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IN THE COMPETITION

Case No.: 1595/7/7/23 & 1644/7/7/24

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 6th May– Thursday 8th May 2025

Before:

The Honourable Mr Justice Roth
Keith Derbyshire
Charles Banks
(Sitting as a Tribunal in England and Wales)

BETWEEN:

Between

Robert Hammond

Proposed Class Representative

-and-

Amazon.com, Inc. and Others.

Proposed Defendants

And Between

Professor Andreas Stephan

Proposed Class Representative

-and-

Amazon.com, Inc. and Others.

Proposed Defendants

A P P E A R A N C E S

Philip Moser KC and Ben Rayment (Instructed by Charles Lyndon Limited & Hagens
Berman EMEA LLP) On behalf of Robert Hammond

Kieron Beal KC, Laurence Page and Hannah Bernstein(Instructed by Geradin Partners) On
behalf of Professor Andreas Stephan

Jon Turner KC and Oscar Schonfeld (Instructed by Herbert Smith Freehills LLP) on behalf of
Amazon.com, Inc. and Others in respect of the Hammond application)

Daniel Piccinin KC and Kristina Lukacova (Instructed by Covington & Burling LLP on
behalf of Amazon Inc and Others in respect of the Stephan application)

Tuesday, 6 May 2025

(10.30 am)

Opening remarks

THE CHAIR: Good morning. Like all proceedings before this T, these proceedings are being live streamed and an official transcript is being made. It is strictly prohibited for anyone to make any unauthorised recording or take any visual image of the proceedings and to do so is punishable as a contempt of court.

There are some limited number of confidential matters in the documents before us and so I think it's appropriate to make an order under the relevant rule of the Tribunal -- I think it is 101, prohibiting any reference or access to those materials for anyone outside any confidentiality ring, notwithstanding that they have been read by the Tribunal, or that attention may be drawn to them in the course of the proceedings. I think it is --

MR BEAL: It's at 101(2):

"In the event of a dispute as to whether the confidential treatment should be accorded, the Tribunal shall decide" --

THE CHAIR: Sorry, it is not that one. It is 102(5). I make that order which someone can draw up.

We will, as again is customary, take a short break at a convenient point mid-morning and mid-afternoon for the convenience of the transcriber, and no doubt for the convenience of everyone else. There are a lot of abbreviations that are being used in the various documents for understandable reasons. Just for consistency -- we have FBA for fulfilment by Amazon, and FBA merchants. Then we have some people talking about FBM, fulfilment by merchants and some people talking about MFN merchant fulfilment network, which I understand is exactly the same thing. Can we

1 use the term FBM, please. I know Amazon internally may call it MFN, but we then
2 have the contrast FBA, FBM, which is of course the way it was approached in the
3 judgment in the carriage dispute. Also for consistency, if we could refer to it as the
4 Microsoft test, rather than the Pro-Sys test.

5 I think that is all by way of preliminary observations. So Mr Beal?

6 MR BEAL: Thank you very much, sir. May it please the Tribunal, I appear with my
7 learned juniors Laurence Page and Hannah Bernstein for the Proposed Class
8 Representative Professor Andreas Stephan. My learned friend Mr Moser KC and
9 Mr Rayment appear for the Proposed Class Representative, Mr Hammond. My
10 learned friends Mr Turner KC and Mr Schonfeld appear for Amazon in its capacity as
11 respondent to the Hammond application. Last but not least, my learned friends
12 Mr Piccinin KC and Ms Lukacova appear for Amazon with their Stephan hat on, if I can
13 put it that way. That is the representation before the Tribunal today.

14 Please can I just check the Tribunal has, firstly, the hearing bundle comprising folders
15 A to F, either electronically or in paper form; and secondly a bundle of authorities,
16 which is rather extensive.

17 THE CHAIR: Yes, which we have electronically, yes.

18 MR BEAL: I have it electronically too. I think the key for that is to add six to whatever
19 I say to find the page in the PDF, but I will try to do the mental arithmetic either way.

20 THE CHAIR: I should mention we have also just received literally a few minutes ago
21 an amended Litigation Funding Agreement dated 5 May, and a deed of confirmation,
22 or deed of variation to the deed, dated 5 May. We have not had a chance fully to
23 digest that, nor to understand why this is being produced just on the morning of the
24 hearing.

25 MR MOSER: I am afraid it is ours. I didn't realise it had been produced to you. It's
26 not amended, it's merely a signed version of the version that's already in the bundle.

1 That can probably quite safely be consigned to some place.

2 THE CHAIR: We know it has now been signed, thank you.

3 I think it has been confirmed, we having raised that in correspondence, that those

4 clauses about the funder's return are not confidential?

5 MR MOSER: Yes.

6 THE CHAIR: Thank you.

7 Yes, sorry, Mr Beal.

8

9 Submissions by MR BEAL

10 MR BEAL: What I am proposing to do in my opening submissions is briefly set out

11 the relevant legal principles governing certification, which I appreciate will be very

12 familiar to this Tribunal

13 Secondly, I propose to go in to somewhat more detail through the regulatory decisions

14 which underpin what we say is the evidential basis for our claim.

15 Thirdly, I propose to touch lightly on our pleaded case because this is an application

16 which is not met by a cross application for summary judgment or on a strike out basis

17 in the defendant's favour. Therefore, the normal principles that the pleaded case is to

18 be taken as the case in the absence of that sort of cross application will apply.

19 Fourthly, I propose to go on to respond to Amazon's critique of the workable blueprint

20 to trial, so-called.

21 Finally, I will deal with the residual issues, namely the absence of a conflict within our

22 class, the question of opt-in versus opt-out, and finally some short points on funding.

23 Unusually, perhaps, this Tribunal is blessed with having had two extensive hearings

24 dealing with carriage for each of the CPO applications before you. Much of the

25 material has already been ventilated; indeed it is part of our case that you have

26 heard quite a lot of this before. What that means is I will therefore, I hope, be

1 quicker than I would otherwise be and I am proposing to sit down by 3.45 or so to
2 allow Mr Moser to take up the baton and deal with Hammond's specific points.

3 I would like to start, please, by just reminding the Tribunal of a warning that the learned
4 president gave at the CMC on 4 February 2025. That's in bundle F, tab 14, page 83.
5 If we could look, please, at lines 17 to 26. So F14, page 83. Please could I invite you
6 to read line 17, two-thirds of the way down the page through to the bottom of the page,
7 and then the first line overleaf.

8 THE CHAIR: From "I don't think we particularly wish to encourage ...", is that it?

9 MR BEAL: Yes.

10 THE CHAIR: Yes.

11 MR BEAL: If I turn, please, to the relevant legal principles governing certification. For
12 your note, this is addressed in our reply, paragraphs 11 to 13, folder B13,
13 page 309 -- I am not proposing to go through all of that at this stage. It is also dealt
14 with extensively in my learned friends Mr Moser and Mr Rayment's skeleton.

15 The Amazon skeleton in response at paragraph 24 appears to quibble with an
16 interpretation of the Court's judgment in MOL v McLaren, but otherwise there is not
17 a great divergence of view, understandably, as to what the appropriate tests are.

18 THE CHAIR: Yes.

19 MR BEAL: I am proposing, unless the Tribunal thinks it's a waste of your time, to start
20 with Merricks and the Supreme Court, albeit lightly, and then go to deal with Gutmann
21 number 1. Starting with the Supreme Court in Merricks, that's in the bundle of
22 authorities folder, tab 15, page 892 internally. So that would be 898, I hope, is where
23 it starts within the PDF version.

24 THE CHAIR: Yes.

25 MR BEAL: If we could start at paragraph 20, which is at page 900, or 906 for those
26 on the PDF. Please could I invite you just to cast an eye back over paragraph 20

1 because it sets out the legislative purpose behind the new regime.

2 THE CHAIR: Yes.

3 MR BEAL: If you could be kind enough then to turn in the PDF to page 911 -- internal
4 905. We can see at paragraph 26 that Lord Briggs identified the rules providing for
5 the CAT on the application to have power to strike out all or part of a claim or to give
6 summary judgment. Those powers are fully applicable in CPOs both generally and at
7 the time of the hearing for a CPO. They enable the CAT to prevent collective
8 proceedings going to a probably very expensive trial in cases where parts of them
9 disclose no reasonable cause of action, aren't abusive, or do not raise triable issues.

10 In short, the CAT has a merits-based control over collective proceedings on that basis.

11 You have my point that there is not such an application in this case.

12 If we could then turn to page 919 of the PDF, internal page 913. What we see in
13 paragraphs 39 to 40 is really the classic statement of the Microsoft test. Then at 41,
14 a recognition that the test is not onerous, disclosure is yet to come, and there is an
15 asymmetry of information.

16 THE CHAIR: Yes.

17 MR BEAL: All of which is well-trodden ground.

18 More importantly, perhaps, for present purposes, if we turn to page 922 in the PDF,
19 paragraphs 46 to 47 recognise that -- at the top of page 916 internal -- 922 on the
20 PDF:

21 "In order to be entitled to a trial of the claim, they need only be able to pass a strike
22 out/summary judgment test i.e. to show that the claim as pleaded raises a triable
23 issue."

24 Then in 47 and 48, there is a recognition that effectively:

25 "Once that hurdle has been passed, there is an entitlement to have the court quantify
26 their loss as long as the loss would be more than nominal."

1 THE CHAIR: Yes.

2 MR BEAL: In 48, his Lordship recognised that:

3 "Resort to informed guesswork rather than or in aid of scientific calculation is
4 particularly important where the court has to proceed by reference to a counterfactual.

5 The loss may have to be measured by reference to what the court thinks a claimant
6 would have done if the defendant had not committed the wrong complained of."

7 There is then a reference to the loss of chance doctrine and Chaplin v Hicks, and
8 so on. Paragraph 54, internal page 919, PDF 925, one sees that:

9 "Certification should not be refused because of complexity in assessing a loss that is
10 more than nominal."

11 We see that:

12 "The gatekeeping function of the CAT [important though it is, I interpose] at the
13 certification stage should be an occasion when a case which has not failed the strike
14 out test should nonetheless not go to trial because of difficulties in the quantification
15 of the damages."

16 In other words, once you have surpassed the threshold that you have an arguable
17 claim in classic strike out terms -- reverse summary judgment terms -- then you don't
18 let the complexity of quantification of loss stand in the way of certification. That's all
19 the more important with this new regime because we see in paragraph 58, internal
20 page 921, PDF 927, that this new regime represents a radical departure from the
21 standard principle of compensatory damages being awarded for an individual claimant
22 pursuing a claim for individual loss. It is precisely because it is now an
23 aggregate-based test --

24 THE CHAIR: That's a sort of different point. That's about aggregate damages.

25 MR BEAL: It is about aggregate damages, but it is recognising that the complexity of
26 calculation of the loss is not a reason to refuse certification, and then that complexity

1 has the added nuance that instead of being “what has this individual suffered by way
2 of loss that is being compensated”, instead of that, it is an aggregate approach, top
3 down approach to the quantification of loss.

4 That may or may not make life easier, but the point is it is different. If you would be
5 kind enough just to cast an eye over paragraphs 58 to 60, we see that effectively the
6 compensatory principle has been moved away from -- towards an approach that is
7 impliedly based, because it is a judicial decision, on being a fair and reasonable
8 outcome in the aggregate for the class as a whole.

9 Then at 59 to 60, we see the whole process of certifying has necessarily moved away
10 from a quasi-merits approach. It is not a dress rehearsal for the trial; it is, "Are the
11 statutory conditions met for certification?", and this Tribunal is very familiar with what
12 the different components of that statutory test are, both as a result of the wording of
13 the Competition Act 1998 and the CAT rules which give effect to it. That's the standard
14 authorisation eligibility issues.

15 We then say -- page 926 internal, page 932 on the PDF, paragraph 73 -- that even
16 quibbles about what disclosure may or may not throw up, what sort of data might or
17 might not be available, should not stand in the way of certification. In the context of
18 suitability for collective proceedings or aggregate damages, it is no answer to say that
19 members of the class can bring individual claims. They would face the same forensic
20 difficulties in establishing, for example, merchant pass-on, and insuperable funding
21 obstacles to their own, litigating for small sums for which the cost of recovery would
22 be disproportionately large. Of course, that has some bite here in relation to the
23 opt-in/opt-out part of Amazon's case against certification.

24 We finally see page 928 internal, page 934 on the PDF, paragraph 77, that:

25 "A central purpose of the power to award aggregate damages is to avoid the need for
26 individual assessment of loss. Whilst there may be many cases in which some

1 approximation towards an individual loss may be achieved by a proposed distribution
2 method, there will be somewhere the mechanics will be likely to be so difficult and
3 disproportionate that some other method may be more reasonable, fair and more just.
4 For that purpose, the statutory scheme provides scope for members within the class
5 to be heard about distribution ..."

6 THE CHAIR: That's all about distribution. I don't think that's really relevant to the
7 certification. That's because the CAT shouldn't certify because one wouldn't be able
8 to distribute by respect to individual loss, and the Supreme Court said that's irrelevant.

9 MR BEAL: It's irrelevant in this sense: to the extent that any quibble is taken against
10 us in relation to where will this loss end up at distribution stage, the answer is that will
11 be determined at distribution stage.

12 THE CHAIR: I didn't see any such point being taken, but I may have missed it.

13 MR BEAL: That brings me, please, on to Gutmann, bundle of authorities, tab 22,
14 starting, if we may, at internal page 1529, which will be 1535 in the PDF. At
15 paragraph 23, the court reiterated that:

16 "In determining suitability, this Tribunal does not consider the merits of the claim.
17 Putative defendants can apply to strike out if they see fit."

18 THE CHAIR: Sorry, you are on which page?

19 MR BEAL: 1529 internal, or 1535 of the PDF.

20 THE CHAIR: Yes, thank you.

21 MR BEAL: I just took you to 23 for the reiterated proposition on merits. Then 24, the
22 Court of Appeal identifies that the Microsoft test will necessarily look at the
23 methodology and setting out how the issues are to be determined or answered at trial.
24 It says:

25 "In practice, the methodology is prepared by an expert economist instructed by the
26 proposed class representative. It will be counterfactual and therefore hypothetical in

1 nature because it is how the market would operate absent the alleged unlawful
2 conduct, and it provides a benchmark against which to measure a defendant's actual
3 conduct. It is a critical document that the CAT will examine when determining
4 commonality and suitability."

5 Of course, that document for my client is principally to be found in Dr Houpis' first
6 report, which this Tribunal went through with some care for the purposes of the
7 carriage dispute judgment.

8 THE CHAIR: Yes. Before we get into all this, there is a rather helpful, it seemed to
9 us, summary of the principles under the Microsoft test in the recent decision of the
10 Tribunal in the Bulk Mail case. I don't know if one needs to go further than that. One
11 can go through the underlying judgments and it is clear that although at first blush, the
12 Merricks Supreme Court is saying, well if it's not struck out -- one can almost read it
13 saying, well, then, the Tribunal has to certify. But it is not quite as simple as that, it
14 has the Merricks clearance --

15 MR BEAL: No.

16 THE CHAIR: -- and you recognise, otherwise you could tear up the Microsoft test. So
17 there are some teeth in the gatekeeper role of the CAT, but the test -- I don't know if it
18 is helpful, Mr Beal -- I don't want to take up more time, I want to save time -- if you look
19 at the Bulk Mail case and perhaps just if we start with that, we can go back to Gutmann,
20 if you like. But it is in the bundle, you will no doubt give me the reference.

21 MR BEAL: Tab 42, page -- I was going to pick it up, actually, at internal page 2333,
22 or 2339 PDF.

23 THE CHAIR: 2339 on the PDF, yes. It's exactly the passage. I think it starts at 2338
24 at paragraph 15.

25 MR BEAL: Yes.

26 THE CHAIR: And there are the sort of six principles.

1 MR BEAL: Yes.

2 THE CHAIR: Then the Tribunal there added some further observations, a further
3 seven observations.

4 MR BEAL: Yes.

5 THE CHAIR: Does that sum it up, or do you want to go beyond that?

6 MR BEAL: That does the job perfectly, with this caveat, if I may add: the pedant in me
7 can't resist, I am afraid, suggesting that paragraph 15, page 2332 internal,
8 Lord Justice Green's principles in Gutmann II extend from paragraphs 53 to 63. But
9 subject to that observation, I respectfully agree that the learned chairman in setting
10 out those principles has caught the essence of the guidance from Lord Justice Green
11 in Gutmann.

12 There are some additional points to be taken from Gutmann at paragraphs 59 to 63.
13 But most of the latter ones go to looking at representative class members giving
14 evidence, top-down calculation of aggregate damages, and so on, which are not
15 necessarily the key points that the learned chairman in Bulk Mail was focusing on.

16 THE CHAIR: Yes.

17 MR BEAL: But subject to that caveat, I am very happy with that. That shortens the
18 tour de raison of the authorities.

19 THE CHAIR: Yes.

20 MR BEAL: Perhaps I could very briefly take you to the very recent Gutmann II decision
21 which deals with funding issues while I am just on the subject of authorities. So, this
22 is bundle of authorities, tab 43. I would like to start at internal page 2378, so that will
23 be 2384. Please could I invite the Tribunal to read paragraphs 78 through to 82.

24 THE CHAIR: Yes.

25 MR BEAL: Please could you then turn to page 2391 in the PDF, internal page 2385,
26 and be kind enough to read paragraphs 97 to 99.

1 Two short points: firstly, there is nothing wrong with having a funder's fee or return
2 paid out of damages awarded to the class in priority to the class; and secondly
3 questions of reasonableness, and so on, are best addressed at the distribution stage.
4 That concludes my overview of the principles, subject to any additional points that
5 Mr Moser wishes to introduce later. Could I please move on to the second part of my
6 opening, which is a quick look -- or relatively quick look -- at some of the regulatory
7 decisions that have inspired both claims.

8 THE CHAIR: Yes. Just on this point about best addressed at distribution, one can
9 see lots of reasons why that is generally the case. At the same time, I think the
10 Tribunal has remarked once or twice that if there is something in the funder's return
11 that really strikes it as wholly exceptional, it would be appropriate to draw that to
12 everyone's attention at certification.

13 MR BEAL: Yes.

14 THE CHAIR: That's indeed in the interests of the funder as well because if it is -- and
15 the class, if it is clear to the Tribunal that no way would they ever approve that sort of
16 return. To say nothing and then just do it at the end would not be very helpful.

17 MR BEAL: The funder would be under a misapprehension --

18 THE CHAIR: Yes. It is always subject to approval. It is always subject to the CAT's
19 supervisory jurisdiction, as the Court of Appeal has emphasised. But there may be
20 cases where it is appropriate to say: this is so striking that it calls out for explanation
21 at this stage.

22 MR BEAL: Yes. And indeed at the carriage stage this Tribunal steered my client's
23 funder to an alternative arrangement that better met the concerns the Tribunal has
24 addressed.

25 The EC Commitments decision is the first one I propose to turn to, please. I am going
26 to start at page 3601 in the bundle of authorities -- that's internal, so 3607.

1 THE CHAIR: Yes.

2 MR BEAL: I appreciate the Tribunal has read this decision previously because it was
3 referred to by Mr Brealey KC at the carriage dispute and has subsequently been
4 referred to in the carriage dispute judgment. Could I invite the Tribunal, therefore, to
5 recast an eye over recitals 1 through to 8, starting at page 3601, and ending on the
6 top of page 3603 internal.

7 THE CHAIR: 1 to 8?

8 MR BEAL: Recitals 1 to 8, please, yes.

9 There is then some general description about the characteristics of sales, starting at
10 internal page 3605 -- on the PDF, it is at the bottom of page 3611 -- and recitals 34 to
11 37 set out a series of findings made by the European Commission. Whilst there is
12 a very large number of products that existed on the Amazon websites, only a small
13 proportion of them actually generate any sales. So, 93 per cent of the relevant
14 identification numbers, ASINs, 93 per cent of those generated zero sales. So, there
15 is a very large spectrum of products that are potentially available for sale, but it is only
16 really the top 7 per cent that are the ones which generate actual sales.

17 Then we also see in recital 35 -- inference, we don't have the figures because it is
18 redacted -- an inference that a large proportion of the professional third-party sellers
19 generate relatively low turnover, which is consistent with Dr Houppis' findings in his first
20 report.

