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4 record.

5 **IN THE COMPETITION**

Case No. : 1641/7/7/24 & 1644/7/7/24

6 **APPEAL**

7 **TRIBUNAL**

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

12 Monday 11th November 2024 – Wednesday 13th November 2024

13
14 Before:

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16 The Honourable Mr Justice Roth
17 Keith Derbyshire
18 Charles Bankes

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

21
22 **BETWEEN:**

23 BIRA Trading Limited

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25
26 **Proposed Class Representative**

27 -and-

28
29
30 Professor Andreas Stephan

31
32
33 **Proposed Class Representative**

34 v

35 Amazon.com, Inc. and Others

36
37 **Proposed Defendant**

38
39
40 **A P P E A R A N C E S**

41
42 Sarah Ford KC and Nikolaus Grubeck On behalf of BIRA (Instructed by Willkie Farr &
43 Gallagher (UK) LLP)

44
45 Mark Brealey KC, Daniel Carall-Green and Christopher Monaghan On behalf Professor
46 Andreas Stephan (Instructed by Geradin Partners)

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48
49 Digital Transcription by Epiq Europe Ltd
50 Lower Ground 46 Chancery Lane WC2A 1JE
51 Tel No: 020 7404 1400
52 Email: ukclient@epiqglobal.co.uk

Tuesday, 12th November 2024

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(10.30 am)

Reply on behalf of BIRA (cont.)

MR JUSTICE ROTH: Ms Ford, just before we continue where you left off about the conflict, can I just go back to something we were asking you earlier about the scope of the BIRA claim on the effect of the abuses you allege, the data abuse. I was asking you whether it covers only the case where the third party product is already on the Amazon platform and then Amazon enters with its own Amazon Retail product, or does it also cover the case where Amazon is the incumbent and then one and then another third party enters second and third? I think you said it covers both, but I wanted to be quite clear about that, because we are finding that a bit puzzling at the moment.

MS FORD: Well, it covers -- the key conduct is that Amazon utilises the data in order to make an entry decision. So it has to enter, but then one has to ask --

MR JUSTICE ROTH: To enter it uses data from a third party.

MS FORD: Yes.

MR JUSTICE ROTH: So it only has data from the third party and the third party is already on the platform.

MS FORD: Sir, that is absolutely right. One then has to ask where is that data coming from and we say it is coming either from products which are the same as already on the platform or products which are similar in the sense that they are competing. We say the reality of the matter is that save in the circumstance where Amazon is the positive pioneer in the sense of it introducing a product where there are simply no existing competing products, it will be utilising the data that's already available on its platform to inform its decision about which products to bring in. I am actually going to -- in the context of the methodology discussion, which we are going to come on to,

1 I will come back to this point, because there is a piece of analysis that Dr Houpis
2 performed that relates to some of the products which have been on the platform a long
3 time, such as books and DVDs, and it goes to a point that the Tribunal was discussing
4 with me about what if you have these products where Amazon has been on for a long
5 time and so there wouldn't have been a relevant entry decision.

6 Dr Houpis has actually conducted some preliminary analysis which identifies there is
7 not a Buy Box effect in relation to those essentially longstanding categories of
8 products. We say that that's entirely consistent with our position that what this conduct
9 is really about is Amazon using the data in relation to these products which are
10 relatively recently introduced on to the platform. And that is consistent with
11 Dr Nitsche's position that the vast majority of sales on the platform relate to recent
12 products as opposed to longstanding products.

13 **MR JUSTICE ROTH:** It may be that the great majority relate to products that came in
14 from 2016 onwards but some of them, a significant number, might have come in first
15 by Amazon Retail so that its decision to enter based on its assessment of product and
16 whether it is going to be a good seller and it is not based upon the performance of
17 a third party product. That's what ...

18 **MS FORD:** It has to be -- it is not just a product where Amazon enters first. It has to
19 be a product where Amazon enters first in circumstances where there is no existing
20 product or category of products on its website -- on its platform -- website is probably
21 not the accurate word -- on its platform that would provide it data to inform that entry
22 decision, because insofar as its entering with a product that is either the same as or
23 competing with existing products, then it can utilise the data that's available to it to
24 inform that decision, and that's in our submission the competitive harm that the
25 regulatory decisions are getting at, because it has access to that data and its
26 competing third party merchants do not.

1 So in order for there to be a scenario where it doesn't utilise that data it would have to
2 be a product that Amazon is entering that there is simply no relative informative data
3 available to it because there are no existing identical products and no similar products.

4 **MR JUSTICE ROTH:** I mean, there might be some data, it might be so limited that
5 the effect on entry decision is not so great, but a third party entering later with a very
6 similar product, then Amazon gets that data and then Amazon uses that in its pricing
7 decisions.

8 **MS FORD:** Yes.

9 **MR JUSTICE ROTH:** Which has nothing to do with entry.

10 **MS FORD:** That is quite true, but again when we come to the methodology we have
11 said that we do take into account in our methodology the extent to which Amazon is
12 then able to leverage that data post entry, because -- I can give you a short reason
13 why that is. The methodology looks at the performance of essentially a large third
14 party and says if Amazon did not have any competitive advantages at all, its
15 performance could be expected to be analogous to that large third party. The large
16 third party would not have access to any of that data, so any pricing data, any logistics
17 data, any of that sort of material. So if Amazon's performance when it enters at that
18 point is materially different than what would be expected of a third party, then one can
19 infer that it is utilising data that it has access to preferentially that's not available to
20 third parties. The methodology does pick that up as well.

21 **MR JUSTICE ROTH:** Just give me a moment. (Pause.) Okay. Thank you. Yes.

22 **MS FORD:** I hope some of this might become a bit clearer when we work through
23 ECA's methodology as well, so it may be an opportunity to revisit some of these points.
24 Yesterday we were dealing with the question of whether it is in FBA merchants'
25 interests to advance abuse 3. We were in particular looking at the 28% calculation
26 that we had performed, which shows that if there were a 28% swinging sales from FBA

1 to FBM, then that would exceed the £1.041 billion figure that Dr Houpis has estimated
2 as being the quantum of the inflated fulfilment fees.

3 That exercise obviously assumes that the £1.041 billion figure is correct. I was going
4 to come on to say there are reasons to doubt that that is the case.

5 The first is the point that is made in Amazon's response to the Hammond PCR's CPO
6 application. This is in bundle F, tab 3 starting, please, at page 115. What Amazon
7 refers to there --

8 **MR DERBYSHIRE:** I didn't get the page number.

9 **MS FORD:** 115. We are in paragraph 3(3) on the previous page, but on page 115,
10 (ii) is making a point they identify "The explicit acceptance by the PCR's expert not
11 only that there might be no overcharge on Amazon's logistics/fulfilment services, that
12 there is some positive evidence suggestive of no overcharge."

13 **MR JUSTICE ROTH:** Sorry. I am not quite with you. Where are you?

14 **MS FORD:** Sorry. I am in tab 3 of F. So it is Amazon's response to the Hammond
15 PCR. They are summarising their case in paragraph 3 which starts on page 114. I am
16 reading from essentially the last part of paragraph 3(3).

17 **MR JUSTICE ROTH:** I see. (3).

18 **MS FORD:** Within that:

19 "(ii) the explicit acceptance by the PCR's expert not only that will there might be no
20 overcharge on Amazon's logistics/fulfilment services, but that there is some positive
21 evidence suggestive of no overcharge."

22 Where they then elaborate on that is in paragraph 69, which is on page 145. Halfway
23 down paragraph 69 there is a sentence that starts:

24 "However, Dr Pike does not point to any evidence or analysis which suggests that
25 Amazon's prices for FBA have exceeded the competitive level. On the contrary, he
26 acknowledges that there might not be any 'overcharge' element to FBA's prices at all,

1 and he adds that 'no overcharge' would be consistent with the evidence that was
2 presented at the carriage dispute hearing by the rival PCR's economist, Mr Harman.
3 That evidence showed that FBA was priced at levels close to what was considered to
4 be a similar Royal Mail service."

5 So we simply draw your attention to the fact that there are reasons to be sceptical
6 about the extent of the overcharge in relation to FBA. Dr Houpis has expressly
7 indicated that one also has to factor in the possibility to the extent there was
8 an overcharge, that might have been passed on to the consumer class. We can see
9 that if the Tribunal could please turn up the pleadings, Stephan claim form starting at
10 page 6298. The paragraph is 55.2. It is pleaded there:

11 "... the issue of pass-on may arise in relation to both claims:", by which it means the
12 present proposed claim and Hammond, "the amount of the Fulfilment/Logistics
13 Overcharge paid by the class members in Hammond is likely to depend on whether
14 and to what extent the Proposed Class Members in the present claim passed the
15 Fulfilment/Logistics Overcharge on to them."

16 Then there is also a mention at 69 where it is said:

17 "... while it is not possible to know at this stage whether or not Amazon will seek to
18 contend that some of the losses suffered by the Sellers have been passed on to their
19 customers, the methodology set out in Houpis 1 caters for this eventuality."

20 We also see mentions in 188:

21 "At this stage, any assessment of the quantum of loss is necessarily a rough estimate,
22 not least because several assumptions (such as, if raised, the level of pass-on) will
23 need to be tested against the evidence."

24 You see a similar reference in 192.

25 So, in our submission, one simply can't proceed on the assumption on the basis of
26 Dr Houpis' figures, pursuing abuse 3 is always going to be net positive for FBA

1 merchants. There is every possibility that they too could be left positively worse off by
2 reason of the decision to attempt to combine these claims.

3 In any event the Tribunal will have well in mind whether it is in their interests or not
4 depends in part on the proportion of sales that were transferred from FBA to FBM in
5 the counterfactual, which is precisely the issue in which we say there is a very clear
6 conflict of interest.

7 There is a final point which needs to be borne in mind in relation to this which is how
8 should a putative class member, who is an FBA merchant, decide whether to opt in or
9 opt out of these proceedings, because at the moment the position is that they do not
10 know whether being part of proceedings where abuse 3 is being advanced on their
11 behalf might be positively detrimental for them as compared to proceedings which did
12 not advance abuse 3, and at the stage when they had to make that important decision
13 they do not know whether or not the decision to advance this abuse will be positive for
14 them or not.

15 Professor Stephan has said in his skeleton that if there is a conflict, it relates only to
16 abuse 3 and only to one effect of abuse 3, not the fulfilment of the logistics overcharge
17 and not the e-commerce overcharge. That's his skeleton, paragraph 33.

18 That in our submission is not correct. We have already discussed that the conflict
19 feeds directly into Dr Houppis' methodology for calculating inflated FBM fees. So it
20 does very immediately impact on the fulfilment and logistics overcharge. I have also
21 shown you that abuse 3 is pleaded to have effects on e-commerce platforms. So it is
22 not insulated from those aspects of the claim either. The problem applies to abuses
23 4 and 5 as well, because of the wholly interrelated nature of the pleaded case.

24 Just to show the Tribunal the pleading on that in the claim form, paragraph 170.4. This
25 was page 6350. It is pleaded consequences of abuse 4. What we see is that all the
26 same effects are pleaded for abuse 4 as were pleaded for abuse 3, including making

1 sellers less likely to win the Buy Boxes so far as they use FBM services, including
2 increasing FBA and FBM fees and then including feeding into the rival e-commerce
3 platforms.

4 So this is a further allegation that FBM merchants are disadvantaged as compared to
5 FBA merchants. So we say it gives rise to all the same difficulties as regards abuse
6 3 including the need for FBA merchants to give credit.

7 Dr Houpis also tells us that the same methodologies are to be applied to both abuse
8 4 and abuse 5. That comes through from his summary. Bundle A, tab 8 at page 189.

9 It should be 159, looking in particular at paragraph 33. The heading is "Fourth
10 potential abusive conduct: making access to Prime conditional on the use of FBA". He
11 says at paragraph 33:

12 "This abusive conduct would be expected to have similar effects as the third potentially
13 abusive conduct (ie higher fulfilment and marketplace-related fees) hence the
14 methodologies set out for the third potentially-abusive conduct (section 3.5) apply."

15 So he is telling us that the same methodologies that are impacted by the conflict in
16 relation to abuse 3 are equally impacted in relation to abuse 4.

17 Dr Houpis has not sought to quantify the lost sales to FBM merchants which are
18 attributable to abuse 4 at this stage. The Tribunal can see that from his summary
19 table in the same document on page 149. He identifies -- this is Table 1, "Denial of
20 Prime benefits" -- he identifies what he says is the driver of loss:

21 "FBM offers cannot access Prime events and customers that apply the Prime-filter
22 results in lost sales for sellers."

23 Then under the "Damages":

24 "No estimate provided: lack of data."

25 What that means is that Dr Houpis is not in any position to assert that the outcome of
26 pleading this abuse, abuse 4, will necessarily be net positive for FBA merchants,

1 because he hasn't got so far as to quantifying the consequences of this abuse.
2 If we turn to abuse 5, it is pleaded at B, 6351. We can see that the FBA/FBM dynamics
3 are equally a feature of abuse 5 as well. If we look at 170.5.1.2, we see the plea that
4 abuse 5:
5 "Prevents FBM fulfilment/logistics providers from achieving scale, and so increases
6 FBM fees charged by such providers to sellers."
7 That takes us right back into the same methodology where the interests of FBA and
8 FBM sellers conflict. Professor Stephan also pleads at paragraph 171 underneath:
9 "As will be apparent from the above, the Abuses have overlapping or combinatory
10 effects -- hence the PCR's contention, set out at paragraphs 165 to 168 above, that it
11 is appropriate to consider these various abuses on a collective (as well as
12 an individual) basis."
13 So all these conflicts in our submission and all these suitability issues bleed into abuse
14 5 as well. In our submission for all those reasons abuses 3, 4 and 5 are not suitable
15 to be combined in collective proceedings.
16 I would like to deal very briefly with the position on the regulatory material, as I am
17 conscious we have gone over the estimated time for this particular area.
18 **MR JUSTICE ROTH:** What you say is (inaudible) regulatory proceedings, collective
19 proceedings where you have FBM merchants combined with FBA merchants. That's
20 your point.
21 **MS FORD:** That's one limb of it. One limb is that there is simply a conflict and so they
22 are not simple for that reason.
23 **MR JUSTICE ROTH:** I think I asked you this yesterday, but just to be clear on your
24 answer, if it is a collective proceedings for FBM merchants, there's no problem.
25 **MS FORD:** Yes, both because that gets rid of the conflict and because it is in their
26 interests potentially to advance that claim on its own, not in combination with FBA.

1 **MR JUSTICE ROTH:** Yes.

2 **MS FORD:** I am going to deal very briefly with the regulatory position. The submission
3 we make in relation to that is that the way we have framed our claim and our theory of
4 harm is grounded more robustly in the actual competition concerns identified in the
5 key regulatory materials than the way in which Professor Stephan has formulated his
6 claim.

7 The Commission decision came first, but that was then echoed essentially in largely
8 the same terms in the CMA decision. So given the time, I am going to focus only on
9 the CMA decision. Mr Brealey showed you that in bundle B, tab 11 starting at
10 page 6423.

11 **MR JUSTICE ROTH:** I think we have got it in various places, haven't we?

12 **MS FORD:** Yes. It is also in the authorities bundle but I am attempting to go back to
13 the version that you may have marked up.

14 **MR JUSTICE ROTH:** Yes.

15 **MS FORD:** You have already been shown the summary of the conduct at 1.2. Point
16 (a) is about the data abuse. We have covered that. Point (b) is the point about the
17 Amazon self-preferencing. The way in which point (b) is put here really illustrates the
18 points that I was making submissions on yesterday about the way in which we have
19 sought to frame our claim in order to avoid any conflict.

20 The Tribunal will see the way in which the self-preferencing is phrased here is:

21 "Amazon sets and applies the conditions and criteria for selecting the 'Featured Offer'
22 on product pages in a discriminatory manner, such that Amazon Retail and sellers that
23 use Amazon's fulfilment services are unfairly advantaged over other sellers."

24 It is put in a composite way. If one looks at a standalone Buy Box type abuse, that
25 conduct impacts both Amazon Retail and sellers that use Amazon's fulfilment services
26 over other sellers. The concern is that there is a risk that if one puts it in that way,

1 then that does then begin to trespass on the conflict that I've outlined. That is the
2 basis on which we have stopped short of pleading a completely standalone
3 self-preferencing allegation and we have pleaded it as an unlawful product entry
4 strategy on behalf of Amazon, which is exacerbated by Amazon's ability to then
5 self-preference those products, but, of course, we can hear what the Tribunal has to
6 say in its judgment in due course about that as to the extent to which it is necessary
7 to insulate the claims in that way.

8 **MR JUSTICE ROTH:** What you have just said (inaudible).

9 **MS FORD:** We have always taken the view that there is a conflict here and insofar as
10 the conduct gets into questions of preferencing FBA sellers over FBM, that then risks
11 trespassing on areas which are subject to a conflict. We obviously anticipate that we
12 will have the benefit of the Tribunal's judgment as to the extent to which it agrees with
13 that proposition.

14 **MR JUSTICE ROTH:** Yes. If we say that you are wrong on that and Stephan is right,
15 there is no conflict and you are stuck with that. It is not that you then amend your
16 claim form.

17 **MS FORD:** That's absolutely right.

18 **MR JUSTICE ROTH:** And have another go. That can't be right.

19 **MS FORD:** If the Tribunal said we were right about that but we don't think that
20 precludes you from pleading a standalone abuse, then that is also something that can
21 be taken into account.

22 **MR JUSTICE ROTH:** Yes.

23 **MS FORD:** We have dealt with (a) and (b). There is a mention of logistics at (c) and
24 that is a very specific concern that the CMA appeared to be identifying. It is that:

25 "Third-party sellers that use carriers other than Amazon's fulfilment services or Royal
26 Mail are unable to independently negotiate terms and rates for Prime delivery services

1 with those carriers and must instead use the terms and rates that have been agreed
2 by Amazon with those carriers."

3 That's a fairly specific and focused concern which in our submission doesn't really map
4 onto a much more general logistics type allegations that Professor Stephan has
5 sought to bring.

6 **MR JUSTICE ROTH:** I don't think -- as I understood it, I don't think Mr Brealey
7 suggested that the Stephan case deals with (c).

8 **MS FORD:** No. It may well be that he hasn't.

9 **MR JUSTICE ROTH:** And you don't either.

10 **MS FORD:** We absolutely don't. The point I make is that the centre of gravity of the
11 CMA's concerns expressed in this decision is about the ability of third party sellers to
12 make sales on the Amazon marketplace. It's not about inflated logistics fees. It is not
13 about inflated e-commerce fees, and although Professor Stephan's claim is claiming
14 in excess of £1 billion in inflated logistics fees and although it is claiming another half
15 a billion in relation to e-commerce fees, we say that those are concerns which have
16 much less foundation in the core competition issues actually express by the
17 Commission in the CMA.

18 You have been shown various passages of this document already. We say that those
19 that you have already been shown absolutely bear out that that's what the CMA is
20 worried about, but just to show you two further paragraphs. 3.17 on page 784.

21 **MR JUSTICE ROTH:** Page?

22 **MS FORD:** Page 6431. Sorry. That was a reference to another version of this
23 document. The CMA are saying:

24 "Having an offer selected as the Featured Offer is important to sellers, as evidence
25 provided by Amazon indicates that over 75% of purchases on the UK Amazon
26 Marketplace are made via the Featured Offer."

1 Similarly 4.9. I think this was a paragraph you were shown:

2 "Data provided to the CMA by Amazon shows that where both Amazon Retail and
3 third-party seller offers were eligible to be the Featured Offer on a product page in
4 2021, an offer by Amazon Retail was selected to be the Featured Offer in more than
5 80% of cases."

6 In our submission the core concern that is coming through here, and it is one that we
7 do address in our claim, is the access that third party sellers have to making sales on
8 the Amazon marketplace.

9 **MR JUSTICE ROTH:** While we have that page open, 4.6:

10 "The CMA's concerns are reflected in complaints that [they have] received ... These
11 have referred to Amazon's ability to use non-public seller data" -- "superior information"
12 it has been called in this case -- "to:

13 (a) Monitor the success of products introduced by third party sellers, with the intention
14 of entering successful product markets as a retailer."

15 Clearly cover that:

16 "(b) Identify and approach the suppliers of third-party sellers' high-selling goods; and
17 (c) Negotiate more effectively with, and demand discounts from, suppliers of goods
18 to Amazon Retail (for example, by referring to prices paid to suppliers by third party
19 sellers)."

