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IN THE COMPETITION
APPEAL
TRIBUNAL

CaseNo: 1640/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 14th October 2025

Before:

The Honourable Mr Justice Hildyard
Paul Lomas
John Davies

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Vicki Shotbolt Class Representative

Proposed Class Representative

And

Valve Corporation

Proposed Defendant

A P P E A R A N C E S

Julian Gregory & Will Perry on behalf of Vicki Shotbolt Class Representative (Instructed by
Milberg London LLP)

Brian Kennelly KC, Tom Coates & Sean Butler on behalf of Valve Corporation (Instructed
by RPC)

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Tuesday, 14 October 2025

(10.30 am)

MR JUSTICE HILDYARD: One or two starting formalities. First, the live stream. Some of you are joining us live stream on our website, so I must start, therefore, with the customary warning: an official recording is being made and an authorised transcript is being produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of these proceedings and breach of that provision is punishable as contempt of court.

Secondly, Mr Gregory, I understand you are feeling a bit ropery this morning and by all means, if it would help you to make submissions to us sitting down, feel free to do so and if, for whatever reason, you feel ropier still, you must let us know.

MR GREGORY: I am grateful, sir.

MR JUSTICE HILDYARD: Thirdly, and this is a matter which I should probably have raised with you all but I want to raise now, which is I have a judicial assistant, Alice Mingay who is there and who has worked for Freshfields and is now promised to us, I don't know if it's sort of lend lease, or what, for a year. She has signed various confidentiality undertakings, both in respect of matters she learns at the Rolls Building but also as regards any return to Freshfields, she is not obliged, in fact cannot, share with them any confidential information. It is only right I should draw this to your attention. If anyone had any objection, I would have to hear those carefully.

But she is a great assistance to me. I don't know what my role is, really, as the sort of adaptable amateur, so you will have to go slowly, occasionally, but I have the extremely experienced others on the tribunal and I look forward very much to your presentations.

MR GREGORY: Members of the tribunal, I, along with Mr Perry represent the PCR in these proceedings, Ms Shotbolt. Mr Kennelly, Mr Coates and Mr Butler represent

1 Valve, the proposed defendant.

2 Housekeeping: you should have got a set of bundles, a core bundle with pleadings
3 and expert reports. Bundle A has witness statements and exhibits, bundle B has
4 correspondence, bundle C is the authorities bundle -- and the confidential versions of
5 these bundles have the confidential material marked up in yellow highlighting.

6 On timing, I hope that it may be possible to address all the points that have been raised
7 by Valve today without going into tomorrow. I hope to have sat down some time
8 around about lunchtime, by which point I will have introduced the case and the claim
9 form, as well as made the PCR submissions on the point. We will need to see how
10 we go. I am conscious of your indication now and also at the first CMC, that you are
11 less experienced in competition matters than your colleagues, so I don't want to go
12 too quickly. So if you feel that I am labouring a basic point, do say and I will move
13 along swiftly.

14 MR JUSTICE HILDYARD: Thank you very much. We will, as ever, have a break
15 mid-morning for the transcript writers.

16
17 Submissions by MR GREGORY

18 MR GREGORY: As you know, this is an application for these collective proceedings
19 to be certified. We say that all of the certification requirements are satisfied, for the
20 reasons set out in part 3 of the claim form. Unless you want me to address you on
21 any other issues, I am proposing to focus my submissions on the points that have
22 been raised by Valve. In its response, Valve initially raised five objections. Two of
23 those have been resolved. The first related to the definition of the class period within
24 the definition of the proposed class. That has been resolved by amendments to the
25 claim form that are agreed as between the parties and are set out at tab 2 of the core
26 bundle. Given that that issue has been resolved, I was not intending to take you

1 through that issue, or the background.

2 The other category of issues which has been resolved as between the parties
3 concerned the PCR's funding arrangements. The funding developments were
4 summarised in a letter which my solicitors sent to the tribunal dated 9 October. Again,
5 unless you have any additional concerns relating to the funding arrangements, I was
6 not planning to address you on those issues.

7 MR JUSTICE HILDYARD: No. You should have received a letter confirming we didn't
8 require you to provide any additional support from costs counsel.

9 MR GREGORY: Turning now to the remaining objections to certification, I intend first
10 to show you the key elements of the factual background and the claim form, in
11 particular those elements that are relevant to the points that have been raised.
12 Second, to address you on the applicable legal principles and then, third, to make
13 submissions on each of Valve's three grounds opposing certification. What you will
14 see is that part of the answer to Valve's certification challenges lies in the PCR's
15 pleaded case and there has been no application to strike out any elements of the case.
16 Its contention that the PCR has not identified a viable way of proving their case is
17 inconsistent with the case law and what is required to prove competition law
18 infringements, such as those alleged in these proceedings.

19 Once I have taken you through the pleaded case in the case law, I hope to be able to
20 take you through Valve's three grounds fairly quickly.

21 Starting with some factual background, it may be that the playing of computer games
22 is slightly less prevalent amongst members of the tribunal, members of the bar and
23 professional economists, but Ofcom data indicates that across the UK population as
24 a whole, 6 out of 10 adults play video games and participation is even higher among
25 teenagers. As a privately owned company, Valve did not disclose its revenues but
26 based on publicly available information, Mr Harman has estimated that Valve's

1 worldwide income exceeds \$3 billion annually and regardless of the precise figure, PC
2 gaming is big business. It has also moved on quite a lot from what it was. When
3 I were a lad, if I wanted to buy a computer game, I would go down and buy a hard
4 copy disc or CD-ROM for around £10 to £15 from the bricks and mortar store, although
5 I had not yet come to refer to them as such, and then I would take it home and play it
6 for as long as I liked, without making any further purchases. All that has changed.
7 These days, only around 1 per cent of games are distributed through physical media.
8 Overwhelmingly they are downloaded online, in particular from distribution platforms
9 such as Steam and the way in which PC games are monetised has also changed.
10 While there are still some games where the only payment is for the initial purchase,
11 these days the majority of spending on games is for add-on content. Add-ons are
12 purchased after the initial acquisition of the game. Add-on content takes two forms:
13 one, downloadable content, DLC. That is purchased out of game and can take the
14 form of expansion packs that enlarge or enhance the base game, such as additional
15 areas or characters; two, in-game purchases, made through micro-transactions during
16 game play. These can be things that help you do better in a game, such as additional
17 weapons or virtual currency or they can enhance the look, such as skins which change
18 the appearance of a character on screen.
19 For 'freemium' games, all the revenue is generated this way and the initial base game
20 is free to download.
21 Turning to the Steam platform, Valve started out as a game developer and Steam was
22 initially launched to allow users to update Valve produced games. From 2005, Valve
23 started to distribute games on behalf of other publishers in return for a 30 percent
24 commission. The same 30 per cent charges were subsequently adopted by other
25 companies, including Apple for its App Store and Google for the Play Store (charges
26 which are the subject of unfair pricing claims in other proceedings currently before the

1 tribunal).

2 Steam was the first modern PC game distribution platform and remains the leading
3 platform today by some distance. It offers more than 74,000 listed games, whereas
4 its two main rivals, the Epic games store and the Microsoft store, each have less than
5 3,000. We will need to see what the evidence says about when Valve first
6 implemented platform parity obligations, PPOs, which prohibit publishers from selling
7 games more cheaply through other distribution channels, as well as how it enforces
8 them and over what products. But it is quite possible that we will be in a situation
9 where, over the entire period for which data is available from this market, the PC game
10 market has been shaped by both Valve's dominance and the allegedly abusive
11 conduct - the PPOs and its high commission charges. And that is relevant to Valve's
12 second ground for opposing certification, concerning the adequacy of Mr Harman's
13 proposed methodology for assessing the effects of the PPOs.

14 Turning to the conduct that is the focus of the claim, I would be grateful if you could
15 turn to core bundle, tab 1 at page 22. (Pause).

16 Paragraph 53 introduces the defined term of "Commission Charges". They are
17 defined as the 30 per cent charge, which existed from 2005 to November 2018, and
18 then the tiered structure, which has existed since then, under which lower rates are
19 paid when games generate large amounts of revenue.

20 As I will show you in a few moments, the PCR's unfair pricing claim is that those
21 commission charges, considered in general terms, are excessive and unfair.

22 Based on its skeleton, Valve seems to accept that the tiered structure produces
23 an average commission rate of around 27 per cent, but Valve says it is lower if you
24 adjust for Steam keys.

25 Turning to pricing, paragraph 56 on page 23 notes that:

26 Under the contractual documentation, publishers are in principle free to set their own

1 | prices but prices are only implemented on Steam once they have been approved by
2 | Valve.

3 | I would be grateful if you would turn over to page 24, paragraph 57:

4 | This review and approval process gives Valve the opportunity to enforce its PPOs.

5 | And then you have a section summarising the PPOs.

6 | Multi-channel products, games and add-on content, are products that are sold both on
7 | Steam and through other distribution channels. The PPOs only apply directly to
8 | multi-channel products, because if a product is sold exclusively on Steam, there is no
9 | requirement for parity.

10 | On page 25, paragraph 60 and following explains that there is an express contractual
11 | PPO relating to products distributed using Steam keys. You will have gathered now
12 | what Steam keys are: they are product codes that Valve issues to publishers and
13 | publishers can then distribute to users, whether directly or on retail websites, and
14 | users can then redeem the code on Steam which allows them to download the game
15 | and start playing it. In the evidence served alongside its response, Valve explained
16 | that it does not get any commission on Steam key sales. Although, as I have just
17 | noted, it may then earn commission on add-on content subsequently purchased for
18 | the game.

19 | You can see from the terms that the Steam keys PPO is a wide, rather than a narrow,
20 | PPO. That is because it prohibits publishers from selling products more cheaply
21 | through any other distribution channel, including rival distribution platforms, as well as
22 | on publishers' own websites. I would be grateful if you could turn to page 27.

23 | You can see that paragraph 65 alleges that although the express contractual wide
24 | PPO applies only to Steam key sales, we allege that Valve in fact applies the PPO
25 | more generally, i.e. to products that it distributed other than using Steam keys.

26 | Whether, and the extent to which that is the case, will be a matter for evidence in due

1 course. It is a merits issue. However, paragraph 66 notes that there is some limited
2 evidence about this in the public domain from proceedings in the US in which similar
3 allegations have been made. I would be grateful if you could turn ahead towards the
4 back of the claim form at page 115 -- in fact, it is the final page of the tab.

5 Annex 1 sets out some of the evidence referred to in the plaintiff's complaint in the US
6 proceedings, produced in part on the basis of disclosure. I am not going to ask you to
7 read all of it now but could you please read paragraphs 1, 6 and 7.

8 (Pause) In short, evidence has been disclosed in the US proceedings suggesting that
9 Valve checks what prices publishers are selling products through other distribution
10 channels and if they are being sold for a lower price on Steam, tells the publisher that
11 they have to increase the price to achieve parity and also that Valve enforces the PPO
12 by threatening to delist publishers who do not comply.

13 I would be grateful if you could turn back to page 29 in the tab.

14 Under the heading "The Content PPO", there is a reference to the fact that there are
15 express contractual terms that prohibit publishers from selling multi-channel products
16 through other distribution channels earlier than they were available on Steam, or with
17 different content.

18 Pausing there, as a general matter, you can see why a company would want to be
19 able to say that customers could buy products on the best terms from them. For many
20 years John Lewis marketed itself on the basis of its well known "never knowingly
21 undersold" promise. The problem is that when such terms are imposed by an
22 undertaking with market power that many suppliers feel that they have to deal with,
23 such terms inhibit the ability of rivals to compete. If a smaller company cannot attract
24 customers by saying "buy from us because we will sell you the product more cheaply
25 or on better terms than the market leader", it will struggle to build that market share
26 and the leading company will be insulated from competition.

1 Returning to the claim form, the tying and anti-steering arrangements that are the
2 subject of the second abuse claim are discussed in paragraph 75 onwards. That
3 second abuse is not the focus of any of Valve's certification objections but in short,
4 Valve's written contractual terms say that games distributed via Steam cannot contain
5 any functionality that would allow users to buy add-on content other than from Steam.
6 So, for example, a game cannot enable gamers to purchase add-on content from the
7 publishers' own websites.

8 If you turn to page 31, there is a section detailing market developments. Essentially,
9 several large and well-resourced companies have sought to launch distribution
10 platforms to compete with Steam but have had limited success and have subsequently
11 exited the market. On page 33, paragraph 83(b) sets out some public comments from
12 the CEO of Epic Games, whose distribution platform is still operating. He refers to
13 Steam having "veto power" over prices, a reference to the point that we just discussed.
14 The PPOs prevent rival platforms from competing by offering games more cheaply
15 than they are available on Steam and he says that the only way in which a dominant
16 store can be challenged is through exclusives, paying publishers so that they agree to
17 sell their game exclusively on Epic and not also through Steam. It has been reported
18 that Epic has spent hundreds of millions of pounds doing just that. Page 34 and
19 following briefly summarises the *In re Valve* litigation in the US, in which similar claims
20 have been made regarding PPOs.

21 There is then a section summarising the PCR's preliminary case on market definition
22 and dominance, in respect of which no certification points have been taken. I would
23 be grateful if you could turn ahead to page 48, a section which discusses the legal
24 framework relating to PPOs.

25 PPOs are a form of arrangement between two companies. As a result, they can be
26 analysed under the competition provisions relating to anti-competitive agreements, the

Chapter I prohibition in the UK and Article 101 in the EU, as well as where they were imposed by a dominant undertaking, the provisions relating to abuse of dominance, the Chapter II prohibition and Article 102. The present claim is brought under the latter provisions but some of the relevant guidance that has been issued is in relation to block exemptions under the former provisions relating to anti-competitive agreements. The legal context is that if you apply the different sets of provisions to arrangements entered into by a dominant undertaking, you should get the same outcome and that was made very clear by the Court of Justice in its Super League judgment which for your note, is cited at footnote 131 of the claim form.

I am showing you some of the guidance because it is relevant to some of Valve's second ground for resisting certification . It is said that the PCR does not have an adequate methodology for proving that the PPOs have an effect on prices but the legislation and guidance make clear that wide PPOs entered into by companies with market power will generally be regarded as serious restrictions of competition, in part because basic economic theory and also past experience suggests they will inhibit competition and allow incumbents to charge higher prices. But yes, for the purposes of our case on causation, we will have to prove that it is likely that the PPOs had an effect on prices. But Lord Hoffmann famously stated that:

"Some things are inherently more likely than others. It would need more cogent evidence to satisfy one that the creature seen walking in Regent's Park was more likely than not to have been a lioness, than be satisfied to the same standard or probability that it was an Alsatian."

When it comes to proving that the Valve PPO has had an effect on prices, I say that we would be in dog in the park territory, not lion in the park. Both at UK and EU level, there were block exemptions that exempt certain categories of vertical agreement that are generally regarded, based on past experience of competition regulators, as being

1 procompetitive, as long as the relevant companies do not have a market share above
2 30 per cent. But the block exemptions specify they do not apply to certain types of
3 agreement that are not generally regarded as pro-competitive. There are two lists,
4 they used to be called the grey list and the black list, they are now called excluded and
5 hard core restrictions. If an agreement contains an excluded restriction, the block
6 exemption cannot apply to that particular provision, but it can still apply to the rest of
7 the agreement, so long as the provision is severable. If the agreement contains a hard
8 core restriction, the application of the block exemption is removed from the agreement
9 as a whole because hard core restrictions are regarded as being particularly harmful
10 to competition.

11 In the EU block exemption, wide PPOs are an excluded restriction. In the UK block
12 exemption, under the Competition Act 1998 (Vertical Agreements Block Exemption)
13 Order 2022, often referred to as the VABEO, wide PPOs are a hard core restriction.
14 Just for your notes, I'm not going to take you to it, VABEO itself is at tab 31 of the
15 authorities bundle and the relevant provision is section 82(f) on page 2123.

16 Back in the claim form, I would be grateful if you could turn to page 51. At the top of
17 the page, please, read subparagraph (e).

18 So the government took a different approach because it was concerned, based on the
19 CMA's experience, that wide PPOs soften the incentive of rival online platforms to
20 compete on price. The next sub-paragraph refers to the guidance on the VABEO
21 issued by the CMA, the UK competition authority. I would be grateful if you could turn
22 that up. It is in the authorities bundle at tab 34, page 2158.

23 MR JUSTICE HILDYARD: Which bundle, sorry?

24 MR GREGORY: Authorities bundle, tab 34.

25 MR JUSTICE HILDYARD: Yes.

26 MR GREGORY: If you could turn ahead to page 2210, and then please read

1 paragraphs 8.3 to 8.6. (Pause)

2 MR JUSTICE HILDYARD: Sorry, page reference was?

3 MR GREGORY: The page reference is 2210. (Pause)

4 Three points. One, hard core restrictions do not necessarily but will generally restrict
5 competition by object for the purposes of the Chapter I prohibition, so it is not
6 necessary to establish their effects for the purpose of that provision.

7 Two, it is presumed that they generally result in harm to competition and, three, they
8 are likely to restrict competition but are unlikely to satisfy the criteria for exemption.

9 In the same document, I would be grateful if you could turn forward to page 2236. And
10 please read paragraphs 8.82 to 8.88. (Pause).

11 Five points to highlight. Paragraph 8.84, wide retail parity obligations are more likely
12 than other types of parity obligations to produce anti-competitive effects. 8.85, they
13 prevent product suppliers from offering lower prices and 8.86, the intermediary that
14 benefits can increase the commission it charges without the risk of being undercut
15 on price and the overall effect is to reduce the competitive pressure on the commission
16 rate. 8.87, wide retail PPOs reduce the abilities of competitors to enter and expand.

17 When we come to Valve's arguments about whether the PCR has an adequate
18 methodology to prove that the PPOs have an effect on prices, that is the context.

19 I would be grateful if you go back to the core bundle and the claim form at tab 1 and
20 turn to page 56 within it.

21 This is discussing, again, PPOs which is defined to mean the application of the PPO
22 to the sale of the initial base game, as opposed to add-on content.

23 At paragraph 123, you will see:

24 "The existence of the Game PPO, its scope and terms and/or the way in which it is
25 enforced by Valve - and also its effectiveness, in terms of its impact on pricing - will be
26 a matter for evidence in due course, including disclosure from Valve."

1 The subparagraphs then mention the limited evidence that is publicly available prior
2 to disclosure: (i) the express Steam keys PPO, (ii) the annex 1 evidence from the US
3 proceedings which suggest it is applied more widely and (iii) the fact that Epic's CEO
4 says that Valve applies the PPO more widely. I would be grateful if you could now
5 read subparagraphs on page 57, subparagraph (d) and then over the page,
6 subparagraph (e) and also the colourful charts. (Pause).

7 We know that Epic's commission rate is 12 per cent and that Valve's blended
8 commission rate is somewhere around 27 per cent. That is subject to Steam keys
9 which Valve says vary by publisher but Mr Harman has found there are patterns for
10 numerous games, including non-Steam key sales games. The full price of the game
11 is around £55 or £60 but it is regularly discounted and the discounted price gets lower
12 over time, perhaps because the game becomes less novel but even though there are
13 numerous price changes, the publisher never sets a lower price on Epic than on
14 Steam. This is despite the fact that the publisher's distribution costs are lower on Epic
15 because of the lower commission rates. Mr Harman says that he would not expect to
16 see this pricing pattern if a PPO were not being enforced. In non-technical terms, it
17 just looks very odd. It looks very much like it is being driven by a wide PPO.
18 Specifically, it looks like the PPO is preventing the publisher from setting a lower price
19 on Epic, as you would expect, given that it has lower distribution costs there.

20 Mr Harman has already found this pattern for 33 games. I will show you where in his
21 first reports he sets them out a little later and in the merits phase, he intends to expand
22 this type of analysis. If he finds more patterns of this sort, we say that will provide
23 strong evidence that Valve is enforcing a wide PPO and that the PPO is preventing
24 publishers from setting lower, cost effective prices, when selling multi-channel games
25 through other distribution channels. Before leaving PPOs, I would be grateful if you
26 could turn forward to page 90 in the claim form.

1 This is a section summarising the PCR's proposed methodology for establishing the
2 alleged abuses and I would be grateful if you could read paragraphs 201 and 202.

3 As you would fully expect, in addition to the pricing pattern analysis, it is reasonable
4 to suppose that disclosure from Valve will shed light on whether the PPOs had the
5 effect of increasing product prices. There may well be, for example, more
6 communications along the lines of those set out at annex 1, where a publisher seeks
7 Valve's permission for a particular price on Steam and Valve explains it will only
8 approve the price if the lower price is not set elsewhere.

9 If Valve is operating a PPO beyond the express Steam keys PPO, it is reasonable to
10 suppose there will be internal Valve documents discussing the rationale for that policy,
11 which may expressly or implicitly assume that absent a PPO, Valve would be likely to
12 be undercut on price, absent other distribution channels.

13 Turn back in the claim form to page 69. We are now turning to the unfair pricing claim.

14 I would be grateful if you could please read the very short and succinct paragraph 148.

15 That is how the unfair pricing claim is put. It is said that the commission charges
16 defined at paragraph 52, which I showed you a few moments ago, are unfair and
17 abusive, considered in general terms. It is not said that Valve has committed an abuse
18 by charging unfairly high commission rates to individual publishers or on individual
19 games. That is just not the PCR's pleaded case. If you like, it is pleaded on a top
20 down, rather than a bottom up basis, and Valve has not applied to strike out the unfair
21 pricing claim pleaded on that basis.