21 We then see at recital 37 the key role played in achieving sales by the Buy Box
22 and winning the Buy Box, confirmation of how that works from the European
23 Commission. We then see at recital 40, over the page, based on 2017 to 2019 sales
24 data for German/French websites, sales made directly through the featured offer
25 accounted for somewhere between 70 to 80, to 80 to 90 per cent of the overall sales.
26 In its publication to sellers, Amazon stated that 90 per cent plus of sales are coming

1 from the Buy Box. This demonstrates that consumers are much more likely to buy
2 the featured offer they are presented with rather than any other offer on the listing
3 page or the AOD, all offer display.

4 That highlights the pivotal role played in this online marketplace by the Buy Box. If we
5 turn, please, to internal page 3616, PDF 3622 --

6 THE CHAIR: The next paragraph, perhaps, recital --

7 MR BEAL: 96 to 97.

8 THE CHAIR: Yes. Before that, 47 sort of sums up the role of the Buy Box, doesn't it?

9 MR BEAL: Yes, it does.

10 THE CHAIR: Where they say it is essential --

11 MR BEAL: I am adding that highlighting.

12 THE CHAIR: -- for third party sellers.

13 MR BEAL: Then at 96 to 97, obviously the entire decision bears reading -- I am trying
14 to give you edited highlights, if I may.

15 THE CHAIR: Yes.

16 MR BEAL: 96 to 97, we see the preliminary concerns are expressed as to conduct, in
17 particular --

18 THE CHAIR: Before one gets -- you talked about the Buy Box and how
19 important -- about Prime, as distinct from the Buy Box.

20 MR BEAL: Yes. Certainly the findings are that Prime is a very popular product at
21 Amazon --

22 THE CHAIR: Yes.

23 MR BEAL: -- it has a loyal customer class. Customers who are Prime customers tend
24 to value Prime delivery as part of the options that are available to them. So I think the
25 evidence suggests that if you are a Prime seller, you have some built in strong
26 advantages both for winning the Buy Box and also just generally for making sales on

1 the website.

2 THE CHAIR: Sorry, where is that?

3 Mr Bankes is helpfully saying one gets to --

4 MR BEAL: Page 3622 internal deals with Prime sellers generally.

5 THE CHAIR: Yes.

6 MR BEAL: That was on my proposed list to come to shortly.

7 THE CHAIR: Yes.

8 MR BEAL: If I could highlight, please, just an overall summary of the concerns the
9 Commission had, starting at recital 96, internal page 3616, PDF 3622.

10 Bearing in mind this classic way that the Commission has done business, it has set
11 out in a very detailed statement of objections which we don't have what their concerns
12 are and the evidence for it. There is then a response to that, which in this case has
13 taken the form of an offer of initial commitments. There is some horse trading about
14 the terms of those commitments, and it leads to the final commitments which the
15 Commission accepts.

16 I would anticipate, subject to argument from Amazon, that it shouldn't be disclosed;
17 that as in the usual way the full unredacted version of that statement of objections will
18 be available to those in the confidentiality ring and to the Tribunal.

19 THE CHAIR: Yes.

20 MR BEAL: We then see at recital 98, concerns about the role of data within Amazon,
21 and the contractual provisions on the provision of data derived from the business
22 solutions agreement. Essentially, the business solutions agreement requires relevant
23 seller data as defined in the agreement -- I will come on to the agreement when looking
24 at abuse 1 -- has to be handed over to Amazon and Amazon can use it.

25 If we could then, please, look at recital 109. It shows the type of data that is relied
26 upon by Amazon Retail. Again, the detail will be in the statement of objections, but

1 the summary is given here. Amazon has access to Amazon Retail, business has
2 access to three types of data --

3 THE CHAIR: Yes, I think we have read this.

4 MR BEAL: You have that point. 111 to 113, it continues to explain how there is a data
5 covering all non-publicly available data of third party sellers relating to product listings,
6 which produces an advantage to Amazon Retail, which it uses for its competitive
7 advantage.

8 There is a conclusion at recital 123:

9 "Real time access to and use of such volume, variety and granularity of NPSP about
10 its retail competitors generates a significant competitive advantage for Amazon Retail
11 in each of the different decisional processes that drive its retail operations."

12 So that's decisions to enter and leave the market, decisions as to how to price, seeing
13 essentially the products which suddenly become very popular, Amazon can get in at
14 the front end on that and price accordingly.

15 Moving on then, at recital 124 and onwards to deal with the Buy B related conduct,
16 again edited highlights only. The Buy B first step is to identify eligible third-party sellers
17 that meet certain requirements set by Amazon, and the second step then is the
18 application of the algorithmic tools which give rise to the featured offer.

19 Recital 129:

20 "The Commission observed in its preliminary assessment that a rating given to
21 Amazon was artificial in that it did not mirror the actual performance of Amazon Retail
22 and FBA sellers. Amazon Retail could not be rated by customers. However, during
23 the investigation, the Commission identified thousands of transactions where Amazon
24 Retail had been rated by customers as a result of technical error. Screenshots
25 registered show Amazon Retail offers were typically rated at certain confidential
26 percentage popularity rates which in many cases were below that given for MFN, [i.e.

1 FBM sellers or offers]."

2 THE CHAIR: Yes.

3 MR BEAL: Recital 132, there is confirmation that there are more frequent performance
4 adjustment made for FBM sellers; and at 134, evidence concerning the adjustment of
5 delivery promises for FBM sellers.

6 So Amazon seemingly has decided to change the delivery promises that are -- in
7 a sense, it has marked the FBM sellers' homework saying, "You've said you will get
8 this delivered in 48 hours. We are concerned you are not going to make that, so we
9 are going to make it 72". An illustrative example of what's happening.

10 As Mr Banks has suggested, recital 141 onwards deals with the role of Prime
11 eligibility in winning the Buy Box, and there are two separate points here. Firstly, if
12 you are a Prime seller, you automatically get into the Buy Box, or you can automatically
13 get into the Buy Box, without having to satisfy the other aspects. Secondly, you
14 obviously get access to all of the loyal customers who are Prime customers who
15 predominantly choose Prime services. That seems to be the evidence.

16 That's dealt with at 142 and onwards. At 143 onwards, they look at the alternative
17 way of getting the Prime label, which is the SFP, Seller Fulfilled Prime process, and
18 a series of criteria have seemingly been applied by Amazon to getting the benefit of
19 that badge, which the evidence from the Commission suggests that there are
20 concerns -- see 147 to 150 -- as to the process by which the SFP programme produces
21 a Prime label for third party sellers.

22 The key provisions there on findings of abuse really begin at recitals 153 to 158.

23 THE CHAIR: Just a moment.

24 What I am just trying to understand is whether the concern about Prime is that if you
25 are a Prime seller, you are more likely to get into the Buy Box so it really feeds into the
26 other conduct, or whether it's broader.

1 A large number of Prime customers, consumers ... maybe it's that they say you get
2 access to that customer base.

3 MR BEAL: If you would be kind enough to look at recital 173.

4 THE CHAIR: Yes.

5 MR BEAL: Internal 3627, PDF 3633, it says:

6 "Sales through the Buy Box represent the vast majority of all transactions on each of
7 the e-commerce platforms. In the same vein Prime eligibility and labelling are crucial
8 for sellers to reach the most loyal and highest spending user base, applying more
9 favourable conditions and criteria to promote the offers of FBA over FBM sellers both
10 in the selection of the offer that features in the Buy Box and in the eligibility of sellers
11 to ..."

12 THE CHAIR: Is the Prime label irrespective of the Buy Box?

13 MR BEAL: It is both.

14 THE CHAIR: As well as the access to the Buy Box, yes. Thank you.

15 MR BEAL: Going back, the recitals which in my respectful submission encapsulate
16 the Commission's preliminary concerns are really at 153 to 158, where they look at
17 the disparate treatment both from Prime-related conduct and Buy Box-related conduct
18 between FBA sellers, so-called, and FBM sellers.

19 I should say that whenever I mention the words FBA or FBM sellers, it is subject to the
20 obvious caveat that we say you can be both. Therefore, the preferred term from
21 Dr Houpis is FBA offers and FBM offers, but I acknowledge that conceptually it is
22 easier to say sellers.

23 THE CHAIR: Yes.

24 MR BEAL: Those are really the key provisions. Then in terms of the anti-competitive
25 effect, the Commission deals with that separately from recitals 167 onwards, where it
26 applies the preliminary conclusions as to data use conduct, and then says what impact

1 that has on the competitive structure of the market. Please would you read 167 to
2 171.

3 That's looking at specifically the data use conduct. It then moves on at recital 173
4 onwards, internal page 3627, to look at Buy Box-related conduct and Prime-related
5 conduct. It bundles the two together, as I said. Please will you cast an eye over 173
6 to 176 and you can see how the Commission has dealt with the impact of the
7 competitive structure of the markets, i.e. the key markets, plus also the affiliated
8 markets in this case. I'm sorry, I think I said affiliated markets. In fact this section is
9 only dealing with the impact on Marketplace offers.

10 THE CHAIR: Although it says, "Buy Box-related conduct and Prime-related conduct",
11 it is actually mostly about the Buy Box, which given the figures you gave us earlier
12 about the number of sales that are actually from the Buy Box, it is a very high
13 proportion.

14 MR BEAL: Yes.

15 THE CHAIR: That's why I am sort of wondering how important it is outside the Buy
16 Box because you are talking about a very small proportion of actual sales.

17 MR BEAL: I think the primary effect, if I can put it that way, of Prime is to get you into
18 the Buy Box. Winning the Buy Box is everything.

19 THE CHAIR: Yes.

20 MR BEAL: But there are obviously some ancillary benefits of Prime: the loyal customer
21 base, the fact that if you have the Prime label -- the evidence is that quite a lot of
22 customers deliberately tick the filter box on the left-hand side of the website saying
23 "I only want to receive Prime eligible deliveries."

24 There is also specifically Prime discounts and benefits given in the Prime sales days,
25 so whatever the Black Friday sales event is in November, and so on. There's quite
26 a lot of evidence about that.

1 THE CHAIR: Yes.

2 MR BEAL: In terms of then looking at the potential effects of the data use conduct first
3 at recital 183, the Commission identifies how Amazon Retail's decisions on three
4 separate areas: starting to sell a product, its pricing decision, and then inventory
5 management and planning, as well as its vendor selection decisions, will be influenced
6 by the availability of the non-public seller data. We then see at 185, 186, and so on,
7 figures showing the ability of Amazon Retail to essentially corner the market in certain
8 products.

9 You will have seen from Houpis 1, for example, that in CDs, DVDs, and so on, Amazon
10 has a very high percentage of actual sales, full stop.

11 Then 187:

12 "For the purposes of its pricing decision, Amazon Retail relies on information from the
13 algorithm which used and compares all relevant data on third party sellers and offers.
14 That is an advantageous position for testing its prices before posting them so it can
15 optimise its pricing."

16 At 190, similarly:

17 "It can optimise its inventory, management and planning decisions by ensuring (a) that
18 it has popular stock to hand and (b) no doubt getting rid of unpopular stock early."

19 Recital 195, there is a preliminary concern expressed that by relying on the data in
20 that way, Amazon is limiting the normal risk and cost of supplier choice and also
21 directly eliminating well performing competitors for the sale of relevant products on the
22 e-commerce platform.

23 The Commission then moves on to look at the impact of the Buy Box conduct and the
24 key recitals are really 202 through to 206.

25 THE CHAIR: Yes.

26 MR BEAL: The Commission moves on to look at the impact of the Prime specific

1 points at recital 212 onwards, that's PDF 3638. It says:

2 "As set out in the preliminary assessment, the Commission has preliminary concerns
3 that Prime eligibility and Prime labelling generate crucial advantages for the seller on
4 the e-commerce platform."

5 It then gives three reasons why that should be the case.

6 In particular at 215:

7 "The Prime label is an indication to Prime members that the offer fully covers the
8 advantages of the Prime programme, i.e. both free delivery and quick shipment. Prime
9 labelled offers are the preferred choice for Prime members in the majority of cases."

10 So it is tapping into a bespoke form of demand, which is the very loyal Prime
11 subscription class.

12 At 217 to 219, the Commission looks at the effect of that conduct:

13 "Depriving FBM sellers of the ability to develop a large Prime user base and thus
14 places them at an artificial competitive disadvantage both one in terms of the visibility
15 of their offers to Prime users, and secondly as to their ability to generate Prime
16 transactions."

17 So it is both aspects. It is getting into the Buy Box and then actually making the
18 underlying sales. We then see, 218:

19 "Evidence referred to pointed to a negligible proportion of Prime labelled offered sales
20 to any seller other than Amazon Retailer or FBA sellers throughout the marketplaces."

21 And that's consonant with the evidence from Dr Houpis, looking at his data that
22 0.6 per cent of FBM sellers were Prime eligible under the SFP.

23 The Commission was essentially concerned that there was a discriminatory impact
24 through the Prime eligibility conditions, and so on, which effectively put FBM sellers at
25 a competitive disadvantage.

26 The preliminary conclusion on anti-competitive effects is therefore set out at 221 to

1 222, and that wraps up the previous analysis and shows how it was considered by the
2 Commission that this was detrimental to competition taking place on the e-commerce
3 platform.

4 THE CHAIR: Yes.

5 MR BEAL: The commitments, as the Tribunal knows, that were offered took some
6 initial forms. The initial commitments given are summarised at recitals 232 to 236, at
7 page 3641 on the PDF. Essentially, they sought to assuage the Commission's
8 concerns on the key points.

9 Then I am going to cut to the chase, if I may. At recital 273 -- it should be at page 3647
10 of the PDF -- 273 to 276 essentially set out why the final version of the commitments
11 offered by Amazon -- because they were tweaked -- satisfied the Commission's
12 concerns at this stage.

13 Please could I invite the Tribunal to read 273 to 276.

14 THE CHAIR: Yes.

15 MR BEAL: At recital 287, which one should find at 3648 of the PDF, we see
16 a recognition from the European Commission at the bottom of that page, 287:

17 "Data silo related commitments mirror Amazon's fully data-based decisional processes
18 and involve a major change to Amazon's business model. Buy Box and Prime related
19 commitments require a revision of two major mechanisms of Amazon's ecosystem that
20 drive visibility and sales on its e-commerce platform. Notwithstanding these changes,
21 Amazon will retain control of the operations of its e-commerce platform, therefore key
22 to ensure sufficient level of deterrence to minimise any risk of circumvention."

23 And they put in place a trustee monitor, and so on.

24 The key point there I am seeking to draw to the Tribunal's attention is these were major
25 changes agreed by Amazon to its ecosystem, to its operational processes. This is
26 a major shake-up of the way that Amazon does business, and as much as Amazon

1 may seek to persuade this Tribunal at this stage that all is well in the world of Amazon
2 and there are no competition concerns, my respectful submission is that if a very large
3 business is willing to shake up its business to that extent it must have seen the writing
4 on the wall.

5 Now there is a rather arid dispute between the parties as to the effect of
6 a commitments decision. We have cited the CJEU decisions in Gasorba and in
7 Canal+ to the effect that it wouldn't be open to a national court to go behind this
8 Commission decision if it were binding in its domestic legal system, at least for so long
9 as the Commission had power to amend the impact of the decision.

10 So if, for example, the Commission found non-compliance or decided to revoke the
11 commitments decision, it wouldn't be appropriate for a national court to give
12 a particular set of arrangements a clean bill of health in terms of competition -- it
13 should be open to the national court to say: this infringes competition, notwithstanding
14 the commitments that were given; but it isn't open to a national court to say there was
15 nothing wrong in the first place. That's essentially where the jurisprudence comes out.
16 The reason I am not taking you through that, what I describe as "arid dispute", is we
17 recognise that this decision doesn't relate to an investigation that predated Brexit and
18 is not, therefore, a decision that is binding on this Tribunal as a matter of the
19 withdrawal agreement.

20 In a sense, we rely on it for its evidential value but we recognise it is not formally
21 binding on this Tribunal and we don't articulate it in that way. So, whilst we can debate
22 the legal issues, ultimately my respectful submission would be "so what?"

23 Can I move on to the CMA Commitments decision? That may be perhaps
24 a convenient moment to temporarily lift the veils.

25 THE CHAIR: And take a break at this point.

26 Yes, it would be helpful if someone could amend our clock. We will return in ten

1 minutes.

2 (11.40 am)

3 (A short break)

4 (11.50 am)

5 THE CHAIR: Yes.

6 MR BEAL: If we could turn, please, to the CMA Commitments decision. That is
7 internal page 3288 of the authorities bundle, 3294 on the PDF.

8 Paragraph 1.2, the CMA summarises the concerns which the Commitments it's
9 accepted meet, and they describe those concerns. If you please cast an eye over
10 that.

11 THE CHAIR: Sorry, can you give the --

12 MR BEAL: The PDF page is 3294, and 1.2 summarises the concerns the CMA has
13 discovered following its investigation.

14 We then see at 1.3 what the Commitments are designed to ensure. Firstly, that
15 Amazon will not use non-public data provided by third party sellers for its own retail
16 operations. That's the data commitment. Subparagraph B, over the page:

17 "Amazon will apply objectively verifiable non-discriminatory conditions and criteria to
18 determine which offer will become the featured offer [that's the Buy Box commitment],
19 and it will not use Prime eligibility or Prime labelling as relevant criteria for selecting
20 the featured offer."

21 It will then thirdly deal with the Prime eligible issue by again ensuring that Amazon will
22 allow the use of independently negotiated rates between carriers and sellers:

23 "Amazon will make reasonable means available to enable interested carriers to
24 connect with Amazon systems and will not use any information obtained for the
25 purposes of Amazon's own fulfilment operations."

26 Those are the SFP rates commitments, allowing essentially Prime to be conferred,

1 even if an FBM seller is using its own delivery and fulfilment structure.

2 Page 3302, internal page 3296, we have paragraph 3.14 of the decision, where the
3 CMA summarises the impact of the terms of the BSA and the payments agreement,
4 imposing an obligation to provide certain data to Amazon -- it describes what sort of
5 data are provided.

6 At 3.23, over the page, the CMA identifies the importance of being able to list offers
7 with a Prime label. It gives certain figures for Prime subscriber numbers in the UK,
8 which are on any view substantial.

9 Moving on to its analysis of the underlying concerns about the anti-competitive
10 behaviour, one sees at page 3299 internal -- that's 3305 on the PDF -- paragraphs 4.4
11 to 4.7. Please could the Tribunal cast an eye over those paragraphs?

12 THE CHAIR: Yes.

13 MR BEAL: The CMA then adopts a similar approach to biases in the featured offer
14 selection process at 4.8 to 4.10, setting out what its investigation has found.

15 THE CHAIR: Yes.

16 MR BEAL: At 4.12, over the page, the CMA identified the potential impact of that
17 potentially abusive conduct, namely:

18 "Reduced competition between sellers on the UK Amazon marketplace, a reduction in
19 the number and range of products offered from third party sellers, consumers having
20 less choice, being offered lower quality goods and/or paying high prices, and a
21 reduction in the scale and competitiveness of fulfilment service providers that serve
22 sellers on the UK Amazon marketplace."

23 4.13 to 4.14, the CMA turned its attention to the SFP carrier rates and terms and was
24 essentially concerned that Amazon was having a say in who the fulfilment providers
25 or delivery carrier would be for FBM merchants. At 4.15, we see the concern was that
26 disadvantaged SFP sellers that may otherwise be able to obtain better rates from the

1 relevant carriers reduced the carrier's ability to compete against Amazon fulfilment
2 services and led to higher fulfilment costs being passed on to consumers by way of
3 higher prices.

4 Section 5 then moves on to look at the commitments that were offered in very similar
5 terms to the EU Commission commitments offers from Amazon. The analysis of
6 whether or not these would assuage the CMA's concern starts at page 3314 on the
7 PDF, paragraph 6.16. We see in 6.16 itself, the CMA concluded that:

8 "The commitments [i.e. the obligation] not to use NPSD for retail decisions ... the
9 commitment would ensure that took place. This restriction applies to the use of such
10 data by Amazon Retail employees, as well as the systems."

11 Then at 6.32, which will be at page 3317 -- 6.32 in paragraph number terms -- in terms
12 of the biases in the FOSP:

13 "The commitments will ensure that Amazon does not set or apply the conditions and
14 criteria involved in the FOSP in a way that unfairly favours Amazon Retail and/or FBA
15 sellers."