20 So, in other words, Amazon is selling a product. Maybe it entered first. Maybe it
21 entered second. There would be very few where it didn't enter, there was not
22 something similar already there. After Amazon enters another third party enters and
23 seems to price more cheaply. Amazon can see who their supplier is. Amazon
24 approaches the supplier and gets a discount. So that's nothing to do with entry. It is
25 simply using data at a later stage to get better terms. Is that an effect that Dr Nitsche
26 is calculating?

1 **MS FORD:** It comes in because post entry what Dr Nitsche does is to compare
2 Amazon's performance with the performance of a comparable third party, a third party
3 of comparable scale. Insofar as Amazon has any post entry advantages which would
4 include advantages of this nature and would also include the advantages such as the
5 pricing effects, the insight into inventory, those sorts of points, those will be reflected
6 in the performance of Amazon that is not comparable to third parties who do not have
7 access to that material. So he does factor that into his methodology. When we come
8 to work through that, I will show the Tribunal where that is.

9 **MR JUSTICE ROTH:** Yes.

10 **MS FORD:** Just to wind up this section of our submissions we say that the way in
11 which we have formulated our claim is much more firmly founded in the core
12 competition concerns that come through from the regulatory materials. So in terms of
13 the scope of the competing claims our submission is that BIRA's is the better
14 formulated claim.

15 Mr Brealey now has a right of reply on that element before we move on to methodology
16 and other matters, unless the Tribunal has any further questions.

17 **MR JUSTICE ROTH:** Yes. I think it is the Italian authority and we did look at their
18 decision, that covers the logistics.

19 **MS FORD:** Yes. I have deliberately not addressed that in the sense that Mr Brealey
20 did not go to it in opening. If the Tribunal would be assisted, I can address it briefly.

21 **MR JUSTICE ROTH:** Just when you said the regular true position is better reflected
22 in the BIRA case, I understand that regarding the CMA that you have been looking at,
23 but if one takes the regulatory position as a whole, the Italian one is looking at logistics,
24 isn't it?

25 **MS FORD:** My submission is that the core regulatory position that one gets both from
26 the Commission and the CMA does not go into these matters of essentially excluding

1 the effects on Amazon's competitors. What the Italian decision identified was
2 an impact of Amazon's conduct on competing third party logistics providers and
3 competing e-commerce marketplaces. So even the Italian decision is not concerned
4 in immediate terms with inflated fees to merchants or indeed with inflated e-commerce
5 fees.

6 What it is concerned with is the exclusionary effect on those markets of Amazon
7 leveraging its dominant position on the e-commerce market.

8 **MR JUSTICE ROTH:** Yes, but exclusionary effects therefore reinforcing its market
9 prominence, therefore enabling it to charge prices. I mean, why are exclusionary
10 effects -- I appreciate there is an element of just simple variety and choice, but general
11 consequence of exclusionary effects is higher prices, isn't it? That's why exclusionary
12 effects are disapproved.

13 **MS FORD:** I don't seek to make the submission that it is unarguable as a case, but
14 the submission I do make is that when one is exercising that judgment that is referred
15 to in the authorities about what is the narrower, stronger core conduct, what is the
16 case that is best to advance taking into account things like efficiency, delay, cost, in
17 our submission the narrower core conduct is that that we have identified, and it does
18 adversely impact on things like efficiency, complexity, delay, cost, to try to expand it
19 out and encompass everything else.

20 **MR JUSTICE ROTH:** That in a sense leads me to the other question I wanted to ask
21 you. In very broad terms, and obviously we haven't got Amazon addressing this, what
22 do you think -- leave aside the Hammond case altogether. If it was just your case
23 being tried, can you give us any idea at all of what would be the length of trial?

24 **MS FORD:** I am sure our litigation plan will have addressed that. I don't have the
25 material to my fingertips. Perhaps I can come back to it and give you a reference as
26 to what we say about it.

1 **MR JUSTICE ROTH:** Yes. I just wanted a general understanding of how long you
2 think, assuming Amazon fights you hard, as no doubt they will, what you think for the
3 case you put is the length of trial. As I say, leave aside the complexities of the
4 Hammond trial with it, which obviously has an effect. If you can in due course. Thank
5 you.

6 **MS FORD:** Certainly.

7 I don't know if it is Mr Brealey or Mr Carall-Green or both.

8 **MR BREALEY:** Both actually. It is going to be more my learned friend than me.

9

10 **Reply on behalf of Professor Stephan**

11 **MR BREALEY:** Can I just make two points in response? The first is just immediately
12 responding to the submission about the core competition concerns. If you still have
13 the CMA's Commitments Decision open, I would refer to paragraph 4.10 in bundle B.
14 It is at 6435. All I am doing is responding here:

15 "The CMA has received complaints from third party sellers which allege that the criteria
16 for selecting Featured Offer discriminating in favour of Amazon fulfilled offers,
17 including the circumstances where Amazon fulfilled offers are less competitive on
18 price."

19 So to a certain extent I think that's feeding into the 70% hike in price we saw yesterday.

20 Over at page at paragraph 4.12(b) --

21 **MR JUSTICE ROTH:** The 70% hike in price was for the fulfilment.

22 **MR BREALEY:** The FBA fulfilment.

23 **MR JUSTICE ROTH:** Yes.

24 **MR BREALEY:** Then at 4.12(d), which is something again Mr Houpis -- Dr Houpis
25 refers to, there is a specific concern of the CMA about delivery and fulfilment.

26 "[It] is concerned that any biases ... may lead to:

1 (d) A reduction in the scale and competitiveness of fulfilment service providers that
2 serve sellers on the UK Amazon marketplace."

3 So again the theory of harm that a lot of people have identified about sellers paying
4 higher fulfilment prices than they would otherwise have done is clearly flagged in my
5 submission at 4.10 and 4.12.

6 **MR JUSTICE ROTH:** Isn't 4.10 the same -- the FBA product -- (overtalking) -- talking
7 about logistics.

8 **MR BREALEY:** "... in circumstances where Amazon-fulfilled offers are less
9 competitive on price."

10 Well, it may well be that it is the product rather than the delivery, but they include both.
11 It is surprising if the sellers are not saying to the CMA that the fulfilment costs are
12 going up. It is a short paragraph. Clearly at 4.12(d) there is a concern.

13 **MR JUSTICE ROTH:** Can I read it again?

14 **MR BREALEY:** That's the first point I wanted to note. There is clearly a competition
15 concern about the higher charges fulfilment.

16 The second point I wanted to make --

17 **MR JUSTICE ROTH:** Can I just ask you, and I appreciate it is not a point of reply, but
18 I didn't raise it before. Your abuse 5, which is on Dr Houpis' broad estimates a lesser
19 part of the case, but that is something which has not been recently pursued by any
20 Competition Authority. It was when they had different terms back in up to 2012 I think,
21 but then Commitments were given and the terms were changed. As I understand it,
22 you are running an allegation which may well be pleadable, but it is not founded in
23 anything any of the regulatory authorities have said. Is that right?

24 **MR BREALEY:** Except for the Federal Trade Commission.

25 **MR JUSTICE ROTH:** In the US.

26 **MR BREALEY:** Yes, and the UK terms and conditions are very similar.

1 **MR JUSTICE ROTH:** But the CMA -- I think it was already at the CMA -- got
2 Commitments and presumably monitors those to some extent, has not expressed,
3 despite this very detailed report in 2023, following a lot of investigation of Amazon
4 leading up to it (inaudible). The investigation started in July 2022 after establishing
5 their reasonable grounds and so on. There They didn't find cause for concern
6 underlying your allegation of abuse 5.

7 **MR BREALEY:** That may be true, but in section 12 of Dr Houppis' report he does set
8 out a regulatory background for Amazon engaging in the anti-discounting conduct. So
9 this is at B, 7871. So there is some regulatory background to this. If it is proven he
10 sets out the likely effects and how that can result in higher charges.

11 All I would say on abuse 5 for now, because my learned friend will deal with it in the
12 conflict, no-one has suggested that this is not a valid claim. Ms Ford has not said this
13 is strike outable.

14 **MR JUSTICE ROTH:** No.

15 **MR BREALEY:** Therefore Professor Stephan has looked at this point. He has looked
16 to see what the Federal Trade Commission has said. He has looked to see what the
17 terms and conditions in the UK say. There is on the face of it a valid claim for loss in
18 respect of abuse 5. BIRA in its skeleton says it doesn't pursue it because there's
19 a conflict of interest. It is hard to see what the conflict of interest is on abuse 5. This
20 is something my learned friend will deal with.

21 So it is not an unimportant point. We are addressing BIRA's criticisms on abuse 3 and
22 potentially abuse 4. As I say, this is a pleaded claim --

23 **MR JUSTICE ROTH:** Can I stop you and interrupt?

24 **MR BREALEY:** No problem.

25 **MR JUSTICE ROTH:** I think you said the terms of the contract, which is the same in
26 the US, but it is a different entity contracting in the US, is it not? Do we know that it is

1 the same in the US?

2 **MR BREALEY:** I am just taking it from paragraph 432(b), 7872. I beg your pardon.

3 This is volume 9 of Houpis, the main report. I was referring to --

4 **MR JUSTICE ROTH:** Can you give the reference again?

5 **MR BREALEY:** B, 7871 is his section 12. It starts at paragraph 429. It is my volume 9
6 of 108, B.

7 **MR JUSTICE ROTH:** It is not in --

8 **MR BREALEY:** This is the Houpis main report, tab 12.

9 **MR JUSTICE ROTH:** Yes. B, 78...

10 **MR BREALEY:** 7871. As you know, sir, he has separate sections dealing with the
11 five abuses. He says on 7871 "Amazon engages in anti-discounting conduct":

12 "... may have deterred third party sellers that use the marketplace from multi-homing
13 on rival online marketplaces, which in turn would imply that Amazon has foreclosed
14 rival online marketplaces and lessened the competitive constraint they posed on
15 Amazon's own offering."

16 This is essentially another vice of Amazon trying to increase its market power.

17 Then he sets out Amazon's fair pricing policy. At 432 this is where I got the statement
18 I just made:

19 "Amazon's fair pricing policy is worded in a similar way in the US. The FTC has
20 expressed concerns about Amazon's fair pricing policy in the US being
21 anti-competitive."

22 He then deals with the consequences for third party sellers. So again I repeat the
23 point that it is not clear to us why there is a conflict. At 433 onwards he sets out the
24 consequences.

25 Then the preliminary conclusions at 441:

26 "Based on the evidence available to me there is some indication that Amazon's fair

1 pricing policy may deter third party sellers from setting materially lower prices on rival
2 online marketplaces."

3 At B, 7876 he deals with the likely effects.

4 **MR JUSTICE ROTH:** Yes. I wasn't seeking to suggest it is not an arguable case.
5 I was just asking about the regulatory background. You say it is the FTC. Then
6 I asked you was it a similar contract and the answer seems to be in footnote 518.
7 I don't know where footnote -- one would need to follow that up and see whether that
8 shows that it's a similarly worded contract. Of course, the contract here was amended
9 following -- and in Europe was amended following the Commitments in 2012.

10 **MR BREALEY:** If you want, sir, we can follow this up. I was just taking it at face value
11 from Dr Houpis' report.

12 **MR JUSTICE ROTH:** Yes. Do you have a cross-reference to exhibit -- footnote 518?
13 Someone can perhaps provide it. (Inaudible).

14 **MR BREALEY:** Shall I follow that up?

15 **MR JUSTICE ROTH:** Yes. You can supply that in due course. Yes. Thank you. So
16 that's on abuse 5.

17 **MR BREALEY:** That's on abuse 5.

18 Then, sir, the last point I would like to make again is in response to what Ms Ford said
19 yesterday and this morning. As you know, sir, I submitted yesterday that BIRA's
20 narrow claim would likely exclude certain products and thus certain sellers from the
21 class. One example I gave was where Amazon was the first to enter. That is
22 something that you, sir, have asked this morning. Mr Derbyshire actually asked
23 yesterday how narrow was narrow and Ms Ford said:

24 "Instances where Buy Box was divorced from the data abuse would be minimal."

25 So how narrow is narrow? Ms Ford says:

26 "Instances where Buy Box was divorced from data abuse would be minimal."

1 On that we do have a figure in our footnote 9, but can I go to bundle G just on this
2 point to the Crawford paper upon which Dr Nitsche relies quite heavily. This is
3 bundle G, 3. This is going to -- it is going to the volume of products where Amazon
4 could well be the first to enter. This is the paper that BIRA rely on quite substantially
5 in its report. This is called the Crawford report. It is just a small section, but if one
6 goes to G/8, halfway down -- we do refer to this in footnote 9 of our skeleton, but it is
7 important to see where it comes from. So on G/8 in the paragraph beginning:

8 "We have four sets of results",

9 We see the following sentence:

10 "Almost half of the revenue from products in which Amazon is present (48.7%) comes
11 from products where there was *de novo* Amazon entry, that is products Amazon
12 introduced that no third party merchant previously offered on marketplace."

13 One would obviously have to drill down into that, but that is a significant number. As
14 I understand it, if one goes back to -- if one goes to the Nitsche report -- I am not going
15 to deal with this now; I am just going to flag the point, because those who are dealing
16 with methodology will deal with this maybe later on this morning or this afternoon -- if
17 one goes to bundle A and the Nitsche report -- so bear in mind that 48.7% of products
18 on the marketplace are products where there was *de novo* Amazon entry. That's
19 a significant number. What there appears --

20 **MR JUSTICE ROTH:** I think that's almost the minimum, because if you look at Table
21 2 on G/51, there is a share of the total where they just don't know. They haven't got
22 the data. At G/51 you have the .487 figure in the middle and .269 where Amazon did
23 not enter first and then they have the unknown .244. So it's at least 48.7% it seemed
24 to me.

25 **MR BREALEY:** And it refers to type of product. All I was going to flag is that this is
26 a significant number. If one goes to core bundle A, so this is the Nitsche summary at

1 7, to see how it appears they are going to deal with the significant number, so this is
2 A, 136 and again I think Ms Ford is going to deal with this later on, and Mr Carall-Green
3 will look at this dealing with methodologies but it is important just to flag the point now.
4 At paragraph 24 what BIRA seem to be saying they are going to do, they realise that
5 Amazon had a *de novo* entry where there is no other product. They will then try and
6 identify -- the *de novo* Amazon entry. They are going to try and identify third party
7 products that are already there. So, in other words, BIRA is saying "I am only
8 responding to a similar successful product". So I have a *de novo* entry where there is
9 no other product on the marketplace but nevertheless the methodology is "I am
10 responding to a similar and successful product introduced earlier by a third party".
11 That's their merger analysis that they are going to have to undertake for many, many,
12 many products, looking at 24, but it is a big ask, because you still have this 48% at
13 least Amazon *de novo*. You then have to identify an existing third party similar product
14 and then you have to show that the data -- you have to show that product was
15 successful, to pick up a point that Mr Bankes referred to yesterday. What happens if
16 the third party product is not successful and you have *de novo* entry and then it
17 subsequently becomes successful.
18 This is all part of the problem of the narrowness of the BIRA claim being focused on
19 market entry. Obviously, sir, you have it in mind, but I did want to emphasise this
20 significant figure of *de novo* entry.

21 **MR JUSTICE ROTH:** Yes. I know it is a little bit early, but it might be that's a sensible
22 point to break and we will come back at 11.50.

23 **(Short break)**

24 **MR CARALL-GREEN:** Sir, first something to clarify from yesterday. At one point you
25 asked which case it was that reserved the right to extend the limitation period
26 backwards in time by reference to the Eureka case.

1 **MR JUSTICE ROTH:** Yes.

2 **MR CARALL-GREEN:** Ms Ford pointed out that BIRA does that. I just wanted to
3 clarify that we do that as well. I can give you the reference to that if it helps. Just to
4 clarify that's something we do in our claim form.

5 **MR JUSTICE ROTH:** Can you give me the reference?

6 **MR CARALL-GREEN:** It is footnote 3 of our claim form which is to be found at
7 bundle B, tab 8, page 6286.

8 So, sir, I want to go back to the conflict. Ms Ford set up the conflict by saying that the
9 FBM seller wants to argue for a higher diversion, if you can call it that, ie the sales
10 effect, whereas the FBA seller wants to argue it away. I would like to respond to that
11 in five submissions.

12 My first submission is that it is not true that these two groups such as they are, and
13 I addressed you yesterday on whether or not those two groups could properly be
14 identified, but such as they are, it is not true that they are at loggerheads. The FBM
15 seller wants to argue for the diversion, because it gave rise to lost sales, because it
16 drove the logistics overcharge and because it drove the e-commerce overcharge. The
17 FBA seller --

18 **MR JUSTICE ROTH:** Just a second. Logistics effect, higher sales and the
19 e-commerce effect you say.

20 **MR CARALL-GREEN:** Yes.

21 **MR JUSTICE ROTH:** Yes.

22 **MR CARALL-GREEN:** Now the FBA seller also wants to argue for the diversion
23 because that's how you get to the FBA overcharge and how you get to the e-commerce
24 overcharge.

25 **MR JUSTICE ROTH:** The logistics effect.

26 **MR CARALL-GREEN:** Yes. So this is not like a pass-on situation where the indirect

1 purchaser and direct purchaser are facing in opposite directions. One wants the
2 pass-on and the other does not. In this situation both groups are directionally aligned,
3 but they both want to argue for the proposition.

4 **MR JUSTICE ROTH:** The inflated use of FBA means the price of FBA goes up and
5 inflated use of FBA means reduced scale for the competitors doing FBM and therefore
6 they don't get the scale benefits. Their prices cannot go down.

7 **MR CARALL-GREEN:** Yes. That's the point. Ms Ford says that the FBA seller has
8 a disadvantage because it then has to give a credit in respect of the diversion. Now
9 preliminarily just as a threshold point I want to say that whether or not credit should be
10 given at all as a matter of legal principle is an open question. It is a defence for
11 Amazon to raise. We don't know whether it will.

12 Now as a methodology I have shown you that Dr Houpis assumes a netting off. So
13 he works with a credit against the FBA lost sales, but whether or not Fulton Shipping
14 requires that credit to be given as a matter of law and whether or not Amazon will
15 argue for that is an open question. Sir, just to go --

16 **MR JUSTICE ROTH:** We can assume Amazon can argue it. I think we are safe in
17 making that assumption. You can't say it is unarguable.

18 **MR CARALL-GREEN:** Yes, I am happy to make that assumption. Let's assume that
19 they do take us to the test, which is at the authorities bundle, page 78. Starting
20 between B and C the relevant paragraph is (3).

21 **MR JUSTICE ROTH:** Just a moment. 78. This is Mr Justice Popplewell's --

22 **MR CARAL-GREEN:** This is Lord Clarke's speech.

23 **MR JUSTICE ROTH:** Yes, but he is quoting, isn't he, the trial judge's statement of
24 principles.

25 **MR CARALL-GREEN:** That's it.

26 **MR JUSTICE ROTH:** Because he is going through in the appeal what happened in

1 the High Court, what happened in the Court of Appeal and then he gives his
2 conclusion.

3 **MR CARALL-GREEN:** Sir, I think it is common ground, and, of course I can be
4 corrected if this is wrong, that the test is one of causation ie the test is whether the tort
5 caused a benefit. It is not sufficient if the tort has merely provided the occasional
6 context of benefit.

7 **MR JUSTICE ROTH:** Yes. It is really paragraph -- I know you want to come back to
8 16 -- paragraph 16, if you want, but it is really in paragraph 33, isn't it, 30 and 33 in the
9 conclusions?

10 **MR CARALL-GREEN:** Yes. That's the paragraph that I think Ms Ford took you to:
11 "The essential question is whether there is a sufficiently close ..."

12 **MR JUSTICE ROTH:** Ms Ford took us to para 30 and there is also 33. That is where
13 you get the occasion in the court.

14 **MR CARALL-GREEN:** If we do assume that Amazon is going to run the point there
15 will be an argument to be had about whether the gains were caused by the tort or
16 whether they were caused by sellers' own decisions, for example. I don't seek to argue
17 that point right now. I just make the threshold point that whether or not the giving of
18 the credit is actually required as a matter of law is going to be an arguable point and
19 I imagine this Tribunal will entertain submissions on it.

20 **MR JUSTICE ROTH:** Yes.

