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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 10th February 2025

Before:
Ben Tidswell
Dr William
Bishop
Tim Frazer

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr. Rachael Kent

Class Representative

v

Apple Inc. and Apple Distribution International Ltd

Defendants

A P P E A R A N C E S

Mark Hoskins KC, Tim Ward KC, Michael Armitage, Matthew Kennedy, Antonia Fitzpatrick,
(Instructed by Hausfeld & Co. LLP) On behalf of Dr. Rachael Kent

Marie Demetriou KC, Brian Kennelly KC, Daniel Piccinin KC, Hugo Leith, Hollie Higgins
(Instructed by Gibson, Dunn & Crutcher UK LLP) On behalf of Apple Inc. and Apple
Distribution International Ltd

Monday, 10 February 2025

(10.34 am)

MR DEREK HOLT (continued)

Cross-examination by MS DEMETRIOU (continued)

THE CHAIRMAN: Good morning, Ms Demetriou, Mr Holt.

MS DEMETRIOU: Good morning.

Good morning, Mr Holt. So we were discussing on

Friday afternoon the IP issue.

A. Yes.

Q. I would just like to go back to the transcript from
then, just to recall what you said. So Day 18,
page 218, please. That should come up on the screen.
{Day18/218:1}

A. Yes.

Q. If we look at lines 17 and following. So you had
accepted that Apple was entitled to charge for its
proprietary technology, but the point you were making
here -- you said that there was no need to factor that
in when looking at comparators, and the particular point
you were making here was that even with a 15% commission
Apple would be earning a lot of money, yes?

A. Well, that is one aspect of it, but that is right, yes.

Q. In relation to that point, so you agree that the 15%
figure reflects what you say is the competitive
benchmark for distribution and payment services,

1 correct?

2 A. Well, not quite. I say that that reflects the not
3 unfair charge in relation to the relevant markets.

4 Q. For distribution and payment?

5 A. Yes.

6 Q. So the premise for your analysis is that Apple would not
7 be charging developers who monetised through paid
8 downloads or in-app purchases anything additional for
9 its tools and technology, correct?

10 A. That is correct.

11 Q. But you say that this does not matter because it is
12 earning enough anyway, but, Mr Holt, it is no answer, is
13 it, to say that Apple is earning a lot from its
14 ecosystem because developers are also earning a lot from
15 the iOS ecosystem too, are they not?

16 A. Well, I agree that developers are obviously making
17 sales, so the amount of billings has grown over time,
18 but I disagree with the suggestion that it is not
19 relevant. What I am looking at is the right balance to
20 achieve a not unfair charge, and I am looking at that in
21 the context of comparators, but also other evidence, and
22 looking at -- in the round -- what developers are
23 contributing, and there are a number of aspects of what
24 they are contributing: one is through the commission
25 itself; secondly, through the app developer fee;

1 thirdly, through the ecosystem advantages. Then I also
2 refer to the observation that in other ecosystems, one
3 identifies that the IP is not something that is
4 a supplementary charge to developers because of the fact
5 that the advantages are already recouped through
6 a number of other mechanisms.

7 Q. So you say here that they are contributing through the
8 Commission itself. Well, of course, at the moment they
9 are contributing to Apple's tools and tech through the
10 Commission itself, but your 15% comparator assumes, does
11 it not, that Apple would not be entitled to charge
12 developers a fee comprising a proportion of the profits
13 they make using Apple's intellectual property. That is
14 the premise for your comparators analysis, is it not?

15 A. The only premise I am making is that in relation to the
16 relevant markets, what on would be the benchmark for
17 a not unfair charge. Now, there are two aspects of
18 that: there is the charging structure and there is the
19 charging levels. The approach that I have adopted is to
20 look at the charging structure, which is, in my view,
21 common across a range of different ecosystems, whereby
22 you see commission as a primary charge to reflect the
23 various contributions made, in addition to fixed fees in
24 some cases, and the observation is that the IP is
25 generally granted to the developers without further

1 charge on top of those other contributions, reflecting
2 the advantages that that IP confers to the ecosystem or
3 the platform owner.

4 Q. Well, hang on a minute, Mr Holt, because you say that
5 you look at structures and you say that you see
6 commission as a primary charge to reflect the various
7 contributions, but take the Google Play Store. You have
8 not investigated, have you, what the 30% commission that
9 the Google Play Store comprises; for all you know, that
10 30% commission also comprises monetisation of Google's
11 tools and tech. It is not something you have looked at,
12 have you?

13 A. I have considered whether the Play Store's 30%
14 commission reflects an appropriate benchmark to take
15 into account, and I have reached the judgment that it
16 does not, for a number of reasons.

17 Q. That is not quite the question. You have not considered
18 whether Google's 30% commission includes a fee for its
19 tools and technology, have you?

20 A. I have not specifically considered that, that is fair,
21 but it is not relevant to my consideration, because I am
22 looking at the overall balance of contribution made by
23 developers in relation to a workably competitive market,
24 and that is really the focus of my analysis.

25 Q. Well, when you say you have looked at the overall

1 balance between Apple's contribution and developers'
2 contribution, you have not actually done that, have you
3 in your reports? There is no analysis of the balance
4 between Apple's profits and the developers' profits. It
5 is not something you have investigated at all?

6 A. Well, I -- what I have done is used the benchmark
7 associated with workably competitive competition, which
8 I think is, in my judgment, the reasonable benchmark to
9 assess what is a not unfair charge. That takes into
10 account investigation of these types of issues, but by
11 reference to comparators.

12 I have also looked at, within iOS, issues, including
13 the nature of the contribution made by developers in
14 cases where they have a greater degree of choice, albeit
15 not the degree of choice you would expect in the context
16 of competition within a market.

17 Q. All right, let us look at something else you said at the
18 end of last week. So if we go back to Day 18, page 221,
19 and I just want to look at lines 12 to 18.

20 {Day18/221:21-18}

21 You make the point -- the point that you were making
22 here and in the next few exchanges -- I do not think we
23 need to read all of them -- at the end of Friday was
24 that app marketplaces that provide tools and technology
25 usually only make an additional charge for the use of

1 the tools and technology that is not on their platform
2 or ecosystem. That is the point you were making there,
3 was it not?

4 A. That is correct.

5 Q. But you have not -- you have just -- just taking the
6 example of Epic and its Unreal Engine, which is the
7 example we were looking at here, that is a graphics
8 engine that works on all sorts of different devices,
9 correct? So PC, console, mobile?

10 A. That is my understanding, yes.

11 Q. Epic charges developers who use Epic's tool for all
12 revenues on all three types of device, except for the
13 tiny proportion of their sales that take place through
14 the Epic Games Store, yes?

15 A. I think that is right, yes.

16 Q. So assume a developer that makes a game, a PC game,
17 using Unreal and sells it on both Steam and the
18 Epic Games Store, and let us say, in line with average
19 figures, 85% of their sales go through Steam and 15%
20 through the Epic Games Store, then the developer pays
21 Epic 12%, yes, a 12% commission for the 15% of its sales
22 that go through the Epic Games Store, yes?

23 A. I think that is right, yes.

24 Q. The developer also pays Epic 5% for the 85% of its sales
25 that go through Steam, and that is on top of the 20 to

1 30% that the developer has to pay Steam, correct?

2 A. I think that would be correct.

3 Q. Of course the decision that Epic makes to waive the 5%
4 charge on revenue through the Epic Games Store costs
5 them next to nothing, does it not, because only a very
6 small share of PC games revenues go through the
7 Epic Games Store?

8 A. That may be correct.

9 Q. So there is not any reason, is there, why Apple should
10 not be free to charge for its much more extensive
11 proprietary technology to all iOS developers whether
12 they use the App Store or not?

13 A. I think I am really making the observation that there
14 are important ecosystem considerations to be made when
15 looking at the charging structure that one observes in
16 relation to the distribution of digital content. One
17 typically observes that if you are within the ecosystem,
18 then the charging structure which Apple and Microsoft,
19 Google and Epic applies is commonplace, so in my
20 counterfactual I am merely assuming that that continues
21 and making no adjustment for it.

22 Now, I entirely accept that you could conceivably
23 have a different charging structure, but then you would
24 have to revisit the analysis in any event to look at
25 what is the balance of charges, taking into account both

1 commission and any additional charges.

2 Q. Just picking you up on one point. You said:

3 "One typically observes that if you are within the
4 ecosystem, then the charging structure which Apple,
5 Microsoft, Google and Epic applies is commonplace ..."

6 But taking Apple, we know that within its ecosystem
7 the 30% commission includes monetisation for its tools
8 and tech, yes?

9 A. Well, the way I put it is there is a subjective debate
10 as to what it is for, and I am not making an opinion on
11 that, I understand that Mr Howell has formed some views
12 and Mr Schiller has different views, I am not commenting
13 further on that.

14 Q. No.

15 A. I do accept, of course, that if you look at the
16 profitability of the App Store, then clearly it is
17 making a very large contribution to the ecosystem, and
18 that may well include a contribution to tools and tech.
19 My point is that that would continue to be the case to
20 a very great extent in my counterfactual and -- so
21 I will not repeat some of the other points but that is
22 just one of several.

23 Q. Just going back to what you said with Google's charging
24 structure, I think you agreed with me that you have not
25 investigated whether the Google Play Store's 30%

1 includes monetisation of its tools and tech, that is not
2 something you investigated?

3 A. No, I sort of considered Android and the Play Store to
4 the extent that it would represent a relevant comparator
5 for my benchmark of a workably competitive distribution
6 market and I reached a judgment it does not.

7 Q. Ultimately, the profits that Apple makes on its iOS
8 ecosystem do not say anything, do they, about developer
9 value?

10 A. Do the profits that Apple makes say anything about
11 developer value? I think what it speaks to is that the
12 size of the market is large. Any commission percentage
13 will obviously lead to a split of that large amount of
14 sales as between the two parties, Apple and the
15 developers. Clearly the larger the volume of sales, the
16 greater the benefit both are achieving, but in my view
17 that is not really a relevant question because in the
18 counterfactual you would still have that large base of
19 iOS Device users in any event.

20 So the question then comes down to not is the size
21 of the market large, or are developers making a lot of
22 billings, but what would be the split in a workably
23 competitive situation.

24 Q. All right, let us move on. Can we go to {C2/10/99}.

25 This is your third report, paragraph 265.

1 A. Yes.

2 Q. You recognise here that one way in principle of
3 identifying a competitive benchmark is to compare prices
4 for the market in the impact period with prices in an
5 earlier period which is deemed to operate under
6 conditions of workable competition, yes?

7 A. Yes, that is the time series approach, yes.

8 Q. But you have not analysed in your reports, have you,
9 whether Apple's Commission in 2008 was charged under
10 conditions of workable competition so as to make that
11 a suitable benchmark?

12 A. No, I have merely made the observation that the original
13 Commission, from what I understand the Apple witnesses
14 to have said about that, reflected a number of
15 considerations, one of which was a couple of examples of
16 commission they were aware of, I think Steam being one
17 of the cases, that they had not explicitly tried to
18 assess developer value as part of that consideration,
19 nor had they, at least within the distribution market,
20 looked at issues of competition.

21 Q. But do you agree that the key question here is whether
22 Apple was dominant when the App Store was launched,
23 because if it was not dominant then the price it was
24 charging was a price in conditions of workable
25 competition, yes?

1 A. I have not looked at that question. I was not -- it was
2 not within my remit to focus on the question of
3 dominance and, to be clear, my focus was on whether the
4 pricing was excessive and unfair during the Relevant
5 Period.

6 I do not think whether Apple was or was not dominant
7 at the time the original Commission was set is relevant
8 to my consideration, because the market has changed in
9 many ways since that point in time. By the time you get
10 to the Relevant Period, I think the nature of the market
11 is extremely different than it was perhaps in 2008.

12 Q. Well, let us take this in stages. So do you accept that
13 if Apple was not dominant when the App Store was
14 launched, then its 30% commission would be a commission
15 set under conditions of workable competition?

16 A. I would have to, I think, think about that in a bit more
17 detail, as to the wider set of conditions. I think if
18 one takes the assumption that Apple was not dominant,
19 then I think it may be reasonable to say that -- clearly
20 if it is not dominant then it would be unlikely that you
21 would say that the Commission was set at an excessive or
22 unfair level, in fact you could not say that, I think
23 I would go as far as that, because dominance is
24 obviously a pre-condition.

25 Whether it necessarily, however, represents a good

1 benchmark for my workable and effective competition
2 test, even at that time, is still debatable, because of
3 course there are still issues around barriers to entry
4 and other sort of conditions that you might want to
5 reflect on. Again, I have not focused on those
6 questions as it pertains to the period 2008. I have
7 focused on the questions from 2015 onwards.

8 Q. Now, I cross-examined Dr Singer on this topic at some
9 length and I showed him quite a large number of
10 contemporaneous documents. Did you see that, or have
11 you seen the transcripts of that?

12 A. If this refers broadly to things like competition with
13 BlackBerry and things of that nature --

14 Q. Exactly.

15 A. -- I am somewhat familiar with that, yes. You do not
16 need to take me to everything. As long as you put the
17 core point, and I -- (overspeaking) --

18 Q. -- do it like that. So I am not going to -- let me just
19 take you to one document, then I am going to put
20 a series of propositions to you and you can tell me
21 whether you agree.

22 Let us go to {D1/28}. So this is an Apple
23 presentation from November 2007, and if we go to page 19
24 we see that is entitled "Checkpoints". {D1/28/19}

25 A. Yes.

1 Q. I put this to Dr Singer. You may have seen the document
2 yourself, have you?

3 A. I did not see the document. I only saw the transcript,
4 so ...

5 Q. Fair enough.

6 Is it possible to sharpen it up so it is a little
7 more legible. Great.

8 So what we see here are -- you can see in the bottom
9 to last row, "Margin", and --

10 A. Yes.

11 Q. -- then you see the comparable charges, so Nokia 40 to
12 50%. Handango 40% standard, 30% wireless. Microsoft
13 40% standard. Then it goes across, and we have the
14 carriers 50 to 60%. So what we see from this is that
15 the Commission that Apple set was materially lower than
16 those other platforms, yes?

17 A. I agree that 30 is lower than some of the numbers
18 expressed here and similar to some of the other ones.
19 This is for -- sorry, this is a document, just to be
20 clear, that Apple had in mind as it was devising its --

21 Q. Exactly.

22 A. So approximately 2007 or 2008, something like that.

23 Q. November 2007 is the date of the document.

24 A. Yes.

25 Q. So when you said I think just a moment ago, and in your

1 concurrent evidence, that you had not seen any evidence
2 that Apple conducted any analysis of what the
3 competitive levels were, this would be some evidence of
4 that, would it not?

5 A. I think that is fair. I think this would be some
6 evidence that they are considering what others have
7 carried out. Again, even if that is -- even if it that
8 is the case, I think two points are worth bearing in
9 mind. One, assuming that the market definitions are as
10 described in my instructions, then similar
11 considerations might apply to some of these benchmarks,
12 in other words some of these other benchmarks might also
13 be a -- essentially a situation whereby once you are in
14 the ecosystem, then the distribution of apps might not
15 be subject to a great deal of choice. I do not know for
16 sure whether that is the case in all of these, I have
17 not looked at this time period, but that would be one
18 consideration that the Tribunal might wish to take into
19 account.

20 The second one is what are the market conditions
21 here as you look at this at November 2007 by reference
22 to the considerations that I take into account for
23 a workably competitive market for the Relevant Period,
24 and I think those are different.

25 Q. All right, so I am going to put my propositions to you

1 now, Mr Holt.

2 A. Okay.

3 Q. Then if you just indicate whether you agree, disagree or
4 whether you are unable to comment.

5 A. Sure.

6 Q. So when the App Store was launched in 2008, Apple had
7 a tiny sale of shares of smart phones?

8 A. I think that is fair, because I do not think it had
9 smartphones before the -- sorry, it obviously had the
10 iPhones in 2007 and then the App Store in 2008. I do
11 not know the market share, but I am happy to take the
12 proposition that its share at the time was not high.
13 I do not know.

14 Q. The market for smartphones was competitive at that time?

15 A. I have not looked at the nature of competition in
16 smartphones at that time. I think it may well be
17 a reasonable proposition that it was. Obviously it was
18 a growing market, there were a few different providers.
19 It is obviously some long way away from perfect
20 competition, not that that is the test I am looking for
21 in these matters, but again it is not, in my view,
22 germane to the issues I was asked to look at, and I have
23 not looked at it so I have not formed a --

24 Q. No, fair enough. If the answer is "I have not looked at
25 it and I do not know", that is fine.

1 A. Fine.

2 Q. So Apple saw the App Store as a means of competing on
3 the devices market, did it not?

4 A. I think that is, again, likely to be true. I cannot see
5 what else you would do with it, other than to try and
6 have a better, you know, a better overall proposition.
7 If that is what you are putting, I agree.

8 Q. We saw in the documents I put to Dr Singer that
9 competing platforms responded to Apple by developing
10 their own app marketplaces. Is that something that you
11 are aware of too?

12 A. I think that may well be correct. It sounds like some
13 of these seem to exist already, so I am not sure if it
14 is necessarily correct to say that Apple had the first
15 one and everyone else reacted, but it may well be that
16 a number of different players were developing these
17 things over a period of time.

18 Q. That is fair. So Apple needed to make the App Store
19 attractive to developers, did it not?

20 A. Well, it would certainly need to set conditions that
21 were sufficiently attractive so as to encourage some
22 developers to join up, I agree.

23 Q. We see from the document I have just shown you that 30%
24 was an attractive commission and lower than commissions
25 charged by its competitors at the time, correct?

1 A. That -- yes, I think that may well be the case. Again,
2 I have not looked at it in great detail.

3 Q. Would you accept that following the launch of the App
4 Store, there was a massive increase in output?

5 A. I think you would have to define "output" a bit more
6 specifically.

7 Q. So the output was in innovative new products. The apps
8 themselves were highly innovative and the devices were
9 highly innovative.

10 A. I think generally that period of time you could describe
11 it as devices were developing, ecosystems were
12 developing, and indeed, as you say, developers created
13 apps that, you know, could be useful for users.

14 Q. Developers had much more choice about how to market and
15 distribute their products, and consumers had choices
16 too, correct?

17 A. Well, again developers -- I think it is important to
18 consider what you mean by developers had choices.
19 I think it is not the case that you are sort of making
20 a choice which ecosystem do you buy into for
21 a developer. Obviously different ecosystems represent
22 separate categories of customers that you might want to
23 reach. So if you have a, you know, a potentially
24 broadly -- an app of broad appeal, you may well want to
25 participate in multiple ecosystems. By not

1 participating in one ecosystem, you clearly leave
2 yourself leaving sales on the table, because you are
3 sort of outside of the potential for reaching quite
4 a large number of users.

5 Q. But it would not have harmed developers very much to
6 leave an ecosystem off the table if that ecosystem did
7 not represent a high volume of consumer sales at that
8 point in time?

9 A. Obviously there is a degree to which the opportunity
10 costs a developer would take into account; the smaller
11 the ecosystem, I would agree the opportunity costs may
12 be less. You would perhaps also want to take into
13 account anticipated levels of device users over time,
14 for example.

15 Q. All these factors I have been putting to you, they all
16 indicate, do they not, that Apple was not exercising
17 market power back in 2008?

18 A. I think what they indicate is that there was clearly
19 competition at the outset for devising handsets and
20 ecosystems that would be attractive. I think that is
21 certainly a fair statement. It is not necessarily the
22 case that one can sort of reach from that to say, in the
23 markets as defined, whether it had market power in that
24 context. I think the argument would have to be that the
25 degree of competition in the handset market was

1 constraining the level of commission, for example, in
2 the iOS App Distribution Market.

3 I have not looked at the evidence to see whether the
4 degree of switching and the degree of competitive
5 tension was sufficient to make that statement at that
6 period of time. In my view, it is certainly not the
7 case, in my view, during the Relevant Period.

8 Q. If it is right that the 30% commission was being charged
9 in circumstances of workable competition, then that is
10 highly relevant, is it not, to whether it is
11 a competitive price today, because demand side value has
12 increased very significantly since that time, and so if
13 30% commission was a competitive commission in
14 2008/2009, it must also be competitive now?

