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5 **IN THE COMPETITION**
6 **APPEAL TRIBUNAL**

Case Nos: 1568/7/7/22 & 1595/7/7/23

7
8
9 Salisbury Square House
10 8 Salisbury Square
11 London EC4Y 8AP

12 Wednesday 20th December 2023

13
14 Before:
15 The Honourable Mr Justice Marcus Smith

16 Ms Carole Begent

17 Mr Charles Banks

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

22 **BETWEEN:**

23
24 **Proposed Class Representatives**
25 **Julie Hunter & Robert Hammond**

26
27
28 v

Proposed Defendants

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31 **Amazon.com, Inc. & Others**

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

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37
38 **Marie Demetriou KC, Sarah Love & Tom Coates on behalf of Julie Hunter (Instructed**
39 **by Hausfeld & Co LLP).**

40 **Philip Moser KC & Ben Rayment on behalf of Robert Hammond (Instructed by**
41 **Charles Lyndon Limited and Hagens Berman EMEA LLP).**

42 **Jon Turner KC on behalf of Amazon.com, Inc. & Others (Instructed by Herbert Smith**
43 **Freehills LLP).**

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(10.30 am)

Opening remarks

MR JUSTICE MARCUS SMITH: Good morning. Before we start, a couple of housekeeping points. First of all, as is usual, these proceedings are being live-streamed, and an official recording is being made and an authorised transcript will be produced by my direction. It is strictly prohibited for anyone else to either record, photograph or transmit, audio or visual, any record of these proceedings and a breach of that would be punishable as a contempt of court. I'm sure it won't happen but that is what I say at the beginning of every hearing.

Some declarations of interest which will come as no surprise but which I will also get on the record. More amusingly, most of us order matters through Amazon, I think that will be no surprise. More importantly, we do as a collective all know the experts involved on the part of the applicants; indeed Mr Harman is, as it were, in open business in a case that I'm doing at the moment, I'm assuming no problem but you should obviously know that we know these people and I speak for all of us, it's in different degrees but that ought to be on the record. Subject to that, we have an agenda. Ms Demetriou, are you kicking off?

MS DEMETRIOU: May it please the Tribunal, I appear with Ms Love and Mr Coates for Ms Hunter. I have on my right Mr Moser and Mr Andrews for Mr Hammond; and Mr Turner is here for Amazon in mostly I think an observational role.

I think you have an agreed, at least between us, timetable. We are confident, at least we are confident on our side, that we can finish today, obviously subject to the Tribunal's thoughts and how things go.

MR JUSTICE MARCUS SMITH: I suspect that will be the imponderable question but obviously it would be helpful if we finish today but we don't want anyone to feel

1 under any pressure to do so, we have tomorrow if necessary.

2 **MS DEMETRIOU:** Thank you very much.

3 **Submissions by Ms Demetriou**

4 **MS DEMETRIOU:** The Tribunal, of course, has seen that Ms Hunter and
5 Mr Hammond have both applied to bring collective proceedings against Amazon
6 alleging an abuse of dominance by Amazon in connection with the operation of the
7 Buy Box, and the Tribunal will, in this carriage dispute, have to decide which of
8 the two claims goes forwards by considering the relative merits of the rival
9 applications.

10 Now, members of the Tribunal, both parties have addressed the legal framework and
11 the proper approach in their written submissions, I'm not proposing to take up time
12 with that orally as this appears to be common ground and of course the Tribunal set
13 out in the Evans case the approach that the Tribunal will adopt, which was endorsed
14 by the Court of Appeal, including that it will assess the relative merits of each
15 application by reference or with one eye on the certification criteria and consider
16 which claim is better thought through and which claim will better serve the interests
17 of the class that they seek to represent.

18 So I'm proposing to develop my submissions in support of Ms Hunter's application as
19 follows: so first I propose to explain the claim that Ms Hunter proposes to bring by
20 reference to the pleaded case, the claim form, and we say that an important virtue of
21 Ms Hunter's proposed claim is that it is aligned with the decisions of the European
22 Commission and the CMA which have investigated the same issue that is the subject
23 of Ms Hunter's proposed claim and have accepted commitments from Amazon.

24 Ms Hunter's claim was filed before those decisions, and we do say that the fact that it
25 aligns with what the regulators then found following their investigations demonstrates
26 that this is a claim that has been well thought through and as I go through the

1 claim form, I will accordingly show the Tribunal relevant parts of the Commission and
2 CMA decisions. I then propose to take the Tribunal to the reports filed by
3 Ms Hunter's expert economist, Mr Harman, to explain the methodology that he
4 proposes to use to establish loss. And a key point that I'm going to be making is that
5 by contrast with Mr Hammond's claim, Ms Hunter's and Mr Harman's methodology
6 seek really to home in on the precise loss that is caused by the abuse alleged and
7 whilst explaining Ms Hunter's claim and Mr Harman's proposed methodology I will
8 pick up the key points made against us by Mr Hammond.

9 I will then go on to explain the difficulties that arise, the key difficulties that arise on
10 Mr Hammond's proposed claim and Mr Pike's methodology which render it a less
11 suitable claim, in our respectful submission, and as I will come on to show you, a key
12 difference between the two claims is that, as I say, Ms Hunter's claim seeks to
13 confront directly the loss that's been suffered by consumers by pleading and putting
14 in place a methodology to determine what product would have won the Buy Box in
15 a counterfactual absent the abuse and, critically, the value that consumers would
16 have placed on that alternative product and that, we say, necessarily involves
17 an assessment of consumer preferences.

18 By contrast, Mr Hammond's claim expressly disavows any assessment of consumer
19 preferences, and we say it's impossible to see how the product that would have won
20 the Buy Box in the counterfactual could be identified and the value that consumers
21 would have placed on it ascribed without investigating consumer preferences. And
22 so Mr Hammond's methodology can't take account -- doesn't investigate consumer
23 preferences and can't take account of consumer preferences, including regarding
24 delivery speed, despite this being obviously relevant, and so by way of quick
25 illustration let's say that there's a product which in the real world won the Buy Box
26 which cost, for example, £10 with a three-day delivery window, if there was

1 a competing product available that cost £9.90, so a little bit cheaper, but with
2 a six-day delivery window, so much longer, Mr Pike's methodology would include
3 that small loss, even if consumers would not have purchased the product because
4 they would have been worse off because of the longer delivery time. So, we say that
5 Mr Hammond's methodology for establishing the loss suffered by consumers is
6 therefore more crude than Ms Hunter's and doesn't track through to loss that's
7 actually being suffered by the class.

8 So, with that introduction I'm going to ask the Tribunal please to turn up the draft
9 amended claim form. So that's at core bundle 1, tab 11, and if we could take it from
10 page -- let's start from the beginning, so 136.

11 I think I can see you are all working from hard copies of the bundle.

12 **MR JUSTICE MARCUS SMITH:** I am afraid we are, yes.

13 **MS DEMETRIOU:** I am too, so that makes it easier for me. Perhaps if we start on
14 page 138 in order to contextualise the claim. So, paragraph 4 sets out the three
15 types of retailers on Amazon Marketplace, so there's Amazon Retail itself which sells
16 goods, so it therefore both is the operator of the platform and a direct competitor to
17 third-party retailers.

18 Then we have third-party retailers and there are two types, so there are FBA
19 retailers, those being retailers that purchase Amazon's delivery and logistics
20 services. And there are FBM retailers which do not purchase Amazon's delivery and
21 logistics services but procure their own services.

22 Then you'll see at paragraph 5 that the majority of purchases throughout the relevant
23 period on Amazon's website have been made through its Buy Box. And that
24 Amazon applies an algorithm to determine which product wins the Buy Box.

25 At paragraph 6, this is in the summary of the claim, there's a selection bias in the
26 algorithm which means that it almost invariably selects either an offer from Amazon

1 Retail itself, or an offer from a third-party retailer which purchases the FBA fulfilled by
2 Amazon logistics services.

3 Then we say at 7: by reason of this selection bias, the Buy Box offer is not always
4 the cheapest offer or the offer that's most valuable to consumers.

5 Then we see at 8 that we say that the abuse is compounded by the form, the format
6 of the Buy Box, and I'll come back to this point when we see it again at
7 paragraph 119 because it's a point that my learned friend acting for Mr Hammond
8 seeks to make something of and I will come back and explain precisely how that fits
9 into our case.

10 But sticking with the summary for the moment, over the page at paragraph 9, we say
11 that, as a result of the abusive conduct, the Proposed Class has collectively suffered
12 loss in the form of overcharges and then there's a provisional estimate of the loss
13 which has been pleaded.

14 Then if we could go forward, please, to page 143, that explains who Ms Hunter is
15 and of course Ms Hunter has provided a witness statement with the claim form which
16 explains why she should be authorised to act as a Class Representative, and if I may
17 just say at the outset, no issue is taken by Mr Hammond's team as to Ms Hunter's
18 suitability and equally we take no issue as to Mr Hammond's suitability, so this
19 carriage dispute is not going to turn on the identity or the merits of the respective
20 Proposed Class Representatives.

21 Then if we could skip forward onto page 172, please. This sets out at paragraph 81
22 the Proposed Class definition and you can see it's all Relevant Purchasers who,
23 during the Relevant Period, made one or more purchases on the Amazon
24 Marketplace for the United Kingdom, and you will see over the page that Relevant
25 Period means the period between 14 November 2016 and the date of final judgment
26 or earlier settlement of these collective proceedings.

1 We do accept that following the recent Sony judgment we will have to tweak the
2 class definition such that the members of the class become fixed as at the date of
3 certification, but we do propose to continue claiming for losses suffered by those
4 members up to the date of judgment or date of settlement.

5 **MR JUSTICE MARCUS SMITH:** Yes, I see, so the Class is stabilised at certain
6 date, but the losses to that Class continue to accrue.

7 **MS DEMETRIOU:** Correct, sir. And it's a point of difference between our claim and
8 Mr Hammond's claim because Mr Hammond's claim cuts off the period in 2020,
9 I think by reference to changes that were made by Amazon. And our position on
10 that, just because it's a short point let me just pick it up now, is to say that that cut-off
11 of 2020 is not justified, indeed we say it's not justified on two bases: one, because
12 Mr Harman's analysis of the web scrape in relation to 2022 shows that loss was
13 suffered in that period, so we have evidence that loss was suffered after 2020. But,
14 secondly, that's reinforced by the decisions of the two regulators, the European
15 Commission and the CMA, which have required forward-looking commitments on the
16 basis that the problem is still not fixed. So, we do rely on that as a positive point of
17 distinction between Ms Hunter's claim and Mr Hammond's. We say on
18 Mr Hammond's claim the cut-off in 2020 will mean that his Proposed Class does not
19 recover all of the loss that they've suffered. We say it's an arbitrary cut-off.

20 **MR JUSTICE MARCUS SMITH:** Ms Demetriou, since this is a draft amended
21 collective proceedings claim form and since we will see if a point is taken about
22 changes to that, I think it would be helpful for us if we had the precise wording from
23 you in order to understand how you are going to tweak 82(c) in order to adjust for the
24 Sony decision.

25 **MS DEMETRIOU:** Yes.

26 **MR JUSTICE MARCUS SMITH:** It's simply to get a baseline.

1 **MS DEMETRIOU:** Of course, I completely understand and will provide that as soon
2 as we can certainly during the course of today.

3 **MR JUSTICE MARCUS SMITH:** That would be really helpful, thank you.

4 **MS DEMETRIOU:** I think practically speaking if we can provide it after the lunchtime
5 adjournment, that's probably easier.

6 **MR JUSTICE MARCUS SMITH:** That's fine. I'm sure it will be straightforward but
7 it's always better to have the thing there and then Mr Moser, if he wants to take
8 points, can take the points as against the specific draft rather than one which is
9 understandably obviously defective but only because of a recent decision of
10 the Tribunal. So that would be helpful.

11 **MS DEMETRIOU:** Sir, absolutely we will do that.

12 **MR BANKES:** If I may, just before you move on.

13 **MS DEMETRIOU:** Of course.

14 **MR BANKES:** I would be interested to understand why the date starts with 14
15 November 2016?

16 **MS DEMETRIOU:** That's the date which is six years back from the date of issue.

17 **MR BANKES:** So, there's a limitation point that prevents you going further back?

18 **MS DEMETRIOU:** Yes, there is a question as to whether or not limitation can be
19 extended. There's always a question in any case as to whether limitation can be
20 extended.

21 **MR BANKES:** So, will you be coming back to this? Because the other claim starts
22 earlier and is therefore a different --

23 **MS DEMETRIOU:** Can I come back to that, Mr Bankes?

24 **MR BANKES:** Yes, of course.

25 **MS DEMETRIOU:** I'll come back to that to make sure that I have given you a full
26 response.

1 Can I deal with another point while I'm on class definition. Mr Hammond criticises us
2 for including legal persons as well as natural persons and you can see the definition
3 of Relevant Purchaser at paragraph 82(a) is any natural or legal person who has
4 made a purchase on the Amazon Marketplace. We say for our part that the inclusion
5 of businesses in the Class is a reason to prefer Ms Hunter's claim because it's
6 a potentially important category of victim and there is no good reason for excluding
7 them from the Class.

8 Mr Hammond criticises us for including businesses and he makes two main points.
9 So, the first is that the inclusion of businesses, he says, gives rise to a risk of
10 conflicts within the Class. But we say that that's wrong because Ms Hunter's claim is
11 only in respect of direct purchases from Amazon, so the risk of conflicts is said to
12 arise that if a business customer bought a product and sold it on to a consumer, then
13 there may be some conflict or risk of double-recovery, but we say that simply doesn't
14 arise on the Class definition because this only encompasses direct purchases. So, it
15 doesn't --

16 **MR JUSTICE MARCUS SMITH:** Just so we have it, where is the direct qualification
17 in your pleading?

18 **MS DEMETRIOU:** It's in the Class definition. So, a Relevant Purchaser is:
19 "Any natural or legal person domiciled in any part of the United Kingdom who has
20 made a purchase on the Amazon Marketplace."

21 So, it doesn't include, if I can put it this way, an indirect purchaser who's made
22 a purchase from somebody else who has made a purchase on the Amazon
23 Marketplace. That's really the point.

24 **MR JUSTICE MARCUS SMITH:** I see. So, I mean, if one was to say instead of
25 "who has made a purchase", "who has directly purchased", that would capture
26 exactly what you are saying.

1 **MS DEMETRIOU:** Yes. Exactly. That would reinforce it, but we say -- and whether
2 or not we need to make that --

3 **MR JUSTICE MARCUS SMITH:** No, no.

4 **MS DEMETRIOU:** We say exactly, that's the point, sir.

5 **MR JUSTICE MARCUS SMITH:** I'm certainly not taking a pleading point, I'm taking
6 a point that I just want to be absolutely clear what you are saying.

7 **MS DEMETRIOU:** Absolutely. So yes. So, it's intended to read as saying directly
8 purchased. If we need to make that amendment to make it super clear, we will.

9 **MR JUSTICE MARCUS SMITH:** This is a draft and I'm certainly not saying
10 you need to, I'm merely just capturing -- just so that we know, is that also the case --
11 or is it a point of difference between yourselves and Mr Moser's clients or are they
12 also direct purchasers?

13 **MS DEMETRIOU:** They are direct purchaser but only natural persons.

14 **MR JUSTICE MARCUS SMITH:** But only natural persons?

15 **MS DEMETRIOU:** Yes.

16 **MR JUSTICE MARCUS SMITH:** Thank you.

17 **MS DEMETRIOU:** So, the first point made by Mr Moser or his clients simply doesn't
18 arise.

19 The second point that they make is that Ms Hunter doesn't account for pass-on from
20 businesses to consumers. Now, Mr Harman has said that there is no reason to
21 suppose that this is a significant issue, it would really only arise if businesses were
22 purchasing things off Amazon as a matter of course for re-sale and Mr Harman
23 explains why that's unlikely. But if it transpires that this does happen to any material
24 extent then Mr Harman will be able to develop a methodology to address such
25 pass-on and I think it's fair to say that the Tribunal will know from other cases that
26 methodologies to assess pass-on are bread and butter in the competition world. So,

1 the question is: Is this something which is likely to be a problem? We say no. If it is
2 something which on the facts transpires to be a significant issue, then it's something
3 which can readily be addressed.

4 **MR JUSTICE MARCUS SMITH:** But I think, just following that through, even if
5 pass-on is a difficult question, and frankly I'm not sure it is bread and butter because
6 I think we are still identifying the loaf in question in terms of pass-on but even if it
7 was a very difficult question, what you are saying is there's a prima facie claim in the
8 Class, there may be, going down the line, a pass-on defence, and it would be
9 a defence in this case by Amazon, but that's no reason not to have a bigger claim
10 because the defence will be articulated in due course.

11 **MS DEMETRIOU:** Sir, precisely so.

12 **MR JUSTICE MARCUS SMITH:** At the moment we're just at the level of articulating
13 the claim.

14 **MS DEMETRIOU:** Precisely so and of course the Tribunal will be now aware of the
15 abundance of jurisprudence starting with *Merricks* in the Supreme Court and the now
16 jurisprudence of this Tribunal and of the Court of Appeal emphasising the importance
17 in collective proceedings of vindicating consumers rights and the Tribunal doing what
18 it can with a broad axe to vindicate those rights and so we say where on the one
19 hand you have a claim which seeks to recover loss for a class of claimants which
20 ostensibly have suffered loss, if I can put it this way, there is no reason to distinguish
21 between business claimants and consumer claimants in terms of the loss suffered.
22 There's no reason why a business claimant would have paid a different price. They
23 are purchasing from the Buy Box in the same way as consumers are.

24 So, they are in no different position as regards loss and so we then say that it's
25 a point in our favour because we are seeking to include that segment of victims or
26 that category of victims and it's no answer to say well, it might be difficult because

1 you then have to show that the loss wasn't passed on.

2 **MR JUSTICE MARCUS SMITH:** Well, is there also -- I mean, I'm unpacking these
3 so that Mr Moser can push back as advised. But of course, the natural legal person
4 is on one level well understood, but what about the sole trader? What about the
5 partnership? All of these business organisations involve natural persons not legal
6 persons, the pass-on point would be as strong -- or as weak, I don't want to
7 anticipate -- in their cases, so, I mean, natural person can equally well embrace -- no
8 idea how many but can equally embrace people who are not the ultimate consumer.

9 **MS DEMETRIOU:** Sir, exactly, and that's why it's so arbitrary. So, you have
10 somebody, for example, who is a sole trader but sets up as a company for business
11 reasons, and purchases their own supplies, their own stationery supplies, the
12 supplies they need to carry out their business which they themselves use and
13 purchase these off Amazon. But they happen to do so in the name of the company,
14 it's simply arbitrary to exclude them, that is really our point, and there is no reason to
15 suppose that -- I mean, that category of victims would not be -- there would be no
16 pass-on analysis needed at all because they are the end-user.

17 **MR JUSTICE MARCUS SMITH:** And equally you imagine someone in
18 an organisation given a discretionary spend, they might very well themselves be
19 signed up to Amazon, they might buy their staples or their Post-it notes from Amazon
20 on their own account and yet be reimbursed through the business because it's
21 a business expense. I mean, I have no idea how businesses organise themselves
22 but that doesn't seem beyond realms of possibility.

23 **MS DEMETRIOU:** No, sir, I accept that as well, and so I think where we're coming
24 to is that there may for some categories of natural legal persons, for some subsets of
25 consumers, there may be some complexity around the edges that needs ironing out
26 at trial.

1 **MR JUSTICE MARCUS SMITH:** No, indeed, but what you are saying is we are not
2 really interested in the business/non-business division, we are not really interested in
3 the ultimate consumer, we are interested in the direct purchaser and the price that
4 you pay for that is that there may be, certainly will be if you go forward, a pass-on
5 defence articulated which will involve complexity.

6 **MS DEMETRIOU:** That's correct. But what you are then doing is you are capturing
7 all of the sole traders.

8 **MR JUSTICE MARCUS SMITH:** All the direct purchasers, yes.

9 **MS DEMETRIOU:** Exactly, and you are not excluding them.

10 **MR JUSTICE MARCUS SMITH:** The other way of doing it would be to say we are
11 only interested as a class in the ultimate consumer, and you would say, well, only if
12 you are an ultimate consumer, query direct or indirect, are you in the Class, and that
13 is exactly how you haven't framed it but that would get round, as it were, the issue if
14 you were minded to exclude it, which of course you are not.

15 **MS DEMETRIOU:** Sir, yes. I think in principle that would get round the issue.
16 I think it may lead to complexity in terms of determining who is --

17 **MR JUSTICE MARCUS SMITH:** An ultimate consumer.

18 **MS DEMETRIOU:** Who is a member of the class and so that is, I think, one of the
19 reasons why we haven't gone down that road. So, I hope that helps in terms of what
20 we are trying to do.

21 **MR JUSTICE MARCUS SMITH:** No, that's very helpful, thank you.

22 **MR BANKES:** Can I ask a follow-up? Are you comfortable with the concept of
23 domicile in the context of a legal person? Is that the same as "incorporated in the
24 United Kingdom" or does it include branches of foreign corporations? I don't need
25 a lengthy answer, but I just want to make sure there is legal clarity about what is
26 a legal person domicile means.

1 **MS DEMETRIOU:** Yes. It's a good question, let me see if I have addressed this
2 anywhere in writing. If not, I will try to give you an answer. **(Pause)**.
3 I'm not sure that we have addressed it in writing. Can I come back on that point to
4 make sure that I'm saying something which is supported by my instructions?
5 **MR JUSTICE MARCUS SMITH:** That's helpful. I think there is obviously a whole
6 body of case law dealing with when corporations are domiciled in a particular
7 jurisdiction.
8 **MS DEMETRIOU:** There is, yes.
9 **MR JUSTICE MARCUS SMITH:** But there are a whole range of ways in which
10 entities can be domiciled or otherwise present in the jurisdiction and it may be that
11 that is something that would require clarification. To the extent you can today, that
12 will be helpful, but to be clear and for my part I don't regard that reference to
13 domiciled in 82(a) as requiring immediate clarification now. It's something that is --
14 **MS DEMETRIOU:** I'm grateful. I'm sure that there will be points for both parties that
15 will in due course, whoever goes forward to certification, require clarification, I'm sure
16 that Mr Turner will in due course have a lot to say about that. So, in advance of --
17 **MR JUSTICE MARCUS SMITH:** I'm sure his notebook is being filled up even as we
18 speak on these things.
19 **MS DEMETRIOU:** May I just come back to Mr Bankes' previous point. We have
20 addressed this partly in a footnote. If we go to tab 5 of the core bundle, page 13, this
21 is the limitation point.
22 **MR JUSTICE MARCUS SMITH:** Is that 13 of the internal numbering or 13 of the --
23 **MS DEMETRIOU:** It's 13 of the bundle.
24 **MR JUSTICE MARCUS SMITH:** I'm grateful.
25 **MS DEMETRIOU:** These are our submissions on the carriage issue, not the
26 skeleton but the lengthier submissions, and if you look at page 13, footnote 20, what

1 we say is that:

2 " ... Ms Hunter's claim period is aligned with the six-year limitation period. Mr
3 Hammond does not appear to explain why he has selected a start date of
4 1 October 2015 and his claim in relation to the earlier part of the period may need to
5 overcome limitation issues. To the extent that it may become open to Ms Hunter to
6 claim for a longer period (for example, by reason of the issues arising in [the
7 Umbrella proceedings and Merricks], she may amend her claim to do so."

8 And of course, the Tribunal will be acutely aware that in the Umbrella Interchange
9 proceedings the issue of limitation and the interaction between domestic limitation
10 periods and EU law has been addressed by the Tribunal and I think the Tribunal,
11 I think I'm right in saying, the Tribunal's granted permission to appeal so that will go
12 further.

13 And I know I'm right because I'm arguing it in January in the Merricks claim, there is
14 a trial on the application of section 32 of the Limitation Act to those proceedings. So,
15 if I may put it this way, it's a point of law that is in flux and so I imagine both parties
16 will want to take account of developments in the law and reflect those in their claims.

17 If we could go back, please, to the pleadings, so we are back in tab 11, if we can go
18 to page 183. We there have the pleading on market definition, and you can see at
19 paragraph 113 that the Relevant Market is alleged to be:

20 " ... the market for the provision of intermediation services on online retail
21 marketplaces in the UK. The relevant market comprises the services provided by the
22 operators of online marketplace platforms."

23 And you see at paragraphs 114 to 116 these set out the basis on which Ms Hunter
24 alleges that that is indeed the relevant market. And then just to skip forward to
25 page 186, there you have the pleading on dominance.

26 Now, pausing here, if I can just show you -- if it's not too awkward to keep that open

1 and also pick up core bundle 3 at the same time, I can show you the relevant
2 sections of the CMA decisions, if we go to A3 -- sorry, authorities bundle 3, I had the
3 wrong bundle. Authorities bundle 3, tab 33, page 2078. You will see the CMA's
4 preliminary conclusion on the basis of its investigation at paragraph 3.6 at the
5 bottom. So, 3.5: the CMA recognises that this is indeed a two-sided market.

6 Then 3.6:

7 "On the basis of its Investigation to date, the CMA's preliminary view is that the
8 relevant market ... is no broader than the supply of e-commerce marketplace
9 services to third-party sellers to reach customers in the UK."

10 So, Ms Hunter's case is consistent with this, and of course the Commission adopted
11 a similar approach, we don't need to turn that up but it found that Amazon was
12 dominant on the retailers' side of the market in Germany, France and Spain.

13 Then if we go back, please, to the pleading, so page 189 and turning to abuse, so it's
14 core bundle 1, tab 11, page 189, and let me take you through this section reasonably
15 carefully.