22 If it had made a strike-out application, it would have failed. Because there is no single
23 way to prove an unfair pricing abuse and it is perfectly possible to establish it through
24 an aggregate analysis. Please turn over to page 70, which summarises the legal
25 framework for unfair pricing, and read from paragraph 151 down to the bottom of
26 page 70(vi). (Pause).

1 Flynn Pfizer concerns an appeal from a CMA infringement decision, that the principles
2 apply equally to claimants in private competition law actions. For now, with Valve's
3 Steam key objections in mind, I would just ask you to note that the Court of Appeal did
4 not state that the only way to prove an unfair pricing claim and to establish liability is
5 to prove that a price is excessive on a customer by customer or sale by sale basis.
6 On the contrary, it emphasised that there is no single way to establish liability, and in
7 relation to the unfairness limb, there is no fixed list of categories of evidence relating
8 to unfairness.

9 As to the PCR's proposed approach, please turn to page 72. At paragraph 56, you
10 will see the first two sentences:

11 "At present, the PCR does not have access to Valve's data relating to its costs and
12 revenues associated with the Steam platform. As a result, [at certain paragraphs of
13 his report] Mr Harman sets out his proposed methodology for determining whether
14 Valve's commission charges are excessive and unfair. See paragraph 204 below."

15 I would be grateful if you could turn forward and look at that. It is at page 90 of the
16 bundle.

17 Paragraph 204 summarises the PCR's proposed methodology for establishing the
18 unfair pricing abuse and I would be grateful if you could read it. (Pause).

19 Consistent with the way in which the abuse is put, in terms of the relationship between
20 Valve's commission, revenues, and costs, the PCR has proposed considering these
21 at an aggregate level. There is no suggestion that Mr Harman will consider the
22 relationship between revenues and costs at the level of an individual publisher or
23 game. Quite apart from the fact that that would be unworkable, it would be inconsistent
24 with how the unfair pricing is put in the claim form.

25 The PCR's proposed approach is consistent with the standard approach to unfair
26 pricing claims under United Brands and the Court of Appeal judgment in Flynn Pfizer.

1 Limb 1 considers whether the price is excessive and limb 2 considers whether it is
2 unfair.

3 In relation to limb 1, the PCR's pleaded case is that she will assess whether the
4 commission charges are unfair; through "a comparison of Steam's revenues with its
5 full economic costs". That reflects Mr Harman's first report and the reference, for your
6 note, is to paragraph 7.6.13 at core bundle 11, page 397.

7 What will matter for that assessment is Valve's total revenues from its commission
8 charges. The Steam keys point is therefore irrelevant to that limb. If Valve does not
9 earn any commission from Steam key sales, such sales will not affect its total
10 revenues, is what matters. Valve's average commission rate is relevant to limb 2,
11 which, as is typical in these cases, will here involve a comparison of Valve's
12 commission charges with the rates of comparable products.

13 There is no suggestion at paragraph 204 that Mr Harman intends to undertake that
14 comparison on a disaggregated basis by reference to the charges paid by each and
15 every individual publisher. In a moment I shall come to whether the PCR is required
16 to do that as a matter of law, but that is not what she has proposed.

17 I would be grateful if you could turn back to page 72. You will see that the final
18 sentence at paragraph 156 says:

19 "However, notwithstanding the absence of costs and revenue data at this stage,
20 Mr Harman identifies a number of considerations which indicate that Valve's
21 commission charges are likely to be abusive."

22 So what follows here are simply preliminary indications based on publicly available
23 information. At page 73, at the top of the page, paragraph 159:

24 "As to whether the commission charges are excessive, Mr Harman proposes to
25 compare Steam's revenues with the full economic costs of its game and add-on
26 content distribution activities. Various public information suggests that Valve's

1 | commission charges are likely to be excessive."

2 | There is a reference at paragraph 159(b) to the fact that the CEO of Epic Games has
3 | publicly estimated that the costs of operating a game distribution platform are
4 | equivalent to around 5 to 7 per cent of revenue. At paragraph 160, there is a reference
5 | to Valve's commission charges having an average rate of 27 per cent, but that is
6 | simply noted by way of a preliminary indication based on publicly available evidence.

7 | The last thing I am going to show you in the claim form concerns the PCR's case on
8 | causation and counterfactuals, and I would be grateful if you could turn to page 75.

9 | If you look at the bottom, paragraph 168(a):

10 | "In order to prove their case, competition claimants must establish (a) a breach of
11 | competition law, (b) actionable harm or damage caused by that breach. That means
12 | that the claimants must prove that some damage was caused by the infringement and
13 | the test for causation is on a but for basis."

14 | Over the page on page 76, I would be grateful if you could read subparagraphs (e) to
15 | (f). When we get to Valve's argument that the PCR does not have an adequate
16 | methodology for proving that the PPOs caused the claimant's loss by preventing
17 | discounting, we will need to consider the extent to which its case is consistent with the
18 | principle of effectiveness. And in the next section the PCR summarises how she says
19 | losses are caused in the primary counterfactual in which all of the abusive conduct is
20 | removed.

21 | But also, in counterfactuals in which only the PPO terms are removed or only the unfair
22 | commission rates. In the light of Valve's Steam key arguments, please turn to
23 | page 82, which concerns a counterfactual in which only the unfair commission charges
24 | are removed. I would be grateful if you could read paragraphs 185 to 187. (Pause).

25 | The point to note here is the breadth of the case on causation of loss, and the different
26 | causal mechanisms which are alleged. The class is defined to include people who

1 purchased products, PC games and add-on content from Steam but also off other
2 distribution platforms. The unfair pricing claim is said to have caused loss, in part on
3 the basis that even products sold exclusively through other distribution channels which
4 were not directly affected by the commission charges would have been cheaper in the
5 unfair pricing counterfactual because of market wide effects. Because publishers
6 benchmark the prices of their own games against the prices of products sold on Steam
7 and also, because if the prices of products sold on Steam had been lower, price
8 competition would have been more intense across the market as a whole.

9 In summary, neither the liability nor the causation elements of the PCR's case on unfair
10 pricing is based on saying that the measure of excessiveness in pricing or the measure
11 of loss, is based on the difference between the actual commission rate paid by an
12 individual publisher on a specific game and the commission rate that would have been
13 paid by that individual publisher on that game in the counterfactual.

14 Valve's Steam key objection to certification is that that is the PCR's proposed
15 approach, but it just is not. It does not reflect the pleaded case on abuse, or the
16 pleaded case on causation of loss and such a bottom up approach to establishing
17 liability and causation is not required, as I will show you.

18 That was all the points I was going to make based on the claim form. I now turn to
19 cover the legal principles that will apply.

20 I am going to cover four sets of principles. First, the broad axe which applies to liability
21 as well as to causation of loss; second, the way in which you can establish liability in
22 unfair pricing claims. On that I will show you the Court of Appeal's Flynn Pfizer
23 judgments and also the tribunal's 2024 judgment in Le Patourel. This was the final
24 determination of a collective proceedings claim based on an unfair pricing allegation.

25 Third, how you can establish causation of loss in collective proceedings claims, and
26 the relationship between that and how you prove breach of duty, and four, the

1 principles that govern certification.

2 We will start with the Supreme Court judgment in Merricks, which is relevant to all of
3 those points. That is at the authorities bundle, bundle C, tab 3.

4 The European Commission found that Mastercard's interchange fees were
5 anti-competitive and unlawful. Mr Merricks brought an opt out collective proceedings
6 claim on behalf of all UK consumers who had made purchases from merchants who
7 accepted Mastercards, on the basis that the banks had passed on the inflated
8 interchange fees to merchants who had, in turn, passed them on to consumers through
9 higher prices. The tribunal initially refused certification, on the basis that it would be
10 not satisfied there would be sufficient data at trial reliably to quantify the level of
11 merchant pass on and that Mr Merricks did not propose to distribute aggregate
12 damages in a way that reflected the individual losses suffered by members of the
13 class. The Court of Appeal allowed Mr Merricks' appeal and the Supreme Court
14 rejected Mastercard's further appeal, also finding that the tribunal had been wrong to
15 deny certification on the basis that it did.

16 I would be grateful if you could turn to page 146 and please read from paragraph 45
17 down to the end of the first sentence in paragraph 48, "a counterfactual state of
18 affairs". (Pause).

19 Then when you have finished, I would be grateful if you could turn to page 148 and
20 read paragraph 50. (Pause).

21 The Supreme Court recognised that courts were often in a position where they cannot
22 quantify something with precision, because the necessary evidence is not available.
23 So they just have to do the best they can with the evidence that is available. In its
24 skeleton, Valve seeks to draw a distinction between using the broad axe to quantify
25 damages and where you were concerned with establishing liability, breach of duty, but
26 at paragraph 50, the Supreme Court makes clear that the principle is not limited to

1 estimating damages. The court should not bring the proceedings to an end simply
2 because the necessary evidence to establish the existence of a right is exiguous,
3 difficult to interpret, or of questionable reliability.

4 On page 149, at paragraph 52, the Supreme Court notes that the Commission's
5 practical guide on quantifying harm in competition damages is of the same effect as
6 the broad axe principle and I will take you to that document a little later.

7 At the bottom of the page, I would be grateful if you could please read paragraph 54.
8 (Pause).

9 The broad axe is not in any way watered down in collective proceedings claims.
10 Indeed, when applying rules in collective proceedings claims, you should take into
11 account the purpose of a statutory scheme is to facilitate the vindication of individual
12 rights. While you have the judgment open, it is convenient to see what the Supreme
13 Court said about the basis on which aggregate damages are estimated in such claims.

14 Look at page 151. I would be grateful if you could read paragraph 58. (Pause).

15 In collective proceedings claims, you estimate the level of loss suffered by the class
16 as a whole, without any need separately to assess the loss as suffered by individual
17 claimants.

18 When it comes to distributing those aggregate damages to class members, the only
19 requirement is that it should be done in a way that is fair and reasonable. It is not
20 necessary for distribution to align with the extent of individual losses. Finally, I would
21 be grateful if you could turn to page 155 and read paragraph 74. (Pause).

22 I am now going to turn to the principles governing establishing liability in unfair pricing
23 claims. This is relevant to Valve's first Steam keys objection to certification.

24 It is premised on the assertion that to establish an unfair pricing abuse, it is necessary
25 for the PCR to undertake a disaggregated bottom up analysis, based on the effective
26 commission rate paid by individual publishers or even on individual gains, so as to

1 prove that each and every commission rate is excessive.

2 The problem with that assertion is that it is directly inconsistent with the case law, in
3 the ways in which you can prove liability in such claims. The leading domestic
4 authority is the Court of Appeal judgment in Flynn Pfizer. It is in tab 1 of the authorities
5 bundle, two tabs back from Merricks, if you still have that open.

6 You have already seen its short summary of unfair pricing principles that were set out
7 in the claim form, noting there was no single method to prove unfair pricing but there
8 are a few more important points to bring out.

9 The case concerned unfair pricing in the pharmaceutical sector. The CMA made
10 an infringement finding which was overturned by the tribunal on appeal. The Court of
11 Appeal largely rejected the CMA's appeal but also departed from certain aspects of
12 the tribunal's reasoning. Lord Justice Green and the Chancellor gave separate
13 judgments with consistent reasoning and the third member of the court agreed with
14 both. It is helpful to start with the key paragraphs from the judgment of the Court of
15 Justice in the United Brands case, and I would be grateful if you could turn to page 16
16 and read paragraph 56. (Pause).

17 Then if you could read from paragraph 59 at the bottom of the page to the end of
18 paragraph 63 over the page, at the end of page 17.

19 MR JUSTICE HILDYARD: Say that again, sorry.

20 MR GREGORY: The second passage, starting at paragraph 59, the bottom of that
21 page, to the end of paragraph 63.

22 MR JUSTICE HILDYARD: Yes, thank you very much. Yes. (Pause).

23 MR GREGORY: First, the unfairness approach is merely one possible way of
24 establishing that a price is unfair. Two, that militates strongly against construing the
25 two part test as if it laid down a fixed and definitive methodology and three, note that
26 based on the wording of United Brands, for the purpose of limb 2, you can establish

1 that a price is unfair either in itself, or by reference to comparator products.

2 Lord Justice Green then goes on to consider previous unfair pricing cases. This is
3 going to illustrate there is no single way to prove that a price is unfair. Among other
4 things, a detailed comparison between prices and cost is not always required. One of
5 those authorities was the Athens Airport case and the heading is right at the bottom of
6 page 18 but the first paragraph, paragraph 74, is at the top of page 19.

7 A complaint was made regarding certain charges at Athens Airport and the European
8 Commission rejected the complaint on the basis of the comparison with similar
9 charges at other airports. It did not carry out a costs plus analysis, comparing the level
10 of charges and costs. The complainants appealed on the basis that the Commission
11 had been obliged to do so. The Court of First Instance rejected that argument and the
12 Court of Justice upheld the CFI. I would be grateful if you could read the quotation
13 from the Court of Justice judgment which is just set out below paragraph 74, starting
14 "In accordance with ..." (Pause).

15 And then Lord Justice Green stated, the third sentence of paragraph 75:

16 "The judgment is certainly inconsistent with the proposition that the Commission must
17 always analyse more than one appropriate test. But that is not the same as saying that
18 in an appropriate case, the Commission can ignore exculpatory evidence of another
19 type, if it is prima facie relevant."

20 On the facts, that would be one of the main findings in the Court of Appeal's judgments.
21 The CMA had based its infringement finding exclusively on a comparison between
22 prices and costs. Flynn Pfizer have sought to defend their prices on the basis of
23 comparator based arguments. The Court of Appeal held it is not necessary to
24 undertake a comparator analysis to prove that prices are unfair. In principle, it can be
25 done exclusively through a comparison between prices and costs but if the relevant
26 company argues that its prices are fair by reference to comparators, that argument

1 must be addressed.

2 If you turn to page 20, on paragraph 78 there is a discussion of the Latvian copyright
3 case and you can see at the top this case concerned a reference relating to an
4 allegation that royalties charged by a copyright collecting society were abusive. The
5 collecting society was fined by the competition authority for imposing unfair rates and
6 down a little bit:

7 "This was not a case involving a cost-plus analysis since in cases involving intangible
8 property, such as copyright, it is recognised that such an analysis might be artificial."

9 There was no comparison between prices and cost at all in that case, it was all done
10 through comparators.

11 If you turn to page 25, that very dense paragraph 97 is the list of key points taken from
12 the case law that you have seen already in the claim form.

13 Over the page at page 26, towards the top of the page, there is a heading "The
14 economic literature", which is then discussed in the following paragraphs. At
15 paragraph 102, there is a reference to an OECD paper on excessive pricing in the
16 pharmaceutical sector that was treated by all parties as a fair summary of the current
17 economic thinking.

18 I would be grateful if you could turn to paragraph 27, paragraph 105 and please read
19 from the end of line 6, which starts "In some cases ..." to the end of the paragraph.

20 (Pause).

21 Then right at the bottom of the page, the conclusions from the literature are
22 summarised and I would be grateful if you could read paragraph 107, as well. (Pause).

23 Many different tests might be used and the appropriate test will depend on the
24 availability of evidence and data.

25 Please turn to page 31. The CMA's second ground of appeal was that the tribunal had
26 been wrong to find that the CMA was obliged to determine that prices were unfair by

1 reference to a specific hypothetical price that would have existed in a competitive
2 counterfactual and the Court of Appeal upheld that argument.

3 I would be grateful if you could read paragraphs 122 and 125. There is no need to
4 read the paragraphs in between. (Pause).

5 It is for the person seeking to establish the infringement to choose the benchmark that
6 they want to use to do that. There is no particular approach that they are obliged to
7 use. Specifically, it is not necessary for the excessiveness assessment to be based
8 on a comparison of actual and hypothetical prices, here commission charges. ROS
9 return on sales, (operating profit divided by net sales); ROCE, return on capital
10 employed, (calculated by divided measured earnings by capital employed). They are
11 both measures of profitability. If an analysis shows that a company is earning huge
12 profits, that may be sufficient to show that its prices through which it earns that revenue
13 are excessive and unfair.

14 It is obvious that all of the uncertainties relied on by Valve in relation to Steam key
15 sales, exact price, and the timing of sale and so on, are entirely irrelevant to such
16 measures.

17 One final point from the Chancellor's judgment -- I would be grateful if you could turn
18 to page 53 and read paragraph 244 at the top of the page.

19 The same is true in the context of private enforcement actions. Indeed, requiring
20 a claimant to prove an unfair pricing case from methodology that was so complex and
21 time consuming as to be practically impossible and difficult, would be contrary to the
22 principle of effectiveness.

23 I have now finished with Flynn Pfizer, and I am going to turn to the tribunal's judgment
24 in the Le Patourel proceedings from last year. That is at the authorities bundle tab 24,
25 page 1279.

26 This was an opt out collective proceedings claim on behalf of around 2.3 million

1 customers who had stand-alone contracts for landline telephone services from BT,
2 referred to as stand-alone or fixed voice or SFV services.

3 It was alleged those customers had been made to pay charges for landline services
4 that were unfair and abusive, as well as that BT was dominant.

5 The tribunal ultimately found that the charges were excessive under limb 1 but not
6 unfair under limb 2. And sir, you will be able to see from your hard copy that the
7 judgment is 300-pages long and you will be relieved to know I am not going to take
8 you through it in any detail, I just want to highlight a few key points in relation to liability
9 and breach of duty.

10 You will have seen from Flynn Pfizer that whether or not it is appropriate to use
11 a methodology based on profitability, or prices, depends on the facts of each case,
12 including the availability of data. In Le Patourel, a profitability analysis was not
13 attractive because BT offered a myriad of different telecom services. The parties and
14 the tribunal therefore used a figure representing the price for the relevant services
15 rather than a total revenue figure, and I would be grateful if you could turn to
16 page 1297 and go to the bottom of the page.

17 In paragraph 54 and over the page at 55, the tribunal explains that it, as well as both
18 of the parties, proceeded on the basis that to show that a price was excessive over
19 a competitive benchmark, one had to show a "Significant and persistent excess", and
20 to see what the tribunal concluded that meant on the facts of the case, I would be
21 grateful if you could turn forward to page 1492.

22 MR JUSTICE HILDYARD: Sorry, to where?

23 MR GREGORY: 1492.

24 You will see at the top of the page, paragraph 926:

25 "We consider that any excess would have been significant if it was 20 per cent or more
26 above the competitive benchmark."

1 And then in paragraph 927:

2 "We also concluded the excess was persistent because it applied across the whole
3 period".

4 Pausing there, what if the same approach were adopted in this case. Let us just say
5 purely illustratively and because it is a round number, that the relevant competitive
6 benchmark was a 10 per cent commission charge. On the basis of the 20 per cent Le
7 Patourel threshold, any commission charged above 12 per cent would be considered
8 unfair. And let us just say that of the uncertainties surrounding Steam keys, it was
9 only possible to estimate Valve's effective commission charge as being somewhere in
10 the range of 20 to 25 per cent. Even though you could not estimate Valve's
11 commission charge with precision, you could still be confident that it was abusive
12 because even the lower end of the range would be 8 percentage points above the
13 threshold for abuse.

14 Similarly, the tribunal and the parties in Le Patourel faced a situation with parallels,
15 a situation that Valve said exists in relation to the Steam key sales, given that it says
16 that the effective commission rate varies by publisher.

17 I would be grateful if you could turn back to 1312.

18 Please read paragraphs 120 to 122. (Pause).

19 The following paragraphs note that over time, different line rental prices were offered
20 to different customers and there had been a substantial change in the composition of
21 voice prices and call volumes. As a result, the tribunal concluded at paragraph 126:

22 "This creates a complex factual background to the analysis of market prices and price
23 changes under which it is not simple to identify a definitive price per unit charged by
24 BT or its rivals for the SFV products in question. The parties and the tribunal did not
25 respond to this by seeking to determine whether BT's charges were unfair by reference
26 to the charges paid by each individual user. Instead, they used average figures."

1 Please turn to page 1317.

2 You can see at paragraph 135, towards the bottom of the page:

3 "Line rental and call charges and changes in call volumes are brought together in
4 measuring the total voice revenue received from each customer, the so called average
5 revenue per user, ARPU."

6 If you turn to page 1320, at paragraph 140, the tribunal states that SFV profitability
7 depends on how this flat ARPU compares with the cost of providing these services.

8 Then turn to page 1485. This sets out the tribunal's conclusions on the unfair pricing
9 analysis. Paragraph 898 discusses how the tribunal proposes to determine the
10 relevant costs associated with the SFV services and then over the page, I would be
11 grateful if you could please read paragraphs 899 to 902.

12 For the purpose of assessing the price paid and faced with the position in which the
13 price paid by individual class members varied, the tribunal used an average revenue
14 per user figure and it emphasised that when comparing average prices and costs for
15 the purpose of an excessive pricing analysis such as this, it is impossible to do so by
16 reference to price figures.

17 To so illustrate the latter point, please turn back to page 1435. One of the challenges
18 of the analysis in Le Patourel was that since 2009, BT had not identified the costs
19 associated specifically with the stand-alone fixed voice services. It had instead
20 gathered costs associated with BT consumers, under which BT provided a range of
21 different services. The two parties dealt with that in different ways. The class
22 representative used the 2009 SFV specific costs and then uprated them over the claim
23 period for inflation. BT used the more recent BT consumer figures and then sought to
24 allocate an appropriate proportion to the SFV services, and I would be grateful if you
25 could please read paragraphs 697 to 700. (Pause).