15 A. So, firstly, leaving aside whether one can agree that
16 the 30% is representing a competitively constrained
17 commission at that time, which I just explained I do not
18 get that far in my assessment, having admittedly not
19 focused on that period of time greatly, I do not think
20 that is the case, because the market has evolved, the
21 barriers to entry were obviously there in the iOS App
22 Distribution Market, the scope for entry would have been
23 I think very great given the size of the market and the
24 high profitability of that market. So in that case,
25 I would expect that there would be -- if you were

1 looking at the workable competition benchmark test --
2 much lower commission at least during the Relevant
3 Period.

4 Q. Why -- if 30% -- assume with me that 30% was
5 a competitive commission in 2008, now that the value --
6 the value to developers has increased exponentially then
7 30% must still be a competitive commission today, must
8 it not?

9 A. No, I disagree with that, because the -- on the
10 benchmark and the framework I am adopting, the focus is
11 what would you expect in a workably competitive iOS App
12 Distribution Market, and I do not think, even if one
13 were to say that 30% was the outcome of competition in
14 2008, which again I do not think one can go that far,
15 because while there is clearly some handset and device
16 innovation and some other considerations, you still also
17 have the limitations on entry and the need for
18 developers to -- as a business model, to try and attract
19 as many device users as possible.

20 Leaving that aside and taking your assumption,
21 however, that it was competitive, again the market
22 evolve, and the size of the market was obviously tiny in
23 2008, and that is simply not the case. If you roll
24 forward a few years, it grew very rapidly. That would
25 be, in my view, a strong indication for prospects of

1 entry and innovation and additional benefits to
2 developers.

3 Q. So is your position, Mr Holt, that Apple was obliged to
4 charge less as the value that it provided to developers
5 increased massively?

6 A. I am merely making the statement that one needs to
7 compare the actual commission as charged as to whether
8 it is (a) excessive and (b), if it is, then potentially
9 unfair, and if I adopt my standard for that assessment,
10 it would indeed have had to charge a lower rate, at
11 least during the Relevant Period, and the reason for
12 that is that the -- one did not observe the conditions
13 of workable competition at least during that time, if
14 not also before, and therefore one needs to look to see
15 what those conditions would look like, and the
16 comparators as well as the evidence within the iOS
17 system, in my view, lead to the outcome I have
18 identified.

19 Q. All right. Well, we understand your position on that.
20 We do not agree with it, but you know that.

21 A. Yes.

22 Q. Let us move on. So if platforms provide different
23 services, facilitate different transactions, have
24 materially different quality or structure their charges
25 materially differently, then they are unlikely to be

1 good comparators, are they not? Or at least you have to
2 factor in and control for those differences. Do you
3 agree with that?

4 A. Yes, I agree that issues such as quality and/or charging
5 structure could in theory be important to consider at
6 least, yes.

7 Q. Just on quality, quality is relevant, is it not, because
8 if one platform provides a service of materially higher
9 quality than another, then that may well explain why it
10 has a higher price, correct?

11 A. Yes, it could. So in a market of differentiated
12 products you might see a dispersion of prices reflecting
13 different quality, and what you would see in that market
14 is that different developers and users would essentially
15 be attracted to the best trade-off, given their
16 circumstances.

17 Q. A further and related point that you make in your third
18 report is that it is relevant to consider whether there
19 are differences in demand faced by different platforms.
20 Again, if a platform is of better quality and attracts
21 more developers and consumers, then it will be more
22 valuable to both, will it not, and may well be able to
23 command a higher price?

24 A. Yes, I think obviously there are indirect network
25 effects, such that if you are able to offer a large

1 number of users or a large number of other developers,
2 then that can be a factor that can increase the value of
3 the platform, yes.

4 Q. Now, you say in your third report that the PC app stores
5 are indicating under conditions of workable competition,
6 correct?

7 A. Well, that is my assessment of the best available --

8 Q. Yes.

9 A. -- comparator, yes.

10 Q. I think you have just accepted that in a workably
11 competitive market, as you said a few moments ago,
12 a workably competitive market for differentiated
13 products or services, there can be price dispersion,
14 yes?

15 A. Yes.

16 Q. That can be reasonably wide?

17 A. I mean, it depends on the market. Obviously if you look
18 at automobiles, then obviously there is a large
19 dispersion between Ford Fiestas and Lamborghinis, for
20 example.

21 Q. In a market for differentiated products, it follows that
22 there is not any single competitive price, correct?

23 A. You might observe a range, that is correct. I think
24 that just follows mathematically from your --

25 Q. You think it just follows. Within that range, all the

1 prices can be competitive, yes?

2 A. It is possible. I mean obviously it depends on the
3 conditions of competition. If you are pre-supposing
4 that there are effective conditions of competition,
5 there is lots of choices available, there are few
6 barriers to entry and expansion, you know, any number of
7 other sort of factors that an economist might wish to
8 consider in relation to how competitive that market is
9 operating, then I think that is fair, but that obviously
10 does not necessarily mean that in a differentiated
11 products market, all prices that you observe would
12 necessarily be competitive. That does not (inaudible).

13 Q. So if you find a good comparator market for iOS app
14 distribution and payment services, it cannot be right,
15 can it, that Apple should be limited to charging the
16 lowest price in that market?

17 A. I am not suggesting that it should be limited to
18 charging the lowest price, so I think I would agree with
19 that.

20 Q. Can we also agree that it also cannot be right that
21 Apple should be limited to paying the weighted average
22 price in that market?

23 A. I think that is a little bit more debatable. I mean
24 there are two considerations there. In a product
25 differentiated market then there is a range of options

1 that are available, people can choose and self-select
2 the best option for them, and that could in some cases
3 be there are real advantages to going for a lower cost
4 offering, in some cases it might be that the value of
5 the additional quality, as a trade-off compared to
6 price, is enough to get you to go to the higher one, and
7 that is what you see as a dispersion, pre-supposing that
8 that is all happening in a market of competitive
9 competition.

10 But that is not to say that all of those prices are
11 not relevant to take into account as to what the
12 outcomes might be in a workably competitive market, and
13 then of course by reference to iOS app distribution, you
14 do not have product differentiation, you do not have
15 choice.

16 So I do not think it is right to say one should
17 avoid looking at, you know, the range of prices in the
18 round in the case of a single provider being --
19 operating in a market.

20 Q. I just want to show you something Dr Singer said in his
21 evidence, so Day 16, page 165. {Day16/165}

22 At the top of the page I said to him:

23 "Question: Are you also saying that Apple's rivals'
24 commission would be 12% in the counterfactual?"

25 Do you see?

1 A. Yes.

2 Q. He said:

3 "Answer: Not necessarily. I think I have been a bit
4 agnostic as to what the rivals would be. I am trying to
5 come up with a benchmark for Apple. These are
6 competitive rates, so it is reasonable to assume that
7 the rivals are close. But I think certainly in the
8 in-app aftermarket where Apple is going up against
9 a fringe of smaller firms, it is reasonable to believe
10 that Apple would command a premium for comparable
11 services, in light of the fact that Apple is a brand
12 name that everyone knows and loves."

13 Do you agree with this, Mr Holt?

14 A. Well, I think -- I am not disagreeing that Apple has
15 a brand, clearly. I am focusing more on what would be
16 the conditions of workable competition in the iOS App
17 Distribution Market. It is not so clear to me that
18 Apple's brand would apply in the same way as it does in
19 other elements in that market. Obviously, if it did,
20 then perhaps it would not have needed to impose the
21 restrictions over time.

22 Q. Do you agree that Apple has a brand which is trusted by
23 consumers?

24 A. I think that is fair, yes.

25 Q. It also has the advantage, has it not, of being the

1 creator of the ecosystem on which its store appears, so
2 it has been integrated into iOS devices since the launch
3 of those devices, so customers -- consumers are
4 accustomed to it and trust it, correct?

5 A. I have not looked at any specific evidence on that.
6 Obviously it is integrated into the iOS, so that is just
7 a fact, and so I certainly agree with that. I am happy
8 to accept that generally customers, you know, see Apple
9 as a quality product, so yes.

10 Q. Do you accept that trust is highly relevant to app store
11 value to consumers?

12 A. Yes, I think that would be -- would be one amongst many
13 other considerations. Obviously there might be many
14 ways of ensuring that customers are protected and what
15 customer services are offered to them, but yes.

16 Q. These are all reasons, are they not, why you would
17 expect Apple to command a premium, why you would expect
18 that a fair price for the App Store on iOS could be
19 above the highest price in a competitive PC game
20 distribution market, and could certainly be well above
21 the average price on that market; do you agree with
22 that?

23 A. Well, I think -- I think the issue with that statement
24 is that it is putting a lot of weight on one parameter
25 that might be relevant in the app distribution or the

1 iOS App Distribution Market, but there are obviously
2 many dimensions, including approaches to curation,
3 approaches to customer service, approaches to
4 discoverability, you know, one can go on and name all
5 the other dimensions, and I do not think it is correct
6 to say that in the counterfactual you would necessarily
7 see the App Store as superior to what innovations would
8 hypothetically have been brought out in that context.

9 Q. But I think it is right to say, Mr Holt, is it not, and
10 we will come back to this in more detail, but you have
11 not yourself conducted a comparative analysis of these
12 various quality parameters as between the App Store and
13 these comparators, these benchmarks that you rely on?

14 A. I think it is fair to say I have not tried to look at
15 all the dimensions of what an app store might offer,
16 which again includes some of the points I mentioned in
17 discoverability, customer service and so on, and then
18 try and assess on each and every one of those indicators
19 how you might compare all the different app stores.

20 My approach is essentially an entirely different
21 one. Given that we do not have a within market
22 comparator, at least that I think is viable, ie you
23 cannot compare a previous time and say, with other
24 things having been controlled for, that is a good
25 benchmark within iOS app distribution; you necessarily

1 have to look at other markets. In my view, the PC app
2 distribution market is the best, albeit imperfect. As
3 a set of cases, it is I think reasonable because it is
4 digital distribution, it is a broadly similar business
5 structure, and there is at least evidence of what
6 happens when there is entry and competition. I am not
7 saying it is perfect. Obviously it is not even in the
8 same market, so of course there might be different
9 considerations that might be relevant to some extent,
10 but as a, in my view, probative piece of evidence,
11 I think it is quite persuasive.

12 Again I am looking at it in the round, partly based
13 on comparators, partly based on iOS aspects, and I do
14 not think that looking at the individual cases of
15 individual app stores is correct. I think it is
16 relevant for an assessment of workable competition to
17 look at the market as a whole.

18 Q. But you cannot say, can you, how low or high Apple
19 should be in the counterfactual, so how high or low
20 Apple should be -- so looking at your distribution of
21 prices on the PC app comparator market that you are
22 looking at, you cannot say, can you, how high or low
23 Apple should be on that distribution of prices, because
24 you have not carried out -- sorry, just to finish, my
25 fault -- you have not carried out any real comparative

1 exercise, have you, in terms of these qualitative
2 differences?

3 A. I think that is fair. Again, I think I just said in my
4 last response I have not said "Here is the 12 or 15
5 dimensions of quality and customer service and here is
6 a ranking across all of them". I do not think that
7 would be feasible, I do not think it would even be
8 relevant given that the two are not even in the same
9 market. Clearly, individual app stores might have good
10 characteristics in some cases and less good in other
11 dimensions, and that I think applies to Apple as well.
12 I mean obviously one of the most important
13 considerations for app distribution is discoverability,
14 search, AB testing that allows developers to sort of
15 tweak and improve their approach, and those are the
16 sorts of issues that developers had been raising in
17 developer surveys, and indeed in Apple's own research of
18 developers that it quoted internally in 2018, which
19 identified that it is not really necessarily performing
20 particularly well in these key indicators.

21 So when you take that into account I just do not
22 think that there is a viable way to say "Look, here is
23 the range, and Apple should be at the upper quartile" or
24 anything else. I think the best estimate is 15%. There
25 is a number of indicators that suggest that is what

1 happens in competition, there is evidence from the iOS
2 case itself, and indeed it might be conservative because
3 there is a number of -- there is a number of reasons for
4 that which I am happy to go into if the Tribunal would
5 like to hear it.

6 Q. Let us take it in stages. So based on your analysis of
7 PC app marketplace comparators, you say that the
8 effective commission under workable competition would be
9 in a range of 10 to 20%, yes?

10 A. Those are my best estimates for -- those are -- that is
11 essentially the range that I can see as --

12 Q. The range.

13 A. -- the plausibly low and high --

14 Q. You take the 10% -- for distribution, you take the 10%
15 from itch.io?

16 A. Yes, that is one particular indicator, noting that
17 obviously that is the default rate it sets and people
18 are able to set a lower level.

19 Q. And the 20% is one of three rates charged by Steam, it
20 is the lowest of the three rates charged by Steam?

21 A. That is correct, yes.

22 Q. And it is right, is it not, that Steam charge 30%
23 commission on all paid transactions until the end of
24 2018?

25 A. Yes -- well, sorry, that is not quite right. Yes for

1 headline rates, not necessarily in terms of an effective
2 rate.

3 Q. You are talking about the Steam keys here with the
4 effective rate?

5 A. I am talking about both Steam keys and the possibility
6 of negotiated discounts, but I am not sure that there
7 were any necessarily prior to 2018.

8 Q. No I mean we have not -- yes. Now -- and you make the
9 point in your reports, in your third report I think,
10 that throughout the period before 2018 it was always
11 possible, was it not, for developers to distribute their
12 games directly from their website?

13 A. Yes.

14 Q. It was always the case, was it not, that there were lots
15 of developers who were large enough to market their
16 games directly?

17 A. There were at least some. I think I referred to
18 Activision as one example.

19 Q. And so Steam always faced material competitive
20 constraints, did it not?

21 A. I am not sure one would necessarily go to "material",
22 because obviously it had a very strong incumbency
23 position. Yes, there was an option to go for direct
24 distribution, but that would not necessarily be the
25 preferred option for all cases. Third-party app

1 distribution is also an important mechanism as well.

2 Q. But it faced material constraints from large games
3 developers who could distribute their games directly?

4 A. Again, I agree that that was an option, but it was
5 not -- it is not necessarily one that would have
6 a closed competitive constraint within the third-party
7 app distribution market itself. I am not sure what
8 evidence there is to say one way or the other.

9 Q. Again, you have not looked at that?

10 A. No, I have not looked at that. I do not have specific
11 evidence as to Steam's transaction data over time to
12 make that assessment.

13 Q. And it's right, is it not, that Steam still charges
14 a 30% commission to developers with earnings under
15 \$10 million?

16 A. Yes, I think the headline rate is about -- commonly
17 understood amongst the experts as being 30/25/20, and
18 then you can have a debate about whether those headline
19 rates are of most interest in terms of what actual
20 developers pay in a workably competitive market.
21 I think moving on from headline rates to understand what
22 do developers actually pay in a workably competitive
23 market is of even greater interest.

24 Q. We will come to that.

25 A. Sure.

1 Q. And Steam charges 25% to developers with earnings above
2 \$10 million and under \$50 million, yes? To apps, sorry,
3 not developers. It is to apps, not developers.

4 A. That is correct.

5 Q. Comparing Steam's 20% tier rate, which is what you do,
6 with Apple's 25% effective commission, is wrong, is it
7 not, because you are comparing only one of Steam's
8 rates, the lowest rate, and comparing it with Apple's
9 average rate, and if you want to compare Apple's lowest
10 rate against Steam's lowest rate then what you have is
11 15% versus 20%. That would be a more apt comparison.

12 A. I think that would be perhaps the case if one were
13 trying to do a literal translation of Steam to Apple.
14 In other words, let us take Steam as the competitive
15 benchmark, let us see what is its particular charging
16 structure, and let us try and map that across to Apple.

17 That is far from what I am doing. I am looking at
18 a broad range of evidence in the round in relation to
19 the PC app distribution market, as well as other
20 evidence, and then I am saying "Look, there is a lot
21 that points to 15, a fair bit that points to below 15,
22 but you can also see that there is a range around that".
23 I am not trying to literally translate Steam itself to
24 Apple.

25 Q. Well, if you had a developer with ten games, ten apps,

1 that each earned \$60 million, then that developer would
2 have a turnover of \$600 million but would be paying 26%
3 commission, correct, because Steam's price tiers apply
4 game by game?

5 A. I am happy to take the maths in terms of that. As to
6 the tiered structure, my response is, one, does the
7 tiered structure determine the limit of what developers
8 are actually paying, and I do not believe that to be the
9 case, both in relation to the Steam keys issue -- no
10 doubt we will come on to that -- and the potential for
11 negotiation which generally is something that there is
12 evidence of in cases where developers have choice of
13 distribution, so Amazon has managed to achieve an
14 effective rate that is below its -- sorry, developers
15 have achieved an effective rate on Amazon below its
16 headline rate. That is the case for itch, it is the
17 case I understand for Steam, and, you know, potentially
18 others as well, so --

19 Q. Mr Holt, there is no evidence in this case that Steam
20 negotiates below its tiered rates. You have not found
21 any evidence to that effect, have you?

22 A. I have not. I have merely observed what was said in the
23 US Proceedings about that, that situation. I fully
24 accept and I think I was upfront that that was a source
25 that I was making and that I did not have the actual

1 evidence myself in that regard, but I did also note that
2 Steam keys represents one mechanism by which discounts
3 can be achieved and, furthermore, that both from an
4 economic principles perspective you would expect more
5 choice to lead to more scope for negotiation in
6 a workably competitive market, and that there was
7 evidence that a range of other platform operators or
8 stores were indeed acting in that way, as you might
9 expect.

10 Q. When you say "what was said in the US Proceedings", do
11 you mean what was said by the judge about the 10.7%?

12 A. That is correct, yes.

13 Q. Okay, so I cross-examined Dr Singer at some length about
14 this and took him to the expert reports in the US
15 Proceedings. Did you follow any of that, or see that?

16 A. I ... a little bit.

17 Q. I will tell you where we got to.

18 A. Sorry, yes, that is fine.

19 Q. So where we got to on the basis of ... the Valve
20 proceedings, yes. So where we got to on the basis of
21 the expert reports --

22 A. Sorry, just to be clear, are you talking about the
23 Chiou -- is it Dr Chiou reports?

24 Q. Exactly, Dr Chiou and Dr Schwartz.

25 A. Sorry, yes, I did hear that on the livestream and I did

1 see that expert report.

2 Q. Thank you very much.

3 A. After -- only after it was mentioned, yes.

4 Q. So I think we can take it more quickly --

5 A. Yes.

6 Q. -- because you will have seen that where we got to on

7 the basis of the Chiou and the Schwartz reports was that

8 Steam's effective commission, if you do not take account

9 of Steam keys, is 27%?

10 A. Yes.

11 Q. Of course Apple's effective commission is lower than

12 that, right, it is 25%?

13 A. Yes.

14 Q. So that would show, would it not, that Apple's

15 Commission is competitive?

16 A. Well, I think if you are limiting yourself to that

17 comparison, then obviously 25 is lower than 27. I think

18 there would be many more factors that you would need to

19 take into account before you would just limit yourself

20 to that one observation and say that is the entirety of

21 the evidence.

22 Q. But you agree, do you not -- and your reports make this

23 clear -- that Steam is a competitive benchmark?

24 A. Well, what I said is that the PC market itself

25 represents the closest I have identified to a relevant

1 market, ie with digital distribution, similar charging
2 structures and evidence of how the market is evolving in
3 the form of competition, so I think it is that in the
4 round assessment that I have reached. I have not sort
5 of said Steam's rates themselves are necessarily the
6 preferred benchmark.

7 Q. Well, you did, did you not, because you said the PC app
8 distribution market is a competitive market, you have
9 said that in your report, and you have taken one of the
10 Steam rates as being a competitive rate, so --

11 A. It is one amongst several pieces of evidence that I have
12 taken into account. As I say, I have taken it into
13 account at the upper level of my range, because there is
14 a range of other relevant factors which suggest lower
15 values, so I -- you know, I have not sort of just said
16 "Let us find Steam and then try and do a literal
17 translation".

18 Q. All right. But just pausing here, what we are trying to
19 do in this case is work out whether Apple is charging
20 above the maximum lawful price, yes? That is the
21 exercise, the unfair pricing exercise?

22 A. That is right, yes, yes.

23 Q. It cannot be unlawful, can it, to charge a price that is
24 less than what Steam charges in a competitive market?
25 So Steam is in a competitive market, it is charging an

1 effective commission without Steam keys of 27%, and if
2 Apple is below that, Apple cannot be acting
3 anti-competitively, can it?