16 So, at paragraph 119 we say that:

17 "Amazon's abuse of dominance arises from (i) the systematic bias in the selection of
18 Featured Offers ..."

19 So Featured Offers are the offers in the Buy Box:

20 "... combined with (ii) the prominent presentation and operation of the Buy Box (and
21 the correspondingly different presentation, lower visibility, and lesser accessibility of
22 alternative offers) ..."

23 Then at 120:

24 "... consumers are steered, by means of the Buy Box, to an offer that
25 is systematically biased in [favour of] Amazon Retail ... and favours Amazon's own
26 offering as a logistics provider to third-party retailers."

1 And then 121:

2 " ... this systematic bias is compounded by the fact that the Buy Box presents
3 a Featured Offer ..."

4 Then at 121A we have a draft amendment to reflect two aspects of the Commission's
5 Commitments Decision -- or rather, sorry, one aspect -- yes, no, the first is the
6 delivery promise adjustment, and that's an adjustment that the Commission found
7 Amazon applies in respect of non-FBA retailers to the disadvantage of those
8 retailers.

9 Then secondly, the Commission found squarely that the bias also results in
10 preferential treatment for Amazon's own products. So that's the purpose of that
11 amendment.

12 Then if we go to 122:

13 "The combined effect of this systematic bias and the way in which offers for a
14 product are presented ... is that (a) the offer chosen by the customer will, in many
15 cases, not be the cheapest offer ... in that there will be other sellers' offers available
16 on Amazon Marketplace that offer the same product, on the same key terms ..."

17 I just emphasise those words:

18 "... at a lower total price."

19 And those are described by Mr Harman, as we will see, as "superior offers". Then
20 (b):

21 "There will be still more cases in which customers select the offer that wins the Buy
22 Box even though they would have preferred to purchase the same product from
23 another seller on different terms (for example, a lower total price with a longer
24 delivery window, or for a higher price but on terms [that are otherwise more
25 preferable]."

26 Which might be a shorter delivery window.

1 And those are described by Mr Harman as more "preferred offers".

2 And then at 124:

3 " ... further to the effects described above, the way in which the FMA [that's the
4 algorithm] and Buy Box have operated during the Relevant Period is likely to have
5 had the further indirect effect of disincentivising third-party retailers from using
6 delivery options that are priced lower than [Amazon's], even where those options
7 might be preferred by some buyers. In these cases, all else equal, third-party
8 ,retailers face higher fulfilment costs than they would have absent the [abuse] and
9 buyers will, accordingly, pay higher landed prices."

10 So those are, as it were, the buckets of loss that we've identified, that Ms Hunter's
11 claim has identified.

12 Just pausing for a moment and can we go back to paragraph 119 --

13 **MR JUSTICE MARCUS SMITH:** If you are going back, a question, you may well be
14 coming to this because of course it's traversed in a lot of the supporting material, but
15 in a nutshell, how are you going to make good this case? I mean, you have,
16 obviously, millions, quite possibly more than millions, of transactions, and you are
17 going to be wanting to say, well, in the case of these transactions there was, what
18 you define in 122(a), a superior offer. How are you going to establish those
19 instances where there was a superior offer in terms of just date extraction or
20 management?

21 **MS DEMETRIOU:** Well, by looking at the actual data in the real world. So, looking
22 at what products were available at what prices in the real world and --

23 **MR JUSTICE MARCUS SMITH:** In the real world are you looking at what was
24 available elsewhere through Amazon if you didn't go via the Buy Box or are you
25 looking at what was available in the real world excluding or beyond Amazon?

26 **MS DEMETRIOU:** No.

1 **MR JUSTICE MARCUS SMITH:** No. So, it's within the Amazon universe?

2 **MS DEMETRIOU:** Yes. So, in the Amazon universe -- of course Mr Harman has
3 already done this in relation to -- so he has already extracted data in respect of
4 a defined period and particular products. So, he has produced, as it were, a live
5 working of what he proposes to do on the basis --

6 **MR JUSTICE MARCUS SMITH:** This is to do with the data scraping?

7 **MS DEMETRIOU:** That's to do with data scraping. But just to explain in principle
8 what happens is that -- so the Buy Box -- this in the real world is what happens, so
9 you will have a product that was selected in the Buy Box. Now, for a majority of
10 those products, not all but a majority, there was a competing offer for the same
11 product or more than one competing offer for the same product, but that competing
12 offer or those competing offers did not win the Buy Box, so something else did.

13 **MR JUSTICE MARCUS SMITH:** Yes.

14 **MS DEMETRIOU:** Now, in some of those cases the competing offer would have
15 been self-evidently preferable, that's the superior offer.

16 **MR JUSTICE MARCUS SMITH:** Yes.

17 **MS DEMETRIOU:** So, in the sense that it was cheaper but everything else was the
18 same or better.

19 **MR JUSTICE MARCUS SMITH:** No, Ms Demetriou, don't get me wrong,
20 I completely understand the theory in terms of the mismatch between that which is
21 bought through the Buy Box and the superior offer that is foregone because it
22 doesn't appear in the Buy Box, I get that.

23 **MS DEMETRIOU:** Yes.

24 **MR JUSTICE MARCUS SMITH:** What I'm really inviting you to unpack a little bit
25 more is how in terms of -- the granularity, is Mr Harman simply going to carry on
26 scraping without assistance or reference to data that Amazon holds or is there going

1 to be an exercise involving Amazon where you are going to say, right, how are we
2 going to ascertain out of these, let us say, 500 million transactions, which ones had
3 a rival superior offer, to simply take the example in 122(a)?

4 **MS DEMETRIOU:** Yes. So, sir, we are going to be doing this by reference to data
5 from Amazon.

6 **MR JUSTICE MARCUS SMITH:** Yes.

7 **MS DEMETRIOU:** Would it be acceptable if I come back to that when I look at
8 Mr Harman's methodology?

9 **MR JUSTICE MARCUS SMITH:** Indeed. Ms Demetriou, if we raise a question out
10 of order then deal with it as you wish, just take your own order.

11 **MS DEMETRIOU:** But, in short, what Mr Harman says, and we will come back to
12 that, is that he's going to be seeking equivalent information from Amazon to the
13 information that he identified in his web scrape of data, his data scrape.

14 **MR JUSTICE MARCUS SMITH:** Yes. Is that because it's easier to do it that way or
15 more reliable or both?

16 **MS DEMETRIOU:** To do it that way as opposed to what way?

17 **MR JUSTICE MARCUS SMITH:** Well, he's been scraping so far without Amazon's
18 assistance.

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE MARCUS SMITH:** Presumably he is going to Amazon's data because
21 it's either more reliable scraping or cheaper or both.

22 **MS DEMETRIOU:** I think it may be that he can't find available data online for the
23 whole of the Relevant Period because – yes, because his data scrape relates to the
24 later part of the period where he could, as it were, find the data in the public domain,
25 but of course the period goes backwards and so that data is no longer available and
26 that's why we need data from Amazon. So, that is the short answer to the question.

1 **MR JUSTICE MARCUS SMITH:** I understand. So, it can't be done is the short
2 answer. Thank you.

3 **MS DEMETRIOU:** It can't be done. If it could be done, I don't think it would be the
4 case that Amazon's data would be more reliable, it's the data that was out there in
5 real world that -- the point is it's now gone. So that's really the point.

6 **MR JUSTICE MARCUS SMITH:** That's really helpful.

7 **MS DEMETRIOU:** So just going back to paragraph 119, I just want to make one
8 short point in relation to that. It's really to address one of the points that my learned
9 friend seeks to make against us, and they've made great play of this, they say that
10 we plead a separate abuse which comprises the presentation of the Buy Box. They
11 then seek to use that as a springboard for various submissions. So, they then say
12 that this means we are positing a counterfactual that doesn't involve the Buy Box,
13 and indeed that's a submission that my learned friend puts at the forefront of his
14 argument. Can I just knock that on the head. We say it's incorrect. If we go to
15 core bundle 3, tab 14 --

16 **MR JUSTICE MARCUS SMITH:** Core bundle 3 or authorities bundle 3?

17 **MS DEMETRIOU:** Core bundle, please. It's called correspondence -- I have called
18 it core. It's correspondence bundle. Correspondence bundle, tab 14, page 52.

19 **MR JUSTICE MARCUS SMITH:** Yes.

20 **MS DEMETRIOU:** And this is responding to a question put to us by Amazon's
21 solicitors, Herbert Smith Freehills. We have explained here in paragraph 4, we've
22 rearticulated that part of our pleadings, then we've said:

23 "While the PCR does not allege that the Proposed Defendants' design of the Product
24 Detail Page to display a single Featured Offer is in and of itself an abuse, as set out
25 [in the relevant parts of the] Claim Form, she does allege that the visual design,
26 display, and location of the Buy Box and design of the Product Detail Page have

1 effects on consumers which compound the systematic bias in Amazon's selection of
2 Featured Offers and accordingly forms an important part of the factual context in
3 which the abuse must be assessed."

4 Let me just explain what we mean by that. What we mean is that in effect the
5 Buy Box is the means through which the abuse takes effect. So, the abuse is
6 a self-preferencing abuse, via a biased algorithm, and self-preferencing of Amazon
7 Retail and Amazon Logistics and it's because a single product is chosen in the
8 Buy Box, which is very visible and which is the product that by far the majority of
9 consumers choose, that that abuse is able to have effect. So, if in fact, to take the
10 other extreme, every single offer was placed on the same page and the Featured
11 Offer was in exactly the same font but in bold, that may not be as bad because
12 everybody would have access, consumers would see on the same page all of
13 the offers and would be able to make their own choices. So, we are not saying that
14 the Buy Box, the existence of the Buy Box is abusive, we are saying that it's the
15 mechanism through which the abuse takes effect. So that is why it has an impact on
16 consumers, because consumers are funnelled or channelled to a single offer.

17 But we are certainly not saying that it's a separate abuse, it's a contextual factor
18 which is important. And if we look at the Commission findings and the CMA findings,
19 they make exactly the same point. Perhaps just to take it from the Commission
20 findings, so if we can go back, please, to authorities bundle 3, tab 30, page 1955. If
21 we look at recital 124 at the top, so that's the Buy Box related conduct and you see
22 that the preliminary assessment there is, that:

23 " ... while the Buy Box qualification process and the identification of the Featured
24 Offer have been evolving ... different conditions continued to apply to MFN
25 third-party offers and to AFN offers ... Moreover, the Buy Box qualification process
26 and the identification of the Featured Offer ... identified in the Commission's

1 investigation, applied in the same manner to all of Amazon's marketplaces in the
2 EU."

3 Then if we go down, please, to look at -- if we go over the page and we look at
4 recitals -- just pausing, just so you can see the point about the delivery adjustment,
5 it's a different point, but just so that you can locate it because I did show you that in
6 our pleading, that's 133 to 136. That's where the delivery adjustment comes from,
7 while we are here.

8 But if we move on, please, just going back to the point I am making, to page 1958,
9 you see at the bottom of the page:

10 "Preliminary conclusion on the Buy Box and Prime-related Conducts".

11 And if you note, if we move forward, the preliminary conclusion is at 153 to 157. So,
12 the preliminary conclusion of bias.

13 If we move on, please, to page 1962, you can see the same point about the
14 contextual point being made by the Commission. So, 173:

15 "Sales through the Buy Box represent the vast majority of all transactions ..."

16 174:

17 "In view of the importance of the Featured Offer for the visibility of offers and the
18 ability of sellers to generate transactions, the Preliminary Assessment came to the
19 preliminary conclusion that Amazon's artificial settings that favour Amazon Retail's
20 offers in the ranking ... is capable of distorting competition ..."

21 And then 176:

22 "In view of the importance of the Featured Offer for the visibility of offers ..."

23 Then you see that again further into the paragraph:

24 "The Preliminary Assessment came to the preliminary conclusion that such inbuilt
25 advantage in the ranking and display of offers by the application of dissimilar terms
26 to equivalent offers ... is likely to place MFN sellers at a structural competitive

1 disadvantage."

2 So, really the point we are making is the same contextual point as the European
3 Commission has made and, of course, in fact the commitments required by the
4 Commission, although not the CMA, included a second Buy Box, so as to improve
5 consumer choice.

6 Crucially, really, to sum up on this point, it's really a strawman. Whether one
7 characterises the abuse as a biased algorithm with the Buy Box as a critical factual
8 piece of factual context, or whether one characterises it as an abuse compounded by
9 the Buy Box doesn't matter, it's just a semantic difference.

10 In each case the loss is the same, so we say this particular criticism made by
11 Mr Hammond is without any foundation.

12 And stepping back, the abuse we've pleaded is on all fours with that investigated by
13 the CMA and the European Commission. And we characterise it as an exclusionary
14 abuse because it excludes effective competition from sellers and that exclusionary
15 abuse vis-a-vis sellers caused Class Members loss because Class Members didn't
16 have access to preferential offers made by the sellers in question.

17 And I note here, and I will come back to it, that a confusing aspect of Mr Hammond's
18 claim, and indeed Dr Pike's methodology, is the identification of an exploitative, as
19 well as an exclusionary, abuse. I come back to that point. But if we could go back to
20 the pleading, please, so tab 11, page 196, just to follow through. At 196 you have
21 the heading at the bottom of the page "Loss and Damage" and again I will come
22 back to this in more detail when I take you to Mr Harman's methodology but let me
23 just show you the way in which loss is framed in the pleading. Paragraph 134 on
24 page 197, we say that:

25 " ... the counterfactual world is one in which: (a) Amazon would not have used the
26 Buy Box in a manner that was biased systematically ..."

1 And (b):
2 "Amazon would not, through the Product Detail Page, have obscured from
3 customers (i) the existence and/or range of offers for the same product ..."
4 Now, of course, the question of what the proper counterfactual is will be one for trial.
5 But the critical point for present purposes, and for the methodology which I'll come
6 to, is that Mr Harman's methodology and our claim is completely consistent with
7 a counterfactual in which there is a single Buy Box. Completely consistent. So, we
8 do not need to show, and this is again another strawman that my learned friend
9 seeks to erect, we do not need to show that there's some magic counterfactual
10 where every single offer is illuminated on the page.
11 Our claim works, and our methodology works, if in the counterfactual, if the Tribunal
12 finds following trial that the proper counterfactual is one with a single Buy Box.
13 So, there's nothing in the criticisms made by my learned friend on that score.
14 Looking at paragraph 135, so 135(a) first of all you see there:
15 "Proposed Class Members have suffered loss on every occasion where they have
16 chosen, for the purchase of a product on Amazon Marketplace, a Buy Box offer in
17 circumstances where the same product was offered more cheaply on Amazon ... on
18 the same or better ... terms."
19 You have seen this already, that is the Universal Loss. Then you have the Choice
20 Loss at (b), and I have already explained what that is.
21 Then you see at paragraph (c) there is Further Loss, so (ba) relates to the delivery
22 promise adjustment which I show you in the Commission's decision.
23 Subparagraph (c) is the Further Loss and again I have explained what that is
24 already, so that's the loss that arises where as a result of -- so the abuse
25 disincentivises sellers from using their own independent or other logistics services
26 even where they might have been preferred by some buyers and so in those cases,

1 all else equal, sellers face higher fulfilment costs than they would otherwise have
2 done and that is because, because the self-preferencing gives so much weight to
3 whether or not the seller use is fulfilled by Amazon, that pushes sellers, we say, to
4 use Amazon's logistics services where otherwise they might find a cheaper service
5 which consumers would be perfectly happy with and those savings would be passed
6 on to consumers. So that is the Further Loss that we claim.

7 Then if we go on, please, to page 199, that is under the heading "Quantum" and
8 138(a) estimates -- this is all, of course, an estimate and based on assumptions at
9 this stage -- estimates the value of commerce relevant to the claim. You see the
10 estimate at subparagraph (a).

11 Then at subparagraph (b):

12 "Mr Harman estimates that for 63% of sales ... there is more than one competing
13 offer ..."

14 That goes back to point I was making previously to the Tribunal. (c): the current
15 estimate is 85 per cent of customers shopped in the Buy Box. So, selected the
16 Featured Offer.

17 And then you have an explanation of the web scraping analysis described at
18 appendix E of Mr Harman's first report. So, you see that what he's done there is that
19 he's estimated the proportion of products for which there is a superior offer outside
20 the Featured Offer displayed in the Buy Box. He estimates that for 6 per cent of
21 products there is such a superior offer.

22 Then he uses two alternative methods to estimate the proportion of products which
23 are preferable, so the more preferred offers. So, first, he posits the "Price Method",
24 under which 12 per cent of alternative offers are considered 'preferable' to the
25 Featured Offer, on the basis there was a cheaper offer which was delivered no
26 slower than the Featured Offer or, two, delivered more slowly but at least

1 two per cent cheaper than the Featured Offer per extra day of waiting or, three,
2 delivered more slowly but at least 10 per cent cheaper than the Featured Offer.

3 So, these at the moment are assumptions about the trade-offs that customers make.
4 But that will have to be investigated.

5 And second, he posits the "Equivalence Method", under which 12 per cent of
6 products are considered 'preferable' to the Featured Offer, on the basis that, one,
7 there is a cheaper alternative offer delivered no more slowly than the Featured Offer.
8 Two, there is an alternative offer which is cheaper than the Featured Offer but
9 delivered more slowly, and is at least two per cent cheaper per day of waiting.
10 Three, there is alternative offer that is more expensive than the Featured Offer but
11 which is delivered more quickly, and is no more than two per cent more expensive
12 per day saved.

13 These reflect for present purposes, implicitly reflect, the trade-offs that we see in the
14 commitments. So that is the basis at the moment. But, as you know, we say that
15 consumer preferences will have to be investigated at trial.

16 Then Mr Harman assumes that only 75 per cent of customers will select
17 an alternative offer that's superior or more preferred, and that is a very conservative
18 estimate.

19 Then we have at (f), estimates at this stage, but again based on real-world data,
20 which lead to a provisional estimate of damages that you see at paragraphs 139 and
21 140.

22 Then at paragraph 141 we explain there is at this stage no estimate of the Further
23 Loss.

24 And, again, we say that this approach to loss accords with what was said by the
25 CMA and the Commission. Can we briefly turn back to those. I'll just show you
26 a couple of paragraphs. If we go to A3, tab 33, that's the CMA, authorities 3, tab 33.

1 **MR JUSTICE MARCUS SMITH:** Yes.

2 **MS DEMETRIOU:** Page 2085. It's paragraph 4.12. Could you just read that to
3 yourselves because we say that that does indeed correspond to the theory of harm
4 and loss that is pleaded in Ms Hunter's claim.

5 **MR JUSTICE MARCUS SMITH:** Yes.

6 **MS DEMETRIOU:** Then if we could turn back to the Commission, please, so tab 30,
7 page 1966. If you look at the bottom of page 1966, recital 207:

8 " ... the Commission has preliminary concerns that the Buy Box-related Conduct has
9 a direct and immediate effect on sellers. Amazon displays a unique Featured Offer,
10 shown in the Buy Box. Most consumers will only look at this unique Buy Box offer.
11 Accordingly, for third-party sellers the unique Featured Offer display implies that they
12 are visible to consumers only through winning the Buy Box. By artificially altering the
13 winner of the Featured Offer, the Conduct may directly distort competition among
14 sellers."

15 Then to 208:

16 "The Commission also has preliminary concerns that the Buy Box-related Conduct
17 also prejudices consumer choice and directly harms consumers by driving them to
18 view and transact offers whose selection and display does not mirror the outcome of
19 competition on the merits. In particular, the systemic biases may lead to not
20 displaying the best offer as the Featured Offer where those would be proposed by
21 MFN sellers, or may display the best offer by an AFN seller but typically with a higher
22 price than the one which that seller would have had to offer should it not benefit from
23 those preferential conditions and the resulting more favourable ranking by the ...
24 algorithm."

25 Then also if we look at 211:

26 " ... the Commission has preliminary concerns that such conduct may steer

1 consumers to offers whose selection and display do not necessarily mirror the
2 outcome of competition on the merits."

3 And again, they say something similar. So:

4 " ... concern that consumers may be steered to viewing and purchasing Amazon
5 Retail or FBA offers that might not correspond to the best offer, as offers of MFN
6 sellers that would have met the same or superior quality requirements as the
7 Featured Offer got lower ranked by the ... algorithm, did not show as the Featured
8 Offer and were therefore de facto scarcely visible to the consumer."

9 So, all of that is the same, really the same theory of harm and loss that Ms Hunter
10 has pleaded, and of course I do say that that is a powerful indicator that Ms Hunter's
11 claim is well thought through because, of course, the claim was filed from scratch
12 before we had any of these findings.

13 I would like to turn now to methodology and could we turn up Mr Harman's first
14 report. We are back in first core bundle. If we could go to tab 12, page 272. You
15 have here at figure 7-1 at the top of the page a stylised illustration of the Universal
16 Loss and the Choice Loss. So that's a stylised illustration of the point that I was
17 making by reference to the pleading. If there was a competing product that was
18 cheaper and had the same delivery window or better, that is illustrated as Universal
19 Loss in the square, but if there was a product that was more expensive with better
20 delivery or cheaper with longer delivery that would, critically, in each case have been
21 preferred by the average consumer, that is Choice Loss, and those are illustrated by
22 reference to the two triangles.

23 And the methodology is explained for estimating the Universal Loss and the Choice
24 Loss at 7.4.3 and 7.4.4. I have essentially been through the summary of those
25 paragraphs in the pleading.

26 If you go to figure 7-2 on page 274, this methodology is explained again in this

1 figure, in this conceptual framework, and if you follow the two rows from left to right
2 you can see that both the Universal and Choice Losses start by taking only the
3 percentage of GMV for Amazon UK where there's a sale with more than one offer
4 and it was made via the Buy Box, that's the starting point in terms of volume of
5 commerce. The next step is to work out, taking into account the results relating to
6 consumer preferences, for what percentage of sales in the Buy Box there was
7 a superior alternative, so that's the Universal Loss, that would or should have won
8 the Buy Box in the counterfactual and for what percentage there was a more
9 preferred Choice Loss that would or should have won. And of those sales in what
10 percentage the customers would have chosen the superior or the more preferred
11 alternative.

12 So, as I say, Mr Harman out of caution has set this for the purpose of his provisional
13 estimates at 75 per cent, but one might think it should actually be much higher than
14 that, particularly on a counterfactual in which there was just still one Featured Offer
15 in a Buy Box, but that is something that will be assessed in more detail based on
16 actual evidence. And the final step is to multiply the result by the price difference.

17 Then you can see over the page at page 275, and this comes back, sir, to the
18 question that you were asking me, you can see the data sources that Mr Harman is
19 envisaging. So, you can see first of all in figure 7-3 the data sources which he
20 envisages to use to ascertain the percentages and the numbers in each of the
21 boxes. And then you see at paragraph 7.4.11, the data sources that Mr Harman
22 would seek or the data and information from Amazon that he would seek, and you
23 see at (1):

24 "Equivalent information to the evidence gathered from my exploratory sample ..."

25 We have explored that a little bit already.

26 So he will require:

1 " ... a historical dataset covering the relevant products (or at least a sample thereof)
2 ... and under it each offer including the Featured Offer and the alternative offers."

3 Just pausing there, and just I think coming back to the President's question, so if you
4 look at page -- if you keep that page open but then go on to page 322, which is
5 appendix D, so what Mr Harman says at D.2.4 is:

6 "To the extent that any datasets mentioned above are too large from a data handling
7 perspective, I will consider various sampling approaches. As with the current scrape
8 that I have carried out, any samples of data would be representative in terms of the
9 products covered and the time periods relied on."

10 So, again, that is a matter for trial. So, we would be seeking data for the period, the
11 Relevant Period, from Amazon, basically the equivalent data that Mr Harman has
12 already himself managed to obtain, there will then be no doubt a debate as to how
13 much of the data is required and that would turn on no doubt factors such as how
14 difficult it is to provide and how expensive it is to provide but, you know, that's the
15 kind of bread and butter of trials in this field. So, there will have to be a debate about
16 the scope of disclosure later on, but what you see here is what Mr Harman would
17 like. The question then follows: do we get all of the data, or do we approach it on
18 a sample basis? That's a question for later.

19 So, I hope that answers the President's question from previously.

20 And then also you see, going back to page 275, that Mr Harman's also envisaging
21 seeking other disclosure relating to, for example, studies commissioned by Amazon
22 on the Buy Box eligibility criteria, and studies on purchaser responses to various
23 changes, and so all of this is designed to try and reach a landing, along with the
24 conjoint analysis, which you can see further down that page on 276, reach a landing
25 or an assessment in relation to consumer preferences, so how do consumers trade
26 off, notably price and delivery speed?

1 So, Mr Harman will look at both disclosure from Amazon and conduct his own
2 conjoint analysis to investigate that question and it is a central question.

3 Pausing here, my learned friend says that one of the key disadvantages of
4 Mr Harman's approach is that it's inconsistent with there being a Buy Box in the
5 counterfactual. That's wrong. In relation to any product, Mr Harman's methodology
6 is completely consistent with there being a Buy Box, a single Buy Box in the
7 counterfactual. The task in each case will be to work out what offer would have won
8 the Buy Box in the counterfactual. You have seen that Universal Loss arises where
9 in the real world there was a competing offer that was cheaper and on the same or
10 better terms. And so, two conditions for Universal Loss: one is that there was such
11 a competing offer on the same or better terms that was cheaper and, two, that that
12 offer would have won the Buy Box in the counterfactual world of no abuse. And if
13 that's the case then the consumer's suffered Universal Loss.