26 Here we are concerned with difficulties in identifying the precise costs associated with

1 the proposed services, rather than the price. The general point is that when
2 undertaking analysis of this type, it is common for courts not to have the actual data
3 needed to identify a price or a cost with precision, such that it has to be estimated and
4 liability thereby established by extrapolating or making assumptions from the data that
5 is available. Consistent with the broad axe principle, this is completely standard in
6 commercial litigation, including competition proceedings.

7 There is no legal rule that says that courts can only make breach of duty findings, such
8 as there has been a competition infringement, if it has actual data that allows
9 development matters to be identified with certainty and precision.

10 Sir, I can see the time. I don't know if that is an appropriate moment to take a short
11 break.

12 MR JUSTICE HILDYARD: Thank you.

13 (11.49 am)

14 (A short break)

15 (12.09 pm)

16 MR JUSTICE HILDYARD: Mr Gregory, before you recommence, and with apologies,
17 for as it were, interrupting your flow, it is really to alert you to three or four questions
18 which we may have for you, bearing in mind on your present timetable, you may finish
19 by the short adjournment.

20 The first is, I think we would like to ask you as to the reason for the constitution of the
21 class by reference to people who were both licensees and payers, if you see what I
22 mean? We need to be satisfied that the class is comprised of people who have
23 actually suffered the loss. You should take it that we have considered in that regard
24 the theory, which is the presumption of advancement that even if the money is derived
25 from, say, the parents, nevertheless the loss will be sustained by the child.

26 So we just wanted to explore with you whether that is the most sensible way of defining

1 the class.

2 The second relates to this, and both this and the next question are in some senses
3 the function of the curiosity of this case, which is the likely preponderance of minor
4 claimants, given their even greater propensity to game and that is whether
5 consideration might be given to the addition to the advisory panel of a senior lawyer,
6 in addition to a costs guru, by way of protecting their interests from a fairly objective
7 point of view.

8 The third, and also as I say, a function of the relevant class, is whether we should be
9 asking for reports from Epiq as to the comprehensiveness of the communications with
10 the relevant stakeholders.

11 In that context, I think we will also be asking, or seeking to set in as part of the process,
12 continuing reporting obligations as regards the rate of burn, and not in terms of making
13 an enquiry into each step of the process but in terms of having a heads up if
14 expectations are being exceeded, in terms of costs expenditure. And we want to
15 discuss what the regularity of that should be or whether it can be tied to the programme
16 of interlocutory applications which will inevitably arise.

17 There is one further question which we're going to consider over the short
18 adjournment, but by way of a warning, in case we decide to raise it with you, there has
19 been a recent authority suggesting that the tribunal should have a record of the steps
20 which were taken to ensure that the funding arrangements are the best available. That
21 may be a matter which only will become really relevant at a subsequent stage but to
22 be candid with you, we just need to look at the judgment in question and the reasoning
23 for it, and we will raise that, giving you proper time to respond.

24 MR GREGORY: Thank you very much, sir. Almost certainly I will take instructions on
25 those points over lunch and respond to those after the lunchtime break, if that's okay.

26 MR JUSTICE HILDYARD: Yes, it is not fair to leave it to reply and it is fairer for you

1 and your team to have a quick think about those before being asked to respond.

2 MR GREGORY: Continuing, the fact that it is possible to determine whether there has
3 been a breach of duty in an unfair pricing claim through an aggregate approach,
4 whether based on total revenues or average prices across a class of consumers, does
5 not create any problems for the causation element of the analysis, because in
6 collective proceedings claims, causation of loss falls to be assessed on an aggregate
7 basis as well.

8 I would be grateful if you could turn to our reply, which is at core bundle-tab 4, and if
9 you go to page 165. If you are there, I would be grateful if you could read paragraphs
10 29 to 31. (Pause).

11 MR JUSTICE HILDYARD: Yes.

12 MR GREGORY: In his skeleton, Mr Kennelly notes that when the Court of Appeal in
13 Gutmann referred to liability, it was referring to causation of some material loss, as
14 opposed to breach of duty. That is correct and we made that clear in the reply. The
15 point is simply that in the collective proceedings claims, establishing breach of duty on
16 a top down basis marries up with the top down approach to determining causation.
17 You don't get in a situation where, if you establish liability on a top down basis, you
18 then potentially have an issue about whether an individual claimant has suffered the
19 loss.

20 The final legal principles topic that I would like to address you on are the certification
21 requirements and I would be grateful if you could turn up our skeleton argument, which
22 if you don't have it separately, I believe is at tab 18 of the core bundle.

23 I would be grateful if you could read paragraph 26, which is a very condensed
24 summary of the certification principles, set out in a little more length at paragraph 10
25 of our reply. (Pause).

26 Note also the point we make at paragraph 27, the recent Hammond & Stephan CPO

1 judgment from July. The tribunal emphasised that intense granular dissection of the
2 methodology is inappropriate at the CPO stage, in part because the experts will not
3 typically be cross-examined. I would be grateful if you could turn up the passage. It
4 is at tab 28 of bundle C, the authorities bundle. And if you could go to page 1825.
5 That is in volume 3, if you are working from the hard copy. Once you are there, if you
6 could read subparagraph 179(1) at the top of the page, "Whereas at trial ..." (Pause).

7 MR JUSTICE HILDYARD: Yes.

8 MR GREGORY: For your note, on the previous page, 1824, there is a helpful
9 summary of the certification principles from the appellate court judgments which
10 covers some of the same ground as our paragraph 26 in our skeleton.

11 My final point on the certification principles is this. If you accept that we have made
12 out a prima facie and articulated a reasonable preliminary methodology, given the
13 limited data available at this stage, but you do have concerns about how certain issues
14 will be addressed at trial, including through what data, then the appropriate course is
15 for you to address those issues through your ongoing case management powers,
16 rather than by refusing certification. And on that, I would be grateful if you could turn
17 to the Court of Appeal judgment in McLaren v MOL. That is at tab 15 of the authorities
18 bundle, volume 3 in the hard copy.

19 This judgment is routinely relied on by defendants and supportive of the submission
20 that the tribunal should refuse certification, as was the case at paragraphs 28 and 29
21 of Valve's response and in many ways that is an odd use of it because it was a case
22 in which the tribunal granted certification and the Court of Appeal rejected the appeal
23 and held that it was right to do so.

24 The facts of that case - the European Commission had found there was a cartel in the
25 market for transporting new cars by sea, so liability was established. Mr McLaren
26 brought a collective proceedings claim on behalf of consumers who had purchased

1 new cars, alleging that the cartel had increased the cost of sea transport for car
2 manufacturers and that those costs had been passed down the distribution chain to
3 consumers in the form of higher delivery charges. There was factual evidence that
4 delivery charges were separately itemised on consumer bills, distinct from the cost of
5 the vehicle and at a high level, Mr McLaren's expert was proposing to determine
6 whether the cartel overcharges had been passed on by looking at changes over time
7 in those specified delivery charges.

8 The defendants' methodological challenge was that delivery charges are not set in
9 a silo, as vehicle and delivery charges were said to be set holistically through overall
10 pricing, so you had to look at both to determine whether there had been any pass on
11 of the overcharge. I would be grateful if you could turn to page 943 and read
12 paragraph 18. (Pause).

13 If the data is not available to implement a methodology, then it will not be
14 an appropriate methodology, even if it might be preferable as a matter of economic
15 theory.

16 Valve's Steam key objection is essentially that the only way to prove that its
17 commission charges are unfair is by calculating individual revenue shares for each
18 publisher or and games, taking into account Steam key sales and that the data
19 required to do that are not available. But if it is right that the data are not available,
20 then that means that it is not an appropriate methodology. And the effective revenue
21 share methodology is Valve's proposed methodology. It is not the PCR's proposed
22 methodology, which is based on determining the limb 1 excessiveness issue by
23 comparing Valve's total revenues to costs and then at limb 2, comparing Valve's
24 commission rates to comparators at some sort of simple aggregate level.

25 Now let us see why the court rejected the defendant's argument that the tribunal
26 should have refused certification.

1 Please turn to page 950.

2 MR JUSTICE HILDYARD: 950.

3 MR GREGORY: Yes, 950 and you can see at paragraph 41, the court notes the
4 Merricks point that if a claim is arguable, it should proceed to trial and the court must
5 do the best it can with the available evidence and then I would be grateful if you could
6 read paragraphs 42 and 43. (Pause).

7 MR JUSTICE HILDYARD: Yes.

8 MR GREGORY: We obviously bear the overall burden of proving that the price is
9 unfair but if the defendant wants to raise an argument, then it bears the burden of
10 making the running on that, at least initially. If Valve wishes to submit that our
11 methodology that we have proposed is insufficient to establish that its commission
12 charges are unfair, because of considerations of variation and the charges paid by
13 individual publishers, then it can do that and we will address it and the tribunal will no
14 doubt consider it as well.

15 We have set out some ways in which that might be done to some extent but that
16 methodology is not our methodology and we are not obliged to run with it. If Valve
17 wants to make it, then it can do so.

18 I would be grateful if you can turn to page 951. At paragraph 48, the Court of Appeal
19 notes that it was clear from the certification arguments what the main methodological
20 issue would be in that case, silo pricing against overall pricing, and I would be grateful
21 if you could please read paragraphs 49 to 53. (Pause).

22 MR JUSTICE HILDYARD: Yes.

23 MR GREGORY: The point I started with, that if we have established a prima facie
24 case but there are some remaining uncertainties about exactly where the data is going
25 to come from, that is something you should respond to not by refusing certification, but
26 throughout the case management.

1 Those are my submissions on the legal principles, so I am now proposing to turn to
2 Valve's three objections to certification.

3 I hope that I will be able to address them fairly concisely, given that I have signposted
4 several of the points along the way.

5 A few higher level points may be made, particularly in relation to the first two grounds
6 for opposing certification based on the proposed methodology. First, as we noted in
7 the reply, in a number of instances Valve's arguments simply ignore the PCR's case
8 set out in the claim form and accompanying documentation.

9 Second, the PCR has had to formulate her preliminary methodology on the basis of
10 limited publicly available information. It is always the case that proposed class
11 representatives have to formulate their claim prior to disclosure and, therefore, on the
12 basis of limited information but it is particularly limited in this case, for two reasons.

13 One, Valve is a private company and so there was less information in the public
14 domain concerning its operations and financial performance and second, unlike like
15 other collective proceedings cases, this is not a case where there have been several
16 lengthy public regulatory decisions or court judgments traversing the same ground.
17 There are some documents in the US proceedings that I pointed to but that is it.

18 Third and relatedly, Valve has chosen to disclose some pieces of information that it
19 considers supports its ground for opposing certification, it has not adopted a cards
20 face up on the table approach. In relation to Steam keys, it has stated, for example,
21 that Valve may have some ad hoc information on Steam key sales it learned incidental
22 to interactions with Steam partners but has chosen not to disclose that information.
23 Instead, emphasising it does not hold systematic or confidential information relating to
24 such sales. A letter on behalf of Valve on 30 September 2025, paragraph 2.8 and the
25 reference, for your notes, is bundle B, tab 34, page 117.

26 Similarly, the annex 1 evidence from the US proceedings that I showed you in the

1 claim form suggests that Valve has evidence of publishers selling products on other
2 distribution channels more cheaply than on Steam and then responding to that but
3 again, none of that evidence has been disclosed at this stage.

4 Valve may not be under a duty to provide such information at this stage but when
5 assessing its certification objections, the tribunal is entitled to take into account there
6 is an opposing certification, on the basis that certain information may not be available,
7 while at the same time being somewhat coy about the information that it does hold.

8 Fourth, while the limited amount of information in the public domain means that in
9 some instances it has been challenging for Mr Harman to put flesh on the bones of
10 some of his methodology, he has identified categories of information and documents
11 that he will seek through disclosure and those are categories that can be reasonably
12 expected to exist.

13 The first objection is the Steam keys objection. Valve asserts that the PCR can only
14 demonstrate the unfair pricing abuse if it could calculate an effective commission rate
15 for each individual publisher, taking into account Steam key sales. And Valve says
16 that cannot be done because Valve does not hold the necessary information and none
17 of the alternative potential sources of information identified by Mr Harman can fill the
18 gap, nor can the gap be filled by assumptions. In essence, this is a two step argument.
19 Step 1, you cannot prove the abuse without calculating the effective commission rates
20 for individual publishers and step 2, the information to do that is not available.

21 The unstated conclusion is that it is therefore not possible to prove that Valve
22 committed an unfair pricing abuse. Mr Kennelly may try to suggest that that is not right
23 and that necessary information might be available from somewhere, it is simply that
24 the PCR has not identified it, but any such possibility seems more theoretical than real.

25 Paragraphs 40 to 43 of Valve's skeleton appear to rule out all obvious potential
26 sources, publicly available information, digital retailers, data aggregated or publishers.

1 The implication is that it is simply not possible to prove that Valve's commission
2 charges are unfair or abusive, which would put Valve beyond the reach of the
3 protections offered by competition law prohibition on abusive pricing. Even if the data
4 were available, Valve's contention that it would be necessary to calculate effective
5 commission rates for individual publishers, and Valve has more than 40,000 of them,
6 would make it impossible, in practice, for anyone, whether a claimant or a regulator,
7 to establish an abuse. There is obviously an extremely strong policy objection to that
8 approach. I showed you the passage at paragraph 244 of the Flynn Pfizer judgment,
9 in which the court stated that it:

10 "...would be undesirable to establish an approach or a methodology that is so complex
11 and time consuming that the CMA has neither the time nor the resources to deal with
12 cases of alleged unfair pricing."

13 And in the context of private litigation, that sort of approach would be contrary to the
14 principle of effectiveness, summarised at paragraph 168(d) to (f) of the claim form.

15 And as stated by the Supreme court in Merricks:

16 "In collective proceedings claims, the tribunal must have regard to the fact that the
17 statutory regime is intended to facilitate, rather than impede, the exercise of private
18 rights."

19 Valve's Steam key arguments in their response, disclose two obvious and significant
20 errors. I would be grateful if you could turn to core bundle-tab 3, page 138.

21 Paragraph 46 at the top of the page, Valve asserted that Mr Harman had simply
22 assumed that Valve receives a revenue share on Steam key sales. That was simply
23 incorrect. There are several statements in the claim form and in Harman 1 that made
24 it clear that Mr Harman required information disclosure from Valve in relation to
25 whether it had a commission on sales and their number and Mr Harman expressly
26 acknowledged that his methodology may need to be refined to take them into account.

1 The various quotes are set out at paragraphs 16 to 18 of the reply, which for your
2 notes is core bundle, tab 4, page 161.

3 The fact that this information was not in the public domain and was only disclosed in
4 the evidence served in Valve's response is an important part of the context.
5 Mr Harman cannot be criticised for not proposing a Steam keys methodology in his
6 initial report and since Valve has disclosed this information, Mr Harman has sought to
7 address the points in Harman 2, noting the ways in which Steam keys could be taken
8 into account. However, as I shall show you in a moment, there remains a substantial
9 amount of potentially relevant information that Valve has yet to disclose. Once that
10 information has been disclosed, Mr Harman will be able to put more flesh on the bones
11 of how he proposes to take Steam keys into account.

12 The second and obvious significant error in Valve's response was it assumed it would
13 be necessary for Mr Harman to take into account Steam key sales for the purposes of
14 its limb 1 excessiveness assessment and you can see that from paragraph 48 of the
15 response.

16 The same error is made at paragraph 35. That is not correct. As you have seen,
17 Mr Harman proposes to undertake the limb 1 assessment through a profitability
18 analysis, based on Valve's total costs and revenues. I showed you paragraph 204 in
19 the claim form which summarised his approach but I would be grateful if you could
20 now turn to the relevant paragraphs in Mr Harman's first report. So core bundle,
21 tab 11, page 397.

22 Tab 11, page 397, and I would be grateful if you could read from paragraph 7.6.10 at
23 the top of the page, and then also paragraph 7.6.13 at the bottom. There is no need
24 to read 11 and 12. (Pause).

25 When you have read those, I would be grateful if you could turn to page 399 and read
26 paragraph 7.6.18.

1 Consistent with the case law, any (Inaudible) analysis of Valve's commission rates are
2 only relevant to the limb 2 fairness analysis.

3 Indeed, you will recall from the Flynn Pfizer judgment that in principle, it is not
4 necessary to undertake a comparator assessment under limb 2 at all, at least as part
5 of someone's positive case. One way to show a price is unfair is to demonstrate that
6 it is unfair "In itself", and Mr Harman is proposing to undertake a comparator analysis
7 under limb 2, but it is a relevant part of the context. It's the limb 1 assessment that
8 indicates that Valve's prices are bringing in a level of revenue that is far in excess of
9 costs that will still be relevant to the limb 2 assessment.

10 Is Valve correct that any comparator analysis must necessarily be based on the
11 effective commission rates for more than 40,000 individual publishers, and a multiple
12 of reasons why the answer is no. You have seen from Flynn Pfizer that there is no
13 single method that must be used to establish an unfair pricing abuse. A regulator or
14 claimant cannot, therefore, be required to adopt any particular method, particularly
15 one that would make it practically impossible to establish the abuse. There is,
16 therefore, no basis for saying that the PCR is obliged to base a comparator analysis
17 on individual publisher commission rates. That is the case even though the effective
18 prices paid by individual publishers may vary, taking into account Steam key sales.
19 That was also the case for the landline customer class members in Le Patourel and
20 the tribunal there based both limbs of its United Brands test on market wide average
21 rates, the ARPU.

22 The number of the individual publisher commission rates would also be unsuited to
23 the nature of the limb 2 assessment that Mr Harman is envisaging. He is proposing
24 to compare Valve's commission charges with the commission charges used by other
25 digital platforms, both in PC games markets and in other analogous digital markets.
26 That analysis is inevitably going to have to be done, at least predominantly, at

1 an aggregate level. We are not going to have individual publisher by publisher
2 commission rate figures, customer by customer figures for comparator services and
3 the analysis will inevitably just have to factor in much higher level considerations, such
4 as the extent to which there are material differences between the services provided
5 under different markets or the market conditions.

6 The fifth point, as I showed you at the outset, it's simply not the PCR's pleaded case
7 that the commission charges are unfair, considered on an individual publisher by
8 publisher basis. The case is put at a much higher level.

9 However, since Valve's response, Mr Harman has provided some indications in his
10 second report about how he might take into account Steam key sales when carrying
11 out the limb assessments. I would be grateful if you could turn that up, next tab, tab 12
12 in the core bundle and please go to page 539.

13 At paragraph 3.3.16, he starts by noting that Valve's experts stated that:

14 It is of fundamental importance to calculate effective revenue share figures for each
15 Steam partner, even though there are more than 40,000 of them

16 He explains why he does not consider that to be appropriate and why an aggregate
17 analysis of Valve's effective commission rate is likely to be relevant. That remains
18 Mr Harman's primary proposed approach, consistent with the PCR's pleaded case.

19 If you turn over the page to 540, Mr Harman notes, however, that "Alternatively,
20 an analysis could be carried out across different groups of Steam partners." I would
21 be grateful if you could read paragraphs 3.3.19 and 3.3.20. And then also 3.3.22.
22 (Pause).

23 You can see at paragraph 3.3.23, it sets out a list of potentially relevant information
24 that might affect how publishers could appropriately be grouped, were an alternative
25 grouping analysis to be carried out. For example, it may be that Steam keys are
26 disproportionately issued for games where the upfront cost is low, relative to

1 subsequent revenues for add-on content for which Valve would earn a commission or
2 there may be evidence that Valve used Steam keys as a form of selective discounting,
3 offering large quantities to publishers who were threatening to sell their games
4 exclusively through other distribution channels.

5 If that were the case, it would not be clear that such a discount should be taken into
6 account, given they could potentially be considered abusive.

7 At paragraph 372 of its skeleton, Valve contends that the suggestion that Steam
8 partners might be grouped in some way is unexplained. No detail is provided and nor
9 has any detail been provided as to how Steam partners' different marketing and sales
10 strategies would be taken into account. That is because Valve has yet to provide any
11 information or disclosure on how and why Steam keys are issued in the way that they
12 are. Nor has it provided any disclosure on the different marketing and sales strategies
13 of different publishers. The lack of specificity at this stage therefore reflects Valve's
14 lack of disclosure.

15 In general terms, it will be possible to consider the most appropriate way to take Steam
16 key sales into account, once Valve has provided some disclosure. But Mr Harman is
17 not simply hoping that something will turn up. In paragraph 3.3.23 of his report he sets
18 out a detailed list of questions in respect of which it would be helpful to have
19 information.

20 But if you assume that the comparator analysis will be at some sort of aggregate level,
21 then it already seems clear that it will be possible to take Steam keys into account in
22 one way or another. Almost all of Valve's Steam key methodological objections are
23 premised on the incorrect assumption that it would be necessary to calculate
24 individual, effective commission rates.

25 As soon as it is accepted that the analysis would be at some sort of aggregate level,
26 the objections fall away. I would be grateful if you could go to our reply again, core

1 bundle tab 4, page 168.

2 I would be grateful if you could please read paragraph 39, which summarises the data
3 on Steam keys that Valve has provided.

4 MR JUSTICE HILDYARD: What is the reference for that, I am so sorry?

5 MR GREGORY: Sorry, core bundle, tab 4, page 168, paragraph 39 at the bottom of
6 page.

7 MR JUSTICE HILDYARD: Thank you very much. (Pause).

8 MR GREGORY: Valve says it does not hold comprehensive information on the prices
9 at which Steam keys are sold and I would be grateful in relation to that, if you could
10 read paragraph 40 on page 169.