4 A. Well, I think that is putting too much weight on the
5 literal comparison of Steam versus others. I have
6 looked at a broader range of evidence as to what I would
7 consider to be benchmarks and relevant evidence points
8 -- (overspeaking) --

9 Q. Well, sure, you have looked -- you have found others,
10 like itch.io and the Epic Games Store, which are lower,
11 but what the Tribunal needs to work out is whether Apple
12 is charging above the maximum lawful charge that it can
13 make.

14 A. Yes, and that is what I am trying to identify, the range
15 that would be, you know, inputs to the Tribunal in order
16 to make that determination.

17 Q. Now, we saw with Dr Chiou and Dr Schwartz that Steam's
18 effective commission, if you do take account of Steam
19 keys, using some approximations, which they had to use
20 because they do not have all of the Revenue figures
21 because those are developers' figures, that the
22 effective commission, if you do take account of Steam
23 keys, is around 20%, did you see that?

24 A. Yes, I saw that, and I saw a range of values I think
25 from 16 to just above 20%, and I think there were some

1 other values I believe in that document which had some
2 other values that might have been even lower in certain
3 circumstances. But, yes, I am happy to take that the
4 keys had the impact of bringing it down to that sort of
5 range.

6 Q. All right. Then let us look at what Dr Singer said,
7 just to remind you. So Day 17, page 49. {Day17/49}

8 If you look at line 6, I took Dr Singer to your
9 explanation of how Steam keys work, and so we looked at
10 that paragraph in your report. Do you see that?

11 A. Yes, yes, the free services that (inaudible) that
12 paragraph, yes.

13 Q. Exactly. Then I said:

14 "So they are using them on the Steam platform but
15 the transaction is taken off the platform."

16 A. Yes.

17 Q. "That is exactly the same, Dr Singer, is it not, as what
18 goes on for Apple under the Multiplatform Rule. So if
19 you are going to count the zeros ..."

20 Dr Singer called them the zeros, you know what
21 I mean by that?

22 A. Yes.

23 Q. "... for Steam, which you want to, you need to count the
24 zeros for Apple; correct?"

25 He said:

1 "Answer: "I think that [is] a reasonable approach."

2 Can I take it that you agree with him on that. So
3 if you are going to compare the zeros with Steam, the
4 comparison needs to be with the zeros for Apple, so you
5 need to take -- factor in revenues achieved by
6 developers through the Multiplatform Rule and the Reader
7 Rule?

8 A. I disagree with that.

9 Q. Why?

10 A. Because the circumstances are not the same. So, for
11 example, in the Steam keys case, the entire purpose of
12 that is that you have the sale of the product for the
13 purpose of distribution solely on the Steam platform, on
14 the Steam app store. If you compare that to the Reader
15 Rule or the Multiplatform Rule, what is granted by Apple
16 is access to already -- to content already purchased, so
17 that is already one important distinction.

18 Q. But just pausing there, that is not a difference, is it?
19 Because if you are a consumer and you are playing a game
20 on -- say you are playing a game on your iOS device
21 and -- say you are playing a Roblox game and you think
22 "I want to buy some Robux so I can buy some extra
23 costumes, or whatever, or swords in this game", and you
24 think "All right, I am going to go off to the Roblox
25 website, because Roblox have this nice offer where they

1 give a 25% discount, so they are allowing me to buy more
2 Robux".

3 So you go off for the purposes of making the
4 transaction on to the Roblox website, but then you are
5 consuming those Robux on your iOS device. You are back
6 to your game again. It is exactly the same thing, is it
7 not?

8 A. No, I do not think so, because I have not even seen any
9 evidence to show that the purpose of purchasing the
10 Roblox on the website is in order to specifically
11 consume it on iOS, whether that is the one and only
12 purpose in the case of the Steam keys.

13 I think the other -- the reason why the two are not
14 similar I think also reflects that Steam keys, again in
15 the context of PC app distribution, represents economic
16 substitutability within a market, ie Steam is having to
17 compete, attracting developers, offering a mechanism by
18 which a lower than average -- its average commission is
19 made in order to distribute on its own platform. But in
20 the Reader Rule and the Multiplatform Rule, you clearly
21 have an alternative important driver, which is that they
22 are complementary platforms, complementary demand.

23 So you mentioned the person going off to buy Roblox,
24 but I think at least an obvious driver of demand in that
25 case is that you have got someone playing some game on

1 their console when they are at home, and then perhaps
2 when they are on the bus or in transit they might be
3 playing on their mobile. Of course they might do
4 a range of things across the different platforms.

5 Q. Mr Holt, suppose you are only playing on iOS, so you
6 only ever play your game on iOS, and then you go off to
7 the website to make your purchases, then we are in
8 exactly the same position as the Steam keys, aren't we?

9 A. Well, firstly, that is a very strong statement that
10 someone is only playing on iOS and specifically going
11 off-platform in order to -- (overspeaking) --

12 Q. Assume I am right. Just take someone that does do that.
13 I am sure there are lots of people that do do that,
14 including my children. So they play on their iOS
15 devices and then they go off and they buy Robux more
16 cheaply somewhere else, but they always play on their
17 iOS devices, so assume that is happening?

18 A. Okay.

19 Q. In that situation, we are in the Steam keys situation.
20 There's no material difference, is there?

21 A. I think that clearly would be closer, but it is still
22 not exactly -- it is not the same even in that
23 situation. I think, leaving aside whether that is the
24 predominant sort of explanation for consumer behaviour,
25 as opposed to the alternative complementary demand one

1 which I think also seems quite clear, I think there is
2 also the functionality perspective, in other words -- so
3 on Steam keys when -- when that is downloaded on Steam,
4 Steam is carrying out all of the subsequent
5 functionality associated with the download of that game,
6 even as if it was downloaded without the Steam keys. In
7 other words there is no distinction as to what Steam is
8 providing to the developer and the user in that context.

9 That is not the case for the iOS situation for the
10 Multiplatform Rule, as I understand it. It might be
11 a bit of a technical point, and others might have
12 a better factual appreciation of this, but my
13 understanding is that when you enact the Reader Rule or
14 the Multiplatform Rule, the developer is responsible for
15 things like validation that the user has access and has
16 previously paid for the content. Whereas if iOS is the
17 distribution platform used then Apple is doing that, so
18 there is a distinction.

19 In contrast, Steam does that in either case whether
20 the distribution is with the Steam keys or not.

21 Q. Well, Mr Holt, if the Tribunal agrees with us on this
22 point, and if, in order to compare pears with pears or
23 apples with apples, if you are looking at the 20%
24 effective commission rate using Steam keys you also need
25 to look at developer revenues on the multi-platform and

1 the Reader Rule derived from those sources, then that
2 would result, would it not, in a significantly lower
3 effective commission for Apple, just logically?

4 A. Well, okay, so I am happy to take that as an assumption,
5 despite the prior commentary as to whether that is the
6 right assumption. I think in that case then -- and
7 leaving aside the functionality distinction, which
8 I think is a further reason why you cannot really call
9 these apples and apples or pears and pears comparisons,
10 so let us leave all that aside. Let us assume, as
11 I think you are asking me to, that Apple is correct that
12 these are literally exactly the same situation, Steam
13 keys and multi-Reader Rule. I think in that case,
14 clearly, if they are exactly the same situation, then it
15 would be reasonable to take that into account.

16 You then asked: that is therefore a substantial and
17 material reduction? I have no basis of information on
18 which to say that is the case or not.

19 Q. Right. Think about Spotify and Netflix who monetise
20 exclusively off iOS, yes?

21 A. Yes, they -- I understand that they have turned off that
22 facility, yes.

23 Q. At least some of their consumption takes place on iOS,
24 yes?

25 A. Yes.

1 Q. Well, then, when you are comparing like with like, you
2 need to take account of those revenues too, do you not,
3 when you are calculating Apple's effective commission?

4 A. Well, I think we are back to the debate we just had,
5 because essentially these are very similar situations,
6 I think, to the Reader Rule. In other words a situation
7 where there is a debate about actually where is the
8 distribution -- (overspeaking) --

9 Q. Well, they are benefiting -- so Spotify is benefiting,
10 is it not, from distribution on the iOS device, correct?

11 A. Yes, they are benefiting, Apple is benefiting from
12 allowing users to observe content, or listen in
13 Spotify's case, to content that has already been
14 purchased.

15 Q. But Spotify is benefiting, so Spotify is benefiting
16 through -- because of distribution on the iOS device,
17 and so if we are going to carry out a like with like
18 comparison then revenues that are achieved by Spotify
19 off the iOS device, because there cannot be any
20 monetisation on the iOS device, need to be taken into
21 account, do they not, when calculating Apple's effective
22 commission?

23 A. Well, I think that again comes down to the prior debate
24 as to whether these are like for like situations.
25 I have expressed my view that I do not think they are

1 like for like situations. In one case, the context is
2 that the distribution function has happened on Steam.
3 In these cases it is not the same, in my view.

4 Q. You would also need to include, would you not, developer
5 revenues from advertising, because if a developer
6 distributes its app through iOS and monetises its app
7 through advertising, no commission is charged on
8 advertising revenues, but these are revenues that the
9 developer is achieving. So, again, if you are going to
10 be comparing Steam's effective commission with Apple,
11 you would need to take account of those advertising
12 revenues which are achieved through the App Store,
13 correct?

14 A. I disagree with that. I think what we are looking at is
15 a charging structure model that Apple has adopted.
16 Clearly developers can and do take advantage of an
17 advertising focus in some cases. I do not think there
18 is any evidence to suggest that that represents
19 a competitive constraint on the Commission. There are
20 obviously similar complementary type issues in that
21 context, in other words developers might see that those
22 are complementary business models, models that work in
23 some cases but not necessarily so well in others.
24 Developers might be reaching different user bases
25 depending on their, you know, cash versus time sort of

1 trade-off. So I do not think these are --

2 Q. Well, Mr Holt, when -- when you are looking at Apple's
3 effective commission, you have got to look at what it
4 does not charge commission on as well, do you not? You
5 have to look at the revenues that developers achieve
6 through the App Store and on which Apple does not charge
7 commission. You cannot just exclude those from the
8 picture which is what you have done.

9 A. I agree that I have not taken that into account for the
10 purpose of measuring an effective commission rate, but
11 again, the charging structure that I am adopting is
12 taken from the existing one, and then I go on to look at
13 what is the level of profitability associated with that
14 and what are the fair levels of commission, given that
15 type of a charging structure.

16 I do not think it is right to say, for those apps
17 that adopt a paid or an in-app model, that it does not
18 matter because some other types of business models,
19 you know, even in advertising dollars, do not pay. I do
20 not think that is the right basis of comparison.

21 Q. Let us look at -- I want to go to {D1/1449}.

22 A. Can you --

23 Q. If we go to page 3 {D1/1449/3}. So this shows -- if we
24 look at table 1 here and you look at the first row. Let
25 us take the 2022 figures. So what you have for digital

1 goods and services are revenues of \$104 billion. Do you
2 see that?

3 A. Yes. Sorry, which --

4 Q. So the top row.

5 A. Top row, "Digital goods and services".

6 Q. 2022.

7 A. Yes, 104 billion you said, yes. Sorry, I got it.

8 Q. Then if you look at the penultimate row, "In-app
9 Advertising" just before you get to the total?

10 A. Yes.

11 Q. Then you have \$109 billion.

12 A. Yes, I see.

13 Q. Dr Singer has calculated the effective commission based
14 on transactions for digital goods and services as 25.2%,
15 albeit on a UK App Store but let us take that as
16 a proxy.

17 A. Yes.

18 Q. So that is the commission on 104 billion, correct?

19 A. Correct.

20 Q. If we add in the 109 billion which does not attract
21 commission, then it reduces the commission to just --
22 I am not going to do the maths, but just under half,
23 yes?

24 A. It would if you added it in and determined that was
25 a reasonable approach. So I am not disputing the maths.

1 If you were to add the two up and then measure
2 commission on that larger base, it could even go down.

3 My point is that I am looking at this as a benchmark
4 for a workably competitive digital distribution market
5 for iOS app distribution. There is a clear charging
6 structure that applies. In a competitive market, I am
7 saying that that charging structure would be maintained.
8 Indeed, if one were to say "Let us start charging extra
9 commissions in a workably competitive iOS App
10 Distribution Market", then I think whoever is suggesting
11 such commissions would see their business eke away to
12 the ones who are maintaining the starting point in the
13 efficient charging structure.

14 Q. Mr Holt, we are not asking you to suppose that anyone is
15 going to be charging extra commissions, but the point is
16 really this, that these advertising revenues are
17 revenues that the developer derives from iOS but on
18 which they do not have to pay any commission, whereas on
19 Steam developers are not allowed to earn these revenues
20 through in-app advertising because Steam does not permit
21 in-app advertising, so Steam's commission is applied to
22 more of the developers' revenues than Apple's Commission
23 is. That is a relevant factor that needs to be factored
24 in, does it not, when you are comparing Steam's
25 effective commission with Apple's?

1 A. No, because if you look at the workably effective
2 context in the iOS App Distribution Market, it is a much
3 bigger market, there would be much greater scope for
4 rivalry and entry, and if you did have that then there
5 would be an existing model that would I think continue
6 to operate.

7 Q. All right. Now, you describe the Epic Games Store in
8 your report as a relevant comparator for the purposes of
9 assessing the commission that would be paid under
10 conditions of workable competition, yes?

11 A. It is one of several benchmarks I refer to, yes.

12 Q. The Epic Games Store was launched in December 2018,
13 correct?

14 A. Correct.

15 Q. If we look at your first report from May 2021; quite
16 a long time ago now, Mr Holt.

17 A. Yes.

18 Q. So {C2/1/75}. You see there, 7.3.77, second sentence:
19 "Epic claims that its store can be profitable even
20 when charging only 12% commission to developers."

21 A. Yes.

22 Q. "Furthermore, Epic itself will have saved very
23 substantial amounts in terms of distribution costs ..."

24 A. Yes.

25 Q. "Epic's CEO Tim Sweeney has emphasised that the 12%

1 commission is profitable ..."

2 He says -- you can see what he says there.

3 A. Yes.

4 Q. So in the next paragraph you say that this would
5 indicate that the Epic Games Store would be reasonable
6 benchmark for Apple's Commission in a more competitive
7 market, yes?

8 A. Yes.

9 Q. Now, Professor Hitt -- so I think at this stage you did
10 not mention that the Epic Games Store was loss-making.
11 Is that because you did not know at that stage that it
12 was loss-making?

13 A. I have to admit I cannot remember what I knew in 2021 --

14 Q. Do not worry.

15 A. -- compared to now. I am aware that it is loss-making.

16 Q. You are now?

17 A. Yes.

18 Q. In fact Professor Hitt said that, did he not, in his
19 report?

20 A. Yes.

21 Q. You responded to that in your second report. So even
22 your second report was nearly three years ago, that
23 is March 2022.

24 A. Yes.

25 Q. So if we go to {C2/2/18} and if we look at sub-paragraph

1 (b), so you said there that it is:

2 "... a recent entrant in the PC game distribution
3 market, having launched in December 2018 with
4 a commission rate of 12%. It considers that
5 a commission at this level will be (very) profitable in
6 the long term. However, as Professor Hitt notes, it is
7 suffering losses at this stage which likely reflects the
8 entry costs faced by Epic as a challenger seeking to win
9 market share from a long established incumbent."

10 A. Yes.

11 Q. It is right, is it not, that the Epic Games Store has
12 continued to be unprofitable?

13 A. I understand that that is what Epic have said in other
14 contexts, yes.

15 Q. Again, did you see -- because we can take this more
16 shortly if you did, so I showed Dr Singer some of Epic's
17 testimony in Australia.

18 A. Yes, I did see that.

19 Q. So that showed that they did not -- Epic did not expect
20 its games store to be profitable until 2027?

21 A. Yes, I understand that is right. Just to be clear,
22 I think at one point they referred to cumulatively
23 profitable. I am not sure what year they expected the
24 games store to be cumulatively profitable. Obviously
25 there is a distinction between becoming profitable

1 within a year and cumulatively profitable, because
2 obviously cumulatively profitable requires the
3 recoupment of the prior losses over a number of years of
4 profits until you have then made up those losses.

5 Q. Did you see the evidence in Australia was that the
6 Epic Games Store had a strategy of achieving \$1 billion
7 revenue by 2019 and achieving --

8 A. Yes.

9 Q. -- half of that through third-party games?

10 A. Yes, I heard that, yes.

11 Q. It still had not reached its revenue target in 2024, did
12 you see that?

13 A. Yes.

14 Q. Now, going to your fourth report, so we are getting
15 a bit closer in time now, September 2024, so {C2/11/25},
16 and paragraph 66. So you say -- you refer to what
17 Professor Hitt has said about it not being profitable.

18 A. Yes.

19 Q. Then you say that it is "consistent with its entry
20 strategy", and then you say for example it "committed
21 \$444 million in minimum guarantees".

22 A. Yes.

23 Q. Now, I think it is fair, you do cite one -- in your
24 footnote -- one internet article, but would it be fair
25 to say that you have not yourself investigated the

1 reasons why the Epic Games Store is loss-making?

2 A. I have not. I have quoted what I understood Epic to
3 have said about it, I think, from those cases, that it
4 represented costs associated with attracting developers,
5 whether in the form of minimum guarantees or in the form
6 of, for example, exclusivity payments.

7 Q. It was launched, we know, more than six years ago. It
8 is not really realistic, is it, anymore, to say that the
9 Epic Games Store is pursuing an entry strategy? It is
10 much more likely just to be a commercial failure, no?

11 A. Well, I do not think I agree with that. I mean
12 obviously I am sure they would have preferred to meet
13 their targets on the original timeframe and it is
14 clearly taking longer, but I think, as to whether 12% is
15 a reasonable benchmark, I think incrementally it is
16 covering the operating costs, leaving aside these sorts
17 of additional costs; and I think actually, when
18 I reflect on it further, I do not think I said it in
19 these reports, but if you think about what sort of
20 bargaining position there arises between developers and
21 app stores in a condition of workable competition and
22 choice then extra benefits for developers in the form of
23 exclusivity or minimum guarantees are a real advantage,
24 and to the extent that that is extra benefit that Epic
25 is conferring to developers, I have not actually taken

1 that into account. It sort of makes me wonder whether
2 the 12% to some extent is a bit too conservative.

3 Q. Well, are you -- did you see also I showed Dr Singer
4 a document which showed that the Epic Games Store was
5 going backwards year on year in terms of increasing the
6 number, the proportion of third-party developers on its
7 store?

8 A. I saw that for third-party developers from one year to
9 the next there had been a negative movement, and again
10 I would agree that I am sure Epic's preference would be
11 to have positive growth rather than that. Clearly it,
12 you know, it may be trying to do better than it has
13 done, but if the costs of distribution are what the
14 evidence from Epic had indicated, leaving aside the sort
15 of guarantees and other developer benefits that I just
16 referred to, then I think 12% is still a reasonable
17 assessment. It is still a materially higher value than
18 that. It is higher than costs. It allows for
19 incremental recovery of some of these fixed entry costs.

20 MS DEMETRIOU: Sir, I am seeing the time. Is now
21 a convenient moment?

22 THE CHAIRMAN: It is. If that works for you, let us take
23 a ten-minute break, thank you.

24 (11.48 am)

25 (Short Break)

1 (11.59 am)

2 THE CHAIRMAN: Yes, Ms Demetriou.

3 MS DEMETRIOU: Mr Holt, there is a lot of press coverage

4 establishing that the Epic Games Store is of very poor

5 quality. Have you seen that?

6 A. I saw the discussion that you had with Dr Singer about

7 that.

8 Q. Okay, so let me show you a different article, one that

9 I did not put to Dr Singer. If we go to {D1/1671.1}.

10 So this is an article from 30 January 2024.

11 A. Yes.

12 Q. If we go to page 3, at the very bottom of the page we

13 can see just the heading "Epic Games Store", at the very

14 bottom. {D1/167.1/3}

15 A. Yes.

16 Q. If we go over the page we can see:

17 "Pros: free games, good discounts.

18 "Cons: everything else."

19 A. Yes.

20 Q. Then the journalist says:

21 "... I was rooting for the Epic Games Store [when it

22 first launched] ... it deserved a chance to develop and

23 grow."