14 Choice Loss arises where in the real world there was a competing offer that was
15 different. So, it may be lower price, longer delivery window or the opposite. And that
16 offer would have won the Buy Box in the counterfactual.

17 So, for each product in respect of which loss was suffered there will either be
18 Universal Loss or Choice Loss.

19 So, one is in each case working out what offer would have been in the Buy Box in
20 this counterfactual world of a single Buy Box, and that either would have been
21 Universal Loss, a superior product or a more preferred product, not both, and
22 Mr Harman proposes to investigate consumer preferences to work out what it is.

23 Just going back to my very simplified example, let's say that in the real world the
24 Buy Box Featured Offer was a product for £10 with three days' delivery, and let's say
25 that in the real world there were two competing offers that didn't win the Buy Box,
26 one offer was £9.50 with a four-day delivery window, and the other offer was £10.50

1 with a two-day delivery window, so those are all different offers, and what then needs
2 to happen is there then needs to be an analysis of consumer trade-offs and
3 preferences to work out which one of those would have been most attractive to the
4 average consumer. And that's the basis on which loss will be calculated. It may be
5 that in fact the Featured Offer is the one that would have been most attractive, in
6 which case there is no loss in respect of that offer.

7 **MR JUSTICE MARCUS SMITH:** Yes. I mean, the question of subjective consumer
8 choice is the much harder case. You would accept that, I think.

9 **MS DEMETRIOU:** Yes, but it's a point which is inevitable in this claim, and I think
10 that's why --

11 **MR JUSTICE MARCUS SMITH:** I mean, it's not inevitable when you are looking at
12 the unequivocally better product, the same delivery lower price. I mean, that one is
13 where you can say, well if it's exactly the same but cheaper, then it is a highly
14 irrational consumer that is going to prefer the more expensive product. That's fine.
15 And you can see that there is a proper criticism to be made of the algorithm that
16 allocates the more expensive product into the Buy Box.

17 But matters become rather harder when you have, let us say, a cheaper product
18 featuring in the Buy Box albeit at a longer delivery period than the non-Buy Box item
19 which is more expensive but faster.

20 Now, one has there a question of what is the consumer going to prefer? But you
21 have the more important question, I would suggest, which is what does Amazon
22 think the consumer is going to prefer in terms of what they then choose by way of the
23 algorithm to put into the Buy Box? And that seems to me to be a rather harder, more
24 nuanced question rather than the absolute preference that exists in the simpler case
25 where it's just price.

26 **MS DEMETRIOU:** So, yes, I accept that that's a harder question, I accept that the

1 easier position is where you have two offers, there were only ever two offers, one
2 won the Buy Box, and the other alternative offer was cheaper and at least as good in
3 terms of all the other terms. I accept that that is the easy case. The question is
4 whether the claim should stop there, because it's undoubtedly the case that
5 consumers have suffered loss in all sorts of other circumstances too. So, the fact
6 that there are some easy cases doesn't mean that you then abandon the more
7 difficult cases, and the question then is how do you go about identifying the loss
8 that's been suffered in those more complex cases, which is what we've characterised
9 as the Choice Loss.

10 **MR JUSTICE MARCUS SMITH:** Well indeed. But I think what I am pushing back
11 on is that let's suppose Amazon's algorithm simply mis-predicts what consumers
12 value, it's trying to articulate what consumers want and it's trying to put it in the
13 Buy Box because it's convenient to have it there, and they just get it wrong. They
14 think that it's price that drives desire rather than speed of delivery and so the
15 algorithm, without reference to the allocation to Amazon's own specifics, own
16 logistics, it simply goes for the cheaper item, no doubt subject to within reason, I
17 mean a delivery of, you know, ten years is probably not acceptable, but when it's
18 a lengthy delivery but a cheaper product, the matter defaults simply to the cheaper
19 product.

20 Now, you might very well say that there is an error there in that the consumers want
21 it faster, and that is your question of choice, but does that automatically feed into the
22 content of the Buy Box being wrong?

23 **MS DEMETRIOU:** Sir, I think I understand the question. I think it proceeds on the
24 premise, if I can put it this way, and please tell me if I'm wrong about this, I think your
25 question proceeds on the premise that it's possible simply to strip out the abusive bit
26 of the algorithm and run it all over again and I think that's an issue I'm going to come

1 to when I look at Mr Hammond's claim. So, I think what you are putting to me is if
2 you strip out the abusive bit of the algorithm and run it again, what if Amazon gets it
3 wrong? So, in the counterfactual -- so what if Amazon gets it wrong and should your
4 Choice Loss be recoverable loss if it doesn't reflect what Amazon would have done
5 in the counterfactual. Is that the question you are putting to me?

6 **MR JUSTICE MARCUS SMITH:** It isn't quite but I can see why you are focusing on
7 that. I think what I was getting at was the question of how far the subjectivity of
8 consumer choice, the trade-off between price and speed of delivery, is something
9 which is a significantly complicating factor in the way you are putting your case.

10 **MS DEMETRIOU:** Sir, yes. So, our position on that is that there's no getting away
11 from analysing consumer choice, and we say that for this reason, that what
12 the Tribunal will have to do at trial is to work out what the counterfactual would have
13 been absent the abuse. And so, stripping out the abuse, then presumably Amazon
14 would have wanted the Buy Box to feature the offer that was most attractive to the
15 average consumer. If that's not Amazon's position, we will have to hear about that at
16 trial. So, there will have to be an investigation of what offer would have been most
17 attractive to the average consumer. That will have to be investigated.

18 Now, we are saying, Mr Harman is saying, well, we can investigate that by looking at
19 Amazon's own material and by doing a conjoint analysis by taking survey evidence.
20 But we say there's no getting away from that.

21 Going back, sir, to the beginning of the example you put to me, so take my £10
22 three-day window. So, what if there is an offer or there was an offer that was £9.99
23 and three days, so that would be a superior offer, and what you are putting to me is
24 obviously that 1p would represent the loss suffered by consumers. But what if there
25 was also an offer out there that was £8.50 and four days, so significantly cheaper but
26 one -- it's not at all self-evident that's the saving -- there would have to be

1 an analysis of the extent to which the £1.50 saving outweighs for the average
2 consumer the extra day delivery time. It's not straightforward, it's not necessarily
3 straightforward that the superior offer in every case is one that would have won the
4 Buy Box.

5 **MR JUSTICE MARCUS SMITH:** Does your case then turn on the fact that what
6 appears in the Buy Box is to a material extent informed by a predisposition in favour
7 of Amazon Logistics?

8 **MS DEMETRIOU:** Yes. So that is -- sorry, sir, I'm interrupting.

9 **MR JUSTICE MARCUS SMITH:** So, what you are saying is that is the abuse and
10 the only point about absolute and relative loss, i.e. the choice and the unequivocally
11 superior product, goes to the quantification of the damages flowing from the abuse.

12 **MS DEMETRIOU:** We say the abuse comprises the self-preferencing, so the
13 favouring of Amazon Retail and Amazon Logistics, and what that's led to is
14 consumers being steered away from offers that may be more valuable to the
15 consumer or are more valuable to the average consumer, not in every case but in
16 some cases.

17 **MR JUSTICE MARCUS SMITH:** Let me put it this way though, suppose there was
18 no such thing like Amazon Logistics, suppose all they were doing was acting as
19 a marketplace with no financial interest of any sort, beyond wanting to identify what
20 they thought was best for the consumer, and let's suppose that the algorithm on that
21 basis gets it wrong, it misvalues the importance of speed of delivery over price, but
22 it's trying its best, in those circumstances you would say this is not your case.

23 **MS DEMETRIOU:** We wouldn't have a claim.

24 **MR JUSTICE MARCUS SMITH:** There would be no claim.

25 **MS DEMETRIOU:** That's right, we wouldn't have a claim.

26 **MR JUSTICE MARCUS SMITH:** And so, everything that you are doing on the

1 question of choice is saying, well, what we have is we have a recommendation, if
2 one could call it that, in the Buy Box, which is abusive because it's favouring
3 Amazon Logistics.

4 **MS DEMETRIOU:** Yes.

5 **MR JUSTICE MARCUS SMITH:** That being the case, assuming it is the case, what
6 one is trying to do is to work out what the harm of that abuse is to the consumer and
7 that is where the loss quantification exercise comes in.

8 **MS DEMETRIOU:** That's precisely right. So what we are saying is that you need to
9 identify the loss to the consumer, what that requires you to do is to look at the price
10 paid -- the terms, not just the price but the terms accepted by the consumer in the
11 real world, and then to ask yourself in the counterfactual world stripped of the abuse,
12 what would the Featured Offer have been.

13 **MR JUSTICE MARCUS SMITH:** Yes, so you are going to have to ask yourself two
14 things I think: you are going to have to ask yourself: stripping out the abuse, what
15 would appear in the box?

16 **MS DEMETRIOU:** Yes.

17 **MR JUSTICE MARCUS SMITH:** And then you need to work out whether that would
18 have been different to that which did appear.

19 **MS DEMETRIOU:** That's exactly right. And the reason why you need to investigate
20 consumer preferences is two-fold. One is to work out whether any of the competing
21 offers would have been preferable to the average consumer and therefore appeared
22 in the box, and the other is to quantify the loss, and so, for example, if consumers
23 would have preferred an offer that was marginally -- sorry, much cheaper but
24 marginally longer delivery time, then a value will have to be ascribed to delivery time
25 so there will have to be a value ascribed to delivery time to work out loss, and that's
26 what Mr Harman explains.

1 **MR BANKES:** Can I just cut across. On your counterfactual, is there still a Buy Box
2 which looks and smells exactly like the current Buy Box? Your earlier narrative
3 about the display falls away as an issue so long as the content of the Buy Box itself
4 is non-abusive? Or does your counterfactual envisage a different form of display
5 offering a broader choice to the purchasing consumer?

6 **MS DEMETRIOU:** There is twofold answer to that question. First of all, the
7 identification of the non-abusive counterfactual will be a matter for trial. But it's
8 a factual point so it will be a matter for trial and what you've seen -- just by way of
9 example, in the different commitments that the Commission -- the Commission found
10 it necessary to require commitments for two Buy Boxes for certain products on the
11 page. The CMA did not find that necessary. So, there will no doubt be a debate at
12 trial as to what the lawful counterfactual would have been. But, sir, for present
13 purposes our methodology works perfectly well, I'm prepared to assume for present
14 purposes that the counterfactual, in the counterfactual there will be a single Buy Box.
15 And so, I don't want to close off the fact that the Tribunal -- I don't want to close off
16 the possibility that there may be a debate about the counterfactual at trial. But --

17 **MR JUSTICE MARCUS SMITH:** Well, I mean, I think there are... I do think it is
18 incumbent upon you to say here is the abuse, and here is the non-abusive
19 counterfactual. And if I'm wrong about how you've put it then you'll correct me, but
20 my understanding was that it was the content of the Buy Box, in other words the
21 operation of the algorithm --

22 **MS DEMETRIOU:** It is.

23 **MR JUSTICE MARCUS SMITH:** -- that was the abuse, rather than there not being
24 more than one Buy Box.

25 **MS DEMETRIOU:** No, that's right. So, it is --

26 **MR JUSTICE MARCUS SMITH:** Okay.

1 **MS DEMETRIOU:** Exactly, that goes back to --

2 **MR JUSTICE MARCUS SMITH:** So that is your pleaded case. It is here's the
3 abuse, and here is the non-abusive counterfactual by reference to which loss
4 emerges.

5 **MS DEMETRIOU:** Yes.

6 **MR JUSTICE MARCUS SMITH:** Right.

7 **MS DEMETRIOU:** That's right.

8 **MR JUSTICE MARCUS SMITH:** Okay, that's clear. I mean, that does not prevent, if
9 your case goes to trial, Amazon saying, well, first of all, we dispute abuse. I'm sure
10 they'll say that, but also saying, well, even if you are right and there is an abuse, the
11 non-abusive counterfactual is one that generates less loss to the Class.

12 **MS DEMETRIOU:** Yes.

13 **MR JUSTICE MARCUS SMITH:** That is where the debate lies. But it does seem to
14 me that you are obliged at this stage to be clear about the non-abusive
15 counterfactual so that we can assess your methodology in light of that fact. And to
16 be clear, I proceed on the basis that you are saying it's the algorithm, that's the
17 problem, it's not the Buy Box.

18 **MS DEMETRIOU:** That's exactly right, sir, so my answer, my caveated answer to
19 Mr Bankes was really to say that of course we haven't heard from Amazon and so at
20 trial they may be saying the counterfactual is different and so we are not, as it
21 were --

22 **MR JUSTICE MARCUS SMITH:** That may be in the form of a defence to say that --

23 **MS DEMETRIOU:** It may be, of course, yes.

24 **MR JUSTICE MARCUS SMITH:** -- your loss is less than you say.

25 **MS DEMETRIOU:** Yes.

26 **MR JUSTICE MARCUS SMITH:** I mean, of course you are right, we can't anticipate

1 | what Amazon will say and we are not going to do that save in the most general terms
2 | in testing the viability of your case. But we do I think need to know what it is your
3 | position is going to be at trial, without prejudice of course to the sorts of amendment
4 | that take place when one is going through data gathering and evidence on the way
5 | to trial. But at this stage, looking at Microsoft Pro-Sys, we do need to know what the
6 | abuse is, what the counterfactual non-abusive situation is, how in broad brush terms
7 | you are going to calculate your loss, and that is really why I am focusing on the
8 | question.

9 | **MS DEMETRIOU:** Sir, absolutely. So just to restate our position, we say that the
10 | abuse is the self-preferencing in the algorithm, that the counterfactual is a Buy Box
11 | stripped of that abuse, that in order --

12 | **MR JUSTICE MARCUS SMITH:** So, a neutral algorithm, if you like?

13 | **MS DEMETRIOU:** Yes, an algorithm that doesn't have the abuse.

14 | **MR JUSTICE MARCUS SMITH:** Yes.

15 | **MS DEMETRIOU:** Or a Featured Offer that doesn't have the abuse. And for that
16 | you need to investigate consumer preferences to work out -- assuming there are
17 | competing offers or there were competing offers, if there were no competing offers
18 | then that is obviously Mr Harman's starting point that you don't have loss, but
19 | assuming there were competing offers, you need to work out which, if any, of those
20 | competing offers were more valuable to consumers; in some cases that may be
21 | more straightforward than others but you would need to investigate consumer
22 | preferences and then you need to work out loss and so let's assume that the winning
23 | offer, as I say, in the real world is £10 and three days, and let's say that in the
24 | counterfactual it would have been £10 and two days because there was another
25 | offer that was same price and two days. What is the loss? So, how does the extra
26 | day or the quicker delivery, the day that's gained on delivery, how does that translate

1 to a financial loss? For that you need to investigate consumer preferences and
2 trade-offs, so what value do consumers put on delivery speed, and that is why you
3 just can't get away from investigating consumer preferences. That's what we say.
4 You've seen that Mr Harman proposes to do that both by reference to Amazon data
5 and disclosure and by a conjoint analysis.

6 Do we need a transcriber break?

7 **MR JUSTICE MARCUS SMITH:** I think we usually do but only at a convenient
8 moment to you, Ms Demetriou.

9 **MS DEMETRIOU:** I think let's take it now because it's a convenient moment.

10 **MR JUSTICE MARCUS SMITH:** I'm grateful. In that case we will rise until five past
11 midday. Thank you very much.

12 **(11.55 am)**

13 **(A short break)**

14 **(12.05 pm)**

15 **MR JUSTICE MARCUS SMITH:** Ms Demetriou.

16 **MS DEMETRIOU:** Sir, given the discussion we have just had, I think I can take
17 things a little more swiftly. I want to turn in a moment to Mr Pike's report to look at
18 how he deals with loss but can I just before we leave Mr Harman's first report for now
19 could we just turn to page 281, that is core bundle 1, tab 12, page 281, because
20 I just want to show you what Mr Harman says about Further Loss. That starts on the
21 previous page, as a heading "Proposed methodology to quantify the Further Loss."

22 But then if you look at 7.5.8, he is proposing to:

23 " ... quantify the Further Loss based on: (i) Amazon's fulfilment fee premium (i.e., the
24 differential between [its] fees and other fulfilment options' fees that can be used by a
25 Third-Party Retailer); and (ii) purchasers' average willingness to pay for the premium,
26 if any, which I will assess using the [consumer preferences]."

1 So, in other words, if you have a third-party logistics provider that is cheaper but
2 consumers would be willing to pay a premium to use Amazon's then that is
3 an adjustment in the loss.

4 Then you can see at 7.5.9 to .11 how he proposes to go about that. So, you can
5 estimate by comparing Amazon's fees with the prices faced by a Third-Party Retailer
6 for equivalent services from other logistics companies. That can be expressed as
7 an average, so (ii) above, purchasers' average willingness to pay:

8 " ... can be expressed as an average value per sale ... The aim would be to analyse
9 the extent to which purchasers are willing to pay for FBA and hence would have
10 continued to choose FBA absent the abuse, as opposed to opting for a FBM option.
11 The conjoint analysis focuses primarily on purchasers, who ultimately pay for
12 delivery fees."

13 But you can have surveys and conjoint analysis in respect of Third-Party Retailers,
14 that is one option in terms of taking that forward.

15 Then:

16 "From these inputs, I propose to calculate the Further Loss as Amazon's 'Residual
17 Fulfilment Premium' ... In short, purchasers have suffered the Further Loss to the
18 extent that they have been charged more for products and that this price premium
19 exceeded the purchasers' willingness to pay. This could apply to the sale of some or
20 all products on Amazon's online marketplace."

21 So, you can see that what he's proposing, what Mr Harman is proposing is to look at
22 the extent to which Amazon's logistics service was more expensive than third-party
23 delivery services, adjust that to take account of the fact that some consumers may
24 prefer Amazon's more expensive service anyway and then to consider the extent to
25 which those savings are passed through to consumers. Then there's a methodology
26 to avoid double-counting which he sets out on the next page.

1 Now, I just want to take you now to Mr Hammond's --

2 **MR JUSTICE MARCUS SMITH:** Yes, thank you. Just for my note and a reference
3 will be enough, in terms of the split, between Universal Loss and Choice Loss, do
4 you have any feel for which will be Universal Losses and which will be Choice
5 Losses in terms of metrics? You may not have.

6 **MS DEMETRIOU:** No, sir, what I can say is that in respect of each product there will
7 either be no loss, if there was no competing better offer, Universal Loss or Choice
8 Loss.

9 **MR JUSTICE MARCUS SMITH:** Yes.

10 **MS DEMETRIOU:** So, there won't be both because in a counterfactual there's only
11 one Buy Box. So, the task --

12 **MR JUSTICE MARCUS SMITH:** But you have no -- and this is not a criticism in any
13 way, shape, or form, you have no -- certainly no data but no feel really of the division
14 between those three baskets.

15 **MS DEMETRIOU:** No, I don't. Just to make clear as well that it depends on two
16 inputs, as it were. First of all, you need to identify the range of other available offers
17 or if there were any, and so going back to my example, you have your actual offer of
18 £10, three days, so you have alternative offers that were there but didn't win the
19 Buy Box of £9.90 and three days, that would be a Superior offer. But you may have
20 something which is much cheaper, £8 and four days, that might be a More Preferred
21 offer. So, then the task would be which of those two alternatives, if any, better
22 reflects consumer preference. So that's why you do need to analyse consumer
23 preferences. So, the fact that there may be an offer -- there may have been an offer
24 out there which was £9.90 and three days which would translate if it had been
25 selected to Universal Loss doesn't mean that Universal Loss would have been
26 suffered in that case because there may have been some More Preferred offer.

1 **MR JUSTICE MARCUS SMITH:** I see. We don't get anything from Mr Harman's
2 scraping exercise in terms of split?

3 **MS DEMETRIOU:** Yes. So, in fact if you go to page 292.

4 **MR JUSTICE MARCUS SMITH:** Very grateful.

5 **MS DEMETRIOU:** There are some indicative --

6 **MR JUSTICE MARCUS SMITH:** That's helpful.

7 **MS DEMETRIOU:** -- quantum estimates. You see that there. And 294 as well. So,
8 294, again you can see -- do you see that, it's the bottom row or the next-to-bottom
9 row, Universal Loss 7%, Universal and Choice Loss 12%, Universal and Choice
10 Loss (Equivalent Method) 9%. So, these are applying his two methods. It's been
11 updated -- sorry, turn the page.

12 **MR JUSTICE MARCUS SMITH:** We are on interest, is that right?

13 **MR BANKES:** I think what we would like to understand is the Choice Loss value.
14 Here we have "Universal Loss" then "Universal Loss and", which means plus, so are
15 we to deduct one from the other to establish a value for Choice Loss?

16 **MS DEMETRIOU:** If you just bear with me a second because Ms Love is showing
17 me a different document, so this is the supplemental report of Mr Harman. That is
18 behind tab 16, page 387. These are revised numbers, but I think the question that
19 you are asking me is -- so this shows Universal Loss and you are asking me do you
20 just deduct the Universal Loss from the Universal and Choice Loss to get the Choice
21 Loss, I think that's the question, isn't it? And the answer is yes. Lots of nods behind
22 me. I thought it was yes and it is yes.

23 **MR JUSTICE MARCUS SMITH:** Thank you.

24 **MS DEMETRIOU:** Okay. Could we turn now to Mr Pike's first report. You will find
25 that in the second -- you should now have up actually the second core bundle behind
26 tab -- sorry, Dr Pike, I am so sorry, I didn't mean to be demoting him at all.

1 I apologise, Dr Pike. Second core bundle, tab 19, page 531.

2 I'm taking you to paragraph 233 because that shows how Dr Pike and indeed
3 Mr Hammond have purported to split the abuse into an exploitative and an
4 exclusionary abuse. So, you see that the exploitative abuse is said to be at (i):

5 " ... whether Amazon's algorithm exploited consumers and non-FBA sellers by
6 discriminating against non-FBA sellers ..."

7 And then the exclusionary abuse is said to be:

8 " ... whether the discrimination excluded equally efficient logistics competitors and
9 thereby reduced competition in the logistics market, and the market for
10 intermediation services for UK online marketplaces ..."

11 So those are the two abuses that they identify.

12 So, sticking with the exploitative abuse, which is the biased algorithm, and how that
13 affected consumers, if we go to page 555, Dr Pike has two approaches, you will
14 have seen, to estimating the loss caused by the so-called exploitative abuse. The
15 first is the constant prices approach. You will see that is the heading at 10.2 in bold.
16 And that assumes that FBA sellers offer the same price in the counterfactual but
17 don't receive the benefit of the algorithm. So, Dr Pike proposes to calculate the
18 difference between the price of the Buy Box product and any lower-priced competing
19 offer. We see that if we go over the page to 364:

20 "In the but-for world in which Amazon's algorithm was unbiased and sellers opted to
21 set the same price, many of these offers would have taken the place of higher-priced
22 FBA offers as the Buy Box winning offer."

23 **MR JUSTICE MARCUS SMITH:** So, this is tracking or using Mr Harman's
24 terminology, Universal Loss.

25 **MS DEMETRIOU:** It's broadly equivalent to Universal Loss but it's much cruder than
26 Universal Loss and it's much cruder because it only looks at price and fails to take

1 account of delivery speed. So, if the product, going back to my £10, three days
2 example, if the product that won the Buy Box was £10, three days, Dr Pike would
3 find that a competing offer of £9.90 but five days or six days would represent loss
4 because he's not taking account of delivery speed, he's only looking at price.

5 **MR JUSTICE MARCUS SMITH:** I see. So, it is capturing Universal Loss in your
6 terminology but it is doing so differently, to use a neutral term.

7 **MS DEMETRIOU:** Well, we say that it's capturing things which are not losses at all.
8 Because if there were a competing offer that's £9.99 but ten days' delivery instead of
9 three, that's highly unlikely to be an offer that's more valuable to consumers. So, on
10 our case that would not be an offer which should have won the Buy Box, there would
11 be no loss. But on Dr Pike's case, because of the one penny saving, that would be
12 what we call Universal Loss.

13 **MR BANKES:** It may be, we will come back to this this afternoon, but I note the
14 phrase "many of these offers would have taken the place". Maybe that is something
15 we can hear from Mr Hammond's representatives, but there is a qualification there,
16 it's not as binary as --

17 **MS DEMETRIOU:** Yes, but the key point is, is the methodology there to distinguish?
18 The key point about our methodology is that on our Universal Loss the other key
19 terms are no worse, the same or better, and that is really key. And on Dr Pike's
20 methodology, that is simply not addressed. So, he's just looking at price. And they
21 say belatedly: oh yes, well, we recognise that delivery speed is important. But the
22 critical fact is that they don't explain at all how delivery speed will be accounted for in
23 the methodology.

24 **MR JUSTICE MARCUS SMITH:** I mean, to adopt a restitutionary language, we are
25 talking about unequivocal benefit versus subjective devaluation.

26 **MS DEMETRIOU:** I'm not sure if I can agree or disagree with that, because I'm not

1 | sure I am as well versed as you are in --

2 | **MR JUSTICE MARCUS SMITH:** Then I will take it no further.

3 | **MS DEMETRIOU:** Yes. But really, as I say, the key point is that our Universal Loss
4 | does properly reflect loss suffered because we are only looking at offers that are
5 | cheaper but everything else is the same or better. And Dr Pike is just looking at
6 | cheaper and everything else may be much worse and, in those circumstances, there
7 | wouldn't be loss.

8 | **MR JUSTICE MARCUS SMITH:** Yes.

9 | **MS DEMETRIOU:** So, the imputed prices approach, so the second approach, starts
10 | at heading 10.3 on page 557. This is Dr Pike's second approach.

11 | **MR JUSTICE MARCUS SMITH:** Yes.