21 **MR CARALL-GREEN:** The *prima facie* measure of loss will be the overcharge and
22 then there will be a debate to be had about whether credit has to be given in respect
23 of it. That's my first submission, sir.

24 For my second submission I'd like to go to my visual aid, if I may. Sirs, if you don't
25 have it anymore, don't worry. I have spares.

26 **MR JUSTICE ROTH:** We have it. Don't worry. We brought it back with us. Yes.

1 **MR CARALL-GREEN:** Now this is assuming that we are doing the (inaudible). We
2 have already lost on this point, the Fulton Shipping point.

3 **MR JUSTICE ROTH:** The legal point.

4 **MR CARALL-GREEN:** Yes, we have already lost on the legal point, but I want to see
5 what the incentives are even in that instance. So first by reference to page 1, and the
6 difference between page 1 and page 2 is simply whether or not the diversion effect
7 outweighs the overcharge. So in the page 1 scenario, and I addressed you on this
8 yesterday, for the purposes of establishing the total loss of the class, the aggregate
9 damages, the amount of the diversionary effect, which I called Z in my algebraic
10 submission yesterday, does not matter. So that 10 in that diagram could be 1; it could
11 be 30; it could be zero.

12 **MR DERBYSHIRE:** That starts from the assumption that the margins are both the
13 same for FBA and FBM.

14 **MR CARALL-GREEN:** It does, sir. This is working on a model that has certain
15 estimates and assumptions built into it, I accept that, but I don't think an attack has
16 been levelled on the model on that basis and I am sure that Dr Houpis is perfectly
17 prepared to reconsider the appropriate approach if it turned out that there were very
18 significant differences between these. If an assumption turns out to be unjustifiable,
19 then ... Sir, I should say that also assumes a fixed level of overcharge.

20 So the point I make is that actually the size of the red arrow, nobody in this scenario
21 rationally cares about the size of the red arrow except insofar as it determines the size
22 of the grey and black boxes.

23 **MR JUSTICE ROTH:** The size of the?

24 **MR CARALL-GREEN:** Grey and black boxes.

25 **MR JUSTICE ROTH:** It is the relationship between them, isn't it?

26 **MR CARALL-GREEN:** That's right.

1 **MR JUSTICE ROTH:** If we change the assumptions and bear in mind the overcharge,
2 then one suspects there may be an argument, as Dr Houpis acknowledges, about
3 pass-on.

4 **MR CARALL-GREEN:** Yes.

5 **MR JUSTICE ROTH:** Even if it is 40 and 60, that may not be the recoverable loss in
6 this case, but if, say, the lost sales, gained sales, which we assume are the same, is
7 70, not 10 and the overcharge for the FBM is 30, not 40.

8 **MR CARALL-GREEN:** Yes.

9 **MR JUSTICE ROTH:** Then the overcharge for the FBA is 50, not 60.

10 **MR CARALL-GREEN:** Yes.

11 **MR JUSTICE ROTH:** They both go down a bit. Then you get a rather different
12 position, don't you?

13 **MR CARALL-GREEN:** You do. You end up in the position on page 2 because --

14 **MR JUSTICE ROTH:** Well, sticking with that one at the moment, and then we can go
15 over the page, what you would get then is that the FBM alone, their claim is 100, 70
16 plus 30. The FBA alone has no claim.

17 **MR CARALL-GREEN:** Yes.

18 **MR JUSTICE ROTH:** But you put them together and you will only get 80.

19 **MR CARALL-GREEN:** Yes, sir.

20 **MR JUSTICE ROTH:** So the FBM is -- the size of the pot --

21 **MR CARALL-GREEN:** Has been reduced.

22 **MR JUSTICE ROTH:** Yes.

23 **MR CARALL-GREEN:** Yes, sir, and that's the point I try to address on page 2, if
24 I may. I appreciate, sir, that you are (overtalking).

25 **MR JUSTICE ROTH:** You accept that's right.

26 **MR CARALL-GREEN:** No, I don't accept that's right. The overall pot should not be

1 reduced.

2 **MR JUSTICE ROTH:** Well, sticking with page 1, why in that example where it is lost
3 sales of 70 on 10 and overcharge of 30 for FBM and 50 for FBA, which I think you
4 agree then the FBM class loan would be on the basis of a loss of 100.

5 **MR CARALL-GREEN:** 100, yes.

6 **MR JUSTICE ROTH:** Why is it when you put them together -- how do you still get
7 100?

8 **MR CARAL-GREEN:** Because the claim on the left is worth 100 and the claim on the
9 right is worth zero. It is not worth minus 20.

10 **MR JUSTICE ROTH:** Yes, but the FBAs are not just claiming abuse 3. Their claim is
11 abuse 1 and 2. They have a total damages claim as an FBA.

12 **MR CARALL-GREEN:** Yes.

13 **MR JUSTICE ROTH:** I, an individual FBA, have lost all this, including from abuse 1
14 and 2.

15 **MR CARALL-GREEN:** Yes.

16 **MR JUSTICE ROTH:** If I have to credit for a benefit, it will come a credit to my
17 damages, won't it?

18 **MR CARALL-GREEN:** It will come a credit to your --

19 **MR JUSTICE ROTH:** Not to one bit of my damages.

20 **MR CARALL-GREEN:** I think there are three things to say about that. The first is the
21 point that I have already made. We are assuming here that I have already lost on the
22 question of whether to give credit.

23 **MR JUSTICE ROTH:** Yes.

24 **MR CARALL-GREEN:** The second is there is another open question about whether
25 it is right for me to give credit in respect of abuse 3 for losses caused by let's say abuse
26 5. Again the question -- the test is the causal link. I imagine if we were to make the

1 submission that a gained sale as a result of FBA bias was not caused by
2 an anti-discounting policy, that the Tribunal would at least entertain that submission.

3 So that's the second thing to say about that.

4 The third thing to say about that, sir, is if we are in a world where as a result of the
5 giving credit, ie I have already lost on everything so far, so I am giving credit in
6 respect -- not only am I giving credit in principle but I am also giving credit on, as it
7 were, a case wide basis.

8 **MR JUSTICE ROTH:** Yes.

9 **MR CARALL-GREEN:** If we are already in that place but I still have my claim on the
10 right in the black, ie it's not turned negative, as it were, then we are in the position set
11 out on page 1 where the red lines are smaller than the boxes. So, if I may, it might be
12 helpful if one just crosses out "overcharges" in the grey and the black boxes and just
13 changes those to "All other damages" or something like that.

14 **MR JUSTICE ROTH:** Yes.

15 **MR CARALL-GREEN:** Now you end up back where we started, which is nobody
16 rationally cares how big the red arrow is, because for every 10 on the left, plus 10 on
17 the left, there's a minus 10 on the right. For every plus Z on the left, there is a minus
18 Z on the right.

19 **MR JUSTICE ROTH:** Yes.

20 **MR CARALL-GREEN:** Sir, thank you for those questions.

21 **MR JUSTICE ROTH:** It is critical as to how the rules or the law on what way the credit
22 will apply, should relate, isn't it, because if in the numbers I gave you, even if it is
23 (inaudible), if it is credited against the total FBA loss, then it will reduce the pot that's
24 recovered.

25 **MR CARALL-GREEN:** No, it will not reduce the pot that's recovered, sir.

26 **MR JUSTICE ROTH:** Then it must be me. I have lost you. I understand your legal

1 argument that it shouldn't be credited, but if it is why are you not ending up that the
2 FBM loss, absent an FBA claim, is 100, but putting two together you end up with 80.

3 **MR CARALL-GREEN:** Sir, let me see if I have understood and then I can try to
4 answer. If we have already crossed out the word "overcharges" and we put "All other
5 losses" in there.

6 **MR JUSTICE ROTH:** Yes.

7 **MR CARALL-GREEN:** So the claim on the left for abuse 1 through 5 is
8 40 -- sorry -- on your figure 30.

9 **MR JUSTICE ROTH:** The claim on the left is 30.

10 **MR CARALL-GREEN:** The claim on the right in respect of all abuses 1 through 5 is
11 50. All we have left is a lost sales element of 70.

12 Now the first thing to say is that what we are talking about here is now a diversionary
13 effect in the order of £3 billion. I am not sure that's even possible on the figures that
14 we have. That's an extraordinarily high diversionary effect. So the first thing to say is
15 this is just not a realistic scenario, but even if it were to arise, then my answer would
16 be that it's simply -- the credit that has been given and the claim on the right is
17 a defence by way of set-off and that's what Ms Ford called it yesterday. It is a defence
18 by way of set-off.

19 That's what Fulton Shipping tells us. If you received a gain as a result of a tort, you
20 set off or bring into account, is the language that's used, the gain that you made as
21 a result of the tort. What that can never result in is a claim that goes negative. So the
22 right-hand side person, whoever that is, if they in theory had a *prima facie* loss of 50
23 and then they were argued down on the Fulton Shipping point so that they had to give
24 a credit for 70, the end of the proceedings would be a nil damages award or the claim
25 would be dismissed. It would not result in a 70 payment by that person to the
26 defendant.

1 So if we are in the business of combining claims, which we are under section 47B, we
2 are combining a claim on the left for 100 and a claim on the right for zero, not a claim
3 for minus 20, but a claim for zero, so the total is 100. That's the point.

4 *In extremis* you are right, sir, that I would have to be left with a legal argument but in
5 my submission, sir, that legal argument is robust and at the very minimum it is robust
6 enough for me to be able to argue it.

7 **MR BANKES:** I understand your point that eventually you run out of things to set off
8 against. The zero sum again. Put aside the effect of costs at the moment to that
9 outcome. Are you saying that every step along the way it seems to me that slide 2,
10 which you have asked us to look at, sets out a position which is not at the extreme that
11 you postulated but it does lead to a reduction in the size of the cake or the size of the
12 pot or whatever else you call it. Are you saying there is no way at any step along the
13 various mutations that the cake is reduced, or are you saying the hard stop is
14 eventually run out of cake.

15 **MR CARALL-GREEN:** No. I say that both as a matter of fact and as a matter of law
16 you are never going to reduce the cake size.

17 **MR BANKES:** And that relies on you winning the Fulton Shipping point.

18 **MR CARALL-GREEN:** No. It only relies on me winning that point if I get to the
19 position where the red line takes the right-hand side claim into the negative on a claim
20 wide basis.

21 **MR BANKES:** There is a scenario in which you rely on winning.

22 **MR CARALL-GREEN:** There is a scenario but I do say that that scenario is almost
23 impossible to arrive at, but I do rely on a legal argument at that point.

24 **MR DERBYSHIRE:** Can I ask you a question? You just said the cake is never
25 reduced, but surely the cake would be reduced compared to late class action. If the
26 FBA sellers went separate and the FBM sellers went separate, then on these figures

1 before us the separate cake would be bigger than the combined cake.

2 **MR CARALL-GREEN:** In what sense, sir?

3 **MR DERBYSHIRE:** In the sense that the separate cake on the first slide, the FBA

4 sellers would get the £60.

5 **MR CARALL-GREEN:** The FBA sellers would get the £60?

6 **MR DERBYSHIRE:** As the overcharge and the FBM sellers would get the £40

7 overcharge and the lost sales.

8 **MR CARALL-GREEN:** So if I win on everything, so if I get to the point where I don't

9 have to give credit at all, then on an aggregate basis that will be true as well.

10 **MR DERBYSHIRE:** If you win that point.

11 **MR CARALL-GREEN:** Yes, if I win, but as we have all acknowledged, I think, it is

12 possible -- we think Amazon will run the point. If we lose that point, we end up on

13 page 1 where nobody rationally cares about the size of the red arrow, and then if the

14 red arrow becomes so big that it erodes every other loss that I have, then we end up

15 in the situation where I make the point about you can't reduce beyond zero.

16 **MR DERBYSHIRE:** Just humour me for a second then. If you lose the legal point,

17 the cake you get with the combined case is 40 plus 10 on the left-hand side.

18 **MR CARALL-GREEN:** Yes.

19 **MR DERBYSHIRE:** And 60 on the right-hand side.

20 **MR CARALL-GREEN:** No. If I have lost the point --

21 **MR DERBYSHIRE:** I thought you get all of the overcharge. You get 60.

22 **MR CARALL-GREEN:** Yes, if I win the point. I thought your point was I have lost the

23 point. If I have lost the point, then the right-hand side is only 50.

24 **MR DERBYSHIRE:** Sorry. So you are down to 100 rather than 110.

25 **MR CARALL-GREEN:** Exactly.

26 **MR DERBYSHIRE:** You may say it is theoretical, it is not likely, but that is the kind of

1 lower quantum you get by combining the two classes.

2 **MR CARALL-GREEN:** Yes, but if I have lost the legal point then the FBA seller
3 claiming alone it stands to reason would lose the legal point as well. So the FBA seller
4 claiming alone will also get 50. So in my combined claim he gets 50 because I lost
5 the point. If he goes alone, then if there is any justice and consistency in the way that
6 that point is applied, he will also lose and get 50.

7 **MR DERBYSHIRE:** So if you go to go slide 2.

8 **MR CARALL-GREEN:** Yes.

9 **MR DERBYSHIRE:** Which is the doomsday scenario that the kind of overcharge is
10 insignificant compared to the lost sales.

11 **MR CARALL-GREEN:** Yes.

12 **MR DERBYSHIRE:** What happens with your kind of comparison of the two sides go
13 separate or the two sides go together?

14 **MR CARALL-GREEN:** It is the same because of the point that I made. We are in the
15 business of combining claims here. So if they are separate, and if we are on slide 2,
16 I can just use the figures that are there.

17 **MR DERBYSHIRE:** Yes.

18 **MR CARALL-GREEN:** The person on the left is going to go off by themselves and
19 claim 140. The person on the right is going to go away and have a go but lose and
20 get their claim knocked down to nil, not negative, nil.

21 **MR DERBYSHIRE:** Okay.

22 **MR CARALL-GREEN:** Then if we put them together, we just say the right way of
23 calculating that is 140 plus zero is 140.

24 **MR BANKES:** But the point against you, assuming you have lost on Fulton Shipping,
25 is that the 140 on the left is then available to be offset against the negative on the right.
26 If you were separate that wouldn't be the case.

1 **MR CARALL-GREEN:** Yes. Well, the point might be made that in distribution --

2 **MR BANKES:** No, not in distribution. The point is if they were separate, the left-hand

3 side would be 140 and that would be ring fenced from any problems on the right-hand

4 side. It would be insulated.

5 **MR CARALL-GREEN:** Yes.

6 **MR BANKES:** As you so rightly point out, the size of the cake on the left would go

7 down to zero but not below zero. There is no such thing as negative cake. But if they

8 are together and you have lost on Fulton Shipping, then the negative, the difference

9 between the 60 and the 100 is taken off the totality of all the claims and therefore

10 reduces the 140. The 140 is vulnerable.

11 **MR CARALL-GREEN:** No. Again this is what I am trying to get at by going back to

12 slide 1. If this reduction -- if the red arrow is smaller than the total damages available

13 to the claimant as a result of all the abuses -- so if we go back to slide 1 and say it is

14 not just abuse 3, it is all of the damages, as long as the red arrow does not exceed the

15 size of the black or grey bars, nobody rationally cares about the size of that red arrow

16 when it comes to maximising aggregating damages because it always nets off. Plus

17 Z, minus Z.

18 **MR BANKES:** I think we are in agreement.

19 **MR JUSTICE ROTH:** There is a further point under Fulton Shipping, and I don't think

20 Ms Ford suggested that, is whether a credit on an FBA loss could be set off as against

21 a claim by an FBM, which is a further aspect, isn't it? It is one thing to say the FBA

22 has to credit against FBA's damages, but to credit against another category of

23 damages of somebody else.

24 **MR CARALL-GREEN:** Exactly.

25 **MR JUSTICE ROTH:** Is a further step.

26 **MR CARALL-GREEN:** We say if that would result -- if they are insisting that that

1 would have to be done to the detriment of that class member, we say that that -- first
2 of all, we wouldn't do that. We are only netting in a scenario where it has no effect on
3 aggregate damages. That's the only time we apply netting. If they were to say that
4 you must apply netting to the detriment of the overall damages pot we would say that
5 illustrates that this is an error of law, because it leads to an unjust outcome. So in
6 a sense --

7 **MR JUSTICE ROTH:** One thing I don't follow on your second slide, when you say in
8 the box on the right "Dr Houpis' current estimates indicate that BIRA's hypothetical
9 scenario does not apply. If it were to apply, Dr Houpis' methodology would correctly
10 calculate £140 in damages". I think at the moment what Dr Houpis said is "I am not
11 going to bother to calculate the value of lost sales, because they net off".

12 **MR CARALL-GREEN:** Yes, because on our case as put the overcharge exceeds the
13 lost sales and therefore the slide 1 scenario applies. So you can just net off and it
14 doesn't have a consequence.

15 **MR JUSTICE ROTH:** You say there is that loss but there is no point putting a lot of
16 effort calculating it, because it will net off.

17 **MR CARALL-GREEN:** That's right.

18 **MR JUSTICE ROTH:** That's what I understood you to say.

19 **MR CARALL-GREEN:** Yes. If it turns out that Amazon -- this is effectively a reply
20 point, because if Amazon comes along and says "Ah, no, there is an enormous
21 diversion". It is the 100 in slide 2, and as I said yesterday, query whether they will
22 because that effectively speaks to a gross bias in the algorithm, but let's say they do
23 argue for that and then say "And you will have to give this credit" then the reply point
24 is "No. In that scenario 140 please".

25 **MR JUSTICE ROTH:** Then it seeks to quantify. That is what will then be done.

26 **MR CARALL-GREEN:** Correct.

1 **MR BANKES:** The point is although you have not calculated the size of the arrow,
2 nevertheless without that calculation you are confident that it is not going to be so big
3 as to bring slide 2 into play.

4 **MR CARALL-GREEN:** Yes. I can come on to this because my learned friend Ms
5 Ford did try to sow doubt as to whether or not that was likely to be the case. For this,
6 sirs, I think it would be helpful -- I am going to have to go through some figures,
7 because effectively our case is and Dr Houpis' opinion as expressed is that compared
8 to the overcharge the diversion effect is small or smaller. It is smaller.
9 My learned friend has sought to persuade you yesterday and today that that is
10 an unsafe estimate. This was her point about the 28%. So Ms Ford's point was that
11 a 28% swing, ie a red arrow of 28%, would be big enough to wipe out the grey and
12 black box.

13 Now when I came to that point yesterday in my first set of submissions, I hesitated to
14 get into that level of detail. If I can just explain why I hesitated. Can I take to you to
15 the authorities bundle at page 682.

16 **MR JUSTICE ROTH:** Is this Gutmann?

17 **MR CARALL-GREEN:** That's right. It is the Court of Appeal in Gutmann.

18 **MR JUSTICE ROTH:** Yes.

19 **MR CARALL-GREEN:** Now here at paragraph 73 the Court of Appeal is going to
20 quote the Tribunal and then in paragraph 74 say "This is an appropriate point of
21 departure". So the Court of Appeal's endorsing this perspective.

22 So if I go to the indented quotation from the Tribunal starting in the second line, last
23 word:

24 "Almost any class action will include some claimants who suffered no loss [...] we think
25 it would create an unfortunate obstacle to an effective regime for collective
26 proceedings if potential defendants could sustain objections based and speculative

1 | examples."

2 | The reason I hesitated to get into this point about the 28% is you have Dr Houpis'
3 | opinion that there is a net loss suffered as a result of abuse 3 and having a speculative
4 | discussion in this forum about how robust that is, is straying into trial territory.

5 | **MR JUSTICE ROTH:** Yes. I think my slight reservation about Dr Houpis' opinion is
6 | that in terms of an overcharge as such (inaudible) where Dr Houpis says he just
7 | doesn't know at the moment if it is pass-on, and pass-on can be a real issue it seems
8 | to me in the delivery overcharge.

9 | **MR CARALL-GREEN:** I accept that, sir, but it is worth bearing in mind that the billion,
10 | which is the nominal overcharge that is trying to be wiped out by the 20%, is already
11 | subject to a notional 50% adoption of a pass-on. So the starting point is actually
12 | £2 billion. That's just the logistics overcharge. The e-commerce overcharge is stated
13 | in Dr Houpis' preliminary estimate to be £521 million.

14 | **MR JUSTICE ROTH:** Yes.