24 Then they say:

25 "Unfortunately, it really hasn't. Though people

1 rail against Epic exclusivity deals, connections to
2 Tencent, and being forced outside the Steam ecosystem,
3 the true problem with the Epic Games Store is just that
4 it is a rubbish, underbaked, buggy launcher."

5 "Buggy launcher"; sorry, wrong emphasis!

6 THE CHAIRMAN: A bit of a giveaway, I think.

7 MS DEMETRIOU: "Countless basic features are missing,
8 navigating the store or even your own library is
9 a nightmare, and it's only recently that it even added
10 a cart function."

11 Then the punchline:

12 "Score 41%

13 "Over five years on from launch, the Epic Games
14 Store still offers barebones features and a dreadful
15 user experience."

16 So these are, are they not, really serious problems
17 in the Epic Games Store's offering?

18 A. Yes, I mean actually, just on the buggy launcher point,
19 I think there were times when I had my child I would not
20 have minded a buggy launcher!

21 But I think I am happy to accept that this article
22 indicates a number of problems with Epic Games. I think
23 my reaction to that is, look, there are obviously going
24 to be some quality variations in any market. There are
25 also going to be issues around actual performance. So,

1 you know, what you would expect in a market might not
2 always be achieved by everybody. I think that, clearly,
3 had Epic performed better on some of these dimensions
4 maybe it would have had a higher market share.

5 But none of that goes against the view that in
6 a situation where more developer choice arises, some
7 people clearly are using the Epic Games Store despite
8 some of these quality issues, and they are paying the
9 12%. So I do not think it undermines its role as one
10 amongst many aspects of my benchmarks.

11 Q. You say -- so in your first report you provide some
12 figures -- let us go to {C2/1/76}. So paragraph 7.3.82,
13 you provide some figures here on the numbers of apps,
14 users and commerce for the Epic Games Store in 2020, and
15 I think, this is not a criticism, but I think it is
16 right that you have then referred to those figures in
17 your third report, you have not produced updated
18 figures?

19 A. I think that is correct.

20 Q. You make the point here that the Epic Games Store is
21 much smaller than Steam, correct?

22 A. Yes, I mean that is not that surprising given that it
23 entered later, yes.

24 Q. So it would follow, would it not, that from the
25 perspective of a developer, Steam is a more attractive

1 platform?

2 A. I think, yes, in the sense that by a revealed
3 preference, more developers are selling a greater volume
4 over Steam than they are over Epic. As some of these
5 articles note, different stores have different niches
6 and offerings that tailor to different types of
7 developers and users. So, you know, there is, in
8 a sense, a place for a range of differentiated offerings
9 within a market.

10 Q. Developers are more attracted to Steam even despite its
11 higher price, correct?

12 A. I think -- well, yes, so again leaving aside the debate
13 about what the effective rate is on Steam, for which
14 I think there is insufficient information, but if I take
15 the range that you have put as necessarily correct, then
16 I think its rate is somewhat higher than Epic and --
17 yes.

18 Q. I think we agreed, did we not, that, looking at the
19 expert evidence in the Valve litigation, the effective
20 rate, taking account of Steam keys, was coalescing
21 around the 20% mark?

22 A. Yes.

23 Q. So 20% is a lot higher than 12%, is it not?

24 A. I think it -- if that is the right number and there is
25 no other evidence of -- sorry, yes, and there were not

1 any other sort of major discounts that were being
2 offered, and I do not know whether that is the case or
3 not, then yes, 20 is clearly higher than 12 and
4 developers are using it.

5 Again, that might reflect a number of factors. Of
6 course, one factor that was arising in that particular
7 context is what is the impact of the Steam sort of
8 platform MFNs, and that is not something that I am
9 forming a specific opinion on. Obviously there has been
10 a certification process which has been -- I understand
11 there has been a November 2024 certification decision in
12 that regard, so that might be one further factor.

13 Q. Mr Holt, they are very soft MFNs, do you know that?

14 A. I do not know the nature of them. I have not
15 investigated them in detail. All I am aware of is there
16 is a class certification decision in the class' favour
17 which actually post-dated all of my reports.

18 Q. So does not the fact that Epic has a very small share of
19 transactions as compared with Steam make Steam a better
20 comparator for Apple than Epic is?

21 A. I think that might be one of many considerations, but
22 again I am not looking at individual comparators, I am
23 looking at how did the market react in the context of
24 increased competitive forces, consistent -- at least
25 more consistent with workable competition.

1 Q. Yes, but what you are trying to do in your report is
2 establish the maximum lawful price that Apple could
3 charge.

4 A. Yes.

5 Q. When we are thinking about the maximum lawful price that
6 Apple could charge, Apple, with its obviously superior
7 quality to the Epic Games Store, and with its vastly
8 larger number of transactions, the maximum lawful price
9 that Apple could charge is nowhere near the price
10 charged by the Epic Games Store, is it?

11 A. Well, I do not think that is correct for a number of
12 reasons. Obviously on some of those dimensions, Epic
13 clearly had some issues, but again similar sort of
14 issues could arise in a wide range of cases. Again,
15 I refer to some of the core functionality of the app
16 discovery process that developers had some serious
17 reservations about regarding Apple. So I do not
18 think --

19 Q. Mr Holt, just pausing there, are you really trying to
20 tell the Tribunal that your evidence is that the reviews
21 of the App Store and Apple's proposition is anywhere
22 similar to the absolutely dreadful -- I could go on
23 showing you contemporaneous documents, I am not because
24 we do not have time, but are you in any way trying to
25 equate the quality of the App Store to the Epic Games

1 Store? Because they are just poles apart, are they not?

2 A. I was not suggesting that. What I am saying is that in
3 a context where there were no rival iOS app stores that
4 were able innovate and provide alternative offerings, it
5 is not actually possible to do a within market
6 comparison. Yes, you can then go to a different market
7 as the next best alternative, and yes, there might be
8 a range of issues in that market, but -- or at least in
9 terms of some individuals, but again, the evidence is
10 not specific to Epic. I am looking at a range of
11 benchmarks, I am looking at what in the round is the
12 best evidence as to workable competition, and I think
13 that is really the context that I am looking at.

14 I do not think it is safe to say that Apple would be
15 in a counterfactual world, you know, of a higher quality
16 than other potentially innovative app stores in the
17 hypothetical.

18 Q. Now, one of the services that is provided by Apple in
19 connection with the App Store is App Review, is it not?

20 A. Yes.

21 Q. Let us look at the guidelines dating from
22 September 2024, so {E/8} please. We can see under
23 "Introduction" that:

24 "The guiding principle [is to] provide a safe
25 experience for users to get apps and a great opportunity

1 for all developers to be successful. We do this by
2 offering a highly curated App Store where every app is
3 reviewed by experts ..."

4 Then further down the page -- so I am going to show
5 you a few things, Mr Holt, and then ask you some
6 questions.

7 A. Okay, sure.

8 Q. Further down the page they say, first bullet:

9 "We have lots of kids downloading lots of apps.
10 Parental controls work great to protect kids, but you
11 have to do your part too. So know that we're keeping an
12 eye out for the kids."

13 Then if we go to page 3 {E/8/3} we see the heading
14 "Safety", and the first sub-heading is "Objectionable
15 Content", such as -- so:

16 "Apps should not include content that is offensive,
17 insensitive, upsetting, intended to disgust, in
18 exceptionally poor taste, or just plain creepy."

19 You can see there a list of things that are
20 precluded on the App Store, do you see?

21 A. Yes.

22 Q. So violent, obscene or illegal content, overtly sexual
23 or pornographic material or material that encourages
24 physical harm.

25 A. Yes.

1 Q. Then if we go on to page 5 {E/8/5}, section 2, you see
2 that App Review also provides for the performance of the
3 proposed apps to be tested, yes?

4 A. Yes.

5 Q. Do you accept that many consumers will find the fact
6 that each app on the App Store has been reviewed in this
7 way to provide them with assurance?

8 A. Yes. I think that seems reasonable, yes.

9 Q. Those consumers will be more inclined to purchase and
10 download apps as a result of that assurance, yes?

11 A. Obviously we are now sort of describing consumers as
12 a whole, and obviously there would be a whole range of
13 different types of consumers with different elements of
14 focus.

15 Q. There might be some that do not care at all?

16 A. There might be some, yes.

17 Q. But those that do care would be more likely -- more
18 inclined to download and purchase apps as a result of
19 the assurance that is provided through this App Review
20 process?

21 A. Again it is hard to know how much of an effect that
22 would be. I have taken the point that if users care
23 about some of these things, then if those things are
24 provided, that clearly almost by definition means they
25 are more likely to want to download them.

1 Q. Now, you do not address the extent of any review of
2 proposed apps conducted by the Epic Games Store in your
3 reports, do you?

4 A. No.

5 Q. Are you aware that the Epic Games Store permits other
6 app stores on its platform?

7 A. Well, I am -- yes, okay, I am not aware of the technical
8 details of how that operates.

9 Q. Okay. So one app store it allows on its platform is an
10 app store you have considered in your comparators
11 analysis which is itch.io?

12 A. Yes.

13 Q. Let us see what you say about itch.io at {C2/10/123}.
14 So you say:

15 "Itch.io [at the top of the page] was launched in
16 2013 and describes itself as 'an open marketplace with
17 independent digital creators with a focus on independent
18 video games'. Like other PC app distribution platforms,
19 itch.io offers search functionality and a curated home
20 page to facilitate discoverability."

21 Did you investigate at all what itch.io does in
22 order to curate its home page or offer search
23 functionality?

24 A. No, I did not investigate that in detail. It was --
25 again, in a market you might expect a range of different

offerings. Some might do more than others in certain respects. If you see a revealed preference that people are using it nonetheless, I think that tells you something about the nature of demand: it is not uniform.

Q. Did you know that the Epic Games Store does not itself review the content of games provided by itch.io on the Epic Games Store?

A. No.

Q. Did you know that itch.io permits games with highly objectionable content?

A. I am -- I did not know that. Obviously I think what it describes, which I referred to, is that it focuses primarily on the independent market, so game developers and so on, that, you know, have perhaps a different niche focus. Obviously that may or may not include things that Apple might perceive as objectionable, I do not know.

Q. Well, very niche actually, Mr Holt. Shall we look at {D2/620.1}.

So the first -- if we can zoom in to the first one, the first is a game called "Babyshooter", can you see that, and it is a picture of a baby's face with a gun pointed at it, and when Mr Sweeney was asked about this, when he gave evidence in Australia, he agreed that it was a distasteful and offensive game, and I am sure we

1 could all agree with that, could we not?

2 A. Yes.

3 Q. Then Mr Sweeney was asked about a further game available
4 through itch.io called Isis Hunter, and we can see how
5 that game promotes itself at {D2/624.1}. If we zoom in
6 just to the top, we can see that this is its own
7 promotional material:

8 "Buy Isis Hunter today! Only One US Dollar! Play
9 the game banned in three countries and deleted from
10 Amazon because it was too controversial."

11 Now, thinking -- you did not address this issue in
12 your report, either when addressing itch.io or the
13 Epic Games Store, but you did say that itch.io offers
14 a curated game store. Now, in what sense did you mean
15 curated, Mr Holt?

16 A. I meant in the sense that, as it described itself, as
17 a platform that was particularly of relevance to
18 independent developers. Now, obviously from these
19 examples that perhaps raises some questions as to
20 whether -- what is the nature of some of that content.
21 I am not disagreeing with that at all. But I think,
22 again, this does not really go to the relevance of my
23 broader assessment of a range of different benchmarks
24 for the comparison, and nor I think does it suggest that
25 just because App Review is carried out, or Apple

1 maintains a view that it has a high secure environment,
2 that that has a significant impact on my overall
3 methodology for the assessment of the benchmark.

4 Q. Well, I think we can agree this, can we not, that for
5 many consumers, the fact that this kind of objectionable
6 content is screened by Apple's App Review is
7 a significant advantage over other platforms that do not
8 screen for it. It would make consumers more comfortable
9 about downloading apps, especially if they are allowing
10 children to download apps, can we agree that?

11 A. I think that would be the case for many people, that is
12 probably a fair statement, but, again, the relevance of
13 this for my framework needs to be put in proper context.
14 I am not saying that consumers have no value on any of
15 these types of characteristics, such as security or
16 privacy or anything of that nature, they may well have
17 a very high willingness to pay and it may well not be
18 uniform. There might be a lot who would, and obviously
19 this series of examples suggests there are others with
20 a different mindset on that. I am not making any
21 assessment about that.

22 But even if it is the case that there is a high
23 willingness to pay for security, that does not mean that
24 that is consistent with economic value to any particular
25 level of commission percentage, and the reason is that

1 if willingness to pay was sufficient and consumers
2 wanting it was sufficient, then you would say the same
3 about a monopolist in the water sector saying "Well,
4 you know, consumers clearly need water to survive, and
5 if there was a monopolist and no regulation, the charges
6 might be, you know, £2,000 a month".

7 Q. Well, Mr Holt, you say you cannot equate willingness to
8 pay necessarily with what is a fair price, but what we
9 are trying to get at -- so leaving -- let us assume that
10 you are right about that, you cannot necessarily equate
11 willingness to pay with what is a fair price, what
12 Dr Kent is trying to establish is that Apple is charging
13 higher than the maximum lawful price it could charge,
14 and you have put forward a range of comparators, and the
15 point that I am putting to you is that the differences
16 between itch.io and the Epic Games Store on the one hand
17 and Apple on the other are extremely significant, both
18 in terms of the security and safety issue we have just
19 been looking at, and in terms of the size of the
20 platform, and in terms of the general quality of the
21 offering.

22 So the commissions charged by the Epic Games Store
23 and itch.io are very far away, are they not, from the
24 maximum lawful price that Apple could charge for its
25 service?

1 A. So I think, as you have gone along, I have not disagreed
2 with some of the specific issues that have been raised
3 in relation to some of the app stores, but again, what
4 you do see is a range of outcomes, you see reactions
5 when the incumbent faced increased competitive tension,
6 you saw a significant reaction in that regard, and
7 I think that is another sort of piece of evidence.

8 Again, I take it back to the, you know, this is not
9 necessarily a market that is operating within the same
10 market that we are looking at. I mean obviously there
11 might well be some cases of differentiation, but there
12 are equally a number of propositions that would suggest
13 going materially the other way.

14 This size of market that these comparators are
15 fighting over is much, much smaller than the iOS
16 distribution market. The profitability that they are
17 earning -- not that I have done a detailed analysis, to
18 be fair, of that, but just by looking at the size of the
19 profitability of the App Store, which I have looked at,
20 alongside Mr Dudney, is so high that you would expect
21 really intense entry and competition on those prices.

22 So while I do not dispute counsel's suggestion that
23 some of these cases have not had a high App Review
24 standard for some types of apps, and some of them have
25 been criticised in certain regards -- again, I mention

1 that Apple's own core distribution service has been
2 subject to criticism as well -- but, you know, there is
3 a lot of factors that go the other way, and that is why,
4 in the round, my assessment is how I have -- what I have
5 suggested.

6 Q. Mr Holt, I want to move on to the Microsoft Store which
7 is another of your comparators.

8 A. Yes.

9 Q. From the start of the claim period in 2015 until
10 October 2017, the Microsoft Store charged a 30%
11 commission for all apps, yes?

12 A. Yes.

13 Q. Then in October 2017, Microsoft began charging
14 a headline 15% commission for non-gaming apps but
15 continued to charge 30% for gaming apps, yes?

16 A. Yes.

17 Q. Then in August 2021, Microsoft reduced the commission
18 for gaming apps to 12%, correct?

19 A. Yes.

20 Q. So for part of the claim period Microsoft's commission
21 for all apps was 30%, and for gaming apps it has been
22 30% for the majority of the claim period, correct?

23 A. Correct.

24 Q. It has a tiny market share, does it not?

25 A. I saw the discussion between yourself and Dr Singer

1 which suggested it was low. I do not have any precise
2 numbers to mind.

3 Q. Do not worry.

4 A. Yes, but I am happy to proceed on the basis that it is
5 relatively low.

6 Q. Now, again, the Microsoft Store suffers from very bad
7 quality, does it not?

8 A. Well, I am not so sure that that is -- I think it has
9 been subject to some criticism, but then I -- you know,
10 there are many dimensions, so I am prepared to accept
11 that there are some dimensions, or some criticism has
12 been levied at it, yes.

13 Q. Let us look at some of it, because I do not think I had
14 time to take Dr Singer to some of this. So {D1/1671.1}.
15 So this is the same article that we saw before. If we
16 go to page -- so you can see the heading "Steam still
17 puts the rest to shame".

18 A. Yes.

19 Q. If we go to page 6, please {D1/1671.1/6}. So we see
20 Microsoft Store is about two-thirds of the way down:

21 "Pros: [and it says] Er?"

22 Then:

23 "Cons: Slow, awkward, poor library functionality."

24 Then we see the more detailed review over the page
25 {D1/1671.1/7}:

1 "The interface is clunky and frustratingly slow and
2 managing your library is a pain - both because of its
3 poor design, and also because it brings together
4 everything you download from the store ... Technically
5 you can access Game Pass through this launcher, but it
6 is nowhere near as useable as the Xbox app."

7 Do you know that Microsoft charges a 30% commission
8 for its Xbox app?

9 A. Yes.

10 Q. You can see the punchline is:

11 "Score: 21%.

12 "A dreadful launcher that's also totally redundant
13 when it comes to gaming."

14 Would you agree that reviews such as this are likely
15 to damage the image of the Microsoft Store?

16 A. Yes, I think obviously if there was sort of a consistent
17 sort of perspective over time and across the board, then
18 obviously this does not assist in its marketing, for
19 sure. One might expect that games stores would want to
20 sort of respond to this sort of critique and try and
21 improve, sure.

22 Q. Now, if we go to your report {C2/11/26}. So
23 paragraph 68, you refer to Professor Hitt pointing out
24 that the Microsoft Store has suffered from poor quality,
25 and you say -- you quote what he says. Then you say:

1 "These assertions are at odds with some of the
2 evidence Professor Hitt cites. For instance, while
3 Professor Hitt states that the Windows store suffers
4 from a lack of useful apps, one of the sources he cites
5 notes that 'Microsoft's official Windows store is full
6 of helpful apps, both official and third-party'."

7 Do you see that?

8 A. Yes.

9 Q. Then let us go to the article that you are both talking
10 about, so that is at {D1/1536}. If we look at the
11 sentence that you picked up on, we see:

12 "Microsoft's official Windows store is full of
13 helpful apps, both official and third-party."

14 Then the immediate next sentence is:

15 "It also falls victim to what many other app stores
16 do, and that is a glut of fake apps and malicious
17 products."

18 You quoted from the first sentence but not the
19 second, but do you agree, looking at it now, that it
20 would have been more helpful to refer to both?

21 A. Yes, I think it might have been a broader perspective on
22 its quality to look at both. I think what I was
23 identifying, though, is that Professor Hitt sort of
24 seeks to remove Microsoft as a relevant comparator on
25 the basis of some critique, and what I am saying is

1 that, look, there are many dimensions across all of
2 these app stores, some do well in certain respects, some
3 do better in other respects, some are, you know, quite
4 poor in certain respects. So it is just not I think
5 fair to say -- and, you know, in the round one cannot
6 make use of a range of outcomes in a competitive market,
7 or a more competitive market at least, on the basis of
8 a few stories focusing on some specific concerns.

9 Q. What are the parameters that you say the Microsoft Store
10 has done well on?

11 A. Well, it does review. I quoted this particular citation
12 regarding the range of apps. It is obviously -- it
13 provides both games and other types of apps. Again,
14 I am not really trying to make a specific case-by-case
15 assessment of each individual app store, I am looking at
16 when there was more competitive pressure from entry in
17 the market from a starting point of typically around 30%
18 what has been the reaction, and there has been a number
19 of benchmarks for what prices rivals offer and what the
20 incumbent has offered as well. That is the in-the-round
21 assessment, and I am taking it into account alongside,
22 again, my other evidence outside of the PC market,
23 indeed from Apple itself, and the developer
24 perspectives.

25 Q. Let us look at page 5 of this report. {D1/1536/5}

1 Can you see that it is talking about reviews. This
2 says:

3 "PrintScreen Fast Screen Grabber holds a 5-star
4 review on the Windows Store and seems innocent enough.
5 However, this program doesn't work. It's a fake,
6 nonfunctional app, designed to take a relatively small
7 amount of money from you and leave you without the
8 option of a refund."