12 | **MS DEMETRIOU:** And this approach assumes that FBA sellers reprice their
13 | products in the counterfactual to retain the same probability of winning the Buy Box,
14 | despite the absence of the bias in the algorithm. And the first point to make about
15 | this is that there is no basis for supposing that it's realistic, because you can't
16 | assume that FBA retailers can simply charge whatever lower price it takes to retain
17 | the same probability of winning the Buy Box without regard to whether or not that's
18 | commercially realistic in light of their costs etcetera. So, it's based on a crude
19 | simplified assumption of what sellers would have done in the counterfactual.

20 | The second point to make is that, as Mr Harman explains in his position paper, the
21 | imputed prices approach also ignores delivery speed, so we are back to the same
22 | problem, and on any view delivery speed is, as Amazon has said in correspondence,
23 | self-evidently an important factor valued by consumers.

24 | **MR JUSTICE MARCUS SMITH:** Yes.

25 | **MS DEMETRIOU:** So, if we turn to page 559, you see the heading there "Harm from
26 | exploitative abuse" and paragraph 381 refers back to the two approaches, so the

1 constant prices and the imputed prices. Then at 382:
2 "Understanding seller decision-making will allow me to estimate how sellers would
3 behave absent discrimination ... This might point me towards one of the models set
4 out above, or to some mixture of the two. I therefore plan to use Amazon research
5 and analysis (e.g., surveys) of likely seller behaviour in the event that a non-
6 discriminatory algorithm were to be used (either revealed in response to an actual
7 change, or as a stated response to a hypothetical change).
8 "For example, survey data from Amazon, or sales and offer data from pre-2006
9 would help to identify likely seller behaviour absent the conduct. It may also be the
10 case that this behaviour can be observed as a consequence of the coming into force
11 of the Digital Markets Act in the EU ..."
12 So, what you see there is that there is in fact, leaving aside the fact that here, having
13 disparaged survey evidence, Dr Pike now seems to want to use survey evidence but
14 leaving that point aside, there's no explanation as to how these two approaches are
15 going to be combined or reconciled.
16 What my learned friend now says in their skeleton argument is that the two
17 approaches provide an upper and a lower bound but it's not clear to us in any
18 substantive sense why they provide an upper or a lower bound and it still doesn't
19 explain how the methodologies are going to be combined.
20 And if we look at paragraph 20, I don't know if you have the skeleton argument
21 separately or in the bundle, but if we look at Mr Hammond's skeleton argument at
22 paragraph 20, this is the upper and lower bounds point. And there are said to be
23 three options. So, there are three options for refining the harm within these bounds:
24 "(i) Using only the lower bound; (ii) using an average midpoint; or (iii) using Amazon
25 data to estimate the proportion of sellers that are likely to act according to the
26 assumptions in each counterfactual..."

1 And option 3 is really highly speculative because what is the data or disclosure from
2 Amazon that would ever enable Dr Pike to examine whether in a hypothetical
3 counterfactual FBA sellers would reduce their prices to the required degree in order
4 to retain the same probability of winning the Buy Box. It's a highly speculative
5 question. And we say that Dr Pike hasn't properly identified the basis on which
6 disclosure or data from Amazon could enable him to engage in that hypothetical
7 exercise.

8 So, staying with this abuse, in addition to the point I've just made about there being
9 no triangulation, if you like, of the two methodologies, there are two further
10 fundamental flaws in Dr Pike's two approaches. First, the approaches are crude and
11 will inevitably include in the estimation of loss amounts which are not in fact
12 representative of loss. So, as I've said, by characterising as better offers, offers
13 which might be marginally cheaper but overall significantly worse for consumer
14 welfare, might also on occasion be underinclusive in that it will exclude offers which
15 were marginally more expensive but with a quicker delivery time that the consumer
16 would prefer. So, the offer that's £10.02 and comes within a day.

17 So, unlike Mr Harman's methodology, it does not actually home in on the loss in fact
18 suffered by the Class. It excludes the entire category of Choice Loss identified by
19 Ms Hunter which Mr Harman does propose to quantify.

20 I think I said I'd show you the HSF letter, that is in the correspondence bundle,
21 tab 17, page 62.

22 **MR JUSTICE MARCUS SMITH:** Yes.

23 **MS DEMETRIOU:** If we look at paragraph 2 of that letter, part of the way down:

24 " ... the methodology described in those Exhibits consists of modelling in which the
25 only offer attributes Dr Pike takes into account are price and seller rating, and not
26 any others, for example delivery speed. This is despite the fact that our response of

1 30 March 2023 to your letter before action states that Amazon does take other offer
2 attributes into account when selecting the Featured Offer, including for example
3 delivery speed (a factor that is self-evidently likely to be relevant to consumer
4 preferences)."

5 And then if we see the response to that letter, it's behind the next tab, page 65 at the
6 bottom:

7 "Dr Pike recognises the importance of delivery speed to consumers ..."

8 So, no dispute about that.

9 It then says:

10 "Precisely how Amazon incorporates that information and applies it to select the
11 Buy Box winner or what other factors are at play has not yet been disclosed. Until
12 this information has been disclosed, so that the algorithm can be modelled with
13 greater precision, Dr Pike has used a seller rating variable as a proxy for delivery
14 speed to illustrate how a model of the full algorithm might work in practice."

15 Now, first of all, just taking that in stages, the seller rating, by definition can't tell you
16 anything about delivery speed, because that is something completely different. So,
17 the seller rating applies to the seller and doesn't relate to delivery speed for particular
18 offers.

19 **MR JUSTICE MARCUS SMITH:** No, but it may affect how a seller is rated, surely?

20 **MS DEMETRIOU:** Well --

21 **MR JUSTICE MARCUS SMITH:** I mean, if I'm happy with a seller, one of
22 the reasons I may be happy is because I've had a promised delivery. So there has
23 to be a degree of correlation between seller rating and delivery because it's
24 something that I regard as important. It might be very hard to extract but it can't not
25 be a factor, surely?

26 **MS DEMETRIOU:** It's a factor, the rating applies to the seller across all of their

1 products, and it applies in relation presumably to various metrics.

2 **MR JUSTICE MARCUS SMITH:** If you are saying there are lots of reasons why I'm
3 going to be pleased or not pleased with a particular seller, I absolutely accept that.
4 But if you are saying that one of the reasons that I might be pleased or not pleased is
5 not delivery speed then I think that's a bit of a stretch.

6 **MS DEMETRIOU:** I think what I'm saying is that the two issues -- I'm not saying that
7 delivery speed could never be a factor that goes into the seller rating, I'm saying that
8 the two things -- it's insufficiently relevant to provide --

9 **MR JUSTICE MARCUS SMITH:** It's not a very good metric.

10 **MS DEMETRIOU:** Exactly. Because a seller may say: our delivery window is three
11 days, everybody knows that and as long as they stick to the three days, they get
12 a five-star rating. That doesn't tell you whether -- so if somebody advertises
13 themselves as being a three-day delivery seller and they comply with that in every
14 case, there's no reason to be dissatisfied with them. It doesn't tell you whether
15 there's a better offer out there from someone else that can do it in one day. That's
16 really the point.

17 **MR JUSTICE MARCUS SMITH:** But also, sellers are not judged by simply that
18 metric?

19 **MS DEMETRIOU:** Exactly. So, it's too far removed to act as a proxy.

20 **MR JUSTICE MARCUS SMITH:** But this point about how the Amazon algorithm
21 works, that is something which is a known unknown that is the same for both PCRs.

22 **MS DEMETRIOU:** That's right. And this takes me to my second point, because,
23 going back to Mr Hammond's skeleton argument and if you look at paragraph 32 of
24 their skeleton argument, what they do is they make a virtue or they seek to make
25 a virtue of not having any methodology to assess consumer preferences. So, they
26 say:

1 " ... one of the strengths of Dr Pike's methodology is precisely that it does not [seek]
2 to quantify subjective consumer preferences."

3 That's what they say. And of course, we say if there's no assessment of consumer
4 preferences, it won't be possible to assess what would have happened in the
5 counterfactual or to quantify loss. You have my points on that. But what
6 Mr Hammond's skeleton argument suggests, and we get this from paragraph 19 if
7 you could look at that, is that what Dr Pike will do is to essentially re-run the Amazon
8 algorithm without the discriminatory aspects. If you look at paragraph 19 of their
9 skeleton, they say this:

10 "In order to quantify this over-charge, Dr Pike will use a well-accepted method for
11 assessing algorithmic discrimination as set out by EU economic experts. This
12 involves isolating the 'discriminatory provisions' of the [algorithm], removing them,
13 and then re-running the algorithm using historic offer data to ascertain which offers
14 would have won the Buy Box but-for the discrimination."

15 That's what they say they will do. You see there that that refers to three paragraphs
16 of Dr Pike's first report. And if we go to those paragraphs, so that's back in the
17 core bundle at 2, tab 19, page 547, you can see that paragraph 318 refers to the EU
18 economic expert report and there's then a cross-reference in this report to
19 paragraph 237 above. So, as proposed in the EU economic experts' report.

20 And if we follow that through and look at -- let's look at what the report actually says.
21 This we'll find in the authorities bundle, so this is authorities bundle 3, tab 25,
22 page 1899. This is the bit that the earlier passage of Dr Pike's report refers to. And
23 if we look at page 1899, you have the heading "Self-preferencing". So, this is
24 a report, you can see the first page on page 1885, the EU Digital Markets Act, a
25 report from a panel of economic experts.

26 Then you have the heading on 1899 "Self-preferencing". Then final paragraph of the

1 page:

2 "At a conceptual level [again I emphasise those words], a rule of non-discrimination
3 would imply that an algorithm's recommendation ... be a function of objective
4 characteristics and not depend on the product's affiliation with the platform. A
5 natural and simple test would be to run the algorithm twice - with and without seller
6 identities - and verify that it produces the same outcome: seller characteristics (price,
7 location, reliability, delays, service quality, etc.) should drive the ranking, not seller
8 identity. However, such a test requires regulator access to the algorithm."

9 Pausing here, this is at a conceptual level a test for identifying whether there is
10 discrimination pure and simple, not a test for quantifying any loss.

11 **MR JUSTICE MARCUS SMITH:** Well, the two must be linked, surely?

12 **MS DEMETRIOU:** Sir, no. I will come on to why, why we say that it doesn't follow.

13 **MR JUSTICE MARCUS SMITH:** But just to be clear, are you not going to be doing
14 a similar exercise in order to identify the nature of the abuse? And if not, why not?

15 **MS DEMETRIOU:** We say it's not enough. So yes, we --

16 **MR JUSTICE MARCUS SMITH:** You will be doing the same thing?

17 **MS DEMETRIOU:** We will be doing a similar exercise, but we say that it's not
18 enough for the reasons I'm going to come on to show you.

19 **MR JUSTICE MARCUS SMITH:** But just to identify where the common ground
20 exists between approaches, you will both need access to the Amazon algorithm,
21 which you neither have at the moment. Have I got a right?

22 **MS DEMETRIOU:** We will both need access to the algorithm.

23 **MR JUSTICE MARCUS SMITH:** You will then say, well, the abuse that we are
24 alleging, of course it may be more nuanced, but the abuse we are alleging is
25 favouring Amazon Logistics inappropriately. So, let's strip that out to see what would
26 have pertained had the abuse not occurred; in other words, what would have

1 appeared in the Buy Box assuming a proper non-abusive algorithm.

2 **MS DEMETRIOU:** Sir, we say --

3 **MR JUSTICE MARCUS SMITH:** Have I got that right, just in terms of the abuse?

4 **MS DEMETRIOU:** I just want to qualify the second point of what you said. So, when
5 you say strip it out, we accept that what you are doing, the exercise for the Tribunal
6 is to strip out the abuse, and so what one is asking is in the counterfactual world with
7 no abuse what would have been in the Buy Box. What we don't accept that you can
8 do or necessarily do, is simply strip out the abuse from the algorithm and rerun it
9 again because that assumes, that assumes that it's easy -- we don't know what the
10 algorithm look likes, it assumes almost that there are various variables and one of
11 them is easily identifiable as the discriminatory variable.

12 **MR JUSTICE MARCUS SMITH:** I understand that there's an unknown difficulty,
13 because I'm quite sure this algorithm is extremely complex and I'm quite sure that
14 even if it was simple, I would have difficulty understanding it, so we can take all that
15 as read but assuming it is doable, the way of identifying the counterfactual is to
16 operate the algorithm, extracting the abuse.

17 **MS DEMETRIOU:** We accept, we agree that a non-abusive algorithm would have to
18 be stripped of the discriminatory element. So, we agree with that. We agree that
19 what you have to ask yourself in the counterfactual is what would the product have
20 been in the Buy Box, applying a non-discriminatory algorithm. So, we accept that
21 the abuse has to be stripped out.

22 **MR JUSTICE MARCUS SMITH:** Right.

23 **MS DEMETRIOU:** The difference between us, just to crystallise this, the difference
24 between Ms Hunter's claim and Mr Hammond's claim is that Mr Hammond's
25 proposal is simply to rerun the algorithm, they say stripped of the abuse. We say
26 that that doesn't remove the need to investigate consumer preferences --

1 **MR JUSTICE MARCUS SMITH:** Pause there. I mean, why is that? I mean, let's
2 assume it's all possible, let's assume it's actually really easy, and I completely accept
3 that it's unlikely to be really easy, let's suppose it's really easy to have algorithm 1,
4 the algorithm with the abuse, and algorithm 2, the algorithm without the abuse; now,
5 we'll have all sorts of arguments as to what the abuse is and what it isn't but let's
6 assume that it's actually an easy thing to do. So, you know what the outcome is with
7 the abusive algorithm, the non-abusive algorithm gives you the counterfactual.

8 **MS DEMETRIOU:** Yes.

9 **MR JUSTICE MARCUS SMITH:** So, you know the extent to which the non-abusive
10 algorithm produces an outcome in the Buy Box that is different to the one produced
11 by the abusive one. So, if you can do it, that must be the way to do it. Or do you
12 disagree?

13 **MS DEMETRIOU:** We say that that would identify -- that only goes part of the way,
14 as follows. So, assuming, and again I'm taking your hypothesis, sir, so assuming it
15 could be done and it's straightforward, then what that will enable you to identify,
16 I agree, is the product that absent the abuse would have been in Buy Box. But then
17 there is obviously a second stage to the enquiry, which is what is the loss that
18 follows from that? And once it's been identified which product won the Buy Box in
19 the counterfactual, then that must be of course translated into loss. And that entails
20 not only comparing prices but analysing the value that the average customer places
21 on the difference between the two offers in taking delivery speed into account.

22 **MR JUSTICE MARCUS SMITH:** Let's suppose --

23 **MS DEMETRIOU:** And, sir, just, sorry, rerunning the algorithm would not provide
24 that answer, so this is just to finish, rerunning the algorithm, if it could be done,
25 provides you with the offer that would have been in the Buy Box but does not enable
26 you to calculate loss.

1 **MR JUSTICE MARCUS SMITH:** But let's suppose that the abusive and the
2 non-abusive algorithm are weighted so as to be predisposed to favour price
3 advantage over delivery advantage; in other words, even if it is a penny and days
4 difference, the penny trumps the days, but there's no abuse in the form of favouring
5 Amazon Logistics.

6 **MS DEMETRIOU:** Yes.

7 **MR JUSTICE MARCUS SMITH:** So, what you get in both the abusive and the
8 non-abusive models is an outcome, a Buy Box product that is favouring in terms of
9 output the cheaper product, even if it is very marginally cheaper and even if there is
10 an enormous disbenefit in terms of delivery time.

11 **MS DEMETRIOU:** Yes.

12 **MR JUSTICE MARCUS SMITH:** Why is there a loss arising out of that if one gets
13 the same predisposition under both the non-abusive and the abusive algorithm in
14 terms of price?

15 **MS DEMETRIOU:** Because the predisposition tells you what would have been in the
16 Buy Box but let's say, going back to my £10, three days offer, was the offer actually
17 in the Buy Box, and let's say the algorithm, taking into account all of the
18 pre-dispositions, tells you that actually an offer of £10.50 or £10.10 but a one-day
19 delivery window should have won the Buy Box absent bias, so the algorithm stripped
20 of the abuse places a value, a monetary value on the speed of delivery, which I think
21 is what you are putting to me, and so rerunning this algorithm without the abuse
22 produces a product, an alternative product that is marginally more expensive,
23 say £10.10 but a much better delivery window, so one day.

24 **MR JUSTICE MARCUS SMITH:** But why should it?

25 **MS DEMETRIOU:** Because there will be – why should it not?

26 **MR JUSTICE MARCUS SMITH:** No, no, what you are doing, I think, is building into

1 the counterfactual algorithm elements of consumer choice which you say matter, and
2 what I'm putting to you is all that you are stripping out is the predisposition in favour
3 of Amazon Logistics. If in stripping that out the compliant algorithm favours tiny price
4 differentials over extensive delivery advantages, but it does so neutrally, why is that
5 generative of loss relating to the abuse?

6 **MS DEMETRIOU:** Sir, with respect, that is question begging, because what one has
7 to do is identify what would have been – so just going back a step, you have the
8 abuse, I agree with you that you strip out abuse to work out what would have been in
9 the Buy Box.

10 **MR JUSTICE MARCUS SMITH:** Okay.

11 **MS DEMETRIOU:** Now, what Amazon has said is that what it's seeking to do with
12 its algorithm is reflect things that are attractive to consumers. So, Amazon has said
13 that it's seeking in its algorithm to reflect consumer choice, which obviously it would
14 do, it has a commercial incentive.

15 **MR JUSTICE MARCUS SMITH:** But that's not abusive.

16 **MS DEMETRIOU:** That's not abusive. So, the question in the counterfactual would
17 be well, what would the algorithm have looked like without the abuse? And one has
18 to assume, one has to assume that the algorithm would have produced a product
19 that best served the interests of the average consumer.

20 **MR JUSTICE MARCUS SMITH:** Yes.

21 **MS DEMETRIOU:** Now, that may be a product, obviously the simple case --

22 **MR JUSTICE MARCUS SMITH:** But that's why the counterfactual operation that we
23 are discussing here of the algorithm is so important, because if you end up with
24 a situation where the non-abusive counterfactual algorithm is producing an outcome
25 that is not reflective of consumer choice but not abusive, then why should any loss
26 arise in that case?

1 **MS DEMETRIOU:** I agree with you.

2 **MR JUSTICE MARCUS SMITH:** Right.

3 **MS DEMETRIOU:** But the question would be what does the non-abusive algorithm
4 produce in the counterfactual world? There's a question which we are parking for
5 the moment as to whether that can be done simply by rerunning the present
6 algorithm, which we say is not straightforward.

7 **MR BANKES:** Could I just ask, I'm looking at Mr Harman's report again, page 274
8 you talked us through earlier. I don't see on the face of that a discussion of
9 rerunning the algorithm. This may be a nuance without a difference. I think he's
10 proposing at 7.4.7 an alternative methodology and he just says this will be supported
11 by primary research and econometric analysis.

12 **MS DEMETRIOU:** Yes, so he wants access to the algorithm, he is not planning to
13 rerun it.

14 **MR BANKES:** He's not planning to rerun it; he is planning to calculate something
15 which he thinks it should produce.

16 **MS DEMETRIOU:** Yes, and the reason for that -- there are two -- can I try and
17 unpick two points, one point I'm going to park in response to the President's question
18 but I will come back to, the point I'm going to park is that the reason that we are not
19 proposing to go down that road is that there is no reason to believe that you can
20 simply extract the non-discriminatory bits of the algorithm and say, "Ah well, now this
21 is what it would have looked like in the counterfactual and you can rerun it".

22 **MR JUSTICE MARCUS SMITH:** I understand that. What you are saying is that my
23 nice, clean hypothetical example is simply not doable.

24 **MS DEMETRIOU:** Yes, and -- we don't know. I mean, we do not know but we think
25 it's unlikely to be doable because we think it's --

26 **MR JUSTICE MARCUS SMITH:** Yes. Well, look, of course you -- both PCRs are in

1 a situation where you don't have anything like the knowledge that Amazon has, take
2 that, so you are going to have to look at probabilities, if you are able to do what I've
3 been putting to you; namely, re-run the algorithm and strip out the abuse, then are
4 we agreed that that is the best way to establish what would have happened in the
5 non-abusive case?

6 **MS DEMETRIOU:** What product would have been in Buy Box.

7 **MR JUSTICE MARCUS SMITH:** In the Buy Box.

8 **MS DEMETRIOU:** We are saying it can't lead to the calculation of loss.

9 **MR JUSTICE MARCUS SMITH:** Leave the calculation of loss one moment to one
10 side, I'm just interested in the process. We agree that in terms of identifying what the
11 non-abusive outcome would be, that would be the best which if it can be done.

12 **MS DEMETRIOU:** If it can be done.

13 **MR JUSTICE MARCUS SMITH:** So, is Mr Harman proposing to do that, if it can be
14 done; and if he isn't, why not?

15 **MS DEMETRIOU:** Let me just take instructions.

16 **MR JUSTICE MARCUS SMITH:** Just to follow on while you do take instructions, it
17 may be that Mr Harman is in a different state to Dr Pike, and he's saying, "Look, let's
18 be realistic, you are right, it just can't be done, this notion that I'm floating past you of
19 stripping out the abuse is just horribly complicated because these algorithms are
20 hugely complex" and so one is going to have to evolve a proxy for working out what
21 the output of a non-abusive algorithm would be. If that's the way he's doing it, then
22 I completely get it and I understand. But if he's saying, "I'm forsaking what we
23 agreed is the best way of doing it" for no good reason, then --

24 **MS DEMETRIOU:** No, my understanding --

25 **MR JUSTICE MARCUS SMITH:** That's my question.

26 **MS DEMETRIOU:** So my understanding -- I haven't discussed this point but I'll be

1 told if I'm wrong – my understanding of the position is that Mr Harman is very
2 doubtful that it can be done in a way described by Dr Pike because the algorithm is
3 unlikely to have a distinct variable, if I can put it this way, which is labelled abuse or
4 even is labelled preferencing of Amazon or preferencing of FBA. It's much more –
5 it's going to be much more complicated –it's much more likely to consist of different
6 weightings of different factors, which would be – it would be overly simplistic to say
7 that the discriminatory bits can be stripped out and rerun. That's, as I understand it,
8 Mr Harman's position. Yes, I'm getting thumbs up and nods, so I'm right to say that.

9 **MR JUSTICE MARCUS SMITH:** It would be helpful I think to have the best
10 articulation of Mr Harman's position in his reports, so we have that. Because we
11 have very clearly what Dr Pike thinks, which he is saying, "Look, we can re-run it",
12 and obviously I'll be pressing Mr Moser on whether that is actually doable or not. It's
13 a flip side of the question I'm running past you.

14 **MS DEMETRIOU:** Yes.

15 **MR JUSTICE MARCUS SMITH:** So, if it is the case that baked into Harman's
16 approach is, "I would like to do this but let's be real about this, it can't be done,
17 practically speaking, because these things are too complicated, we need to do it
18 some other way", then that's great but I just need to know that's his thinking.

19 **MS DEMETRIOU:** Let me come back to that.

20 **MR JUSTICE MARCUS SMITH:** After the short adjournment, it would be very
21 helpful.

22 **MS DEMETRIOU:** Can I just make three brief points to follow on from the discussion
23 we've just been running, I'm really grateful for the discussion because we are really
24 getting to the nub of things.

25 Just going back to the European economic expert's report, that's in authorities 3,
26 tab 25, I was going to show you the next bit following on from the bit that Dr Pike

1 refers to. It's on page 1900.

2 **MR JUSTICE MARCUS SMITH:** The page again?

3 **MS DEMETRIOU:** 1900. I've shown you the part that Dr Pike relies on at 1899, at
4 a conceptual level, rerunning the algorithm it's there to establish whether or not there
5 is self-preferencing going on.

6 But if we go over the page to 1900:

7 "More generally, the research literature on algorithmic bias shows that producing fair
8 algorithmic outcomes is complex. The statistical formulation of fairness and
9 unbiased representations often results in lists of criteria that may be flawed
10 depending on the context. Are market shares and prices adequate criteria for an
11 unbiased presentation of products on e-commerce websites, or do they simply
12 perpetuate existing situations? Consumers may pay attention to product quality,
13 delivery conditions and other aspects. Factoring all these variables into an unbiased
14 presentation leads to inherent trade-offs. This makes it very hard to define a general
15 framework for the evaluation of bias and self-preferencing in search rankings or
16 displays."

17 **MR JUSTICE MARCUS SMITH:** That is making your point --

18 **MS DEMETRIOU:** That is making my point.

19 **MR JUSTICE MARCUS SMITH:** -- that it's actually rather difficult to do what I'm
20 suggesting.

21 **MS DEMETRIOU:** The second point I wish to make is this, which is that if we are
22 right that it's very difficult to do that, then Dr Pike simply has no methodology
23 because his position stands or falls on rerunning the algorithm, having stripped out
24 the non-discrimination, because as you've seen he is expressly disavowing any
25 independent investigation into consumer preferences.

26 **MR JUSTICE MARCUS SMITH:** Yes.

1 **MS DEMETRIOU:** And the third point that I want to come back to, and please
2 forgive me if I'm repeating myself, is the point about loss because it really is critical.
3 And can I try and explain again why we say even if Dr Pike is right, which we say he
4 is not, if he can re-run the algorithm and that can demonstrate what is in the
5 Buy Box, so assuming it can be done, then I accept that that would produce the
6 Buy Box offer in the counterfactual. And what one is then positing, because of
7 course -- of course Amazon, leaving aside the discrimination, which is the abuse,
8 Amazon's commercial incentive is to sell products which are attractive to consumers.