16 Over the next page at 6.36 to 6.37, the Commission rejected a suggestion that had
17 been made by one of the respondents to the consultation process that distinguishing
18 between the relevant discriminatory and non-discriminatory conditions would be
19 impractical. Please could I invite you to read 6.36 and 6.37 which deals with that point,
20 and also a concern about lack of enforceability.

21 6.45, page 3314 internal, 3320 of the PDF, states:

22 "The CMA notes that the Buy Box commitments are substantively the same as
23 equivalent provisions in the EC Commitments, except that Amazon also committed to
24 introduce a secondary display offer in the EC Commitments."

25 That's the substantial difference between the two. Then at 6.48 over the page:

26 It was intended that "the CMA commitments will ensure that SFP sellers can

1 independently negotiate terms and rates with SFP carriers that wished to do so rather
2 than being required to use the terms and rates set by Amazon with those carriers."

3 At page 3326 of the PDF, we find paragraph 6.68 of the decision. The CMA envisaged
4 that monitoring and reporting processes -- again, there is a monitoring trustee that has
5 been appointed to oversee implementation and compliance -- the CMA didn't consider
6 that these would be difficult to enforce or ensure compliance of, so perhaps difficulties
7 which were not considered to present that problem.

8 We see at 6.69:

9 "Amazon's compliance with the commitments will be closely monitored. In particular,
10 the CMA will ensure that an appropriate monitoring trustee and technical expert with
11 the requisite skills, expertise and capacity is appointed to monitor compliance."

12 Then under B:

13 "Amazon will be required to provide the monitoring trustee with all cooperation,
14 assistance and information necessary to monitor including [we say this is important]
15 access to any of Amazon's IT infrastructure including algorithms, databases, servers,
16 internal systems and tools, processes, programs, services, platforms, operating
17 systems, hardware, software, [et cetera, et cetera] technical and all other information
18 insofar as this is necessary for the monitoring trustee to fulfil its duties under the
19 commitments."

20 So the anticipation is that the internal mechanics of the Amazon operational processes
21 will be made available to the monitoring trustee and his or her technical assistant to
22 ensure that compliance is being obtained. So where, for example, Amazon is saying,
23 "This is all going to be terribly difficult to see under the lid how we do things," the
24 answer is they have seemingly given a commitment to the CMA, no doubt in good
25 faith, that this can all be done. You can look under the lid and you can ensure
26 compliance.

1 Moreover, one then sees at the bottom of that page at 6.71:

2 "Amazon has to ensure that in addition to being non-discriminatory, the conditions and
3 criteria for the Buy Box are objectively verifiable. It will therefore be incumbent on
4 Amazon to ensure that the monitoring trustee and the CMA can fully and properly
5 assess those conditions and criteria."

6 Pausing there: if that is an obligation imposed on Amazon vis-a-vis the CMA, then the
7 same obligation is capable of being extended to this Tribunal.

8 So this Tribunal must be therefore capable of being put in the same position as the
9 monitoring trustee and the CMA to ensure that the criteria that comprise the Buy Box
10 selection process are objectively verifiable.

11 Then in subparagraph B, there is an obligation to provide information and documents,
12 and failure to comply with those requests could lead to enforcement under the CMA's
13 powers.

14 Those are the points I wished to draw out from the CMA decision.

15 THE CHAIR: So far as Prime is concerned, they deal with it -- the CMA -- really under
16 the second head of abuse, is that right? Under the Buy Box commitments --

17 MR BEAL: They deal with Prime primarily --

18 THE CHAIR: -- other than to say that for SFP sellers, you should be able to negotiate
19 your rates with carriers independently.

20 MR BEAL: Yes. And my understanding is that the SFP criteria also have to be
21 objectively verifiable.

22 THE CHAIR: Yes.

23 MR BEAL: The CMA has sought to replicate, as I understand it for the most part, the
24 EU commitments that were given, save in relation to the existence of a second display
25 offer on the page. But it is true that the CMA has not separately looked at Prime
26 eligibility concerns in terms of reaching the Prime --

1 THE CHAIR: Yes. Criteria for becoming Prime is not part of the CMA commitments.

2 MR BEAL: They have not adopted the same bifurcated approach which the EU

3 Commission adopted on that very issue, the focus on Prime on being able to organise

4 your own carrier under your own terms in order to qualify for SFP.

5 The Italian competition authorities have looked at Prime in greater detail, and more

6 akin to the EU Commission approach. The AGCM decision is at tab 73 of this bundle,

7 starting at page 3035 in the PDF.

8 Sorry, no, that's the wrong one. A full translation of the decision -- that's the Italian

9 decision -- the one that will help us, at least me, is to look at the English translation of

10 the decision. That's at bundle of authorities, tab 116. Can we start at page 5271

11 internal, which will be page 5276 of the PDF. In fact, it is 5277, where the Italian

12 competition authority moves on to having set out the arguments at some length,

13 because -- 5277. There should be a paragraph --

14 THE CHAIR: Where does it start, this one, PDF references?

15 MR BEAL: Where does it start? It starts at 5121 internal, so that will be 5127 --

16 THE CHAIR: Yes, I see.

17 MR BEAL: -- to see the front page. Then back to 5277 is where the meat of the

18 analysis starts. Please could I invite you to read paragraphs 503 through to 506.

19 If you would then please turn to page 5325 in the PDF, there is a further description of

20 the abusive conduct found by the Italian authority at paragraphs 685 through to 691.

21 In fact, it goes all the way through, I am sorry, to 702. It is quite a long section.

22 THE CHAIR: 685?

23 MR BEAL: 685.

24 THE CHAIR: Yes. I think these references in this translation to Amazon.co.uk are all

25 mistaken, aren't they? It should be the Italian one.

26 It looks as though in Italy, there was no seller fulfilled Prime alternative.

1 MR BEAL: There was. It's just not dealt with this section. It is dealt with later.

2 THE CHAIR: Because it says at 691:

3 "Amazon only allows retailers who are customers of its logistic service to bear the

4 Prime label."

5 MR BEAL: I am sorry. So, there was seller fulfilled Prime, but you had to use the

6 Amazon logistics service rather than -- they didn't have the equivalent of using

7 Royal Mail as a selected carrier.

8 THE CHAIR: But then isn't it FBA, if you are using Amazon?

9 MR BEAL: Well, there are some findings made at -- if we please turn to page 5352,

10 paragraphs 787 to 788 have a critique of the SFP conditions. That is 5352.

11 THE CHAIR: Yes, so I think that's --

12 MR BEAL: So there were contacts with others. I am not quite sure in the

13 context -- your question was about paragraph --

14 THE CHAIR: 691, which is inconsistent that.

15 Well, maybe it is a small point. I wouldn't worry about it.

16 MR BEAL: I don't have an answer to that, I am afraid.

17 THE CHAIR: Yes.

18 MR BEAL: It is possible they are dealing with a different point in time and that there

19 was an evolution. But I agree it is not apparent from the text.

20 I should say there was an evolution in the number of sellers that could be used for

21 SFP in this country as well.

22 THE CHAIR: Yes.

23 MR BEAL: There was Royal Mail, and then DPD were added, and then Evri --

24 THE CHAIR: Yes.

25 MR BEAL: -- at later stages.

26 I have asked you to read quite a long section of this, I am afraid.

1 THE CHAIR: Perhaps we will read it out of the hearing because it's --

2 MR BEAL: Yes. 700 to 702 really set out some of the core points. Then at 704, it is
3 identified as being part of an articulated exclusionary strategy. So, it is all part of an
4 overall series of conducts which are geared towards the same exclusionary aim.

5 But at 716, the competition authority drew a comparison with the Google Shopping
6 case and the context of preferencing one's own products on a supposedly neutral
7 platform.

8 Then at 724, we see that Amazon had been presenting to the Italian competition
9 authority some of the points which are made in Amazon's written submissions for this
10 Tribunal. So, 724 at page 5336 of the PDF, it says this:

11 "As to the existence of a contradiction between the complaint made here and the
12 company's business model, which is pro-competitive and based on access to the
13 platform by the greatest number of third party sellers and efficient logistics operators,
14 it should be noted that beyond the statements of principle relating to the ultimate goal
15 pursued by the company, the investigation has demonstrated the existence of abusive
16 conduct carried out by Amazon to induce the adoption of its service by third party
17 retailers to the detriment of competing logistic services and indirectly disadvantaging
18 competing marketplaces. As a result of its conduct, Amazon has damaged
19 competition in the market for e-commerce logistics and in the market for marketplace
20 brokerage services, ultimately producing negative effects on the welfare of the end
21 consumer."

22 So, it was faced with a suggestion that Amazon's business model was inherently
23 pro-competitive, and that was rejected.

24 Then at 727, there is a rejection of the suggestion that Amazon had an incentive to
25 favour sales handled by -- sorry, rejection of the suggestion that there is no incentive
26 to favour FBA sales over FBM sales based on the alleged profit margin. The short

1 point the AGCM makes here is that the company's analysis of that alleged profit margin
2 hadn't been capable of being replicated, and nor were the cost and revenue items
3 attributed to the two types of sales verifiable, thus making it impossible to understand
4 whether the profit margins indicated were calculated in such a way as to exclude
5 co-mingling.

6 So in short, whilst Amazon had presented the suggestion that we have every incentive
7 to ensure that as many third party sellers use our platform as possible because of the
8 higher margins we derive from FBM sellers rather than FBA sellers, that was rejected
9 because it couldn't be vouchsafed by the data which had been provided by the
10 company.

11 In contrast, what we do see, in a sense, that's new in this decision is found at
12 paragraph 729, where one sees:

13 "It is important to note that the evidence in the record shows that the link created by
14 Amazon between its logistics service and the benefits package described above is the
15 cornerstone of a strategy deliberately devised by the company to incentivise third party
16 sellers to use FBA and indirectly to induce them to choose single homing on the
17 Amazon.IT platform."

18 So, the Italian authority obviously had access to documents confirming that this was
19 all part and parcel of a grand scheme by Amazon to drive the link between its logistics
20 service and its supposedly neutral platform.

21 We then see at page 5343 of the PDF quite a detailed section from paragraph 746
22 onwards, giving a detailed analysis of the self-preferencing of FBA offers over FBM
23 offers on the website. That's paragraphs 746 through to 753.

24 Again, I think I probably don't have time to labour that, but in short, the Italian authority
25 identified specifically how that preferencing had taken place, and it rejected the
26 suggestion that it was inherent of the superior efficiency or delivery speeds of FBA

1 services as opposed to FBM services.

2 We see at 753 the conclusion:

3 "It is quite evident that this strategy is likely to influence the choice of logistics operator
4 to be used by third party sellers [and so on and it had detrimental impact on rival
5 fulfilment services]."

6 I think I have already taken you to paragraphs 760 to 762 which deal with the
7 combination of FBA and Prime, and the impact of the Prime badge on matters, coupled
8 with the configuration of the seller fulfilled Prime programme. Again, all of the details
9 are there showing the overlap between, in a sense, the Buy Box abuse and the Prime
10 abuse.

11 The overall conclusion that's reached can be seen at page 5366, paragraphs 849
12 through to 853, where the AGCM found a single complex and articulated strategy with
13 an exclusionary purpose that was in breach of article 182. At paragraph 854, the
14 conclusion was that that had impacted both the dynamics in the e-commerce logistics
15 market and in the marketplace brokerage service market for the reasons there given.

16 The consequence of this was that a series of structural measures were put in place.
17 If we look at 5381, there was a cease-and-desist order. But there was also a series
18 of directions given to Amazon under paragraph 902 requiring Amazon to set out the
19 requirements it required, and to ensure that the fair and non-discriminatory standards
20 for the processing of orders were applied. It had to change its configuration of the
21 SFP to any provider of the qualification of third-party sellers, and to then ensure that
22 the qualification for the SFP programme, third-party sellers could demonstrate how
23 they qualified on fair and non-discriminatory terms. Similar arrangements were made
24 for the access to the Prime label, and so on.

25 There were then a series of monitoring provisions put in place dealing with compliance
26 and monitoring, pretty swingeing requirements for Amazon to change its conduct.

1 The final regulatory decision --

2 THE CHAIR: Before leaving that, this one is unrepealed, isn't it?

3 MR BEAL: It is.

4 THE CHAIR: When we last looked at it, I think we learned that that appeal has been

5 stayed because of a reference to Luxembourg, is that right?

6 MR BEAL: I am afraid I have no information.

7 THE CHAIR: Do you know what the grounds of appeal are?

8 MR BEAL: I don't. I am sure my learned friend --

9 THE CHAIR: Amazon will know obviously, yes.

10 MR BEAL: Can I please turn to the FTC complaint? I am doing so primarily because

11 of the regulatory decisions, it deals with the anti-discounting practice. It starts at

12 page 3756, we see the front sheet. It's in the United States District Court, Western

13 District of Washington in Seattle.

14 Please could we pick it up at 3840. Paragraph 259 here summarises the two essential

15 core grounds of challenge that were brought by the FTC. Firstly, it was said,

16 paragraph 259:

17 "Amazon deployed a series of anti-competitive practices that suppressed price

18 competition and pushed prices higher across much of the internet by creating an

19 artificial price floor, penalising sellers offering lower prices off Amazon. Secondly it

20 coerced sellers into using its fulfilment service to obtain Prime eligibility and to be able

21 to successfully sell on Amazon."

22 At 260 to 263, one derives a sense of the interwoven nature of the two grounds and

23 the anti-competitive exclusionary impact on the market for online marketplace

24 services.

25 At 264 to 265, PDF page 3842, we have the core allegation in relation to the

26 anti-discounting practice complaint. So please would you read 264 and 265.

1 266 then alleges that there would have been greater price competition and lower
2 marketplace fees in the counterfactual, the chilling effect that the conduct had,
3 therefore. At page 3846, we find paragraphs 277 to 279 which show the practices
4 Amazon adopted even after its formal contractual requirement for a price parity clause
5 was removed. That's 277 through to 279.

6 So in a sense, there is a disciplining function that was adopted by Amazon, at least in
7 the US website seemingly, based on this allegation where sellers who do offer lower
8 prices on rival websites are then disciplined through the application of the algorithm.

9 The consequence of this can be seen at page 3853, paragraph 310:

10 "Amazon had steadily increased the fees it charged sellers, almost doubling them over
11 nine years for sellers in FBA."

12 At 312, over the page, it was said:

13 "Amazon had destroyed the competitive dynamic by algorithmically forcing sellers to
14 ensure their prices off Amazon are no lower than prices on Amazon regardless of the
15 relative cost."

16 The obvious anti-competitive effect there is if, for example, a rival platform offers lower
17 costs for fulfilment or simply for using the marketplace, then that could be reflected in
18 lower prices charged by the seller. But because you can't do that through
19 Amazon's -- as our US colleagues would put it -- "coercive conduct," because you
20 can't do that, you end up charging the same rate as you charge on Amazon and prices
21 remain high across both platforms.

22 We then see at page 3855, paragraphs 317 to 318 show the primary impact of that:

23 Amazon sellers end up paying higher fees charged by Amazon. It is said at 318:

24 "The primary and intended effect of the anti-discounting strategy is the sellers do not
25 offer lower prices off Amazon even if other online marketplace offers sellers lower
26 costs."

1 We then see at page 3859, paragraphs 332 to 333, an encapsulation essentially of the
2 form of dynamic deterrence effects: Amazon deterring rivals from even attempting to
3 compete with its first party retail business on price because they quickly learn that they
4 will come second on that competition. It's not open to rivals to Amazon Retail to offer
5 its products on rival marketplaces precisely because of the anti-discounting practices
6 that are put in place.

7 There was a motion to dismiss, i.e. reverse summary judgment application, brought
8 by Amazon in the United States, but that application was rejected. One sees that at
9 page 3983, bundle of authorities, tab 89, page 3983. That's the introduction and the
10 heading of the decision of the United States District Court. The following page, internal
11 page 3978, says:

12 "Amazon moves to dismiss the amended complaint ..."

13 Essentially the next point is that the Court had to assume that the pleaded case was
14 a viable one. Applying those standards, the Court denies Amazon's motion to dismiss
15 as to plaintiff's claims, and then it dealt with some issues about bifurcation and some
16 of the individual state law claims which had been brought, and dealt with those
17 separately.

18 THE CHAIR: The date of that judgment is what?

19 MR BEAL: 30 September 2024. In this case, interestingly, if one looks at page 3998,
20 Amazon had sought to advance some pro-competitive justifications for its practices.
21 At the bottom of that page, internal page 3992, the court agreed with the plaintiff's
22 submission that it wasn't appropriate to look at alleged pro-competitive justifications at
23 this stage.

24 Those are the only sections of that particular FTC complaint I wish to draw to your
25 attention. Partly because obviously it is a different jurisdiction, but also to the extent
26 that they have concerns about the Buy Box procedure or Prime, they essentially

1 replicate the concerns given by the regulatory decisions which we have already looked
2 at.

3 The final point to draw to the Tribunal's attention is simply the way of looking at things
4 which was developed by the learned president in the Streetmap case. Could we look,
5 please at page --

6 THE CHAIR: You quote that in your skeleton.

7 MR BEAL: I do. I don't need to turn it up, it's fine.

8 THE CHAIR: Do we need to turn it up? It was quite enough.

9 MR BEAL: No. It was simply, we thought, a helpful way of looking at if you have, for
10 example, an old-fashioned marketplace -- a fruit market, say in Covent
11 Garden -- where people are charged for having a stall, the marketplace holder is not
12 meant to be picking winners in the marketplace. It should not be saying to people as
13 they walk in, "There's a whole bunch of stores here but you really ought to be using
14 our apple store over here on the right". Consumers are meant to decide for
15 themselves, to weigh up the competing offers and have their own preferences as to
16 which stall they use. Therefore, for example, you would not expect to have the
17 marketplace holder's own stall in a prime spot as you go in with a big sign saying, "Buy
18 here." We say that sort of analogy -- the analogy which was given in the Streetmap
19 case was of a supermarket doing something similar, and we say that grasps the nettle
20 of the key problem with Amazon having the dual role in this case of a supposedly
21 neutral market platform, yet also having its own retail arm selling products in
22 competition with third party sellers on the same place.

23 Next, I move on to the third part of my opening, which is our pleaded case. The
24 Tribunal looked very carefully at this in the carriage dispute, so I am going to again
25 simply do edited highlights. This is in bundle B, please, tab 8. It starts at page 248.

26 THE CHAIR: We looked at it, as you said, not only in detail. We also summarised it

1 I think in the judgment. So, is there anything additional we need to see? We know
2 you have the five abuses.

3 MR BEAL: The five abuses, the impact, the counterfactuals, and so on. It is all set
4 out within, I hope, a logical order, going through the key issues that need to be
5 established.

6 It is supported, of course, by Dr Houpis' evidence. Dr Houpis' evidence is also dealt
7 with in the carriage dispute judgment. Please could we have a quick look at that at
8 hearing bundle folder E, tab 14, page 488, in particular paragraph 96.

9 THE CHAIR: This is the judgment, is it?

10 MR BEAL: The carriage judgment of this Tribunal, 20 January this year. You were
11 faced, as you will recall, with competing expert reports from Dr Nitsche and from
12 Dr Houpis. A point had been taken about whether or not Dr Houpis was going to be
13 able to get the tools to do the job in the form of data disclosure and algorithms, and
14 so on, and this Tribunal found the evidence from Dr Houpis' colleague, Mr Dorrell
15 reassuring:

16 "Dr Houpis' approach had the benefit of tracking more directly the effects of the alleged
17 abuses implemented through the algorithms."

18 Then over the page:

19 "... and thus mirrors the approach of the CMA and the Commission which accepted
20 adjustment to the algorithms as meeting their competition concerns. Moreover, insofar
21 as such approaches should not be practicable, we note that Dr Houpis has a back-up
22 econometric approach. Altogether we found that Dr Houpis' comprehensive report
23 presented an impressively well developed and thought through methodology."

24 At the risk of sounding like a Blue Peter presenter, that was a conclusion which we
25 say has been made before and can be applied here. So we say none of the arguments
26 raised by Amazon provide a basis for this Tribunal to change that, with respect,

1 perfectly correct conclusion; alternatively a conclusion that the T was entitled to reach.
2 This certification hearing is not meant to be a battle of the experts. To the extent that
3 Mr Holt in his first report has sought to somehow poke some holes in Dr Houpis' three
4 reports, that is not something which will be subject to detailed resolution at this stage,
5 unless it is existential to the methodology Dr Houpis is putting forward, and we
6 respectfully suggest it isn't.