11 Mr Harman has identified various potential sources of pricing data which he intends to
12 explore in the merits phase but even if they do not prove workable, then it would be
13 possible to rely on that presumption / assumption.

14 In relation to volumes and timings of Steam key sales, I would be grateful if you could
15 read paragraphs 41 to 45.

16 (Pause).

17 In short, none of these objections are a legitimate basis for refusing certification. You
18 are descending here into the granular detail of Mr Harman's proposed methodology,
19 and it will be possible for him further to develop it in due course, in the light of
20 disclosure. No doubt the available data will not be perfect but perfection is not required
21 under the broad axe. It is perfectly legitimate to address any uncertainties and data
22 limitations through the use of estimates, reasonable assumptions and ranges and it is
23 standard in most litigation.

24 As to whether the use of such estimates and assumptions are likely to preclude any
25 reliable judgment as to whether Valve's effective commission rate is materially in
26 excess of comparator rates, I would be grateful if you could look at the report of Valve's

1 expert, Dr Majumdar -- core bundle, tab 13.

2 Please turn to page 590.

3 At paragraph 71, Dr Majumdar explains he does not think there is a material timing
4 issue when the period of the analysis is the 6-year claim period. If you turn and look
5 at page 591, he explains that he has estimated the volume of Steam key sales based
6 on two approximations. Approximation 1 is based on the number of redemptions and
7 approximation 2 is based on the number of issuances.

8 Please turn to page 593. It is highlighted in yellow because the numbers are
9 confidential. The chart shows his estimation of the effective commission rate for all
10 Steam partners considered in aggregate. You can see that over the claim period,
11 there is a range based on the difference between using redemptions and issuances.

12 Mr Harman disagrees with some of the assumptions used by Dr Majumdar which he
13 has adjusted for. Please turn to his second report, which is at tab 12, page 548.

14 That chart shows his adjusted calculations but the context of both of these charts is
15 that Steam's main rivals both have commission rates of 12 per cent, while Epic's CEO
16 has estimated the cost of operating a PC game platform as being in the region of 5 to
17 7 per cent. In Le Patourel, the tribunal suggested a price that was 20 per cent above
18 a comparator price could be excessive. But even if it was only possible to estimate
19 effective commission rates in a range, it is still plainly possible that it would
20 demonstrate that Valve's rate is excessive, even based on the lower end of the range.

21 Those are my submissions on the Steam keys ground.

22 I am now going to turn to our second ground for opposing certification which relates to
23 the PPOs. Valve says the PCR has not adequately explained how it would assess the
24 effects of the PPOs on the prices paid by class members. In its response, Valve made
25 the sweeping contention that Mr Harman had not formulated any methodology for
26 assessing the impact of the PPOs on the prices and in our reply, we pointed out that

1 that contention ignored several elements of his first report. You will note that
2 Mr Harman's proposed approach is summarised at paragraphs 60 to 61 of the reply
3 and section 4 of Harman 2.

4 Notwithstanding that it is more extensive than Valve originally credited, Valve
5 continues to contend that Mr Harman does not have any empirical method for proving
6 that the PPOs had an effect on prices, saying that he is entirely reliant on economic
7 theory and comparisons with the impact of PPOs in other markets. That is simply not
8 true. Before I get to the empirics, the context is important. As I discussed earlier,
9 when it comes to proving that wide retail PPOs imposed by a dominant undertaking
10 have an effect on prices, we'll be in dog in the park territory. It is expected that such
11 PPOs would have an effect on prices and, therefore, less evidence should be required
12 to prove that that was in fact the case.

13 I showed you the CMA's VABEO guidance which explained why such an effect is
14 expected.

15 Second issue to note is that we are dealing with a market that has been affected over
16 the entire claim period by Valve's dominance and its high commission charges and
17 the effect of the PPOs. As a result, direct evidence of what the counterfactual
18 commission rate would have been is unlikely to be available and I will return to that in
19 a moment.

20 Third, we have not yet had evidence as to the terms of the PPOs, which products they
21 were applied to and how and to what extent they were enforced.

22 That is basic information that is required for the purposes of undertaking an empirical
23 assessment of whether or not those PPOs had an effect on prices and unless and until
24 that material is disclosed, it is difficult to articulate an empirical methodology in detail.

25 Nonetheless, it is reasonable to expect that following disclosure, several pieces of
26 empirical evidence will be available that are relevant to whether or not the PPOs had

1 an actual effect on prices. I showed you the annex 1 to the claim form which notes
2 the evidence to the US proceedings about the communications between Valve and its
3 publishers. In some cases where it threatened to delist them if they did not increase
4 their prices on the other distribution channels. Appendix 1 to Mr Harman's first report
5 summarised the disclosure that he intends to seek in respect of the different issues.
6 I would be grateful if you could turn that up. It is at core bundle, tab 11, page 517.

7 I would be grateful if you could read the paragraph at the top, 1.4.2.

8 If Valve is applying a wide PPO, going beyond Steam key sales, it is to be expected
9 that it will have some internal documentation discussing the impact of its policy on
10 prices. It would be unusual, if we were operating such a policy, without any
11 understanding of its effects, particularly given it would be doing so at considerable
12 legal risk.

13 Four, Mr Harman has already analysed the pricing patterns found on 33 products that
14 were sold on both Steam and through other distribution channels and I have shown
15 you one of those already. There were two points here. First, those analyses provide
16 empirical evidence that the PPOs are affecting prices. Second, to the extent the
17 analysis showed some variation on the impact on prices, that may also be informative.
18 In particular, if Valve's disclosure reveals that it does not enforce its PPOs equally in
19 respect of all products, then the different pricing patterns that you see, depending on
20 the extent to which PPOs are being actively enforced, will also provide evidence of
21 an impact on the price.

22 I would be grateful if you could turn to Mr Harman's first report at tab 11 and the
23 relevant passage is at page 368. And right at the bottom of page, I would be grateful
24 if you could read paragraphs 6.45 to 6.46. (Pause).

25 Then, once you have read that, I would be grateful if you could turn to page 371 and
26 read paragraphs 6.4.9. (Pause).

1 Then page 373. And read paragraphs 6.4.13 and 6.4.14, and you will see the figure
2 at 6.3. (Pause).

3 At paragraph 58 of its skeleton, Valve suggests the fact that Mr Harman finds that
4 Steam key products are often sold at a discount will make it harder to prove that
5 Valve's PPOs are having an effect but the opposite is true. If it turns out that Valve
6 enforces its PPOs less strictly for Steam key sales, for example because they tend to
7 be used for lower value products or products where a greater proportion of revenue is
8 attributable to add-on content, that will provide compelling empirical evidence that the
9 PPOs are having an effect where they are strictly enforced.

10 Sir, I am conscious of the time. I have a few more minutes on PPOs. I don't know if
11 you want me to try and finish that before we break?

12 The final issue is the class issue and I can conveniently pick that up after lunch, in
13 combination with the questions you put to me.

14 MR JUSTICE HILDYARD: Yes, finish the PPOs and then we will come back to class.

15 MR GREGORY: Okay.

16 If we can establish that the PPOs had some effect on prices, the next issue for the
17 purposes of aggregate damages would be the level of prices that would have existed
18 in the counterfactual, absent those PPOs.

19 We will be very clearly in broad axe territory. Given the timing, Mr Harman's second
20 report summarises the approach he proposes to adopt. I will not ask you to read all
21 those paragraphs now. It is summarised at paragraphs 68 and 70 of his second report
22 and for your notes, that is core bundle, tab 4, page 176.

23 Sorry, Mr Perry has just corrected me, that was actually a reference to our reply that
24 collates all the relevant paragraphs together.

25 Mr Harman accepts that for the purpose of estimating what prices would have been in
26 the counterfactual, he will have to rely on economic theory more heavily than in other

1 cases because there is likely to be limited direct evidence available from this particular
2 market on outcomes, absent the PPOs, had they been in place for an extended period
3 of time.

4 For example, even if the pricing analysis shows that prices are lower, where the PPOs
5 are not strictly in force, they may still be higher than they would have been in the
6 counterfactual because prices across the entire market will have been inflated for
7 many years.

8 Valve criticises this reliance on economic theory but it is entirely orthodox in
9 competition law proceedings where there are significant data limitation issues. To
10 make good that submission, I would be grateful if you could turn up the European
11 Commission guide on quantifying harm in competition damages actions and that is at
12 tab 35 of the authorities bundle, which in the hard copy is in volume 4. It's the final tab
13 in volume 4.

14 MR JUSTICE HILDYARD: Say that again, 4?

15 MR GREGORY: Authorities bundle volume 4 in your hard copy. Tab 35.

16 MR JUSTICE HILDYARD: Thank you.

17 MR GREGORY: I would be grateful if you could turn to page 2314.

18 If you could please read paragraphs 16 and 17 at the bottom of the page. (Pause).

19 Those two paragraphs were endorsed by the Supreme Court in Merricks at
20 paragraph 52, in the context of the broad axe analysis. I would be grateful if you could
21 then turn to page 2343 and read paragraph 123. (Pause).

22 MR JUSTICE HILDYARD: Sorry, which paragraph is it?

23 MR GREGORY: 123 -- it should be stressed. (Pause).

24 And then next page is page 2365, and paragraph 200.

25 And 201.

26 And then finally, paragraph 204 on page 2366. And a number of other paragraphs are

1 | cited for your notes at paragraph 105 of the PCR's reply.

2 | There are other situations where it is easier to estimate the likely counterfactual price
3 | using direct empirical evidence from the relevant market. For example, imagine
4 | a hypothetical cartel who might have a 5-year pre-infringement period with clean data,
5 | followed by a 5-year cartel period where prices were increased and then a 5-year
6 | post-infringement period where the prices returned to normal. In that situation, you
7 | can do a before, during and after analysis and you can quantify the impact of the
8 | infringement, using data from the relevant market but we are not in that world. As far
9 | as we are aware, the PPOs have been in place since long before the start of the claim
10 | period. Mr Harman is not proposing to rely exclusively on economic theory but in this
11 | context, some reliance on economic theory is entirely legitimate. Indeed, if the PCR
12 | were precluded from relying on economic theory in this sort of context, the principle of
13 | effectiveness would be undermined. It would be very difficult, if not impossible, for
14 | claimants to prove their losses, in the absence of untainted direct evidence from the
15 | relevant market. The position would be perverse. The longer that a dominant
16 | company had engaged in abusive conduct, the harder it would be for a claimant or
17 | a competition authority to bring a case against them.

18 | The final point on PPOs just relates to the comparators. Given the likely absence of
19 | direct evidence from this market, Mr Harman also proposes to take into account the
20 | extent to which PPOs have had an effect on prices in other digital platform markets
21 | where they have been removed and it has been possible to observe subsequent
22 | changes in price levels.

23 | I would be grateful if you could turn to Mr Harman's second report at tab 12 of the core
24 | bundle, page 553. (Pause).

25 | Paragraph 4.3.3, Mr Harman agrees in principle that it is necessary, when considering
26 | such comparator evidence, to take into account differences in market features that

1 exist across the different markets.

2 MR JUSTICE HILDYARD: Where are you reading, sorry?

3 MR GREGORY: Sorry, 4.3.3. I am just paraphrasing rather than reading directly.

4 MR JUSTICE HILDYARD: Thank you, yes.

5 MR GREGORY: One such possible difference is the extent to which prices were
6 above the competitive level when the PPOs were removed because that will obviously
7 limit the extent of potential price falls. And then I would be grateful if you could turn
8 over the page and read paragraphs 4.3.4 and 4.3.5. (Pause).

9 As long as such differences are taken into account, the use of comparators is standard
10 in competition cases.

11 MR LOMAS: Mr Gregory, I am sorry, perhaps I should have looked at this. On 4.3.4,
12 where there is the reference to the empirical effects analyses on other markets, do
13 you happen to know, you may not, whether the output from those analyses show
14 a great range in outcomes or actually, quite narrowly grouped?

15 MR GREGORY: I can try and look into that over lunch.

16 MR LOMAS: I appreciate that is a PhD level question, not a O-level question.

17 MR GREGORY: It is obviously an interesting source of evidence because the PPOs
18 have been removed --

19 MR LOMAS: Correct.

20 MR GREGORY: The effects of them have been analysed in various academic studies.
21 It would be odd not to have regard to that evidence at all in this sort of context, while
22 you obviously do have to take into account the differences in different markets.

23 You have seen that the use of comparators is actually standard in the United Brands
24 test in the second limb and finally on this, I would be grateful if you could turn to our
25 reply, tab 4 of the core bundle at page 182.

26 And I would be grateful if you could please read paragraph 81. (Pause).

1 The point is simply that the use of comparator analysis as part of the wider analysis is
2 entirely orthodox and those are all my submissions on the PPO and perhaps that is
3 a good time to break and then I can address you finally on the class issues after lunch,
4 both Valve's argument and also the questions that you put to me, sir.

5 MR JUSTICE HILDYARD: Thank you, 2.05.

6 (1.10 pm)

7 (The lunch break)

8 (2.05 pm)

9 MR GREGORY: Before I begin by answering Mr Lomas' question, as to the latest
10 PPO effects, the short answer is we don't think there is a uniform impact from removing
11 the PPO terms, so there is no off the shelf figure that you can take out from the other
12 cases, it requires more the contextual analysis to understand what the different market
13 situations are, but clearly it is relevant evidence that you have removed the PPOs in
14 a number of different markets and --

15 MR LOMAS: I was not expecting a precise figure but the only question is how big is
16 the range and if the range is from 10 per cent to 90 per cent, the evidential value is
17 much less than if it's grouped between, say, 15 per cent and 25.

18 MR GREGORY: I spoke to the economists and I think they think the impact of the
19 market circumstances are quite significant from case to case, but I can't (Inaudible) in
20 isolation (Inaudible).

21 MR LOMAS: We won't spend any more time on it. Thank you.

22 MR GREGORY: The next point I was going to address was, sir, your first point about
23 the class definition and I think with your permission, we might take that away and
24 respond in writing. It is quite a complicated area. We have given some thought to it
25 previously. Ms Shotbolt, the PCR, has obviously got a lot of experience in terms of
26 children and parental activity, in terms of physical space and digital space and

1 spending. The legal question of who is the consumer in these sorts of instances is
2 quite complicated and there is some case law on it. There are also different types of
3 account, so sometimes going to be purchased by someone -- a minor using their own
4 account and sometimes they are purchased using the parent account and Steam at
5 least, also has family accounts and there's a possibility that different people are
6 making the payments. Potentially quite a significant number of minors make the
7 payment themselves, with their own bank cards and so on and obviously, sometimes
8 it will be a parent but for the purposes of class definition, this has potential implications
9 for who has suffered the loss. It also, obviously, has implications for how easy it is for
10 people to prove that they are a class member, given their access to account records
11 and so on.

12 Mr Lomas was nodding vigorously when I talked about who'd suffered the loss. We
13 will take it away and think about it. Was that the tribunal's primary concern about
14 whether they were class members who will not have suffered any loss personally?

15 MR JUSTICE HILDYARD: That was our primary concern, yes.

16 MR GREGORY: Okay. All right, that is helpful.

17 I think what we will do is we will go away, consider it, and then set out our position in
18 writing, both explaining why we took the approach that we took and then if we have
19 any proposals, to come up with an amended class definition. We can put those
20 forward to the tribunal and also we can try and discuss and agree them, if possible,
21 with Valve.

22 MR LOMAS: I think part of the concern was whether the aggregated damages
23 approach would overlook the question of whether the individual defined in your
24 definition to be a claimant, was the one who in law or in fact had suffered the loss that
25 is necessary to complete the cause of action.

26 MR GREGORY: Yes.

1 MR LOMAS: To take a classic example of a nine year old buying something on his or
2 her father's credit card, whether the loss lies, therefore, with the parent and not with
3 the child, and whether that was an issue that if the collective proceedings order were
4 to be granted, was going were to create a problem or not.

5 MR GREGORY: I accept -- that is helpful.

6 What I was then proposing to do was just to address Valve's submissions that it has
7 made on the class issues and then after that, come to address the other questions
8 that you put to me.

9 MR JUSTICE HILDYARD: Okay.

10 MR GREGORY: So Valve's objections to how the class members will be able to prove
11 their entitlement has morphed over time. Its first argument was that the PCR's
12 proposals were reliant on data held by Valve, which it is said may not be adequate in
13 all cases but that was based on a clear misreading of our distribution proposals, as we
14 pointed out in our reply, and then in its skeleton it has replaced that with a new
15 objection based on the proposition that the approach is not workable, as a large
16 number of the class are minors.

17 That, obviously, has some relationship to the point you put to me.

18 I would be grateful to start off, if you just turn to paragraph 66 of Valve's skeleton, and
19 read that. (Pause).

20 So the suggestion that we had pivoted is entirely unjustified. I would be grateful if you
21 could turn up our reply, core bundle, tab 4, page 190.

22 Read paragraph 111. (Pause).

23 Paragraph 112 quotes from a litigation plan which is in quite similar terms.

24 Paragraph 8.6.1 explains that class members will be able to prove their entitlement
25 using their own evidence, transaction histories, email records, bank statements and
26 so on and paragraph 8.6.2 says if possible, it may be possible to rely on Valve's

1 transaction history, in order to reduce the administrative burden on class members
2 and paragraph 113 sets out a similar passage to that.

3 So the PCR was extremely clear that the use of Valve's own records was a possible
4 alternative approach. Her primary position was that the main source of evidence
5 would be transaction histories, in fact evidence produced by the class members
6 themselves.

7 In relation to the substance of the point, Valve says that its minors may be using
8 parents' cards for their purchases, so may not hold the relevant financial records. They
9 may not have retained email records of their purchases and Steam accounts cannot,
10 obviously, be linked to individuals because little personal information is required to set
11 them up.

12 The first point I would like to make is Ms Shotbolt, the PCR, has a huge amount of
13 relevant experience in the area, in terms of how digital transactions are undertaken
14 involving minors. I would be grateful if you turned up her witness statement in volume
15 A, tab 1 and then turn to page 9. I would be grateful if you could read paragraphs 15
16 to 18. (Pause).

17 The second point is Ms Shotbolt is also supported by an advisory panel and I would
18 be grateful if you could turn to page 14, and read paragraph 34. (Pause).

19 Valve's suggestion that minors have less efficient document retention procedures than
20 adults is unevicenced. I suspect that many minors operate the same email retention
21 policy as me, which is to allow all their emails to build up in their inbox, without doing
22 anything about it and then you can search through them when the occasion arises, to
23 find an invoice or a payment receipt.

24 To the extent that a minor does not have access to the relevant document that proves
25 their class membership, they could ask their parents for the relevant records.
26 Similarly, the opposite is true, if the parent made the payment and it is the child who

1 had the account.

2 Note here the NAP, notice of administration plan, envisages targeting parents and
3 guardians, so that they can assist their children with validating claims at the distribution
4 stage and messages targeted at children, conversely, will encourage them to speak
5 with their parents and guardians. I'd be grateful if you could turn to the litigation plan
6 which is in core bundle 5, page 205, and please read paragraph 4.6. (Pause).

7 For your notes, there is similar material in the NAP at paragraph 4.5. The reference
8 is core bundle, tab 6, page 224.

9 Having said that, these issues are obviously interrelated with the point that you have
10 made about class membership. So what we propose to do is go away and consider
11 whether it is appropriate to make any amendments to the class definition, which could
12 also, potentially, have implications for the practicalities at the distribution stage and
13 then we'll write to the tribunal setting out our position and our reasoning for adopting
14 it.

15 MR LOMAS: The thing that was occurring to us was there were two quite separate
16 questions here, whether the arrangements made sufficient provision for minors to be
17 safeguarded and protected and to have access to information and advice.

18 But secondly, it was the question of whether, legally, it was a technical lacuna in the
19 case because the claimants were not the people who suffered the loss and they relate,
20 perhaps, to the same strategy but they are different questions.

21 MR GREGORY: Just as you have raised it, our position on the (Inaudible) type issue
22 is we did consider that (Inaudible) but the position, apart from the reason (Inaudible)
23 Ms Shotbolt's expertise and experience with the advisory panel is we considered that
24 between Ms Shotbolt and the advisory panel we had quite a lot of experience in the
25 relevant sphere and that they would be able to manage the process. I suppose we
26 would like -- having seen the experience, if the tribunal still thinks it would be helpful

1 or appropriate to have a lawyer on the advisory panel to take on that specific role, then
2 that is something we could do.

3 Just a final point on the legal significance of these issues, in particular the practicalities
4 of distribution. We obviously say that whatever the concerns, they are not concerns
5 that are capable of justifying refusing certification in its entirety. That is partly because
6 the appropriate time to consider detailed distribution proposals is if and when the
7 distribution stage is reached. I would be grateful if you could turn to our reply, again
8 core bundle-tab 4, page 189. 189.

9 And please read paragraph 105. (Pause).

10 The effectiveness of the distribution arrangements is simply one issue, one factor that
11 is weighed amongst several others in deciding whether the claim should be certified.
12 Distribution arrangements in any claim are unlikely to be perfect and it is highly unlikely
13 that any member of the class would be compensated. That would be the case here
14 but it is also inevitable in any collective proceedings claim.