9 **MR JUSTICE MARCUS SMITH:** Yes.

10 **MS DEMETRIOU:** So, leaving aside the abuse, one would imagine that Amazon's
11 algorithms, stripped of the abuse, would be analysing trading-off delivery times and
12 price.

13 **MR JUSTICE MARCUS SMITH:** Ms Demetriou, I think you are absolutely right, that
14 is what Amazon will be striving to do. And if you can't do a reconstruction in the
15 manner that we've been debating, then you'll say, "Well, what would Amazon do,
16 given we can't reconstruct the algorithm?" Yes, they try and reflect consumer choice
17 because they want to sell more widgets and everything else.

18 **MS DEMETRIOU:** Yes.

19 **MR JUSTICE MARCUS SMITH:** I get that. If though it is the case that you can
20 re-run the algorithm, stripped of the abuse, and Amazon have simply made an error
21 but a non-abusive error in how they evaluate the consumer choices, in other words
22 they've done themselves a disfavour, they just got it wrong, then I fail to see how that
23 is causatively related to the abuse, and you agree with that.

24 **MS DEMETRIOU:** I agree with that.

25 **MR JUSTICE MARCUS SMITH:** So, the key question is not I think your third point,
26 but your first and second points, which is how do you do it?

1 **MS DEMETRIOU:** Sir, they are all key questions, and let me have another go at the
2 third point. Because I do accept that if Amazon make a mistake that's not something
3 that we can claim in relation to. But let's say that one strips out -- so say I'm wrong
4 on my other points, let's say that you can strip out the non-discriminatory elements of
5 the algorithm, what you assume you would be left with is an algorithm which in
6 Amazon's view reflects consumer choice in some way.

7 **MR JUSTICE MARCUS SMITH:** Why do you have to make the assumption then?

8 **MS DEMETRIOU:** Because the purpose of the algorithm --

9 **MR JUSTICE MARCUS SMITH:** Because that's assuming they don't make
10 a mistake.

11 **MS DEMETRIOU:** Well, let's say -- it doesn't matter or -- they may or may not make
12 a mistake, but what they'd be striving to do, what the algorithm would be striving to
13 do --

14 **MR JUSTICE MARCUS SMITH:** Yes. You're talking about the non-abusive
15 algorithm here?

16 **MS DEMETRIOU:** This is the algorithm stripped of the abuse.

17 **MR JUSTICE MARCUS SMITH:** Yes.

18 **MS DEMETRIOU:** If you re-run -- let's say take Dr Pike's approach --

19 **MR JUSTICE MARCUS SMITH:** Let's assume Dr Pike is right, you can strip it out --

20 **MS DEMETRIOU:** Say Dr Pike is right, you rerun the algorithm. Almost
21 *ex hypothesi* that algorithm, stripped of the abuse, would be the algorithm that
22 Amazon -- so you take out the abusive element, what you are left with is something
23 which presumably Amazon believes, rightly or wrongly, reflects consumer choice.

24 **MR JUSTICE MARCUS SMITH:** Why does Amazon's belief comes into it though?
25 Who cares?

26 **MS DEMETRIOU:** How it's set up to reflect consumer choice, otherwise what is it?

1 **MR JUSTICE MARCUS SMITH:** It's a non-abusive algorithm.

2 **MS DEMETRIOU:** A non-abusive algorithm has to have inputs relating to price --

3 **MR JUSTICE MARCUS SMITH:** The abuse you are focusing on is the

4 pre-disposition in favour of Amazon logistics, that is what you are alleging.

5 **MS DEMETRIOU:** Yes.

6 **MR JUSTICE MARCUS SMITH:** Great. You strip that out. Anything else, however

7 it operates, is not a pleaded abuse.

8 **MS DEMETRIOU:** Right. So, let's say the rightly or wrongly --

9 **MR JUSTICE MARCUS SMITH:** Let's say wrongly -- I mean of course I'm sure you

10 are right, Amazon are going to be trying their level best to sell as much as they can,

11 actually at as high a price as they can, but that's what they will be trying to do. And

12 in order to do that they need to understand consumer preferences. I get that. But

13 even Amazon might make a mistake and what I'm saying is if you can do the Dr Pike

14 exercise then once you stripped out the abuse, anything that remains is simply what

15 Amazon have done in a non-abusive way; and that must represent the starting point

16 for a quantification of the outcome of the non-abusive case and the quantification of

17 loss.

18 **MS DEMETRIOU:** That's right. So, if the algorithm run in that way and has

19 produced a product which is £9 and three days, then one quantifies the loss as being

20 £1 in relation to --

21 **MR JUSTICE MARCUS SMITH:** If the algorithm operates in a certain way that

22 operates as the starting point for working out what the loss is, yes.

23 **MS DEMETRIOU:** Yes. But my point, at step 3, is that let's say that the algorithm --

24 so Dr Pike's rerunning of the algorithm, produces a product which is, I don't know, as

25 I said before, £10.10, but one-day delivery, because that's what the algorithm

26 produces, rightly or wrongly, then the difference between -- the loss that's suffered,

1 or whether loss is suffered on that basis, will depend on comparing the offer that was
2 purchased, so £10, three days, with the offer that would have been there in the
3 counterfactual which is £10.10 if one day, and working out whether that represents
4 first of all a loss to consumers, and that would depend on how consumers relatively
5 prefer or trade-off those competing things, and if so what loss. And you can't do that
6 exercise, you can identify what was in the Buy Box in the counterfactual, but you
7 can't do that quantification exercise without examining consumer preferences, and
8 that's my third point.

9 **MR JUSTICE MARCUS SMITH:** I think there is a Banque Bruxelles Lambert point
10 in there, isn't there?

11 **MS DEMETRIOU:** I'm so sorry, sir?

12 **MR JUSTICE MARCUS SMITH:** A BBL point in that you are trying to quantify the
13 loss that arises out of the abuse, not a loss that is coincidental or unrelated to the
14 abuse.

15 **MS DEMETRIOU:** We are trying to --

16 **MR JUSTICE MARCUS SMITH:** Which is what Lord Hoffmann was getting at.

17 **MS DEMETRIOU:** We are trying to identify the loss that arises from the abuse, and
18 so if what you have stripped of the abuse, so take -- let's make it a simpler example:
19 the actual offer £10, three days, let's say you have an offer -- absent the abuse you
20 rerun the algorithm, and what you would have got is an offer of £10, two days, so the
21 same price but a better deal for consumers because they have a speedier delivery,
22 then that is loss undoubtedly to the consumer.

23 **MR JUSTICE MARCUS SMITH:** Yes, of a day.

24 **MS DEMETRIOU:** And the question is what pound sign do you put on that loss.

25 **MR JUSTICE MARCUS SMITH:** I see. If all you are doing is converting the
26 nonmonetary into the monetary then I understand what you are saying.

1 **MS DEMETRIOU:** It's not all you are doing because it's also --

2 **MR JUSTICE MARCUS SMITH:** That's all you are doing in that example.

3 **MS DEMETRIOU:** In that example.

4 **MR JUSTICE MARCUS SMITH:** In that example you have the same price, but you
5 have a more advantageous delivery speed of one day, that is a loss, it needs to be
6 quantified, yes, I get that.

7 **MS DEMETRIOU:** And in my slightly more complicated example, which is £10.10
8 and one day -- you have to work out the trade-off that consumers place on those
9 things. So, you can say, well that's what the algorithm would have produced. But
10 there are two questions: does that represent loss? So, it might be that consumers
11 value the 10p saving over a delivery speed, in which case it's not loss at all; or it
12 might be that they place a greater value on delivery speed, in which case it is a loss,
13 but you have to quantify it and that's why there's no getting away from looking at
14 consumer preferences. Or £9.99 for four days. So, Dr Pike would say well that's 1p
15 of loss, and we say perhaps there's no loss at all. So that's really why, as I say,
16 there's no getting away from looking at consumer preferences.

17 Sir, is that a convenient moment? I now don't think we are going to be done in
18 a day.

19 **MR JUSTICE MARCUS SMITH:** No, it's entirely our fault, and it's been very helpful,
20 if I may say so, to explore all this. We will resume then at 2.00.

21 But the question about practicability of the rerunning exercise and Mr Harman's view
22 on that is something which would really assist.

23 **MS DEMETRIOU:** I understand, sir. We also have on our list the revised Class
24 definitions.

25 **MR JUSTICE MARCUS SMITH:** Because it rather makes the question we are
26 pressing you on certainly different, and I think easier if Mr Harman's position is that

1 the rerunning exercise is just not practicable. And I'm not asking for a right or wrong
2 answer, I'm asking for what Mr Harman's view is as an expert in this area, knowing
3 how one can run counterfactuals in relation to complex algorithms, and that is
4 something on which we do need to be educated. We are not expecting certainty but
5 what we are expecting is an understanding of how Mr Harman expects to do it,
6 because that really goes to the core of the Microsoft Pro-Sys test in terms of
7 methodology.

8 **MS DEMETRIOU:** I understand.

9 **MR JUSTICE MARCUS SMITH:** There may be, I'm not sure, there may be
10 a difference between the experts on that very fundamental question of whether
11 a counterfactual algorithm can actually be constructed.

12 **MS DEMETRIOU:** Yes.

13 **MR JUSTICE MARCUS SMITH:** Dr Pike clearly says yes there can be, I'm sure
14 Mr Moser will expand on that. Mr Harman's position is I think -- not sure if it's entirely
15 my fault, more equivocal on my understanding but I want that equivocation removed
16 by reference to what he said.

17 **MS DEMETRIOU:** Thank you.

18 **MR JUSTICE MARCUS SMITH:** Thank you very much. We will resume at 2.00.

19 **(1.00 pm)**

20 **(The short adjournment)**

21 **(2.00 pm)**

22 **MR JUSTICE MARCUS SMITH:** Ms Demetriou, good afternoon.

23 **MS DEMETRIOU:** Sir, I'm going to address both my pieces of homework for the
24 lunchtime adjournment. Can I just deal quickly because it's the shorter point on the
25 proposed revised Class definition.

26 **MR JUSTICE MARCUS SMITH:** Yes, thank you.

1 **MS DEMETRIOU:** I can deal with that very briefly. So that's, if you pick up the
2 pleading, please, which is core bundle tab 11, page 172.

3 **MR JUSTICE MARCUS SMITH:** Yes.

4 **MS DEMETRIOU:** We think the simplest way of achieving the change, so as to align
5 ourselves with what the tribunal said in Sony, is if you have paragraph 81 there, so:

6 "All Relevant Purchasers, who, during the ... "

7 If you strike through "Relevant" and put "Class" with a capital C "Period". And then
8 over the page on page 173, if we amend subparagraph (c) at the top of the page, so
9 strike through "Relevant", so you have a new definition which says, "Class Period",
10 and then "means the period between 14 November 2016 and [14 November 2022]",
11 that does the trick. And then elsewhere in the pleading we have the definition of
12 relevant period, which is the period of the claim.

13 **MR JUSTICE MARCUS SMITH:** Yes, I see. Thank you.

14 **MS DEMETRIOU:** Thank you.

15 In relation to the points that you put to me just before the lunchtime adjournment, the
16 short answer is that Mr Harman hasn't addressed in his report specifically this point
17 about rerunning the logarithm. I keep saying logarithm. Algorithm. You know what
18 I mean.

19 **MR JUSTICE MARCUS SMITH:** Yes indeed.

20 **MS DEMETRIOU:** If we go to Mr Harman's first report, so core bundle 1, tab 12,
21 page 275, you'll see there, and this is also elaborated on in one of the appendices,
22 that Mr Harman's proposing to request data and information from Amazon, and you
23 see a list of the data, that's also set out in appendix D, and he is asking for the
24 algorithm.

25 So, the key point that we make, can I take it in stages in a number of points, first of
26 all we say that -- of course nobody knows what the algorithm is going to look like.

1 So, we just don't know what it looks like. And we don't know, it's true to say we do
2 not know whether it will be possible to do what Dr Pike suggests, which is to strip out
3 the abuse and rerun it on the basis of publicly-available information.

4 Now, Mr Harman is sceptical that that will be possible, that was the point I was
5 making before lunch.

6 **MR JUSTICE MARCUS SMITH:** Where does he say that?

7 **MS DEMETRIOU:** He doesn't say that.

8 **MR JUSTICE MARCUS SMITH:** Right.

9 **MS DEMETRIOU:** Sir, I think the reason he doesn't say that is because what he's
10 seeking to do is set out a methodology in accordance with the Pro-Sys test to
11 establish loss and for the reason I'll come back to, simply rerunning the algorithm is
12 not capable of achieving that goal. So simply rerunning the algorithm cannot lead to
13 quantification of loss. I will come back to that point if I may.

14 **MR JUSTICE MARCUS SMITH:** Okay.

15 **MS DEMETRIOU:** So --

16 **MR JUSTICE MARCUS SMITH:** I mean, Ms Demetriou, one of the problems with
17 having very learned experts is that they make assumptions about our knowledge
18 which don't necessarily justify the true state of our knowledge. For my part, I can
19 quite see that there are likely to be difficulties in extracting from an algorithm the
20 abuse and rerunning it.

21 **MS DEMETRIOU:** Yes.

22 **MR JUSTICE MARCUS SMITH:** But of course, that is what I think, and Mr Moser
23 will of course assist us on this, that seems to be the way Dr Pike is doing it.

24 If there is a difference between the experts on this, no doubt to them, rather trite
25 point, I'd quite like to know and for my part I wonder if both experts wouldn't mind just
26 closing out this point and explaining what they are thinking and clearly they don't

1 know what is possible, but it does seem to me that looking at the Microsoft Pro-Sys
2 test, you may be right, that one could proceed straight from algorithm to loss without
3 looking at a reconstructed abuse-excluding-algorithm. For my part, I would be much
4 more comfortable if that was something which was informed by Mr Harman's
5 conscious decision that this was probably not going to be possible.

6 **MS DEMETRIOU:** Yes.

7 **MR JUSTICE MARCUS SMITH:** Than him simply not addressing it at all, and
8 equally I do think that Dr Pike is entitled to explain -- we've only seen a couple of
9 sentences where he's saying "I can rerun this", to take account of the same point,
10 because it does seem to me that it is just the sort of point that we ought to be
11 thinking about in terms of triability.

12 **MS DEMETRIOU:** Yes.

13 **MR JUSTICE MARCUS SMITH:** And I just see it as a gap that arises out of
14 a mismatch between the experts' very elevated understanding and our very
15 non-elevated understanding of the point.

16 **MS DEMETRIOU:** Sir, I understand that. May I ask how that would most
17 conveniently be approached by us from the Tribunal's perspective?

18 **MR JUSTICE MARCUS SMITH:** I think a very short statement --

19 **MS DEMETRIOU:** Yes.

20 **MR JUSTICE MARCUS SMITH:** -- from each. Mr Moser, is that something that you
21 have a problem with?

22 **MR MOSER:** Sir, provided that our statement can be responsive, because we've
23 already said what we are going to do.

24 **MR JUSTICE MARCUS SMITH:** That is understood. It has arisen out of our
25 questions of Ms Demetriou. I don't want this to become a major point, it's simply, as
26 I see it, our need to be educated that we are addressing.

1 **MS DEMETRIOU:** I understand.

2 **MR JUSTICE MARCUS SMITH:** Nothing else.

3 **MS DEMETRIOU:** No.

4 **MR JUSTICE MARCUS SMITH:** And you will, I'm sure, want to go on to address the
5 causality point that lies at the end which you say means that further work needs to
6 be done irrespective of the possibility of this, and we are not in any way gainsaying
7 that, we will think about it very hard, but it does seem to me that there is this anterior
8 point where we would like to know what both experts are thinking.

9 **MS DEMETRIOU:** Sir, entirely understood and we will do that. We will do that.
10 I entirely understand that.
11 Without prejudice to that exercise, may I make just a few --

12 **MR JUSTICE MARCUS SMITH:** No, of course. Absolutely.

13 **MS DEMETRIOU:** -- short submissions?

14 **MR JUSTICE MARCUS SMITH:** Absolutely.

15 **MS DEMETRIOU:** Thank you. So, I just want to explain -- I want to give you one
16 illustrative point of why we say that it doesn't seem to be a straightforward exercise
17 and could I just ask you to turn up --

18 **MR JUSTICE MARCUS SMITH:** Sorry, this is the rerunning of the --

19 **MS DEMETRIOU:** The rerunning of the -- so just one example. If you could go to
20 core bundle 1, tab 16, this is Mr Harman's supplementary provisional report,
21 page 385. He's extracted at the top of the page some references to the European
22 Commission decision and if you look at subparagraph (II), so this is from the
23 Commission's decision:
24 "While Amazon Retail offers 'could not be rated by customers on the website' in
25 normal circumstances, the European Commission 'identified ... transactions where
26 [it] had been rated by customers as a result of a technical error."

1 And we believe to the best of our knowledge that the same factual position pertains
2 in the United Kingdom. So, in other words, that Amazon Retail, so Amazon Retail
3 cannot be rated by customers, cannot be given a star rating by customers. So, the
4 reason why this provides an example of why it's difficult simply -- why we are not
5 talking about simply stripping out discriminatory provisions, is that -- let's assume, for
6 example, that FBA sellers who have four stars, who are rated four stars by
7 customers are treated by the algorithm because of the bias as having five stars, so
8 let's assume that's one of the biased things that happens, and they are treated as
9 having five stars for no other reason than the fact that they use Amazon Logistics
10 services and Delivery services.

11 So, it might be possible to strip out the effect of the fifth star from those FBA
12 retailers --

13 **MR JUSTICE MARCUS SMITH:** But you wouldn't know what the counterfactual star
14 rating should be.

15 **MS DEMETRIOU:** Yes. You wouldn't know -- for example, for Amazon Retail
16 products you wouldn't know -- you would have to make an assumption as to what
17 they would be given in terms of stars or weighting. So that's why we say that it's
18 unlikely, we say it's not going to be as simple as simply stripping things out,
19 assumptions are going have to be made. I just wanted to provide that example to
20 illustrate --

21 **MR JUSTICE MARCUS SMITH:** Ms Demetriou, if this was a question of economics,
22 I don't think we would be having this conversation, we would just take it away and
23 think about it, but because it is an area which is somewhat outside our comfort zone,
24 I don't think we would feel comfortable in -- if we have to, I mean we may not have to
25 but if we were having to say something definite about this --

26 **MS DEMETRIOU:** I understand.

1 **MR JUSTICE MARCUS SMITH:** -- I wouldn't be feeling comfortable on the material
2 we have. I can see both sides but we really do on this sort of point need to proceed
3 by reference to the best evidence and although I am very confident we could stitch
4 together something which would enable us to answer the question for the purposes
5 of the carriage dispute, I don't think it's fair to either expert for us to proceed
6 accordingly given that there is a low-cost option in achieving confidence as to what's
7 intended. Because, as I say, if this is something which isn't capable of being done
8 very, very quickly by Mr Harman then I'll want to know because we see this as a bit
9 of a no-brainer as to how he thinks he's going to do it. And similarly with the other
10 expert, it's really our own knowledge gap that we are trying to fill and it's no more
11 complex than that.

12 **MS DEMETRIOU:** I understand and nothing I'm saying is intended to gainsay that.
13 So, we will of course do that.

14 **MR JUSTICE MARCUS SMITH:** I'm very grateful. But this is also very helpful to
15 have illustrations, concrete illustrations, you showed us earlier what the
16 EU Commission said about the in-principle position and the in-practice position,
17 again that's something which we could certainly use but it just seems to us --

18 **MS DEMETRIOU:** I understand.

19 **MR JUSTICE MARCUS SMITH:** -- we ought to have the best efforts on this.

20 **MS DEMETRIOU:** Sir, I understand. So just sort of cutting to the chase in terms
21 of -- I'm going to stop now on this because we'll come back -- but cutting to the
22 chase in terms of what we say, so of course if it transpires that having seen the
23 algorithm Mr Harman's suspicion is wrong and in fact the algorithm can easily be
24 stripped of the abuse and rerun, then of course that is what Mr Harman will do too,
25 for the reason that we canvassed before lunch, and what that will produce is the
26 counterfactual Buy Box product.

1 But you have my point that I was making before, that that's only the first stage
2 towards determining loss.

3 **MR JUSTICE MARCUS SMITH:** I have that point. Look, it may be that this point
4 evaporates in that one expert says: "Look, I don't know, I would expect that I have to
5 pivot down a proxy to the alternative", which might be Mr Harman's position; and the
6 other expert is saying: "Look, I don't know but I reckon I can do it but if I can't then
7 I will have to do something like finding an alternative". It may be that they are in
8 exactly the same position on this. But rather than guess, we would like to know.

9 **MS DEMETRIOU:** Yes, absolutely.

10 And on that point, sir, on that latter point, we would say that what Mr Harman has
11 endeavoured to do in his report is produce a methodology which is apt to address
12 any likely defence that Amazon may set up. I think the key point is, if Dr Pike is
13 wrong about stripping out the counterfactual and rerunning it, he doesn't have a plan
14 B. Whereas Mr Harman very much has a plan which can cater for all events once
15 we've seen the algorithm. That is really the submission I want to make.

16 **MR JUSTICE MARCUS SMITH:** I understand. Your point is that Mr Harman is of
17 a pessimistic bent and he's emphasised plan B over A because he doesn't think plan
18 A is likely to be realistic. That may be his thinking and I completely understand that if
19 that's the case.

20 **MS DEMETRIOU:** And also, what Mr Harman's seeking to do is quantify loss and on
21 any view plan A can't quantify the loss.

22 **MR JUSTICE MARCUS SMITH:** We have your separate loss point.

23 **MS DEMETRIOU:** You have my separate point on that.

24 **MR JUSTICE MARCUS SMITH:** That we will think about. But it doesn't, I think,
25 remove our interest in why plan A has been light-pedalled.

26 **MS DEMETRIOU:** Yes. Sir, I understand that. And you have my point also that

1 Dr Pike's quantification methodology is apt to be over-inclusive because he would
2 include a product -- going back to my example, he would include a product that cost
3 £9.99 with a five-day delivery window, as representing consumer loss, even though
4 we would say that that doesn't represent loss at all and so that is why you do need to
5 analyse, because you have that point.

6 **MR JUSTICE MARCUS SMITH:** Yes, there's a very interesting and philosophical
7 question about subjective evaluation here. I see that.

8 **MS DEMETRIOU:** Sir, I wanted to go on to look at Mr Pike's exclusionary abuse,
9 which I think I can do relatively swiftly, and then there are a few points just to pick up
10 that I haven't dealt with that are points made against us by Mr Hammond. I don't
11 think I'm going to be that much longer. Can I approach things in that order?

12 If we go to Mr Pike's first report, please, in core bundle 2, tab 19, page 559. You'll
13 see at the bottom of the page the heading "Harm from exclusionary abuse".

14 **MR JUSTICE MARCUS SMITH:** 552, was it?

15 **MS DEMETRIOU:** 559, at the bottom of the page.

16 **MR JUSTICE MARCUS SMITH:** Thank you.

17 **MS DEMETRIOU:** And do you have the heading at the bottom? Thank you.

18 Dr Pike says that harm to consumers arises from the exclusionary abuse in two ways
19 and we see that there. So, first, harm incurred as a consequence of discrimination,
20 which then also has exclusionary effects. And, two, harm incurred as a result of
21 exclusionary effects, either on fulfilment rivals or on marketplace rivals. So those are
22 the two categories.

23 Taking the first category, we say it's unclear how this category of loss, the first one,
24 is any different to the loss we've just been discussing under the exploitative abuse, it
25 just seems to be the same thing, and if you go over the page and look at
26 paragraph 385, you can see that the plan for estimating this loss is the same as the

1 previous methodology, so it's entirely unclear whether this is additional loss or not.

2 The second category, harm caused to fulfilment rivals, so, for example, Royal Mail,
3 or to marketplace rivals, for example eBay presumably, and starting with the harm
4 caused to fulfilment rivals, which they say is passed on to the Class, to the extent
5 that Amazon's abuse has disincentivised sellers from using cheaper fulfilment
6 options and making cheaper offers to consumers, this is something which forms our
7 further loss in Ms Hunter's pleading, but Mr Hammond's version of this loss is much
8 less clear.

9 Could we go back, please, to core bundle 1 to look at Dr Pike's position paper. So,
10 it's core bundle 1, tab 9, page 118. And paragraph 50 addresses the three different
11 possibilities. And we can see subparagraph (a):

12 "First, there might be no overcharge, at least not yet. For example, if the
13 exclusionary conduct coerces third party sellers to use FBA, thereby increasing
14 FBA's share of fulfilment, and reducing the share of rivals, and increasing their costs,
15 then Amazon may have created the opportunity [for] overcharge ... [But it may not
16 have chosen] to exploit that power to charge more than rivals..."

17 So, we say on (a) there is no overcharge and it's entirely unclear how there would be
18 any loss at all to potential class members.

19 "(b) ... there might be an overcharge, but not relative to the prices of rival fulfillment
20 services in the market, only relative to an even lower price that Amazon might have
21 offered absent the discrimination ..."

22 So, in other words, Amazon's keeping the same pricing when it could have offered
23 even lower prices. And we say that it's implausible that that has led to any loss
24 because if rival logistics providers were not cheaper than Amazon in the
25 counterfactual, we say, would have had no commercial incentive to provide its
26 logistics service more cheaply. So, this seems to be a theoretical rather than

1 anything that plausibly could have led to loss in fact.

2 Then we have at (c), and this is similar to our allegation of further loss, that Amazon
3 actually charges more than rival fulfilment services, so (c) maps on to our Further
4 Loss.