7 This is quite difficult because of course here Amazon has not applied to strike out the
8 pleaded case. The pleaded case, we say, establishes an arguable case for each of
9 the abuses, their impact, and the fact that they give rise to more than nominal loss.
10 Therefore, the starting point is unless for some reason Amazon can show there is
11 a fundamental flaw in the methodology which means it simply cannot work, then they
12 are stuck with having to meet a case which we say is not simply viable but actually
13 has good prospects of success.

14 It is supported by the panoply of regulatory decisions I have taken you through at some
15 length -- probably too much length -- this morning.

16 THE CHAIR: Well, the decisions of course assist you greatly in showing that there is
17 a good indication of the various abuses -- although the FTC is not a decision, it's an
18 allegation -- that you rely on, and they are not suggesting they are not well arguable,
19 even though they will dispute them.

20 Then the question is: how do you calculate the effect of them, which was such as to
21 lead to a figure of aggregate damages which is reasonable, which of course the
22 regulators didn't have to do, they had to show an effect.

23 MR BEAL: Yes.

24 THE CHAIR: That's where the Microsoft test comes in, and it has to be a credible
25 methodology.

26 We looked at that in the carriage dispute decision in a relative sense, and indeed in

1 a substantive sense. We didn't of course have the objections which are now raised
2 by Amazon in Mr Holt's report. So whether it has to be an existential challenge, I don't
3 know. It has to show that it is not a credible method which is likely, one can say even
4 at this stage, is likely to work.

5 MR BEAL: Yes.

6 THE CHAIR: That's the question. And Amazon is entitled to come up with arguments
7 that the rival Potential Class Representative didn't.

8 MR BEAL: To the extent that they have.

9 THE CHAIR: To the extent they have. They can come up with arguments and we
10 have to see if those arguments are powerful.

11 MR BEAL: Yes. So, what I am proposing to do now is to have a quick look at some
12 of the points made in Amazon's skeleton argument for this application --

13 THE CHAIR: Yes.

14 MR BEAL: -- and, how can I put this, suggest they are asking quite a lot of the Tribunal
15 at the certification stage.

16 THE CHAIR: Yes.

17 MR BEAL: If we could look, please, at paragraphs 9 to 12 of that skeleton.

18 THE CHAIR: The Amazon skeleton?

19 MR BEAL: This is the Amazon skeleton.

20 THE CHAIR: Just a moment.

21 MR BEAL: What one sees in these paragraphs is a series of factual assertions, or
22 assertions as to incentives that operate for Amazon, or what the impact of their
23 business model is. But none of this is actually backed up by witness evidence and it
24 isn't something, we respectfully suggest, can be the subject of detailed findings by the
25 Tribunal at this stage.

26 So we see, for example, in paragraph 11 it says --

1 THE CHAIR: Just a minute. Yes.

2 MR BEAL: Amazon's aim in the design of the algorithm is that the FO should be the
3 offer customers themselves would be most likely to choose. It doesn't matter whether
4 it is a third party seller offer or anything else. The FMA is designed to enable
5 customers quickly to identify --

6 THE CHAIR: That's not really going to your methodology.

7 MR BEAL: No.

8 THE CHAIR: That is just their background as they see it.

9 MR BEAL: What they then say in paragraph 12 is:
10 "It is antithetical to its commercial objective to discriminate against lower price offers
11 that customers would prefer."
12 Again, we don't respectfully see how that can be the subject --

13 THE CHAIR: As I say, this seems to be going to the substance of the alleged abuse.

14 MR BEAL: Yes.

15 THE CHAIR: Which as you say, there are good indications that there is certainly
16 a case to investigate and to go forward, based on a series of regulatory decisions.
17 But that's not really where they are going to the methodology, is it?

18 MR BEAL: Well, if I can put it this way: if this Tribunal is satisfied at this stage -- and
19 I can come back to it in reply -- that wherever Amazon suggest that they are the
20 quickest, the best in the market, that they have no anti-competitive bone in their body,
21 if all of that is perceived to be background information and not for now, then I don't
22 need to dwell on it.

23 THE CHAIR: I fail to see how it can be relevant now. There is certainly a question
24 whether their margins are higher on third party sales, and so on, which is evident --

25 MR BEAL: What is trickier is when they repeat some of those -- how can I put
26 this -- contentious factual assertions in the context of exploring Professor Stephan's

1 methodology. That really begins at page 78, paragraphs 60 and 61.

2 At the end of paragraph 60, they correctly identify that a certification hearing is not the
3 occasion for a debate on the merits of Dr Houpis' report versus Mr Holt's report, and
4 I respectfully endorse that. What they then say is what Amazon and Mr Holt have
5 done is to explain certain facts about Amazon's business model and incentives which
6 are necessary to understand the allegations of abuse in context.

7 Firstly, we don't respectfully understand why an expert is giving evidence about facts.
8 But even putting that to one side, we respectfully don't see how that can sensibly be
9 resolved at this stage. Why is it appropriate to have contextual facts when what one
10 is actually doing, as the Court of Appeal made clear in Gutmann I, is looking at the
11 core document, the key document -- namely Houpis 1 -- and saying: has that set out
12 a workable methodology that appears to indicate how this matter can be tried
13 substantively in due course once disclosure has been given, witness evidence has
14 been obtained, and so on.

15 What paragraph 61 moves on to do is to say that our methodology fails because
16 somehow we haven't taken into account inherently nuanced but obviously potentially
17 pro-competitive rationales. That, with greatest of respect, puts things the wrong way
18 round, because our methodology sets out quite clearly how these different abuses can
19 be established as a matter of liability, identifies the material it is relying on at this stage
20 for that purpose; it then sets out the steps that will be taken in relation to each
21 methodology to support that, through expert economic analysis both of the underlying
22 documentary material and the data analysis through regression techniques and/or
23 before and after analysis and/or Bertram differentiated model to the extent we get to
24 that as a complementary method.

25 There is no commendable and comprehensive set of attempts to work out how the
26 data can be crunched that is deployed in Houpis 1. The suggestion that somehow it

1 hasn't taken into account potential pro-competitive rationales is not the point. If what
2 they mean by that is that it is for Dr Houpis to say why there isn't an objective
3 justification for the conduct, then they have the burden the wrong way round.

4 Somewhere in the depths of the bundle of authorities there is an extract from Bellamy
5 & Child which makes it clear that typically in Article 102 it is for the complainant to
6 raise the allegation of abuse and the impact on the competitive structure of the market,
7 and then it's for the defendant to explain why, notwithstanding that impact, there is in
8 fact a pro-competitive justification for the conduct. That's the first point.

9 If what they mean is that Dr Houpis' methodologies do not distinguish between
10 illegitimate conduct and fair conduct on the merits, then that is exactly what his
11 methodology is designed to elicit, because he recognises, for example, that price
12 competition based on quality of the product, the price of the product and the delivery
13 time for example of the conduct would all be pro-competitive considerations, or
14 potentially competitive considerations, that reflect competition in the merits. He is
15 saying: my initial analysis is such that I don't think that is what the simple way of doing
16 the algorithm works; it isn't simply confined to what might be called legitimate
17 competitive concerns or legitimate competitive interests as to how one goes about
18 choosing the favoured product through the Amazon website.

19 So we do say it is important that the burden of proof is recognised for what it is. As
20 with any of the competition cases, it isn't for an expert to try to predict what any defence
21 might be and build that into his methodology. That would come in the reply report in
22 due course.

23 There is a series of references in Amazon's skeleton to alleged facts. It is unclear
24 whether it is inviting this Tribunal to make factual findings at this stage, but we
25 respectfully suggest that has to await a proper evidential process in due course.

26 The next stage of my submissions moves on then to deal more specifically with the

1 response that is given by Amazon to abuses 1 to 5.

2 So turning if I may to abuse 1, this is described in our skeleton at paragraphs 10 to 12,
3 and in our reply at paragraphs 25 to 49. Before looking at the specific arguments, it
4 might be convenient to turn up the BSA, the agreement. That's in the bundle of
5 authorities tab 114. It starts at, please, page 4782 internal, which will be 4788 in the
6 PDF. This is titled "The Amazon Services Europe Business Solutions Agreement."

7 At page internal 4784, a couple of pages down --

8 THE CHAIR: This is the most up to date version?

9 MR BEAL: This is. I have a short point to make on that. Obviously it isn't the
10 applicable contract because the claim ends at the moment with the issue of the claim
11 form.

12 THE CHAIR: Yes.

13 MR BEAL: So, this isn't the contractual terms that would have been applicable at the
14 right time, but it is in the bundle. In the material we served with the Claim Form there
15 was one from, I think, 2022 or 2023, which was a better candidate, but that hasn't
16 found its way into the hearing bundle.

17 I haven't done the detailed analysis of the competing clauses but it is sufficient --

18 THE CHAIR: I don't know why we have been given the wrong one.

19 MR BEAL: I don't know off the top of my head why --

20 THE CHAIR: Yes, but --

21 MR BEAL: But this gives you an indication of the relevant provisions. To the extent
22 that they are different, we will have to have an argument --

23 THE CHAIR: But they are summarised or explained in the decisions, aren't they?

24 MR BEAL: Yes, they are, sir.

25 THE CHAIR: So do we need to look --

26 MR BEAL: No, it is only if you wanted to see the underlying clauses. I specifically

1 don't necessarily need to go there. I think the only thing I might need to turn to is at
2 page internal 4798, so that will be 4804, a definition of "required product information."
3 The obligation that is put on sellers is that they have to provide required product
4 information to Amazon. Then the definition can be found at page 4803 internal, so
5 4809 on the PDF. There is a definition there specifically of the required product
6 information that needs to be given over to Amazon when selling on its marketplace.
7 You will see that the information required is very extensive.

8 THE CHAIR: Yes. But I don't think it's said that, I mean, the factual summary in the
9 CMA or the EC decisions are wrong, is it? I mean, it's said that it is not an abuse, and
10 it didn't have the effects that you say it had, but the actual statement of what --

11 MR BEAL: One of the points taken against me is, "well, this is all information that's
12 publicly available on the website because that's what people are trading through". My
13 submission in response is no, this is non-public seller data; it is by definition therefore
14 stuff that isn't available to third parties and is effectively commercially confidential to
15 the seller itself.

16 So I was responding to that point by saying if you look at the obligations imposed on
17 third party sellers, it is very voluminous, the amount of data that has to be provided to
18 them.

19 In answer to your question, sir, I don't suggest that the CMA was labouring under the
20 misapprehension that it was generally available public information that was the nub of
21 the concern. It was specifically the use of information that wasn't available to the
22 market more generally.

23 THE CHAIR: Yes.

24 MR BEAL: Now in terms of the summary of the steps and the methodology here, I can
25 give a very quick overview of them for this first abuse. It is dealt with in our
26 skeleton -- that's probably the easiest way to deal with it -- paragraph 11.

1 I should say that I hope I am not giving any secrets away: whilst our skeleton is quite
2 dense, that was done deliberately to try to identify as shortly as possible the key
3 elements of the different methodologies lying behind abuses 1 to 5. That methodology
4 necessarily touches on liability, causation of loss, quantification of loss, and all three
5 of them are wrapped up -- albeit dealt with to some extent in different parts of
6 Dr Houpis' reports -- but in paragraph 8 we have tried to summarise exactly what the
7 overall approach is.

8 Firstly, he's relying on findings that have been made by the various commission
9 authorities. You will see throughout his report that he indicates that he hopes to get
10 unredacted copies of the salient material that was both provided to those regulatory
11 bodies and formed the basis for their preliminary conclusions, so the unredacted
12 statement of objections and so on.

13 He then, armed with that material and general data, has a proposal for adopting a
14 bottom-up methodology where he will obtain the non-public seller data and the
15 information on how Amazon use that data in order to inform its decision-making
16 processes. So in a sense looking at precisely how Amazon fed particular data into the
17 decision-making processes. And he proposes to interrogate the automated tool which
18 sets prices and manages inventory planning decisions whilst making use of the NPSP.
19 He will then re-run the tool based on historical data with and without the confidential
20 data being included and on the basis that he could estimate how the retail prices would
21 have differed if Amazon did not have access to that data. That would then yield likely
22 success in the counterfactual Buy Box, which would then give an indication of how the
23 relevant respective sales could have changed between Amazon Retail, FBA sellers
24 and FBM sellers.

25 If that approach is not possible because of data limitations, he will adopt a top-down
26 approach which will focus on a particular set of very specific products with high price

1 variability in the core markets. So, he will then adopt the approach of looking at leader
2 sellers as a benchmark category in circumstances where Amazon does not compete
3 and seeing how they use publicly available data to position themselves, and then
4 comparing and contrasting that with how Amazon is able to secure its position as
5 leading seller when it has access to NPSD as well.

6 So that is the methodology suggested. But either way, you end up with a propensity
7 to win the Buy Box which is either higher or lower depending on the presence of or
8 use of NPSD.

9 THE CHAIR: Does your client accept that the commitments to the CMA on this abuse
10 are effective?

11 MR BEAL: Well, I think the best I can say at this stage is our methodology is
12 proceeding on the basis that they are. I say that because Dr Houpis is planning on
13 using before and after analysis around the key date of May 2024 when the CMA
14 commitments came into effect.

15 So the assumption for the purposes of that before and after analysis -- and it is not,
16 I think, on this abuse; it's not on abuse 1 that that's necessarily front and centre of the
17 methodology, I don't think it features at this stage -- but it does come in with, I think,
18 abuses 3 and 4 that there will be elements that are before and after analysis that are
19 intended to disclose the impact of certain factors.

20 So, it's necessarily implicit in that, at this stage, that the commitments are working. If
21 for some reason it is discovered that there hasn't been any change, then we may need
22 to dig a bit deeper. But that's not for now.

23 THE CHAIR: Because Amazon, of course, has changed the way the algorithm works
24 because of the commitments.

25 MR BEAL: If they have complied with the commitments, that is absolutely true.

26 THE CHAIR: Yes. If the assumption is compliance --

1 MR BEAL: Yes.

2 THE CHAIR: -- and there is a monitoring trustee, and --

3 MR BEAL: Yes.

4 THE CHAIR: -- you will no doubt also get the reports from the monitoring trustee as

5 well.

6 MR BEAL: What I am trying to avoid is any firm commitment as to what in fact has

7 happened on the ground which is beyond my knowledge. Subject to that caveat, yes,

8 absolutely: at this stage our methodology assumes compliance and therefore change.

9 THE CHAIR: Because that will be, of course, a fairly easy way of looking at what effect

10 it had.

11 MR BEAL: Yes.

12 THE CHAIR: Even if a sort of reconfiguring for Dr Houpis and those assisting him on

13 the data science side reconfiguring the algorithm may be difficult, you will have a fairly

14 good basis for trying to extrapolate what would have happened from what has

15 happened now.

16 MR BEAL: Yes. And Dr Houpis in various places has set out the regression analysis

17 he will be using, using econometric techniques where there are a series of explanatory

18 variables which are designed to capture perceived legitimate changes -- so, for

19 example, an inflationary factor, a demand factor, a speed of delivery factor and so on,

20 all of these explanatory variables will be fed in -- and then there will be an infringement

21 indicator, which is typically zero or one in the econometric analysis and the regression

22 analysis whereby you will be able to see whether or not the existence of the

23 infringement period is causative of any particular change in the factors. And it is that

24 infringement indicator as a dummy variable that Dr Houpis relies upon for part of that

25 before and after analysis.

26 I see the time on the amended clock.

1 THE CHAIR: Yes.

2 MR BEAL: I have --

3 THE CHAIR: Do you want to wrap up abuse 1?

4 MR BEAL: Abuse 1 simply requires me then to suggest that the critique of it, given by

5 Amazon in its skeleton, is with respect not a good one.

6 The first point it makes is the suggestion that our definition of "seller data" is too wide.

7 My short point in response to that is, it is non-public seller data that's an issue. That's

8 why I made the point I was making earlier about the definition in the contract of

9 required product information. It's precisely data that's not in the public domain which

10 is being used by Amazon and we say that's the mischief.

11 Secondly, Amazon has suggested that its Amazon Retail launching a competing

12 product based on the non-public information leads to pro-competitive conduct because

13 it's meeting what it describes as "unmet demand". That's, we say, an untested

14 assertion, but it doesn't explain how that's lawful competition on the merits.

15 If, for example, Amazon takes the view that there is a new product on the market which

16 is doing very well, it's the latest thing, and it jumps in on the basis of non-public seller

17 data that it's only obtained from its neutral position as a marketplace, then that shows

18 exactly what the anti-competitive concern is. It is using confidential information that it

19 shouldn't have as a competitor in order to steal a march on its rivals. So that is the

20 very mischief that we are concerned about.

21 Thirdly, it's said that Dr Houpis' methodology doesn't explain why data abuse does not

22 constitute lawful competition on the merits. That's precisely what his methodology

23 does do. In any event, to the extent that that is based on objective justification, you

24 see the point I made earlier about that being for the defence in due course and not for

25 our expert.

26 Unless you would like me to say anything more, that is abuse 1 addressed.

1 THE CHAIR: No, that's fine. So, we will return at 2 o'clock.
2 (1.03 pm)
3 (The luncheon adjournment)
4 (2.05 pm)
5 THE CHAIR: Yes, Mr Beal.
6 MR BEAL: Please may I recommence with abuse 2. This is described in our skeleton
7 at paragraphs 10 to 12 and in our reply at paragraphs 25 to 49. The methodology has
8 been addressed in all three of Dr Houpis' reports.
9 THE CHAIR: Sorry, just a moment. Let me remind myself, abuse 2 is the --
10 MR BEAL: Preferencing of Amazon Retail.
11 THE CHAIR: Retail on the featured offer?
12 MR BEAL: Yes.
13 THE CHAIR: Yes.
14 MR BEAL: It's the approach of the factors that are fed into the FOSP promoting sales
15 to Amazon Retail.
16 THE CHAIR: Yes.
17 MR BEAL: Preferencing. The summary of the steps in the methodology is in principle
18 given in our skeleton argument in pretty broad terms at paragraph 16, page 40 of
19 hearing bundle for bundle A.
20 In essence, Dr Houpis has indicated that he will first through disclosure obtain the
21 relevant algorithms and the factors that get fed into the Buy Box outcome. That will
22 produce an estimate of the higher sales volumes that the proposed class members
23 would have made if there had been competition on the merits. Then applying that to
24 the variable profit margin associated with the affected sales will give an estimate of
25 the aggregate loss suffered. He notes in various places that the algorithm has been
26 successfully investigated by the Commission, the Italian authority, and the CMA.

1 However, he has a fallback plan in case the data doesn't enable that, which is to
2 produce an econometric model which operates as a replica for the algorithm, and that
3 simulated model is then used to identify the impact of discriminatory versus non-
4 discriminatory features. We have had something of a foretaste of that in the
5 preliminary model which Dr Houpis established, referred to in his first report, principally
6 appendix F, where he has carried out some preliminary analysis and is able to replicate
7 the sales process at least for illustrative purposes at this stage.

8 The third aspect to his methodology is to look at the dynamic deterrent effect. For
9 that, he proposes to use the before and after regression analysis, taking May 2024 as
10 the end date for the conduct, and using the infringement indicator which I referred to
11 shortly before the short adjournment.

12 In response to that, essentially Amazon's skeleton raises two points, which we
13 respectfully suggest aren't good ones. Firstly, in its skeleton at paragraph 68, it
14 suggests there will be insuperable technical difficulties in running the recalibrated
15 algorithms. Of course, we have seen that part of the commitments given to the CMA
16 requires the trustee monitor and his or her technical assistant to be given full access
17 to what I described as what's under the lid of the Amazon process. Indeed, that's
18 a necessary part of Amazon demonstrating to the trustee that there has been
19 compliance. So, Amazon does need to demonstrate to the monitoring trustee that the
20 discriminatory factors have been removed from the process.

21 Secondly, of course, insofar as Dr Houpis deploys the alternative approach of an
22 econometric analysis producing a model, that is within his gift. I would respectfully
23 suggest that he's unlikely to present a model to the Tribunal that does not work. If he
24 finds that a model does not work, it's not going to be a very good alternative way of
25 establishing the loss, and Amazon would therefore have nothing to fear because we
26 would not have discharged the burden of proof in this case.