15 | **MR CARALL-GREEN:** But that again is subject to a notional 50% pass-on. So we
16 | are actually looking at another billion.

17 | So the starting point is actually £3 billion of overcharge that needs to be wiped out by
18 | the diversion.

19 | **MR DERBYSHIRE:** £3 billion before pass-on.

20 | **MR CARALL-GREEN:** Again we have a *prima facie* measure of loss which is the
21 | overcharge. Obviously defendants will try to chip away at that, chip away by pass on,
22 | chip away through credit arguments, but what Ms Ford is effectively asking you to do
23 | is to say that it is so hopeless to suppose that we will be able to make out a case on
24 | the basis that we have suffered a net loss that we shouldn't even be allowed to run it
25 | at this point. It is effectively a strike-out application by the back door. I say there is
26 | just no proper basis for reaching that conclusion. There is clearly an arguable case

1 here and it is not clear why it wouldn't be in the best interests of the class members to
2 run that case.

3 Now, sir, I have some more detailed points on the 28%, but I wonder if I would be
4 acting contrary to my own counsel by delving into those details.

5 **MR JUSTICE ROTH:** I think we would find it helpful. We have found this a troubling
6 aspect.

7 **MR CARALL-GREEN:** All right. In that case let's go back, if we may, to bundle B,
8 tab 12, page 7902.

9 **MR JUSTICE ROTH:** This is Dr Houpis' main report.

10 **MR CARALL-GREEN:** This is Dr Houpis' main report. I explained yesterday that
11 Dr Houpis posits a smaller swing than the 28% to which my learned friend refers. I
12 took you to this passage and said he is positing at 541 something in the region of 10%.
13 The Tribunal asked why 10%, not 15%, not 20%. Maybe you recall that discussion.
14 There is an answer to that. There was an answer to that, Dr Houpis was trying to give
15 me when I turned my back but I confess I needed a bit of time to digest it.

16 **MR JUSTICE ROTH:** This 10% is a swing from Amazon Retail, not from FBA, isn't it?

17 **MR CARALL-GREEN:** It is. I am just giving you a sense check rather than the actual
18 posited figure. I am trying to explain why Dr Houpis thinks that the swing would be
19 roughly in this region, not that he actually articulates the conclusion here.

20 Now the reason a swing to FBM in the region of 10% is this. Go back to 540. He says
21 his model predicts that FBM would have won about 40% of offers. He then says that's
22 too high, because it doesn't control for delivery speed. There is also an increase of
23 40% products.

24 **MR JUSTICE ROTH:** Product of the same kind.

25 **MR CARALL-GREEN:** So he says that of all the competitions going on in the Buy
26 Box FBM offers would have won in 40% of instances. Then he says that that's an over

1 estimate. Why is it an overestimate? Because it does not control for delivery speed.
2 So what does he do about that? Well, in the absence of information at the moment he
3 says, paragraph 541. A better way of looking at it is to say that the swing to FBM
4 would be roughly the same as the swing from Amazon Retail to FBA. The reason for
5 that is that Amazon Retail and FBA are essentially the same when it comes to delivery
6 speed, because they both use the Amazon fulfilment network.

7 **MR BANKES:** You have the advantage of the transcript in the Hammond Carriage
8 dispute case, haven't you? I think we were told in that case that delivery speed is
9 excluded from the algorithm which determines the Buy Box winner. I don't suppose
10 you can answer that now, but --

11 **MR CARALL-GREEN:** That's not our understanding.

12 **MR BANKES:** We were given the example of a third party seller who could deliver
13 faster and we were told that was not included in the calculation which went into the
14 Buy Box. I can look that up.

15 **MR CARALL-GREEN:** I am afraid I am at a disadvantage when it comes to the
16 evidence in those proceedings, but I don't think that is -- it has been suggested to me
17 that it may be that there is something going on here about Amazon using proxies to
18 represent delivery speed, because it will obviously assume, given that it delivers
19 Amazon Retail products and it also delivers FBA products. There is no difference in
20 delivery time between those two. So that may be what's going on there. Again I am
21 at a disadvantage, but that point has been suggested to me from behind.

22 So the point is that Dr Houpis has said the 10% is a good indicator of if we can call it
23 the quantum of the bias in the algorithm, when differences in delivery speed are not
24 being taken into account, because there are no differences in delivery speed between
25 Amazon Retail and FBA.

26 So the only point that I am making, sir, it is just a short point, that the 10% is not

1 arbitrary.

2 **MR JUSTICE ROTH:** Where does the 10% come from?

3 **MR CARALL-GREEN:** That's the econometric model. So the 40% went to FBM in
4 the econometric model and the 10% also came out of the econometric model.

5 **MR JUSTICE ROTH:** So the model has already been carried out?

6 **MR CARALL-GREEN:** Yes, sir. So the first thing to say on the 28% is just to make --

7 **MR JUSTICE ROTH:** Can you just give me the reference. I appreciate Dr Houpis
8 says it is the same as the 10%. Where did he set out the 10% before?

9 **MR CARALL-GREEN:** So it is Table 13, which is at page 7957.

10 **MR JUSTICE ROTH:** 7957 you say? That's much later on.

11 **MR CARALL-GREEN:** It is annex F of the report.

12 **MR JUSTICE ROTH:** Yes.

13 **MR CARALL-GREEN:** The whole of the model is worked through in the annex. The
14 annex explains the calculation. A simple way of seeing where that 10% is set out is in
15 the conclusion at Table 13.

16 **MR JUSTICE ROTH:** He has used the Keepa data. Is that right?

17 **MR CARALL-GREEN:** He has, sir.

18 **MR JUSTICE ROTH:** To run the analysis on the econometric model.

19 **MR CARALL-GREEN:** Yes.

20 **MR JUSTICE ROTH:** That has given him the 10% from sellers using FBA and then
21 he applies that 10%. Yes, I see.

22 **MR CARALL-GREEN:** That's just to make the point that that reduction from the 42%
23 down to the region of 10% is an informed estimate.

24 **MR JUSTICE ROTH:** Yes.

25 **MR CARALL-GREEN:** So that's the first point I want to make on my learned friend's
26 submissions regarding the 28% swing.

1 The second point I have already made, which is that Dr Houpis has already built in
2 a 50% pass-on.

3 **MR JUSTICE ROTH:** Yes.

4 **MR CARALL-GREEN:** In case a reference is needed for that, 7915. So, as I have
5 said, if Amazon does not argue or fails to establish pass-on, then we have
6 £0.1049 billion of overcharge to wipe out but double that. So that takes the necessary
7 swing, as it were, to 56%.

8 The third point, if I may, is again somewhat more technical and mathematical. BIRA
9 takes its baseline for affected sales as being about £33 billion. So it takes that from --

10 **MR JUSTICE ROTH:** It takes its baseline.

11 **MR CARALL-GREEN:** Of the effected sales. BIRA does a calculation and says
12 "What swing of sales would I need to wipe out the overcharge". We have to start from
13 what are the relevant sales. So BIRA takes its baseline from Table 8 of Houpis 1,
14 which is where we already are. You see FBA sales about halfway down the Table,
15 £33.3 billion.

16 Sir, in order to understand why those sales are not the relevant sales there is a bit of
17 Keepa data that I would like to give you. If I could hand this up. (Handed).

18 **MR JUSTICE ROTH:** What is this?

19 **MR CARRAL-GREEN:** This is telling you the percentage of products on the Amazon
20 website broken down -- the percentage in the right-hand column broken down by who
21 participates in the competition for the Buy Box. So just to take as an example the top
22 row in 7% of products Amazon is offering that product, a product is offered using FBA
23 and a product is offered using FBM. That's the top row.

24 **MR JUSTICE ROTH:** Where does this come from?

25 **MR CARALL-GREEN:** This is the Keepa data on which Dr Houpis has based his
26 model.

1 **MR JUSTICE ROTH:** I know Keepa data has been referred to. What is it actually?

2 **MR CARALL-GREEN:** It is purchasable data gathered by a marketing intelligent
3 organisation about sales on the Amazon platform.

4 The point I want to make here is we can see from this data -- obviously I accept this
5 data is just purchasable data from a marketing intelligent organisation. It all needs to
6 be refined by disclosure, but we can see from this data that FBA participated in about
7 52% of competitions on the platform. So that's the first line, 7% and then the green
8 box and then the pink box.

9 FBA offers are involved in 52% of Buy Box competitions, if we can call it that. We also
10 see from the pink box -- just pausing there, so the 52% where FBA is involved
11 corresponds to the £33.3 billion of FBA sales. So those sales are all derived from the
12 52%. However --

13 **MR JUSTICE ROTH:** Was the Keepa data also used as an input into this modelling
14 described in --

15 **MR CARALL-GREEN:** Yes. The Keepa data is the basis for Dr Houpis' econometric
16 modelling.

17 **MR JUSTICE ROTH:** Yes.

18 **MR CARALL-GREEN:** So out of the 52 where FBA offers are involved, if we go to
19 the pink box 31% aware FBA won -- FBA only. What that means is there is only
20 an FBA competitor going for the Buy Box. There is no competition in that instance
21 with an FBM offer. There is only competition in respect of an FBM offer in respect of
22 the 7 and the 14, ie 21 out of the 52. So in 21 out of 52 instances, ie 40% of FBA
23 sales, is there a competing FBM offer, only 40%.

24 So to find the relevant sales that are actually going to be at all affected by these three,
25 we can't start from the £33.3 billion, because that has a very substantial number of
26 cases in it where there's no FBM alternative. So we have to take that down by 60%

1 to 40% to about -- again I hesitate to go through all of the calculations in great detail,
2 but that takes us down to a much smaller figure, which again means that the swing
3 that you need -- it takes us down to total sales of about £13 billion. Relevant sales are
4 assumed to be 75% of that, so about £10 billion. The profits are assumed to be 15%,
5 so about £1.5 billion. So already we are in a position where the affected profits are
6 lower than the overcharge of £2 billion that have to be wiped out, assuming no
7 pass-on. If there's pass-on for, say, 50%, then it is £1.5 billion plays £1 billion. So
8 two-thirds swing is necessary in order to wipe out the overcharge.

9 **MR BANKES:** This data I don't know what period it covers, but are you saying these
10 percentages are reasonably constant throughout the Claim Period?

11 **MR CARALL-GREEN:** We only have one data point from Keepa is the best that we
12 can manage. Again this is one of the reasons that I was hesitant to get into this in the
13 first place, because we are dealing here with points of great detail. In my submission
14 all I really need to establish here is that we have an arguable case.

15 **MR DERBYSHIRE:** That was very useful and very effective. Thank you very much.
16 Just one question, which is the 52%. You get that to be £33.3 billion. I can't see how
17 you got that.

18 **MR CARALL-GREEN:** The 52?

19 **MR DERBYSHIRE:** You added the three figures together and got the 52%. Does that
20 sum to £33 billion?

21 **MR CARALL-GREEN:** All I am saying is that 52% of the total sales on the platform,
22 we know it is 52% of the sales on the platform and we know from Table 8 that the FBA
23 sales are £33.3 billion. So the £33 billion represents that 52.

24 **MR DERBYSHIRE:** Okay.

25 **MR CARRAL-GREEN:** So if we take it down to 21 out of 52, then we get 21 out of 52
26 is 40%. Apply that to the 33 and you get to that figure of 13.

1 **MR JUSTICE ROTH:** 52% is a portion where there are FBA sales but part of that 52
2 is made up of FBM and Amazon, isn't it?

3 **MR CARALL-GREEN:** It will be, sir. In fact, this will be --

4 **MR JUSTICE ROTH:** So it is not that the £33.3 billion, because that's just FBA, is it?

5 **MR CARALL-GREEN:** I am actually giving the benefit of the doubt.

6 **MR JUSTICE ROTH:** It will be lower than 52%, won't it?

7 **MR CARALL-GREEN:** Sir, I am being told from behind that Dr Houpis is happy -- if it
8 is necessary, to provide a calculation which sets out blow-by-blow why he reaches the
9 view he does, but without --

10 **MR JUSTICE ROTH:** We are getting there, but all I am saying is the £33.3 billion is
11 just FBA sales and the 52% is FBA and others who are selling the same products as
12 FBA, isn't it? That's my understanding of what you have said.

13 **MR CARALL-GREEN:** The 52 is just in what products is the FBA offer competing.

14 **MR JUSTICE ROTH:** In what products -- in what products is there an FBA sale. It is
15 in 52% of products.

16 **MR CARALL-GREEN:** Yes.

17 **MR JUSTICE ROTH:** And the £33 billion is the actual FBA sales.

18 **MR CARALL-GREEN:** All I am doing is using --

19 **MR JUSTICE ROTH:** So it is less than the 52%, because the 52% includes --

20 **MR CARALL-GREEN:** It will be even lower. So I have given the benefit of the doubt
21 by assuming that it is the full 33, but it will actually be even lower.

22 **MR BANKES:** Forgive me for pressing this. This paper you have handed up is
23 products but you are applying percentages from that to revenue. Is that a legitimate
24 read across?

25 **MR CARALL-GREEN:** There is an assumption that's being made that it smooths out
26 across the entire population, and I accept that there might have to be adjustments to

1 be made on the basis of that.

2 Given the time I will make one last submission on some separate topics, but if there
3 are further questions on Dr Houpis' methodology, as I have said, he is here and is
4 happy to provide further detail, answer questions, provide a written example, whatever
5 it may be.

6 So a few submissions to wrap up before lunch, sir. My fifth submission on the abuse
7 3 point is that BIRA's case is, in fact, worse on the FBA and FBM issue. That problem
8 emerges this way. BIRA says that it will construct a counterfactual in which the unfair
9 preferencing of Amazon Retail is stripped out. Leave aside for a moment the
10 questions about the scope of how that applies, but it wants to strip out the preferencing
11 of Amazon Retail. So that means there is a counterfactual which sends sales to third
12 party sellers as a group. Those sellers are both FBA and FBM sellers.

13 However, BIRA presents no case on abuse 3 and so it will have to accept as lawful
14 and as part of the counterfactual the preferencing of FBA that is at least arguably there
15 on the face of the authorities' decisions. Therefore BIRA's counterfactual will bake in
16 the bias towards FBA and deliver more damages for FBA sellers than it should.

17 Professor Stephan's case is different, because it accepts that the bias exists
18 and seeks to tease it out. Or alternatively if BIRA is now going to turn around and say
19 that bias can be stripped out, then on its own case it has a conflict.

20 **MR JUSTICE ROTH:** Say again.

21 **MR CARALL-GREEN:** On its own case it has a conflict. Now, of course, I say to you,
22 sir, that is not a conflict, because what I say to you is on the strength of Ennis that
23 when you have class members at distribution that may have varying entitlements,
24 depending on their particular characteristics, that does not give rise to a conflict of
25 interest.

26 Perhaps we could go back to the relevant Ennis passage, which is paragraph 37 at

1 1041 of the authorities bundle.

2 **MR JUSTICE ROTH:** Yes.

3 **MR CARALL-GREEN:** We went here yesterday.

4 **MR JUSTICE ROTH:** It is probably enough if you just give us the reference.

5 **MR CARALL-GREEN:** Yes. Authorities bundle page 1041, Ennis, paragraph 37.

6 You will recall, sirs, that I took you to this quotation which says the PCR has to
7 adjudicate competing claims by members, but it doesn't put the PCR in a position of
8 conflict any more than a trustee distributing assets from the discretionary trust, and we
9 had the example of the three daughters.

10 Ms Ford submitted to you the only reason the Tribunal came to that conclusion is
11 because it had already decided there was no conflict of interest, but, sir, that's not what
12 the Tribunal was deciding here. Go back just one paragraph to see what the Tribunal
13 was having to adjudicate on. Apple made an argument -- I should say by way of
14 background the class here is app developers who sell inside the UK and outside the
15 UK. The argument is, as it says at paragraph 36:

16 "Some PCMs", proposed class members, "are more exposed than others to the
17 argument that transactions carried out", in the language, "via foreign store fronts", ie
18 to customers in France, or South Africa, or Australia, "are not governed by UK
19 competition law and are outside the Tribunal's subject matter jurisdiction ..."

20 This leads to a conflict of interest, because what the PCR has to do is to say, "Well,
21 I have a UK-centric developer here who makes all sales in the UK and I have a
22 foreign-centric developer over here who makes all sales in Canada and the US and
23 they are now in conflict with each other, because the UK app developer is going to say
24 'Ah, yes. This applicable law problem is a big problem for my friend over there, so
25 I should get almost all the damages' whereas the other app developer on the other
26 side is going to say 'No, no, no, no. This applicable law problem is not a big problem

1 and so I should be entitled to the same amount as my friend who sells to UK
2 customers". So directly opposing arguments on the question of applicable law.

3 The Tribunal says once you have your pot of damages which you have successfully
4 achieved by advancing the claims of the class as a whole and got the maximum pot
5 of damages and you come to the division, the fact that there are those competing
6 arguments does not place the PCR into a conflict of interest and of course it can't.
7 That's just common sense, because in any distribution, whether settlement or
8 damages, in any distribution it is a zero sum game. So my gain is always my brother's
9 loss.

10 Briefly, sirs, in the last few minutes abuse 4. I take it that if you are with me on abuse
11 3, then abuse 4 does not add or take away very much. I will add just two things.

12 First, when it comes to abuse 4, it is not entirely obvious that if there had been more
13 Prime products with FBM -- that's the gist of abuse 4, that the FBM offer can't get
14 Prime -- it is not obvious if abuse 4 was stripped out, the FBA seller would lose out,
15 because it is possible in many instances that the offers would have been at the
16 expense of Amazon Retail, which is also a Prime seller.

17 Now, second, BIRA complains in its skeleton argument at paragraph 23, and Ms Ford
18 repeated that criticism this morning, that we have not sought to quantify lost sales to
19 FBM merchants due to abuse 4, but if I can take you to Dr Houpis' summary, which is
20 in the A bundle at page 157, and I am in footnote 25 here.

21 **MR JUSTICE ROTH:** Yes.

22 **MR CARALL-GREEN:** I am starting on the fourth line towards the end:

23 "I estimate that the benefits to FBA sellers through Buy Box discrimination in relation
24 to abuse 3 is £150 million."

25 Now the complaint is he is not dealing with abuse 4, but, of course, part of the reason
26 for that is that the argument on abuse 4 is new in BIRA's skeleton argument and so

1 was not addressed in this document, which predates that, but what I can tell you -- and
2 again Dr Houpis is here and can confirm any of this in whatever way the Tribunal sees
3 fit -- I can tell you that Dr Houpis has arrived at that figure by taking a total of
4 £450 million for the diversionary effect and assuming that one-third of it is attributable
5 to abuse 3.

6 So in that regard what he is doing is essentially the same as what he is doing in the
7 previous sentence, which is -- do you see in the previous sentence where he says that
8 one-third of the damages from the overcharge is attributable to abuse 3 and the
9 remaining two-thirds to abuse 4? So he is saying there is a net negative effect from
10 both abuse 3 and abuse 4 and he is currently passing it up one-third/two-thirds. So
11 on that basis the diversionary effect attributable to abuse 4 would be around
12 £300 million and the overcharge £650. That already includes all the points I have
13 made about pass-on already being included there and the e-commerce platform
14 overcharge being left out of account.

15 Finally, sir, on abuse 5 I am not sure there is much to add on this. Ms Ford took you
16 to the fact that we say that abuse 5 has a negative effect on the FBM prices, ie
17 increased FBM prices, but it is not clear to us how this has a positive effect on FBA
18 sellers, so it is not clear to us how that gives rise to any conflict.

19 Sir, I think I have again overrun and I apologise.

20 **MS FORD:** Sir, may I make -- just put down a marker now? Mr Carall-Green has
21 opened on a number of matters that were not dealt with in his primary submissions.
22 So I do seek a right to respond to those, including this new data that has been handed
23 up.

24 **MR JUSTICE ROTH:** We have had this Keepa, how that relates to the £33 billion,
25 and where that relates to. I think it is fair you have a chance to respond to that.

26 Now where in terms of timetable can you help us are we at this point? We have, of

1 course, got Wednesday in reserve. We were going to start on methodology and
2 funding, but we have now just had the reply, so we are sort of half a day in. So do you
3 want to make your response -- you are going to be addressing us on methodology, the
4 PCR, funding in any event. Would it be appropriate for you to make any response to
5 what we just heard together with that?

