in August 2017. So it's hard to understand why, even for the limited
21 purpose that this evidence was in fact used by Mr Harman, that that is somehow
22 illegitimate because in a judgment some time later there is a finding about events
23 which happened two years after those comments.

24 But more fundamentally even that that, although the claim is largely dismissed, as
25 we saw from the order, Mr Beard said we need not trouble with the reasoning which
26 led to that, there is of course the high level point that application of a US law

1 framework to a set of facts doesn't necessarily generate the same outcome as
2 application of UK law.

3 But at page 1311 hard copy, 1314 electronic, you'll see the judge's finding in relation
4 to Apple's argument that the 30 per cent rate it charged was commensurate with the
5 value developers get from the app store. This claim is unjustified, the judge held.

6 "One, as noted in the prior section, developers could decide to stay on the app store
7 ...(Reading to the words)... test the proposition or motivate a change."

8 Now it's not our case that this claim that we bring should be adjudicated by reference
9 to findings of a US judge in relation to a different operator and different
10 circumstances and different framework of law, but to suggest that all this provides
11 some reason why it was wholly illegitimate for Mr Harman to point to Mr Sweeney's
12 remarks that he thought the charge was too high and the actual cost of providing the
13 service were much significantly lower we say misses the mark by a mile and
14 certainly doesn't provide an objection to certification.

15 The last place we were taken was to the list of disclosure sought. Again they are
16 categories of evidence. It's not the suggestion that we are going to need wild
17 general unfocused disclosure or are seeking to make those. But we are required, as
18 the Tribunal knows, to identify the sorts of disclosure that would be required in order
19 to support the methodology so that the Tribunal can understand how the
20 methodology is expected to work. Obviously the disclosure exercise is a far more
21 detailed and forensic exercise and has to be approached in the right way.

22 Can I just check whether there is anything else I need to cover?

23 **THE CHAIR:** Yes, of course.

24 **MR PALMER:** I think those are my submissions in reply.

25 **THE CHAIR:** Thank you very much.

26 **MR BEARD:** There's just one remark. It's not responsive. It's that what is being

1 | said in relation to the excessive pricing allegation is that it wasn't necessary for the
2 | PCR to run it in the alternative directly in respect of the pricing of games. We have
3 | to respond and then it's a defence that's being put forward or it's a response to our
4 | defence that's being put forward.

5 | Because the parts of the pleading that Mr Palmer took you to were to do with the
6 | quantification of loss, if you recall. He didn't -- the allegation of abuse is only
7 | excessive pricing in relation to commission.

8 | **THE CHAIR:** So he is saying he's pleaded out a case.

9 | **MR BEARD:** Yes.

10 | **THE CHAIR:** And you have raised a point about the counterfactual.

11 | **MR BEARD:** Yes.

12 | **THE CHAIR:** And he is saying he's got an answer to that, and we've been arguing
13 | about whether that answer requires him to adjust his pleading and methodology.
14 | I think it does follow, doesn't it, that that's a defence and then reply approach? Or is
15 | that not right?

16 | **MR BEARD:** No, the point I am making is ordinarily one would have expected that
17 | you would have pleaded in the alternative. You just said it's excessive pricing in
18 | relation to commission and/or, in any event, it's excessive pricing in relation to
19 | games, but we haven't seen that.

20 | **THE CHAIR:** No, but I think he is only raising the point because you challenged the
21 | counterfactual. As I understand it, he's saying it's not open to you to run the
22 | counterfactual argument you are running because that would effectively amount to
23 | an abuse in its own right. I think that's effectively what he's saying.

24 | Now he'll have to make that good if he runs it, but he's saying he doesn't have to
25 | develop that argument to plead it.

26 | **MR BEARD:** I think we'll leave that pleading debate for another day.

1 **THE CHAIR:** It may be more than a pleading debate. Certainly I don't think it
2 changes the analysis we were discussing, Mr Beard.

3 **MR BEARD:** No, no, no --

4 **THE CHAIR:** We still have to get to the bottom of --

5 **MR BEARD:** -- I completely accept that. I just wanted to be clear what was actually
6 being said, that he isn't required to actually plead out an alternative case in his
7 primary case. Because of course, although he talks about a defence, there is of
8 course a response from the PCR that deals with all of these things that is substantive
9 and of course we haven't -- we have dealt with these things but we've only dealt with
10 what has been put in front of us.

11 **THE CHAIR:** Thank you, everybody. I am sure a huge amount of work has gone
12 into all of that.

13 I am just going to make one very boring point which I am sure you will both support
14 me on, which is that if the indexes are paginated when they are made electronic,
15 then we are all going to have to work on the same pages, and that would be
16 enormously helpful, if anybody listening has responsibility --

17 **MR PALMER:** We've already discussed this point.

18 **THE CHAIR:** Have you? Good. The more people know about it the better I think,
19 so forgive me for making that point at the end.

20 **MR BEARD:** No, it's well made.

21 **THE CHAIR:** But we are very grateful for all of your input and hard work. We will
22 reserve our decision and let you have the decision as soon as we sensibly can.
23 Thank you very much.

24 **(11.54 am)**

25 **(The hearing concluded)**

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