15 The issue is whether because of that, it is more suitable for the tribunal to refuse
16 certification and leave the class members to bring individual claims which, obviously,
17 is not going to happen, or to certify it on the basis that a proportion of the class will be
18 compensated which we say is obviously the appropriate course to take, although when
19 we get to the distribution stage, if we get there, we will have a more informed
20 distribution proposal to monitor the things the class members would have had
21 an opportunity to (Inaudible) on them. Evidence may have come out during
22 proceedings which is relevant to how distribution can be performed most effectively
23 and the tribunal will have a supervisory role about what distribution proposals are put
24 in place to try and maximise the distribution to the class members.

25 At this stage, the relevant test is simply whether there is, and I quote: At least
26 a credible suggestion as to how class members will be able to identify themselves for

1 the purposes of distribution. The reference for that is from the CICC 2 judgment, in
2 the authorities bundle, volume 2, tab 23, page 1258 at paragraph 72.

3 So in short, we do not consider that the distribution issues could provide a basis for
4 refusing certification at this stage and I think finally --

5 MR JUSTICE HILDYARD: On that, I think you are obviously right to distinguish
6 between distribution on the one hand and the question whether the class has been
7 constructed in the most efficient way, in terms of capturing the people who are
8 genuinely suffering the loss in legal terms.

9 You are dealing with the second. You are going to think hard about that and provide
10 a suggestion to us on the future issues of distribution and the question of records of
11 actually, who paid and who is a participant, who is a licensee.

12 Is this something which -- information and communication to prompt what may be
13 a counterintuitive record keeping, a shot across the bows, as it were, that they would
14 need that if the matter proceeds?

15 MR GREGORY: Well, obviously, there were notices of the collective (Inaudible)
16 proceedings. People had an opportunity to register for (Inaudible) website and then
17 ongoing communications about proceedings, whether that could be made clear.

18 Yes, I think it has already been made clear.

19 MR JUSTICE HILDYARD: Sometimes it may be more difficult. As I understand it, you
20 don't have to provide your real name, do you, you could be mickey mouse or --

21 MR GREGORY: Well, there are obviously a limited number of cases which have
22 actually reached the distribution stage that from my understanding from the Boundary
23 Fares case, is there are different sort of categories of distribution.

24 In some cases, partly because the level of compensation to a certain class of customer
25 was so low, no evidence needed to be provided at all, it is just people had to sign up
26 on the website and validate their claim and effectively, by a statement of truth,

1 presumably because it would be disproportionate to require someone to go away and
2 gather significant evidence to claim a small sum of money. Where the sums are larger,
3 it may be proportionate to require some proof of bank statements and so on.

4 MR JUSTICE HILDYARD: Yes.

5 MR GREGORY: So I think the other questions you raised are fairly easy for me to tick
6 off.

7 Periodic reports from Epiq on communications with the class members, I think you are
8 asking for a summary of the communications that have gone out and perhaps
9 a summary of the level of engagement with the communications. Is that a summary?

10 MR JUSTICE HILDYARD: Yes.

11 MR GREGORY: That is fine. Costs reporting at CMC, an update on the costs incurred
12 by the PCR. We have seen that in some of the recent CPO judgments (Inaudible),
13 and that is perfectly fine as well.

14 Evidence on the steps taken to ensure the adequacy of the funding arrangements, this
15 obviously came up most noticeably in the Riefa case. The facts of that case were
16 somewhat exceptional. There had been multiple changes to the funding arrangements
17 to take into account the implications of PACCAR and the tribunal was also concerned
18 that it had been provided with misleading evidence in one of its hearings.

19 As a general rule, the level of the funder return is not considered to be a reason for
20 opposing certification. What the tribunal has in mind is, as and when any application
21 is made for funding costs paid, it will be able to consider the appropriateness of the
22 funder return at that stage and our position on that is at that stage, if we reach it, we
23 will be able to provide evidence that summarises the steps that have been taken to
24 ensure that the funding burdens are appropriate.

25 MR JUSTICE HILDYARD: I think we had in mind -- apologies that this is a late
26 entrance, as it were -- but if you go to the Hammond & Stephan judgment, which I think

1 is at file 3, tab 28, and in particular to paragraph 67, you will see there that -- I think it
2 was Mr Justice Peter Roth and his tribunal emphasised two matters as being -- whilst
3 they would wish to see dealt with, and putting it shortly, they wanted to have some
4 assessment, some evidence as to the origin and the development of the funding
5 proposal.

6 Now, we have discussed this amongst us. In future cases, this may very well be
7 a matter which should be provided for at the CMC, so that people have a chance to
8 get their (Inaudible) in order beforehand. To that extent we are slightly anachronistic,
9 slightly out of sync, but we think it would be helpful if you were to provide evidence in
10 this regard so that we have a record now of how the funding agreement came to be
11 developed and the efforts made to ensure that it was competitive.

12 MR GREGORY: Yes, we will obviously do that.

13 So I think unless you have any questions, those are my submissions.

14 MR JUSTICE HILDYARD: Thank you very much indeed.

15 Mr Kennelly.

16
17 Submissions by MR KENNELLY

18 MR KENNELLY: Members of the tribunal, the law applicable to certification and in
19 particular, the need to show a proper methodology, is largely common ground, as you
20 have seen from our skeleton arguments. But to be clear, the bar for the methodology
21 requirement at certification is low but there is still a bar and if I may ask you briefly to
22 go to the PCR's reply, to recall a standard to which they are held, in the core bundle
23 at page 158. So the reply is behind tab 4, page 158 and I am focusing in particular on
24 the plan to produce the necessary information to support the methodology. Because
25 if the tribunal goes to subparagraph (e) -- this is paragraph 10(e) on page 158 -- this
26 is a quote from -- this is a passage which appeared in many of the cases dealing with

1 the Pro-Sys test and this is most recently from Gutmann in the Court of Appeal, and
2 I am focusing in particular on the second half of that paragraph.

3 At the certification stage, all that might be possible is for the class representative to
4 advance a methodology identifying what might be done following disclosure.
5 Consequently, the Pro-Sys test simply refers to some evidence of the availability of
6 the data to which the methodology is to be applied.

7 So the law recognises that the methodology is provisional and may only be able to
8 identify what could be done following disclosure but it is also necessary for the PCR
9 at this stage to adduce some evidence that the necessary information will be available
10 and the methodology could be applied to that at trial.

11 Part of the reason why the methodology need not be perfect now is that this process
12 takes place before disclosure. So it is open to the PCR to say that the gaps will be
13 filled by disclosure at trial, but, again, the onus is on the PCR at this hearing to show
14 you why it is likely that disclosure at trial will fill the gaps.

15 Subparagraph 10(i) on page 160, the same analysis quoting from Gutmann in the
16 Court of Appeal. This is a reference to the broad axe and at the bottom of that
17 subparagraph (i), the tribunal is less demanding when the amount of hard data is
18 limited at the certification stage, in the knowledge that the axe head can be expanded
19 to facilitate the achievement of practical justice at later stages of the litigation.

20 So again, it is for the PCR at this stage to show how you can be confident that the
21 necessary data is likely to emerge at trial.

22 We have two major concerns with the PCR's lack of a blueprint to trial. The first, we
23 say, is absolutely fundamental. It is that there is no adequate method for determining
24 Valve's effective revenue share. This is not forensic nit-picking, what Valve calls its
25 effective revenue share is what the PCR calls Valve's commission: that is the price
26 which the PCR claims is excessive and unfair. The PCR has no plan, no credible plan,

1 for identifying that price.

2 You cannot have an excessive pricing trial when the impugned price cannot be
3 identified.

4 In theory, to be clear, the tribunal could use an average across all Steam partners.
5 But you still will need to estimate the effective revenue share that they are paid, even
6 in aggregate, to work out any consequential harm to any member of the class, the
7 consumers who purchase from these Steam partners.

8 To begin with the basic basis and Mr Harman's evidence, could I ask to turn up the
9 core bundle, Mr Harman's first report, behind tab 11, page 309. We ask the question:
10 what is the market with which we are concerned? And after paragraph 4.1.2, near the
11 top of the page, Mr Harman is looking at the first of his markets on the consumer side,
12 a game market, where consumers purchase games.

13 How do consumers purchase games which they can play on what are called Steam
14 enabled games? Mr Harman deals with that at 299. If you go back in the same report
15 to page 299. Sorry, paragraph 3.7.17. Mr Harman says:

16 In the case of Steam, there are two ways in which a consumer may obtain a Steam
17 enabled game. The first is by purchasing a game directly on the Steam application or
18 by purchasing a product key through a digital store front. [That is like a third party
19 digital shop that sells Steam keys, among other things] and by redeeming the product
20 key by entering the code associated with it into the Steam app and those product keys
21 are known as Steam keys.

22 The question then is what share of the consumer spend on Steam enabled games
23 does Valve -- does Steam get? And for that, Mr Harman deals with this at page 301,
24 paragraph 3.8.4.

25 To be absolutely clear, Mr Harman is also looking at the effective commission rate.
26 Nothing to do with the headline rate but the effective commission rate and you see

1 that at 3.8.4, on page 301, and I would ask the tribunal to look just at the middle of that
2 paragraph, where he is speaking to the significance of the blue line in figure 3.4 below
3 and he says -- he notes first of all, there is a tiered revenue share rate, depending on
4 revenues in respect of the game, but then he says:

5 "The blue line shows the effect of the commissioning rate at each sales value, i.e. total
6 commission paid as a share of total revenue."

7 So the focus is on the effective commission or what we call the revenue share. The
8 total commission as a share, a percentage of total value. That is the revenue earned
9 by the Steam partner's game.

10 So according to the PCR, according to Mr Harman, you need to include all of the
11 revenue earned by the Steam partner's game to work out the effective revenue share
12 or price and there are two ways the Steam partner gets revenue: when its game is
13 sold to a consumer on the Steam store and when the Steam partner sells Steam keys
14 for the game, either to the consumer directly or to a third party.

15 Now, that page that you are looking at, members of the tribunal, page 301, and that
16 figure 3-4, that only covers revenue from the Steam store. That is an estimate of what
17 Mr Harman says is the effective commission rate, looking at the Steam store in
18 isolation. We don't accept 27 per cent is the effective rate but that's what he's looking
19 at there. That is important because Steam partners also earn significant revenues
20 when they sell Steam keys and there is no dispute that Steam partners get these
21 Steam keys from Steam for free and that Steam takes zero revenue share from the
22 sale of Steam keys.

23 So for the sales on the Steam store, Steam's revenue share is between 20 and
24 30 per cent, as you have seen. For sales, using Steam keys, Steam's revenue share
25 is zero.

26 One can see immediately how that changes the effect of revenue share or

1 | commission, as the PCR calls it, and we see that most clearly in Dr Majumdar's report.
2 | This is in the core bundle, page 583. Dr Majumdar is behind tab 12, page 40, please.
3 | MR JUSTICE HILDYARD: Could you give me that reference again.
4 | MR KENNELLY: I am so sorry, page 583, behind tab 13, my mistake, and
5 | paragraph 40.
6 | So if you could read to yourselves paragraph 40, it gives just a basic explanation as
7 | to how this makes a difference to the effective commission or the effective revenue
8 | share, as we call it.
9 | Because of the volume of Steam keys that are given for free by Steam to the Steam
10 | partners, this is highly material to the ultimate revenue share or price which is said to
11 | be abusive in this case. And in terms of its materiality, could I ask you to go to
12 | page 586, the same document, and this is all confidential so I will ask the tribunal
13 | simply to read two paragraphs, to give you a sense of how material these Steam keys
14 | are to the revenue, the Steam partners' revenue and the revenue share.
15 | Paragraph 51, please. Paragraph 51 on page 586. It tells you how many Steam keys
16 | are issued worldwide. When they are actually used to play the game and they are
17 | launched on Steam, they are redeemed and we call those redemptions.
18 | Just paragraph 51, I will come back to other paragraphs later.
19 | Specifically then, by reference to the United Kingdom, over at page 588, please, could
20 | you read paragraph 58. Dr Majumdar has noted that he has considered Steam keys
21 | on a global basis and now he is looking at the UK specifically and you can see there
22 | the significance of Steam key sales in the United Kingdom.
23 | The need to include Steam key sales revenue in order to work out the effective
24 | revenue share is not seriously in dispute. Mr Harman deals with this in his second
25 | report and could you go to that, please, tab 12, page 537, paragraph 3.3.10.
26 | He says that his proposed methodology can account for the value of Steam keys by

1 adding the revenues that Steam partners earn from the sale of Steam keys to the
2 game revenue from sales on a Steam store, and then he can calculate the effective
3 commission rate by dividing the commission revenue from sales on a Steam
4 store -- for which Valve receives the revenue share -- by the Steam partners' revenue
5 from both sales from the Steam store and revenues from sales of Steam keys.

6 It is exactly what we say needs to be done.

7 Then what does he need for that? Mr Harman deals with it for the PCR at 3.3.11:

8 "To estimate revenues from the sales of Steam keys, whether across all Steam
9 partners or for groups of them, I will need to estimate the volume of relevant Steam
10 key sales and the actual or average prices." The volume of the Steam key sales and
11 the average or actual prices for Steam keys sold by Steam partners.

12 And that, members of the tribunal, is the problem because the PCR has no real
13 methodology for getting either of those figures, volume or the prices.

14 They are obviously interlinked. To get the revenue, you need to know the volumes or
15 the prices at which those sale volumes were affected.

16 Now, my learned friend, in his submission, sought to really avoid the various
17 concessions Mr Harman made and focus on the fact that the law is generous to PCRs
18 in terms of what is required. He took you to the Le Patourel judgment and I think the
19 submission was even in an excessive pricing case, you don't have to worry too much
20 about identifying with precision the actual price which is said to be excessive. But that
21 is not what Le Patourel says and could I ask you to go to that in the authorities bundle.
22 It is the second volume, tab 24. Because in Le Patourel, as you will see at page 1317,
23 a price was identified with precision.

24 It had to be disaggregated from other services that BT was providing but the tribunal
25 found at 1317 that the ARPU, the average revenue per user, was the relevant price
26 because it recorded the revenues that BT was earning in respect of the services in

1 question.

2 And it could be determined with precision because, of course, the tribunal had from
3 BT the revenues and the numbers of users. They had the call volumes and the price.
4 And they used that then to conduct the excessive pricing analysis, and we see that at
5 1486 -- can you go to 1486, please, and paragraph 899. My learned friend took you
6 to these passages and one sees at paragraph 899 that the real difficulty was, in fact,
7 working out the competitive benchmark against which the price had to be compared
8 and that is what is being described in paragraph 899. And at paragraph 902, the
9 tribunal speaks to the fact that it is impossible to be scientific in conducting this
10 exercise. But that reference to a rough and ready approach, and issuing that
11 precision(?), were about a different question. They were about assessing both BT's
12 costs and the relevant comparators. It was not a discussion about a rough and ready
13 approach to identifying the price that was said to be impugned. My learned friend said
14 in his submissions today that it is completely standard, he said, to take -- I think he
15 meant a rough and ready approach involving estimations and approximations, to
16 estimate the price which was alleged to be excessive, but there is no excessive pricing
17 case where the impugned price could not be identified with precision, even in
18 aggregate or by average.

19 And our concern is that even now, the PCR cannot explain how, at trial, the tribunal
20 will be able to work out the prices charged by the Steam partners, when they sold
21 Steam keys and the volumes of Steam keys that were sold at that particular price.

22 MR DAVIES: Are you planning to expand on the point about volume?

23 MR KENNELLY: Yes.

24 MR DAVIES: You are presumably saying volume sold is different from or could be
25 different from issuance or redemption because those two numbers are net.

26 MR KENNELLY: Yes. I want to take prices first and then I will look at volume because

1 of course, they need both to work out the revenues. Whether by aggregate or average,
2 both volumes and prices are --

3 MR DAVIES: Yes.

4 MR KENNELLY: I will start, if I may, with the prices which the Steam partners charge
5 when they sell these Steam keys and I would ask you to go to the core bundle, and
6 that is page 538 this time, in Mr Harman's second report.

7 At the top of page 538, Mr Harman recognises that the prices at which Steam keys
8 were sold on digital store fronts is not available in the Steam transaction data.

9 Incidentally, Steam has already provided to the PCR a very significant set of Steam
10 transaction data. What the Steam transaction data contains is in footnote 32 on the
11 same page and I will come back to it. It is common ground that that transaction data
12 doesn't provide any information about the prices at which Steam keys were sold by
13 Steam partners or by third parties.

14 And Steam, therefore, does not have this information. Steam does not get data in
15 relation to the sales of Steam keys after they have been issued by Steam and for the
16 avoidance of doubt, that is Mr Peterson's evidence. It is important to go to Mr Peterson
17 because to the extent that it's suggested that disclosure from Steam will fill the gap, it
18 is important to put that idea to bed right away. Mr Peterson has been very clear, not
19 coy, about what Steam does not have.

20 His evidence is in volume A, bundle 1, A/1, page 15.

21 Sorry, it is not /1, it is tab 4, page 15.

22 Paragraphs 13 and 14. Paragraph 13 simply notes the stages in the life cycle of Steam
23 keys and I focus in particular on subparagraph 3, the sale or distribution of the Steam
24 key outside of Steam, by the Steam partner or a retailer.

25 Over the page, paragraph 14, Mr Peterson says that Valve has no oversight or
26 information about the sale or distribution of the Steam key outside of Steam by the

1 Steam partner or the retailer. It is entirely a matter for the Steam partner, if and how
2 they distribute the keys and how they set the price of those keys, if they are sold. The
3 partners do not report their sales back to Valve on any level. They do not report sale
4 prices -- they are not required to provide information back to Steam in relation to Steam
5 keys.

6 At paragraph 19, we see the significance of this gap. On page 52, please, you see
7 how many games are available on Steam and in fact, these two numbers,
8 I understand, are not confidential. There are currently over 100,000 games available
9 on Steam and over 40,000 Steam partners.

10 Now, contrary to what my learned friend said in his submissions, we have never
11 suggested that you must ask each and every Steam partner for the relevant
12 information. The point was you cannot assume that the Steam partners are
13 a homogenous group in how they price and how they sell Steam keys because it is
14 common ground that Steam partners sell Steam keys through diverse channels and
15 that the prices vary enormously and with great regulatory as between them.

16 This is clear from the undisputed evidence.

17 So as to the channels that are used to sell Steam keys -- we are in Mr Peterson's
18 statement. Go back, please, to paragraph 15 on page 51.

19 You see:

20 Steam keys can be sold on Steam partners' own websites ...

21 That's important because these Steam partners, many of them are major undertakings
22 and they have their own websites, online stores, where they sell Steam keys:

23 ...or via third parties. Examples of platforms or retailers such as Green Man Gaming
24 and Amazon. Steam partners can use the Steam keys to sell their games in bundles
25 of multiple games ...

26 Again, through online stores such as Humble Bundle and so forth and that includes

1 wholesalers. Steam partners can sell their Steam keys to wholesalers, who then own
2 the revenue, which is relevant for our calculation, and the wholesalers then sell on to
3 retailers. No suggestion in the PCR's case as to how that is going to be identified.

4 So the significance of this we can see in Dr Majumdar's evidence and I would ask you
5 to put Mr Peterson away and go to -- sorry, Mr Harman. Mr Harman's first report
6 behind tab 11, page 373, to see the variety in pricing. My argument is it is not disputed
7 that the Steam partners and the digital store fronts sell these Steam keys in a mass of
8 different ways and with prices that change extremely regularly between them. And
9 getting to the point of it, it cries out for some methodology to identify how these prices
10 could be identified, and that is missing. My learned friend showed you nothing that
11 would satisfy you in that respect.

12 6.4.13 at the top of page 373. Here Mr Harman frankly acknowledges that when he
13 looks at digital store fronts selling Steam keys on the second line:

14 "Digital store fronts frequently offer lower headline and discounted prices than Steam."

15 And he observes the digital store fronts undercutting each other. And if you look at
16 6.3, these are all digital store fronts. Steam is the bold blue line. Pricing with huge
17 variations within their own platforms and obviously in comparison with one another.

18 These are just the third party stores. This is just one of the channels used to sell
19 Steam keys.

20 Dr Majumdar explains the significance of this in his report, tab 13. Page 586 this time.
21 Paragraph 54.

22 We know and it is common ground there is massive variation in how they price and
23 there are multiple channels through which Steam keys are sold but this tells you how
24 significant these sales are, because Dr Majumdar is reporting here at 54 that Steam
25 keys are used by the largest Steam partners, as well as the smaller Steam partners.

26 There is no pattern as to whether they are only used by small ones or big ones. Here

1 he is focusing on the larger Steam partners, and I am not going to read out the detail
2 because it is confidential but there is a focus here on the larger ones -- I should say,
3 before we move on from 54, even though they're the larger ones, if you look at the last
4 sentence of paragraph 54, that is still not an enormous percentage of the direct Steam
5 sales.

6 Everyone can see for themselves how much more is left to be assessed by reference
7 to the smaller Steam partners, the other 3,990.

8 Sorry, 39,990.

9 Over the page, figure 7 again. I shall not read the names of the Steam partners, but
10 the point of this figure is to show you how even for the larger ones, very significant
11 numbers of Steam keys are issued and redeemed but for others, the level of issuance
12 and redemption is much smaller. So there is not a pattern within the larger Steam
13 partners and you get that from paragraph 55 and a further paragraph at 56.

14 Two points to take from this. The first is it is highly material. This is not just a forensic
15 nit-picking point, this is a huge factor in calculating the effect of revenue share and
16 secondly, there is massive diversity, even within the larger Steam partners.