6 **MS FORD:** I can certainly pick it up at the outset of those submissions. It is obviously
7 a slightly distinct point from the methodology, but I can do that.

8 **MR JUSTICE ROTH:** I think that's sensible and then you have the rest of this
9 afternoon. It looks as though we will go into day three, and that Professor Stephan
10 will then -- you will then be, will you, most of the afternoon on methodology, PCR and
11 funding?

12 **MS FORD:** Yes. The original plan was that it would take half a day in the morning,
13 and so I fear it may take most of the afternoon, yes.

14 **MR JUSTICE ROTH:** Then I think we should not have a problem with completing
15 tomorrow. I don't think that's --

16 **MS FORD:** Tomorrow should be fine. The only point I would flag up is that we have
17 our economists and our algorithm expert here today. I don't think it had been
18 envisaged that they would be here tomorrow, so insofar as --

19 **MR JUSTICE ROTH:** I don't know whether we want to ask Dr Nitsche any questions.

20 **MS FORD:** I'm grateful. Also Mr Kervizic, who is our algorithm expert, is here and he
21 has come over to London. So insofar as the Tribunal has some questions for him, he
22 is here today as well.

23 **MR JUSTICE ROTH:** Thank you. 2.10.

24 **(1.07 pm)**

25 **(Lunch break)**

26 **(2.10 pm)**

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Further reply on behalf of BIRA

MR JUSTICE ROTH: Ms Ford, we said that you can, of course, respond to any new points that were made, not really by Mr Brealey but Mr Carall-Green. I don't think Mr Brealey made any new points.

MS FORD: No. The only point I was going to address in relation to that was the Tribunal's question about the FTC.

MR JUSTICE ROTH: Yes. Then you are going to talk about methodology. After you have talked about methodology but before we deal with the quite separate point about the PCR and then funding, which are wholly discrete, I think that's the stage at which we do have a few questions we want to ask Dr Nitsche just really to clarify and make sure we have understood what he is saying. So we will do it then so that there is no danger of it spilling over and, if necessary, we can come back to the PCR or whatever tomorrow morning.

MS FORD: I am grateful. I will attempt to deal very briefly with the matters that came up before lunch.

The first point was the Tribunal's question about our trial length estimate and we have estimated on a conservative basis 12 weeks. The Tribunal's reference for that is bundle B, tab 5, page 6017, footnote 23. As I said, it is an estimate conservatively based on funding purposes and where possible it may well be possible to do it. I am told it is footnote 8, not footnote 23. I apologise. Footnote 8. I apologise.

MR JUSTICE ROTH: Same page.

MS FORD: Same page. If the Tribunal has the page, it is extraordinarily small writing but it does give the 12-weeks.

The second point was in relation to the Tribunal's question asking Mr Brealey about his reliance on the position before the FTC. The position in this jurisdiction is as

1 | pleaded by Professor Stephan in his pleaded case, bundle B, tab 8, page 6313.

2 | **MR JUSTICE ROTH:** Yes. That's the November '13 closure of the case by the OFT.

3 | **MS FORD:** Yes. It is October 2012 that launched the investigation and then exactly:
4 | "Thereafter Amazon informed the OFT that it intended to end that policy. In light of
5 | that, in November 2013 the OFT decided to close its investigation on administrative
6 | priority grounds."

7 | Just for completeness we do have available to hand up the OFT press release which
8 | relates to that, where it says -- we can hand up copies:

9 | "Amazon had informed the OFT and third party sellers trading on Amazon marketplace
10 | of the decision to end its marketplace price parity policy on amazon.co.uk and more
11 | widely in the European Union. In light of this decision to remove the price parity policy
12 | and its subsequent steps to implement that decision, and in accordance with its
13 | prioritisation principles, the OFT has decided to close its investigation on
14 | administrative priority grounds."

15 | **MR JUSTICE ROTH:** This is the document that's referred to in footnote 37, is it?
16 | I know it is not your pleading, but it sounds like it. Is it? Yes, it sounds like it, doesn't
17 | it?

18 | **MS FORD:** It may be.

19 | **MR JUSTICE ROTH:** It has the same title.

20 | **MS FORD:** Yes, indeed. So that was the short point on the FTC. We say the provision
21 | in this jurisdiction is that essentially the OFT has closed the matter because they have
22 | indicated that they have ceased that conduct.

23 | I am turning to deal with the table of Keepa data that was handed up. We do say that
24 | it is an unsatisfactory --

25 | **MR JUSTICE ROTH:** You said you wanted to say something about the FTC or not?

26 | **MS FORD:** The context of --

1 **MR JUSTICE ROTH:** Because that's on the same point, isn't it?

2 **MS FORD:** It is. The FTC is obviously the position in the US. So I am simply drawing
3 the Tribunal's attention to the position in this jurisdiction, which one would think would
4 be the more relevant enquiry.

5 **MR JUSTICE ROTH:** We have got that point. Yes.

6 **MS FORD:** I am then turning to deal with this table of Keepa data. We do say it is
7 an unsatisfactory situation that we have been provided this in reply on day two and we
8 are told that this is -- essentially told it is Keepa data. We are not told who compiled
9 it. We are not given details as to how it is compiled. We don't know the basis. Had it
10 been provided on a timely basis we could have asked our experts to give careful
11 consideration to it and it would have helped to know the origin of it essentially and the
12 basis on which it's been compiled. We don't have any of that. We have simply have
13 this table of figures. So it is difficult for us to deal with this.

14 **MR JUSTICE ROTH:** No, I understand. I don't think we will put much emphasis on
15 it, if at all.

16 **MS FORD:** In that case I can take it extremely quickly. It is worth just recalling how
17 we came to be looking at, that is in the context of two tables in Dr Houpis' report. It is
18 bundle B, tab 12, page 7957. The situation is in my submissions I referred the Tribunal
19 to F30 and Table 14.

20 **MR JUSTICE ROTH:** 75 ...

21 **MS FORD:** 7957. The Tribunal will recall that I referred to F30 in Table 14 which is
22 where I get the figures I relied on about the diversion of 42% of products and FBM
23 would have won the case in 55% of the products. That comes from Table 14. Table
24 14 is concerned with percentage by box wins in which FBA and FBM offers compete
25 but Amazon Retail does not. So is this a sort of direct transfer in circumstances where
26 you only have FBA and FBM.

1 What Mr Carall-Green refers to is Table 13, which is where he gets his 10% figure.
2 That's the counterfactual in which all three seller types compete, so where Amazon
3 Retail is present as well. If we look at his table, we can see that the circumstance
4 where Amazon plus FBA plus FBM is present is the top one, 7%, and the circumstance
5 represented by Table 14 is the one that's actually highlighted green, FBA plus FBM,
6 which apparently represents 14%.

7 **MR JUSTICE ROTH:** Yes.

8 **MS FORD:** That's the context in which we come to these figures. We say that there
9 are really three important reservations to bear in mind about these figures.

10 The first is that our understanding is that these figures are based on ASIN numbers,
11 so the Amazon numbers that identify different distinct products. What they don't take
12 into account is the extent of competition between similar products, which is obviously
13 a fairly fundamental enquiry. So the starting point of these figures is that it doesn't
14 give a fair representation of the extent to which FBA and FBM compete, because it
15 only deals with separate products. It doesn't take into account similar products.

16 The second point, and it is really a continuation of the first point, is to bear in mind that
17 the Keepa data is based on the number of distinct products. It is not an expression of
18 the volume of the products sold and it is not an expression of the value of the products
19 sold. What it is identifying is individual products. So it's saying there might be a pen
20 with a cap and that's a product and there might be a pen that has a clicker on the top
21 and that's a different product. It is identifying one product that has a cap and one
22 product that is designed differently and has a depression button. It is not identifying
23 either volume or value. So in our submission that really has very limited informative
24 value and we are looking at the actual question.

25 **MR JUSTICE ROTH:** (Inaudible) Mr Bankes put to Mr Carall-Green.

26 **MS FORD:** The third point is that these are figures in the actual (inaudible). So it is

1 entirely possible that even if there is no competition between FBA and FBM in relation
2 to a particular product in the actual, there might well be greater competition in the
3 counterfactual. That's entirely plausible in the context of the theory of harm where we
4 are being told that FBM supposedly paid too much for logistics fees and might well
5 have been competing more strongly in the counterfactual. These figures we were told
6 represent a point in time in the factual.

7 So in our submission they really are inadequate to try to get at the question of what is
8 the competitive relationship or what might have been the competitive relationship over
9 a lengthy period of time in the counterfactual.

10 Just for the Tribunal's reference there is a table in the ECA report, B, tab 2, page 413,
11 which shows that over the relevant period of time FBA sales go up and FBM sales go
12 down. So that really does beg the question what would be the situation in the
13 counterfactual? Of course, we know that that is the very question on which there is
14 a conflict in our submission as between the two sides of that equation.

15 Mr Carall-Green made submissions on the meaning and effect of Fulton Shipping for
16 the first time in reply. In our submission that ought to have been dealt with in opening,
17 because our reliance on Fulton Shipping has been ignored in correspondence for
18 a long time. He first of all made the submission that the test in Fulton Shipping might
19 not be satisfied and there might not be actually any causal relationship satisfied at all
20 in relation to FBA and the extent to which they have benefited from the conduct.

21 The short answer to that is it is Professor Stephan's pleaded case that there is a causal
22 relationship which impacted as between FBM and FBA and favoured FBA merchants.
23 That is his case. So if there is no causal relationship, then they have no case.

24 The second point that was made in relation to Fulton Shipping was a suggestion that
25 one can't -- one is not obliged as a matter of law to give credit beyond the value of any
26 individual claim. It was said that the moment any individual claim gets to zero, that's

1 the end of the obligation to give credit and one doesn't then have to take into account
2 that it might go further and impact on the aggregate claim as a whole.

3 In our submission at the risk of taking the cake analogy too far, this is trying to have
4 their cake and eat it, because their pleaded case is that you have to look at the class
5 in aggregate and you set off the sales made by FBM and the sales made by FBA. The
6 gains of the two you set them off as against each other. So they are claiming
7 an aggregate calculation of the loss to the class as a whole.

8 If that is what they are seeking, then the approach to set-off, the approach to giving
9 credit under Fulton must equally be in aggregate. If that's the case, and we say it
10 clearly is on the face of the legal principles, then there is the potential that running this
11 case on behalf of FBA claimants could have the consequence that you leave the entire
12 class as a whole worse off.

13 The final point is that Mr Carall-Green made the submission on a number of occasions
14 that the test he needs to meet is just that it is arguable that it might be in the interests
15 of FBA merchants to bring this claim. He said it on a number of occasions. "All I have
16 to show is that I have some sort of arguable case" and we have not sought to strike
17 him out.

18 A number of points in response to that. The first is the extent to which it is arguable is
19 the very point on which we say a conflict arises.

20 **MR JUSTICE ROTH:** What do you say?

21 **MS FORD:** A conflict arises. The second is that in our submission that's not a relevant
22 legal test. It is not the relevant legal test for the purposes of weighing up a carriage
23 dispute, because this Tribunal has to decide which case is the most suitable. All the
24 flaws and uncertainties and assumptions that feed into Professor Stephan's case in
25 order to try and get to a situation where it might actually be in the class's interest to
26 run this case or bear on the question of the suitability, the relative suitability of the

1 cases. But equally this position needs to be decided so that the class knows where
2 they stand, because it is absolutely fundamentally unsatisfactory that a class member
3 might be asked to make the decision whether to opt-in or to opt-out of this claim in
4 circumstances where it could turn out to be contrary to their interests and adverse for
5 them for the abuse 3 and indeed 4 and 5 to be run on their behalf, because the
6 consequence is that they end up reducing their own claim.

7 In our submission it cannot be left that there might be a basis on which on certain
8 favourable assumptions this might be favourable to the class and then the class
9 member is obliged to decide on that basis whether or not they want to be part of that
10 or not.

11 **MR JUSTICE ROTH:** Well, subject to this I think, he could not say conclusively, it
12 seems to me, there is no conflict because even if that were our view, this is not the
13 certification hearing, and if that's our view now, it still would not bind Amazon, because
14 they would be entitled at the certification hearing to say "That was your view at the
15 time, but we are now making submissions", and it would be open to them to submit
16 there is a conflict. At that point one would have to take a conclusive view. It is only
17 after that that any question of opting in -- opting out more specifically arises. At this
18 point we are therefore not faced with that binary decisive decision it seems to us. We
19 can't.

20 **MS FORD:** Sir, that is right as to the question of whether there is or is not a conflict.
21 It is a slightly different point in relation to the weighing up of whether or not it is in the
22 interests of FBA merchants to bring this claim or not. That's a related but potentially
23 distinct point, that the consequence of aggregating these claims together could leave
24 even FBA merchants worse off, and it is pretty unsatisfactory for that to be
25 an acknowledged possibility, but that the FBA merchant who is looking at these
26 proceedings has to take the gamble "Do I want to participate in proceedings where the

1 outcome might be that by reason of this claim being brought on my behalf my actual
2 claim, my overall recovery will be less than had these abuses not been advanced on
3 my behalf?"

4 **MR JUSTICE ROTH:** The FBA -- it is the FBM merchant.

5 **MS FORD:** The FBM merchant is categorically disadvantaged by reason of these
6 claims being advanced. They can absolutely take the view that it is not in their
7 interests for their claims to be combined with FBA claims. That in our submission is
8 absolutely clear. The matter that has been debated to a greater degree is whether or
9 not it is even in FBA merchants' interests for their claims to be brought -- essentially
10 for their claims to be combined with an allegation in respect of which it might be found
11 that they were the beneficiary rather than the victim.

12 **MR JUSTICE ROTH:** Yes.

13 **MS FORD:** It goes to the suitability of combining those claims if the outcome might
14 be not just you have a zero claim, because, of course, that's always a risk that a class
15 member might take, that their claim might be adjudicated to be ineffectual, but by
16 combining these claims together actually you have reduced the claim that they would
17 otherwise have had if you hadn't brought this claim. It can't be right that just because
18 it might be arguable on certain assumptions it is suitable to go ahead and leave the
19 class member worse off.

20 I am mindful that we have spent a lot of time on this. So I am proposing at this point
21 to ...

22 **MR JUSTICE ROTH:** It is a major point you make on the application. Yes.

23

24 **Submissions on methodology on behalf of BIRA**

25 **MS FORD:** I'm moving on to deal with, after much introduction, methodology and I will
26 start off with Dr Nitsche's methodology. What I propose to do is work through the

1 summary that is in bundle A and then pick up the various criticisms that have been
2 levelled as we go through.

3 His summary is bundle A, tab 7 starting at paragraph 9. The Tribunal was already
4 shown some of this by Mr Brealey in opening. Paragraph 9 is where Dr Nitsche
5 explains the informational advantage that Amazon Retail have relative to third party
6 selling on the same platform. He explains that:

7 "Due to Amazon's vertically integrated position, Amazon Retail had access to timely
8 and high quality indicators of the successive products being sold by third parties,
9 including actual quantities sold and actual revenues generated."

10 Those are the ones which, as we know, he defines as the Superior Indicators. He
11 makes the point:

12 "In contrast, third parties only had access to publicly available information, which is
13 more expensive, less timely and yields lower quality indicators of success."

14 Those are what he defines as Inferior Indicators. His theory of harm is:

15 "The Superior Indicators allowed Amazon Retail to maximise the likelihood of its
16 success by studying the relationship between early movements in the Superior
17 Indicators and actual success in the form of high sales and revenues."

18 Paragraph 10, as we have also seen, defines that as the data delta and it enabled
19 Amazon Retail to introduce successful products earlier than otherwise would have
20 done and the following parties are harmed in the various ways that he goes on to say.

21 Those are the ones that we have pleaded in our pleaded case.

22 Paragraph 12 over the page then explains the other anti-competitive behaviour,
23 self-preferencing by Amazon and Amazon's entry was more successful and there was
24 an increased likelihood of success which would have been factored into entry
25 decisions making a decision to enter more likely.

26 Now we have been discussing the extent to which data abuse is likely to have

1 impacted all merchants on the platform and the Tribunal has the point that we say that
2 all merchants selling the same or similar products would have been impacted, because
3 Amazon could be expected to utilise the data from those products to inform its entry
4 decisions.

5 One point the Tribunal has raised is what about longstanding products that have been
6 sold by Amazon for a long time and where there is no entry decision. The first answer
7 to that point is the one that Dr Nitsche indicates at paragraph 14 right at the end. He
8 says:

9 "I expect that the vast majority of the sales made by Amazon Retail in the Claim Period
10 related to products it started selling in this period, because I understand newly
11 introduced new products drive sales on Amazon's online marketplaces."

12 The Tribunal will see the authority for that in footnote 23 is the Crawford article that
13 you have already been shown in another context.

14 But there is supportive analysis by Dr Houpis, which we would say also bears this out.

15 Can I ask the Tribunal to look at bundle B, tab 12, page 7973.

16 **MR JUSTICE ROTH:** Page again.

17 **MS FORD:** It is Dr Houpis' report, B12, 7973. We are looking in particular at
18 paragraph G47. Just to put it in context what Dr Houpis is setting out here is his
19 analysis of whether Amazon's access to data about pricing and inventory decisions
20 enabled it to win the Buy Box more frequently than competing third party merchants.

21 So on the one hand, this is an analysis which is dealing with the data abuse because
22 it is access to pricing and inventory data but equally this is analysis which is relevant
23 to the circumstances in which Amazon wins the Buy Box.

24 The finding of his analysis is that although for many products his analysis suggested
25 that Amazon did win the Buy Box more frequently than competitors for many
26 categories of products, there were some exceptions and those are the ones that he

1 deals with in this paragraph. The exceptions are books and DVDs. He comments on
2 that. He says:

3 "I understand that books were among the first categories of products to be sold by
4 Amazon and where Amazon first built its reputation as a leading retailer, before
5 moving into CDs and DVDs and other products ... the Keepa data", about which we
6 have heard much, "indicates that Amazon Retail has more than 90% of Buy Box wins
7 for books that it sells. This may mean that the incremental value of data on third party
8 sellers for books may be lower than for other categories, since these third parties only
9 account for a small proportion of sales on the marketplace."

10 So this is a pertinent scenario, because these are the sorts of products I understand
11 the Tribunal might have had in mind in putting questions to me about products which
12 are longstanding on the Amazon platform, where there is not a recent entry type
13 decision. This is the scenario where it is suggested against me that not having
14 a standalone Buy Box type alleged abuse somehow leaves money on the table, but
15 actually what Dr Houpis found in his analysis is that there were no effects, there were
16 no -- there was no demonstrable effects whereby Amazon won the Buy Box more
17 frequently than competing third party merchants.

18 So his conclusion in G48 is that he's excluded these products from his preliminary
19 damages calculations. What that suggests is in the counterfactual Amazon would
20 have won the Buy Box anyway and so there would be no loss. You can see here he
21 says:

22 "Amazon Retail has more than 90% of Buy Box wins for books it sells."

23 That's in the circumstances where he has found that it doesn't on his analysis have -- it
24 is not a circumstance which is attributable to the abusive conduct.

25 In our submission what this suggests is that we are rightly focusing on more recent
26 products where the data does make a difference and where there is likely to be loss

1 and these longstanding products, what Dr Houpis' analysis suggests, these
2 longstanding products there is unlikely to be loss and they are simply -- indeed, he has
3 indicated he has taken them out of his provisional damages estimate. So that's really
4 the second point in relation to the points that are put against me.

5 I do need to respond to the reliance on the figure from Crawford in this context.
6 Mr Brealey pointed to the figure in Crawford which says that 48.7% of products are
7 according to Mr Brealey *de novo* Amazon entry. So he sought to suggest that in 48.7%
8 of circumstances you have a situation where Amazon got in first.

9 The Crawford figures are done on the basis of ASIN numbers. So they are done on
10 the basis of identical products. So they do not reflect the reality of the matter that
11 within that 48.7%, although Amazon may have entered with what was a *de novo*
12 product in terms of having a new number, there will also be similar products already
13 on the Amazon website -- Amazon platform. I am sorry.

14 Just to make good the fact that this is done on ASIN numbers, it was in bundle G,
15 tab 1, page 15. I am looking at section 2.2, "Marketplace data in the home and kitchen
16 department". What he is setting out is the data that he has used for his analysis. He
17 says:

18 "This data includes the product sold, what Amazon calls an ASIN, the merchant who
19 sold it, the date and time of the sale and the price paid inclusive of tax and shipping
20 and/or any other charges."