1 So, either way, with respect, that particular objection is overblown. To the extent it
2 encourages this Tribunal to try and resolve difficult issues about modelling or
3 modelling choices or how things might work in due course, that's not for now.

4 The second point Amazon raises at paragraph 69 of its skeleton is an objection to how
5 we would go about sorting out the wheat from the chaff on the discriminatory factors:
6 why are you saying this is discriminatory and this one isn't? Well, the answer is that
7 the expert, Dr Houpis, much like the Tribunal, will need to form an evaluative judgment
8 as to which factors are discriminatory and why. Much as this Tribunal, and indeed the
9 High Court routinely does, with FRAND disputes -- fair, reasonable and non-
10 discriminatory access, for example in patent litigation -- working out whether
11 conditions are discriminatory or non-discriminatory is part and parcel of the judiciary
12 function.

13 To the extent Dr Houpis is giving evidence on that, he is doing so from the perspective
14 of an expert in economics, and he is saying what the economic impact of particular
15 factors would be through that process.

16 For your note, he has given examples showing how he would treat certain factors in
17 paragraphs 96 to 97 of Houpis 3, hearing bundle folder 4C, tab 33, page 1452. That
18 gives the type of contrasting examples of what's in and what's out. If Amazon objects
19 to that selection process, then of course it would doubtless say so and give reasons
20 for its objection. Again, not something that can be dealt with at this stage.

21 THE CHAIR: How much does Amazon itself have to remove those factors under the
22 commitments?

23 MR BEAL: It would have had to remove factors that have to be documented and
24 provided to the monitoring trustee.

25 THE CHAIR: Then presumably those are factors that Amazon or the trustee considers
26 are discriminatory?

1 MR BEAL: Yes.

2 THE CHAIR: Because that's the whole point of the commitment, isn't it?

3 MR BEAL: Yes.

4 THE CHAIR: So, is that not now a way of determining what's discriminatory?

5 MR BEAL: Evidentially, we will certainly know which factors Amazon, having given
6 the commitment it did, chose to remove from the selection process. That's a pretty
7 good start.

8 THE CHAIR: Well, chose or was required to because if it didn't remove enough,
9 presumably the monitoring trustee would not be satisfied that the discriminatory
10 elements had been removed.

11 MR BEAL: With respect, I agree entirely.

12 THE CHAIR: To what extent does Dr Houpis himself have to do that, if it is now being
13 done?

14 MR BEAL: Well, he would certainly use evidential disclosure of which factors had
15 been removed as part and parcel of working out prima facie what the discriminatory
16 factors were. I am leaving open the possibility that the monitoring trustee may have
17 missed something.

18 THE CHAIR: That would be for argument.

19 MR BEAL: It would.

20 THE CHAIR: Amazon may say no, then Dr Houpis is going too far. But it seems
21 a good basis on which one would assess it.

22 MR BEAL: Yes. Again, I am trying to give myself a degree of latitude at the
23 substantive trial whilst respectively agreeing with the Tribunal's observation that that
24 would be a very good starting point for working out which bits need to come out and
25 therefore which bits historically were causing the problem.

26 THE CHAIR: The only issue -- potential difficulty -- is that the current aspects of the

1 algorithm may be different from the way the algorithm was some years ago, so you
2 will have to extrapolate or whatever. But in principle, it nods to the objection how can
3 one tell? Well, it is being done, and it will be for Dr Houpis to persuade the Tribunal
4 that somehow what is being done is not enough. It may be difficult for him to persuade
5 the Tribunal of that, but saying you can't do it at all when it is being done and has been
6 done, it seems to me is the position.

7 MR BEAL: Could I please move on to abuse 3? Abuse 3 is the self-preferencing of
8 FBA offers, rather than self-preferencing of Amazon Retail.

9 Amazon Retail of course doesn't compete for every sale on its marketplace. It
10 competes for core products in certain sectors. But it does mean that there is
11 a category of sellers, FBA sellers, who benefit from Amazon logistics, and to the extent
12 that the FOSP process, the Buy Box process, favours them, it is obviously putting
13 money towards Amazon in the form of the logistics fees, fulfilment fees, FBA fees
14 which are therefore being paid. So there is a clear commercial incentive, we say, at
15 face value, for Amazon to steer third party sellers towards its logistics offering.

16 A summary of the steps again in the methodology is given in paragraph 21 of our
17 skeleton. What we say there is essentially that first off, we will have the disclosure
18 process again. There will be the relevant data, information, and full copies of the
19 regulatory decisions and supporting material provided -- this is paragraph 21, page 43
20 of the bundle -- and Dr Houpis will analyse that material; and through that disclosure
21 process he will review the effects of the algorithms generally, including, for example,
22 the automatic maximum scoring for seller performance ratings which are given, and
23 the more significant adjustments made which tend to disincentivise FBM sellers, or
24 disadvantage FBM sellers.

25 He will also analyse how Amazon's unit costs have fallen over time, and the
26 performance of rival fulfilment providers. He will look at the evolution of FBA --

1 THE CHAIR: Pausing there. The performance of rival fulfilment providers, is that third
2 party disclosure from rival -- is that what --

3 MR BEAL: It may require some third party disclosure.

4 THE CHAIR: Because how else would he do it?

5 MR BEAL: Well, Dr Houpis considers it is possible that Amazon will have internal
6 reports on the performance of rival providers as part of its management information.
7 Of course, we do know from the SFP criteria that Amazon had negotiated with certain
8 third-party carriers particular rates, in particular initially with Royal Mail and then
9 subsequently with DPD and Evri. So, in fact, it may have a pretty good idea of the
10 relevant factors that go to assess different fulfilment providers' performance in the
11 market.

12 So that step involves analysing comparable changes in the cost of FBA and FBA
13 services over time. Thirdly, he will then look at the cost of having to multi-home for
14 offers, so the cost of having to run, for example, duplicative costs of fulfilment. If you
15 are running something on the Amazon website but you can't in practical terms use
16 anything other than Amazon fulfilment, then you are going to have a separate
17 fulfilment process you are running on all the other rival marketplaces in order to get
18 your product to customers. We would say that duplication gives rise to costs, and
19 Dr Houpis would propose to look at that duplication.

20 THE CHAIR: He would look at that -- the reference is to the Deliveroo decision.

21 MR BEAL: He does reference that for a source of information about market costs.

22 THE CHAIR: Are you envisaging that he may get some disclosure from some of your
23 class members on multi-homing?

24 MR BEAL: I think the anticipation is that we will have some class members who are
25 helping with our process both from a witness perspective, and also from a perspective
26 of what they are being offered by way of charges. How that process is to be conducted

1 is subject obviously to internal discussions which I confess I am not currently privy to.
2 But the litigation plan does set out quite how we are proposing to move things forward
3 to a final trial. Certainly, my understanding is we will be approaching a sample of
4 resellers to understand their experience of dealing with the Amazon marketplace over
5 the material period of time.

6 THE CHAIR: Yes. Because multi-homing, that's not something Amazon directly of
7 course has experience of. It may have some internal considerations of what leads
8 people to go on other competing sites or not, but the people who know about
9 multi-homing, the cost of doing it, and so on, are your class members.

10 MR BEAL: Yes. And there is a passage in Houpis 1 where he gives marketplace fees
11 for three different marketplace providers. One is Amazon, one is eBay, and one is
12 Etsy. He gives examples of different costs both from using the marketplace itself and
13 for per item selling costs, delivery items, and so on.

14 There is a helpful table somewhere in Houpis 1 which shows, for example, the sorts
15 of information which may well be at our disposal in due course. I anticipate that we
16 will have resellers who are able to give evidence as to their contractual terms, be it
17 into the confidentiality ring, with rival marketplaces.

18 THE CHAIR: Sorry, do you have the reference to Houpis 1? Perhaps someone could
19 give it later.

20 MR BEAL: Houpis 1 itself begins at --

21 THE CHAIR: Yes, I have Houpis 1.

22 MR BEAL: -- 540. The box I was thinking of is page 137 internally.

23 THE CHAIR: That is HB676, is it?

24 MR BEAL: 676, yes. That has the table I was thinking of, where the selling plans are
25 compared and contrasted, the basic professional plan is identified, standard paid
26 listings are identified, and then the ad valorem charge is dealt with. Over the page,

1 | there is then payment processing and processing fees, and so on.

2 | We see, for example, at 675, paragraph 387, an indication of the market shares for
3 | a rival marketplace falling, and we have market shares rising for Amazon at figure 17.
4 | Page 671 also shows there are differential charges applied to FBA fees, which is the
5 | Amazon fulfilment, and then multi-channel fulfilment fees. So, where Amazon delivers
6 | not only for its own marketplace products, but also for marketplace products from rival
7 | marketplaces, it has a different fee structure in place, and we see that the difference
8 | in fee is there identified.

9 | Amazon's skeleton does not advance a separate critique for abuses 2 and 3, it treats
10 | them as both the same. Therefore, my response to that critique stands for abuse 3 as
11 | for abuse 2. Unless the Tribunal has any further questions for me on abuse 3,
12 | I propose to move to abuse 4.

13 | THE CHAIR: Abuse 3, because the argument is that it creates artificially increased
14 | demand for FBA services, it therefore enables Amazon to charge more for FBA than
15 | it would in a fully competitive market where there wasn't that self-preferencing, and it
16 | also leads to higher fees for FBM because FBM logistic providers can't achieve the
17 | economies of scale, that's my understanding.

18 | MR BEAL: Yes.

19 | THE CHAIR: So, Dr Houpis has to have a method of looking at what are the
20 | economies of scale in logistics and how that might have been affected.

21 | MR BEAL: Yes. I mean, he does that in one of the annexes to his first report. It is
22 | annex D, page 761 of the bundle, internal page 222, where he identifies the role of
23 | economies of scale in the provision of fulfilment services. He sets out why in his expert
24 | opinion economies of scale can arise from fulfilment services for a number of reasons.

25 | THE CHAIR: I can see that as a concept, but he's going to have to actually work out
26 | what they are and what the effect would be to have a method of coming up with

1 damages, isn't he?

2 MR BEAL: He's going to have to estimate what the likely impact would have been with
3 higher demand for a rival service provider.

4 THE CHAIR: Yes.

5 MR BEAL: He will of course be able to interrogate the data which Amazon has, which
6 shows very substantial increases in its delivery capacity since 2016.

7 If I can please invite you to look at page 662 of the bundle, which is within Houpis 1.
8 We see the figure at 13 has annual revenues for --

9 THE CHAIR: Sorry, can you give me the reference again?

10 MR BEAL: Page 662 of Houpis 1, paragraph 346:
11 "Since Amazon entered the markets, it has opened around 24 fulfilment centres where
12 it warehouses goods."

13 Then figure 13 shows the annual revenues of Amazon UK Services Limited increasing
14 substantially over a similar period.

15 THE CHAIR: Yes.

16 MR BEAL: Overleaf, there is a figure 14 which shows the number of fulfilment centres
17 and indicates how effectively Amazon has scaled up. By interrogating Amazon's data,
18 the consequences of that scale on per unit costs should be capable of being at least
19 estimated.

20 We can then see the conclusion is reached that one stop fulfilment provider scale has
21 remained small, and obviously there will be scope in principle for seeing whether or
22 not we can get disclosure of the likely costs from rival fulfilment providers, if they are
23 either prepared to volunteer that data into a confidentiality ring, or if the Tribunal were
24 to direct that third party disclosure be given. But even if third party disclosure can't be
25 given --

26 THE CHAIR: There are not a huge number in that market, are there?

1 MR BEAL: There aren't, no. I think there is a smaller number of one stop fulfilment
2 providers, there are quite a lot of either designated service providers or delivery
3 companies, not many people offer the one stop shop. But at least Dr Houpis --

4 THE CHAIR: By "one stop", you mean warehousing --

5 MR BEAL: Everything, replicating essentially the FBA offering.

6 What we can see, turning to page 664, is an analysis of FBA prices over time.
7 Dr Houpis obviously at this stage doesn't have access to FBA costs over time, but that
8 would be sought by way of disclosure. What we can see at 665, however, is at least
9 some prima facie evidence in relation to how this abuse has impacted on FBA prices
10 in answer to the Tribunal's question.

11 We see FBA prices have risen by approximately 70 per cent between 2016 and 2023,
12 while the PPI standard for warehousing and storage services shows inflationary rises
13 of between 17 and 18 per cent. In other words, FBA prices have outstripped the
14 inflationary measure by something like 52 to 53 percentage points. So there has been
15 a quite extraordinary relative increase in FBA costs compared to the inflationary
16 pressures on the sector more generally.

17 Whilst that could, Dr Houpis recognises, reflect potential improvements in quality, it is
18 also consistent with foreclosure of rival fulfilment providers.

19 THE CHAIR: Yes.

20 MR BEAL: We then see at page 666 onwards the sorts of areas where Dr Houpis
21 would seek further information, further data, in order to establish the economies of
22 scale and look at foreclosure issues.

23 THE CHAIR: Yes, thank you.

24 MR BEAL: That is abuse 3. Abuse 4 is the Prime abuse. For your note, this is dealt
25 with in our skeleton at paragraphs 24 to 26, and in our reply at 65 to 74. You will have
26 seen the structure of Dr Houpis' various reports is that he deals with all the abuses

1 sequentially, so it is easy to find one's way round.

2 Again, I am proposing to look at the summary given in paragraph 25 of our skeleton.

3 Again, it's a broad overview, but we have tried to capture the key points. The
4 methodology involves ascertaining what the full criteria for seller fulfilled Prime actually
5 were over the material period, and comparing the price of parcel delivery for third party
6 sellers using SFP, with the effective price of parcel delivery for third party sellers using
7 FBA.

8 It then proposes to determine the precise level of take up of SFP by potential class
9 members over the relevant period, looking at how that has changed as the conditions
10 have changed, and necessarily looking at the impact of the implementation of the CMA
11 commitments. So if, for example, the SFP take -up has improved since the
12 commitments were given, that will be something Dr Houpis' analysis will be able to try
13 and ascertain.

14 He will then analyse the reasons why take -up was so low, his indicative figure based
15 on the data he obtained from Keepa was 0.6 per cent of third party sellers who use
16 FBM so a view can be taken as to whether or not SFP had been a viable and effective
17 alternative to FBA.

18 He has relied in part on the disclosure obtained to date which suggests that Amazon
19 never intended SFP to be an alternative to Prime, it was meant to be a complement.

20 So that's another factor to be taken into account.

21 But essentially, the thrust of the analysis is to try and see whether or not SFP was ever
22 a viable alternative to FBA, and how the foreclosure of the market was influenced by
23 having access to the Prime label and the very difficult circumstances in which the SFP
24 criteria could be met, the constraints it placed on SFP as a viable alternative.

25 So those in summary are the steps which are taken.

26 THE CHAIR: But his counterfactual on this abuse is presumably easier access to

1 SFP.

2 MR BEAL: Yes. The SFP conditions would be non-discriminatory and capable of
3 being readily achieved by third party sellers who don't use FBA, coupled of course with
4 the dispensation of any obligation to use a specific carrier designated by Amazon. So,
5 freedom to negotiate your own SFP rates and delivery --

6 THE CHAIR: Then he has to estimate what the take -up of SFP then would have
7 been, his counterfactual SFP.

8 MR BEAL: Yes. Imagine the conditions had never been unduly difficult from day one,
9 how would that have changed the take -up of SFP --

10 THE CHAIR: Given the requirements for speed of delivery, and so on?

11 MR BEAL: Exactly.

12 THE CHAIR: And that he does how? That's not covered in your paragraph 25.

13 MR BEAL: No, it's not.

14 THE CHAIR: That's the difficult part, really, it seems to me.

15 MR BEAL: Dr Houppis has currently said he hasn't had sufficient data available to him
16 to be able to perform a clear understanding of looking at the data he does have and
17 doing the sorts of analysis we have seen for abuse 2 and abuse 3. The way he's put
18 it in his summary of abuse 4 --

19 THE CHAIR: Are you in the main report or the summary report?

20 MR BEAL: I was going to go to the summary report.

21 THE CHAIR: Yes.

22 MR BEAL: The main report deals with this at some length.

23 THE CHAIR: It's at tab 28, isn't it? Is that right?

24 MR BEAL: He does of course have the before and after approach I have
25 indicated -- tab 28, page 1384 of the bundle. It is possible that when I said he hasn't
26 conducted an analysis, that's actually for the additional effect in relation to FBM offers

1 being able to access Prime events and Prime filtering customers. He will rely on
2 estimates of shares of sales captured by third party sellers after the commitments have
3 been implemented. So, there he's not relying specifically on --

4 THE CHAIR: He's really relying on the commitments --

5 MR BEAL: He is.

6 THE CHAIR: -- after the commitments.

7 MR BEAL: But in relation to the abusive conduct more generally, i.e. the impact that
8 having access to the Prime label has on the Buy Box issues and fulfilment issues, he's
9 anticipating that the effect will be similar to the abusive conduct for abuse number 3,
10 see paragraph 33, so there will be an overlap. This is dealt with in his first report at
11 chapter 11 over the course of eight pages. That's page 681 in bundle C, tab 21, where
12 it is dealt with at some length.

13 Methodology is dealt with at page 687. He would carry out various investigations he
14 identified, and then likely effects he deals with separately at 426. At 425, he says:

15 "The overall approach of the benefit of the Prime label could be expected to have the
16 same anti-competitive effects as abuses 2 and 3, as it was another mechanism
17 through which Amazon may have unfairly favoured FBA offers and Amazon Retail,
18 therefore the same reasoning applies."

19 There is then the additional mechanism, which is the bit I think he's accepted requires
20 the before and after analysis, at least at this stage. He's referred to the AGCM, but he
21 then says right at the end of paragraph 428:

22 "Additionally, my proposed methodology for establishing the quantum of harm is
23 applicable such that it is likely to provide further evidence of this effect. I consider the
24 data requirements and methodology that would allow me to further investigate
25 potential abuse post certification in the quantum chapter."

26 So, he's identifying where he would go to be able to fill out any perceived missing

1 details in the overall approach.

2 Dealing with harm, that's dealt with in chapter 15 of his report, where he looks at the
3 impact on FBA fees, FBM fees, and so on.

4 THE CHAIR: Yes.

5 MR BEAL: The response from Amazon to this approach has been essentially to take,
6 as far as I can see, three separate points at paragraph 72 of their skeleton. The first
7 point in paragraph 72, subparagraph 1, is to suggest that the CMA commitments cover
8 a range of matters which may mean that before and after analysis does not cover the
9 specific effect of abuse 4.

10 But of course the before and after analysis is only one part of the methodology and
11 the overall approach can be re-run or re-interpreted with different dummy variables to
12 strip out, if necessary, any particular impact from a particular aspect of the CMA
13 commitment which is said to be different. What can't be said at this stage is that the
14 proposal from Dr Houpis is doomed to failure, or not sufficiently credible that it can't
15 be tested at trial.

16 The second subparagraph of paragraph 72 seeks to --

17 THE CHAIR: I am just trying to understand paragraph 1:

18 "... form no part of alleged abuse 4 ..."

19 But the --

20 MR BEAL: My understanding of the points being made is: the commitments cover
21 quite a lot of things, how are you going to strip out the effect of the other impact of the
22 commitments for the specific commitment which relates to Prime, to which my
23 response is: the methodology is a before and after one, but to the extent that there are
24 explanatory variables which might arise and might need to be considered, they can no
25 doubt be factored into the analysis.

26 The second point which is taken is that somehow we wouldn't be able to determine

1 the effective price for parcel delivery separately from the wider FBA charges. Just on
2 that point, one would have thought that the cost data from Amazon was sufficiently
3 granular that one could work out the underlying costs of the different provision of
4 services, and also one anticipates the information management available to Amazon
5 as a large multinational company is sufficiently granular that it can work out how it is
6 pricing for particular services and what the relevant factors are.

7 So, in any event, one can work backwards from a third-party indication of what the
8 costs of parcel delivery are to look at the particular benefits of size and scale which
9 Amazon necessarily has achieved over the last six or seven years, and factor that into
10 a third-party comparator exercise.

11 So, the suggestion that that simply can't be done and it has to be ruled by this Tribunal
12 that it can't be done at this stage, is, we would respectfully suggest, aspirational.