5 The real issue comes at paragraph 51 where Dr Pike seems to be saying that (a)
6 and (b) would still have led to consumer harm. So, he says:

7 " ... I also do not rule out the possibility that Amazon is not ... [overcharging] for FBA
8 relative to the counterfactual. As such there might be no pass-on."

9 We would say stop there, therefore no loss:

10 "However, again I note that in that case, Amazon would still be foreclosing the
11 competition, and in the process would still be harming consumers (through the
12 discrimination against non-FBA sellers that leads to consumers buying from higher
13 priced sellers that face reduced competitive constraints), even if the foreclosure of
14 the fulfilment market, while having the potential to raise fulfilment prices, had not yet
15 done so."

16 And with very great respect to Dr Pike, we simply don't understand that, we don't
17 understand how there could be no high elevated charge, no pass-on to consumers
18 but still loss. We are at a loss to understand it.

19 Now, back to Dr Pike's first report, to look at the second element of his exclusionary
20 abuse. So, we are back to the second core bundle, please, tab 19, page 560. And
21 you will recall that the second element of the exclusionary abuse relates to
22 competition between Amazon and rival marketplaces, so presumably such as eBay.
23 And at paragraph 389, Dr Pike proposes to assess the extent to which the
24 discrimination allows Amazon to build market share at the expense of its rivals and
25 thereby protect the position of Amazon Marketplace.

26 And we say it's very hard to understand how that could cause loss to the Proposed

1 Class. If it does cause any harm to the Proposed Class, it must be very remote
2 indeed because any primary harm would be caused to Amazon's rivals, so eBay,
3 and their customers, who are not members of the Class.

4 And so, we regard this category of loss as implausible and have not pleaded it.

5 Moreover, Dr Pike has put forward no means of quantifying this harm to the Class.

6 He refers at paragraph 389, he says:

7 "To do so I will identify and quantify any supra-competitive commission that Amazon
8 enjoys as a result of its dominance. I will then assess the extent to which that is
9 protected by barriers to entry ..."

10 Etcetera, etcetera. We do not understand how Dr Pike proposes to identify and
11 quantify any supra-competitive commissions that Amazon earns, let alone identify
12 that they are caused by the abuse that is alleged in this case. So that's, I think,
13 a reason to prefer our claim, which is much more tightly focused on loss that has
14 actually been suffered.

15 So, members of the Tribunal, that's what we say about methodology.

16 There are some sweep-up points, if I can put it that way, that I skipped over, and I'd
17 like to go back to. One of the points made by Mr Hammond in relation to my clients'
18 Proposed Class is that they say that it's over-inclusive because it includes large
19 numbers of claimants who will not have suffered any loss. That's their point. And
20 so, what Mr Hammond appears to be saying, we can see this perhaps, we can pick it
21 up from the skeleton argument, it's paragraph 3(d) (ii) of my learned friend's
22 skeleton. Maybe that reference is wrong. 54, paragraph 54.

23 **MR JUSTICE MARCUS SMITH:** 54(b)?

24 **MS DEMETRIOU:** 54(a):

25 "These forms of loss only apply to a sub-set of purchasers from FBA sellers. This
26 means that neither purchasers from non-FBA sellers, nor purchasers from the 86-88

1 | per cent of unaffected FBA sellers are captured."
2 | And so, the point being made is that our Class definition is overly-inclusive.
3 | And we say really that's a surprising point for Mr Hammond to make in
4 | circumstances where his Class definition is materially similar apart from the
5 | exclusion of business users. So, in those circumstances broadly the same number
6 | of claimants should have suffered loss. It's difficult to see how Ms Hunter's class
7 | can include swathes of members who have not suffered loss in circumstances where
8 | Mr Hammond's does not. But in any event, we say the point's a bad one. I will take
9 | it quite swiftly and see what Mr Moser says about it.
10 | Dr Pike sets out some analysis in his report, in his first report, to explain why the
11 | number of unaffected shoppers in his class would be, in his own words, vanishingly
12 | small. So, he observes, for example, that most buyers use Amazon frequently,
13 | making more than 10 purchases a year, and he says any purchase has a 73 per cent
14 | chance of being affected and so the number of purchasers who didn't make at least
15 | one affected purchase is vanishingly small. That's what he says.
16 | And precisely the same reasoning would apply to our claim, given that the class
17 | definitions are in this respect materially identical. And so, we do not think that this is
18 | a good point. If it were a good point, it would equally afflict Mr Hammond's claim, but
19 | it is not a good point.
20 | Market definition. In paragraph 63 of my learned friend's skeleton, they claim that
21 | Mr Harman has set out no methodology for determining market definition and
22 | dominance and instead relies entirely on the Italian Competition Authority's analysis.
23 | I'm not sure I need to take you back to it but there is a rather full section in
24 | Mr Harman's report showing that that's not correct, and he says that he planned --
25 | perhaps we should look at it. So, if we go to Mr Harman's first report, please, so
26 | core bundle tab 12, page 239. He explains in section 4.2 that he had plans to use

1 the established framework used by the CMA and by the Commission based on the
2 hypothetical monopolist test. He explains how that test is applied and how a relevant
3 market can be defined on the basis of qualitative evidence where there may be
4 limitations on the available quantitative data.

5 Then he goes on at 4.3 and 4.4 to survey a range of relevant regulatory precedents
6 and you will see six listed, for example, at paragraph 4.3.1, and what those
7 regulators have concluded on product and geographical market definition.

8 Then if you go on to section 4.5 on page 242, Mr Harman expresses his provisional
9 conclusion as to the likely result of his market definition assessment. And again, I do
10 make the point that this was filed before the CMA and the Commission, which, as
11 I showed you when I took you to the pleading, has found essentially the same as
12 Mr Harman has provisionally concluded. Really, also, this is ample for the
13 certification stage, particularly in view of the guidance that this Tribunal and the
14 Court of Appeal have both given most recently in the Boyle case.

15 The threshold, really what one's looking at in terms of the Pro-Sys test is a plausible
16 methodology for quantifying loss and so one's not in the business at this stage, we
17 respectfully submit, of picking apart detail of market definition.

18 **MR JUSTICE MARCUS SMITH:** We are in no position to do that.

19 **MS DEMETRIOU:** And really the same point applies in respect of the complaint that
20 my learned friend makes about two-sided markets. Again, we say that that's
21 something that Mr Harman has acknowledged in his report and no doubt will be
22 a matter for trial but it's not something which goes to the matters that really lie
23 between us at this stage.

24 **MR JUSTICE MARCUS SMITH:** Indeed. I mean, I know you don't mean this but
25 the words "for trial" can lead to unfortunate outcomes. I'm thinking of the
26 Court of Appeal in McLaren. What you mean by "for trial" is for case management in

1 the post-certification period.

2 **MS DEMETRIOU:** Of course.

3 **MR JUSTICE MARCUS SMITH:** I mean, I'm as guilty as everyone else as saying
4 "for trial", but just so that we have it on the record, of course we would be managing
5 these proceedings, assuming one or other of you get certified, in exactly the same
6 way as we do with all the others with active case management going forward, it's just
7 that some questions are best parked for management later down the line because,
8 market definition being an excellent example, we simply can do no more than kick
9 the tires of what the experts have come up with and it would be quite surprising if
10 they had exactly the same market definitions. If there's nothing obviously wrong then
11 it isn't a point of differentiation, but we can't go further than that and work out who is
12 right because that, as you say, is a matter, this time I use the words advisedly, for
13 trial.

14 **MS DEMETRIOU:** Sir, that is exactly what I meant by way of shorthand.
15 I completely agree.

16 **MR JUSTICE MARCUS SMITH:** I'm a little bit McLaren sensitive, that's all.

17 **MS DEMETRIOU:** Of course, and of course I'm not saying that the Tribunal should
18 wash its hands of all of this until the actual trial. Of course, we recognise that
19 post-certification there will be active case management, but the question is what are
20 the key points of distinction between the respective proposed claims now, and this
21 on any metric really isn't a key point of distinction that the Tribunal should be
22 concerned about.

23 **MR JUSTICE MARCUS SMITH:** I think though it's probably worth putting on the
24 record that both parties have very sensibly approached this on the basis that we are
25 in the early stages, they are very helpfully focusing on the manner in which the case
26 is being put, we are looking in the broadest sense at Microsoft Pro-Sys triability and

1 it is in that spirit that we are hearing the points that you are running, we are trying to
2 work out which case goes forward and which case doesn't.

3 **MS DEMETRIOU:** Absolutely, and so I haven't alighted on every single point of
4 difference where we say our claim is better thought through, I have really attempted
5 or sought to identify the key points which are more central.

6 **MR JUSTICE MARCUS SMITH:** Ms Demetriou, it has been extremely helpful just
7 asking you questions and getting your very helpful answers in understanding what
8 the essence of the case is. I am sure we will get the same benefit with Mr Moser,
9 and we will be -- I won't say in a better position because you are both extremely
10 capable at presenting your clients' case, but we will be in a better position of
11 understanding the position after your submissions. So, thank you.

12 **MS DEMETRIOU:** Thank you very much, sir.

13 **MR BANKES:** Are you going to come back on the question of the starting date?

14 **MS DEMETRIOU:** I think, sir, I can't do any more than I showed you in the footnote.
15 So, our position -- I would like to hear Mr Moser first just because they haven't
16 explained on what basis they are able to go back more than six years, and I do say --
17 and we've pleaded it on the basis of the six-year limitation period.

18 **MR BANKES:** Let it rest on the footnote and we'll come back to it.

19 **MS DEMETRIOU:** We rest on the footnote.

20 **MR BANKES:** The other thing I noticed is you don't have a UK-incorporated
21 defendant, which they do. Are you comfortable that has no adverse impact on your
22 ability to obtain disclosure?

23 **MS DEMETRIOU:** Can I come back on that point?

24 **MR BANKES:** Please do.

25 **MS DEMETRIOU:** I wasn't expecting that question but it sounds like a good
26 question so I will take instructions and come back, thank you, sir.

1 **MR BANKES:** Thank you.

2 **MR JUSTICE MARCUS SMITH:** Mr Moser.

3 **Submissions by Mr Moser**

4 **MR MOSER:** Sir, I should start by explaining very briefly the absence of
5 Mr Rayment, who is on the pleadings, it is not through any disrespect to the Tribunal,
6 unfortunately he's unwell. But he is following proceedings remotely, so, he's here in
7 spirit.

8 **MR JUSTICE MARCUS SMITH:** And no doubt he will have a virtual Post-it note up
9 his sleeve to pass on to you in due course.

10 **MR MOSER:** Electronic Post-it notes have made their way.

11 I plan to make my submissions in a similar sort of order. First, some introductory
12 remarks, including the task for the Tribunal, and then some high-level observations
13 about the competing claims. Given the way that discussion this morning and this
14 early afternoon has developed, very helpfully, I am maybe going to say a little bit
15 more in my introductory remarks than I was planning to say and in particular about
16 the counterfactual and about the methodology.

17 Then I plan to cover, secondly, Dr Pike's methodology to the extent it hasn't already
18 been covered. Then, third, the criticisms being made of Dr Pike, in order to rebut
19 them. And finally, a further sweep-up look at Mr Harman's methodology to the extent
20 again it hasn't been covered in 1, 2 and 3 above.

21 Both PCRs before you take a similar line as far as the suitability of each other is
22 concerned. So, I'm not going to trouble you, they are both alike in dignity. There is
23 nothing there. Nobody is taking a point on who is the better lawyer on either side,
24 and that's also welcome, so we don't have to go there.

25 But we do say that there is clear blue water between the two and it is of course the
26 diametrically opposite reason that is advanced against me and that is all about the

1 experts' methodology.

2 As the Tribunal said in Pollack, we needn't turn it up but it's at paragraph 25.3 of

3 Pollack, the task at this stage of a carriage dispute is to find out what is the best

4 case-management outcome. That's the simple and flexible test. That's a direct

5 quotation. What is the best case-management outcome. And I would add that this

6 means what is more tractable and what is more triable. And of course, one has to

7 look at Pro-Sys and one has to look at Gormsen and the blueprint to trial. Not just

8 at trial, all the way to trial.

9 And most immediately of course to certification because we do not shrink from

10 saying that Mr Harman's methodology, and Ms Hunter's case will face some pretty

11 intractable problems at the certification stage, but before I start on that, some

12 bullet points about our methodology. We say that we are offering a pretty irresistible

13 methodology, we would have thought. We have a clear and simple counterfactual.

14 It will be what Amazon is already supposed to be doing, under the undertakings it's

15 given to the CMA and to the European Commission. It will be to remove from the

16 algorithm those aspects that have been found by those regulators, including the

17 Italian regulator, to be discriminatory, or at least found by the Italians, viewed on

18 a preliminary basis by the CMA and by the European Commission, as being

19 anticompetitive. And as is always the case in these matters, Amazon of course

20 admits nothing, but they have agreed to abide by these undertakings. And therefore,

21 they will already be doing that which Dr Pike says needs to be done to determine

22 both the counterfactual and therefore loss.

23 My learned friend took the Tribunal, just recently, to the EU expert's report. Can

24 I just turn that up briefly. Ms Demetriou took you to authorities bundle 3, tab 25, at

25 page 1900. It was some minutes ago, you will remember it. It's where the experts

26 say at the top of page 1900:

1 "More generally, the research literature on algorithm bias shows that producing fair
2 algorithmic outcomes is complex."

3 But, with respect, my learned friend misapplies this general statement. Of course,
4 it's right that it's a very complex exercise to look at an entire algorithm and work out
5 whether it's fair or not. But we are not starting from there, we are starting from
6 a position where we have a specific algorithm with certain specific elements of bias
7 that we already know about. There may be others, but we already know about
8 some, and we know from Dr Pike exactly how he plans to deal with that. And we
9 have that in Dr Pike's report at paragraphs 316 and 318. Sorry, that is
10 core bundle 2, page 547 behind tab 19. This is why I say that -- we've already set
11 out very clearly what we plan to do by way of the algorithm, which is why we say
12 prima facie we have nothing to say, but we will respond to whatever --

13 **MR JUSTICE MARCUS SMITH:** Which paragraph?

14 **MR MOSER:** Starting at 316, page 547. It is very straightforward. He says first he
15 plans to review the functioning of the algorithm and he has reason to expect that it
16 will contain a number of discriminatory provisions. These include but may not be
17 limited to those that relate to Seller Performance Rating, Seller Fulfilled Prime
18 programme, and something else, Multiple Offer Price Dispersion provisions.

19 So, he will then assess whether that is the case in the UK because those findings
20 that we talk about are for Italy, Europe. Now, we say that the CMA already gives us
21 a fair idea. But he'll assess that for the UK. Then 317, and that includes details on
22 the way input values are calculated.

23 So, he looks at Seller Performance Rating, and he says that includes data such as
24 delivery delays. We don't know at the moment what the aspects including deliveries
25 are. But we've used a proxy for now and we will see. There is not at the moment
26 any indication that delivery days are an element of the bias.

1 Then at 318 he says:

2 "Second, I plan to look at the outcomes of the algorithm that Amazon used to
3 allocate the Buy Box. As proposed in the EU economic experts report ... I would run
4 the algorithm without discriminatory provisions to understand the net effect of
5 the discrimination."

6 That is, in my respectful submission, a perfectly clear approach. And it corresponds
7 to the way that we have pleaded this, if we put that away and look at our claim form,
8 which is -- I'm sorry, we don't put it away, it's the same bundle but it's a different tab,
9 it's at tab 18, the first tab in this bundle, at page 450. What we say at paragraph 33
10 is:

11 " ... Amazon designed the FMA, Amazon's Buy Box algorithm, and applied it in the
12 UK during the relevant period and potentially beyond, to give preferential treatment
13 to itself and the third-party sellers that rely on Amazon's FBA service as their
14 logistics provider."

15 That's the allegation:

16 "Whereas the FMA considered other sellers' delivery delays to determine whether
17 their offering should win the Buy Box, it disregarded shipping delays when Amazon
18 was the designated shipper. It also made it nearly impossible for non-Prime offers to
19 win the Buy Box ..."

20 And so on. This is by reference to the Italian decision primarily, which, as I say, it's
21 the only one of the decisions that's a final decision after a full investigation. The
22 others are undertakings after preliminary views.

23 34:

24 "In sum, during the Relevant Period the effect of the FMA being configured in the
25 way described above meant that entrusting Amazon with the logistics of orders
26 improved the seller's chance of winning the Buy Box by assigning the maximum

1 value, equal to 1, to the performance evaluation feature of the third-party seller and
2 by giving them a Prime badge equal to 1, as opposed to 0 assigned to non-Prime
3 offers."

4 So, these are the two kinds of bias that were found in the investigation. One is
5 always giving the full marks to FBA sellers on Amazon for the Buy Box, and the other
6 is to give a 1 as opposed to a 0 for those who are not considered Prime ready.

7 What Dr Pike plans to do is strip out those two aspects, rerun the algorithm, and see
8 who would have won the Buy Box. And that is also what is the effect of the
9 undertakings given by Amazon to the CMA, and to the EU Commission.

10 **MR JUSTICE MARCUS SMITH:** So, I mean, just to cut to the chase, Mr Moser,
11 what you are saying is that the difficulty, or otherwise, of stripping out is actually in
12 itself theoretical because if Amazon have abided by their undertakings, and I'm sure
13 they have, the job is already done.

14 **MR MOSER:** Exactly.

15 **MR JUSTICE MARCUS SMITH:** All you will need is disclosure of two algorithms, as
16 it were, the pre-undertakings and the post undertakings, and you run your process
17 accordingly.

18 **MR MOSER:** Sir, you have stolen my payoff line, but absolutely. And that's an end
19 to it. And that is a process to which our pleading and our methodology is already
20 suited because that's exactly what we are proposing to do.

21 My learned friend's case, as developed and then, with respect, redeveloped this
22 morning and this afternoon, is by contrast both unnecessarily complicated, we say,
23 and far from clear. According to my notes, my learned friend started by saying that
24 Mr Harman would strip out the abusive bits of the algorithm, as a first step, and then
25 see where that takes one. As Mr Bankes pointed out, that is something that is
26 nowhere in Mr Harman's report. In his report he says he's going to do it all with

1 consumer preference. So, I was extremely surprised by this, and I was prepared to
2 stand up and make a submission about where is this in the report?

3 But as I perceived my learned friend's revised version of her case to be, it seems she
4 then resiled from that, indeed she went so far as to suggest that it couldn't be done,
5 at one point. Now, that was equally surprising because one thing that Mr Harman
6 had not suggested in his report, in all the criticisms that have been advanced of
7 Dr Pike, it has not been suggested at any stage before briefly perhaps today that this
8 was an exercise that could not be done. And in fact, if one looks at Harman 3, which
9 is perhaps the last occasion on which this could have been developed, that's in
10 core bundle 1, tab 8, page 84 at 2.5.1, the closest Mr Harman comes to discussing
11 this, as far as we can discern, is in the penultimate sentence of 2.5.1 where he says
12 about common ground between himself and Dr Pike:

13 "Fifth, we broadly agree that a review of Amazon's algorithms and their outcomes,
14 *inter alia*, would be useful in assessing Amazon's abuse."

15 Useful. He doesn't say there: "Oh, but by the way, it's all completely impossible",
16 and indeed had he said that it would have been marked with a red hand as being
17 their point number 1 front and centre.

18 Instead, my learned friend appeared to start with that submission this morning until
19 about 10 to 12 when that case seemed to run into difficulties and it eventually was
20 reversed, although in the final analysis, shortly before the end of the submissions, it
21 went to a position where it has been submitted on behalf of Ms Hunter that nobody
22 knows what the algorithm looks like but that Mr Harman is sceptical. That was the
23 latest. He didn't express that scepticism in Harman 3. But there we are. We will see
24 what he says in Harman 4.

25 But, sir, quite apart from the fact that we don't plan to change our methodology,
26 which stands as proposed by Dr Pike, there does seem to us to be a further fatal

1 problem for Ms Hunter in the way that her methodology is now put, and that emerged
2 in the discussions between the president and Ms Demetriou this morning around just
3 what it is that Ms Hunter is alleging would have happened in the counterfactual and
4 how that leads to a claim for loss. And that includes also Mr Bankes' point around
5 whether or not there is going to be a Buy Box in Ms Demetriou's counterfactual. As
6 I understand it, it is Ms Hunter's current position that whether or not there was going
7 to be a one Buy Box is somehow a matter for trial, but that it appears to be the
8 working assumption that there is and they don't take issue with a Buy Box, the
9 Buy Box it is said, and that was said in the skeleton argument to be fair, is not itself
10 an abuse. Fine. If so, Ms Demetriou was asked, well, what if Amazon's algorithm
11 did not perfectly predict the consumer preference in the Buy Box? What if there is
12 an innocent mistake, say? Now, in the innocent mistake case Ms Demetriou says
13 there would be no claim.

14 Well, that, however, on the methodology as we currently understand it, would be the
15 end of her case altogether, because if it is said that Mr Harman's methodology
16 cannot capture what would have happened in a revised algorithm, there is never
17 going to be a launch point for my learned friend's step 3, which is to compare
18 consumer preference against the content of the Buy Box, because they won't be able
19 to determine what the correct content of the Buy Box ought to have been.

20 So, I suspect they will have to fall back on the idea that everything has to be done by
21 consumer preference. But that doesn't get them home either. Because if everything
22 has to be done by consumer preference, then the President's question of yes, but
23 what would Amazon do, cannot be answered. Because what we have here is
24 an algorithm used by the world's most successful intermediary in a two-sided market
25 of this nature, Amazon, and they say, they've said it in paragraph 11 of their position
26 statement for this hearing, they say that consumer preference is already something

1 that they attend to.

2 Can I maybe just give you the reference.

3 **MR JUSTICE MARCUS SMITH:** Yes, of course.

4 **MR MOSER:** It's at core bundle 1, tab 7 and within it at page 77. Obviously, they
5 deny everything. But then on abuse in line 2 they say:

6 " ... a key point is that the Featured Offer is intended by Amazon to be the offer that
7 customers would likely choose if they compared all the available offers for a given
8 product. The factors which matter to customers when choosing the product to buy
9 include a range of matters, to which Amazon attends."

10 I will leave that there.

11 Now, apart from being slightly evasive, with respect, about what the matters are, it is
12 clear that Amazon is of the view that it is already trying to determine consumer
13 preference, that's what the algorithm already does. Under our methodology we don't
14 consider it's either necessary or indeed possible to try and second-guess consumers
15 preference in that way and it's not necessary because if you have an unbiased
16 algorithm, at the very least in two respects that have already been identified, then the
17 rest of the algorithm may be presumed to attend to matters of consumer preference,
18 including delivery times and so forth. At the moment, for instance, there's no
19 indication, I may have already said this in which case forgive me, but there's no
20 indication at the moment that the algorithm works unfairly in relation to delivery
21 times. And until there is such an indication, that is not going to be a relevant head of
22 loss.

23 So, you have the Amazon algorithm which leads to the contents of the Buy Box and
24 that is always going to be the case in any realistic counterfactual. You cannot have
25 a counterfactual where you say: "Aha, but consumer preference would lead
26 somehow magically for the contents of the Buy Box to be different to match the ideal

1 preference of the individual consumer or even the average consumer, whatever that
2 might be.” It's always going to have to be what can Amazon do to come as close as
3 it can, and that's what it says it's trying to do, and it has undertaken to the regulatory
4 authorities to do, what could Amazon do to come as close as it can to the consumer
5 preference for the Buy Box?

6 If Mr Harman disagrees and if Ms Hunter disagrees, then what they are really saying
7 is, well, Amazon should have a better product, it should be a better marketplace. But
8 that's a not competition law claim, that is not an abuse. That's an algorithm in that
9 hypothesis, and I'm not accusing them of this, but that is an algorithm that is not
10 doing its job well enough. Design a better algorithm, Amazon. That's not a task for
11 the Competition Appeal Tribunal. So that's not a claim that can be certified or that
12 can properly be brought.

13 So, again, it doesn't work. It doesn't work on either view. And really, in a way,
14 I could sit down here because unless it is thought that somehow the counterfactual
15 ought to be a magical box that will always contain the most preferred product or even
16 that Mr Harman is able to design a better algorithm than Amazon sitting at his desk
17 upstairs on the basis of a survey, a better algorithm that will better predict what
18 consumer preference would be in the Buy Box, even if that were relevant to the
19 abuse, which it isn't for reasons I've just explained, it's simply implausible to think
20 that Mr Harman is going to do better than literally the world's most successful
21 intermediation marketplace algorithm. Quite, quite implausible. So, with that
22 methodology you are never ever going to get home as far as loss is concerned.
23 And, as I say, as I read it, at the moment at least, Mr Harman is using consumer
24 preference both for the content of the Buy Box and for loss.

25 So, an entirely implausible methodology I'm afraid.

26 That is all I propose to say, at least on Mr Harman's methodology for now. Let's see

1 | what he comes up with in Harman 4. I'm going to say something more about the
2 | counterfactual and the something more is that it remains unclear, with great respect,
3 | whether in the counterfactual there is really one Buy Box or many, many Buy Boxes,
4 | because one of the things that is pleaded by -- I'm talking now about their
5 | counterfactual, one of the things that is pleaded by Ms Hunter, and we see that at
6 | core bundle 1, tab 11, page 197, at 134(b), that's their alternative. So, they have at
7 | 134(a), my learned friend went through this with the Tribunal --

8 | **MR JUSTICE MARCUS SMITH:** 134(b)?

9 | **MR MOSER:** Well --

10 | **MR JUSTICE MARCUS SMITH:** The reason I hesitate is I have a 134(a) and then
11 | a 135.