17 That is important, even if you were to try and work out an aggregate effective revenue
18 share, for all or some groups of Steam partners. You still need to know, (Inaudible)
19 by group, what they were actually charging and the PCR has shown you no potential
20 pattern as to how you would go about doing that at trial.

21 But then the second problem, these prices change over some time. We address this
22 in a letter in response to Mr Harman's second report and could I ask you to go to the
23 correspondence bundle, please. Page is 116. Because, of course, what is required
24 is to be able to match the volumes of Steam keys with the prices that were applied to
25 those volumes at the time of the sale. So you need to match them together, and the
26 prices change regularly over time. If you go to page 127 -- I asked you to go to 116,

1 because that tells you what this is. It is the letter -- do you see that, 30 September?
2 You have seen this already. On page 127, it contained extracts from one particular
3 game, Persona 5 Royal and it was attached to the letter simply to show -- it's obviously
4 a game from a major Steam partner, Sagar -- to show how often the prices change by
5 time. The little white box inside the screen-shot contains a list of the prices that were
6 available for this game on 31 October 2022.

7 These are Steam enabled games and first of all, it is interesting to see how Steam is
8 not even the most expensive. The Humble Bundle store has the most expensive price
9 but the prices range from about £43 to £51 and the multicoloured lines one sees beside
10 that white box to the right of it, indicate the price movements in the individual stores.
11 And you will be able to see the enormous variation in prices up and down during this
12 period, and this is the period, the week of Monday, 31 October 2022, and next page,
13 page 128, and we are in May 2024, and the prices are varying still from £17 to £50
14 and one sees the price movements on the page. Next page, 129, same game, the
15 prices are now down to £16.72, between £16.72 and £50, with enormous variety
16 during that period. My learned friend showed you a similar graph earlier on for
17 a different point. My point is that one cannot simply put a finger in the air and isolate
18 a particular price point. There is huge variety as to how they put the price.

19 The individual Steam partners, the wholesalers and third party retailers, change Steam
20 key prices by the day, sometimes by the hour, depending on their own independent
21 commercial strategy.

22 So we ask ourselves what is the PCR's solution to identifying the relevant prices and
23 matching them with the relevant volumes to work out the revenue that Steam partners
24 earned? And for that, we go to Mr Harman's second report.

25 Second report in the core bundle, behind tab 12, page 538. The first point that I will
26 address, because it is mentioned first in my learned friend's reply and in the skeleton,

1 is the suggestion that somehow Valve's rationale in issuing the Steam keys will tell the
2 tribunal the price at which the Steam partner later charged for them. And it is hard to
3 understand how that could be the case. Mr Peterson's evidence, that you saw, could
4 not have been clearer. Whatever Valve's motivation in offering these Steam keys and
5 one can see immediately all sorts of reasons why Valve might do it, once the Steam
6 keys are issued, Valve has no control as to how they are sold, what price, and no way
7 of knowing.

8 Now, my learned friend today said: well, one could get disclosure from Valve as to
9 sales and marketing strategies. Now I understood that he meant the sales and
10 marketing strategies of the Steam partners but there is no reason, and nothing from
11 Mr Peterson, to suggest why Steam or Valve would have the sales and marketing
12 strategies of the Steam partners, in circumstances where there's no dispute, but we
13 have no control over what they do with the keys and no way of policing what they do.
14 As regards Steam's own sales and marketing strategies, there is no reason they would
15 tell you anything about the prices that Steam partners are selling the Steam keys at or
16 the volumes that they are selling, applying those prices.

17 There is no link between the two.

18 If you go to page 541 of Mr Harman's second report, we see a further development of
19 this point, subparagraph 3. In the middle of that paragraph, he offers as a relevant
20 question that might be elicited from disclosure, how does Valve target a
21 specific, effective commission rate?

22 But that is just hopeless. Valve cannot target a specific effective commission rate
23 when it has no control over the Steam partners' pricing, volumes or revenues and no
24 way of knowing what they are earning.

25 Then if you go to 3.3.24, it says:

26 "To the extent that Steam partners' revenues from the sale of Steam keys will be

1 needed to calculate an effective commission rate ..."

2 Pausing there, absolutely, Mr Harman himself acknowledged that you need the Steam
3 partners' revenues to work out the effective commission rate. He says:

4 "This can be done using the Steam transaction data."

5 Just plain wrong. The Steam transaction data does not tell you the revenues earned
6 by Steam partners when they sell Steam keys.

7 When you go back in the same report to page 538, footnote 32, that tells you what the
8 Steam transaction data contains. It tells you about issuance and redemption. But the
9 Steam transaction data does not record the revenues earned by the Steam partners
10 when they sell Steam keys.

11 So examining why Steam partners ask for Steam keys and why Steam issues them,
12 is not going to provide you with the missing numbers. In order to work out the revenue
13 earned by Steam partners from Steam key sales from 2018, by average or aggregate,
14 you will still need some way of estimating the prices at which the Steam keys were
15 sold from time to time and multiply those prices by the volumes of Steam keys sold by
16 them at those prices.

17 The second possible solution, as offered by Mr Harman, and this maybe links to what
18 Mr Davies mentioned a moment ago, is to assume that all Steam keys are sold for the
19 same price as the price offered at the Steam store at the same time.

20 My learned friend cited that possibility earlier. That is directly contradicted by the
21 evidence I have just shown you at Mr Harman's own report. It is obvious nonsense to
22 say that Steam keys are sold at the same price as Steam games on the Steam store,
23 because we know from the undisputed evidence that there is massive discounting by
24 digital store fronts, among others, when they are selling Steam keys for the same
25 games. Discounting off the price on the Steam store. That is Mr Harman's own
26 evidence that I showed you earlier.

1 MR LOMAS: I think the point being put against you was to be prudent, to give you the
2 benefit of that discounting when doing your revenue calculations, and then ask: even
3 with giving you that prudent benefit, would it be possible to show that the pricing
4 thereby reduced was still excessive?

5 MR KENNELLY: That puts the tribunal and us in a difficult position because if it is
6 their pleaded case that the tribunal can assume -- or their stated methodology is that
7 you can proceed on the basis that the Steam keys were sold for the same price as the
8 equivalent game on the Steam store on the same day, that at least is an ascertainable
9 number, but that's not their pleaded case and that is not Mr Harman's evidence. And
10 far from it. Having mentioned that as a possible approach, he immediately disavows
11 it, as he must. One, because it is contradicted by his own evidence and secondly,
12 because obviously, it's very generous to Steam and because it assumes that the
13 revenue share for Steam partners is much greater than it was likely to be.

14 MR LOMAS: It is a very prudent assumption.

15 MR KENNELLY: It is not an assumption they are asking you to make against them.
16 They are offering it as one possible thing which they have promptly disavowed in their
17 own expert report and it is not appropriate at the certification stage to say: this is
18 a methodology which we don't believe in and which we will ditch the second we are
19 certified, and allow that as a basis to certify the proceeding. They have not pinned
20 their colours to that particular mast.

21 MR DAVIES: It might be, effectively, the same point expressed in a slightly different
22 way but to what extent is it essential that the price that Valve receives is considered
23 as a revenue share or a commission share? Because in a sense, if you just take the
24 volume as being issuances, to be conservative in the way that Mr Lomas was talking
25 about, you know the total revenue to Valve, so you get something that looks like
26 an average revenue per unit, as far as Valve is concerned. Now that is not

1 a commissioned rate because you don't know what it is a percentage of but in a sense,
2 it is a price. Is it not? To what extent is it essential to be able to get to a price to Valve
3 which has to be expressed as a rate of a percentage of something else? In this case
4 the revenue for the Steam partners.

5 MR KENNELLY: It has to be because both for limb 1 and limb 2 you have to
6 compare -- for limb 1, it is the cost of something and for limb 2, you are comparing
7 comparators, potentially, to something.

8 MR DAVIES: And those comparators are rates.

9 MR KENNELLY: And if I can understand precisely what Mr Davies is saying to me. If
10 we take issuances as volume, and then look only at Steam's revenue from sales on
11 the Steam store, one ignores entirely the revenues that are earned by Steam partners
12 through the sale of Steam keys.

13 MR DAVIES: Yes, you are working out the average revenue to Steam from sale of
14 units of distribution.

15 MR KENNELLY: Yes, but you are ignoring distribution of value that the Steam keys
16 represent. The Steam keys are transferred from Steam to Steam partners and they
17 are then vindicated on the Steam platform and from the consumer's perspective, the
18 choice is from buying the game on the Steam store or buying the Steam key.

19 The revenue arising from the game is the same. It is just divided between Steam store
20 sales and Steam key sales.

21 How could we possibly ignore the Steam key sales when examining the fairness of the
22 price, if the price is simply taken to be the revenue earned by Steam?

23 MR DAVIES: Well, because -- I don't want to be argumentative, but because that is
24 a way of thinking about a price and it's actually the normal way of thinking about price
25 and so my question is, to what extent in this market is that a completely inappropriate
26 way of thinking about a price and why -- if maybe I can develop it just a little bit,

1 thinking about the excessive pricing and the two limbs. If the fact you cannot express
2 it as a commission or a revenue share stops you doing a comparator, that's a problem
3 for limb 2 but it is not a problem for limb 1, is it?

4 MR KENNELLY: It is, because first of all, we have to focus on the pleaded case and
5 Mr Harman's case before you. The proposal, the discussion we are having, is not
6 a proposal which Mr Harman has advanced and he has proposed to compare
7 percentage rates. That is as clear as could be from his reports and even for limb 1, in
8 limb 1 you go to -- let me find the passage. (Pause).
9 Harman 1, page 397.

10 Here he is dealing with limb 1 excessiveness, and at page 398, at the bottom of
11 paragraph 7.6.16, he is comparing Steam's annual commission income based on the
12 27.7 per cent commission rate -- that is what he thinks is the effective commission
13 rate, he's accepting there needs to be an effective rate. Then he is comparing that to
14 the cost range of 5, 7 per cent. So even for limb 1, Mr Harman's approach is to
15 compare the rate for the costs and then for limb 2, to compare the rate with the
16 comparator rates.

17 That, in my respectful submission, is the appropriate way to conduct an excessive
18 pricing case, when one is looking at revenue share or commission rates in a two-sided
19 market like this. Which is why Mr Harman took his approach and it would be
20 inappropriate, in my respectful submission, simply to look at the revenue earned by
21 Steam in isolation and say that if you divide that by the number of issuances, that gives
22 you the price but that is entirely artificial and it is not the methodology you are asked
23 to adopt.

24 My learned friend hinted at that in his submissions but that is not what Mr Harman has
25 offered to you in this certification hearing. There's no evidence as to how these
26 businesses work in practice.

1 I do need to focus on what Mr Harman has offered to you. That is what the tribunal is
2 asked to test today.

3 MR LOMAS: Sorry, is it a consequence then, of the submission you are making, that
4 there is no way in a two sided market like this, where you have Steam keys being sold
5 and no visibility of the price or volume of that, that it is impossible to construct
6 an excessive pricing case because there will always be an element of revenue that
7 you cannot estimate and, therefore, an excessive pricing case just cannot be mounted.

8 MR KENNELLY: Not at all. This is a strong "and", it is an evidential and informational
9 gap.

10 MR LOMAS: But that is inherent, isn't it? In this commercial structure, that gap will
11 always be there?

12 MR KENNELLY: Not necessarily because the Steam partners have the information.
13 A sufficient number of Steam partners. You can imagine -- and I'm not promoting this
14 as a way to sue my client but Steam partners in some form of opt in case, if they sued
15 in sufficient numbers and had a representative group that could show a way of
16 estimating the revenue they have earned over the relevant period, could have a stab
17 at a methodology potentially to show the effective revenue share. And it is open to
18 the PCR, if they were organised, to sort some form of cooperation, information
19 gathering from a sufficient number of Steam partners, and it is highly unlikely, of
20 course, in reality, that Steam partners would want to help them because if, in fact, my
21 clients have set an unlawfully excessive price, which is denied, the Steam partners
22 could claim, and it would be a claim in conflict of the claim of the PCR , but that is
23 neither here nor there. The idea that we are immune from competitive scrutiny is
24 wrong. A sufficient number of Steam partners could have a viable methodology.

25 Of course, if there was a genuine competition problem, the CMA could act and get
26 whatever information it wanted from third parties. The idea that we are somehow in

1 Elysian -- it is just wrong.

2 The second solution offered by Mr Harman, that he recognises that there is
3 an informational gap, is digital store costs and his second report deals with this at
4 page 542.

5 Paragraph 3.3.26, he says that there are various companies, GG.deals, ITAD, and
6 Humble Bundle, and there are services which web scrape the prices of Steam keys
7 offered on these store fronts.

8 Now, except for one, Mr Harman does not say that he can get -- except for one
9 particular example, he does not say he can get information back from 2018 and there
10 is no information as to how granular this information may be.

11 That is important because we have seen that the prices change in many different ways
12 under many different channels, so granular information will be required, even to do an
13 aggregate or an average assessment. And you have seen there are over 100,000
14 games. The task is an enormous one and what we have seen here in terms of web
15 scraping, does not come close to showing you that, at trial, this evidential gap would
16 be filled.

17 Mr Harman says where there is price information for a day, for a particular game, you
18 could multiply that by the redemptions for that day, for that game, and that would tell
19 you the Steam partner earnings. But again, as you have seen, there are multiple
20 changing prices for the same game. The redemption figure will not tell you how many
21 Steam keys were bought at the particular price, thrown up by the web scraping for the
22 particular digital store front. You still won't know where they were sold. It only tells
23 you the redemption information, which Steam partner originally got the Steam key
24 when it was issued and that particular Steam key could have afterwards gone to any
25 number of third parties selling between £10 and £50, depending on the game, and
26 there are 100,000 games at least.

1 And the redemption information could not tell you when the consumer bought the
2 Steam key. The Steam keys don't expire. The Steam keys are not necessarily bought
3 and redeemed at the same time.

4 So it could have been bought months earlier and the PCR has come nowhere close
5 to explaining how that problem could be resolved. This is just the third party store
6 fronts. It ignores sales made by the Steam partners at their own online stores, it
7 ignores wholesalers and bundling.

8 And we made this point. Could I ask you to go to the correspondence bundle again,
9 page 119. Same letter of 30 September, 2025. It is in a letter because we were
10 replying to Mr Harman's second report. It is in the correspondence bundle, page 119.

11 Go to paragraph 3.5.1. We made the point that these price comparison sites which
12 are sought to be scraped don't generally tell you about sales on the Steam partners'
13 own store fronts. At 3.5.2, the web scraping won't pick up prices that are sold -- the
14 prices agreed between Steam partners and wholesalers when they sell Steam keys.

15 And then we will skip through 3.5.3 at the moment and go to 3.5.4, but bundling is
16 a very significant way in which Steam keys are used and bundle websites, such
17 as -- sorry, just to pause, obviously bundling means a third party takes the Steam key
18 and bundles it with other games to make a more attractive package. Maybe bundling
19 less popular games with more popular games. And bundling websites, such as
20 Humble Bundle have bespoke pricing models and of course, bundles are typically sold
21 at a single price for a group of games, they don't allocate prices to individual games
22 within the bundle, and Humble Bundle users can actually choose how much they pay
23 for a bundle.

24 If you go to -- that particular aspect, which may come as a surprise to the tribunal, if
25 you go to page 122 in the same bundle, you see at annex 1 and the game "Critter
26 Chaos", if you look on the right-hand side about a third of the way down, you see

1 a range of options, so the consumer can choose how much to pay. They are told what
2 the value is and then the prices are below and they can choose between different
3 prices and allocate what they are paying between the publishers and various charities
4 and to the Humble Bundle website itself. When you see that kind of approach to
5 pricing, all through these pages, this is one game, that is a typical aspect of sales on
6 this Humble Bundle website, which is a major reseller of Steam keys.

7 Finally, the web scraped material, it will not surprise you to know, is not necessarily
8 reliable. Even the sample cited by Mr Harman contained errors. If you go to A, the A
9 bundle, page 529 -- it is behind tab 12, page 529. To give you a flavour of the kinds
10 of problems that web scraping is going to give the tribunal if this proceeds to trial. Here
11 is an extract from the Humble Bundle website, in respect of a game called Sleeping
12 Dogs. It's offered by Mr Harman as an example of the Steam key being offered at
13 a massive discount, £2.39, but Mr Harman didn't notice that above that picture of the
14 game, there was a note saying "We have run out of Steam keys for Sleeping Dogs
15 definitive addition in your region but more on the way", et cetera, et cetera, so despite
16 appearances, it is not actually offering Steam keys at that price, at that time.

17 The next proposed solution, (Inaudible), is disclosure from a small sample of digital
18 store fronts. You see this in the second report, 3.2.27, page 542. Back to
19 Mr Harman's second report, page 542. And at 3.3.27, he says:

20 A small sample, GG.deals, ITAD, Humble Bundle, could give disclosure on sales of
21 Steam keys on their platform.

22 No investigation, members of the tribunal, as to whether that is a representative
23 sample of digital stores. That is even more concerning when we know this is already
24 a subset of the channels that ignores Steam partners' own stores, wholesalers and
25 bundling. None of that is addressed by the PCR, but more importantly, there is no
26 analysis of how this third-party disclosure could be ordered by the tribunal.

1 First of all, this would have to be daily, possibly hourly, pricing data since 2018, highly
2 sensitive commercial data. And these digital stores are outside the jurisdiction.
3 GG.deals is operated by a Polish company; Humble Bundle is a US company and
4 ITAD doesn't actually sell games itself.

5 As we have actually encountered in other cases, it is an open question as to whether
6 this tribunal can order the production of documents brought from third parties located
7 abroad. To order non-party disclosure from another jurisdiction from a foreign entity
8 is highly controversial. Since they have given the reference in the skeleton, I shall not
9 go back to it, it is enough to give you the evidence, the documentary evidence and it's
10 the Gorbachev case at the authorities bundle tab 14, page 931. It is an open question
11 of law. On one view, the only way to get those documents is to go through the Hague
12 process of the 1975 Act. There's an argument that in exceptional circumstances, the
13 court can serve out solely for the purpose of disclosure from a non-party. Highly
14 controversial and difficult. That is not addressed by the PCR at all.

15 The next proposed solution for Mr Harman and PCR is that data aggregators can
16 locate pricing data. Again, from digital store fronts. This is 3.3.28 on the same second
17 report. At 3.3.28, he says publicly available information on Steam key sales may be
18 obtained from data aggregators, Sparkers, GfK, Neilson.

19 It is completely unsubstantiated as to how that might be done. There is no footnote or
20 any supporting material for this. In fact he has already addressed and dismissed
21 Sparkers and Neilson and GfK in his first report. If you go back to his first report, core
22 bundle 6, page 363. And this is behind tab 11, paragraph 5.10.1. Mr Harman says in
23 relation to getting information from third party sources, second sentence he says:

24 "I have contacted specialist data providers that may produce estimates of UK
25 consumer product spending."

26 And he mentioned Sparkers, GfK and Nielson but he says:

1 I have not used the information at this stage because among other things, the
2 information is expensive to obtain and the information doesn't appear to cover the
3 relevant markets in the UK.

4 That is hardly a promising start for one of his solutions to gathering the enormous
5 amount of critical and missing information in order to establish the effective revenue
6 share.

7 The final solution from Mr Harman is to survey or get disclosure from the Steam
8 partners themselves. To come back to the discussion we had with Mr Lomas, this is
9 in Mr Harman's second report at page 542, paragraph 3.3.29.

10 So how would he survey either the full 40,000 or a sample of? He would need,
11 obviously, a representative sample, and what would that be? We are not told.

12 It is common ground, as we have said many times, that the Steam partners use and
13 price Steam keys in extremely diverse ways, constantly changing how they use them
14 and price them during the same period. No patterns have been suggested by the PCR
15 and Mr Harman and that is why Dr Majumdar said it would be necessary to survey and
16 obtain responses from a very large number of Steam partners. And there is no obvious
17 pattern in the material Mr Harman has put forward. Again, most of them are outside
18 the jurisdiction. They can be asked to provide this highly sensitive information but
19 whether they can be compelled to do so, very unlikely and the tribunal has no
20 jurisdiction to subpoena them if they would have to speak to the disclosure, if it were
21 ordered. And as I said earlier, it is unrealistic to expect the Steam partners to give
22 a mass of sensitive information to help the class claim, when, if they had acted
23 unlawfully, they have their own conflicting claim.

24 Those are my submissions on price.

25 This is not nit-picking, this is casting about trying to find some way in which the PCR
26 can satisfy you that they can show, either by averages or aggregates, what the price

1 was for the Steam keys when they were sold during the claim period. And I turn then
2 to the question of volume, because they need also to show not just the prices but the
3 volumes that were sold at those prices.

4 MR JUSTICE HILDYARD: Would that be a good time to --

5 MR KENNELLY: Yes, thank you, sir.

6 (3.34 pm)

7 (A short break)

8 (3.45 pm)

9 MR KENNELLY: I was going to two proposed approaches you have seen in the
10 papers to volume or issuances of Steam keys. We know the issuances number and
11 redemptions, we know the redemptions number. Neither party supports the idea of
12 issuances being a proxy for volume because it is common ground that a significant
13 proportion of the Steam keys issued are not redeemed.

14 So then we are looking at redemptions and Mr Harman proposes the redemption figure
15 as a proxy for sales volumes. That is at paragraph 3.3.28 of the second report.