9 Did you go to the Windows store -- did you look at
10 this issue of fake reviews at all when you were putting
11 forward the Microsoft Store as a comparator?

12 A. No, I did not, no.

13 Q. Then if we go to page 7 {D1/1536/7}, "Beware of the
14 Knock-Offs".

15 Then over the page {D1/1536/8}:

16 "The Windows store is rife with low-quality or
17 outright fake apps that fill the results of popular
18 brands."

19 I mean, these are serious quality problems, are they
20 not?

21 A. I would certainly accept that if -- these are sort of
22 negative comments about certain aspects of quality,
23 I agree with that. I think again it has managed to win
24 some market share. It has a range of aspects to its
25 offering, some better, some aspects obviously have been

1 criticised.

2 I still think that if you look at the price by
3 reference to the incremental cost, that is a relevant
4 indicator for what an entrant would be seeking to charge
5 in a market.

6 Obviously if these stores up their quality game then
7 they might increase their market share, I agree with
8 that.

9 Q. Well, let us look at {D1/884}. This is an article dated
10 June 2020:

11 "Microsoft, we need to talk about the Microsoft
12 Store ..."

13 If we look at page 1, if we scroll down {D1/884/2},
14 we can see:

15 "The Microsoft Store has several issues, the main
16 one being a lack of apps."

17 But then if we go -- so the top of the page:

18 "It's an integral part of the Windows as a Service
19 experience, which is why I'm shocked at how bad the
20 Microsoft Store as an app really is."

21 Then we see further down page 2 -- can we scroll
22 please:

23 "Internally, Microsoft has more or less abandoned
24 the Microsoft Store as an app. It now basically runs on
25 its own, with a little maintenance here and there to

1 make sure basic functionality still works."

2 So again, just thinking about what is the highest
3 lawful price that Apple could charge for its offering,
4 we are a million miles away from the Microsoft Store,
5 are we not?

6 A. Well, again, I think this sort of falls in the prior
7 category of commentary about exactly what the quality
8 is, and there have been different perspectives mentioned
9 on that. Again, I am not looking at an individual
10 assessment of Microsoft's, you know, 12%, for non-games,
11 15, as the basis of my finding, I am looking at an
12 overall assessment for multiple comparators and for
13 multiple aspects within Apple itself.

14 Q. Let us look at some more comparators that you do not --
15 that you reject. So the Google Play Store charges a 30%
16 commission on both paid downloads and in-app
17 transactions, correct?

18 A. Correct, yes.

19 Q. The Microsoft Store on Xbox charges a 30% commission,
20 yes?

21 A. Yes.

22 Q. The Nintendo eShop charges a 30% commission, yes?

23 A. Yes.

24 Q. The PlayStation Store has a 30% commission, correct?

25 A. Yes, I think most of the games consoles are doing that,

1 yes.

2 Q. All of these games consoles compete against each other
3 in the devices market, do they not, and they compete
4 against mobile devices and PCs too?

5 A. I have not done a market definition of the games console
6 market to say whether they compete, you know, to
7 a sufficient degree of constraint with the mobile
8 market, or whether those would be separate markets.
9 That is just not something that I can say, based on the
10 evidence I have looked at.

11 Q. The Samsung Galaxy Store, 30% again?

12 A. Yes, I think there is some question as to what it might
13 charge in terms of discounts, but in any event Samsung
14 is obviously within the Android system, so at some point
15 if I offer an observation as to why I do not treat these
16 as relevant comparators for my standard, which is
17 workably effective competition in the iOS App
18 Distribution Market, then there would be an explanation
19 for that as well.

20 Q. So your view, in other words -- so your approach depends
21 on excluding all of these other platforms as
22 comparators, yes?

23 A. In a sense, yes, but the reason for that is that I am
24 trying to identify the most relevant benchmark that
25 I can, based on the standard that I have adopted, which

1 is the workably effective one, and I have considered
2 each of these -- obviously the console ones as
3 a category, Android ones -- and found that they do not
4 meet that standard. They -- probably the main reason
5 for that, if it is helpful to identify, is that the
6 nature of competition in the equivalent markets -- they
7 are obviously not in the same market, but the equivalent
8 app distribution and payment solutions aftermarkets --
9 does not to me, in my judgment, represent workably
10 effective competition.

11 In some of the cases there are no rivals at all, and
12 in other of the cases, which are the Android ones, there
13 are some rivals, but there are material barriers to
14 expansion and also some competition concerns that have
15 been raised around the world, including in this
16 jurisdiction amongst several others, and obviously there
17 are some which are not yet through to finding and some
18 which have reached a finding.

19 So that was the broad context within which
20 I considered these alternatives and did not feel that
21 they met the standard I was looking for.

22 Q. But it is right, is it not, that you have not considered
23 whether these other comparators that I am referring to
24 are operating -- you have not analysed whether or not
25 they are working -- they are operating in workably

1 competitive markets? So take the Google Play Store, you
2 refer in your report to allegations that have been made,
3 but you yourself have not reached any conclusion about
4 whether or not it is operating in a competitive
5 environment?

6 A. I think I am happy to accept part of that but not the
7 other part. So I agree that I have not carried out an
8 in-depth competition assessment of the Google conduct
9 that has been alleged to be anti-competitive, for the
10 purpose of these Proceedings, and reached a view that
11 "Oh, yes, indeed they are --", you know, they reached
12 that particular level of concern that they would be
13 anti-competitive. I have not done that.

14 I have instead, rather more indirectly, looked at
15 what the nature of that market looks like, identified
16 that there are a number of ongoing and some already
17 judgments against it in relation to some of these
18 concerns, that there are some clear issues around
19 barriers to expansion, and that simply when I am looking
20 for a comparator, those are not characteristics that
21 I would import into a comparator analysis as a good
22 benchmark for workably effective competition.

23 Q. All right, Mr Holt. I dealt with the Google Play Store
24 in more detail with Dr Singer, so I am just going to
25 deal with one more short related topic with you.

1 We looked at Roblox earlier. Are you aware that
2 third parties are committed to create in-game content
3 and sell it within the Roblox game platform?

4 A. Yes, I have to admit I am not an expert on how the
5 Roblox market operates.

6 Q. The in-game content can in fact be sold within
7 experiences which are created by other creators.

8 Let us look at -- I want to -- let us go to
9 {D2/826.2}. So this is the Roblox creator hub -- I just
10 have to find -- page 3 is the right page. {D2/826.2/3}

11 So we see under the heading "Commissions", if we can
12 zoom into that, so:

13 "When community items are sold on Roblox, a portion
14 of the sales is split between the item creator and
15 Roblox. If the item is sold within an experience ..."

16 You can have other third parties creating
17 experiences.

18 "... the revenue share will additionally be split
19 with the owner of the experience."

20 Then you see the table. So "3D assets", the creator
21 receives -- only receives 30%, yes? So Roblox takes
22 70%. If it is an in-experience purchase, the creator
23 still only gets 30% and the remaining 70% is split
24 between the owner of the experience and Roblox.

25 Then if we look at "Classic Clothing", we can see

1 that for that, the developer receives 70% with Roblox
2 taking 30%, unless it is an in-experience purchase, in
3 which case the creator receives 60% with the remaining
4 40% split between the experience owner who gets 10% and
5 Roblox who gets 30%.

6 So this shows, does it not, Mr Holt, that -- it
7 shows Roblox monetising its IP by taking a commission
8 from sales of digital content created by third parties,
9 yes?

10 A. Yes. I have not looked at this in detail, I do not know
11 what the characteristics of the third parties are, or
12 other details relating to how that marketplace works,
13 but obviously I can see the values that are identified.

14 Q. Then we can see that the commission that Roblox takes
15 ranges from 30 to 70% depending on the situation?

16 A. Yes.

17 Q. Do you think that is unfair too?

18 A. I have not reached any view either way on that. I have
19 not looked into that particular comparison.

20 Q. Thank you very much. Just bear with me for one minute.

21 (Pause)

22 Mr Holt, thank you. Mr Piccinin now has some
23 questions for you.

24 DR BISHOP: I have one or two questions for Mr Holt in this
25 area. If Mr Piccinin is going to continue in this area,

1 I will save them for later.

2 MR PICCININ: No, sir, I was going to move on to

3 profitability, so I am happy for you to go first.

4 DR BISHOP: Mr Holt, workable competition, workable

5 competition, workable competitors.

6 A. Yes.

7 DR BISHOP: Yesterday -- last evidence day, Dr Singer gave

8 us a picture of the world of mobile phones in 2007 and

9 2008.

10 A. Yes.

11 DR BISHOP: He made the observation or claim, or whatever

12 you want to call it, that we could have wound up with

13 three or four more independent mobile phone systems and

14 companies, but in the event alas we wound up with only

15 two, and I want to pursue that a little bit.

16 A. Yes.

17 DR BISHOP: Suppose we had wound up with, say, five mobile

18 phone companies, different systems, I suppose you would

19 consider that to be workably competitive, would you?

20 A. A market where there are five operators?

21 DR BISHOP: Five.

22 A. I think, if based on no other information, yes, that

23 could be. Obviously it might depend on what is the

24 nature of competitive conduct. Within that, what are

25 the barriers to expansion, what other conduct any

1 individual --

2 DR BISHOP: (Inaudible) -- and lots of other things.

3 A. Yes. So there is a range of possible sort of answers to

4 that question.

5 DR BISHOP: My memory of when workable competition was first

6 developed, although it is some years ago, the concept

7 was three, four, five, six (inaudible), that would be

8 enough --

9 A. Yes.

10 DR BISHOP: -- sufficient in many cases. Anyway, let us

11 suppose there are five, and suppose all five had 30%

12 commission.

13 A. Yes.

14 DR BISHOP: Would it still be workably competitive?

15 A. So again we would be looking at -- so there is obviously

16 first a market definition question, and you have

17 described --

18 DR BISHOP: I imagine mobile phones pretty much like today,

19 except instead of Apple and Android, there is X, Y and

20 Z, which are --

21 A. Yes.

22 DR BISHOP: -- independent and each with substantial market

23 shares big, well-known companies.

24 A. Yes, yes. Okay.

25 DR BISHOP: They all discover that there is a market for

1 games, they all have a fairly substantial rake-off of
2 25, 30, 35%, that sort of thing.

3 A. Yes.

4 DR BISHOP: Would that be workably competitive?

5 A. The overall market may well be, and then there is
6 a separate question as to whether the -- because you
7 have described the singular market, ie the market for
8 either the ecosystem or the devices. One then proceeds
9 to investigate, assuming that there is a relevant market
10 for app distribution within each of those devices, and
11 then further assuming that broadly similar terms apply
12 on each of those cases, then it would -- then it would
13 not necessarily represent a workably competitive market
14 in those markets.

15 The reason I say that is because when looking at
16 those individual markets, you need to look at the terms
17 and conditions and the switching costs and the scope for
18 expansion and entry and so on.

19 DR BISHOP: So you are saying even though there were five
20 companies, one of which is Apple, and then there are
21 four little Apples, Apple and Android and three or
22 four -- three little Apples and Androids, other Apples
23 and Androids, that it might -- so are you saying that
24 only the devices market would be competitive. They
25 might all be anti-competitive in respect of the apps, is

1 that right?

2 A. They might be. I think there would be further
3 considerations that you would then get into. So the
4 considerations I looked at, for example, in my -- is 30%
5 fair or unfair in itself, looked at a range of factors,
6 such as, for example, what was the contribution made to
7 the ecosystem. I think you would perhaps also want to
8 look at some points that I made around the objective
9 justification for that rate in the context of what it is
10 doing in the devices market.

11 So if in the case of having five, and there was
12 intense competition, then there might very well be
13 a situation whereby those -- there was an efficient
14 charging structure rate whereby 30% was being charged
15 because of the market power that each of the five had in
16 the aftermarket, ie the app distribution and then the
17 payment solutions markets, but there was intense
18 competition, hypothetically, if there were a lot of
19 rivals, for the devices. In that case what you might
20 see, for example, is intense competition leading to
21 losses in the devices market, or not very significant
22 profits.

23 DR BISHOP: Absolutely.

24 A. With people trying to capture and look ahead to the
25 impact of the aftermarket.

1 DR BISHOP: But you are aware that this is ubiquitous in
2 business and commerce, are you not? That people have
3 very little return, even make losses, in the before
4 market in order to capture the aftermarket opportunity.

5 A. I think that is a business model that is -- can be
6 prevalent. Obviously it is not the case in all cases --
7 (overspeaking) --

8 DR BISHOP: -- they say this themselves, that they do not
9 make any money on the sale of cars but they make a bit
10 of money on supply of spare parts and things like that
11 later. Whether that is true, I do not know. But I do
12 know that in the market for lifts, elevators, it is
13 routine for people to lose money building the lift
14 because they expect to get 12 or 14 years of service
15 revenues later --

16 A. Yes.

17 DR BISHOP: In fact I -- it is very, very common.

18 Take a very competitive market, such as restaurants.

19 You go to restaurants I take it?

20 A. Yes.

21 DR BISHOP: Restaurants all over the world seem to have
22 a very high margin on wine.

23 A. Yes.

24 DR BISHOP: Stable, very competitive; much higher returns on
25 wine. It is very simple, you take the cork out or twist

1 the cap off, and you may need a bit of storage space for
2 a couple of cases of wine, but it is very, very
3 inexpensive in staff time, unlike cooking food and that
4 sort of thing, yet the margins are very high, sometimes
5 200%.

6 A. Yes.

7 DR BISHOP: Stable, competitive.

8 How do you know that the market for mobile phones,
9 very much a multi-product, how do you know that it is
10 not like the market for wine -- for restaurants, or the
11 market for BMWs, or the market for lifts? How do you
12 know that?

13 A. Well, I think -- I have looked at the market structure.
14 You -- there is a question about the degree of choice
15 that arises in some of these contexts. So, for example,
16 take the wine. Obviously restaurants are a highly
17 competitive market where there is entry and exit
18 happening all of the time and obviously it can make
19 a lot of sense to have low menu pricing in order to
20 attract customers, and then you can sort of, in a sense,
21 take advantage of the fact that they are there to offer
22 a service.

23 But even then there is, you know, reasonable choices
24 to be made by individuals as to whether they want to
25 drink or not, whether they want to go to a restaurant

1 that offers that sort of a policy or not. There is
2 a lot of choice available in that context. I do not
3 think that applies here.

4 DR BISHOP: You would not favour a competition law getting
5 into regulating the restaurant business and insisting it
6 is anti-competitive to have a 200% mark-up on wine and
7 it should only be 12% or something like that, I am sure
8 you would not suggest that?

9 A. No, I would not. But I think, again, amongst the
10 reasons for that are the nature of the intensity of
11 competition and the amount of choice available.

12 DR BISHOP: But again we do not really know what would
13 happen in the market for mobile phones. We call these
14 things mobile phones, but they are complicated palm
15 computers in like really with signaling functions. We
16 do not know what would happen in that market if there
17 were five or six -- four, five, six --

18 A. I think you are raising a counterfactual or
19 a hypothetical question: what would that market look
20 like? I agree with you, we do not know that. In a
21 sense that is the definition, is it not, of a
22 counterfactual. One outcome could be that you maintain
23 high commissions with restrictions and have intense
24 competition in order to win that business. Another
25 could be that the degree of competition in that

1 market -- that device market is materially greater than
2 you observe in the actual where there are only two, and
3 again taking away this whole debate about how closely
4 competitive those two are in regard to switching costs
5 and loyalty and all of those issues.

6 But assuming that there was quite a lot of
7 competition, it may very well be that in order to reach
8 a competitive advantage, fighting very hard against
9 a bunch of rivals, that you would actually, potentially,
10 do something different, which could include a lower
11 rate.

12 DR BISHOP: I just wanted to explore this a little bit and
13 see what you said.

14 A. Okay.

15 DR BISHOP: One final question for you. In this case there
16 is a large chunk on pass-on of incidence. Now,
17 incidence certainly matters for calculation of damages,
18 if we get that far. Damages only come up if there is
19 liability.

20 A. Yes.

21 DR BISHOP: But it affects liability too, does it not? If
22 there is not much pass-on, if all of the lower
23 commission leads to ... that all the extra money sticks
24 to the fingers of the games developers and the dating
25 apps, and so on, these people are so angry, then this

1 is -- there is no consumer interest at all. Fundamental
2 to modern competition law is that there needs to be
3 a theory of harm. If it all sticks to the fingers of
4 the app developers of various sorts, then this is just
5 a struggle over rents, is it not?

6 A. Well, I am not sure I would entirely agree. I see --
7 I certainly agree with you that consumer welfare is an
8 important standard, and theories of harm are important
9 in that regard. I do not think one then takes from that
10 that competitive outcomes that affect primarily the
11 business user rather than the consumer are necessarily
12 immune to concerns regarding anti-competitive conduct.
13 I think obviously if that were the case, then the regime
14 arguably would not permit collective actions on behalf
15 of consumers, or at least would only do so subject to
16 some thresholds around what is the rate of incidence,
17 and that is obviously not the case.

18 DR BISHOP: On behalf of consumers and not on behalf of
19 developers, you mean?

20 A. Sorry, if the proposition were that incidence is the
21 necessary condition for a theory of harm and hence
22 a liability finding, then that, to some extent, would
23 seem to be inconsistent with the prospect that
24 collective actions could be levied by businesses in
25 a vertical chain where anti-competitive behaviour is

1 arising above.

2 DR BISHOP: I see your point. It can be in some

3 circumstances.

4 A. Yes.

5 DR BISHOP: We're here of course in a consumer case. Okay,

6 I just wanted to explore these with you.

7 A. Thank you.

8 THE CHAIRMAN: Mr Piccinin, what do you want to do? We

9 could start, or we could finish now and then have an

10 earlier ...

11 MR PICCININ: Yes, why do we not do that.

12 THE CHAIRMAN: Shall we rise, and then we will start again

13 at 10 to 2, shall we, so you have your time. Good.

14 Okay, thank you.

15 (12.49 pm)

16 (The lunch break)

17 (1.55 pm)

18 THE CHAIRMAN: Yes, Mr Piccinin.

19 MR PICCININ: Good afternoon, Mr Holt.

20 A. Good afternoon.

21 Q. As I said earlier, I've got some questions for you about

22 your profitability analysis. I am not going to go over

23 all the material we have been through with Mr Dudney, we

24 have had that debate.

25 A. Okay.

1 Q. If we could just take your third report, please
2 {C2/10/86}. So this is, just to locate it, this is in
3 chapter 6, which is concerned with limb 2, unfairness,
4 and if we could just look at paragraph 224 at the
5 bottom, you can see there that you refer to your
6 calculations of Apple's profitability, yes?

7 A. Yes.

8 Q. Then in the second sentence you say that the App Store's
9 ROCE is "much higher than would be consistent with
10 normal returns"?

11 A. Yes.

12 Q. Specifically, very much above the WACC is what you mean
13 by that?

14 A. Yes.

15 Q. Then you say that those results "are not sensitive to
16 plausible ranges of cost allocation", and I think what
17 you mean by that is that the result that the ROCE is
18 much higher than WACC is not sensitive to plausible
19 ranges of cost allocation, is that right?

20 A. Yes, the result that ROCE is much higher than WACC is
21 not sensitive to alternative plausible ranges of cost
22 allocation, yes.

23 Q. Yes. Then you say what the cumulative level of excess
24 profit is over an eight-year period, do you see that?
25 Let us not say the number, but --

- 1 A. Yes, I will not say the number, but yes.
- 2 Q. Then you comment just at the bottom that in your
3 opinion, that number is "likely above the threshold for
4 unfairness". We can just go over the page {C2/10/87} to
5 see the rest of the sentence, but the point is that
6 number, as a cumulative profit figure over eight years,
7 is, you say, above the level of unfairness?
- 8 A. I think it is likely to be, yes.
- 9 Q. Okay. So then looking at paragraph 225, I just want to
10 take this quite slowly because it is a subtle passage in
11 your evidence, if I can put it that way.
- 12 A. Okay.
- 13 Q. So the first sentence, you say that the cumulative
14 amount of profit is significantly greater than you
15 estimate would reflect fair pricing.
- 16 A. Yes.
- 17 Q. Then in the second sentence, you make clear that you are
18 not suggesting that any excess profit above WACC
19 necessarily represents profit from unfair pricing, yes?
- 20 A. Correct.
- 21 Q. Then in the third sentence, you refer to your
22 conclusion, or your analysis earlier in the report,
23 section 5, where you found that a 15% commission would
24 have produced profit over WACC of 31.4 billion over
25 eight years, yes?