12 | **MR MOSER:** At page 197?

13 | **MR JUSTICE MARCUS SMITH:** I am so sorry, I'm looking at the small B rather than
14 | the big B.

15 | **MR MOSER:** There is now a --

16 | **MR JUSTICE MARCUS SMITH:** I'm looking at the wrong level of --

17 | **MR MOSER:** 134(b):

18 | "Amazon would not, through the Product Detail Page, have obscured from
19 | consumers (i) the existence and/or range of offers for the same product outside the
20 | Buy Box and (ii) that some of [them would] have been cheaper ..."

21 | So, this suggested to us, and I think we might be forgiven for thinking this, that they
22 | weren't suggesting a single Buy Box, because somehow, they won't have reflected
23 | the range of offers. And if there is not more than one Buy Box, even if there were
24 | two Buy Boxes, which was the European solution, though not the UK one, then you
25 | still wouldn't display the whole range of offers for the same product outside the
26 | Buy Box. So that's why we hesitate about accepting the proposition that they are

1 content to say there's only one Buy Box in their counterfactual.

2 **MR JUSTICE MARCUS SMITH:** Do any of the reports of Mr Harman shed light on
3 this or is that something which his report is agnostic on?

4 **MR MOSER:** Not obviously, but I will be corrected if I've missed it.

5 **MR BANKES:** Could I just listen carefully to what you are saying. Your expert's
6 case depends fundamentally on running historic data through an algorithm other
7 than that which was used at the time, and I had previously thought that the proposal
8 was that Dr Pike would adjust the algorithm so that we have a historic algorithm
9 which is non-abusive, but I think you've just said to us actually that's not necessary
10 because all he needs to do is take the algorithm that has emerged from Amazon's
11 changes as a result of the Italians and adopt that wholesale without any changes to
12 the algorithm? So, which is it? Is he going to amend it or is he going to take the
13 current one and run historic data through it?

14 **MR MOSER:** My position on this is, I hope, simple, which is that taking what we
15 already know is going to be the absolute bedrock starting point, and it's going to be
16 in my submission entirely sufficient for a successful claim in the CAT, he has said,
17 and it's at paragraph 316 of his report, he has said that when he gets disclosure he
18 will see what the other aspects of abuse might be. There might be something, might
19 being something about delivery, there might be something in those points. We've
20 been criticised that we haven't pleaded for instance some of the things mentioned in
21 the Commission's decision, so greater self-preferencing of Amazon Retail, say,
22 although we think actually, given the undertakings, the preferencing of Amazon
23 Retail and FBA sellers seems to be always on a par, but there we are. Something
24 like that may emerge. Or indeed the other aspect, the DPA that is mentioned. So,
25 that may happen. If that happens, then Dr Pike has already said his methodology
26 allows for him to strip those things out also and have an even more unbiased --

1 **MR BANKES:** Even if they are present in the non-abusive Italy algorithm that is now
2 being used?

3 **MR MOSER:** Yes. In which case, it wouldn't be non-abusive. And the Italians
4 would be wrong. But, you see, we are starting from the simple proposition that
5 you've identified, it's quite right, we are starting from the position that we strip out
6 simply the two instances of abuse that all the regulators seem to have focused on.
7 We don't exclude the idea, and this is really more responsive to this criticism where
8 they say: "Ah well, our methodology is so much more inclusive because we are
9 somehow going to also deal with Amazon Retail self-preference and something else
10 that the Commissioner suggested might exist." Well, we could do that as well. We
11 don't have to, and indeed we may not find that such a further abuse even exists.
12 The same is true of delivery times. So, we are perfectly happy to rest on the
13 algorithm as it exists. My learned friend says it's crude, I say it's workable. Because
14 that would not quite be a follow-on claim, but it would be very similar to recreating
15 what the CMA, the European Commission have asked so far, and indeed what the
16 Italian authority has found as a matter of decision. That's not binding on the court of
17 course but it can have regard to it.

18 And that's entirely sufficient for our purposes. And for the purposes of our claim,
19 bearing in mind that Dr Pike's current calculation of loss is based on those factors
20 and not on any further extraneous or extra factors.

21 So, coming back to triability and tractability, and I don't wish to be seen in any way to
22 take this lightly, but we have quite enough loss to be getting on with in relation to the
23 algorithm as now corrected, without going into the further complications of finding
24 other things wrong with it. I hope that answers the question.

25 To some extent, I admit there is a little bit of having your cake and eat it because we
26 say if we find anything else, we can add it. We would be criticised, I think, if we

1 | didn't say -- if there's something -- the disclosure comes -- and I don't for a moment
2 | accuse Amazon of this today, but if the disclosure comes and there's a glaring bit of
3 | anti-competitive abuse to do with how they treat delivery dates, for instance, well, we
4 | will take that into account, how could we not? At the moment, we don't and so we
5 | haven't pleaded it, for instance, because we have no indication that that is the case.
6 | I probably can say this now then I don't need to return to it, that's why we say that
7 | there's nothing in this criticism of saying, "Oh you didn't plead this from the
8 | Commission decision, you didn't plead that from the Commission decision." Well, at
9 | the moment these are hypothetical points. When the Commission in the paragraph
10 | cited by my learned friend is speaking about where it seems that Amazon Retail is
11 | being self-preferenced, that is part of the context of the abuse that we are already
12 | talking about. The FBA sellers and Amazon appear to be given the same score, top
13 | score, in the algorithm.

14 | The Commission hasn't found, and certainly hasn't found it necessary by way of
15 | undertaking, to ask Amazon to do something about extra self-preferencing of
16 | Amazon. No, the undertaking is to treat Amazon Retail and FBA sellers as the same
17 | as non-FBA. And, again, until we know otherwise, that is what we've pleaded, and
18 | we haven't felt the need to have more in our pleading as the regulators came out
19 | with every iteration of the decisions.

20 | So that is a brief canter through, not so brief, but a brief canter through what I say
21 | about Mr Harman's methodology.

22 | Can I just knock a few other things on the head that seem to persist in the
23 | submissions on the other side. So, the first one is this business about the time
24 | periods in relation to our claim as opposed to their claim. And that can be seen in
25 | core bundle 2, tab 18 at 444. The relevant period, the relevant period in our claim is
26 | at paragraph 16. And we say it goes from October 2015, which is the jurisdiction of

1 the Tribunal, to at least, at least June 2020. Two things to be said about at least
2 June 2020. The first is that we got the date June 2020 from the fact that, at least as
3 far as the Italian decision is concerned, it was said that that had been fixed in Italy in
4 June 2020. So, we don't know whether it might have been fixed elsewhere.

5 My learned friend Ms Demetriou is right when she says, well, the undertakings, the
6 forward-looking undertakings tell a different story, although, and Amazon is probably
7 not going to tell us, Amazon may simply be agreeing to an undertaking to do
8 something it's already done, why not? But we say at least till June 2020 because we
9 know from the Italian decision that that's when the Italians think something was done
10 by Amazon.

11 But it doesn't say to June 2020, this is the second thing about the phrase, it says to
12 at least June 2020, but it is open-ended, at least it was open-ended when we
13 pleaded it. The true time period is from October 2015 until, after the recent case
14 date of issue. And we say at least June 2020 because it may have ended then, but it
15 may not have ended then and if it hasn't ended then, then we are in fact taking it
16 through to -- I think it was January 2023 when this claim was issued. So, a longer
17 time period.

18 And why do we start in October 2015? Because we say that we didn't know, we
19 didn't have a date of knowledge for the relevant test until the Italian decision came
20 out, which I think was in December 2021, so we have taken it back to six years
21 before that.

22 So, in fact we have a more inclusive period than the other side and, also, I submit it
23 requires no amendment because -- well, it's sufficient in itself, at least June 2020
24 I say is sufficient to encompass the recent case law and we make no argument
25 about that. If it were thought necessary to specify that it doesn't go beyond the date
26 of issue, then that could be added.

1 **MR BANKES:** Certification, what will the Class definition be in relation to people
2 who make their first purchase between 2020 and 2023? Will they be in the Class for
3 certification purposes or out of the Class for certification purposes?

4 **MR MOSER:** They would be in the class.

5 **MR BANKES:** Even though you have pleaded it to end -- the only date you have
6 given is June 2020?

7 **MR MOSER:** No, we haven't, we've said at least 2020.

8 **MR BANKES:** Yes, but then the class is indistinguishable. You haven't pleaded that
9 it ends at any point.

10 **MR MOSER:** No, we haven't.

11 **MR BANKES:** So, it seems to me there's certain amount of uncertainty about the
12 class definition. You are going to pick a date sometime after 2020.

13 **MR MOSER:** Well, rather like my learned friend, I don't shrink from -- if it helps --
14 again, we can do that in very short order, if it helps, we can spell it out differently.
15 We have spelled it out several times in correspondence and in the skeleton
16 argument. If it looks more appropriate to say from October 2015 until such-and-such
17 a date, which is the date of issue, with a second sentence that says for the
18 avoidance of doubt, it may end in June 2020 if we find the conduct ceased then, then
19 I am perfectly content with that also.

20 **MR BANKES:** I will ask the Chairman here, but I think you need certainty of class,
21 and may doesn't give certainty.

22 **MR MOSER:** Well, the Class is certain.

23 **MR BANKES:** Is it?

24 **MR MOSER:** It's a question of what the facts at trial find. The same thing might be
25 said of my learned friend's --

26 **MR JUSTICE MARCUS SMITH:** No, I think the point that is being made against you

1 is a temporal uncertainty in that either you need to -- well, you need to remove the
2 "at least" because there are so many difficulties and it's then up to you whether you
3 stick to a June 2020 day or move to a date of issue date. But it's same point that we
4 encountered.

5 **MR MOSER:** That's true but I give the same answer.

6 **MR JUSTICE MARCUS SMITH:** Yes.

7 **MR MOSER:** In which case we would move to the issue date.

8 **MR JUSTICE MARCUS SMITH:** Yes, okay. I think I appreciate that you don't have
9 any draft amendments before you, but I think we would expect -- there's no need to
10 produce a draft until we've resolved the question of carriage, but I think we would
11 expect, were the case to proceed, then we would want an amendment to
12 paragraph 16 to make this point.

13 **MR MOSER:** I'm grateful.

14 **MR JUSTICE MARCUS SMITH:** Again, as with Ms Demetriou's Class
15 Representative, there's no criticism here, this is simply a crystallisation of law
16 following the Sony decision.

17 **MR MOSER:** Sir, yes.

18 There is then a further issue, which is the nature of Dr Pike's methodology. I don't
19 know to what extent the Tribunal need me to go through again Dr Pike's
20 methodology because I discern that it has been well understood what Dr Pike's
21 methodology is. And I've explained how we say it is aimed squarely at the concern
22 of the European Commission that led to the undertakings in the settlement decision
23 and the concern of the CMA in its notice that then led to the settlement decision in
24 this case.

25 At the moment, Dr Pike's methodology relies on information that is obtained in the
26 public domain. He's obtained information with some 30 million data points, which

1 has allowed him to make a preliminary analysis. This a different process than the
2 data scraping which Mr Harman engaged in. Mr Harman did his data scraping over
3 two periods, one over a day and the other over 22 minutes, whereas we have
4 a much wider scope of data on which Dr Pike has been able to base his preliminary
5 analysis. He assumes offer price, that's one factor. And he's used the seller
6 performance rating as a proxy.

7 Now, my learned friend has criticised the use of the seller performance rating but
8 that I suggest goes nowhere because in the final analysis he won't have to use the
9 Seller Performance Rating because he will have the actual information from Amazon
10 as to, for instance, what aspect of delivery times were taken into account. And the
11 key point that I've mentioned is that once Dr Pike has access to the algorithm, his
12 method allows him to identify all of the discriminatory factors that were operating on
13 the selection of the winning offer and to remove their impact if necessary if there are
14 more than we already know about, and I've had that discussion with Mr Bankes.

15 What my learned friend concentrated on as a criticism of Dr Pike is -- if I can just turn
16 that up again, it's at core bundle 2, tab 19 in his report and it's at page 556. And my
17 learned friend, you will recall, took you to paragraph 364 and the second half of that
18 paragraph between the two-hole punches:

19 "In the but-for world [the] algorithm [is] unbiased and sellers opted to set the same
20 price ..."

21 And so on. And my learned friend criticised this concentration on price and said: "Ah
22 yes, but what about delivery times?" Which is of course Mr Harman's constant
23 refrain about delivery times, that somehow Dr Pike has completely ignored that.

24 I just wanted to take you for completeness to paragraph 363, where he says:

25 "As discussed, it is not known precisely at this stage how Amazon's algorithm
26 functioned, which variables were considered and how these were weighed -

1 | however, based on what is known, price and seller performance were relevant
2 | factors. All else equal ..."

3 | That's an important phrase:
4 | "All else equal, I would expect that a lower-priced offer would be selected over
5 | a higher-priced offer."

6 | So that's the modelling that's gone on using the seller performance rating. And all
7 | else being equal of course includes the delivery times. If delivery times were treated
8 | differently in the algorithm, then it will emerge.

9 | The way that Dr Pike plans to run his two counterfactual scenarios to evaluate the
10 | impact of Amazon's conduct on prices is at page 555, just the page before. We've
11 | seen this page, but we haven't actually looked at the diagram. I just wanted to draw
12 | your attention, if I may, to figure 5 at the top of page 555, which is a pictorial
13 | illustration of the actual and the two counterfactual scenarios that Dr Pike modelled.
14 | So, the actual is on the left-hand side, the little figure is the customer, and the dotted
15 | square is the Buy Box. So, this is what happens in the actual: customer buys the
16 | Buy Box offer at £12. In the first counterfactual of the unbiased algorithm, where
17 | sales volume is constant, the customer buys from the Buy Box with a cheaper price.
18 | In the second counterfactual, which is the right-hand side one, where the sales
19 | prices are held constant, the customer buys from the Buy Box which has now moved
20 | to a cheaper price. And that's what's explained at 10.2 and then at 10.3, and the
21 | right-hand side version is where the sellers would have adjusted prices to achieve
22 | the same sales volumes.

23 | And that is where Dr Pike has used the SPR as a proxy for now, to approximate the
24 | star ratings to the unbiased algorithm.

25 | Criticism is made more in the skeleton than it was made orally today, but that there
26 | are two counterfactuals here, it's unclear how they work and so on. With respect it's

1 not. Dr Pike is going to model these two counterfactuals side by side, and then he's
2 going to let them flow together to provide a lower bound and an upper bound and if
3 necessary, an average. Because it's unclear, perhaps, what is going to happen in
4 the counterfactual, whether you have prices that move, or you have volumes that
5 move. And they all go to the same counterfactual, there aren't two counterfactual
6 cases, they all go to the fair Buy Box counterfactual, and they are based in our
7 model on what would have happened from the seller's end. Their model is all about
8 what would have happened at the consumer's end. But the consumer as I said
9 doesn't determine what goes in the Buy Box.

10 So, the information that Dr Pike needs to be available includes the research and
11 analysis by Amazon of what would happen in a non-discriminatory algorithm and he
12 ought to disclose the information that he requires in order to carry this out. There's
13 some criticism made of Dr Pike for allegedly asking for a great deal of disclosure.

14 Again, it wasn't made orally today. But in the submissions, for instance at
15 paragraph 78 of the Hunter submissions, the core bundle, tab 5, page 78, I am not
16 planning to turn it up, it is said oh well, it's far from clear whether these exist, and it is
17 also said against us that well, there's going to be a problem of third-party disclosure.
18 That wasn't reiterated with respect rightly in oral submissions. But there is a long
19 piece of written advocacy attached to my learned friend's skeleton argument where
20 they would have extracted, you will have seen this, all of the instances where in our
21 expert's report he mentions information.

22 We have produced, if I may hand up, this is really not something -- I will hand up
23 three -- it's not something where I propose to make submissions on -- we have
24 produced a version of the table which does something slightly different. Our version
25 of the table is of the information stripped down to what is actually being asked for by
26 Dr Pike. **(Handed)**. It avoids duplication because they've quoted entire paragraphs,

1 they have repeated again and again the same information wherever it's mentioned;
2 and it breaks it down into what information is sought in relation to each area: market
3 definition, dominance, abuse, Class size and quantum. It's really only on page 2
4 where a meaningful comparison can be made with Mr Harman because he doesn't
5 seek information at the moment very much on market definition or dominance. And
6 it's certainly no more extensive than annex D or section D of Mr Harman's report
7 where he seeks his information, and it's very similar information. You can look at it
8 and compare it to Mr Harman's annex D and you will see that these are bits of
9 information that he considers to be available.

10 None of this is new information. This is just a condensing of the table that was
11 served with the skeleton from the other side. It may be useful; it may not be very
12 important.

13 I will say that the take-away point, in my submission, is that we do not rely on third
14 party disclosure. If some disclosure cannot be obtained from Amazon, Dr Pike says
15 it would be available publicly, there may be information with third parties, but we
16 don't need it. Everything should be available via the closed system of what we have
17 here, rather than having to go out and ask somebody. So that was a suggestion that
18 was made against us. And I may be tilting at windmills in the sense that it may no
19 longer be made against me but since it's in the skeleton argument I wanted to do it.

20 **MR JUSTICE MARCUS SMITH:** Mr Moser, would that be a convenient moment for
21 a shorthand writer break?

22 **MR MOSER:** Yes.

23 **MR JUSTICE MARCUS SMITH:** In that case we will rise for ten minutes.

24 **(3.28 pm)**

25 **(A short break)**

26 **(3.40 pm)**

1 **MR JUSTICE MARCUS SMITH:** Mr Moser.

2 **MR MOSER:** Thank you. Just to orient ourselves as to where I am in my
3 submissions, I've dealt with my introductory remarks and, also, most of Mr Harman's
4 methodology points, I have dealt with Dr Pike's methodology. I come now to 3 and 4
5 which are respectively a rebuttal of the criticisms of Dr Pike and then a look at any
6 further aspects of Mr Harman's methodology that we criticise. I have already dealt
7 with almost all of the rebuttals to the criticisms of Dr Pike that I wish to address, apart
8 from the point made towards the end about exclusionary effects on fulfilment and
9 marketplace rivals. So that is the further effect on competition.

10 We say that our principal complaint is about the exploitative abuse in relation to
11 consumers. But Dr Pike recognises that there may have been an exclusionary effect
12 on competition from fulfilment rivals to FBA and other marketplaces, and that's his
13 conclusion. In core bundle 2 at tab 19, page 546, paragraph 313.

14 "Having considered the publicly available evidence it is my preliminary view that by
15 discriminating against sellers that purchase non-FBA services, Amazon protected
16 itself from equally efficient logistics competitors and thereby reduced competition in
17 the logistics market. Furthermore, I also consider that this conduct served to protect
18 Amazon's dominance in the market."

19 And so on:

20 "I consider that this discrimination has therefore harmed consumers."

21 Then he says, well he consider the class of consumers that have been harmed.

22 He has set out a methodology for testing these effects; that's at section 8.3.2. I think
23 my learned friend has actually already taken you to that, and also at 10.42.

24 In Pike 2, which is in the first core bundle, we see this further discussed at
25 paragraphs 41 to 52, starting at page 117 of core bundle 1. At 41, at the top of
26 page 117, Dr Pike explains his approach to causation in the exclusionary period of

1 harm, which is that:

2 "Discrimination between sellers foreclosed competition in the logistics market and
3 protected Amazon's dominance. This theory of harm links the placement of
4 a product in the buy box to the seller's selection of Amazon as its logistics provider.
5 Because it is effectively most closely aligned with a tying claim, my preliminary
6 approach and plan is to follow European Commission guidance on the analysis of
7 tying. This provides a well-established and conventional analytical structure for
8 testing the theory of harm and so links the dominance and the allegedly abusive
9 conduct to the effect on consumers."

10 So that is how he says there is a connection between what is going on in the
11 logistics market and what happens to consumers. He says it's akin to tying -- he's
12 not saying it is tying -- it's akin to tying and that's how he plans to test for it. And that
13 is where his argument at paragraph 50 comes from that my learned friend took you
14 to; that's at page 118. You will remember this was at the end of her submissions,
15 Dr Pike has posited that there were three different possibilities. So, nothing may
16 have happened, Amazon may simply have chosen not to exploit that power; or there
17 might be an overcharge. My learned friend says, all right, so why might there be the
18 possibility of a lower price. But there might be, because in a competitive
19 environment that's what you do, you lower your prices.

20 Or a third is there might have been an overcharge in the sense that Amazon set
21 prices for FBA that were relatively more expensive than rivals' prices because they
22 could, because of the tying.

23 And the discrimination against non-FBA sellers that leads to consumers buying from
24 higher-priced sellers is, we submit, a fairly straightforward bit of economic theory. It's
25 perfectly normal. It is not different really from the similar losses posited by
26 Mr Harman in his report. And it's held against us that this is all somehow not

1 | pleaded. But it is in fact pleaded and if one looks at our pleading, I hope it will have
2 | become immediately clear what we are seeing here is this further potential head of
3 | loss. And our pleading on this is in core bundle 2 at tab 18, starting at 461. And in
4 | fact, because of the way I went into these submissions I haven't yet taken you to this,
5 | but it's worth just marking up this is where we plead abuse and loss. So, at 71 on
6 | 461 we plead our abuse. And (a), (b) and (c) deal with dissimilar conditions, unfair
7 | trading conditions, respectively on third-party sellers. And then third-party sellers
8 | were not members of FBA. I'm doing that I hope not too quickly. But (d) we plead:
9 | "Further or alternatively, it limited through the preference given to FBA sellers the
10 | relevant market for intermediation services in the UK."
11 | So that is the exclusionary effect on fulfilment of marketplace rivals.
12 | At 73 over the page at 462 we say:
13 | "By providing a discriminatory advantage in the allocation of the Buy Box to sellers
14 | that purchase FBA services in addition to intermediation services, Amazon
15 | significantly increased the attractiveness of its FBA services to sellers in a manner
16 | that rival marketplaces and logistics firms could not match."
17 | So, we say it limited the market and the related logistics market in the way that we
18 | say there, and it's cross-referenced to section 82 of Pike.
19 | 75 is again about the abusive conduct on the logistics market, reinforcing the
20 | position on the other market.
21 | And then a few pages on at 465 is paragraph 88, as to how consumers have been
22 | affected, and they've been affected, relevantly at (c), by the fact that:
23 | "Amazon was able to charge FBA sellers more for FBA services and/or in
24 | commission fees as a result of the exclusionary effects of its conduct on marketplace
25 | fulfilment services and/or other marketplaces."
26 | That is the supra-competitive commission pleaded.

1 **MR BANKES:** Would that not have been passed through the consumer price
2 anyway? Isn't that already caught? Because the only way that's passed through to
3 consumers is the price which you already modelled in your previous modelling. So,
4 does this add anything to the previous analysis?

5 **MR MOSER:** It may not. It may not. But it's there. And, indeed, at one point
6 Dr Pike goes so far as to hazard, although I don't subscribe to this entirely, that if
7 everything else fails, there's always this. But you are right of course.

8 **MR BANKES:** Of course, it could even be said by the other side if everything
9 through the algorithm fails, there's always that.

10 **MR MOSER:** I suppose so, in which case very little to choose between us. Let's
11 hope nobody has to fall back on that.

12 That is the exclusionary abuse. Again, it is one of those, it may not happen. And
13 indeed, for a similar purpose there is a pass-on methodology in Dr Pike's report as
14 just in case, in case he does have to fall back on calculating pass-on in this way. But
15 it is not something that Dr Pike expects to be needed and that's at Pike 2,
16 paragraph 62. So that's the just in case pass-on methodology.

17 That is all I wanted to say about our own methodology, which brings me to what
18 remains of my "look at Mr Harman's methodology". I think I have already said quite
19 a lot about Mr Harman's methodology. But I cannot leave the Tribunal today without
20 saying something about conjoint analysis, because apart from the fact of
21 Mr Harman's methodology seeks to evaluate consumer preference in a way that we
22 say is neither necessary nor possible, we submit that evaluating consumer
23 preferences by way of conjoint analysis would be a leap in the dark. None of the
24 competition law cases that have been heard in this country have relied on conjoint
25 analysis as a primary methodology for the assessment of abuse and damages.

26 So, the problems that we've already discussed in relation to Mr Harman's analysis

1 are all posited on the notion that somehow, he can carry out his conjoint analysis
2 and reach a useful, helpful outcome. But to note, first of all at paragraphs 36 to 39 of
3 our submissions, which are bundle 1, tab 6, page 55, we've already elaborated on
4 the problems. And Dr Pike has elaborated on the problems, and we go to this in
5 bundle 1, tab 9, in Pike 2, starting at paragraph 30 on page 113:

6 "Mr Harman's proposed conjoint analysis is a poor fit, inadequately described and
7 unlikely to meet the evidentiary requirements."

8 He explains at paragraph 33, over the page at 114, that:

9 " ... 'the general idea behind conjoint analysis is that the market value for a particular
10 product is driven by features or descriptions of features embodied in that product.
11 Survey respondents are therefore asked to choose between different sets of product
12 attributes, the responses are aggregated, and statistical methods are then used to
13 determine the value (often termed 'partworth') that consumers attach to each specific
14 attribute'."

15 Now, this next sentence contains a phrase that was extracted by my learned friend in
16 her skeleton argument but extracted in the way that theatre reviews are sometimes
17 extracted and put up at the front. So, if a theatre review says, "This was an
18 absolutely terrible performance, I very much enjoyed leaving at the end", it will say
19 "I very much enjoyed [it]."

20 So, what he said is that, for litigation purposes, courts typically admit conjoint
21 analysis as simulations of buying experiences to determine the market's willingness
22 to pay for a product in a counterfactual setting.