21 So again if it is only based on identical products it doesn't in our submission provide
22 anything close to a relevant piece of information about the extent to which Amazon
23 was the first entrant for the purposes of this analysis. In fact, Amazon is the only one
24 that they know, but certainly we say it doesn't help to identify. To rely on that statistic
25 we simply say Amazon entered with a different product which may or may not have
26 been similar to existing competing products. So that's the theory of harm.

1 I am moving on to the two methodologies that Dr Nitsche uses to investigate that
2 theory of harm and to quantify any damages. He explains this at paragraph 15. He
3 explains that he relies on two complementary approaches: the broad brush approach
4 and the econometric approach.

5 Starting with the broad brush approach, what that does is to identify characteristics of
6 entry by Amazon Retail that in combination strongly suggest that the timing of
7 Amazon's entry was triggered by Amazon's access to information which was
8 unavailable to third parties. Those characteristics he is looking for are set out in
9 paragraph 16.

10 So "Successful product", he is looking for signals of commercial success of a product
11 which would only have been evident to Amazon Retail, such as a strong increase in
12 the quantity sold.

13 He then identifies Amazon entering with the same product shortly thereafter. Bear in
14 mind at this stage we are looking at the narrowest scenario. I am going to come on to
15 say that he expands it to deal with similar products, but here we are dealing with
16 the -- essentially the most narrow formulation, narrow entry effects.

17 **MR DERBYSHIRE:** May I ask you a question on that narrow formulation? Was that
18 the same product, the point you just referred to earlier on, or is it similar products?

19 **MS FORD:** It is the same products. You can see narrow entry effects is defined in
20 19. He says:

21 "[It] is the simplest and most clear-cut ... narrow entry effects ... narrow entry effects is
22 easy to implement because it focuses on those cases where Amazon Retail entered
23 shortly after the product was first introduced with the same product ..."

24 **MR DERBYSHIRE:** "... the same product ..." Okay.

25 **MS FORD:** Yes, and he later looks at wider entry effects and those then take into
26 account similar products.

1 So signals a commercial success. Amazon enters with the same product shortly
2 thereafter and it does so before following third parties who have access to less
3 information.

4 As he explains in 17, it is a combination of those features which:

5 "... strongly suggests that the timing of Amazon Retail's entry was triggered by the
6 Data Abuse, which thereby restricted competition."

7 He goes on to explain:

8 "Amazon Retail's early entry harms the introducing Third Party, because it has to
9 compete with a rival merchant ... earlier than would have been the case absent the
10 Data Abuse -- in essence they have lost their first mover advantage ... Following Third
11 Parties are also harmed as Amazon Retail's early entry pushes them back in the
12 sequence of entry ... there may be Third Parties that were harmed as they did not
13 enter the market at all ... even though they would have entered absent the Data
14 Abuse."

15 He says that's the aspect of the conduct which is restrictive of competition.

16 Now one of the criticisms that was levelled against us was that Dr Nitsche hasn't
17 advanced proposals for establishing the abuse. We say that the broad brush
18 methodology does on this basis identify a causal link between superior access to
19 information which is unavailable to third parties and Amazon Retail's entry decisions,
20 which is the essence of the abusive conduct. So we say it does establish that causal
21 link and establish the existence of an abuse.

22 It is illustrated by figure 1, page A, 134. Just to talk the Tribunal through that, the
23 bottom left of the graph you can see a third party is introducing a new product and that
24 product shows strong revenue growth in the form of the strong purple line going up.
25 That strong revenue growth then prompts Amazon Retail to enter and the point where
26 that occurs is the first vertical red line, vertical red dashes. Amazon's revenue in the

1 factual in that scenario is shown by the solid yellow line.

2 Once Amazon enters the incumbent third party's strong revenue growth drops off. So
3 we see that the steep growth in the strong purple line evens out because it is losing
4 sales now to Amazon Retail.

5 Rival third parties who haven't got access to the same information as Amazon only
6 enter later. So they enter at the second vertical red line of dashes. Those lines are
7 what happens in the factual.

8 What we can also see on this graph is what would have happened in the counterfactual
9 scenario, absent the data abuse. So in the counterfactual if Amazon does not have
10 access to superior information, it ends up entering later. So it enters at the second
11 vertical line of red dashes and it enters at the same time as the rival third party,
12 because they have access to the same information.

13 **MR JUSTICE ROTH:** They might have different volume expectations, different
14 strategies. Why should one assume they will just do what rival third parties do and the
15 rival third parties moreover are entering after -- in the factual after Amazon has
16 entered. So that may well delay their entry, because Amazon has been there long
17 before and that might make them hesitate to enter.

18 **MS FORD:** Sir, that's absolutely right on the factual. That's part of the theory of harm
19 is that if they are delayed in what they would otherwise have done, but they can only
20 ever enter based on their knowledge of the publicly available information, because
21 that's all they have. So the theory --

22 **MR JUSTICE ROTH:** The publicly available information then is Amazon is in the
23 market and is a powerful player. Why does it necessarily follow that in the
24 counterfactual Amazon would enter at the same time as third parties enter in the
25 factual?

26 **MS FORD:** Because in the counterfactual Amazon only has access to that information

1 that third parties had in the factual. So all other things being equal, it enters at the
2 same time as third parties would in the factual.

3 **MR JUSTICE ROTH:** All other things are not equal. Amazon has entered. If you look
4 at your factual -- Dr Nitsche's -- Amazon has entered at the time they did. That's going
5 to strongly influence rival third parties in the factual as to when they should enter and
6 it may well delay them entering, because Amazon through its abuse has got in earlier.

7 **MS FORD:** I don't dispute that.

8 **MR JUSTICE ROTH:** If there is no abuse it doesn't mean that rival third parties or
9 Amazon would come in so late. They might all have come in earlier but not as early
10 as Amazon actually did. Do you understand the point I am making? Third parties in
11 the factual are dealing with a very powerful competitor, Amazon.

12 **MS FORD:** Yes.

13 **MR JUSTICE ROTH:** That is now in the market. That may well delay their decision
14 in the factual when to come in as opposed to what would have happened in the
15 counterfactual.

16 **MS FORD:** Yes, I understand the point that you are making and I think the point
17 I would make in response is the benefit of Dr Nitsche's analysis is that he has both
18 what is termed a broad brush analysis and an econometric modelling and they
19 cross-check each other. So insofar as you say all else would not be equal, those are
20 factors that he would seek to control for in the econometric analysis, but this is
21 essentially a stylised analysis and the premise of the stylised analysis is that Amazon
22 would not enter any earlier than competing third parties would because it has access
23 to the same information.

24 In the counterfactual scenario we can see that the original third party who introduced
25 the product is better off. So the dotted purple line is representing their -- the dashed
26 purple line is representing their counterfactual revenue. So they get all the sales

1 between the point where Amazon entered in the factual and the later point it entered
2 in the counterfactual. By the later point Amazon enters the introducing party has the
3 benefit of the first (inaudible) advantage. So its sales are higher in the counterfactual.
4 That difference is shaded grey as between the introducing party's factual sales and
5 the arch of its counterfactual sales.

6 As I foreshadowed, this is focusing on what's termed narrow entry effect, so the most
7 clear-cut scenario. That's what we saw explained at 19. He then proposes to widen
8 out his methodology to encompass other scenarios. Those are described as the wider
9 entry effects in paragraph 19. They are the sudden success products, which I think
10 we have canvassed with the Tribunal before. So these are older products. They have
11 been around for some time but they suddenly take off and that prompts Amazon entry.
12 Dr Nitsche also then identifies a scenario of multiple merchant entry products and what
13 he means by that is circumstances where multiple third parties might enter due to
14 factors other than the information about commercial success being available. The
15 example he gives is there may scenarios where two third parties generally track and
16 copy each other's behaviour even before it is clear whether that behaviour is profitable.
17 In the counterfactual they would have operated as a duopoly until their success was
18 visible. In such cases Amazon Retail's early entry can also be attributed to the data
19 abuse.

20 Then the third broadening of his methodology is that rather than entering with the same
21 product, Amazon enters with a similar product. Again that's something that we have
22 canvassed fairly extensively. That is then picked up.

23 The criticism that has been advanced that suggests we have no methodology to
24 identify similar products is not right. Dr Nitsche elaborates on that in paragraphs 24
25 to 26 in this document. What he essentially says is that he doesn't have to reinvent
26 the wheel for these purposes because in merger analysis it is standard practice to

1 identify products that compete and there are established methods for doing that. He
2 says the starting point for his analysis will be the subcategories that Amazon itself
3 uses. In paragraph 25 he gives an illustration of that. So subcategories in relation to
4 earphones, so earbud headphones, one ear headphones, open ear headphones and
5 such like.

6 Up until now we have been talking about essentially only looking at the causal
7 relationship between access to superior information and Amazon entry and that
8 analysis is intended to demonstrate the existence of an abuse by reference to the
9 causal relationship between the availability of the data and Amazon then entering.

10 Figure 2 in this document on page 138 is then moving on to the broad brush
11 methodology for quantifying the abuse. This is a modified version of the figure that we
12 were just looking at. What it shows is how Dr Nitsche will quantify the harm in what
13 he terms the business stealing channel, so the loss of sales channel.

14 So the losses that we are trying to identify, the losses to third parties, the losses of
15 revenues that Amazon Retail earned by reason of its early entry, which it would not
16 have earned in the counterfactual. The Tribunal sees there is numbered 1, 2 and 3.
17 Part 1 is the revenue that is earned by Amazon Retail from the date of its early entry
18 until the date it would have entered in the counterfactual. Part 2 is the additional sales
19 that Amazon Retail earned in the period after counterfactual entry.

20 So a further what we say is an unjustified criticism of this methodology was the
21 suggestion that it has no proposals for quantifying the effect of the other
22 anti-competitive behaviour, the self-preferencing. That is not correct. That's explained
23 in paragraph 31 of this document. The basis of that is that in the counterfactual if
24 Amazon had no unfair competitive advantages, its revenue development could be
25 expected to be similar to that of other large parties. So in figure 2 what we see is
26 a yellow dotted line for Amazon entering and its yellow dotted line would essentially

1 follow the entry patterns of comparable third parties.

2 If in the counterfactual Amazon's revenue development was more comparable to the
3 factual scenario, then one can conclude from that that there must be other
4 anti-competitive advantages present. The revenue that's attributable to that is labelled
5 3 in this chart.

6 **MR DERBYSHIRE:** Can I just ask a question on that? From my way of thinking
7 looking at this chart which is very useful, this assumes that if Amazon has no
8 illegitimate advantage from the data abuse, it is a typical big third party retailer. So
9 that assumes that Amazon isn't actually a very large third party retailer with lots of
10 potential advantages over another not so big -- not so experienced, not so
11 longstanding, not so publicly well known big third party retailer. So am I right in
12 thinking it assumes it is no better than a large third party retailer?

13 **MS FORD:** It is assumed that is a relevant comparable to essentially attempt to
14 quantify Amazon's benefits. I think I am right in saying that Dr Nitsche has taken into
15 account that there may have been economies of scale. So when comparing the third
16 party he assumes I think margins and scales which are comparable to those of
17 Amazon. So he equates those two. Dr Nitsche is here and he can answer that
18 possibly better than I can.

19 **MR JUSTICE ROTH:** As we said, we will ask him some questions. Perhaps it is
20 easier to ask him directly rather than through you. We will do that in due course, not
21 straightaway. You finish your submissions.

22 **MS FORD:** Paragraphs 32 to 34 are dealing with quantification of the harm due to the
23 price channel. What Dr Nitsche proposes to do there is to determine how Amazon
24 Retail's entry affected prices by conducting a difference in difference analysis. That is
25 intended to analyse how prices developed before and after Amazon entry and then to
26 compare it with products where Amazon did not enter at all. The product of that

1 analysis is expressed as a percentage and then it is applied to third parties' effective
2 revenues to ascertain the extent of their lost profits.

3 There was a comment in Professor Stephan's carriage dispute submissions which
4 said:

5 "It is a strange proposition that losses suffered by sellers because they are not able to
6 charge consumers more for goods than Amazon."

7 Just to respond to that, in our submission is it not at all novel in competition terms that
8 lower prices can have exclusionary effects on competitors. They also harm
9 consumers in the long run because they undermine third parties' ability to cover their
10 costs and they undermine their ability to compete as effectively with Amazon Retail.
11 So our response to that is there is really nothing counterintuitive at all about the
12 proposition that competitive harm is capable of arising from lower prices.

13 Dr Nitsche then deals with the innovation channel, paragraphs 35 to 36. This is the
14 head of loss which seeks to quantify the extent to which Amazon's abusive conduct
15 lowers the incentive for third parties to innovate and introduce new products.

16 Just to pick up another criticism which has been directed at us, it is suggested that we
17 do not deal with the possibility that Amazon's conduct might deter third parties from
18 competing. That is not right. This is the point at which that is taken into account. The
19 proposal the Tribunal will see is to identify a robust measure for innovation activity on
20 Amazon's UK online marketplace and then to conduct a difference in difference
21 analysis and that analysis will compare the extent of innovation in product categories
22 where Amazon entered and the extent to which there was innovation in product
23 categories where it did not enter.

24 So that is the broad brush approach and it is intended to be simple and intuitive and it
25 is intended then to be complemented by the econometric modelling approach. The
26 intention is that they can each be used to check that the other makes sense, but as

1 the Tribunal anticipates, the econometrics will be much more complex.

2 Paragraph 40 is the first step in explaining the econometrics approach. The first step
3 is to identify the Data Delta. We know that's the information advantage Amazon had
4 by reason of its access to Superior Indicators. The way that's done in econometric
5 terms is to model the relationship between non-public data and public data. So the
6 non-public data, the data that only Amazon can see, is the number of sales by Third
7 Parties already active in the market. The public data is the number of reviews for
8 a product.

9 What that will enable Dr Nitsche to do is to identify the sales development of the
10 product which can only be explained by the non-public data, the number of sales that
11 cannot be explained by reference to the public data. That is what represents the Data
12 Delta. That represents the advantage that Amazon has over its competitors.

13 Paragraph 43 explains that once the extent of the Data Delta has been ascertained, it
14 can then be used to investigate the effects of the Data Abuse. For that purpose
15 Dr Nitsche proposes two equations. The first is an Entry Equation and the second is
16 a Revenue Equation. The Entry Equation is investigating how Amazon's entry relates
17 to factors that might explain the likelihood and timing of entry and those factors include
18 public data and the Data Delta which has already been calculated. That enables him
19 to establish whether Amazon's entry is caused by the Data Abuse.

20 Again in relation to econometrics methodology it is not right to say that there is no
21 proposal for establishing the abuse, because the product of this exercise is that the
22 Entry Equation tells us whether there is a causal relationship between Amazon entry
23 and the Data Delta.

24 The Revenue Equation then explores the factors that will determine the revenue that
25 goes to Third Parties. One factor that is expected to influence that is the presence or
26 absence of Amazon Retail. So, sir, in relation to the point you were putting to me

1 about the stylised broad brush approach, insofar as Amazon Retail being present on
2 the market impacts Third Parties that is a factor that's then factored into the Revenue
3 Equation.

4 The Revenue Equation enables Dr Nitsche to establish the counterfactual revenue as
5 well. So he uses his Entry Equation to find out when Amazon would have entered in
6 the counterfactual, absent the Data Delta. Then he inputs the counterfactual Amazon
7 entry into the Revenue Equation to calculate the counterfactual revenue. The damage
8 that's attributable to the infringement is the difference between the revenue in the
9 factual and in the counterfactual multiplied by the gross margin.

10 The Revenue Equation also allows Dr Nitsche to isolate the damage which is
11 attributable to self-preferencing by Amazon. That's the points explained at
12 paragraph 45 in this document. Essentially, absent unlawful self-preferencing, the
13 assumption again is that Amazon's entry would equate to the entry of an additional
14 large Third Party. That is something which can be modelled in the econometric
15 modelling.

16 Paragraph 48. The Tribunal will recall a yet further criticism was that Dr Nitsche's
17 methodology does not contain proposals for quantifying the effect of the other
18 anti-competitive behaviour, so the self-preferencing. Dr Nitsche is proposing
19 a separate analysis to demonstrate that that conduct occurred and restricted
20 competition. That's under heading 4.2.3, "Proving the other anti-competitive
21 behaviour".

22 What he proposes to do is to model Amazon's entry behaviour and measure the
23 empirical impact of factors which impact the allocation of the Featured Offer. That is
24 why he has called that the Featured Offer Equation. So that is intended to model the
25 objective factors that determine the allocation of the Featured Offer, so factors such
26 as price, delivery, speed and such like. It will have an indicator variable that takes

1 a value of 1 for Amazon Retail and zero for Third Parties, and if the indicator variable
2 for Amazon Retail is positive and statistically significant, then it will indicate that
3 Amazon is self-preferencing and that is driving the allocation of the Featured Offer.
4 Again insofar as elements of the Data Abuse give Amazon Retail a competitive
5 advantage over Third Parties in relation to, for example, pricing decisions and
6 inventory management and planning decisions and such like, if that increased the
7 likelihood that Amazon Retail obtained the Featured Offer position, then that will be
8 taken into account by this modelling.

9 What we do emphasise is that this modelling is only being proposed to establish the
10 existence of the anti-competitive conduct. It is not being proposed to predict
11 counterfactual outcomes, and that is one relevant distinction between the methodology
12 that we have set out here and the approach that Dr Houpis takes.

13 So where it is said in Professor Stephan's skeleton, paragraph 21.2, "Ironically
14 Dr Nitsche himself proposes to run a regression analysis to assess quantum, BIRA
15 can hardly criticise Dr Houpis for doing the same."

16 It is quite right that we run a regression analysis. It is the Entry Equation and the
17 Revenue Equation and they are based on factually ascertainable inputs and they are
18 robust, but it is wrong to suggest that we are attempting to model the Featured Offer
19 selection process in the counterfactual. We say that that is the exercise which is
20 unworkable in practice, and I'm turning at this point in deal with Dr Houpis' competing
21 methodology.

22 I don't know whether or not the Tribunal would like to ask its questions of Dr Nitsche
23 before I go on to what we say about Dr Houpis.

24 **MR JUSTICE ROTH:** The quantification of the anti-competitive behaviour is -- where
25 is that addressed?

26 **MS FORD:** That is done by the -- I am just trying it find where it --

1 **MR JUSTICE ROTH:** You have said this is just to establish the abuse.

2 **MS FORD:** Yes.

3 **MR JUSTICE ROTH:** 4.2.3, not to quantify the effect.

4 **MS FORD:** Yes.

5 **MR JUSTICE ROTH:** Where do we find the quantification of the effect?

6 **MS FORD:** That's by done by -- I am hearing the word 45 coming from behind me, so
7 I suspect this may be explained in paragraph 45. Yes. It is done in the same way by
8 reference to the Entry Equation and the Revenue Equation, but the point being made
9 in 45 is that one can determine the revenue earned by Third Parties in the
10 counterfactual, so one estimates the effect of an additional large Third Party on total
11 revenues, and using this parameter adjust the effect of Amazon Retail's presence in
12 the counterfactual. "This approach would account for the impact of Other
13 Anti-Competitive Behaviour after entry."
14 What he is essentially saying is the same approach is being applied, that one assumes
15 that Amazon entry can be modelled as the effect of an additional large Third Party,
16 and insofar as Amazon Retail's entry is distinguishable from that insofar as it has
17 different effects in the factual, then that must be attributable to anti-competitive
18 conduct.

19 **MR JUSTICE ROTH:** (Inaudible).

20 **MS FORD:** I think one has to proceed on the basis that one is only measuring the
21 anti-competitive conduct that is pleaded unless there is good reason to suppose that
22 there is other anti-competitive conduct. It would be a criticism that could be levelled
23 at any sort of regression to say something else might be going on that is some other
24 anti-competitive conduct. One can only strip out in the counterfactual that which is
25 determined to be anti-competitive.

26 **MR JUSTICE ROTH:** Yes.

1 **MS FORD:** I can either go on to deal with what we say about Dr Houpis' approach or
2 allow the Tribunal to ask questions of Dr Nitsche now.

3 **MR JUSTICE ROTH:** Have you finished with Dr Nitsche's report?

4 **MS FORD:** Yes, I have.