13 The third point taken in subparagraph 3, it is said there is no reason in law why Amazon
14 should be required to apply a lowest common denominator when awarding the Prime
15 label. That isn't what we are contending for. We are not saying you have to let in
16 everyone regardless of merit. What we are saying is if you have allowed someone to
17 have the Prime label because they are an FBA seller, then you must have accepted
18 they meet certain requirements for performance which you are happy with. What we
19 ask is you apply the same level of assessment, the same criteria, for recognising that
20 that performance is satisfactory to FBA sellers as well.

21 It is a comparison exercise, not an absolute threshold. The essential point being made
22 here is we say if you've let a level of performance from a FBA seller get the benefit of
23 the Prime badge, then if an FBM seller has the same level of performance as that,
24 there cannot be any intrinsic objection to awarding the Prime label to that service, that
25 performance, and we would simply ask for parity of treatment between the two cohorts.

26 So, this is not a question of suggesting that Amazon somehow has to lower its

standards for Prime; we simply want the same standard to be applied to FBM and FBA sellers.

Sorry, sir --

MR DERBYSHIRE: Can I just ask a question about that? How long would the counterfactual run for the SFP? You have the commitments, you have a change in the criteria that's happened recently, but how long would the counterfactual run? What would be the kind of time limits over the retrospective change?

MR BEAL: The counterfactual will run for the relevant period in the sense of the run of the claim period. So, it is effectively the beginning of 2017 through to the issue of the claim form in 2024. That's the period under review.

There is a separate point which is evidentially how long do you let the commitments bed in before you work out whether or not you can apply that reasoning backwards? I think that is a more nuanced point, where clearly there will be some time for impact on the market to be felt. At the moment, I am not able to say it is going to be four years, five years, or six years. One recognises that change doesn't happen overnight, and that needs to be built in.

But essentially the before and after analysis from Dr Houpis will need to recognise that there is a glide path towards a better functioning market, and there will come a point at which one would say in best estimate competitive conditions are now sufficiently realigned that this can be a proxy for what the competitive level would have been.

MR DERBYSHIRE: Yes, I think I understand that point, and I suppose my question may not actually be for today, but would you actually then do the counterfactual on just the SFP component all the way back from 2017?

MR BEAL: One would look at what was perceived to be the competitive level or the competitive conditions which surround the SFP criteria with the objectionable factors removed, and take that back and apply it from 2017 to 2024, yes.

1 MR DERBYSHIRE: Okay.

2 THE CHAIR: Because the commitments took effect how many months after the
3 decision?

4 MR BEAL: I think they took affect from May 2024. I think Amazon asked for
5 a six-month period from the date of the CMA decision to implement, and that's why
6 the period of time, the duration of the commitment, is expressed as being, I think, four
7 years and six months within the commitment itself.

8 THE CHAIR: So, they have now had a year?

9 MR BEAL: They have currently had a year, yes.

10 My respectful submission is once we have data on the ground as to changes, how
11 things have changed, how -- are there now more third-party sellers who are using SFP;
12 and, if so, what is the rate of change of SFP? We will have a better idea of the length
13 of time it's taking for the market to readjust to competitive conditions.

14 I am being referred to page 717 in Houpis 1. Under subparagraph C at the top,
15 Dr Houpis says:

16 "Amazon's fourth abuse may have led to fewer FBM offers having the Prime label in
17 the factual compared to the counterfactual ...(Reading to the words)... In turn this
18 diminishes the chances. In the counterfactual, I have assumed a modified SFP would
19 have been available and therefore more sellers would have met the criteria. I would
20 assume all FBM sellers that meet the modified criteria would have selected to obtain
21 the Prime label."

22 He then assesses that by re-running the algorithms, assuming that is the case. I think
23 that would be only for the length of the claim period that that would be run.

24 Those are my observations on abuse 4. On abuse 5, this is the anti-discounting
25 practices --

26 THE CHAIR: Just a minute.

1 MR BEAL: I am sorry.

2 THE CHAIR: To estimate how many FBM sellers would have met the modified criteria,
3 you would do that on the basis of the number of FBM sellers that use SFP after the
4 commitments?

5 MR BEAL: So for the --

6 THE CHAIR: That's what I am trying to understand.

7 MR BEAL: Well, I think the rate of acceptance would change. Once the SFP
8 conditions are made more realistic and more obtainable, one would expect
9 a proportion of FBM sellers to meet those criteria. Dr Houpis is assuming that if you
10 meet the criteria, you would go for it.

11 THE CHAIR: Yes, I can see that bit. It is how you estimate the proportion that would
12 meet it.

13 MR BEAL: Because once a sufficient length of time has been given, has elapsed, for
14 the re-levelling of the playing field, you will have an indication of the proportion of FBM
15 sellers that are currently going for SFP, and that will give you a proxy for the level of
16 FBM sellers historically that would have gone for SFP as well.

17 THE CHAIR: So, in a sense, the delay in this case going forward is helping to make
18 more robust analysis that will be carried out because one has more time for the
19 commitments to bed in.

20 MR BEAL: We will have the benefit of a degree of hindsight which is not currently
21 available, subject of course to the caveat I gave earlier. This is assuming compliance
22 and --

23 THE CHAIR: Yes.

24 MR BEAL: -- the caveat I gave earlier.

25 THE CHAIR: Yes. Well, Amazon's critique is not based on any suggestion that it is
26 not complying.

1 MR BEAL: No, I don't suppose we will hear that submission.

2 Could I please move on, unless you have any further questions on 4, to deal with
3 abuse 5. This is the anti-discounting practices, and I took you through the FTC
4 complaint which is the evidential basis for this. You made the point earlier that the
5 FTC complaint is an allegation. That's quite right, but it is an allegation that has passed
6 the motion to dismiss threshold in the United States for what it is worth, and I accept
7 that goes so far.

8 This is premised on the so-called fair pricing policy, the effect of which is if there is
9 a significantly higher -- it's not open to a third-party seller to have a significantly higher
10 price on Amazon than it is offering either on its own website or on a rival marketplace.
11 The methodology is addressed in our skeleton argument for your note at paragraphs
12 27 to 30, and in our reply at paragraphs 75 to 80.

13 The summary of the steps again at a high level is paragraph 25 of our skeleton, please,
14 which is page 44 of bundle A.

15 THE CHAIR: No. 28, isn't it? 28 and 29.

16 MR BEAL: Yes, paragraph 28, I apologise.

17 First off, Dr Houpis will obtain access to the monitoring algorithms and the basis upon
18 which Amazon was determining what was a significantly higher price and how it
19 determined what the external competitive price was. He will then examine the data on
20 a number of third-party sellers whose offers have been removed from the Buy Box for
21 violation of the policy and, if possible, compare the prices they were offering with the
22 relevant external price at the time. He's also proposing to conduct a survey of third-
23 party sellers to help determine whether that led to a reduced incentive to multi-home
24 as a result of the policy.

25 Those are the steps he proposes to take. The response from Amazon in its skeleton
26 at paragraph 74 is essentially a bare assertion that this methodology cannot show

1 competitive harm. We respectfully suggest that isn't a good point. Competitive harm
2 will be established if third party sellers have been hindered or deterred from selling the
3 same products on rival marketplaces.

4 So, if the effect of Amazon's policy as implemented is to stop third-party sellers offering
5 the same products for sale at cheaper prices on rival marketplaces, that has an
6 anti-competitive effect, since one assumes if they had been able to offer products more
7 cheaply on a rival marketplace, they would have sold more products. They would
8 therefore have paid lower marketplace fees because the assumption behind this is
9 that Amazon, as a result of its prime position -- forgive the pun -- charges higher
10 marketplace fees to sellers than rival marketplaces, and the consequence of this would
11 be that also third party sellers would have paid lower fulfilment fees because the FBM
12 fulfilment service would have been promoted by the greater demand for FBM services
13 from the higher demand on the third party marketplaces.

14 So, you have a variety of different effects which are all leading to a conclusion that
15 third-party sellers would have paid lower costs for using a rival marketplace through
16 lower marketplace fees. It would have paid in the end lower fulfilment fees because
17 FBM fulfilment services would have achieved greater scale, and it also would have
18 been able to sell products at lower prices, thus producing a greater demand expansion
19 effect for those sellers. We say all of those points give rise to a clear theory of harm
20 for competition purposes, and they are explained in detail in Houpis 1 at chapter 12,
21 and in Houpis 3 at section 4.4.

22 Amazon also suggests in its skeleton at paragraph 74 that it was protecting customers
23 "from unfair and deceptive pricing practices". Whether or not Amazon is able to run
24 that consumer champion defence will have to be a matter for trial, not for now.

25 That's all I propose to say at this stage on abuse 5, unless I can be of any further help
26 on that.

1 THE CHAIR: Just a moment.

2 Yes, thank you.

3 MR BEAL: So, the next issue which really arises, a couple of residual -- not residual,
4 important matters, but matters which I am proposing to take more lightly for reasons
5 which will become apparent.

6 Firstly, there is the question of establishing loss. This is the area where, with respect,
7 the broad axe most clearly is felt. As we have seen from the authorities I cited earlier,
8 in circumstances where a prima facie case of arguable breach of a competition rule is
9 made out with an indication that there is more than nominal loss, working out the
10 details of what the loss is very much a let's do the best we can with the material we
11 have. But as it happens, Dr Houpis has, at a preliminary level, set out a detailed
12 methodology of how he would propose to estimate loss in due course using further
13 disclosure and further data once it becomes available.

14 This is dealt with in our skeleton argument at paragraph 31, but in more detail in our
15 reply at paragraphs 81 to 86. In short, there are different avenues for loss. Firstly,
16 you have predicted lost sales,, i.e. loss sales from third party sellers in the
17 counterfactual where they would have beaten Amazon Retail in the Buy Box, and then
18 in circumstances where FBM sellers would have won the Buy Box in comparison to
19 either Amazon Retail or minimal sellers.

20 Secondly, you have predicted losses on margins due to higher fulfilment charges; and
21 thirdly, you have predicted losses on margins due to higher marketplace fees. Both
22 of those second and third effects essentially amount to Amazon raising a rival's costs
23 through imposing higher charges if you don't use the Amazon product.

24 This is really set out in our reply. If I could invite you to cast an eye over our reply --

25 THE CHAIR: It's raising its own costs as well, isn't it?

26 MR BEAL: Amazon?

1 THE CHAIR: Yes.

2 MR BEAL: No, because it is vertically integrated for its fulfilment services.

3 THE CHAIR: No, but I thought the higher fulfilment fees is both FBA fees, isn't it, for

4 the --

5 MR BEAL: It is able to charge higher FBA fees.

6 THE CHAIR: Yes. So, its own fulfilment fees and rival's fees, isn't that right, for

7 different reasons?

8 MR BEAL: Yes, yes. In essence, this is dealt with in detail in our reply at

9 paragraphs 81 to 83, which I can either take the Tribunal to or allow the Tribunal to

10 re-read in due course, but it is set out in detail there. I think given the marching time,

11 I probably ought to move on, unless you have any specific questions for me on it.

12 There is a further point Amazon makes at paragraph 30 of its skeleton argument about

13 pass-on. It says Dr Houpis has not taken pass-on into account. As a factual matter,

14 that's wrong. In paragraph J20 of Houpis 1, he has assumed a provisional pass-on

15 rate of 50 per cent for the purposes of his preliminary damages estimate. So it has

16 been factored in. He has indicated that it will require more work to fine tune that, but

17 at least at this stage it has been taken into account on a preliminary basis.

18 THE CHAIR: J?

19 MR BEAL: J20, so that is page 809.

20 THE CHAIR: Yes.

21 MR BEAL: It is a short statement. He says:

22 "From my preliminary damages estimate, I have assumed an illustrative pass-on rate

23 of 50 per cent."

24 We may by trial have the pass-on judgment from the Interchange litigation, which may

25 help.

26 THE CHAIR: Yes.

1 MR BEAL: There are three remaining issues. The first is the question of conflict of
2 interests within the class. This has been addressed by us on a number of occasions.
3 At the moment, it is dealt with in our claim form at paragraph 190, our reply at
4 paragraphs 87 to 121, and in our skeleton at paragraphs 32 to 39.

5 We find a statement of principle in the Ennis v Apple case from this Tribunal. Please
6 would you look in the bundle of authorities, tab 40, PDF 2265.

7 THE CHAIR: Just a moment, yes.

8 MR BEAL: If you wouldn't mind casting an eye over paragraph 18 for some of the
9 salient principles. 2265 is where it starts at the bottom of the page, under the section
10 "Conflicts of interest."

11 THE CHAIR: Yes.

12 MR BEAL: The way the argument was put by Apple in this case is dealt with internally
13 at 2262, i.e. 2268 in the PDF. Essentially the alleged conflict was said to arise
14 because Amazon didn't charge certain app developers --

15 THE CHAIR: Apple.

16 MR BEAL: I beg your pardon. Apple had 84 per cent of the third-party apps distributed
17 which were free, even though they enjoyed access to the same app store services and
18 16 per cent were paid. So, it was said that therefore recovering loss, there was
19 a difference between the two cohorts.

20 At paragraph 30, page 2272, the Tribunal accepted the point made by the PCR in that
21 case that that wasn't the case they were running:

22 "Whether or not the PCR is in a position of conflict of interest ... should be determined
23 by reference to the claims advanced by the PCR in the Claim Form, not by reference
24 to an alternative claim postulated by Apple."

25 So, Apple had developed a counterfactual in which to posit the claimed conflict, which
26 wasn't actually the counterfactual the PCR was advancing. Specifically, the

1 | counterfactual alleged by Apple was that all of the developers would have been
2 | charged for access and therefore there would have been no freebies anymore. That
3 | wasn't the way the PCR was putting the case.

4 | Paragraph 31, one sees the Tribunal recognised that:

5 | "Contrary to Apple's case, there is no duty on the part of the PCR to pursue a different
6 | claim on behalf of those class members who earn most of the revenue from
7 | commissionable transactions. The obligation of a class representative is to prosecute
8 | the collective proceedings in a way that furthers the interests of the group as a whole;
9 | the PCR's obligation should be seen in that context. If individual members of the class
10 | wished to take proceedings requiring Apple to conduct its business in a way that
11 | requires Apple to reduce commission on transactions which are currently
12 | commissionable and increase commission on other transactions which are currently
13 | free from commission, they were at liberty to do so, but not in the context of the
14 | collective proceedings."

15 | We then see at paragraph 33 recognition of the fact that on the PCR's case, there may
16 | be no recovery for some class members, did not entail a conflict of interest, and didn't
17 | militate against the grant of a CPO.

18 | The comparison which is then made at paragraph 37, 2268 internally, is that:

19 | "At the distribution stage ... it would be for the PCR to make a judgment as to the
20 | allegation between an individual claimant or group of claimants with different claims,
21 | but that did not give rise to a conflict of interest. Essentially at distribution stage as
22 | with, for example, a trustee in a discretionary trust or an executor of a will who is given
23 | a broad discretion as to which legatee receives the benefit under the will, the fact that
24 | there are different people calling out for different distributions of a pot of funds does
25 | not establish a conflict of interest, otherwise there would be no executor in the country
26 | who is not conflicted."

1 Here, we respectfully suggest that Amazon's approach has been based on a confusion
2 between the determination of the aggregate damages available to the class as
3 a whole, and the individual allocation that may or may not be appropriate at distribution
4 stage. What the PCR has done here is to advance a claim which maximises the pot
5 of damages for the class as a whole.

6 It follows since it is in the interests of the class to maximise the available pot for
7 everyone, it is in the interests of all class members to subscribe to that model. It would
8 only be if Amazon could show -- which it doesn't even try to -- that somehow the
9 choices which have been made by the PCR mean the aggregate pot of damages is
10 lower than it would otherwise be, that there would even be a claim to say there was
11 a problem.

12 The carriage judgment in fact dealt with this issue at length -- I appreciate Amazon
13 was not participating at that stage, and I accept of course it can have another go at
14 this argument. But I would like to remind the Tribunal of how it was dealt with in the
15 carriage dispute. This is in bundle E, tab 4, page 450. It starts at paragraph 78 at
16 page 481.

17 The submission that was essentially made by BIRA, as the Tribunal will recall, was
18 that the conflict arose in relation to the proportion of sales that would be diverted from
19 FBM sellers to FBA sellers under abuse 3. Paragraph 79 then sets out
20 Professor Stephan's response. It could not be assumed that FBA sellers would still
21 use FBA in the counterfactual so that unlike, for example, indirect purchases in Trucks,
22 could not realistically suggest that the removal of the overcharge would suddenly
23 cause them to buy Trucks directly.

24 There was a difference in the counterfactual here where FBA sellers in the
25 counterfactual, if there is no practical distinction between the benefit of FBA versus
26 FBM, one can posit a scenario in which many FBA sellers may well have become FBM

1 sellers in the counterfactual. So, the concept of there being two conceptually different
2 classes whose interests aren't aligned simply does not translate to this scenario.

3 Paragraph 80 then sets out the arguments advanced by my learned junior,
4 Mr Carrall-Green, at the carriage judgment. It was not the case, as he noted, that
5 abuse 3 was only advanced for the benefit of FBM sellers for precisely the reason the
6 Tribunal just identified in argument; namely that because the effect of abuse 3 is to
7 drive higher demand for FBA services, that means Amazon is able to charge higher
8 fees for FBA services because they are more popular; indeed, we have seen in
9 practice that they have substantially increased FBA fees since 2017. That higher fee
10 that is being charged redound to the disbenefit of FBA sellers because they end up
11 paying more for FBA services than they would do otherwise. So exposed to the full
12 rigour of competition, they would end up with lower fulfilment charges, full stop.

13 That effect necessarily impacts on all merchants, not simply FBM merchants -- higher
14 overcharge fees paid by FBA sellers is obviously only for FBA sellers, but in any event,
15 there is also the separate higher costs of e-commerce platforms more generally
16 because Amazon is able to charge more for its platform fees than other rivals do.
17 Therefore, that's the multi-homing effect.

18 Those were the central arguments. At 81, the Tribunal looks at the issue which was
19 raised by BIRA of the extent to which the diversionary effect would have to reach
20 before you ended up in effectively negative territory.

21 Paragraph 81, the Tribunal noted that such a scenario was contrary to the expert
22 evidence of Dr Houpis and was unlikely, therefore, to be argued by the PCR. But in
23 any event, and more importantly perhaps, it is unlikely that Amazon would be saying
24 the diversionary effect of this abuse is very high because it is contrary to its interests
25 because of the impact on FBA overcharges.

26 Paragraph 82, the Tribunal recognised that from the FBM perspective, 82 and 83, this

1 wasn't a case in which FBM sellers would be disadvantaged by virtue of the benefit
2 being granted -- if there was one -- to FBA merchants because it couldn't be said that
3 credit had to be given by FBM merchants for any benefit received by FBA merchants.
4 In a nutshell, that is the reasoning there, therefore there wouldn't be a reduction in the
5 claims that could be advanced by FBM sellers. So, 82 and 83 is from the FBM
6 perspective.

7 The Tribunal then moved on at 84 to deal with the FBA perspective: is this bad for FBA
8 sellers, to which the answer is given: Dr Houpis' preliminary estimate is such that
9 merchants suffered an overcharge of about 25 per cent on the Amazon logistic fees.
10 Even after assuming a 50 per cent pass-on rate, he estimates that such merchants
11 still suffered a loss of around £1 billion.

12 There is then a factual point which had been raised by Ms Ford KC, which is disputed,
13 but I don't think I need at this stage to go through. The Tribunal identified that it was
14 possible of course if one took speculative mathematical examples to come up with a
15 situation in which a perceived benefit from sales being diverted towards FBA sellers
16 would be higher than the overcharge charged by Amazon for higher FBA fees.
17 Mathematically of course, that is possible, but the answer from the Tribunal was it
18 wasn't very plausible.

19 Indeed, it wasn't because the level of the FBA overcharge in the counterfactual would
20 have to be so small that it could be overcome by the perceived benefit. But in any
21 event, that's a sort of speculative example which was inappropriate to go into at this
22 stage.

23 At 85, therefore, this Tribunal drew a distinction between the inherent conflict between
24 direct and indirect purchases in Trucks. Then at paragraph 87, one sees the
25 reiteration of the point taken from Ennis which I have just been through: the fact that
26 you have different merchants with different levels of loss to be reflected in due course

1 if the distribution goes down the quasi-compensatory route did not give rise to
2 a conflict of interest.