1 A. Yes.

2 Q. Then in the fourth sentence you say that that,

3 31 billion over eight years, in other words, could be

4 argued to be a "fair" degree of producers' surplus.

5 A. Yes.

6 Q. Yes?

7 A. In the context of these Proceedings.

8 Q. Yes.

9 A. Yes.

10 Q. Then in the fifth sentence, you say that the unfair bit

11 is the bit that Apple earns above the 31 billion over

12 eight years, yes?

13 A. Yes.

14 Q. Now, I think --

15 A. Okay.

16 Q. -- from your discussion with Ms Demetriou this morning

17 and last week, I think that your view is that a fair

18 price is, by definition, one that is charged in

19 a workably competitive market, yes?

20 A. Yes.

21 Q. I also think what you are saying here is that because

22 15% is in your competitive range of comparators, you

23 conclude that if a 15% commission produces 31 billion in

24 excess profits over eight years, then it follows from

25 that that 31 billion over eight years must be fair, is

1 that right?

2 A. I think that is very close to what the significance of
3 this statement is. I think, again, I am looking at
4 comparators and a range of evidence, including evidence
5 within Apple, in order to identify my best estimate of
6 what I think the not unfair rate is. The sensitivity
7 test which says what is the amount of profitability at
8 that level is what we have just read out, and so I am
9 indicating that in the context of these Proceedings,
10 assuming that was an appropriate benchmark, ie the 15%
11 were appropriate, then it turns out that Apple would
12 have made these profits from the App Store, so that is
13 correct.

14 I think one can then read a couple of things into
15 that. One would be that well that is sort of consistent
16 with the way the market works, the possibility that
17 there has been some degree of innovation or, you know,
18 producer surplus reflective of economic value. Another
19 possible interpretation, which I have not made
20 explicitly, is that it also might indicate that there is
21 a degree of conservatism in the benchmark because the
22 amount of profitability is still very high.

23 Q. Okay, but I do not think you are claiming to have an
24 economic test that can look at different levels of
25 excess profits over an eight-year period, just the

1 numbers, and say which ones are fair and which ones are
2 not fair?

3 A. I would agree with you I have not identified a test that
4 says, here, let us look at an eight-year framework and
5 then allocate a percentage on that basis. I think what
6 I am looking at is an outturn, ie the actual, my best
7 estimate from a wide range of evidence leading to
8 a counterfactual, and then I am looking at those two and
9 saying, well, if that is the right benchmark, there is
10 still well above WACC returns cumulatively over the
11 eight years, and a reasonable interpretation of that is
12 that would represent producer surplus that might accrue
13 in a workably competitive market, for example, as
14 applied in the iOS App proceedings.

15 Q. Let us see if we can tease that out a little further,
16 then, by going back to page 74 in your report
17 {C2/10/74}.

18 A. Okay.

19 Q. Sorry, just before we go there, do not lose track of the
20 number 31 billion --

21 A. I will write that down, 31.

22 Q. That is your eight-year excess profit figure associated
23 with the 15% commission.

24 Where that comes from is here, if we could just
25 focus on table 5.7 at the top. I do not know, did you

1 watch or read transcripts of Dr Barnes' evidence?

2 A. I did, yes.

3 Q. Because he made the point that actually if you add up --
4 it is the penultimate line here, the penultimate row.
5 If you actually add up the excess profits associated
6 with the 15% commission over this eight-year period, you
7 do not get 31 billion, you get 43.1 billion. You can
8 probably do that in your head, but ...

9 A. Yes, I think that -- that may be the case. You might
10 recall that Mr Armitage took me to one update to my main
11 report which reflected that we had agreed, Dr Barnes and
12 I, that there was an update to be made in relation to
13 the WACC. So I am not saying that that necessarily
14 accounts for the entirety of the discrepancy that you
15 have identified, but that would be one factor.

16 Q. I think that is actually a different point, because
17 these two pages that I have just taken you to are from
18 the same report.

19 A. Yes.

20 Q. So this is before you had seen the light on what the
21 right WACC is to look at.

22 A. Yes, yes.

23 Q. I think you have just -- I do not know if you looked at
24 the wrong row or if you just did the arithmetic wrong,
25 but you were just out by about £12 billion.

1 A. Yes, that might be -- I would need to look again and
2 check what the issue is. I think in one sense the
3 precise value -- you are putting quite a lot of weight
4 on what is the precise value, and I -- I think that is
5 a little bit back to front. I am not saying "Hm, what
6 would be the right amount of excess profit for Apple to
7 have made over eight years, is it 31 billion or 22 or
8 43?" What I am really doing is saying "Well, you know,
9 what is my best estimate of a counterfactual rate?" and
10 then essentially, as a mathematical outcome or
11 a financial analysis outcome, this amount would be what
12 it would have earned in that world, and I take your
13 point that there might be a bit of a discrepancy as to
14 the precise value.

15 Q. Whatever comes out of the comparator -- the
16 counterfactual analysis, let me just put it that way, is
17 ipso facto fair?

18 A. Well, yes, I mean in the sense that I am doing my best
19 to identify, on the range of evidence, what I consider
20 to be the not unfair price, then I am sort of saying
21 "Well, you know, had that charge been made, then on my
22 assessment of the evidence that would not have led to an
23 unfair pricing case being made out".

24 Q. Yes, okay.

25 20% is also in your competitive range, is it not?

1 A. 20% is the top -- the upper end of my range. I said the
2 range was 10 to 20. I had various data points
3 reflecting that. I feel that 20% is quite conservative,
4 for a number of reasons. I felt that 15% is the best
5 estimate and, as I indicated earlier to the Tribunal,
6 there are some factors that lead me to think that even
7 15% is somewhat conservative in certain regards. But,
8 yes, my range was 10 to 20.

9 Q. Right. So we could do a similar exercise using the
10 bottom row, then, could we not, and the excess profit
11 that would come out of that would also be at the upper
12 end of your range for fair, yes?

13 A. Yes, I think that may be the case. So if you were to
14 take 20% as, in a sense, the correct value, you could
15 again go back and carry out the analysis, and obviously,
16 incidentally, there is a number of assumptions that need
17 to go into this type of a counterfactual analysis in
18 terms of, well, where do revenues -- some revenues might
19 be fixed, some might be moving and so on. So there is
20 quite a few moving parts, and Mr Dudney has made
21 a number of assumptions in that regard.

22 But leaving aside all of the sort of specific issues
23 around how you do the calculations, obviously the
24 principle that you have identified would in theory
25 apply, that, you know, if there was a different

1 benchmark you could recalculate the operating profits
2 relative to a normal return component.

3 Q. Okay, and -- I mean if Apple were today to decide that
4 they want to take your advice and do what you think is
5 the right thing to do and charge a commission of 15 or
6 20% for the next eight years, then even if there is no
7 growth at all in the app store, then the App Store, on
8 these -- on this analysis, would be producing, at a 15%
9 commission, something like 64 billion in excess profits,
10 eight eights, over the next eight years?

11 A. Yes, so if the next years were sort of similar in
12 cumulative total to the past.

13 Q. No, no --

14 A. Oh, sorry.

15 Q. -- if there is no growth from FY23?

16 A. Oh, from -- so if you replicate FY23 for eight more
17 years, so if you are taking --

18 Q. Eight eights.

19 A. Eight times eight, yes, got it. Yes, I agree.

20 Q. So that would be fair?

21 A. Well, that might be -- again, it is putting a lot of
22 weight on what is the right amount of excess profit as
23 an absolute value, which is actually again back to front
24 to the way I would consider it, which is what is a -- in
25 the size of the market that you observe and the nature

1 of the market conditions that you observe, and again
2 with the counterfactual commission, what would it turn
3 out to be?

4 Q. So actually if the Tribunal takes the view that
5 Ms Demetriou is right about the comparators evidence,
6 and a suitable comparator is, say, at or slightly higher
7 than Apple's actual effective commission -- you remember
8 Ms Demetriou put to you Steam, for example, and had
9 various numbers at Steam that were higher than 25?

10 A. Yes.

11 Q. If that is right, then whatever profits Apple has earned
12 at those competitive rates of 25% of the past eight
13 years would also be fair?

14 A. Yes, I think -- let me just sort of quickly recap to
15 make sure I am understanding the point. If one has gone
16 through the entirety of the second limb analysis and
17 reached a view that a -- in the context of the iOS app
18 distribution and the payment aftermarket, let us say 27
19 were to be the appropriate benchmark for fairness, and
20 then Apple, on the evidence, has actually charged below
21 that, then I think I would agree -- well, sorry, that is
22 not quite correct. It could actually -- there is
23 a distinction between the first and second limb. Sorry,
24 I am thinking a little bit on the fly, because I had not
25 considered whether 27% was the right counterfactual --

1 Q. I am asking you about the second limb, if it helps you.

2 A. Sorry?

3 Q. If it helps to simplify things, I am really asking you
4 here in these questions about the second limb.

5 A. Yes. Well, I think that is a simple question then, is
6 it not? If 27 is, from the weight of evidence, taken to
7 be the correct counterfactual, then I think it would be
8 fair to compare that against the actual commission.
9 I think you are sort of, albeit in a sense by
10 assumption, saying that there would not be an unfair
11 price in that context.

12 Q. My point is that these excess profit figures, the
13 profitability analysis, does not really move the dial in
14 limb 2. That is why you are telling me not to place
15 weight on the particular numbers, you know, whether it
16 is 30, 40? What is 12 billion amongst friends, right?

17 A. I think that is in part true but not entirely. I think
18 there is a bit of a relationship between limb 1 and
19 limb 2. It is clearly the case that you can demonstrate
20 large above WACC numbers on the evidence that I have
21 looked at and still, in theory, not reach an unfair
22 finding, and it is also the case that you can reach
23 a view on limb 1 and yet find also -- well, not "and
24 yet"; it is sort of in addition find a limb 2 finding.

25 So to that extent, the limb 1 analysis is what it

1 mainly is, which is a basis to compare the actual
2 returns, the actual prices by reference to cost, and
3 then to form a view as to whether that is excessive,
4 ie persistently and significantly above a benchmark of
5 some type, and I have taken the WACC; then you move on
6 to the limb 2 analysis, but I think in the limb 2
7 analysis a much broader range of evidence stands to be
8 considered.

9 Q. In that analysis these numbers just do not move the
10 dial. How do they move the dial in limb 2?

11 A. I think the only sense in which they move the dial --
12 again, the primary limb 2 assessment is on the basis of
13 pricing evidence, ie what would be a not unfair price,
14 so that is a combination of comparators in the context
15 of Apple. I think it is fair to say that is the primary
16 evidence. Then there is additional evidence relating to
17 what do developers' perspectives add to the mix, and
18 a number of other things that I look at in the "in and
19 of itself" section, 6.

20 I have also said that understanding the degree to
21 which one looks at the degree of profitability could be
22 a factor as well, and I think I would agree that, well,
23 that might not be determinative, because it could be the
24 case that a higher amount of profitability could be
25 found, and yet you would agree that it is, you know, on

1 the limb 2 analysis, fair.

2 So it is -- so I do not go so far as to say it is
3 determinative, that the profitability outcomes are
4 determinative of the limb 2 analysis, but if the degree
5 of excess returns is significant, persistent, in the
6 context where competitive conditions have been harmed,
7 and also in the context where prices are above what you
8 might expect in a workably competitive market, then that
9 I think is consistent with and supportive of the
10 finding.

11 Q. Mr Holt, I am going to try one more time.

12 A. Okay.

13 Q. Assume with me that everything other than the
14 profitability analysis that you look at in limb 2, so
15 everything else you just mentioned, the comparators,
16 Apple's prices and all of the other materials, except
17 for profitability, points to 25% as the answer --

18 A. Okay.

19 Q. -- then there is nothing you can do with these numbers
20 that we have got on the screen, these excess profit
21 figures, to move the result. You are just going to say,
22 well, whatever was produced by the 25% is fair.

23 A. Yes. I think the question, though, would be whether --
24 so I think that is true to the extent that you have
25 taken account of all the evidence and reached the view

1 on the 25 or the 27 benchmark.

2 Q. All except for the profitability.

3 A. Okay, so all except for the profitability analysis. So
4 your question is can profitability analysis add
5 anything? Well, I think in that case profitability
6 analysis might add something if there was some
7 uncertainty and doubt and you needed -- and there was
8 sort of evidence going in a number of different ways and
9 you wanted to really understand how reliable the outcome
10 of the unfairness test was.

11 Q. Okay, well, I will move on from that topic and move on
12 to another one.

13 A. Sure.

14 Q. So I think you would agree that Apple's work in
15 designing and producing iOS devices produces value to
16 developers and also to device users?

17 A. Yes.

18 Q. In order to provide that value, Apple needs to incur not
19 just the cost of goods sold for the device and the cost
20 of goods sold for the App Store, but also the OPEX, yes?

21 A. Yes.

22 Q. That is a similar story in two-sided markets, is it not?

23 A. Yes, that a platform operator might incur costs on both
24 sides, yes. In this case there is a question as to
25 whether we are talking about Apple at the ecosystem

1 level or Apple as the platform owner of the App Store.
2 Obviously a two-sided market can, in theory, be either
3 of those two situations.

4 Q. Okay. You are very familiar with the economics of
5 two-sided platforms?

6 A. Yes.

7 Q. So let us think about one. Let us think about
8 American Express.

9 A. Okay.

10 Q. So American Express provides acquiring services to
11 merchants, yes?

12 A. Yes.

13 Q. It issues payment cards to cardholders, yes?

14 A. Yes.

15 Q. It lends them money, lends cardholders money?

16 A. Yes.

17 Q. Those services on both sides are provided in markets
18 that you have looked at before and that are at least
19 workably competitive, yes?

20 A. Sure.

21 Q. Yes?

22 A. Yes.

23 Q. Those services can in principle be disintermediated and
24 provided by separate entities?

25 A. Well -- (overspeaking)

1 Q. -- four parties.

2 A. Yes, four parties to the scheme could -- yes, you could

3 have acquiring providers or banks doing the issuing,

4 yes, I agree.

5 Q. So if we could go to {D1/1682.2}. This is the

6 American Express Form 10-K for the fiscal year ended

7 Christmas 2023. If we go into page 97 {D1/1682.2/97}

8 and just zoom in at the top to make it bigger.

9 This is effectively a P&L for Amex, yes?

10 A. It looks like it, yes.

11 Q. You see the first entry under "Revenues" is "Discount

12 revenue" and it is about 33 billion, yes?

13 A. Yes.

14 Q. I think you probably -- you probably are familiar with

15 the terminology --

16 A. Yes.

17 Q. -- that those are the charges to merchants for the

18 acquiring services, yes?

19 A. Yes, merchant service charges effectively, yes.

20 Q. Then you can see there is 7 billion in card fees, yes?

21 A. Yes.

22 Q. So those are from the cardholders?

23 A. I agree, yes.

24 Q. Then there is a small 5 billion line in service fees.

25 Just take it from me, the reference is page 103, that

1 that is a catch-all for a bunch of different fees on
2 both sides.

3 A. Understood.

4 Q. So let us not worry too much about those 5 billion.

5 A. Yes.

6 Q. Then you can see we get down to the interest income and
7 there is a big line item for interest on loans,
8 18 billion?

9 A. Yes.

10 Q. Yes? That is coming from the cardholders obviously.

11 A. Yes.

12 Q. So just adding that to the card fees and ignoring the
13 service fees, basically what Amex is doing is charging
14 33 billion to the merchants and about 25 billion to the
15 cardholders, yes?

16 A. Sorry, yes -- sorry, assuming that the 5 is on -- we are
17 discounting that. So 33 to the merchants and then 7
18 plus 18 to consumers, 25-ish. Got it.

19 Q. Again, do not worry too much about the --

20 A. Broadly similar-ish.

21 Q. -- smaller numbers.

22 A. Yes, similar --

23 Q. Suppose we wanted to do the same kind of exercise that
24 you and Mr Dudney have done for the App Store -- do not
25 worry, I am not going to make you do any calculations,

1 just conceptually. Conceptually, suppose that someone
2 thought it would be a good idea to assess the
3 profitability of Amex's acquiring business.

4 A. Yes.

5 Q. So we have got 33 billion or so in revenues for that
6 business, the acquiring business, and now we want to go
7 looking for costs that relate specifically to the
8 acquiring business?

9 A. Yes.

10 Q. So we are going to find those down under the "Expenses"
11 heading, which you can see on the page in front of you,
12 but I cannot see any there that are sort of very big and
13 specific to the merchant side?

14 A. That may be.

15 Q. Sorry?

16 A. That -- I -- I am just looking to see what they are,
17 but ...

18 Q. Let us go through them, shall we?

19 A. Sure.

20 Q. The big one is "Card Member rewards", yes?

21 A. Yes.

22 Q. That is 15. That is an expense of the issuing business?

23 A. Yes.

24 Q. Then there is also, if you just look above that, just
25 immediately above the "Expenses" line, you can see there

1 is 5 billion in credit losses.

2 A. Yes.

3 Q. Which are also expenses of the issuing business.

4 A. Yes.

5 Q. Then there is "Card Member services", 4 billion. That
6 sounds like another issuing business thing?

7 A. Yes.

8 Q. Then there are a bunch of other line items, "Business
9 development", "Marketing", "Salaries", "Other". I have
10 added those up to about 25 billion. In theory, we could
11 do a revenue allocation between the acquiring and the
12 issuing side of Amex, could we not?

13 A. You could.

14 Q. But that would be an economically meaningless thing to
15 do, would it not?

16 A. Well, again I think all of these types of analysis need
17 to be taken into account in their proper context.

18 I mean I think firstly the App Store is a two-sided
19 market, or at least there are users, ie device users and
20 developers, and so the two-sided consideration there,
21 which I agree that exists, you have to have some
22 indirect network effects and attract both sides, but
23 I think the interesting thing is that the charging
24 structure in the App Store, as is the case for other
25 similar digital distribution networks that are the

1 comparators, is essentially all on the developer side
2 and not on the user side, more or less.

3 So in that context, the App Store business unit as
4 an entity can be looked at in terms of the revenue and
5 the costs as -- you know, looking at the App Store as
6 a whole, and it turns out that most of the revenues are
7 from the developer side and there may be a mix of costs
8 from the two sides.

9 But in a sense, once you have got a view as to what
10 is the efficient sort of charging structure, or the
11 charging structure that is typical, then I think you can
12 do that sort of analysis.

13 I think in the Amex case, obviously that two-sided
14 market includes cardholders and merchants, there are
15 a range of costs on both sides, perhaps more of the
16 costs seem to relate to its issuing business in that
17 case, and there is a mix of revenues, and that mix of
18 revenues may well be something that arises in
19 a competitive market with other card platforms. But
20 I do not think that any of that really takes away from
21 the relevance of looking at a two-sided market as
22 a business unit.

23 If you then start to look at one side of the
24 two-sided market and then make views only on one side,
25 without recognition that there might be revenues and

1 costs on the other side, then I think that might be
2 problematic. But that is not what Mr Dudney has done.
3 He has looked at the App Store as an entity, taking into
4 account the revenues and costs equally of the two sides,
5 ie with regard to both users and developers.

6 Q. The reason why it would be problematic to split the
7 acquiring side from the issuing side in a profitability
8 analysis is that all that work that is being done on the
9 issuing side benefits the merchants as well, does it
10 not?

11 A. I would agree with that, and the same would apply
12 I think in the -- you know, in a general context, sure,
13 yes.

14 Q. So the point is -- well, you have accepted that much,
15 that the same applies to the App Store, so that we
16 obviously need to look at the consumer and the developer
17 side of the App Store together, just as we would for
18 Amex?

19 A. Yes.

20 Q. But my point to you is that the same thing goes for the
21 device business, because you agreed before that the work
22 that Apple does to produce the devices creates benefits
23 for developers as well.

24 A. Yes, I agree with that, but at the same time the
25 granting of the IP that is made available to developers

1 also leads to benefits in the other direction, through
2 the enhancement of the ecosystem and the ability to
3 charge commission.

4 Q. Of course it does, Mr Holt.

5 A. Yes.

6 Q. That is why it is important to look at it all
7 holistically, rather than just looking at the App Store
8 in isolation. Do you accept that?