5 **MR JUSTICE ROTH:** I think it would probably be sensible to ask him to assist us now.
6 If he could kindly go into the -- it is probably sensible if he could go into the witness
7 box.

8 **MS FORD:** Would now be time for a transcriber break as well?

9 **MR JUSTICE ROTH:** Yes. All right. We will take a break now and then, Dr Nitsche,
10 if you want to go ...

11 **MS FORD:** They are asking you to sit in there.

12 **(Short break)**

13

14 **DR RAINER NITSCHÉ (called)**

15

16 **Questioned by THE TRIBUNAL**

17 **MS FORD:** Sir, just to highlight we had been proceeding on the basis this was
18 a somewhat informal evidence giving. So in particular Dr Nitsche has notes with him
19 of what the Tribunal has said.

20 **MR JUSTICE ROTH:** We are not going to ask Dr Nitsche to be sworn. This is not in
21 anyway any sort of cross-examination. It is really just an opportunity for us to clarify
22 in our own minds and make sure we have understood what you are doing and your
23 explanation and what you are not doing. We just have a few questions. No doubt if
24 the BIRA application goes ahead to a certification hearing, there might be more points
25 raised by Amazon, but that's not for today.

26 So you obviously have with you I think your summary of the methodology that you

1 have helpfully prepared for us and which, speaking for myself, we found very helpful.
2 You talk about the two forms of abuse. Then you say -- if we turn within your document
3 to page 4, which we have at A, 130 -- and indeed on page 3 you talk -- under the
4 heading of "Theory of harm" you explain the informational advantages of the Superior
5 Indicators. Then you say at the end of that paragraph:
6 "The Superior Indicators allowed Amazon Retail to maximise the likelihood of its
7 success by studying the relationship between early movements ... and actual ... sales
8 ...
9 I refer to this informational advantage ... as the 'Data Delta'. The Data Delta enabled
10 Amazon Retail to include successful products introduced by Third Parties into their
11 retail portfolio", that is to say Amazon's Retail portfolio I think you mean, "early and
12 earlier than other third parties."
13 You continue:
14 "I consider that the key anti-competitive effect resulting from the Data Abuse is (earlier
15 and more successful) entry by Amazon Retail, which can harm Third Parties through
16 the following channels."
17 Then you set out I think four channels: Business stealing, Price, Innovation and
18 Capacity. That's right, isn't it? If you could say -- I know you are nodding, but the
19 transcript doesn't pick that up. So if you could say "Yes" rather than just nodding?
20 **DR NITSCHKE:** Yes.
21 **MR JUSTICE ROTH:** There is a transcript.
22 **DR NITSCHKE:** Fine. I will be louder.
23 **MR JUSTICE ROTH:** You don't quantify the Capacity channel, because at this stage
24 it is very complex, but you look at the other three.
25 Looking at what you say, the Business stealing channel you say suffered harm two
26 ways. One is:

1 "Same product entry: The Data Abuse allowed Amazon Retail to identify successful ...
2 earlier and more precisely than would have been possible ... 'Same product entry'
3 describes those instances where, following a successful launch by a Third Party,
4 Amazon Retail begins to sell the same product ..."

5 You explain that's the ASIN.

6 "Similar product entry: Amazon ... enabled similar product entry that would not have
7 occurred otherwise ..."

8 So the Business stealing channel -- have we got this right -- is all about Amazon
9 entering earlier than it otherwise would have done with a product. Is that correct?

10 **DR NITSCHKE:** Yes.

11 **MR JUSTICE ROTH:** The Price channel is also, as I have understood it, when it
12 enters it is able to price lower than the Third Party that is already there. Is that right?

13 **DR NITSCHKE:** If I may, I would put in my own words and then we will see whether
14 that's what you meant.

15 **MR JUSTICE ROTH:** Yes, please.

16 **DR NITSCHKE:** So the Price channel is also linked to entry. That attempts to measure
17 the effect if there is illegal entry there will be more competition, because then Amazon
18 Retail is there with a product and it would have been there absent the Data Abuse,
19 and as a result there will be a negative price effect on rival merchants which are
20 competing with that product. That we estimate to be -- we have some estimates of
21 this effect that we can take from this Crawford paper that was mentioned before. So
22 we take that to be 2.5% effectively in the preliminary estimate.

23 **MR JUSTICE ROTH:** Yes.

24 **DR NITSCHKE:** That's linked to entry. So it's linked to this additional product.

25 **MR JUSTICE ROTH:** That's how I understood it. It is linked to entry. Then the
26 Innovation channel is Amazon Retail entry which enabled parts of the benefit

1 innovation, shifted them from the Third Party that took the risk of introducing the new
2 product, a sort of free riding in a sense. Is that right?

3 **DR NITSCHKE:** That's right.

4 **MR JUSTICE ROTH:** Therefore the incentive for Third Parties to introduce new
5 products is reduced. That is correct, isn't it?

6 **DR NITSCHKE:** That's right. It is wider. Right? That's the general effect, because you
7 don't know whether Amazon will enter or not. So you take a view as an innovator
8 when I come with my new product what will happen later. Now if you anticipate there
9 will be very early entry by Amazon stealing some of my business early, then that has
10 a detrimental effect on innovation that can spread wider than the discussion we had
11 about similar or same products, just to explain that.

12 **MR JUSTICE ROTH:** Yes. We see all those abuses that you identified or the effects
13 of the Data Abuse could arise. What I wanted to be clear is if -- there is another
14 possibility, which is say there's a Third Party. Amazon then enters earlier than it might
15 have done. That's one of the effects. Then subsequently another Third Party enters
16 with the same product or similar product. Amazon then gets the data of the other Third
17 Party, the second Third Party, to enter and sees that it must have got very good supply
18 terms from its supplier. So it uses that data itself to get better terms for its own product,
19 or it changes its prices or makes some use of the data, the superior information,
20 Superior Indicator which it had. Is that consequence captured in what you are doing
21 and seeking to do? Is that a harm that you are looking at?

22 **DR NITSCHKE:** So I must say I haven't deeply thought about this for hopefully a good
23 reason. So I think that the key information that comes as a result of the Data Abuse
24 is the understanding of the quantity of sales of Third Parties. That's what you cannot
25 see from the outside world that you can only see if you are Amazon and you have
26 access to -- you make use of the Data Abuse. Then you can see the quantity sold.

1 So you know how successful a product is.

2 Once you enter it yourself, which the scenario that you have laid out.

3 **MR JUSTICE ROTH:** Yes.

4 **DR NITSCHKE:** You can observe your own quantity in any event. Right? So you have
5 information about the demand. So indeed then it would be sort of just one angle of
6 the Data Abuse that you mention that you get additional information on terms and
7 conditions at a later stage which would be even better than the one that you have
8 observed before. So it is a bit second order effect in my view, and hence I haven't
9 focused on that.

10 **MR JUSTICE ROTH:** That's why -- that is the reason why your focus is on in particular
11 the quantity information informing the entry decision?

12 **DR NITSCHKE:** Indeed.

13 **MR JUSTICE ROTH:** Then turning to the Other Anti-Competitive Behaviour as it's
14 been called, and the Other Anti-Competitive Behaviour is preferencing in the Buy Box
15 essentially.

16 **DR NITSCHKE:** Can I make one addition so it is not lost?

17 **MR JUSTICE ROTH:** Yes.

18 **DR NITSCHKE:** Whenever there is an impact of the Data Abuse that allows -- so I think
19 that would be an example you had in mind when you referred to Amazon learning
20 about the cost of rivals that you get a better deal, so you have lower costs as Amazon
21 Retail. That would lower your prices. That would be a price effect that we can then
22 capture, but we get on to that I guess, also under the Other Anti-Competitive
23 Behaviour. So it is not lost in any way.

24 **MR JUSTICE ROTH:** The Other Anti-Competitive Behaviour you say, and this is
25 paragraph 12:

26 "Interacted with the Data Abuse two ways: more successful entry and increased

1 likelihood of entry."
2 Those are where you are looking at the effect of the Other Anti-Competitive Behaviour.
3 **DR NITSCHKE:** That's right, yes.
4 **MR JUSTICE ROTH:** You go on very fairly to say in paragraph 13:
5 "The effects of the Other Anti-Competitive Behaviour will not have been confined to
6 products that experienced Amazon Retail entry due to the Data Abuse but these
7 additional effects are not part of my analysis, as they don't form part of BIRA's claim."
8 Have you at all -- and this is not a criticism -- I am just asking -- looked at the extent of
9 those additional effects beyond their effect on products that experienced Amazon
10 Retail entry to form any view of how significant they are, the additional effects on other
11 products?
12 **DR NITSCHKE:** Sorry. I missed the question.
13 **MR JUSTICE ROTH:** The question is you say the effects are not confined to products
14 that experienced Amazon Retail entry?
15 **DR NITSCHKE:** Uh-huh.
16 **MR JUSTICE ROTH:** Due to this. So it has an effect on other products as well.
17 **DR NITSCHKE:** Indeed.
18 **MR JUSTICE ROTH:** Clearly. You say you have not included them in the analysis
19 here because they are not in the claim. Have you at all looked at how significant those
20 effects might be on other products? Is that clear?
21 **DR NITSCHKE:** Okay. I am sorry. Let me try to -- so probably the answer is no but let
22 me try to sort it out a little bit so we are on the same page.
23 First of all, I think we have been clear on that what we cover is the innovation effect,
24 which is then relevant also for products which are not immediately competing with
25 similar or same products of Amazon Retail. So in that sense we have quite a broad
26 coverage, but I think that's just maybe a statement.

1 Now if I understand your question correctly, did we then look at the effect of other
2 abusers which are not in combination with the effects of the Data Abuse, that's your
3 question? Then the answer is that is not part of the claim and indeed we didn't look
4 at, except, of course, I mean, where it is in combination with the Data Abuse. So
5 I have, of course, information about this, because we looked at it in the context of the
6 Data Abuse.

7 **MR JUSTICE ROTH:** So you only looked at it in the context of the Data Abuse and
8 the question of whether products either that product where Amazon was already on
9 the market and then another product comes in afterwards, but may suffer because it's
10 not in the Buy Box and it won't be in the Buy Box if it is not Amazon Retail or fulfilment
11 by Amazon. That consequence you have not looked at.

12 **DR NITSCHKE:** We have looked at in part as long as it's a similar product. It doesn't
13 matter whether with the -- here we need to be -- I think there is a lot of confusion
14 because of the definition of the word "product". So when I refer to a product as
15 a product with a given ASIN number -- right -- and then use my terminology which is
16 the said product and similar product, I think it is pretty clearer. When we talk about
17 this -- I think there was a bit of confusion maybe before. So I think it is relatively simple
18 in a sense.

19 So you can have Amazon being the first to put a certain product with a given ASIN
20 number on the market. So say a tee shirt with certain colour of Prime label, but it is
21 very similar to another product which has the same features which Amazon has
22 observed to be very attractive to buyer, because it looks at the quantity, how it shoots
23 up and then as a result of that introduces this particular ASIN number with a specific
24 colour, size and whatever, then that would be covered and you would label it, if you
25 speak loosely, as a new product of Amazon, but those new products would be
26 covered.

1 Now what has been referred to as cases which are not covered, those are the cases
2 where Amazon enters with an innovative product where you can learn nothing from
3 rival products looking at the data you have from rival products. Those could also be
4 products which have been introduced a long time before -- right -- before the
5 dominance occurred and the conduct occurred. Those products are out of scope.

6 **MR JUSTICE ROTH:** Equally if there's a product that comes in afterwards, say
7 Amazon comes in with its tee shirt and then someone else, another manufacturer
8 through its retail distributors starts selling on Amazon yet another tee shirt which is
9 similar after Amazon has done it, but because that later entrant won't get on the Buy
10 Box, because they are not using fulfilment by Amazon and they are not being sold by
11 Amazon they may suffer in their sales. That doesn't involve any Data Abuse. It's just
12 because they can't get into the Buy Box.

13 **DR NITSCHKE:** Yes.

14 **MR JUSTICE ROTH:** That's something, as I understand it, you are not covering,
15 because it is not related to the Data Abuse?

16 **DR NITSCHKE:** Ah, okay. As long as it is in combination with the Data Abuse we will
17 cover it because we do take into account and that's also a relevant factor to take into
18 account when you think about the entry decision, we do take into account the entry
19 decision of Amazon can also be driven by the fact that indeed there is the expectation
20 that they will end in the Buy Box more often than they would have absent illegal
21 behaviour. That we do take into account. In that sense for this scenario we look at
22 that. That is why I said we look at it, but only in combination with the Data Abuse.

23 **MR JUSTICE ROTH:** My example was Amazon has already entered.

24 **DR NITSCHKE:** Then the Data Abuse --

25 **MR JUSTICE ROTH:** So there is no Data Abuse.

26 **DR NITSCHKE:** If that's very clear indeed, then there is no relationship whatsoever

1 with the Data Abuse, then we don't cover that at the moment.

2 **MR JUSTICE ROTH:** That's my understanding.

3 **MR DERBYSHIRE:** Okay. Thank you. Can I just echo the words of the Chair and
4 say the summary reports by yourself and by Dr Houpis were very good summary
5 reports, among the best I have ever seen. I thank you both for that.

6 I am at paragraph 19 and I'm moving from the narrower definition of the same
7 product -- you were just talking about it a few minutes ago with the chairperson -- to
8 similar products.

9 My first question is: is there any difference between a sudden success product and
10 then Amazon enters with another product having observed that success and a similar
11 product, which is your sub-paragraph (3), is there a difference between those two? So
12 you observe a sudden success. Amazon gets that data --

13 **DR NITSCHKE:** No. I mean, no, no, there is not.

14 **MR DERBYSHIRE:** Data Abuse -- okay.

15 **DR NITSCHKE:** Maybe, if I may, I think the way I went about this starting with these
16 narrow entry effects was an idea to have the simplest and most obvious case isolated
17 first, describe that where I feel really sort of that is really very, very clearly defined
18 abuse and it is clearly defined what happens there. That's my narrow entry scenario.
19 Then what I tried to do is to widen the scope and add things, but make it very
20 transparent that it becomes more complex and also a bit more assumptions you need
21 to introduce in order to get to a result, but that way I tried to make it very clear what's
22 my sort of very transparent hard kernel of the methodology and what do I add. That's
23 why I added this sudden success element as a wide -- under the label wider entry
24 effects. That's the only driver why I did it that way.

25 **MR DERBYSHIRE:** Yes. It is the complexity of as you extend it out that concerns
26 me, especially with similar products. You give the example of a tee shirt, obviously

1 very similar with a different logo perhaps, but then there's an ordinary shirt or there's
2 a sleeveless tee shirt. Everything is similar to everything else. Have you looked at
3 the categorisation -- you mention it in the report -- on the Amazon website and seen
4 how many products would fall into a typical sub category?

5 **DR NITSCHKE:** That depends. That depends really on the segment you are in and
6 varies quite a bit. In fashion you will have a different number of products by sub
7 category than home and kitchenware. It is not something I can -- I don't think
8 an average would be a very meaningful response but I also wouldn't have that average
9 on the top of my head.

10 **MR DERBYSHIRE:** No, but within a sub category -- the danger, as I see it, is it
11 becomes circular. You have access to the Amazon data and you can see that
12 a product has increased its sales suddenly and you can see that Amazon enter. How
13 do you identify that Amazon entered because of that spike in sales? How do you then
14 define that it has entered with a similar product without looking at the same data that
15 tells you there was a spike, there was an entry?

16 **DR NITSCHKE:** No, I see the point. So, first of all, I think still you can learn something
17 from observing that, because if you have -- I mean, after looking at the data you have
18 a clear feel for how this relationship works between an increase in quantity and the
19 entry behaviour, for example, on the same products. So you have a lot of learning
20 already by looking at this narrow entry effects, equipped with that learning if you then
21 look at products which based on the standard market definition techniques that we use
22 to identify which products compete with each other, you can then test whether you can
23 systematically see an entry behaviour in response to this increase in quantity. So if
24 there is a successful product, you can see where there's very neighbouring with similar
25 characteristics products introduced by Amazon Retail. So it would be like an event
26 study in terms of terminology, but you could also look at other techniques which are

1 completely unrelated, because I think that was what you wanted to get at. Can we
2 also do analysis on which products compete without that analysis being affected by
3 the abuse. Right?

4 **MR DERBYSHIRE:** Yes.

5 **DR NITSCHKE:** That you can do. You can look at price correlations. You can look at
6 interaction. Is there a common reaction to demand? You can -- I mean, there are all
7 sorts of analysis we do in all the merger cases we work on. So I am not worried -- I am
8 not too much worried about this element.

9 **MR DERBYSHIRE:** It doesn't worry you that it is very labour intensive to do all of that
10 and especially year by year?

11 **DR NITSCHKE:** Yes, yes. Okay. So no. I mean, I think there, yes, you need to
12 come -- of course you need to do it sensibly and come up with workable rules, but
13 I think it could well be that the workable rule in the end is we use a sub category.
14 Right? I don't know yet. We would have to study that, but you have -- why I think it is
15 manageable is because it's a big data issue. We have a data set with the
16 characteristics being allocated to each product and with that information we can then
17 run this analysis in an automatic way once we have identified the good characteristics
18 to bundle products into one -- in one market. Let's term it that way (Overtalking).

19 **MR DERBYSHIRE:** Would you do it that way? Would you bundle goods into one
20 market in advance of looking at Amazon's behaviour or would you do it simultaneously
21 while looking at Amazon's behaviour?

22 **DR NITSCHKE:** I would be a very big fan of employing several methodologies. So
23 what you have seen generally in the approach I put forward, I tried to use
24 complementary methods and then using them in combination, because there will
25 always be some disadvantages. You have pointed some out in the discussion before.
26 I can also comment on that if you want. Then that is maybe then a strength of the

1 other method, which maybe has other disadvantages. So I would employ both types
2 of analysis.

3 **MR DERBYSHIRE:** And you would triangulate the answer, you would you look at
4 different approaches to kind of get towards the truth?

5 **DR NITSCHE:** Yes.

6 **MR DERBYSHIRE:** Then the final question, almost a philosophical question: would
7 Amazon ever enter with a product without looking at similar products given the
8 advantage it has with the information?

9 **DR NITSCHE:** It could be that the answer is no. Of course, before -- it could be that
10 the answer is no, but it could be that there is some really sort of -- I don't
11 know -- innovative product I haven't thought about, but to be honest I wouldn't be able
12 to give a good example.

13 **MR DERBYSHIRE:** Okay. Thank you.

14 **MR JUSTICE ROTH:** Following on from that, you mentioned 25,000 subcategories
15 on Amazon. Have you looked at those to see that each sub category, all the products
16 in it would meet your understanding of a similar product?

17 **DR NITSCHE:** No, no, no. What was important to me is to see the data that has been
18 used in academic studies. One example was discussed at length, the Crawford study.
19 The Crawford study for me was mostly interesting to observe what data can we get
20 out of Amazon. Right?

21 **MR JUSTICE ROTH:** Yes.

22 **DR NITSCHE** And what can we do with that data. That you can already see quite
23 well in the published academic literature and hence I feel confident that we get this
24 information about the products to then do the type of analysis that we discussed
25 before. I may not have fully answered your question. Please.

26 **MR JUSTICE ROTH:** You will get details of what's in the subcategories. When you

1 talked about the standard techniques for looking at defining markets and so on, which
2 are familiar in mergers, but this is an exponentially higher number of products than
3 you would ever have in a merger. Is that something that would be of concern? Do
4 you have to carry out the sort of market analysis for definition that you have in a merger
5 where you may have 25, 75 overlapping products and here you have got hundreds of
6 thousands?

7 **DR NITSCHKE:** No. I see your point. I am not so concerned, because what is most
8 difficult if these merger case is to get comparable data from the different parties and
9 then have a matching process where you can evaluate it together. Here you have one
10 source. This is perfect from a data management perspective. You have one source
11 of data with the characteristics being handled in a standardised way. So with that we
12 can employ our big data techniques to work with big data and scale the analysis.
13 I think what's crucial is that -- I mean, I am not saying it is not -- it is sort of done like
14 this (snaps fingers). It is a real task, but I am not so worried about being able to scale
15 it up. That I am not so concerned, because handling bigger amounts of data we are
16 very trained in our firm.

17 **MR JUSTICE ROTH:** There was one other thing about the regression. In the
18 regression, as I understand it you will correct for taking out the -- looking at what would
19 happen if only the objective factors were there, what has to be stripped out. The effect
20 of being in the Buy Box through fulfilment by Amazon, that you treat as an objective
21 factor. Is that right?