3 You can perhaps encapsulate that thought in a nutshell by saying that even assuming
4 the mathematical thought experiment Ms Ford had urged upon the Tribunal leads to
5 a position where the perceived benefits, if they are recoverable, are capable of being
6 set off against the overcharge are so high that you end up with a negative position.

7 The consequence of that would be that that particular cohort simply did not have
8 a claim for that abuse, and you can't have such a thing as negative damages. There
9 is not going to be a cohort giving money to Amazon for its anti-competitive behaviour,
10 therefore the worst position you would end up with would be that a cohort within
11 a claim had zero loss to be given on a distribution basis, whereas FBA merchants had
12 a positive sum to be allocated to them on a distribution basis. In a sense, that's the
13 worst it would get.

14 There is an issue as to whether or not Amazon is advancing the same issue as BIRA.
15 We have suggested that it is, and BIRA's skeleton argument had raised this issue not
16 simply of all or nothing, but also diversionary levels. I am not going to drill down into
17 that point because it seems to me that I have recognised -- and no doubt the Tribunal
18 will tell me if I didn't recognise it, I would be wrong -- that Amazon is entitled to have
19 a go at this. Therefore, the way it was put by BIRA is, in a sense, spilt milk.

20 But my point is that evidentially, Amazon must recognise that it has to try to persuade
21 this Tribunal that the reasoning I have just been through is flawed, and second time
22 round you should reach the opposite conclusion. It seems to me that is the practical
23 reality of the position Amazon is in.

24 Dealing with the merits of the point, we have essentially four points in addition to the
25 negative damages point I have just made. The first and most obvious point is that for
26 any sellers who make both FBM and FBA offers, that conflict is internalised, so there

1 is no doubt a substantial cohort of sellers who either offer FBA one day or offer FBM
2 the next, and they necessarily have a foot in both camps.

3 The second point is that this whole argument is predicated on the application of the
4 Fulton Shipping line of authority. That argument has to be pleaded and proved by the
5 defendant rather than by the claimant, so in a sense, it is a mitigation of loss point.
6 The burden is on the defendant to plead and prove it.

7 We are entitled to take the view that it is arguable, as the Tribunal recognised in its
8 carriage judgment, and therefore at the moment it is in the interests of all members of
9 the class to contend that Fulton Shipping wouldn't apply, that no credit would have to
10 be given by anyone because in fact there is no -- for example, if no claim is being
11 advanced by FBA sellers for loss of sales, then there is no need to give credit for the
12 benefit of sales obtained. As the Tribunal found, this isn't a case where FBM sellers
13 would have to give credit for a benefit received by a different cohort, properly
14 understood.

15 Even assuming we are wrong on that and somehow the point has to be taken against
16 us, it is nonetheless still in the interests of all members of the class to maximise the
17 pot of aggregate damages for distribution at a later stage. In other words, it's in the
18 interests of both FBM sellers and FBA sellers to advance the claim for abuse 3. That's
19 because, for example, if the FBM seller wants to argue for the diversion of sales which
20 is inherent in abuse 3 because it gave rise to loss of sales, in the counterfactual as the
21 Tribunal found, the FBM sellers will be selling more and therefore they have
22 established loss on the basis of the counterfactual analysis. The FBM seller also
23 wants to argue for diversion because it drives the FBM overcharge and because it
24 drove the e-commerce overcharge, the marketplace fee being higher.

25 So that's the FBA seller. The FBA seller also wants to argue for diversion because it
26 drove the FBA overcharge. And for every sale the FBA seller makes, it is having to

1 pay the FBA fees; and those FBA fees, having risen very, very steeply as a result of
2 the abusive conduct, are substantially higher than they otherwise would have been in
3 the counterfactual. That gives rise to loss and therefore the higher the diversion rate,
4 the higher the loss will be, all other things being equal.

5 Dr Houpis in Houpis 3 has set out why -- I think it's paragraphs 281 to 284 -- sets out
6 reasons why that linear relationship is a plausible one for analysis at this stage. What
7 we don't have from Amazon is any countervailing evidence to suggest that that
8 supposition is flawed for any reason.

9 They accept that if Dr Houpis' methodology is correct: the higher the level of the
10 diversion, the higher the level of the overcharge, all other things being equal. There
11 are the Holt graphs, but the Holt graphs are premised on an assumption as to how
12 there is a relationship between diversion and overcharge which doesn't actually reflect
13 Dr Houpis' case.

14 So much like Ennis, it is no good having a counterfactual which isn't actually the
15 counterfactual posited by the PCR, because you are running a counterfactual which
16 in fact is not part of the PCR's claim.

17 The fourth point is conceptually there is of course no difficulty, even if we get to the
18 zero damages point, in having a different distribution for different cohorts or
19 subclasses at the distribution stage, that doesn't give rise to a conflict. It would still be
20 in FBA sellers' interests to be part of this claim because they have the loss attributable
21 to abuses 1, 2, to a certain extent, 4 and 5. The certain extent on 4 simply reflects the
22 use of Prime being akin to FBA criteria in the Buy Box win.

23 So, for those five reasons I have given, we respectfully suggest that the Tribunal's
24 decision in the carriage dispute was right. Alternatively, it was one it was perfectly
25 entitled to reach, and indeed the Court of Appeal said the same thing when it refused
26 BIRA permission to appeal against this Tribunal's decision.

1 The final --

2 THE CHAIR: Is the Court of Appeal's decision in the bundle?

3 MR BEAL: It is.

4 THE CHAIR: It will be somewhere, presumably.

5 MR BEAL: D18, page 523, I have it as, but that is probably wrong. I think it should be

6 E18/523.

7 THE CHAIR: Yes, that's it.

8 MR BEAL: Paragraphs 3 to 5 are really where this point is dealt with.

9 THE CHAIR: Yes.

10 MR BEAL: Could I then please move on to deal with the opt-in versus the opt-out

11 debate. This is dealt with in the claim form at paragraphs 72 to 74, in our reply at 122

12 to 132, and then our skeleton at 40 to 41.

13 Picking up the points of principle, really, could we look in bundle of authorities tab 21,

14 page 1484 internally, which is going to be 1490 in the PDF. You see there the Court

15 of Appeal in Le Patourel. The salient points principally are to be derived from the

16 Court's judgment from paragraphs 82 to 83, page 1511 internally, page 1517 of the

17 PDF. If we could turn to page 1517, could I please invite the Tribunal to read

18 paragraphs 82 and 83.

19 THE CHAIR: Sorry, I must have the wrong reference. What is the PDF page?

20 MR BEAL: Internally it is 1511, PDF it is 1517 in the bundle of authorities.

21 THE CHAIR: This is?

22 MR BEAL: Part of Le Patourel in the Court of Appeal. Paragraphs 82 and 83, please,

23 yes.

24 THE CHAIR: Yes.

25 MR BEAL: However, there are two reasons why we say here opt-in is not a viable

26 alternative. Firstly, the class size is very large, so we say opt-in is impracticable.

1 Secondly, the average claim value is low, which would deter take-up for the opt-in and
2 skew the cost benefit analysis of the claim. I am going to take you to those points in
3 turn.

4 Firstly, class size. Our class size is estimated by Dr Houpis to be 211,000. The largest
5 certified opt-in we have been able to find out is the Trucks litigation. For your note,
6 that is bundle of authorities, tab 18, internal page 1121, where the class size was put
7 at 18,000 or so. I think Mr Burnett's evidence in that case was it was 17,500 and rising.

8 THE CHAIR: Yes.

9 MR BEAL: That particular class obviously had particular characteristics. It was
10 a tightknit community, the RHA knew a lot of people. The RHA had had success in
11 contacting members and non-members alike, and opt-out was considered to be
12 preferable on the basis that the overall structure of the industry meant that small firms
13 would be very likely to become aware of the proceedings, and there appeared to be
14 no disadvantage in recruiting both RHA members and non-members alike.

15 THE CHAIR: The very fact that they had a trade association sort of stood in favour of
16 opt-in.

17 MR BEAL: It very much did.

18 THE CHAIR: Because it has members.

19 MR BEAL: Yes. We don't have here a third-party sellers' trade association.

20 The second point is here, most of the PCMs have suffered relatively modest losses.
21 The information is dealt with in Houpis 1, paragraph 631 -- could we take a quick look
22 at that, hearing bundle, tab C21, page 747, paragraph 631. Based on Dr Houpis'
23 preliminary assessment and size, he estimates:

24 "The average total quantum of damages per seller to be circa £13,000 over the period.
25 This number will be required to be refined. Based on the information on the size
26 distribution, I estimate that 78 per cent of the class members may have suffered less

1 | than the average of £13,000 in damages."

2 | He then goes to look at the higher echelons. He says:

3 | "[He] cannot reliably estimate the amount of damages for the largest sellers. However,
4 | in the US only 2 per cent of the third-party sellers have monthly sales over
5 | US\$250,000. Assuming the UK has a similar structure, this would imply that the
6 | number of so-called large sellers in the UK that might have suffered significant
7 | damages is relatively small."

8 | Here, that small level of average claim and the high number of small sellers is also
9 | matched by the fact that we are in a complex case on any view, where there has been
10 | over 500 pages of expert material filed simply at this stage already.

11 | THE CHAIR: I don't think you need say any more on this point, Mr Beal.

12 | MR BEAL: The final point for me to cover is funding. The very short point on funding
13 | is at paragraph 66 of the carriage judgment. The Tribunal recognised that changes
14 | had been made to funding, and they satisfied the Tribunal in relation to the concern
15 | that had been expressed -- that's in bundle E, tab 14, page 476. The Tribunal was
16 | taken at some length through the history of the LFA arrangements that are in place.

17 | The Tribunal recommended that its approval would be more forthcoming if there was
18 | a KC dispute settlement provision inserted into the arrangements for a funder to be
19 | able to terminate because of a view on the merits. The definition of what was a viable
20 | commercial claim was amended, it was reduced down in terms of the estimated
21 | recovery and the KC settlement clause was put in place.

22 | I could walk the Tribunal through those various different amendments, but the
23 | point -- my short submission is we have ended up in a position where on any view, we
24 | have made amendments to cater for concerns voiced both by Amazon and by the
25 | Tribunal. We are in a position now where our Litigation Funding Agreement is better
26 | than litigation from the perspective of reducing recoverable costs for the funder -- at

1 | least it is better than not necessarily for the funder. It is a more class-friendly funding
2 | arrangement than has been approved in other cases.

3 | The Gutmann II Court of Appeal decision makes clear that any perceived difficulties
4 | with funding can necessarily be resolved at distribution stage once we know what the
5 | final outcome is of this litigation.

6 | Obviously on any view, funders are discharging a recognised and useful function of
7 | enabling these difficult cases to be brought in circumstances where otherwise we
8 | would have what was described once as the mystery of the reluctant plaintiff in
9 | competition claims. That comes from a 1983 article by Dr Picañol, which took many
10 | years to resolve. The Tribunal will remember the number of years that passed after
11 | Garden Cottage Foods before somebody brought a successful competition claim.
12 | This new regime has unlocked the availability of funding so that these types of claims
13 | can be brought for the very public benefit I identified right at the start of my opening;
14 | namely giving substantial access to justice which would otherwise be deprived for
15 | a class of claimants. That extends to small businesses as much as it does to
16 | consumers, and this funding arrangement we commend to the Tribunal in its terms.

17 | Unless I can be of any --

18 | THE CHAIR: Well, yes. There is the point raised at the end of the Amazon skeleton
19 | about a draft undertaking from the funder and the guarantors.

20 | MR BEAL: Yes.

21 | THE CHAIR: It is said there at that point, and it's not been approved, "It is hoped
22 | agreement will be confirmed shortly." So that undertaking has been provided, has it,
23 | from both the funders and the guarantors?

24 | MR BEAL: Yes. Tab 99.1 of bundle D contains a letter from solicitors, Covington &
25 | Burling for Amazon in our case, confirming that they are content with the amended
26 | wording and this point is no longer a live one.

1 THE CHAIR: That's correct, is it, Mr Piccinin -- yes, so that is resolved.
2 Can you help us, on the LFA, which I think is in volume 2 of bundle C at tab 34 --
3 MR BEAL: The original is at tab 34, there are then certain amendments --
4 THE CHAIR: There is an amendment dealing with the Commission, and so on.
5 MR BEAL: Yes.
6 THE CHAIR: In terms of the costs and payment of costs -- and by that, I mean the
7 bills from Professor Stephan's solicitors and how they are going to be paid, where is
8 that in the agreement?
9 MR BEAL: The obligation is for Professor Stephan to pay those fees.
10 THE CHAIR: That's where? Thank you.
11 MR BEAL: Page 1526, clause 5.1:
12 "Subject to such costs being within the approved budget, the lawyers' costs and
13 disbursements will be invoiced to the claimant and shall be payable by the claimant
14 but will be funded by the funder on behalf of the claimant pursuant to the terms of this
15 agreement."
16 THE CHAIR: Yes. This is obviously the agreement with the funder because we are,
17 as a Tribunal, continually learning about the problems that can arise in collective
18 proceedings. One problem is control over costs and that's not something that can be
19 resolved at the stage of settlement or judgment. Because certainly interim bills are
20 paid as the case goes along and --
21 MR BEAL: Page 1546 has an approved budget.
22 THE CHAIR: Yes. But even within the budget costs have to be reasonable. We have
23 here the lawyers' fees and rates and we can see what they are, but it is still a question
24 of whether the actual expenditure in terms of amount of time, number of lawyers, and
25 so on, is reasonable.
26 MR BEAL: If we turn to page 1522 --

1 THE CHAIR: Yes.

2 MR BEAL: -- clause 3.3, There is a provision for amending the approved budget. So
3 effectively if lawyers are suddenly saying, "Well, we are going to have to charge more",
4 there is a process built into the LFA for that.

5 As I understand it, the Tribunal's concern is more an assessment of costs point. But
6 of course, because the funder is simply funding the costs, but the person who is
7 contractually obliged to pay the costs is the PCR, the PCR will be able to invoke the
8 standard client/solicitor relationship to get, if necessary, an own client assessment of
9 costs in the usual way. I am trespassing onto costs knowledge, which is always
10 perilous for me.

11 THE CHAIR: I think you are right. But the concern is that the PCR may lack -- and
12 almost certainly does lack -- the sort of resources and experience that a commercial
13 party bringing a multi-million pound claim will have. The solution the Tribunal put
14 forward in the recent Bulk Mail judgment was that the PCR should have and retain
15 a cost specialist independent of the solicitors.

16 The problem being -- and you have just drawn attention to clause 3.3 -- where any
17 adjustment to the budgets is in the sole and absolute discretion of the funder, and the
18 funder has conflicting incentives in this case. Of course, if the case fails completely,
19 the funder has to pay all the costs and doesn't get anything back. But if the case
20 succeeds, the funder's commission is higher if the costs are higher because it's
21 calculated, as in almost all these cases post PACCAR, by some reference to the
22 project costs.

23 So, the solution which the Tribunal put forward in the recent Bulk Mail judgment is to
24 ask that the class representatives should retain an independent costs specialist to
25 assist him, her or it -- in this case him -- in looking at the bills when they come in.

26 MR BEAL: I have two immediate responses to that, both factual. Firstly, Robert

1 | Marven KC has been presently instructed to deal with the costs issues by the PCR,
2 | and the PCR is capable of instructing Mr Marven to give further advice.

3 | I think probably there is leeway in the budget -- the print on the version of the budget
4 | I have is so small I am afraid I can't break down the individual detail. But there is
5 | leeway within the budget to enable further costs advice to be given. That's the first
6 | point, is my understanding. The advisory committee is the second point -- my learned
7 | junior has pre-empted me on what I was about to make.

8 | THE CHAIR: Yes. But is it proposed that all bills when they come in will be passed
9 | to the advisory committee? Is that an arrangement that could be implemented? You
10 | have the committee, you have -- it includes an experienced litigation barrister, former
11 | solicitor --

12 | MR BEAL: Yes.

13 | THE CHAIR: -- she would be probably best placed to review costs. What we are
14 | looking for -- and it is not a criticism but, as I say, we are learning about problems that
15 | can arise -- is a mechanism that we look to you to put forward whereby as bills come
16 | in, Professor Stephan can assess whether this is something he should query or not.
17 | We are not comfortable with the sole source of querying being the funder. It is
18 | something you might want to take away and think about --

19 | MR BEAL: I will take it away.

20 | THE CHAIR: -- because you need to talk to your client. The solicitor has slightly
21 | conflicting interests on this point, obviously.

22 | MR BEAL: Solicitor and counsel, I should say.

23 | THE CHAIR: Yes, indeed. But you understand the concern.

24 | MR BEAL: Yes.

25 | THE CHAIR: I am not sure going to leading counsel looking at every bill is actually
26 | the most effective way of dealing with that. If you look at paragraph 40 of the judgment

1 in Bulk Mail, it indicates what was sought there was indeed then offered to the Tribunal.

2 MR BEAL: Do you have a paragraph number?

3 THE CHAIR: Paragraph 40 of Bulk Mail.

4 MR BEAL: Thank you. I confess I had not foreseen the point that the funder would

5 have a countervailing interest in anything other than keeping costs down as well as

6 the prospects of the case.

7 THE CHAIR: If you look at the funder's commission as now amended, it is

8 a multiplication of project costs, it expends itself.

9 MR BEAL: Yes, that's the point --

10 THE CHAIR: As I say, it was not a point which was taken in earlier judgments. But

11 as I have indicated, we are learning and we have had a recent experience --

12 MR BEAL: Recent experience suggests that is wise.

13 THE CHAIR: Good.

14 MR BANKES: One question on the budget you drew to our attention: could you just

15 clarify at a later stage whether the numbers at the bottom of that spreadsheet include

16 VAT?

17 MR BEAL: I am waiting for the answer.

18 MR BANKES: It doesn't have to be now.

19 MR BEAL: Yes, I am told they do.

20 MR BANKES: They do include VAT? Thank you.

21 THE CHAIR: I should say, the point we have made about costs which I have just put

22 to Mr Beal obviously will be applicable equally to Mr Hammond, just so you can take

23 instructions in due course.

24 MR BEAL: Sir, if I can give an immediate answer to that, I can do that in ten minutes.

25 THE CHAIR: No, you can tell us tomorrow. That is perfectly acceptable.

26 You finished indeed a few minutes within time as predicted Mr Beal, so that will be

1 a sensible moment for us to take a short break. We will come back at 10 to 4.
2 (3.43 pm)
3 (A short break)
4 (3.54 pm)
5
6 Submissions by MR MOSER KC
7 THE CHAIR: Yes, Mr Moser.
8 MR MOSER: Sir, members of the panel. You have had the benefit, as I have had the
9 benefit, of my learned friend Mr Beal's excellent submissions on the law and also on
10 the regulator's decisions. So, what I plan to do in what time remains for me today is
11 very lightly augment those submissions with bits that I particularly wanted to draw to
12 your attention which haven't been mentioned and give a sort of overview and
13 introduction of how we see this case.
14 Moving as swiftly as I can to Dr Pike's methodology, I hope to reach Dr Pike's primary
15 methodology today -- if I am very lucky, I might finish with Dr Pike's primary
16 methodology today, but that perhaps now seems unlikely in 35 minutes. I do have two
17 hours tomorrow morning on the timetable.
18 THE CHAIR: Yes.
19 MR MOSER: I confidently predict that ought to be enough to deal with both that, the
20 supplementary methodology, and the funding point, which are the three issues
21 I propose to address.
22 THE CHAIR: Sorry, the three issues being Dr Pike --
23 MR MOSER: Dr Pike's primary methodology, which is essentially re-run the algorithm,
24 Dr Pike's further methodology which he describes as his exclusionary abuse.
25 THE CHAIR: I see. And funding?
26 MR MOSER: And funding.

1 THE CHAIR: Yes.

2 MR MOSER: Obviously if there are any other points the Tribunal will have for me,
3 then I will address those as well. But I noted in particular the point that was made at
4 the end of my learned friend's submissions and will be addressing you -- come back
5 with an answer overnight as well.

6 THE CHAIR: Yes.

7 MR MOSER: Our basic proposition is that Dr Pike's methodology -- I am talking
8 mainly about his primary methodology, but it also feeds into the exclusionary
9 abuse -- is compellingly simple and obvious in a way that is sufficient for the
10 certification.