9 A. No, I do not accept that, because the focal point of
10 these Proceedings is the terms and conditions for the
11 App Store. That is in itself a market with the two
12 sides, it has a business unit sort of set of
13 functionality. I agree that you can have a debate about
14 whether that is the appropriate market definition, and
15 the parties differ on that, but certainly assuming that
16 is a reasonable market definition, I think it is then
17 also reasonable, as is common practice amongst
18 competition authorities, to then look at the performance
19 of that business unit while taking into account relevant
20 allocations and reasonable allocations from other parts
21 of the business.

22 Q. Mr Holt, you have made a couple of points there. I just
23 want to focus on the first one, about the focal product.

24 A. Yes.

25 Q. Because in a claim brought against Amex relating to

1 their acquiring services, alleging that the 33 billion
2 in discount revenue was excessive, for example, you
3 would not say that, well, because the focal product is
4 acquiring services, we can just ignore everything that
5 Amex is spending on the issuing side.

6 There is a fundamental principle of economics at
7 stake here, is there not? You have to look at it
8 together.

9 A. Well, if you say, well, it is more appropriate to look
10 at Amex as a -- in terms of a market which looks at both
11 sides, you might want to take into account costs on the
12 user side as well, I think that also applies in the App
13 Store context, but again it does need to reflect the
14 costs associated at the App Store level on both sides,
15 so in other words consumer and developer type --
16 (overspeaking) --

17 Q. But not just the App Store. Why stop at the App Store
18 and not also look at the costs that are incurred on the
19 device side?

20 A. Well, in my view, there has -- well, Mr Dudney's
21 approach has already allowed for some proportion of
22 those costs in any event. But again the question is
23 then, well, what is the best way to look at the
24 profitability of the App Store? There are a range of
25 approaches. I think it is common practice amongst

1 competition authorities to say "Let us get the direct
2 evidence as far as possible for that business unit",
3 then there is a question mark as to whether there is
4 common costs that need to be allocated, and I think that
5 is the common approach, and indeed what I understand
6 Mr Dudney has done.

7 Q. There is no principle of economics, is there, that in
8 a two-sided market your prices on each side should
9 reflect the costs that are allocated through mechanistic
10 accounting methodologies, is there?

11 A. I certainly agree with that. In fact I go further and
12 say that one of the interesting principles of two-sided
13 markets is indeed that you might want to take into
14 account indirect network externalities when thinking
15 about what is the right charging structure, so that
16 explicitly means that you would not expect prices to
17 equal costs on each side of the two-sided market.

18 The Amex example is one good case of it. As you
19 have just shown, the revenue and the cost balance is not
20 the same on the two sides. That I think is also the
21 case in the App Store context, because in that two-sided
22 context the charging structure is commonly, and ie the
23 same in other digital markets as well, applied on the
24 developers' side, not the consumers' side, but I think
25 it is still fair to take into account that overall

1 analysis at the business unit level.

2 Q. Okay. One of the points that you made in that exchange,
3 Mr Holt, was that Mr Dudney has allocated some of the
4 costs of R&D and that kind of thing to the App Store,
5 so --

6 A. Yes.

7 Q. -- that is convenient, because my final topic with you
8 today is indeed the treatment of R&D. If I can just
9 look at what you say about that in your fourth report,
10 if we go to {C2/11/13}, and it is paragraph 35.

11 A. Sorry, this is the fourth report, Mr Piccinin?

12 Q. Yes.

13 A. Fourth, thank you. Yes, I have it here.

14 Q. Here you are talking about some sensitivity analysis
15 that Mr Dudney has done in which he allocates increasing
16 percentages of Apple Inc's R&D -- sorry, are you with
17 me? Are you on the right page?

18 A. Yes, I am on the right page, sorry.

19 Q. Good. So you are talking about the sensitivity analysis
20 that Mr Dudney has done?

21 A. Yes, with regard to R&D allocations.

22 Q. Yes, allocating increasing percentages of the Apple Inc
23 R&D to the App Store, and then you say:

24 "Only when allocated 50% does the ROCE become lower
25 than its WACC."

1 A. Yes.

2 Q. You then say -- of course, just pausing there, that
3 might be relevant for your limb 1 analysis, but of
4 course that is not the right -- the WACC is not the
5 right benchmark for your limb 2 analysis, is it?

6 A. Yes.

7 Q. Okay. So just continuing, you say:

8 "I consider it unlikely that the App Store would
9 account for such a large proportion of Apple's total R&D
10 expenses."

11 Then you say:

12 "For example ... in the base case profitability ...
13 in FY23 ... Mr Dudney allocated more than [a certain
14 amount] ... even though Apple's total R&D investment was
15 only approximately ... 2 billion between 2005 and 2007
16 when Apple was developing its iOS ..."

17 Then you say this:

18 "... I consider it would be reasonable to assume
19 that this period [05 to 07] required much more R&D
20 investment than that subsequently required for the App
21 Store in 2023."

22 Now --

23 A. Yes.

24 Q. -- Mr Holt, you are not a software engineer?

25 A. No.

1 Q. No. You do not have any idea how much more or less
2 complex iOS 18 is than the first iPhone OS?

3 A. No. I mean, I have had different iPhones over the
4 years, so I understand that the features have increased
5 over time in the iOS.

6 Q. But in terms of the complexity of the software
7 engineering that makes those wonderful features happen
8 for you, you just have no idea about that, do you?

9 A. I am not putting myself forward as a software expert or
10 making any specific statements regarding the complexity
11 of iOS. I am making, I think, a simpler point, which is
12 that -- and understanding that we somewhat disagree on
13 whether the focus on the App Store is the appropriate
14 sort of lens with which to look at this, but that is
15 certainly my view, that if you look at how much R&D has
16 been allocated in Mr Dudney's approach, including in --
17 I will not read the number out -- in 2023, but over the
18 entire period, it is a very substantial amount more than
19 was actually put in place to actually devise the
20 App Store alongside the period of devising the first
21 iPhone and the iOS platform.

22 I think Mr Piccinin might be correct in saying,
23 well, just because the iOS -- sorry, just because the
24 App Store was developed and introduced, and hence
25 I think the ... yes, the US\$2 billion value over the

1 three years sort of prior to the introduction of the App
2 Store is not marked confidential, and obviously only
3 a subset of that would be aiming at the App Store as
4 opposed to the device and the iOS.

5 I am simply saying that, well, it would be somewhat
6 surprising, in my view, if the amount to keep it going
7 and to add to the App Store was -- and I will not say
8 a number -- a multiple higher than to actually devise
9 it. That is all I am saying really.

10 Q. So, Mr Holt, I wondered about that. So those words at
11 the end of the paragraph, "required for the App Store in
12 2023", are you excluding from that all of the tools and
13 technology that Apple makes available to developers to
14 create their apps to put them on the App Store?

15 A. No. To the extent that some of that analysis and those
16 costs would be already captured directly in the
17 financial accounts, and to the extent that some of that
18 R&D, to the extent that the tools and tech are arising
19 from R&D, then some of that would be allocated to the
20 App Store. But, again, it would seem somewhat
21 surprising to me if that amount would rise at the rate
22 that is implied by these ratios.

23 Q. But, again, you have no idea how much more complex the
24 current SDK is for iOS -- sorry, do you know what SDK
25 means?

1 A. Yes, I do.

2 Q. Than the first one in 2008?

3 A. I think that is fair. I think --

4 Q. So you just do not have any basis for making that
5 statement, Mr Holt?

6 A. Well, I think the main basis on which I say that is that
7 if you look at -- generally, when there is sort of an
8 innovation, and I am looking at how much R&D ought to be
9 allocated to a product, typically R&D is particularly
10 intensive for the roll-out of a new product, and --
11 (overspeaking) --

12 Q. So typically --

13 A. -- ongoing contributions to sort of improve an existing
14 product, but obviously in the later years, fiscal year
15 2023, Apple's overall R&D is very large, and hence, as
16 a result, Mr Dudney allocates the confidential number to
17 the App Store when a lot of that R&D is likely to be for
18 a range of other things not that closely related to the
19 App Store, such as, you know, artificial intelligence,
20 driverless cars, and things that Apple was working on in
21 that period of time.

22 So it just seems to me that it is unlikely that the
23 approach that Mr Dudney has taken is not conservative in
24 terms of how much R&D he has allocated to the App Store.
25 That is really all I am saying.

1 Q. Mr Holt, that is where you have got me worried again,
2 because why is artificial intelligence not relevant to
3 the App Store?

4 A. Well, some percentage of it perhaps maybe is, I do not
5 know, but --

6 Q. Maybe that takes vastly more work than creating the
7 first SDK did?

8 A. It is possible, but again I have not seen any evidence
9 to sort of link that in such a direct way. In a sense,
10 Mr Dudney has sort of I think been entirely reasonable
11 in saying "Well, let us assume that a proportion of all
12 of this R&D can be attributable to the App Store", based
13 on a commonly used value driver, ie revenue, and he sort
14 of has obviously not gone into whether that is
15 necessarily high or low, and I am happy to sort of
16 acknowledge that -- obviously there is uncertainty about
17 exactly what SDKs' complexity are, but it does seem to
18 me that often you would expect that the development of
19 an innovation leading to a new product would account for
20 a fairly material proportion of the overall R&D for
21 a product which is then, as Apple's internal documents
22 themselves sort of identify, although Apple executives
23 take a different view, I understand, has broadly been
24 evolutionary in nature in terms of the App Store
25 innovations.

1 Q. Mr Holt, what that means is because you do not have any
2 expertise in software engineering, and nor has Dr Kent
3 gone out and got you someone who could give you some
4 factual input for this topic, we just have no idea what
5 proportion of the R&D is related to the App Store in
6 2023.

7 A. Well, I agree that I am not a software engineer and
8 therefore it is potentially possible that there are
9 different approaches. I think the approach of Mr Dudney
10 seems reasonable to me in using a commonly adopted
11 revenue allocation driver. It is one that Apple itself
12 has used, obviously as mentioned in his reports, and one
13 that the CMA has used, as it refers to in its own mobile
14 ecosystems study. So if there is a degree of
15 uncertainty, it is certainly not something that has led
16 to any different findings in either Apple's internal
17 documents that Mr Dudney referred to or the CMA's
18 analysis.

19 Q. All right. So now I am going to ask you some questions
20 about the capital employed measure in your ROCE
21 calculations.

22 A. Okay.

23 Q. But still on the topic, effectively, of R&D and
24 intangible assets.

25 A. Okay.

1 Q. So you understand that Mr Dudney's base case starts with
2 the Apple Inc balance sheet and allocates it down to the
3 App Store from there, yes?

4 A. Yes.

5 Q. The Apple Inc balance sheet has nothing on it for IP or
6 the brand?

7 A. Yes, I think that is fair. It has some small amounts of
8 acquired goodwill and things like that.

9 Q. I think in one year, or ...

10 A. But those are -- in year 1, you are right, yes.

11 Q. Obviously you accept that Apple does use IP in
12 generating App Store revenues?

13 A. Yes.

14 Q. You surely accept that the App Store also benefits from
15 Apple's trusted brand; I think you agreed with that with
16 Ms Demetriou?

17 A. Yes, I think that is fair.

18 Q. Even in competitive markets, you surely accept that
19 a business that has developed a strong brand and is
20 a consistent innovator can earn profits that do much
21 more than just cover the costs of marketing and R&D,
22 yes?

23 A. Yes, in a contestable market you can have outcomes where
24 companies are able to outperform rivals through
25 consistent innovation and performance, so I have stated

1 that in my reports. Again, I think there is a question
2 to be asked here about what is the focus of the
3 analysis, ie is Apple innovative? Clearly the answer
4 is -- has been and perhaps even is still. But is the
5 App Store innovative, and is there a case to, you know,
6 allocate essentially a proportion or even a material
7 proportion of the otherwise excess price to innovation?
8 In my view, the answer to that is no.

9 Q. Yes, and you have just accepted that an innovative firm
10 in Apple's position can earn much more than it costs to
11 build the brand and the R&D?

12 A. Yes.

13 Q. The same is true for app developers, is it not? That
14 they can continue earning vastly more than their app
15 development costs over very long periods of time, yes?

16 A. Yes, in a contestable market, and obviously it is also
17 possible in a non-contestable market for someone to go
18 on earning excess returns, and indeed that is the sort
19 of condition under which the excessive and unfair
20 pricing concern might arise.

21 In a competitive and contestable market I agree that
22 you can also have a situation where an innovative
23 company might outperform, and in that case you might
24 say, well, look at the profitability, that might be well
25 above the WACC, and if you were to carry out an

1 analysis -- again, it is not obvious why you would carry
2 out an analysis of excessive pricing for an app
3 developer because the pre-condition for even looking at
4 it is you have identified dominance, and I think we have
5 agreed that there is a degree of competition, perhaps
6 a high degree of competition, in most app markets as
7 opposed to app distribution markets.

8 But leaving that quite important caveat aside, an
9 app developer could potentially have high profits if it
10 is operating in a competitive market, being innovative,
11 and people are choosing it over legitimate options that
12 they might otherwise have chosen.

13 Q. Your ROCE numbers -- the ROCE numbers that Mr Dudney has
14 calculated and that you rely on -- just give Apple no
15 credit at all for its intangible assets beyond what it
16 cost to create them.

17 A. That is not -- I think that is true. So in the first --
18 in his base case he treats all of the R&D as expense but
19 the R&D is treated as a cost. In an alternative case,
20 he has considered the treatment of all of that R&D as an
21 intangible to go on the balance sheet, but I would agree
22 that the amount of those intangibles is related to the
23 cost incurred. So if your point is that your -- so
24 I think we are agreeing with that, as a matter of fact,
25 as to what he did.

1 There is then a question as to whether that should
2 be what he had done, or should he have done something
3 else. Perhaps that is the next question.

4 Q. On that -- yes. That is why, at least in the context of
5 limb 2, those ROCE numbers are just not useful to
6 demarcate the boundary between normal contestable
7 profits and unfair profits.

8 A. Well, I think I am pretty close to with you on that,
9 because my profitability analysis in the main is
10 a limb 1 issue, primarily. It is looking at whether
11 there is a case to answer and whether one needs to then
12 go and look at the fairness question, so, you know ...
13 So high profitability in itself is identifying potential
14 excessive pricing when compared against actual costs.
15 The limb 2 analysis does not say, oh, well, those are
16 persistent and high, therefore it is also unfair,
17 a whole bunch of other evidence needs to be taken into
18 account.

19 I still think that even in that context of looking
20 at all the other evidence, having some crosschecks and
21 understanding what the implications for profitability
22 are can be relevant, because it gives a signal as to
23 what sort of entry incentives there might have been in
24 the case of a workable market.

25 Q. Okay. I think you would agree with me that one reason

1 why it is important in competitive markets that you can
2 earn significant returns above the cost of your
3 innovations is that innovations are not always
4 successful, yes?

5 A. Yes.

6 Q. Far from it; they often fail in their entirety?

7 A. They could well do, yes.

8 Q. If the maximum you could earn was a reasonable return on
9 what you spend on innovation, then nobody would spend
10 anything on risky R&D?

11 A. I agree. So if you had to invest 1,000 and the WACC was
12 10%, and you said "Well, let us see if there is a return
13 of 120", that is 12%, that is above the WACC, I agree
14 with you that that would not take into account that
15 maybe the innovation would not have been successful and
16 you would have had zero or even negative returns, so
17 that is a fair point.

18 Q. Okay. So if we can go to the bit in the joint statement
19 where you deal with this topic, if we go to {C4/5/14},
20 and we have proposition 16 there.

21 A. 16?

22 Q. 16.

23 A. Yes, the ex post in nature issue?

24 Q. Yes. So the proposition is that your analysis is
25 ex post and fails to account for the ex ante risk

1 involved in Apple's investment in the App Store, and
2 here you are agreeing that your analysis is ex post in
3 nature, yes?

4 A. Yes.

5 Q. But then in the next paragraph you tell us effectively
6 not to worry about that, because by 2015 the uncertainty
7 related to the return of investment on the App Store
8 would have been materially reduced, yes?

9 A. Yes.

10 Q. You say that risk would be unlikely to account for
11 a significant proportion of the required return on
12 investment.

13 A. Yes.

14 Q. But, Mr Holt, whenever Apple spends money developing
15 a new feature of its hardware or its software, there is
16 always significant inherent uncertainty as to whether
17 and to what extent it will take off, yes? Take AI, your
18 example.

19 A. Yes, that is an example. I think that is fair for --
20 I think it depends. I think it is a fairly broad
21 statement that everything it does could fail, and
22 therefore one needs to look at it in that context.
23 I think for incremental improvements to an already
24 extremely successful app store, I am not so sure that
25 necessarily holds, and in the --

1 Q. Mr Holt, just pausing there. Again are you, in that
2 part of your answer, narrowing down the scope again just
3 to the store and not to the iOS and SDK and broader
4 device?

5 A. Well, some of the costs would be expected to be included
6 in allocations to the App Store. Again, I think it is
7 fair to say that the costs that Mr Dudney has allocated
8 include some that go beyond the App Store. Obviously it
9 is allocating on a revenue basis some of these other
10 costs. Some proportion of that is R&D. I agree with
11 you that some proportion of that R&D might well be
12 subject to these risks of failure in principle. But
13 then again you need to look at the materiality and size
14 of those by reference to the ongoing returns that the
15 App Store has earned, and I think there is a very --
16 you know, the rates of return are so high that I think,
17 even allowing for that, it is not clear that that would
18 have any significant effect.

19 I think the first question here -- sorry, the first
20 paragraph, rather, is I think quite important, because
21 it is sort of defining what is the objective of this
22 exercise. I am acknowledging that it is essentially
23 ex post in nature and that the purpose of the exercise
24 is primarily to understand, over a period, just as
25 competition authorities such as the CMA have looked at

1 the mobile ecosystems between 2017 and 2021, or any
2 other sort of market investigations they have looked
3 back over a period of time, over the period where you
4 have actual information, what has been the
5 profitability.

6 Now, I agree with you that if the profitability is
7 high but there is consistent relevant innovation that
8 bridges that gap, then that would be something to take
9 into account in a limb 2 analysis.

10 Q. I mean Apple releases a new device, it invents the phone
11 again every year, and likewise the operating system. Is
12 that not precisely what you just said, "consistent
13 relevant innovation"?

14 A. It might -- well, an element of that might be relevant,
15 in the sense that an allocation of it is being brought
16 into the App Store under Mr Dudney's approach.

17 Q. Fine.

18 A. Obviously a lot of that is being sort of monetised
19 through very high device sales. Is there -- I think
20 there is a question which is, well, once the ecosystem
21 is as successful as it has got to, are the risks of,
22 you know, imminent failure associated with a large
23 amount of incremental exposure high? I am not sure the
24 answer to that is yes, because, you know, a new iOS or
25 a new feature added to a phone is unlikely to mean that

1 Apple's historical record of having a particular market
2 share with high average prices of phones is going to be
3 changed in any significant way as a result, at least in
4 the negative.

5 Q. One last question then, Mr Holt. If you were sitting
6 there giving evidence in a case in 2006 that was brought
7 against Nokia, or against BlackBerry, you might have
8 said exactly the same things about their businesses,
9 yes?

10 A. I find that very difficult to answer, because I have no
11 idea really about either what they were doing with
12 regard to profitability or what they were doing with
13 regard to pricing, or any of the other evidence that
14 would be relevant to this whole debate about market
15 position, dominance and so on, so I am afraid I cannot
16 really assist the Tribunal on that.

17 Q. The truth is that tech markets get disrupted quite
18 rapidly and without warning, do they not?

19 A. Sometimes, and then there is a question I think that is
20 probably more for the Tribunal as to, well, you know, is
21 the Relevant Period nine years from 2015, which is
22 already eight years after the iPhone and the App Store
23 were introduced, is that not a Relevant Period for
24 understanding how this market is operating? I think it
25 is, reasonably.

1 MR PICCININ: All right, thank you. Those are my questions.

2 Re-examination by MR ARMITAGE

3 MR ARMITAGE: Yes, thank you.

4 Just a few re-examination questions, starting with
5 a couple of points from today. Could we get the
6 transcript from page 41 up on the screen, please.

7 A. 41?

8 Q. Yes. In fact, just perhaps if we could have page 40.

9 So you were being asked here by Ms Demetriou about
10 why you disagreed with the proposition that if one is
11 going to compare Steam's effective commission rate,
12 taking account of Steam keys, you need to also factor in
13 revenues achieved by developers through the
14 multi-platform and reader rules in relation to the
15 App Store.