22 **DR NITSCHKE:** Yes.

23 **MR JUSTICE ROTH:** I have nothing else then. Thank you very much. That is very
24 helpful.

25 **(Witness withdrew)**

26

1 **Submissions on methodology on behalf of BIRA (cont.)**

2 **MR JUSTICE ROTH:** We need to think a bit about time, but you wanted to make
3 some remarks about Dr Houpis' methodology?

4 **MS FORD:** Well, the other issue that we have is that we challenge Dr Houpis'
5 methodology in so far it relies on attempting to re-run Amazon's automated tools and
6 algorithms.

7 **MR JUSTICE ROTH:** That's the subject of two data scientists.

8 **MS FORD:** It is, of which Mr Kervizic is here today and unfortunately not here
9 tomorrow.

10 **MR JUSTICE ROTH:** We are not going to ask either data scientist any questions.

11 **MS FORD:** In which case I can proceed to deal with that point.

12 Perhaps we can start by looking at Dr Houpis' summary, because it just gives us
13 an idea of the circumstances in which this comes up?

14 **MR JUSTICE ROTH:** Yes.

15 **MS FORD:** His summary is in A, 8. Starting at paragraph 2 he just makes the headline
16 point:

17 "I have proposed methodologies that are directly linked to what would have happened
18 absent Amazon's abusive conduct. This is why I have proposed to re-run Amazon's
19 automated tools and algorithms ... where relevant and feasible, and modelling
20 Amazon's algorithm using econometric techniques."

21 He then, as Tribunal will have seen, deals with his methodology for each of the five
22 abuses.

23 Under abuse 1 he mentions the algorithms in paragraphs 5 and 6. In paragraph 5 he
24 refers to his bottom-up methodology and says:

25 "The first of these approaches ('bottom-up') would seek to make use of the automated
26 tools that Amazon Retail uses to inform its decisions and the featured merchant

1 algorithm Amazon uses to identify the Featured Offer."

2 Then over the page at paragraph 6, "Bottom-up methodology":

3 "My first approach (the bottom-up approach) to quantifying the impact on third-party
4 sellers relies on obtaining the 'automated tools' used to inform three sets of decisions
5 and then using these tools to estimate how Amazon Retail's decisions would have
6 differed in the absence of the data-use conduct. I plan to do this by re-running the
7 tools on representative samples of historical data with and without the non-public seller
8 data ..."

9 So it features in 1. Then over the page in relation to abuse 2 he refers to it in
10 paragraphs 13 to 15. In relation to abuse 2 he says:

11 "I propose two approaches -- an algorithm-based approach and
12 an econometrics-based approach ...

13 My algorithm-based approach relies on obtaining the FOSP algorithm and 're-running'
14 it without the modifications and/or the criteria which unduly favoured Amazon Retail
15 on a representative sample of products ..."

16 In paragraph 15 he says:

17 "This approach has the potential to deliver a more accurate assessment of the impact
18 of the abusive conduct."

19 Then there appear to be references to similar relevant inputs in relation to abuse 3 at
20 paragraph 20. He says:

21 "As with the second potentially abusive conduct, I will seek to establish whether there
22 was an abuse through investigation of the FOSP, and via the methodologies
23 summarised below."

24 Abuse 4, paragraph 33 is where he says:

25 "This abusive conduct", in abuse 4, "would be expected to have similar effects as the
26 third potentially abusive conduct ..."

1 Then abuse 5, paragraph 35. This also refers to investigating:

2 "... any underlying algorithms for disqualifying third party sellers' offers deemed to
3 breach the policy."

4 So it seems to be a fairly all pervasive approach that he is proposing and it is
5 an approach which we say is completely unworkable. The reason we say that is based
6 on Mr Kervizic's report, which is in A, 10. The Tribunal will have seen from his
7 summary of his experience that he is a data scientist who works at Facebook and
8 Amazon more recently --

9 **MR JUSTICE ROTH:** Not asking questions doesn't mean we have not read it. We
10 have read it.

11 **MS FORD:** Maybe I can take this very quickly. You will have seen his experience.
12 His headline opinion is summarised at paragraph 1.3.

13 **MR BANKES:** Can you give us the page number?

14 **MS FORD:** A, 175. He says:

15 "... Dr Houpis' proposed methodology involves obtaining the algorithms used by
16 Amazon, removing or modifying inputs or features that are alleged to be abusive and
17 then 're-running' them ... As set out ... I consider such an exercise would be impossible
18 and in any event impracticable."

19 So that is his headline position. If we just work briefly through why he says that,
20 section 2 of his report is headed "Algorithms and Automated Tools". What he does
21 first is identify the inputs and interconnected decision-making processes that we are
22 concerned with. The Tribunal has seen he explains what's meant by algorithms and
23 he explains what's meant by machine learning. Then paragraph 2.3 he emphasises
24 the interconnected complexity of those models.

25 The particularly relevant passage in my submission is over the page, A, 177, where
26 he says a few lines in:

1 "It is not uncommon for a company like Amazon to have thousands of such models,
2 operating in a complex web of interactions that ultimately lead to a sale (or not) of a
3 particular item to a particular potential customer. The featured merchant algorithm is
4 one such algorithm, meant to rate merchants based on previous interactions. The
5 featured merchant eligibility is another set of algorithmic processes ..."

6 **MR JUSTICE ROTH:** I mean, you can read it all out, but we have read it. If you want
7 to make some general points coming out of it, I think that's more helpful. It is not a very
8 long report. You don't need to take us through it. We have seen what he says and
9 the problems he highlights.

10 **MS FORD:** The first point I would make in relation to 2.3 and 2.4 is he's saying it is
11 impossible reliably to re-run such algorithms. He refers to the impossibility of doing so
12 with any degree of reliability. The reason I emphasise that is because there is to doubt
13 that something could be done. There is no doubt that Mr Houpis could purport to
14 re-run the algorithm and he could purport to produce a result, but the real question in
15 our submission is whether the Tribunal could proceed on the basis the result it
16 produces is in any way reliable and we say even as a rough approximation very clearly
17 no, it couldn't.

18 Now the subparagraphs of paragraph 2.4 are identifying the various inputs that such
19 a model would require and which would need to be recreated in order to re-run the
20 process. The Tribunal will have seen those are inputs which are themselves
21 combinations of algorithms, systems and real world observations. Each of those
22 inputs would have to be recreated not only as it was in the factual over time but how it
23 might change in the counterfactual scenario.

24 That's the point that Mr Kervizic summarises at 2.5 and he doesn't think it would be
25 possible sensibly to re-run any algorithm and re-create those inputs.

26 Everything up to that point is really dealing with solely a static position, essentially the

1 inputs you would need to recreate a factual and a counterfactual at a given point in
2 time, but what he then goes on to emphasise at paragraphs 2.6 and following is that
3 these are algorithms which are themselves constantly changing. They are designed
4 constantly to learn from new data and that can occur either by automated means or it
5 can occur by human intervention.

6 The important point is that the algorithm that exists now as a product of that continuous
7 process of learning and evolution is based on years and years of the circumstances in
8 the factual. So it's years and years of a circumstance which includes on this premise
9 Amazon's unlawful self-preferencing. It has been learning and evolving and operating
10 for years and years incorporating that circumstance into the algorithm. What we don't
11 know and what we can't know is what the algorithm would look like if it evolved over
12 years and years where Amazon had not engaged in unlawful self-preferencing. It is
13 introducing the speculative alternative inputs to try and generate, reflect a lawful
14 counterfactual, which we say entails piling assumptions on assumptions.

15 Paragraph 2.10 emphasises the algorithm also learns from the choices made by
16 consumers and the fact that the algorithms behaviour changes on new data inputs that
17 it receives. Again what we don't know is how consumers might respond to a new
18 competitive algorithm in the counterfactual.

19 Then there are a series of further challenges which the Tribunal will have well in mind
20 about the need for real time information, sources of third party information, difficulties
21 that arise when one is looking for various code changes, the manpower that would be
22 involved in doing this and the complications from historical data and data retention.

23 So we do very much rely on Mr Kervizic's opinion that the proposal to re-run Amazon's
24 algorithms in any reliable fashion is simply unworkable.

25 Now the response to Mr Kervizic's report has been provided by Mr Dorrell of Frontier
26 Economics. That in itself is something of a surprise, because it was Dr Houpis who

1 advanced the re-running of the algorithm as his proposed methodology in these
2 proceedings, but it now transpires that that's not a matter within his expertise, because
3 it is Mr Dorrell who has been put forward rather than Mr Houpis to defend the proposed
4 methodology.

5 If we look, please, at Mr Dorrell's report at paragraph 38, which is A, 11, page 199,
6 paragraph 38 says:

7 "I have contributed to and reviewed Dr Houpis' methodology as set out in Houpis 1 at
8 various points during its development."

9 Now that was not something that was explained by Dr Houpis in his report and indeed
10 Mr Dorrell was not even mentioned in Houpis 1. The closest one gets is a reference
11 in Annex E to Dr Houpis' report.

12 Perhaps we can turn it up. This is bundle B, tab 12, page 7946. It is paragraph E.6 in
13 this annex, where he says:

14 "Based on the experience of Frontier Economics' data science team, I expect the
15 following information from Amazon to be important for better understanding the FOSP
16 and how it changed over time."

17 So he is disclosing reliance on Frontier Economics' data science team in the context
18 of the information that he wants from Amazon, but what he is not explaining is that
19 Mr Dorrell contributed to and reviewed the methodology that Dr Houpis has put
20 forward as his own proposed methodology. That in our submission is a material
21 omission.

22 Dealing with the substance of Mr Dorrell's report, the Tribunal have seen paragraph 8
23 where he puts forward what he describes as a toolkit of methods available for auditing
24 algorithms. The first one appears to involve reviewing technical and business
25 documents. The second one involves evaluating the effect of an algorithm based on
26 its inputs and outputs. The third one is described as:

1 "... opening up the algorithmic system to understand how the algorithm works and
2 interacts with other systems and processes".

3 In this context he gives the example of the Australian Competition and Consumer
4 Commission v Trivago. If we look at what he says about that -- this is in the context
5 of the technical audit.

6 Page A, 191, paragraph 8(c), right at the end of this paragraph he makes reference to
7 the Australian Competition and Consumer Commission v Trivago and he says that the
8 audit that was conducted in that case:

9 "... provided the evidence, adduced in court, that the algorithm weighted toward the
10 price-per-click paid by hotels and not the best price available to consumers."

11 What he is describing in our submission is an investigation of how an algorithm works
12 and what its effects are and an evaluation of whether it operates in an anti-competitive
13 way. It's all about what that algorithm is doing in the factual. What it is not describing
14 in our submission is re-running an algorithm for the purposes of quantifying damages
15 by seeking to recreate how it might look and operate in a counterfactual. Mr Dorrell
16 has not in his response report given any example of that being successfully achieved.
17 Now he goes on at paragraph 9 to express a view that:

18 "... a technical audit ... is likely to be preferable to an empirical audit ...",
19 and that is an unsurprising conclusion, because that's the most intrusive and in depth
20 form of review that he's identified, but what he describes is all about understanding
21 how the algorithmic system operates in the factual. It not about re-running the
22 algorithm to create a counterfactual.

23 Indeed, if we look at paragraph 10, what he is describing in paragraph 10 is building
24 a technical understanding of the algorithm in order to build an econometric regression
25 model.

26 Now that's Dr Houpis' complementary or back-up plan but it is not re-running the

1 algorithm.

2 The first mention you actually get of re-running the algorithm is actually in
3 paragraph 11 and he says:

4 "... a technical audit, including re-running Amazon's algorithms, will likely be
5 Dr Houpis' preferred method of evaluating the impact of Amazon's abusive conduct."

6 But one looks in vain in this paragraph or anywhere else for any concrete detail as to
7 how that is going to be possible, let alone reliable, and on the contrary what one sees
8 in paragraph 11 is the statement that:

9 "At this stage of the case it is not feasible or appropriate to define exactly how each
10 algorithmic system will potentially be re-run."

11 The comments which follow are extremely high level generalities. They are not
12 concrete proposals about how this could possibly be made workable.

13 Section 3.5 seeks to place reliance on the fact that Amazon has, in fact, modified its
14 algorithm and has ceased its infringing conduct and the fact that the CMA is able to
15 monitor Amazon's compliance with its Commitments, but monitoring compliance is in
16 our submission again very different than trying to create a realistic simulation of what
17 would have occurred in the counterfactual for the purposes of estimating damages.

18 What in our submission comes through from the remainder of this report is that what
19 Mr Dorrell is contemplating and proposing is actually a much more limited and modest
20 exercise, which has no prospect of actually producing a robust result.

21 If we look, for example, at paragraph 23:

22 "Unlike what Mr Kervizic seems to suggest in his report, Dr Houpis does not consider
23 it necessary for his analysis to re-run the FOSP for all products in the UK for the whole
24 of the relevant period. Instead, he is proposing a proportionate approach that for
25 example could use data on all offers and parameters used in the FOSP for a
26 representative sample of products ... that would allow him to draw statistically robust

1 conclusions. It is important to note that for the FOSP in particular snapshots of the
2 data are only needed across various points in time (for example, quarterly for each
3 year of the Claim Period) ie not continuously across the whole infringement period,
4 considerably reducing magnitude of data needed."

5 So what is being proposed is really a very limited exercise and it has at least two
6 fundamental problems in our submission. Firstly, ideally when you are running
7 a counterfactual model, you will use clean, untainted data, data that is not tainted by
8 the unlawful conduct.

9 Now that is not what Mr Dorrell is proposing to do. He is proposing to take
10 an algorithmic system which has been operating, learning and evolving over many
11 years based on Amazon's unlawful conduct and at the very end of that process it is
12 proposed to change a few parameters in that model and to see what happens. That
13 is not the algorithmic system that would have existed in the counterfactual. Indeed,
14 we have no idea what it would look like in the counterfactual. The proposal does not
15 seem to be in any way a sensible attempt to find out what it would look like in the
16 counterfactual. It is to take an algorithm that exists now to make changes to the
17 parameters.

18 There is then a second question as to what inputs one adds to the model. The Tribunal
19 will have seen the list of inputs towards the beginning of Mr Kervizic's report and the
20 sort of inputs that are fed in: inventory, logistics, competitor pricing, consumer
21 preferences. Many of those are dynamic and many of those are interrelating with each
22 other. One simply can't feed in existing data because that is data which itself has been
23 generated in the factual and it might have been different in the counterfactual. So one
24 ends up feeding in assumptions about what might have happened in the
25 counterfactual.

26 So to take a few examples, what does one assume about inventory? Does one

1 assume that every competing merchant has a limitless supply of products? That's
2 obviously unrealistic. Then what assumption might be made about the stock they hold
3 and how soon might it run out? How might they respond to increased or decreased
4 demand in the counterfactual? What does one assume about logistics networks?
5 How might they respond to changes in demand in the counterfactual? Might they be
6 quicker? Might they be slower? Might they have capacity issues? Might they change
7 their prices? How might competitor prices respond in the counterfactual at any given
8 point in time? How would Amazon's prices in turn respond to those changes in
9 competitor pricing? How might consumers respond to the revised competitive
10 algorithm in the counterfactual and how might those responses feed in and be taken
11 into account and change the algorithm further and how would consumers then respond
12 to that changed algorithm?

13 In our submission there is no factual basis for any of those inputs and every single one
14 of them is going to involve assumption upon assumption upon assumption, and even
15 then they are not going to recreate the sort of real-time interrelated dynamic inputs
16 that the algorithm would have been driven by in the counterfactual.

17 So that in our submission is why we say this exercise is not going to produce remotely
18 reliable results. It is not a practical or a reliable methodology and it is dangerous,
19 because it will produce a result that the Tribunal have no means of interrogating
20 whether it is actually what would have happened in the counterfactual or not.

21 Very briefly Dr Houpis has proposed what was initially described as a complementary
22 methodology, so paragraph 525 in his report, B, 7899, and paragraph F.1 at B 7949
23 describes it as complementary, but it becomes more and more a back-up methodology
24 in the event that the algorithmic approach proves to be completely unworkable and his
25 plan is to model the Featured Offer selection process using a regression analysis.

26 The first step is to estimate the probability of an offer winning the Buy Box based on

1 inputs, and we have no objection to that first step because that's essentially what
2 Dr Nitsche proposes to do as well, but the second step is to simulate a counterfactual
3 by adjusting the inputs and/or switching off some of the inputs to remove any
4 discriminatory features of the FOSP to predict which offers would have won the Buy
5 Box in the counterfactual.

6 That in our submission is an equally flawed exercise. First of all, it involves changing
7 multiple parameters at once and we can see in Dr Houpis' report the parameters he
8 would be changing. It is B, 12, page 7897. You should have there a heading
9 "Re-running Amazon's algorithm". What is listed in the subparagraphs are the
10 parameters that might be changed. The true problem is that all the parameters will be
11 changing at once.

12 So we can see (a):

13 "If the FOSP has any features that discriminate between offers in a way that is not
14 justifiable based on objective criteria ...",
15 those features will be switched off.

16 Then in (b) he refers to:

17 "The potentially abusive conducts may have led to Amazon Retail's rivals facing higher
18 prices to access the marketplace ..."

19 This is actually a point about increased fees. If we turn to the end of (b), we can see
20 he is assuming that:

21 "... third party sellers' retail prices would have been lower in the counterfactual."

22 So he's going to re-run the FOSP on the basis that third party sellers' retail prices
23 would have been lower in the counterfactual. That's another parameter that then
24 changes.

25 (c) is talking about the effect of:

26 "... the Prime label in the factual compared to the counterfactual."

1 At the end of (c) you can see:
2 "I will assume that all the FBM sellers that meet the modified SFP quality criteria would
3 have selected to obtain the Prime label. I will then assess the impact this would have
4 had on Buy Box outcomes by re-running the FOSP assuming these sellers had the
5 Prime label."
6 (d) relates to how Amazon Retail's offer characteristics might have differed in the
7 counterfactual. He indicates that he is going to:
8 "... adjust these characteristics accordingly when re-running the FOSP to eliminate
9 any unfair advantage that Amazon Retail may have gained from its access to
10 non-public seller data."
11 Then (e):
12 "... I will make further adjustments to the inputs in the FOSP to ensure that any
13 adjustment made by Amazon to the data used by the algorithm does not unduly
14 preference any offers."
15 So there's a whole catalogue of matters that are going to be adjusted, many based on
16 assumptions about what would have been the position in the counterfactual, all of that
17 in circumstances where we don't know what the counterfactual world would actually
18 look like and so there's no practical means of sense checking what actually comes out
19 the other end.
20 We say that Dr Houpis lacks an advantage of Dr Nitsche's methodology because
21 Dr Nitsche has a complementary sense check. He has his broad brush methodology
22 and the benefit of that is that it operates as a sense check on the results he gets from
23 his econometric modelling. Dr Houpis doesn't have such a sense check and so the
24 Tribunal has no means of verifying whether what actually comes out is in any way
25 robust or not. So in our submission Dr Houpis' proposed methodology is not fit for
26 purpose.

1 **MR JUSTICE ROTH:** Would that be a good place to end?

2 **MS FORD:** Yes, it would.

3 **MR JUSTICE ROTH:** It might be sensible to start at 10 o'clock. (Inaudible) So on the
4 funding and the class representative you will be shorter.

5 **MS FORD:** Certainly one would hope so, yes. Is the Tribunal envisaging that I will
6 carry on first thing tomorrow to deal with the class representative and funding or does
7 the Tribunal want to hear on methodology first from Professor Stephan?

8 **MR JUSTICE ROTH:** To some extent we are in your hands. The programme you
9 presented us with was that you would do it all. It might be convenient if that suits
10 Mr Brealey that we wrap up, as it were, and hear you on the methodology and then
11 I think we will deal -- so we have that as a discrete section. I think we will deal with
12 class representative and funding together, however, and not have three parts. Does
13 that suit you?

14 **MR BREALEY:** Well, it makes sense, yes.

15 **MR JUSTICE ROTH:** I think that will be probably more efficient for us as well while it
16 is all fresh. Very well. 10 o'clock. Tomorrow.

17 **(4.30 pm)**

18 **(Hearing adjourned until 10.00 am**

19 **on Wednesday, 13th November 2024)**

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