16 But that doesn't work either, because as you have seen, a significant proportion of
17 Steam keys are used by Steam partners in bundles. And as you have seen in the
18 papers, when consumers buy bundles of games, they don't always play all of the
19 games in the bundle. Partly why the games are bundled in the first place. So it is
20 possible that a consumer would buy the game as part of a bundle. The Steam partner
21 gets the revenue but the particular Steam key in the bundle is not deployed. It is not
22 redeemed. So for that reason, and sorry, I should add, a significant number of Steam
23 keys go into bundles and you have seen the figure at paragraph 46 in our skeleton.

24 So that is an additional reason to the discussion we had earlier about why redemptions
25 are a proxy for sales volumes but even if redemptions were a good proxy for sales
26 volumes, we return to the problem that I discussed with Mr Davies earlier, which is it

1 is impossible to match them reliably to the prices at which the games were sold and
2 the prices vary enormously as between the channels and within the channels.

3 So we draw all of this together. What are we left with? We see what we are left with
4 in the conclusion of this issue in Mr Harman's second report and I would ask you to
5 turn to that. It is in the core bundle at page 547.

6 Paragraph 3.3.41.

7 The outcome of this is over the page and my learned friend took you to it earlier today
8 as the answer to our concerns but looking first at 3.4.41. This is how Mr Harman
9 proposes to deal with the Steam key issue and these are his approximations for the
10 purposes of certification. And at subparagraph (1), he says in the middle he assumed
11 that "Steam keys were sold at an average discount of 50 per cent, compared to the
12 price of a direct sale on the Steam store."

13 So he is estimating an average Steam key price across all distribution channels of
14 50 per cent of the price on the Steam store for the same game and this approximation
15 is intended to cover, as a credible methodology, all prices for Steam keys since 2018
16 across all digital store fronts, the Steam partners' own online stores, sales by Steam
17 partners to wholesalers and Steam keys in bundles.

18 That is an extraordinary assumption, even on the generous approach the tribunal
19 takes to methodology. It is extraordinary, in view of the extreme diversity in pricing
20 that we have seen that is common ground between the parties and the experts.

21 So where, we ask, is Mr Harman getting this assumption from? The answer is in the
22 confidential sentence that immediately follows the sentence I read and begins
23 "A simple average", and the average is taken from the discount, from the materials
24 identified by Dr Majumdar. And for that, we need to go back to table 3.1, which is on
25 page 544 of this same bundle.

26 It is table 3-1, below paragraph 3.3.35.

1 MR JUSTICE HILDYARD: Sorry, what was the page reference, please?

2 MR KENNELLY: 544.

3 MR JUSTICE HILDYARD: Thank you.

4 MR KENNELLY: And it is table 3-1. And the particular discount that he is looking at
5 is by reference to six games. You can see that because only six of them don't have
6 the non-applicable implied discount, so it is six games.

7 On one day, you see that in the italicised text below table 3/1. 4 September 2025. The
8 price is for six games on one day in September 2025, from digital store fronts only,
9 compared to the Steam store price on that day. That is supposed to provide a reliable
10 proxy for over 100,000 games and the prices of those games on multiple retail and
11 wholesale channels since 2018, when such prices could and did change by the day
12 and by the hour.

13 Of course, Steam keys were not always sold at a discount. We have seen that some
14 prices were above the Steam store price, even in the material shown by Mr Harman.
15 This is a hopeless assumption, even applying the generous standard that the tribunal
16 deploys in considering the Pro-Sys test.

17 Even the broad axe cannot go this far --

18 MR JUSTICE HILDYARD: Surely the question in front of us is not, for the purposes
19 of this hearing, whether 50 per cent is the right number because I think what
20 Mr Harman is doing is abstracting that from this table. It is whether, if you did this
21 exercise across a statistically significant number of examples, you would produce
22 a percentage, whether it is 20 per cent, 50 per cent or 80 per cent, which is sufficiently
23 statistically significant to put it forward in evidence.

24 MR KENNELLY: Yes, I can see. I am not sure that is what Mr Harman is saying but
25 I can see in principle, if one could find the particular discounts that are offered by
26 Steam partners and retailers, a sufficient robust sample of them could be extricated

1 and that would achieve the price information. That might be the first part of the
2 exercise but one still needs to match it to volumes.

3 MR LOMAS: I understand that.

4 MR KENNELLY: And they are equally important, and that is the problem. And even
5 if one reads this in a very generous way and assumes this is just an example of what
6 might have been done, had proper information been available, it still would not help
7 you but that only reveals the real flaw in the PCR's case specification, which is that
8 they cannot show you a plan, a credible plan, for getting that pricing information from
9 the Steam partners and the third parties. That is the web scraping, the disclosure, the
10 surveys. That information cannot be obtained on their plan. They have no credible
11 plan for getting it. So it is not enough for them to say: this is our outline idea and all
12 will be well at trial, when we have disclosure. I have tried to show the tribunal that
13 their plan, even very generously, just does not work. That is the problem. I am not
14 asking for results, I am asking you to scrutinise the plan and the plan just doesn't work.
15 And if I was to read this analysis at 3.3.41 less generously, I would say he was offering
16 this as a possible methodology. The sample he had here is enough to work on for the
17 moment and it is not. Even for the purposes of today, you cannot look at six games
18 on a particular day and say one can extrapolate from that, a sample price.

19 Ignoring the fact that you are not matching any volumes and ignoring the fact it is not
20 on any possible conception, a representative sample of what was happening during
21 the claim period from 2018.

22 Sticking with what Mr Harman is offering to you today -- and we are here today to test
23 this analysis -- first we have his 50 per cent and we see where that has come from
24 and then he says at (ii) "I assume that Steam partners pay a commission of
25 25 per cent to digital store fronts", and again, we ask rhetorically: what about the
26 Steam keys sold on Steam partners' own stores, where they pay no commission?

1 What about wholesalers, what about bundling?

2 And as regards materiality, over the page, this is the figure 3-1 that my learned friend
3 showed you, he seeks to suggest that when he takes into account Steam keys in the
4 way that he has just explained, based on the six games, he gets an effective revenue
5 share or an effective commission rate, he calls it, which he summarises at 3.3.42.

6 Now that is a deeply flawed approach, as I have sought to show. Even on his
7 approach, when one takes into account the Steam keys, one sees even on his
8 approach, their significance, because on 3.3.42 -- this is all confidential but it was not
9 confidential in the skeletons, but I think the percentages themselves, they are all
10 estimates. But he is estimating effective commission rates before you take into
11 account Steam keys of 24 to 29, but when you take into account it is 23 to 27, well
12 there is already there, even on his approach, a 6 per cent difference when Steam keys
13 are taken into account. And in circumstances where they're a comparator for the
14 excessive price analysis, the comparators range between from 15 and 30 per cent,
15 obviously they are favouring 15 per cent. 6 per cent is a material difference and that
16 is on his flawed methodology.

17 My real point to the tribunal is I cannot rely on any of those numbers because we have
18 no idea what the actual revenue share is and they have not offered you any plan for
19 establishing it at trial.

20 And to be clear, this is about methodology for breach of duty but it is not confined to
21 methodology for liability. At trial distribution, it will be necessary eventually, to work
22 out which Steam partners bore an unfair revenue share or commission in respect of
23 which games and which consumers purchased from them. This is not necessary to
24 establish at certification but down the line, you will need to work out who suffered
25 a loss because of unlawful conduct. Other Steam partners who paid a lower effective
26 revenue share because of their Steam key mix, will not have suffered any breach or

1 loss.

2 It is for the PCR at this stage to show you a plan isolating, at trial distribution, the
3 Steam partners who actually paid these allegedly excessive commissions or revenue
4 shares. Not about bottoming it out now but a credible plan needs to be shown to you
5 and we have that from the Trains judgment in the Court of Appeal. Can I ask you to
6 go to the authorities bundle. It's the first volume, tab 11.

7 Page 652. At page 652, paragraph 38, I am so sorry.

8 And the Court of Appeal here is saying:

9 "It is common ground that the quantum should be calculated, so that an award of
10 damages does not overcompensate. [The relevant section of the Competition Act]
11 does not rewrite the constituents of the tort to remove liability issues, it merely permits
12 those ingredients to be established, deploying different top down evidence. In
13 determining quantum, the CAT therefore necessarily ensures that it excludes from the
14 calculation those who fail at the liability stage and the methodology must at some point
15 include a device for winnowing out no-loss members of the class."

16 My submission is there is nothing in the plan for winnowing out the no loss members
17 of the class, because they have no plan for establishing which Steam partners
18 ultimately bore the wrongful effective revenue share, as opposed to those who did not.
19 Before I leave this judgment, I would like to draw your attention to a passage which
20 I am sure is very familiar to you, about the role of the tribunal in relation to certification,
21 and it is on page 657. Paragraph 61.

22 The paragraph begins "The height of the bar", and could I ask the tribunal just to read
23 that paragraph and forgive me if you have read this 100 times.

24 MR JUSTICE HILDYARD: The reference was?

25 MR KENNELLY: Paragraph 61 on page 657. I think every proposed defendant has
26 shown you this paragraph, so you can skim it if you have read it too often. Since I am

1 in the judgment, I did want to remind you of it. (Pause).

2 Before I move on to the PPO issue, I wanted just to pick up on the submission made
3 by my learned friend which appeared to suggest that it would be sufficient to look at
4 Steam revenues alone in absolute terms without any consideration of the effective
5 revenue share or commission charged to Steam partners and whether that would
6 satisfy the legal test for excessive and unfair price.

7 We have touched on this already in discussion with Mr Davies and you have my point
8 that this is not their pleaded case. It is not the case that Mr Harman advanced. In the
9 passages I have shown you, he prays in aid the rate, the alleged excessive rate for
10 his limb 1 analysis, paragraph 7.6.16 and his limb 2 analysis.

11 The whole case that is pleaded against us that we face is a comparison between the
12 alleged effective commission rate that it is said that Steam charges and the lower
13 commission rates charged by Epic and Microsoft and so forth. That is the case we
14 face. That comparison between rates is the methodology you are asked to scrutinise.

15 If the PCR wants to say that you don't need to compare the effective commission rate
16 and lower rates offered by Epic and others, and it is sufficient only to look at Steam's
17 total revenue, it is for them to plead and advance that case and for us to have
18 an opportunity fairly to respond to it in our response and to come to the tribunal then
19 in an organised way, with the benefit of expert assistance, if necessary, to address it.

20 In my submission, had the PCR -- to be clear, had the PCR pleaded the case of
21 excessive pricing on the basis that it was sufficient simply to point to Steam's revenue,
22 to compare it to our costs and say that is sufficient for the purposes of the Flynn Pfizer
23 test, full stop, that would be vulnerable to a strike-out. That is not the pleaded case.

24 They pleaded an orthodox excessive pricing case which involves comparators and
25 that is the case that the tribunal has to test today.

26 But I should say it would be unfair if the PCR were to jump on the bandwagon and the

1 tribunal were to develop an approach which might assist the PCR, in circumstances
2 where it was not properly pleaded and advanced by Mr Harman and we were not
3 allowed an opportunity to respond to it. Obviously, it is open to the tribunal to adjourn
4 and offer people opportunities to fix things but that is normally the right way to do it
5 rather than develop things in the course of the hearing.

6 I am going to move on now, if I may, to the PPO, the PPO methodology issue.

7 MR JUSTICE HILDYARD: Mr Kennelly, before you do that, can I ask you what may
8 be too simplistic a question and I may be standing too far back from it, but it is unusual,
9 in fact in my experience unheard of, for businesses not to have some means of
10 assessing what the effect of a commercial initiative by them is. And when you through
11 Valve -- through Steam -- decide to issue Steam keys, is it your case that they do not
12 really have any idea what the effect on their pricing and their revenues consequentially
13 will be?

14 MR KENNELLY: One can understand immediately the question and Steam is on the
15 record as saying that Steam keys are promotional tools which it has deployed since
16 its inception. This is a tool which has been part of Steam's offering to Steam partners
17 since the business was created. But as regards Steam's approach to monitoring and
18 policing the usage of Steam keys, Mr Peterson's evidence could not be clearer and
19 I could say on instructions, we have a senior representative of the company at the
20 tribunal, to be absolutely clear and Mr Peterson sought to be clear, not to be coy,
21 Steam does not monitor, does not record in any kind of systematic way how Steam
22 keys are used by Steam partners. It has no right to do so and it does not do so as
23 a matter of practice. There is anecdotal material that comes in which Mr Peterson
24 referred to but it is not in a position to police the usage of Steam keys and does not do
25 so. Now Mr Peterson, that evidence was produced in order to answer that very
26 question. He sought to be comprehensive and clear in his evidence and if the tribunal

1 would be assisted by something more comprehensive, more clear, I am sure the
2 company could do it but I am saying this with the benefit of Mr Peterson's evidence
3 and on instructions and I will pause there to make sure I have not missed anything,
4 since the tribunal --

5 MR JUSTICE HILDYARD: That may be a slightly different question though. The
6 question I have in mind, and I don't know whether Steam keys are issued automatically
7 or by tradition, upon making available a new game, for example, or whether at some
8 point it is decided that this is a commercially opportune time to issue Steam
9 keys -- I don't know, and you may be able to assist me on that -- but that would only
10 be an example of why I would imagine that at every stage in the process, there is some
11 assessment or measurement available to Steam or Valve to determine the effect on
12 its commercial performance which will be measured by its prices and revenue.

13 Is that not so?

14 MR KENNELLY: Mr Peterson didn't address that and I will take instructions on it but
15 I will address the prior question, which is how are Steam keys issued? And
16 Mr Peterson does address this and you have the documentation in the bundle and
17 Steam keys are granted on request by developers and developers plainly have their
18 own reasons for seeking Steam keys and Steam itself, in allocating Steam keys, will
19 do so based on its assessment of the request from the Steam partner.

20 MR JUSTICE HILDYARD: Yes.

21 MR KENNELLY: What is not before you is whether Steam does an assessment,
22 a financial assessment, as to whether -- I think this is the question you are asking
23 me -- whether, in deciding whether to grant the Steam keys, Steam assesses in
24 advance the likely impact of the Steam key issuance to the effective revenue share,
25 because that is ultimately where the question is going.

26 MR JUSTICE HILDYARD: I think that is, yes.

1 MR KENNELLY: I will take instructions.

2 MR JUSTICE HILDYARD: It is really a general commercial point. One would imagine
3 that people do not enter into commercial initiatives without having some idea as to
4 their effect.

5 MR KENNELLY: Of course, but we have to focus on what is relevant for the purposes
6 of the question, which is the effect on the effective revenue share.

7 Obviously, would it make the Steam partner happy? We want to keep the Steam
8 partner contented, it is a complex business relationship. The focus really is on what
9 is the likely impact on the financial --

10 MR JUSTICE HILDYARD: I agree. I am not asking about commercial good share,
11 I am asking about the hard reality.

12 MR KENNELLY: I'm not suggesting I can give you an answer now but I will at least
13 turn before ...

14 (Pause).

15 So I am instructed to say that Steam / Valve does not carry out any formal financial
16 assessment of the impact of the issuance of Steam keys on its effective revenue share.

17 I am told that, obviously, when Steam keys are requested, as part of the decision to
18 grant them or not, one consideration is if a Steam partner is selling very few games on
19 the Steam store, already has many Steam keys and is asking for more, that may be
20 a factor in not granting the Steam keys. But in terms of the assessment on the impact
21 on Steam keys and revenue share, no assessment is made of that nature and even if
22 Steam sought to make that kind of assessment, in reality, how would it know that any
23 such assessment was accurate, since it has no way of holding the Steam partner to
24 the pricing or handling of the Steam keys?

25 So one can understand why the question is asked but if one thinks about how, in
26 practice, it would work, whatever assessment Steam might make in advance, it is

1 a thing writ in water, if it cannot monitor the treatment of the Steam keys in real-time
2 and police the issuance of the Steam keys. And on that, Mr Peterson was very clear,
3 both of those things, monitoring and policing, not done and could not be done.

4 If the tribunal would like any more assistance on that, I am sure my clients would
5 oblige, but that is what I can give you at the moment by way of answer.

6 I am afraid I will probably not finish today. I will need to go into tomorrow just to
7 complete. Is that -- my learned friend will need to reply as well, so I just want to give
8 the tribunal a --

9 MR JUSTICE HILDYARD: I mean I think my colleagues and I would be happy to sit
10 a little longer if that would assist you finishing. But equally, we cannot know how much
11 you've got up your sleeve on the PPOs and how much time would be needed for reply.

12 MR KENNELLY: I have probably got 20 minutes left, so sitting late will probably fix
13 me but my learned friend --

14 MR GREGORY: I don't think I will be more than 10 minutes.

15 MR JUSTICE HILDYARD: Then if it is agreeable to you, it seems wise to try and get
16 this finished today, rather than reconvene tomorrow.

17 MR KENNELLY: I am obliged. I will carry on then and deal with the alleged PPO
18 methodology, and I will recall first, if I may, what is alleged.

19 So the PCR is arguing that Valve imposes these price parity obligations on Steam
20 partners which prevent them from selling games for lower prices than other distribution
21 channels lower than the price on the Steam store, and the PCR argues that absent
22 these PPOs, game prices would have been lower.

23 Now, first, it is hard to see how the PCR can maintain that argument with a straight
24 face, when we have just seen reams of evidence in Mr Harman's reports to the effect
25 that Steam enabled games are regularly offered at massive discount on other stores
26 and platforms. Prices far lower than those on the Steam store.

1 To be clear, on the PCR's case, the only express PPO is the one that they say applies
2 to Steam keys. What you have seen much of today is huge discounting by other digital
3 store fronts and other Steam partners in respect of Steam keys, which are in respect
4 of the very same games offered on the Steam store for far higher prices. The idea
5 that Steam is rigorously enforcing a PPO in respect of Steam keys cannot be
6 sustained. At the same time as Mr Harman's evidence, that one sees a lack of
7 enforcement of the PPO, which is what he said in his report that I took you to. The
8 PCR cannot have it both ways.

9 This conflict between reality and the PCR's theoretical case on PPOs should make the
10 tribunal even more anxious to ensure that the PCR is proposing a credible basis for
11 proving that these PPOs actually produce effects. And if I may, to show the tribunal
12 what is required by analogy in the BGL case, the compare the market case in this
13 tribunal, because although that was an infringement case, and it was an appeal
14 against a CMA decision, and although it concerned Article 101 and not the abuse of
15 dominance prohibition, as Mr Gregory, my learned friend, said earlier, there is a real
16 overlap between the approach to price parity obligations, or most favoured nation
17 clauses, as they are called, between Article 101 and Article 102 -- that was his
18 submission which I respectfully adopt.

19 The article is in the authorities bundle at tab 12.

20 The CMA had found that the -- Compare the Market had a wide, what was called most
21 favoured nation clause, the same as the PPO clause, and they found that it had
22 appreciable effects on competition and they found these clauses prevented home
23 insurance providers from offering lower premium on other price comparison websites
24 and that was the finding that the CMA had made.

25 If you go to page 816, please. Page 816, paragraph 216, you can see straight away
26 that the CMA's task was easier than the task of the PCR, because all the CMA had to

1 show in an effects case was that there was an effect and that but for that effect, the
2 premiums would have been lower. There was no need for the CMA to give a figure
3 for the extent to which they would be lower:

4 "Quantification of effect is not the province of a regulator or a competition authority,
5 but the province of a private action, consequential on the regulator's decision,
6 possibly, where damages are claimed."

7 So the CMA didn't have to show the extent to which prices would have been lower if
8 the PPO had been taken away, they just had to show that would have happened, they
9 would have been lower if the PPOs were removed. Page 820, please, paragraph
10 224(2). The problem that the tribunal found with the CMA's decision was that a great
11 deal of the analysis was at the level of theory or less helpfully, bare assertion and they
12 focused on findings such as this in the decision. The CMA found that by preventing
13 the relevant providers from offering lower prices on the rival comparison websites, the
14 clauses restricted the ability and reduced the incentives on those insurance providers
15 to compete on price, by differentiating their prices.

16 The tribunal said: that is just an assertion, it doesn't actually go to how effects were
17 proven. And if you go to page 840 -- 840, it is paragraph 243 -- the tribunal said:

18 "The mere fact that these clauses were effective, in the sense that they were complied
19 with, is not sufficient to demonstrate an anti-competitive effect. The CMA must show,
20 and the burden is on it, that there was such an effect. That involves far more than
21 simply asserting that the wMFNs were effective... [by which the tribunal meant that
22 they existed and that they were enforced and that they were complied with]. The CMA
23 must show not merely any anti-competitive effect but the anti-competitive effect found
24 in the decision... in essence, what must be shown is an inhibitory effect on premiums
25 and / or commissions ..." It is not enough for the CMA to say [and they quote from the
26 passage of the decision] that the terms prevented home insurance providers from

1 offering lower prices. They provided Compare the Market...(Reading to the
2 words)...legally enforceable guarantee, the lowest prices would be on their website.

3 There is no dispute as to the purpose of the PPO.

4 It is all irrelevant to the matters that the tribunal have to decide on effects and if you
5 go to page 843, paragraph 244, the tribunal said:

6 "We are quite prepared to assume widespread compliance but that does not prove the
7 effects that the CMA claims that the wMFNs caused."

8 Because what the CMA had to show was that the clause in fact produced the effects.

9 That if removed, the commissions and insurance premium would have reduced.

10 Page 846. Page 846, please. This is paragraph 248(2), halfway down. What the
11 decision is asserting is when considering the competitive interaction of the providers
12 in the market, there would be greater incentive to reduce prices, absent the clauses,
13 than if they were present.