23 Then at 34 he considers:

24 "My understanding is that Mr Harman does not intend to use conjoint analysis in this
25 manner."

26 From that they have extracted the phrase "typically admit", to say that "courts

1 typically admit conjoint analysis". Well, they do not, with respect, typically admit
2 conjoint analysis. And indeed, as I say, no court in this country has admitted conjoint
3 analysis as a primary method of -- of methodology and assessment so far.

4 My learned friend relies on two things for conjoint analysis. The first is the case of
5 Gutmann and the second is the CMA's merger report. This is at paragraph 35 of
6 Ms Hunter's argument. The gravamen of her reliance in relation to Gutmann is that
7 well, you can see in Gutmann that surveys, surveys are a perfectly acceptable way
8 of doing it. I'll ask you please to turn up Gutmann, which is in authorities bundle 2,
9 tab 9, at page 855. If I can just set the scene in a way that -- I am not giving
10 evidence entirely because as it happens Ms Demetriou's solicitors in this case, my
11 solicitors in this case worked together in Gutmann for Mr Gutmann. So, everybody
12 here, except perhaps Amazon, would be very familiar with the case. In Gutmann,
13 surveys are not a primary methodology for assessing damages. Mr Derek Holt in
14 Gutmann is going to assess damages by taking the price of a ticket that includes
15 something called the boundary fare element and then subtract the boundary fare to
16 see what the loss was, so that the bit of the ticket that was already covered by the
17 travel card that the traveller need not have paid for.

18 Where does the survey come in? Well, that's explained at paragraph 66 of the
19 judgment, which is at page 876. Lord Justice Green says, and the second line:

20 "The issue relating to surveys concerns an estimate of Travelcard holdings. It is
21 clear from the 1st expert report of Mr Holt that he had addressed this relying upon
22 a variety of different data sources. However, he suggested that the data could be
23 improved by use of a survey."

24 So, the survey is not anything to do with assessing the actual loss, the loss is just,
25 what's the element of each ticket price that's the boundary fare? The survey is to
26 improve the data on how many people had a travelcard. So that survey that I --

1 I think has been carried out now, I can't remember, but the survey that's been used
2 in Gutmann critically asks of passengers: did you take this journey during the
3 relevant period, and did you have a travelcard?

4 It's far, far removed from the sort of conjoint analysis that's proposed here. So, no
5 support at all for the proposition for which Gutmann is being cited.

6 The second citation is the CMA merger report. That is authorities bundle 3, tab 24,
7 and conjoint analysis is mentioned there. It starts at 1881, and conjoint analysis is
8 mentioned there at paragraph 8.91 on page 1881. This is the CMA itself, and it
9 says:

10 "We Commissioned an online survey of the parties' OCG customers ..."

11 This is the merger in relation to Amazon and Deliveroo:

12 "We Commissioned an online survey of the parties' OCG customers, which was
13 conducted by Accent and PJM Economics. The survey included standard questions
14 about how the current services are used."

15 And so on. Then we are told what the survey found: each party had a "typical"
16 shopping mission, and so forth.

17 It goes on, I won't read it out all, to break down in a fairly interesting way the
18 relatively limited number of attributes and products that were surveyed in that case,
19 far more limited of course than what would happen in our case. And I think there
20 were some five elements. Mr Harman hazards at least 10 I think in his report, and
21 I would add businesses probably more.

22 The relevant result is at 8.94. And the relevant result is this, at 1884:

23 "... this analysis confirmed that Deliveroo customers placed higher value on delivery
24 speed than Amazon customers in making trade-offs between both speed and price
25 level and speed and delivery charge, while Amazon customers valued range much
26 more than speed."

1 So, this stunning conclusion was the outcome of the conjoint analysis that Deliveroo,
2 a service that gets you your lunch is more about speed, than Amazon, a service that
3 gets you books or ballgowns or paper clips, is more about range. You might think
4 that no very sophisticated analysis was necessary to reach this conclusion but that is
5 a matter for the CMA.

6 **MS BEGENT:** Is your point that this is also about substitutability, i.e., presumably it's
7 market definition rather than measurement of harm?

8 **MR MOSER:** Exactly. So, we are dealing with mergers about which I am aware
9 members of the panel know more than I do. But they are not using it here in order to
10 find out what the damages are or what the consequences of the abuse are. So,
11 absolutely, this is what conjoint analysis is meant to be used for. But in so far as my
12 learned friend relies on it as her other leg on which to stand up conjoint analysis, it
13 does not serve.

14 **MR BANKES:** Can you just remind me your model, as I understand it, takes no
15 account of consumer preference, how consumers would have responded had the
16 non-abusive offer been posted in the Buy Box; is that right?

17 **MR MOSER:** Not directly, no. We considered that a great strength because what
18 both parties agree on is that purchases are primarily driven by the Buy Box. So, we
19 have data that suggests about 82 per cent (inaudible) the Buy Boxes, Mr Harman
20 thinks about 85 per cent. So, the founding theory behind both theories of harm is
21 that consumers are driven to purchase from the Buy Box. So, we say, what does
22 a separate survey of consumer preference add to that? Because that's not what the
23 reality is. The reality is that people are going to buy the Buy Box so we want to find
24 out what really matters, we want to find out what an unbiased algorithm would do by
25 way of what it would put into that Buy Box, which is the conduit at the other end of
26 the two-sided market for the purchase. That's the difference between us.

1 I have finished now with my conjoint analysis point, I have three sweep-up points.
2 My first sweep-up point is, we say, that their Class includes too large a percentage of
3 uninjured Class Members. And my learned friend's answer to that this afternoon was
4 well, Dr Pike has a way of calculating by mathematics how 99 per cent of people
5 must have suffered loss so why shouldn't everyone have suffered loss? That is
6 Dr Pike's report.

7 Mr Harman seems to say that just over 50 per cent have suffered loss and he says
8 that, if I can show you that in core bundle 1 at tab 12, page 266 at paragraph 6.5.15.
9 So, there he says -- he's used Royal Mail's retail prices:
10 " ... which I provisionally proxied using Royal Mail's retail delivery prices ... the share
11 of products for which there is a cheaper option [is] 56.5 per cent ... I set [that out as
12 a] lower bound estimate, and the actual share ... could be higher."

13 And you will have seen that discussed in the skeleton arguments. Well, he says it
14 could be higher. But what of that? Even if it says 60 per cent or 70 per cent, on this
15 aspect of his loss calculation he has about 30 to 40 per cent of people who have
16 suffered no loss, and that's an over-inclusive Class. True it is that the
17 Court of Appeal said in Gutmann that you don't have to have a class where
18 absolutely everyone suffered loss because in reality there will be someone at the
19 margins who doesn't suffer loss. And I turn it up briefly, if I may, again, Gutmann
20 was at authorities bundle 9, tab 879. Within it at 879, paragraphs 75 to 78, what
21 Mr Harris for the rail company was saying against me in Gutmann was well, there's
22 a number of ways in which consumers might choose to pay more. So, at 75 he said:
23 "They might choose to pay more because they don't care, and because they're in
24 a hurry."

25 At 76 he said:
26 "There might be a consumer who acts perversely."

1 And this is the Court of Appeal quoting him, this is not of course Mr Harris, this is
2 Lord Justice Green. And, at 77, was Mr Harris's point that there might be another
3 ticket that may have been cheaper, and it's possible there was a small class of
4 those.

5 And at 78 the Court of Appeal rejects that, and they say:

6 "We disagree. This argument would only hold water if the CAT was unable to make
7 adjustments at trial to take account of issues the defendants prevail upon. However,
8 the CAT is alive to the need to do just this so as to avoid the risk of unfair
9 overcompensation. Mr Moser QC made the valid point that the CAT might adopt a
10 'conservative' (pro-defendant) approach to deductions. If (say) it was of the view that
11 there was a category of person who had suffered no loss which accounted for
12 between 2 – 3 % of the total class, the CAT might choose to reduce the total
13 aggregate damages by a sum reflecting 3%, so as to err on the side of caution."

14 And we had had in the CAT and in the Court of Appeal certain American authorities
15 that have discussed no loss Class Members of up to about 10 per cent of the Class.
16 No Class has been approved where from the off it's been suggested that maybe as
17 much as 40 per cent of the Class have suffered no loss. I say if nothing else, that
18 must be an over-inclusive Class.

19 That leaves two further points. I will try to deal with these as quickly as possible.

20 The first is this question of members of the Class, and it's said against me -- this
21 perhaps was the part of my learned friend's submissions that got the most echo this
22 morning. It was said against me, "You don't have business members in your Class".

23 The reason we don't have business members in our Class is a pragmatic decision.

24 Business members, we submit, will have different priorities to individual consumers.

25 My learned friend says, "Ah yes, but we're only covering direct purchasers". That
26 doesn't answer the question, with respect, because businesses may buy directly but

1 they still resell, and they may resell to other members of the Class.

2 Mr Harman says, "but it's only small businesses we are dealing with." But Dr Pike,
3 and this is at paragraph 88 of Pike 2, tab 9, Dr Pike says about half the FTSE 100
4 purchase from Amazon, and as he says at paragraph 90, businesses pass-on.

5 So, pass-on is something that we wanted to avoid wherever possible in our Class
6 definition and in our claim generally because pass-on is a nightmare.

7 And that's why we did what we did, and we rely in this -- it's the last authority I plan
8 to cite -- on O'Higgins in the Court of Appeal, authorities bundle 3, tab 19 at
9 page 1705. It's paragraph 148 of O'Higgins at the bottom of page 1705 in authorities
10 bundle 3.

11 **MR JUSTICE MARCUS SMITH:** Yes.

12 **MR MOSER:** And the last sentence is:

13 "The mere fact that one putative class representative crafts a broader claim [that's
14 them] is not an indication that the claim is preferable. Were it otherwise all class
15 representatives would be falsely incentivised to draft claims as widely as possible."

16 And so on.

17 Over the page:

18 "There may be many good reasons why a better articulated and thought-through
19 claim will be narrower and not wider. There might be sensible trade-offs to be made
20 between pursuing the more questionable outer limits of a claim (which might
21 significantly add to costs) and focusing upon a narrower and stronger core claim
22 (which might be more efficient to litigate)."

23 And we would like to think we are all about the latter, more efficient to litigate, in the
24 same way that for instance in Gutmann the Class Representative made the
25 pragmatic decision to claim for people travelling one way out of London and not the
26 other way, simply because it made the claim more tractable. So, to compound all of

1 that business consumers, as I said, also compound the problems with the conjoint
2 analysis because they will have different requirements.

3 And finally, and it's linked, finally pass-on, generally, because business members
4 aren't the only pass-on problem for Mr Harman and Dr Pike mentions this in his
5 report. I'll give you just the note, it's at paragraph 64 of Pike 2, and at footnote 29 of
6 paragraph 64 it's page 120 of the core bundle at tab 9. Mr Harman relies on pass-on
7 for other aspects of his methodology. And as I say, it is a problem best avoided, it is
8 not necessary for Dr Pike's methodology even though he's ready for it.

9 So, I commend again our tried and tested methodology, mirroring what the
10 regulators have already required by way of undertaking, and unless I can add
11 anything further, those are my submissions.

12 **MR JUSTICE MARCUS SMITH:** Mr Moser thank you very much, we are very much
13 obliged to you.

14 I see the time. Mr Turner, we obviously are going to drift into tomorrow. If you want
15 to make a start now you are very welcome to but equally, we will have more than
16 enough time to finish I think tomorrow morning. So, if you want to start tomorrow
17 among that will be fine with us.

18 **MR TURNER:** If we are going to continue tomorrow morning, if we are not going to
19 finish this evening then yes it will be better for me to start tomorrow morning.

20 **MR JUSTICE MARCUS SMITH:** Mr Demetriou, we are not going to finish. You
21 have I think at least between you an hour?

22 **MS DEMETRIOU:** I'm so sorry, I didn't hear that.

23 **MR JUSTICE MARCUS SMITH:** I'm trying to work out how much time was agreed
24 for reply submissions by the PCRs.

25 **MS DEMETRIOU:** I think we obviously need to deal with the point about the
26 additional report. In terms of pure reply points, I'm not sure that I need to say --

1 I think my reply is going to be relatively short, given that I covered most of the
2 points I --

3 **MR JUSTICE MARCUS SMITH:** Indeed. What I don't want is I don't want anyone
4 to be cut short. I think trying to finish this evening is not a good idea.

5 **MS DEMETRIOU:** No, that's fine with me.

6 **MR JUSTICE MARCUS SMITH:** Good.

7 Well Mr Turner in that case you can have a clear start at 10.30.

8 **MR TURNER:** Yes. Just to manage expectations, I will be a couple of minutes. I'm
9 not going to be long at all.

10 **MR JUSTICE MARCUS SMITH:** Right.

11 **MR MOSER:** In which case it's unlikely I will have any reply. I do wonder -- I'm
12 completely in the Tribunal's hands, but given the indications from my left and my
13 right, if the Tribunal were able to sit for another, say, half an hour, whether we might
14 not get through it today.

15 **MR JUSTICE MARCUS SMITH:** Do we think that's feasible?

16 **MS DEMETRIOU:** Yes, I do from my perspective, subject to the point about the
17 further report.

18 **MR JUSTICE MARCUS SMITH:** What's the concern about the further report?

19 **MS DEMETRIOU:** We are going to produce one.

20 **MR JUSTICE MARCUS SMITH:** Of course, you are, yes. Ms Demetriou, we
21 weren't expecting that to happen overnight, and we will certainly wait until it's
22 produced before we do anything in terms of -- so I wouldn't want you to think that --
23 I certainly wouldn't want Mr Harman to think that he needs to produce something for
24 tomorrow.

25 **MS DEMETRIOU:** I see, okay. We will produce it as soon as possible. I think we
26 had assumed that you would want it for tomorrow morning, but I'm sure that --

1 **MR JUSTICE MARCUS SMITH:** No, I think that will be unreasonable, on our part,
2 not on Mr Harman's to try. We have identified something which both sides have
3 assisted us on. It's really, as I said, to fill a gap in our knowledge. I think if you can
4 produce it as soon as reasonably practicable but absolutely not for tomorrow, then
5 Mr Moser, a week or so to respond, obviously we know that the Christmas season is
6 already upon us so if this drifts into the New Year, then so be it.

7 **MS DEMETRIOU:** Thank you very much. In that case I think if the tribunal were
8 willing to sit a little bit later then I think we could finish.

9 **MR JUSTICE MARCUS SMITH:** Then I think we should probably try and finish.

10 Mr Turner, if that doesn't incommode you.

11 **Submissions by Mr Turner**

12 **MR TURNER:** As I say, I will make three very brief points on behalf of Amazon.
13 We've listened carefully to what's been said, we are not engaging with the
14 substance, and we are embracing what you said at the case management
15 conference that we should adopt a restrained approach.

16 The three points are these. The first is, having heard references to the Competition
17 Authority decisions, three were mentioned: the Competition and Markets Authority in
18 this country, the European Commission and the Italian authority. The CMA and EC
19 decisions, as Mr Moser rightly said, are explicitly preliminary views, with which, on
20 the substance in relation to abuse, Amazon disagrees. It has made a cost-effective
21 and commercially pragmatic solution to give commitments on a co-operative basis,
22 having assessed that those do not compromise Amazon's aim of serving consumers
23 well, our position.

24 The second point is that a suggestion was made at one juncture from Mr Moser that
25 the consumer representative at certification -- after certification would call for the
26 algorithm on disclosure, and if something extra, some further point turns up, that that

1 will then be included in the legal claim.

2 Now if some closely-related point arises after disclosure in that scenario that is one
3 thing. But we wish to be quite clear that the claim, if it proceeds, should not be just
4 an entry point to a roving investigation into abusive conduct on the part of Amazon.

5 "We've called for this, and we are now going to do a full survey to see what we can
6 throw in". That would not be consistent with the right approach to this sort of
7 litigation and any development should be, as I say, closely related and bounded by
8 the framework of the allegation of self-preferencing, which is the essence of both
9 these claims.

10 The third short point is really to say that we regret we can't give you assistance today
11 on the points that were canvassed earlier about whether it's possible to rerun the
12 algorithm with certain signals removed or if that entails some wider re-design or
13 anything of that nature. And I will turn to what I said at the outset. We have taken a
14 deliberately light touch approach to these proceedings prior to the resolution of
15 the carriage dispute.

16 **MR JUSTICE MARCUS SMITH:** Mr Turner, that I think is entirely the right course
17 and it was for that reason that I didn't even look to Amazon when we were debating
18 the reports. We regard this as a process that is entirely without prejudice to any
19 position that Amazon might want to take on certification, and so obviously you need
20 to be present if you want to be. But if I may say so, your study to distancing from this
21 point is entirely what we expect.

22 **MR TURNER:** Sir, in that case if I may just check that there's nothing further, that
23 would be it from Amazon. We have nothing further, sir.

24 **MR JUSTICE MARCUS SMITH:** I am much obliged to you, Mr Turner, thank you
25 very much.

26 Who is next? Ms Demetriou.

1 **Submissions in reply by Ms Demetriou**

2 **MS DEMETRIOU:** Sir, members of the tribunal, briefly I want to address Mr Moser's,
3 if I can put it this way, rabbit out of the hat, where he says well we don't have to
4 worry about anything else because we have the new algorithm post-commitments.
5 That's a question which I anticipate Mr Harman may well address in his new short
6 report.

7 But briefly, what we say about that is this. First of all of course it's nowhere in
8 Dr Pike's report, despite that report being produced after the commitments decision,
9 and that presumably is for good reason. Had he thought it was a good answer we
10 would have seen it there, but he suggested something different, as Mr Bankes
11 pointed out in debate with Mr Moser. And really, we see why it won't work from the
12 submission Mr Turner just made. Mr Turner said that the commitments were
13 a pragmatic and co-operative solution on the part of Amazon.

14 So, it cannot be said that what is produced following -- pursuant to the commitments
15 is an algorithm which simply strips out the abuses. So, apart from the fact that of
16 course the CMA and the European Commission were looking at abuses and matters
17 which went wider than the abuses alleged in this case, you've heard from Mr Turner
18 that they don't accept that what they are doing pursuant to the commitments is
19 designed simply to address the abuses.

20 If we go to authorities bundle 3, please, tab 30.1, 1979.5. You see the heading
21 "Commitments" there, and then "Application of objectively verifiable non-
22 discriminatory conditions and criteria":

23 "As of the end of the Implementation Period, if a Featured Offer is displayed,
24 Amazon will apply objectively verifiable, non-discriminatory conditions and criteria for
25 the purposes of determining which Offer would be displayed as the Featured Offer.

26 These conditions and criteria will include any parameters and weightings such that

1 the conditions and criteria can and will be applied equally to both Amazon Retail and
2 Sellers. There will include but not limited to those applied by existing selection
3 mechanisms... including the Filters."

4 Then if we go over the page:

5 "Notwithstanding Paragraph 3... Amazon may use factors that are objectively
6 justified in order to protect consumers from the risk of Seller fraud and abuse."

7 Etcetera etcetera.

8 So, what we have is a wide discretion on the part of Amazon as to what it does, but
9 of course what it does has to be objectively verifiable and not discriminatory. So, it
10 may well be, for example, that the new algorithm that's produced, or that has been
11 produced, pursuant to the commitments, includes all sorts of other weightings or
12 measures which as long as they are non-discriminatory are not targeted at the
13 abuse.

14 Therefore, it can't be said that the new algorithm in those circumstances represents
15 a counterfactual where you strip out only the abuse. So that's one point.

16 Another point of course is that our claim goes back to 2016 and the counterfactual
17 one is identifying is the counterfactual from 2016 and all the way along. So, what's
18 happening now and what Amazon thinks now properly reflects consumer choice
19 does not necessarily reflect what the counterfactual would have been back in
20 2016/2017 and every period along the way.

21 So, for that reason we say that there's good reason that Dr Pike didn't say, well this
22 is the answer to all of the issues.

23 I'm not going to say anything more about the feasibility of rerunning the algorithm
24 because that's something that Mr Harman will no doubt address.

25 But what I do want to say is that at no point in Mr Moser's submissions did he ever
26 address the issue of loss. And so, he said again, "Well it's a feature of our case", he

1 prays it in aid, that they don't look at consumer preferences, because he says all you
2 need to do is rerun the algorithm. But again, what that means is that they have no
3 appropriate methodology to establish whether loss has been suffered. So, if he's
4 right that they can rerun the algorithm you can get to a counterfactual but what you
5 can't determine is whether any loss has been caused by comparing the two
6 products, and if so what loss. And you have that point in opening. But Mr Moser
7 simply didn't address it. And we say that that is a lacuna, and it means that his case
8 is not tractable.

9 Gutmann. Gutmann certainly doesn't say that survey evidence can only be limited to
10 particular aspects of the case. So, there's nothing like that in Gutmann at all. And
11 the question here is if not survey evidence, so if not a conjoint analysis to examine
12 whether loss has been suffered and if so what the extent of that loss is, and of
13 course Mr Harman isn't only suggesting a conjoint analysis, he is going to look at
14 Amazon data and disclosure as well. But if not that then what? And again, I come
15 back to the point that Dr Pike simply doesn't have an appropriate methodology for
16 determining once you have the counterfactual whether loss has been suffered and if
17 so, how much.

18 Over-inclusive Class. This point really is a strawman because Mr Moser took you to
19 the part of Mr Harman's report in relation to further loss that says conservatively
20 56.6% prospect of suffering further loss per purchase. But of course, it's common
21 ground that consumers, members of the Class, made multiple purchases per year.
22 So, the idea that there are going to be a significant number of members of the Class
23 that haven't suffered any loss we say is wrong. And we do say, given the material
24 similarity of the respective Class definitions on this point, in relation to this point, that
25 if it's a problem for us it's equally a problem for them.

26 Finally, exclusion of business users. Mr Moser said, "Oh well, it can be a plus to

1 have a more tightly drawn claim if in fact what you are doing is not pursuing claims at
2 the outer edges." Well, we say this isn't a claim at the outer edges, it's the arbitrary
3 exclusion of a group of victims who are in materially the same position as those who
4 are members of the Class. But what is a claim at the outer edges is the claim
5 proposed by Mr Hammond in relation to the exclusionary abuse, and you've heard
6 what I said about that, but it includes a claim in relation to dampening of competition,
7 vis-a-vis other intermediary services, and we say that really is a speculative claim at
8 the outer edges and is a point which should weigh against Mr Hammond's proposal.
9 Those are the only points I wanted to make by way of reply, unless you have any
10 further questions for me.

11 **MR JUSTICE MARCUS SMITH:** Ms Demetriou, very much obliged to you, thank
12 you very much.

13 Mr Moser.

14 **Housekeeping**

15 **MR MOSER:** I have nothing in reply to anyone. If it were possible, if I can use my
16 moment on my feet just to have an indication either from the Tribunal or from
17 Mr Harman as to when they might produce their report, bearing in mind next week is
18 a sort of non-week, if it could be done by -- if it were done by the end of this week we
19 might be able to do it by the very beginning of the year or thereabouts.

20 **MR JUSTICE MARCUS SMITH:** I understand. I mean the fact is this is a difficult
21 season. I'm just getting my diary up so that I can see ... what I'm going to suggest,
22 Ms Demetriou, is -- Mr Harman isn't in court, is he?

23 **MS DEMETRIOU:** He's not in court. Members of his team are.

24 **MR JUSTICE MARCUS SMITH:** Well, in the end it will be his report and what
25 I suggest is that you speak to him, you tell him that we are absolutely not cracking
26 the whip because we too will have a Christmas break and therefore will not be

1 necessarily writing the ruling in this on Christmas Day. So why don't you speak to
2 him, see what is realistic. Clearly, we want it as fast as possible but realistic. Speak
3 to Mr Moser and see what can be agreed. If there is a problem of course revert to us
4 and we will as necessary resolve matters but I really don't expect that today.

5 **MS DEMETRIOU:** No, sir, that's very sensible. We will do that and of course we
6 appreciate that the sooner the better so we'll --

7 **MR JUSTICE MARCUS SMITH:** What I'm worried about is that you over-emphasise
8 that and say Mr Harman needs to, you know --

9 **MS DEMETRIOU:** Cancel his --

10 **MR JUSTICE MARCUS SMITH:** -- cancel his plans. I really wouldn't want that to
11 occur.

12 **MS DEMETRIOU:** Thank you very much. We will take that away.

13 **MR JUSTICE MARCUS SMITH:** The same goes for Dr Pike.

14 **MR MOSER:** I'm grateful. Dr Pike, who is here by the way, indeed sitting next to
15 Mr Hammond at the back, he has sent me a note saying can there be a page limit for
16 what is a short statement.

17 **MR JUSTICE MARCUS SMITH:** There can be. I'm never very keen on page limits
18 because they are liable to be evaded by things like font sizes, annexes and
19 footnotes. The fact is we see this as a short point. If we end up with a very long
20 answer to what is a short point, then that will not assist us.

21 **MR MOSER:** It will speak volumes, yes.

22 **MR JUSTICE MARCUS SMITH:** It will speak volumes but not necessarily in the way
23 one would expect. So, with that warning or guidance I'm not going to say anything
24 more about page limits.

25 **MR MOSER:** I'm grateful.

26 **MR JUSTICE MARCUS SMITH:** Well, we are very grateful to all the parties.

1 I confess we didn't expect to finish by 4.30. It's a tribute to the efficiency and skill of
2 the teams before us that we did. We are very grateful to you all and we will await the
3 reports with interest but not with burning interest, so no burning the midnight oil.

4 Thank you all very much.

5 **(4.30 pm)**

6 **(The hearing concluded)**

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