11 Most consumers look only at the Buy Box. Therefore, sellers are only visible to
12 consumers if they are the winners of the Buy Box. That's what Amazon expressly
13 aims to achieve: to avoid consumers feeling they have to look further than the Buy Box.
14 Without wishing to be too trite about it, the clue is in the name. It is the Buy Box, that's
15 the one you buy.

16 The evidence at this stage of proceedings is that Amazon has in fact been hugely
17 successful in persuading consumers they don't need to look any further, they can
18 simply click on the Buy Box recommended offer. We say -- this is the last part of this
19 opening volley -- a dominant marketplace like Amazon with its special responsibilities,
20 which also processes very large numbers of transactions every day, if such a player
21 in the market artificially alters the winner of the Buy Box, which is the pleaded
22 allegation against which there is no strike out, artificially alters the winner of the Buy
23 Box, then that is clearly liable to distort competition.

24 We are of course in good company where this is concerned. Although this is not strictly
25 speaking a follow-on case, we have the very helpful findings of the regulators both
26 here and abroad. I know my learned friend has already taken you to the EU

1 Commission settlement decision, which is at tab 83 of the authorities. I will just briefly
2 dip back into it, it is tab 83, page 3631 in the hard copy, so that's 3637 online.

3 THE CHAIR: I am sorry, this is the --

4 MR MOSER: This is the EC.

5 THE CHAIR: What recital?

6 MR MOSER: It is hard copy bundle 5, tab 83, page 3631 in hard copy, 3637 in the
7 PDF. After all that, that is probably longer than I wanted even to look at this. But my
8 learned friend took you to 203 to 206 on page 3637. I just wanted to read on also to
9 207, if I may. Recital 207:

10 "As set out in the preliminary assessment, the Commission has preliminary concerns
11 that the Buy Box related conduct has a direct and immediate effect on sellers. Amazon
12 displays a unique feature offer shown in the Buy Box. Essentially the featured offer is
13 the winner of the Buy Box. Most consumers will only look at this unique Buy Box offer."
14 Recital 207, bottom of the page. Internal page -- normal page 34:

15 "Most consumers will only look at this unique Buy Box offer. Accordingly, for third
16 party sellers, the unique feature offer display implies that they are visible to consumers
17 only through winning the Buy Box. By artificially altering the winner, the conduct may
18 directly distort competition amongst sellers."

19 That's just to show it is not just me saying that, it is also the EU Commission.

20 Similar concerns were of course raised by the CMA in the decision of 3 November
21 2023.

22 THE CHAIR: Yes.

23 MR MOSER: I need not turn that up again, my learned friend has gone through it.

24 In his report, Dr Pike of course relies on this. He relies on the sort of figures and
25 percentages we have seen, citing evidence that the Buy Box accounts for 82 per cent
26 of purchases on a desktop; on a mobile device the figure is even higher. That's the

1 reference -- I do not think we need turn it up, but that's in Pike 1 at paragraph 64. It is
2 the hearing bundle C1, tab 15, page 495.

3 Indeed, the CMA also tells us -- we saw that this morning -- that more than 80 per cent
4 of cases, you have Amazon Retail itself winning the Buy Box That's the CMA at
5 paragraph 4.9, 3306 of the authorities bundles.

6 So you have preferencing of the FBA sellers, you have self-preferencing of Amazon;
7 and the US complaint is, if anything, even stronger. Because we haven't seen them
8 yet, I just wanted to dip into the Arizona proceedings. They are in the authorities
9 bundle at tab 88 -- I think that's right -- at hard copy page 3946, digital page 3952.
10 They start at 3935.

11 THE CHAIR: Just a minute. This is brought by the state of Arizona, as it were, on
12 behalf of consumers?

13 MR MOSER: Yes. As you know, sir, in the United States, individual states can elect
14 whether to join in with the federal complaint or bring their own case in their own court
15 under state law. Arizona has opted to bring a case in the Superior Court for the state
16 of Arizona. I should mention it not least because one of the lawyers for Arizona is
17 sitting behind me because the same lawyers who act for Arizona are also one of the
18 solicitors instructing me in this case, bringing their US knowledge to the proceedings.
19 This is also a case that has survived a motion to dismiss, at least on the biased Buy
20 Box algorithm point. Having given all that introduction really to draw attention to the
21 fact that we have the case, the only point I am going to make, if we look at 3946 in
22 hard copy, 3952 on the PDF, we see what the US complaint says. The FTC complaint
23 is cited at paragraph 58 of the Arizona case:

24 "Nearly 98 per cent [it says] of all purchases on Amazon are made using the 'add to
25 cart' and 'buy now' buttons in the Buy Box As a result, winning the Buy Box is essential
26 to making sales on Amazon."

1 I think we had that word "essential" once already this morning, and here it is again with
2 a reason why.

3 That was all I really proposed to say about Arizona for now.

4 Then there was some --

5 THE CHAIR: I am not sure that really takes us much further than the European
6 decisions, which -- the claim that 98 per cent of what happens in the US doesn't
7 necessarily correspond to the UK. We know for the UK, we have the CMA.

8 MR MOSER: Yes. Like my learned friend, I take it lightly. As I say, that's really all
9 I wanted to say.

10 THE CHAIR: Yes.

11 MR MOSER: We see an apparently even more egregious form of conduct or at least
12 accusation in the United States.

13 There was also raised this morning some discussion around how Prime and the FBA
14 fit with one another. I submit it might be useful -- and this will be my last foray into the
15 regulators -- to have a look at the AGCM decision which cites a letter from Jeff Bezos.
16 If I can put that away and for those in hard copy, bundle 7, tab 116 -- it is PDF, the
17 authorities bundle. For you, sir, it will be 5127 of the authorities bundle, the AGCM
18 decision.

19 THE CHAIR: Yes.

20 MR MOSER: There is an interesting quotation from various letters written by Jeff
21 Bezos starting at paragraph 252, which is at page 5210 PDF, 5204 for those watching
22 in black and white.

23 May I simply invite you to read the words of Amazon's founder and CEO in various
24 letters from 252 through to the end of 255.

25 THE CHAIR: Yes.

26 MR MOSER: This is obviously couched in glowing terms. However, we say it is very

1 revealing. When a seller joins FBA, their items become Prime eligible. What do sellers
2 want? We want more sales. What happens when they join the FBA and get Prime
3 eligible? They get more sales.

4 That in and of itself may not sound discriminatory, but the complaint is that the Buy
5 Box displays a recommended or featured offer that has been selected on
6 a discriminatory basis. That's the complaint reflected in the regulator's decisions.

7 Amazon in its skeleton argument appears to be meeting a complaint that the Buy Box
8 doesn't display multiple offers. But the real meat of the discrimination is not that it
9 doesn't display many multiple offers, it is that it has been selected on a discriminatory
10 basis. That's the allegation of abuse we make in this case, and it's a relatively
11 straightforward --

12 THE CHAIR: If I can interrupt you. We understand the allegations of abuse, they have
13 been set out by -- as Mr Beal and now you have emphasised -- a series of competition
14 authorities with provisional findings, with actual findings, with an actual infringement
15 decision, and with an allegation fully articulated by the US authority. The question for
16 us is whether there is a -- within the Microsoft test, which is not an onerous test, but
17 nonetheless is a test -- a plausible methodology of calculating the effect of this conduct
18 in quantifiable terms of estimating with the broad axe the damages which might
19 plausibly result.

20 That's where, rather than if you didn't have all these authorities, having looked at it
21 and opined upon it, then yes, you would have to make all these arguments showing
22 what Mr Bezos said, and so on. But we have a lot of findings now and that's really
23 where we are concerned about Dr Pike's approach, and so on. Is he giving us a good
24 method of saying: all right, okay, you have a good argument, it may succeed or may
25 not succeed, but certainly a well arguable case that it discriminates. Well, to what
26 extent? How much are people harmed, and how do you translate it by a counterfactual

1 into an estimate of damages?

2 MR MOSER: Absolutely. I didn't want to belabour the point because I know my
3 learned friend Mr Beal has been through all of these, so I am certainly not about to
4 undo his good work. I am going to start directly with the correct counterfactual.

5 I submit that Amazon in its skeleton argument has completely lost sight of the correct
6 counterfactual. It is the one that was mentioned in the carriage judgment, Mr Bankes
7 will remember it. The carriage judgment is at E, tab 6, page 154 -- it is at 141 to start,
8 but I want to go to it at 154, paragraph 33, as it happens -- where the Tribunal in the
9 carriage judgment here is discussing the rival methodology of Mr Harman.
10 Mr Harman's approach, to some extent -- I don't want to be too rude with one, but what
11 we said below is that Mr Harman's approach tries to guess at the consumer's
12 preferences, of which there are echoes in Amazon's skeleton argument today. What
13 the Tribunal said at paragraph 33:

14 "... Mr Harman's approach seeks to ascertain consumer preferences by other means,
15 and to define the counterfactual outcome in this way. It will readily be appreciated that
16 the approach does not necessarily align itself with the true counterfactual (the
17 operation of Amazon's algorithm without the abuse), ..."

18 There in the brackets of the Tribunal, the true counterfactual has been simply stated.
19 We have seen that Amazon, while disavowing any attempt to attack the merits of the
20 claims of abuse, has raised a number of points which it says makes the case weak,
21 and so on.

22 I am conscious of what you said just now, Sir, and what you said to my learned friend
23 Mr Beal this morning, so I won't dwell for the moment -- unless it becomes necessary
24 and perhaps in reply -- on why all of those arguments about the sort of quasi merits
25 arguments have been raised and about why things might be objectively justifiable are
26 not for today. I will go straight into why Dr Pike's methodology for capturing the effect

1 of the discrimination simply and compellingly, in my respectful submission, addresses
2 the correct counterfactual as just described.

3 What he does first is he identifies through his methodology the effect of the
4 discrimination on the ranking of seller offers in winning the Buy Box. Then secondly,
5 he estimates the effects of the discrimination on FBA seller behaviour in terms of the
6 offers they would have made in the absence of the discrimination.

7 By the way, when I talk about FBA sellers, I talk about it in the same sense as the
8 European Commission talks about it: it doesn't mean that every single offer that they
9 sell has to be FBA -- I can come back to that if necessary. But anyway, we know that
10 the vast majority of FBA sellers have again in turn a vast majority of their goods on
11 FBA.

12 So, Dr Pike at the first stage proposes to identify all of the discriminatory parameters
13 used in the FBA -- that's specifically the algorithm to identify the winner of the Buy Box.
14 He does that by obtaining information about the operation of the FMA on disclosure.
15 He proposes to remove the discriminatory parameters and then running the FMA
16 again, without the bias, to identify the significance on the ranking of seller offers.

17 We are told by Amazon that this is a newly minted test and there is no authority for it.
18 It was, however, the test suggested by the EU experts in their report and I would like,
19 if I may, to take you to that. That is in the authorities bundle at tab 99 and it starts at
20 page 4296 in PDF --

21 THE CHAIR: Is this under the DMA?

22 MR MOSER: I beg your pardon?

23 THE CHAIR: Is this under the DMA, the Digital Markets Act?

24 MR MOSER: Yes. Nonetheless, the nature of the test, of course, is independent of
25 the legal regime. The relevant bit is in the context of self-preferencing at 4310 of the
26 EU experts' report, a report from a panel of economic experts, they are all set out on

1 the front page. They discuss the sort of issue which any expert would face -- just by
2 the second hole punch -- in real life.

3 THE CHAIR: Well, we are looking electronically, so we don't have hole-punches.

4 MR MOSER: The second paragraph from the bottom, about the middle. The sentence
5 that starts:
6 "Suppose that Amazon's algorithm ..."

7 THE CHAIR: Just a minute. You're on page 4310 in section 3.2?

8 MR MOSER: In the PDF, yes. Then there is a paragraph, the third paragraph in:
9 "At a general level ..."

10 THE CHAIR: Yes, I have that. "At a general level", yes.

11 MR MOSER: Then the third sentence starts:
12 "Suppose that Amazon's algorithm places an Amazon product higher on the list than
13 competing third party products ...(Reading to the words)... the recommendation and
14 the order of display be a function of objective characteristics and not depend on the
15 product's affiliation with the platform."
16 Then the bit I rely on particularly:
17 "A natural and simple test would be to run the ranking algorithm twice with or without
18 seller identities and verify that it produces the same outcome: seller characteristics,
19 price, location, reliability, delays, service quality, et cetera, would drive the ranking, not
20 seller identity."
21 I say in parenthesis: in other words, not whether they are FBA on FBM, but merely
22 price, reliability, delays, et cetera.
23 "Such a test requires regulator access to the algorithm."
24 Well, yes. Then further discussion of this -- speak to if you wish.
25 Now they say it may not be an easy one, but we know because of the undertakings
26 given to the regulators that access to the algorithm is going to be given. We know that

1 the difference that will have been generated by the adjustment of time by the
2 Commissioner and by the CMA will be available to Amazon and will be made available
3 to the monitoring trustee. So, the difficulty of regulator access is not as difficult as the
4 experts would have it outside the procedures of these cases.

5 It is a natural and simple test, and even if it was somehow impossible for him to re-run
6 the algorithm, then just like Dr Houpis, Dr Pike has explained that he could model it.

7 THE CHAIR: Are they in fact approaching this the same way, Dr Houpis and Dr Pike?

8 MR MOSER: As I read it, as far as Dr Houpis' second form of abuse, and to some
9 extent his third form of abuse are concerned, yes.

10 THE CHAIR: It is then merely the same point. No doubt if -- and it is an "if" -- both
11 claims were certified, one would seek to rationalise the way it's done going forward so
12 there would be one exercise, not two. But it is really, obviously Mr Stephan's abuse 1
13 is not one you are claiming, so that's different. But on this one, they are really saying
14 the same thing, although perhaps Dr Houpis has gone a bit further in working out how
15 he would do it.

16 MR MOSER: He has. Two points on that. The first is that I respectfully agree it is
17 essentially a case management point at this stage because Dr Pike's and Dr Houpis'
18 methodologies are essentially the same in this regard. The second is if one looks at
19 the chronology of these cases -- I am speaking second, but in fact Hammond came
20 first and carriage was granted first -- Dr Houpis had, in a sense, I suppose -- I wouldn't
21 for a moment wish to suggest there was copying going on -- but he had the benefit of
22 seeing what had already been done.

23 THE CHAIR: It is no criticism of anyone. I was just seeking to clarify that really it's
24 the same approach. Obviously articulated in a slightly different way, but it's the same
25 conceptual approach seeking to do the same thing.

26 MR MOSER: As I understand it, the Tribunal specifically took into account the fact

1 that there would be a greater similarity between Pike and Houpis than if the other
2 experts had been chosen. That makes perfect sense --

3 THE CHAIR: Yes.

4 MR MOSER: -- and I think in one of the Trucks cases where there was a carriage
5 dispute, a similar point was made. You can't have a jointly case managed case with
6 two radically different methodologies.

7 THE CHAIR: Yes.

8 MR MOSER: So, with respect, they fit nicely. We don't go into some of the other
9 aspects partly because of course we sit -- my class sits at a different level of the supply
10 chain, so we don't have issues around whether all our members are exactly the same
11 or not. We don't have to deal with some of the aspects that they have to deal with.

12 THE CHAIR: But you are saying -- it's the same point: you would seek -- well, you are
13 putting forward the same method as workable and plausible, seeking to re-run the
14 algorithm, stripping out the alleged discriminatory aspects and, if not, seeking to model
15 it. Therefore, if the objections against Houpis succeed, they succeed against you; and
16 if they fail, they fail against you.

17 MR MOSER: That is almost certainly the case, although I would not want to commit
18 myself unnecessarily. But yes, we would be in serious trouble if the objections
19 succeed against them on this point.

20 THE CHAIR: Yes.

21 MR BANKES: Don't you face an extra challenge, which is you have to address the
22 question of how much of it is passed through to EU, the downstream class?

23 MR MOSER: On the primary methodology no, with respect. Because Dr Pike's
24 primary methodology doesn't depend on pass through. Pass through then comes into
25 the exclusionary parts of the methodology in a way I would probably have to explain
26 tomorrow, but he is looking simply at the difference.

1 Now I can recognise that if there is going to be an element of pass through that's
2 central to Professor Stephan's case, you would probably have to look more at pass
3 through than at this stage it has been necessary. But the primary methodology that
4 Dr Pike has advanced looks only at the price difference for the consumer between the
5 item that won the Buy Box and the item that should have won the Buy Box.

6 Quite what the pass through is for this purpose, with respect, doesn't really matter for
7 the consumer. The consumer has had to pay X plus Y instead of X. If there is also
8 a pass through of some overcharge, then that falls into one of Dr Pike's extra
9 categories, and he's allowed for that.

10 So the way that this works -- and I am conscious of the time -- but the way that it works
11 is illustrated by the way Dr Pike has already proposed to model the impact of the loss
12 of the discriminatory advantage on FBA sellers at Amazon's pricing with his two
13 counterfactual scenarios to evaluate the impact of Amazon's conduct on seller prices.

14 Again, I emphasise that these scenarios -- the constant price, the constant volume
15 scenario -- they are at this stage only being used to model aspects of seller behaviour.

16 Dr Pike says that he will be able to determine who would in fact have won the Buy Box

17 So again, pass-on not immediately obvious.

18 But it may help to leave the Tribunal with a pictorial illustration of the modelling, which
19 is in Pike 1 at figure 5. That's at hearing bundle C1, tab 15, page 368. Also
20 paragraph 361:

21 "The Buy Box election is the primary driver of sales. It is difficult at this stage to identify
22 ...(Reading to the words)... have the option of either holding prices constant, winning
23 the Buy Box less often in the counterfactual, losing sales volume; or, two, offer lower
24 prices in order to maintain the same probability of winning the Buy Box and retaining
25 the same sales volume."

26 Then a simple but I submit compelling illustration of what would have happened in the

1 | counterfactual if they had held sales volume constant, or aimed to have them constant,
2 | the price would have gone down for my clients' class; or if they held the prices constant
3 | then the opportunity will have gone to the winner of Buy Box, also at a lower price.
4 | And whatever the pass-on that may have been going on behind the scenes, for the
5 | primary methodology that doesn't matter.

6 | THE CHAIR: Is paragraph 362 correct when it says:

7 | "In either event, customers buying from these FBA sellers would have paid less
8 | overall"?

9 | Isn't it customers buying from the Buy Box, the featured offer sellers --

10 | MR MOSER: Yes.

11 | THE CHAIR: -- not the FBA sellers, isn't it? Because in the second one the FBA seller
12 | is still £12. That's the point. It is someone else who reduces the price. Is that a slip?

13 | MR MOSER: It probably is, but I --

14 | THE CHAIR: I don't know if Dr Pike is here and he can clarify that?

15 | MR MOSER: These Buy Box sellers paid lesser --

16 | THE CHAIR: That's what it seems to me: from the seller in the Buy Box would have
17 | paid less.

18 | MR MOSER: Dr Pike is nodding and I am grateful.

19 | THE CHAIR: Yes.

20 | MR MOSER: On that very helpful point, I wonder whether this is a convenient
21 | moment? Because on one view I don't have to say very much more about the primary
22 | methodology, although I do want to come to some of the things that are set against
23 | me, and then move on to the remaining methodology, including FBA overcharge if
24 | there is one.

25 | MR DERBYSHIRE: Can I just say I would like to come back to pass on tomorrow
26 | morning, and whether or not this methodology, the one we are looking at now, has no

1 pass-on consequences. Because you are comparing the price that did win the Buy
2 Box with an alternative, in this case £10, which may actually include some additional
3 costs that may or may not have been passed on to the consumer.

4 MR MOSER: I can say immediately, so you don't have to hang on in anticipation all
5 night, that you are absolutely right, with respect. All I am saying is that for our basic
6 case, it doesn't matter to us.

7 MR DERBYSHIRE: Okay.

8 MR MOSER: It matters to them, it doesn't matter to us because it includes (inaudible)
9 in. I think that's probably a sufficient answer for now.

10 THE CHAIR: There is no reason, is there, that anyone considers we should sit at
11 10 o'clock? It is 10.30. We are on time?

12 MR MOSER: I believe so.

13 THE CHAIR: Mr Turner?

14 MR TURNER: We should be all right.

15 THE CHAIR: Yes, we are not finishing tomorrow in any event so if necessary we can
16 sit at 10.00 on Thursday.

17 Yes, so 10.30 tomorrow.

18 **(4.37 pm)**

19 **(The hearing adjourned until 10.30 am,**

20 **Wednesday, 7 May 2025)**

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