14 That is a harder question than the effect of a clause on an individual subscriber but it
15 is a question that the decision must answer in the affirmative if it is to stand. And the
16 tribunal went on at paragraph 250 to say:

17 "It is not clear to us whether... home insurance providers would elect to price
18 differentially across different price comparison websites."

19 So it was not enough to show the clause was in force, that it was effective and
20 complied with, they had to demonstrate that if it were removed by reference to factors
21 such as competition between the providers, they would in fact have reduced their
22 premium.

23 And with that in mind, we look to see what the PCR proposes by way of evidence in
24 this case, so we go to Mr Harman's first report and the core bundle. And page 388.

25 Paragraph 7.4.29.

26 He starts off by saying this is his approach to assessing the PPOs and 7.4.30, he says

1 he is going to look at the contracts or agreements, the correspondence, the
2 interpretation of the clauses. Then 7.4.31, he will look at implementation and
3 enforcement of the PPOs, any compliance monitoring and then, third, finally come to
4 the effects. The likely effects of the PPOs on prices and outcomes in the relevant
5 markets. How will he address that? That is the key question. Given that Steam is
6 likely to have been dominant, there may be limited direct evidence. He sets out in
7 more detail his approach in summary. He is going to perform a literature review to
8 assess effects in other markets and assess the effects of PPOs on the price of Steam
9 only products that may have prevailed, absent the PPOs, and the likely rate of pass
10 on.

11 So we ask rhetorically: how? How is he going to do that? Over the page, he is going
12 to assess indirect effects of PPOs and the prices of other products to get an (Inaudible)
13 and that the information gathered about Valve show-rooming and investments
14 (Inaudible).

15 And we look in vain for methodology as to how he is going to demonstrate those effects
16 if the PPOs were removed. If we go to page 407, because he has cited section 8.
17 Page 407, paragraph 8.2.3, he says that the tribunal found that only the PPOs are
18 abusive and this is his approach to assessing damages. He says:

19 "Eliminating the PPOs will allow third party publishers to set prices... Lower
20 commission rate (or cost) on those channels a publisher could, all else equal, sell
21 their product to consumers at a lower price... incentivise price reductions on lower cost
22 distribution channels."

23 There would be an economic incentive to reduce their prices, because there'd be
24 lower costs on channels with lower commission fees. But again, this is all theory. He
25 is not describing how he is going to demonstrate that, what information or evidence he
26 believes he needs in order to make good these points. 8.2.4 again, is just

1 an assumption. No one else has the qualitative or quantitative material that he would
2 gather to make this good.

3 If we turn up the reference to comparison with other markets and PPOs in other
4 markets, that is valid only to the extent that those markets are relevantly similar. But
5 the comparators that Mr Harman proposed are similar to Steam only very superficially,
6 and Dr Majumdar's evidence in the core bundle as well, this time page 598. Because
7 Mr Harman suggested that online travel agents might provide a useful analogy and
8 I am not going to take you through all of this material now, suffice to say Dr Majumdar
9 pointed out that these OTAs, apart from being two-sided markets, bore no relations to
10 Steam's business at all. They are different. Very different services and types of
11 services, completely different demand characteristics and very different costs.

12 You get that from page 598 to 599.

13 Faced with this, the PCR says, Mr Harman says, this is just a cross-check, the OTA is
14 just a cross-check. That is in their reply at page 155. It is not a useful cross-check if
15 the businesses are not analogous in any way but in any event, the cross-check has to
16 check something.

17 Where is the main methodology to which this cross-check would be applied? All we
18 have seen is a theoretical approach. The thing that the methodology really means is
19 no plan for identifying questions to show that if the PPOs were adduced, these
20 particular Steam partners would price differently and the third party wholesalers and
21 so forth. All that is left then is a theoretical counterfactual rate and Mr Harman says if
22 we assume that the PPOs were removed, then everybody would react as he predicts
23 and the true competitive revenue share rate would be more cost reflective.

24 That is it. And, again, even on the generous approach which the tribunal takes to
25 methodology, that is woefully inadequate and it is not just to do with the PPOs in
26 isolation, it is linked to the lack of an effective revenue share because of course, all of

1 this, the analysis of how much commissions would have fallen, involves a comparison
2 with what they say is an effective revenue share. They cannot begin to identify that.
3 It is no answer to say that empirical methodology might be formulated from disclosure,
4 because he hasn't explained how disclosure might help in the future. That is the task.
5 If disclosure is the answer, they have to explain why disclosure will help you and
6 Mr Harman has failed to do that. In fact, in the reply, paragraph 76, all that is said is
7 that disclosure will allow him to illuminate the scope and terms of the PPOs
8 themselves.

9 Can I show you that? That is the reply in the core bundle. Page 181. In case my
10 learned friend says disclosure, again, will come to the rescue here, we see what the
11 PCR says disclosure will do in showing the effects which they say are produced by
12 PPOs, reply -- paragraph 76.

13 MR JUSTICE HILDYARD: Sorry, could you give me that reference again?

14 MR KENNELLY: It is the core bundle, sir, tab 4, page 181.

15 MR JUSTICE HILDYARD: Thank you.

16 MR KENNELLY: Paragraph 76. They said because of the absence at this stage of
17 disclosure from Valve and third parties, about the terms of the enforcement of the
18 PPOs, Mr Harman will use their disclosure to examine the precise scope and terms of
19 the PPOs. But like in Compare the Market, all that will tell you is what they say and if
20 they were enforced. But compliance alone does not show you what would happen if
21 the PPOs were lifted. Perfectly possible that even if the PPOs were lifted, assuming
22 they exist, that the Steam partners would not react as Mr Harman has predicted and
23 he has no methodology to offer you as to how he would explore that question. And
24 that question is an important one in view of the discussion my learned friend had with
25 Mr Lomas, because when you look at appendix H to Mr Harman's first report, that the
26 outcomes of those other studies where PPOs were lifted in other jurisdictions or other

1 businesses, it is a very mixed picture.

2 It doesn't follow, on those analyses, and I am not going to take you to them, because
3 the businesses are hardly relevant anyway, they are not analogous. What you see is
4 when these PPOs are lifted, in some cases, in many cases, no effect was produced
5 at all, so they cannot simply be assumed, as my learned friend would have you think.
6 Those are my submissions on the lack of a PPO methodology.

7 Can I move on then to my final point which is class identification. It is a very short
8 point and it has already been canvassed, I think, with you and you have it well in mind.

9 This is a factor under rule 79.2(e). The ease with which class members can work out
10 whether or not they are in the class. We have raised a number of points. We have
11 tried to narrow this down and be efficient but there remains this concern that where,
12 according to the PCR, a large number of minors are in the class, that is
13 paragraph 254(2)(b) of the claim form, how are they going to establish that they are
14 members of the class? It is just asserted that they will have financial records and
15 sufficient documentation to make that good. It doesn't follow at all that that is the case.

16 It is accepted that they will often have used a parent or guardian's card for purchases
17 and the question then is, to what extent will the children be able to hold these records
18 and access them from their parents and what has the PCR done to ensure that that
19 takes place? My learned friend says we will have very experienced people on the
20 panel and will have advice about how best to communicate with the class members
21 but as things currently stand, they cannot show you a proper basis upon which these
22 minors will be able to easily identify themselves as members of the class.

23 Because, not least because, they cannot be assumed to have effective documentation
24 going back to 2018. My learned friend refers to allowing emails to build up but he has
25 had the same unfortunate experience as me with certain free to use email accounts.
26 After a certain point they become unusable and the search function is very, very

1 unreliable and one can assume for children, that would be a fortiori, not least because
2 the kinds of email accounts that are required to open a Steam account are not fully
3 verified, professional email accounts of the type that we normally see. They can be
4 almost (Inaudible) accounts.

5 MR LOMAS: Mr Kennelly, isn't there a distinction between the test around class
6 certainty, which is essentially to make sure that the class can be defined in such a way
7 that there is a crystal clear rule as to whether you are in or out -- there can be no
8 dispute as to whether you are a member of the class -- and the question that you are
9 posing is whether somebody may have the evidence to demonstrate which side of the
10 line they are.

11 MR KENNELLY: Yes.

12 MR LOMAS: Isn't the rule directed at the first point, not the second?

13 MR KENNELLY: There are two different rules, sir, and I can see exactly where you
14 are going, and quite right.

15 Rule 72.1(a) is a threshold rule. If the class cannot be identified with ease. Then it
16 should not be certified at all, that is a threshold factor. I am speaking to rule 71.2(e)
17 which is only a factor in your overall assessment as to whether you certify or not.

18 MR LOMAS: Thank you.

19 MR KENNELLY: Sorry, 79.2(e), forgive me. That is a factor which you weigh in the
20 balance with the others. I am not claiming that this is the threshold factor, which is
21 rule 79.1(a); I am referring to 79.2(e), which is a factor -- nonetheless an important
22 factor and of course it links to the concern raised by the tribunal about why minors are
23 included in this at all, when in fact, in the vast majority of cases, the true loss is borne
24 by the long suffering parent and not by the child, and we will see what my learned
25 friends have to say about that and no doubt we will have an opportunity to respond to
26 it when we see how they will address the tribunal's legal concern. The easy solution

1 | may be to change the class definition to --

2 | MR LOMAS: Sorry to push back on this. I have just looked up the rule. 2(e) is
3 | "whether it is possible to determine in respect of any person whether that person is or
4 | is not a member of the class".

5 | Well, wouldn't the answer to that be yes, because it is whether you can prove that you
6 | had paid for a game within the relevant period?

7 | MR KENNELLY: Sorry, sir, I can take to you CICC II, and I am happy to in the time,
8 | but tribunal has said that one distinguishes between 79.1(a) and 79.2(e) in the way
9 | I have described. The threshold question is 79.1(a); 79.2(e), that is a practicability
10 | question. So how easy is it to work out if you are in the class or not -- do you have the
11 | email? Do you have some financial records? That is a practicability concern and it is
12 | a factor you weigh in the balance, and so it is open to me to say that, even if a person
13 | can say "True, I played a Steam game years ago, I remember playing that game", that
14 | is not good enough because they need to demonstrate that in evidence in some way
15 | and, to check that their recollection is correct, that is a practicability issue and, as I say,
16 | there is a real problem with doing that exercise in respect of minors, and it is open to
17 | me to make that submission under 79.2(e), but I accept it would not be possible I think
18 | to make this point as a threshold point under 79.1(a).

19 | MR LOMAS: Okay, let's not spend more time on it. That is fine.

20 | MR KENNELLY: Tomorrow I am happy to give you the references -- we have gone
21 | over this ground in other cases and the references should be very easy to produce to
22 | you if you need them.

23 | MR JUSTICE HILDYARD: Mr Kennelly, going back to PPO and the question which is
24 | still troubling me, is it also the position that there is no internal assessment of the effect
25 | of a PPO in terms of the performance of the business of Valve and, for example, of
26 | the cost benefit of enforcement?

1 MR KENNELLY: That is a different question, sir. That --

2 MR JUSTICE HILDYARD: It all goes back to the central root, which is it is
3 counterintuitive to me to think of a business entity, particularly one in the substantial
4 way of things which simply does not assess the commercial effect of various
5 commercial activities that it engages on.

6 Now, I asked the question previously with respect to the keys and I am now asking it
7 with respect to the PPOs and the efforts to tie people to PPOs.

8 Now, one would instinctively consider that the effect of that in commercial terms, and
9 whether it is worth enforcing them, whether it is capable of being enforced in any given
10 circumstance, will be matters of considerable interest to the directors of Valve, but it
11 is not; is that right?

12 MR KENNELLY: I will stand corrected, but that issue was not addressed in the
13 evidence that we put before you and we have not produced our defence on that
14 question -- it has not been necessary to address it.

15 But our focus is on what is their plan for making good their claim that if the PPOs were
16 made out and then removed, the Steam partners would react in a certain way. True it
17 is, they have said, that they would expect Valve on disclosure -- if Valve had
18 documents saying "Let's keep these PPOs because, if they are removed, prices will
19 fall"; that is something they say they would hope to see on disclosure but, even if those
20 documents existed, that would not be enough to make a methodology to prove effects.
21 Presumably in Compare the Market, BGL proposed their restrictions for a reason.
22 Maybe they hoped they would restrict competition in the way that the CMA alleged but
23 the tribunal said that was not good enough; it was not good enough that they existed
24 and they were enforced rigorously. The burden was on the CMA to show that, if
25 removed, these effects would be likely to arise and that is what we say Mr Harman
26 has failed to do. It is a methodological gap, again, and one which presumably they

1 | could fill but they would have to be sent away to fill it. One cannot simply use the
2 | possibility of disclosure from Valve, when Valve speculates in theory as to these
3 | PPOs, if we deny exist, that wouldn't be a methodology even if the documents existed
4 | but, unless I am told, we have no evidence -- because of the nature of our challenge
5 | to certification, we didn't produce any evidence on this question and the tribunal can
6 | assume, in the absence of evidence, that disclosure from Valve may produce
7 | something but it still doesn't save the PPO method, the methodology, that they failed
8 | to produce on PPOs. It is not for us to speculate as to what disclosure might produce.
9 | They have to have a plan for how they will show how PPO removal will produce effects.
10 | It is not a heavy burden but you see what Mr Harman did and it isn't enough.
11 | For Mr Lomas, if I may before I sit down, the reference to 79.2(e) being about the
12 | economics of the matter, it is in CICC --

13 | MR LOMAS: I have picked it up, thank you.

14 | MR KENNELLY: Unless I can be of any further assistance, those are my submissions.
15 |

16 | Submissions in reply by MR GREGORY

17 | MR GREGORY: Just to start with Mr Lomas' question again, in our reply at
18 | paragraph 92 to 107, there is a discussion of the question of the different rules that
19 | apply to the different parts of the class recognition and distribution analysis. I don't
20 | think there is anything between Mr Kennelly and I in terms of the law on that.

21 | MR LOMAS: Thank you.

22 | MR GREGORY: In terms of points in reply, I note that Mr Kennelly immediately
23 | abandoned any argument that you cannot take into account Steam keys on
24 | an aggregate basis, despite the fact that that was the basis on which most of Valve's
25 | objections had been put at this stage.

26 | The short terminological points, Mr Kennelly took you to Harman 1, paragraph 384,

1 the chart saying that Mr Harman has there identified the effective commission rate.
2 That wasn't the language he used. He was there using it for the purpose of coming
3 up with a blended rate that took into account the three tiered commission structure.
4 He was not using it in the same way that Valve uses it. So that would take into account
5 Steam key sales, although of course he acknowledged that he may have to do that.
6 The percentage commission rate is not an issue for limb 1 of the unfair pricing analysis.
7 Mr Kennelly twice stated that it was, and he referred you to Harman 1, page 398,
8 paragraph 7.6.16, which did refer to the 27 per cent figure. I explained when I was
9 making my submissions earlier that, in that passage of his report, he was simply
10 referring to some of the publicly available information, which on a preliminary basis
11 suggested there was a case to answer for Valve, in terms of excessive pricing. That
12 is not his limb 1 methodology. Paragraph 7.6.13 at page 397 of the bundle, it says
13 that his limb 1 assessment will be based on a comparison between Valve's total
14 revenues and costs.
15 And Mr Kennelly took you to Le Patourel, and sought to say that the approach in that
16 case is not relevant here, because they are concerned with uncertainties in the level
17 of costs and not in the level of price. First, that raises an analogous issue -- in fact
18 you might say it is the same issue -- as the excessive pricing part of the analysis turns
19 on the difference between costs and price. Second, it is simply illustrative of a more
20 general point that liability sometimes has to be established, even given challenges in
21 quantification; see also Merricks, paragraph 50.
22 Two minor points. He suggested that in the PCR's skeleton, that the rationale for
23 issuing Steam keys would tell you about the price and we are not saying that. What
24 we said was the rationale may be informative as to how you go about grouping Steam
25 partners if you are going to carry out an alternative grouping aggregate analysis and
26 we are not suggesting that Steam or Valve itself will have the sales and marketing

1 strategies of its customers. One would have thought that they would have some
2 insight into those strategies given their customers request Steam keys for the purpose
3 of implementing them.

4 In terms of the process generally, I emphasised originally that there was very limited
5 publicly available information at the time Mr Harman formulated his first report but the
6 information regarding Steam keys was only produced by Valve in its response quite
7 recently. It is clearly right that the tribunal should explore through its case
8 management powers the evidence that can best be gathered to take Steam keys into
9 account in an acceptable way, obviously accepting that the data was not going to be
10 perfect and that some sort of estimates and assumptions would be appropriate. Part
11 of that will involve having disclosure from Valve in relation to its Steam key practices,
12 and I showed you Mr Harman had a list of information requests.

13 Mr Kennelly said on instruction that Valve does not systematically monitor Steam key
14 sales prices and does not calculate effective revenue share, but it would be surprising
15 if it did not have any relevant evidence and we say, ultimately, it is already clear at this
16 stage that there are some approaches that could be used and it is realistic to accept
17 that it would be possible to come up with other viable alternative approaches following
18 disclosure.

19 That is the objections regarding the price of Steam key sales not being known. All of
20 those issues disappear if you assume that the Steam key products are sold at the
21 same price as on Steam. That is an assumption which is favourable to Valve, as I
22 think was put to Mr Kennelly. It is a fallback assumption that can be used if, ultimately,
23 following disclosure and exploration through case management, it proves impossible
24 to access data that enables more accurate estimates to be made on some alternative
25 basis.

26 As to the different possible sources of price data, I would be grateful if you could go to

1 Mr Harman's first report, core bundle 11, page 363, and have a look at
2 paragraph 5.10.1. Mr Kennelly took you to this.

3 Mr Harman contacted a number of different virtual data providers who are active in the
4 industry. It is true that some of them responded saying they did not hold the relevant
5 data. If you look right at the bottom of page 363, a number of them responded saying,
6 the way it is put in the report:

7 "The data appears to be exclusive to stakeholders within the video game industry."

8 That may have been a somewhat euphemistic phrase. The impression we got is they
9 thought it was not in their commercial interests to provide it to us. We think some of
10 these data aggregators may have relevant information and we would like to explore, if
11 the claim is certified, how we can extract that information from them at the first CMC.

12 On the price issue, again, Mr Kennelly showed you a chart attached to the RPC letter
13 showing that there were frequent price changes in the games to illustrate that it is
14 difficult to identify the volumes of products sold at different prices. That would most
15 obviously be a problem if you were seeking to calculate the effective commission rate
16 for individual publishers or individual games. If you are calculating an average
17 commission rate across all Steam partners, for example, it should be possible to come
18 up with reasonable average figures, for example based on the proportion of games
19 purchased at full price as opposed to at the discounted prices.

20 Mr Kennelly took you to Harman 2, paragraph 3.3.41, in which he had illustratively
21 assumed a particular percentage discount figure on the Steam price, and I would be
22 grateful if you could go to that, at core bundle 12, page 547. You see a number 3.3.41,
23 and I will not read them out because they are confidential. Mr Kennelly presented that
24 as if it was a fully worked up methodology that Mr Harman is proposing. It is not.
25 I would be grateful if you could turn back to page 543 and read paragraph 3.3.31.

26 In this part of his analysis, Mr Harman was just illustrating or saying he did not

1 necessarily agree with all of the assumptions that Mr Majumdar had used for his
2 analysis and he is identifying ways in which you could make some alternative
3 assumptions that would affect the outcomes -- he is presenting final fully worked up
4 methodology for estimating Steam key sales prices.

5 Volume of Steam keys, in relation to the issuances and redemptions, I would be
6 grateful if you could turn to page 545 and please read paragraph 3.3.38. (Pause)

7 It does assume intuitively more appropriate to use redemptions as the starting point.
8 Whether or not that is the case is a merits issue for trial. The certification issue is
9 whether the issue is untriable, whether there is some appropriate methodology. Now,
10 here we have two possible methodologies: one, issuances and, two, redemptions. Of
11 course, in reality, it will not be a binary choice. If it is plainly possible that you could
12 use the redemption figure but adjust it in some way to take into account the fact that
13 some Steam key products are sold but not redeemed.

14 On PPOs, Mr Kennelly referred to an alleged conflict in the PCR's case, in that the
15 evidence suggests that Steam keys are routinely discounted. I addressed that. If it
16 turns out that PPOs are not enforced in relation to Steam key products but are
17 enforced against other products where you do not find discounting, that could itself
18 provide evidence that the PPOs are having an effect on price.

19 As you saw in Mr Harman's report he found strong evidence of pricing parallelism on
20 the most popular and expensive games, and you can see that Valve may have
21 a greater incentive to enforce PPOs against that category of game.

22 Mr Kennelly took you to Compare the Market. Just by way of context, that was
23 an appeal against the final infringement decision of the CMA which it made after a long
24 investigation and using all of its full evidence-gathering powers. It is clearly
25 appropriate to hold the CMA to a higher standard at that point in time than to a PCR
26 at the certification stage.

1 It was also the case under the Chapter I prohibition -- it did not involve PPOs being
2 imposed by the market leader. It is also a different case on the facts. Here of course
3 we have some evidence from the US proceedings that indicates that Valve is telling
4 publishers to adjust prices in order to ensure parity.

5 Those are all the submission that I had in reply, unless you had any further questions?

6 MR JUSTICE HILDYARD: No. Thank you both very much.

7 We will take time to consider it and provide a judgment. So in the meantime, you are
8 going to do some more work on the class constitution, and you are going to provide
9 some evidence as to the origination of the funding-- yes, thank you.

10 Very good. Thank you all.

11 (4.55 pm)

12 (The hearing concluded)