16 Then you see at the top of page 41 you say
17 "I disagree with that", then you are asked why. Then if
18 you could just read your answer between lines 10 and 17
19 to yourself.

20 (Pause)

21 A. Yes.

22 Q. Then can you see Ms Demetriou says "But just pausing
23 there", after you have referred to "one important
24 distinction", it may be that you dealt with the point
25 subsequently, I just wanted to give you the opportunity

1 to make any other points you wanted to make.

2 A. Oh, yes. Yes, well, I think I did mention the other two
3 points, actually, so just to clarify what they are. The
4 first was the distinction between the nature of how
5 competition is -- well, the distinction between demand
6 in these two situations. So we are talking about the
7 Steam keys situation on one hand and the Reader Rule or
8 the Multiplatform Rule on the other.

9 I had already mentioned in that answer that there is
10 a distinction between what is the Steam key for; it is
11 for a discounted purchase without commission being paid
12 on the Steam platform where that is the only sort of --
13 that is the only purpose of it, is to distribute on the
14 Steam platform. That is in contrast to the other two
15 rules referred to by Apple's counsel where, in both of
16 those cases, there is a different platform where content
17 or -- and transactions are being carried out, and that
18 could very well be a primary reason for the purpose of
19 the person making that transaction.

20 In addition, of course, they might want to view
21 content they have already purchased on their iPhone, so
22 that is where I have acknowledged that that is
23 advantageous to the user, but it is in a different
24 context.

25 The second point was in one case you have got

1 substitution, ie developers trying to distribute on the
2 PC and they have options. Steam is one, there are some
3 others, and there is competition for that, and the Steam
4 keys is a part of that economic substitutability within
5 rivalry on the single platform.

6 These other rules which may have some degree of
7 substitution to them, but also clearly have
8 a complementarity to them, ie if you are on a bus --
9 I think I mentioned this example -- if you are on a bus
10 you might well be playing a lot of games on your phone,
11 whereas at home you might play it on the console. I do
12 not see those two types of situations as substitutable
13 demand but, rather, complementary demand where, under
14 different circumstances, you would have a preferred
15 platform with which to play the game.

16 Then I think the third one I also mentioned, so
17 I will not repeat it all, it was that issue about the
18 post download treatment as to what Steam does in terms
19 of validation, as opposed to Apple versus the developer
20 in the context of those two rules.

21 Q. Thank you. Then if we could just have page 47 on the
22 screen, please. Beginning at line 4, Ms Demetriou was
23 saying -- suggesting that you also needed to factor in
24 developer revenues from advertising if you were
25 comparing Apple's Commission with Steam's effective

1 commission rates, and then at page 47, line 14, you say
2 you disagree with that.

3 Then -- it is on the same theme, this question. If
4 you read just through to yourself to the end of your
5 answer, and you will see at the end that you are cut off
6 mid-flow, and again I just wanted to give you the
7 opportunity to say anything else you wanted to say,
8 insofar as you did not address it subsequently.

9 A. Yes. Let me just read. I will be quick.

10 Q. Thank you.

11 (Pause)

12 A. Yes, so I am referring to a situation where clearly
13 there are business models for developers which are
14 relying more on advertising as a monetisation approach,
15 and there are models that rely on other things,
16 including pay downloads and in-app purchases and so on.

17 The evidence from counsel showed that both had risen
18 over time. My main point is that that may well be the
19 case, it is not evidence of closed substitution between
20 the two. They might be growing sort of in a sense in
21 tandem for one of two reasons. One might be they serve
22 different types of developers, so some models work well
23 for advertising, such as Facebook, where you have a lot
24 of time spent on the device looking at the app and so
25 advertising might work, whereas for many games, maybe

1 in-app purchases are a better monetisation model.

2 I also recognise there could be the situation,
3 I think Apple counsel identified it, at least to
4 Dr Singer, where some developers do both, so they have
5 some advertising and some in-app purchases, but even in
6 that case -- and I think this is the point I was sort of
7 expanding on -- even in that case, that is again not
8 necessarily evidence of economic substitutability where
9 the advertising is constraining the commission rate,
10 because consumers are sort of making a close decision as
11 between them, or Apple is sort of having to worry about
12 the level of the Commission that will lead to a lot of
13 advertising. I am not saying that none of that exists,
14 but that actually you might be reaching different user
15 bases, or people with different preferences.

16 Advertising works well if you are spending a long
17 time on it and you do not have a high value of time, or
18 it is not a productivity focused app, but in other
19 contexts it might not be a good solution.

20 Q. Thank you. Then, lastly, if you could just cast your
21 mind back to the halcyon days of last Friday afternoon.
22 You may remember that Ms Demetriou was asking you about
23 the reliance you place in your report on the views that
24 have been expressed by developers about commission
25 level.

1 A. Yes.

2 Q. Could we call up page 204 of Friday's transcript, so
3 that is Day 18, page 204. Can you see at line 21
4 my learned friend asks you -- she puts the question to
5 you {Day18/204:21}:

6 "Question: I think it is fair to say you rely much
7 more heavily on your comparators analysis to capture
8 demand side value than these paragraph of your
9 report ..."

10 The reference was to the paragraphs in
11 which you discuss the developer complaints.

12 A. Yes.

13 Q. Your answer begins at the bottom of the page, and then
14 if we could just go over to the next page, you refer to
15 the fact that you have done an:

16 "... in the round assessment based both on
17 comparative evidence, and a range of other evidence, of
18 which this is sort of one part of that."

19 A. Yes.

20 Q. Then could I just ask that we turn up page 84 of your
21 third report, which is {C2/10/88}. It is section 6.6,
22 "Whether the commission reflects economic value".

23 A. Yes.

24 Q. Do you have that in front of you?

25 A. I do.

1 Q. Would you mind just casting a quick eye over that
2 section, just to remind yourself what you say there, and
3 then I was going to invite you to comment on any other
4 factors that you might want to mention.

5 A. Yes.

6 (Pause)

7 Sorry, there are a few pages so I might just need
8 a minute on that.

9 Q. Yes, I appreciate that.

10 A. I will try and be quick.

11 (Pause)

12 Okay, so I think I can be quite quick because
13 I think some of these themes have been already made in
14 the general commentary.

15 My first point is that developer willingness to pay
16 is not a threshold that I use for my framework. There
17 is clearly high willingness to pay, and that reflects
18 the fact that using the App Store and indeed payment
19 commission is the only way to reach the device users.

20 I accept, and we have had a debate about, well, you
21 could use an advertising model instead. But that
22 constraint, in my view, is not a sufficient one to
23 constrain developers who have a business model that
24 makes sense really for digital distribution rather
25 than -- you know, through the relevant purchases type of

1 monetisation rather than some alternative.

2 So then I identify what I do think is a more
3 relevant benchmark, contestability. I note some
4 evidence in terms of developers, and also I have also
5 referred to prospective app store entrants, in the
6 context that that indicates willingness to consider
7 alternatives were the conditions to allow it, so I think
8 that is relevant to the assessment of the competitive
9 conditions which is part of the contestability analysis.

10 The actual market does not have contestability if
11 you take the relevant markets as I have. Obviously in
12 theory it could be that, even if you had no
13 restrictions, there would be no competition anyway.
14 I do not find that to be the case, given the evidence of
15 developers looking at price as an important
16 consideration, and potential third-party app stores
17 indicating that they might wish to come on to iOS were
18 the restrictions to be not there.

19 Then I have discussed some of the evidence in
20 relation to developers. That relates to two types of
21 things: one is how innovative do they think the
22 App Store is, and the answer is at least some have said
23 there are some problems here in relation to some core
24 discoverability and matchmaking services, and then there
25 is a bunch of evidence about rates which I had

1 a discussion with Ms Demetriou about, where I said, yes,
2 that is a part of the debate, but I do not put a huge
3 amount of weight on it as a precise number, but it is
4 consistent with all the rest of my evidence. Thank you.

5 MR ARMITAGE: No more questions from me. Thank you,
6 Mr Holt.

7 THE CHAIRMAN: So Mr Holt, thank you very much for your
8 evidence. We are finished with you and you may be
9 released from the witness box. Thank you.

10 A. Thank you very much, sir.

11 THE CHAIRMAN: So what is the plan? I presume -- I have not
12 seen Professor Hitt -- is it Professor Hitt next or ...

13 MS DEMETRIOU: It is Professor Sweeting.

14 THE CHAIRMAN: Okay. How do you want to proceed? Do you
15 want to get started?

16 MR HOSKINS: If you are happy to go to the break, and then I
17 can set up and we can do an uninterrupted run, otherwise
18 I am going to go for about 20 minutes and then we will
19 stop.

20 THE CHAIRMAN: We are certainly due a break, I think, so
21 shall we do that and then ... Okay, we will take
22 ten minutes. Thank you.

23 (3.01 pm)

24 (Short Break)

25 (3.11 pm)

Housekeeping

THE CHAIRMAN: Just before we get started with

Professor Sweeting, can I just -- I have been reminded
to ask you about closings, about closing (inaudible).

I do not know whether you have made any progress on that
subject?

MS DEMETRIOU: We think we need 200 pages, and that would
allow us I think to be most helpful to the Tribunal in
terms of not just giving you cross-references to
evidence, but summarising in the body of the closings
the gist of the material evidence, so you do not have to
keep going backwards and forwards to look at the
transcript. So I think that is our best estimate at the
moment.

THE CHAIRMAN: Mr Hoskins?

MR HOSKINS: I think we are in the sort of 150-page realm,
but even that might be horrific to you, I do not know.

THE CHAIRMAN: Well, I have to confess that does not fill us
with joy.

MR HOSKINS: I can imagine that.

THE CHAIRMAN: 200 fills us with less joy than 150. The
reason quite simply -- sorry, Professor Sweeting, to
intrude on your evidence, but otherwise I will forget
about it.

But the concern we have is that the longer these

1 documents are, the harder they are to navigate, and that
2 is just a reality, and no matter how well structured
3 they are, once you get to a certain point you just
4 cannot find anything when you want them.

5 I do not know whether you can do different things
6 with appendices, I mean that is often quite helpful, or
7 maybe finding a way of structuring them, so we just do
8 not have 200 pages of the same thing. I mean, I am
9 a little bit reluctant -- if you are saying that is what
10 you think you need to tell us the answer, and you think
11 it will be helpful, I am a bit reluctant to push back
12 too hard. I know that there may be different views
13 either side of me.

14 MS DEMETRIOU: Sir, that included appendices, and we take
15 on board -- we absolutely want the document to be --
16 want it to be easy for you to navigate the document, and
17 so we will take that on board, and if we can come under
18 200 pages, including appendices, then we certainly will.
19 I just did not want to overpromise at this point in time
20 because we are only slightly progressed with it, because
21 we are still in the middle of the economic evidence.

22 THE CHAIRMAN: No, no, of course I understand that.

23 I suppose the other thing is we do have a bit of time to
24 read them, not an enormous amount, and once you get past
25 a certain point then it is just the reality of whether

1 there is time to get through it sensibly, and we would
2 like to have read what you think that is, and it may be
3 that you can give us some guidance on that.

4 Shall we say -- why do not we say 150 for the body
5 of the document, and that is -- I am not setting any
6 limits or any -- unless you ... I am not going to -- we
7 are not going to set any strict limits on that, but that
8 I think is probably the sort of outer bound of
9 helpfulness in terms of what we can absorb.

10 MR KENNELLY: I understand.

11 THE CHAIRMAN: Then if you want to package things into
12 appendices, and so on, we will try to get as much as we
13 can. Is that a sensible way forward?

14 MS DEMETRIOU: Thank you.

15 THE CHAIRMAN: So you are going to call Professor Sweeting?

16 MS DEMETRIOU: Yes, of course. We call Professor Sweeting.

17 PROFESSOR ANDREW SWEETING (called)

18 THE CHAIRMAN: Professor Sweeting, I am sorry, we need to
19 get you to swear again. Sorry to make you do it again.

20 PROFESSOR ANDREW SWEETING (affirmed)

21 THE CHAIRMAN: Thank you. Please do sit down.

22 Examination-in-chief by MS DEMETRIOU

23 MS DEMETRIOU: Professor Sweeting, you should have hard
24 copies of your reports there. Have you got those?

25 A. Yes.

1 Q. This will come up on the screen, but if we go to
2 {C3/3/1} which is your first report. Can you confirm
3 that is your first report?
4 A. Yes, it is.
5 Q. Then if we go to page 195 {C3/3/195}, is that your
6 signature there?
7 A. It is.
8 Q. Then your second report is at {C3/7} and can you confirm
9 this is your second report?
10 A. Yes, it is.
11 Q. If we go to page 104 {C3/7/104}, is that your signature?
12 A. No.
13 Q. Ah --
14 A. That is the wrong page.
15 Q. That is the wrong page, sorry. I will find the right
16 page. While we are finding the right page -- apologies
17 about this -- I can take you to -- there are certain
18 errors that you have identified?
19 A. Yes.
20 Q. That is your signature, is it not? {C3/7/91}
21 A. Correct.
22 Q. Now, there are certain errors you have identified, and
23 for the Tribunal's reference we have written to Hausfeld
24 about these, so let me just show you them,
25 Professor Sweeting. The first one is at {CB2/27}. Can

1 you just read that and can you confirm that those are
2 amendments that you want to make to your reports?

3 A. Yes, the list is on the next page.

4 Q. We have to go over the page to see the list. {CB2/27/2}

5 A. Yes. That is correct.

6 Q. Then can we also go to {CB2/30} please. Again, can you
7 have a look at that and can you confirm that that is
8 a further clarification you wish to make in relation to
9 your report?

10 A. Yes, it is.

11 Q. Then we see the joint expert statement at {C4/2/1}.

12 That is between you and Dr Singer. If we go to page 17,
13 is that your signature there on the bottom right?
14 {C4/2/17}

15 A. Yes, it is.

16 Q. Subject to the corrections that we have looked at in the
17 two letters, do these reports and do your views as set
18 out in the joint expert statement represent your
19 professional opinion on the matters on which you have
20 been instructed in these Proceedings?

21 A. Yes, they do.

22 Q. Insofar as you refer to facts, are these true to the
23 best of your knowledge and belief?

24 A. Yes, they are.

25 MS DEMETRIOU: Thank you very much. My learned friend

1 Mr Hoskins will have some questions.

2 Cross-examination by MR HOSKINS

3 MR HOSKINS: Good afternoon, Professor Sweeting.

4 A. Good afternoon.

5 Q. Have you appeared as an expert in court proceedings
6 before?

7 A. I have not.

8 Q. Apart from appearing as an expert in these Proceedings,
9 have you done any work for Apple?

10 A. No.

11 Q. You were here when Dr Singer was giving evidence last
12 week?

13 A. Yes, I was in the room for most of the time, yes.

14 Q. Were you here every day when he was giving evidence?

15 A. For at least a big part of the day, yes.

16 Q. So every day for a part of the day?

17 A. At least, yes.

18 Q. Why did you feel it necessary to be here when he was
19 giving evidence?

20 A. Because obviously a lot of the issues that I am
21 discussing, you know, are directly kind of responsive or
22 are the same issues as Dr Singer talked about, so I was
23 obviously interested in seeing kind of what questions he
24 was asked and what his responses were, and also as
25 a rookie expert, I was interested in getting a sense of

1 how things work.

2 Q. Can we have {C3/3/35} on the screen, please. This is
3 your first report. If we go to paragraph 71, you will
4 see you say at the start of that paragraph:

5 "Economists generally agree that a necessary
6 condition for conduct to be anti-competitive is that the
7 firm that undertakes the conduct has market power in one
8 or more markets."

9 For the purposes of the questions I am about to ask
10 you, I want you to assume three things. I want you to
11 assume that the relevant markets are those proposed by
12 Dr Singer, not Professor Hitt.

13 A. Okay.

14 Q. I want you to assume that Apple is dominant in those
15 markets, and I want you to assume that no findings have
16 been made as to whether Apple's Commission rates were
17 competitive or not. We are just neutral on that issue
18 for the purposes of this questions. Okay?

19 A. Okay.

20 Q. Then if we go to page 36 of the same document, so still
21 in your first report, paragraph 75 {C3/3/36}, you say
22 there:

23 "Anti-competitive exclusion is often termed
24 'foreclosure', meaning that rival suppliers are unable
25 to enter the market, are forced to exit, or find it more

1 difficult to compete. In particular, the concern is
2 that rival suppliers who would generate value for
3 customers, and ultimately put downward pressure on
4 prices, are excluded. Such exclusion leads to
5 a decrease in competition. Consumers may be harmed if
6 the firm undertaking the conduct is then able to raise
7 prices."

8 So that is your definition of anti-competitive
9 exclusion, yes?

10 A. Yes.

11 Q. If we can go to the joint expert statement, that is
12 {C4/2/29}, you will see an item marked "Proposition 25",
13 which is that:

14 "Apple's App Distribution Restrictions require iOS
15 app developers to use the App Store as the exclusive
16 distribution channel for iOS apps on iOS devices."

17 You agree with that, do not you?

18 A. Yes, I do.

19 Q. Then if we see proposition 26, and if you look at your
20 comments you will see a paragraph that begins "Second".
21 You say:

22 "Second, under Dr Singer's purported iOS App
23 Distribution Market, which does not include app
24 distribution services on non-iOS devices, then the App
25 Distribution Restrictions do exclude competitors from

1 offering alternative iOS app transaction platforms that
2 compete with the App Store."

3 So Apple's App Distribution Restrictions mean that
4 no rival suppliers are able to enter the iOS App
5 Distribution Market, do they not?

6 A. Sorry, it does mean that no other -- you know, there is
7 no other way of distributing iOS apps, other than
8 through the --

9 Q. You say --

10 A. -- App Store.

11 Q. -- that is not anti-competitive foreclosure, that is
12 your basic position?

13 A. That is my position, yes.

14 Q. Can we go to page 36, please, in this joint statement.
15 We will see I think you take exactly the same position
16 in relation to Apple's Payment System Restrictions.

17 The proposition at 35 is:

18 "Apple's Payment System Restrictions require iOS app
19 developers to use Apple's ASPS/IAP for Relevant In-App
20 Purchases and Relevant Subscription Purchases."

21 You agree with that, do you not?

22 A. Yes.

23 Q. Apple's Payment System Restrictions mean that no rival
24 suppliers are able to enter the iOS aftermarket services
25 market, do they not?

1 A. In the same sense that we are agreeing to 35, yes.

2 Q. Again, you say that that, however, is not
3 anti-competitive foreclosure?

4 A. That is correct.

5 Q. I am going to ask you some questions about foreclosure
6 now.

7 A. Sure.

8 Q. If we can go to page 26 of this joint statement
9 {C4/2/26}, you will see proposition 19, "Incentives".
10 The proposition is:
11 "One factor to consider when determining whether
12 conduct is anti-competitive is to evaluate whether the
13 firm had an economic incentive to exclude competition
14 (ie whether the exclusionary conduct is profitable)."
15 You agree with that proposition, do you not?

16 A. Yes, I do.

17 Q. In your reports you conclude that Apple did not have an
18 economic incentive to exclude competition.

19 A. That is correct.

20 Q. Okay, so I want to focus on the economic incentives
21 relating to distribution. Can we go to your second
22 report --

23 A. Could I just ...

24 Q. Of course.

25 A. For clarification, we are assuming -- we are making the

1 three assumptions?

2 Q. Until I tell you otherwise, those three assumptions are
3 in force.

4 A. Okay, right.

5 Q. Can we go to your second report at {C3/7/14}. Can you
6 read 27, the body of 27 and (a) please. You do not need
7 to read (b) yet.

8 A. Sorry, which part am I reading?

9 Q. So the body of 27, "If, contrary to Professor Hitt's
10 evidence ..." and then (a) "First, Apple ..."

11 A. Okay.

12 (Pause)

13 Okay.

14 Q. So in the final sentence of (a) you say that:

15 " ... Apple's choice to implement the distribution
16 requirements does not appear to be motivated by the
17 foreclosure of competition."

18 Is that right? Do you see that?

19 A. That is what I say, yes.

20 Q. Here, as I understand it, you are making the point that
21 it is unlikely that Apple's conduct is intended to
22 restrict competition because it could obtain value from
23 developers by means other than foreclosure. Does that
24 fairly encapsulate the point you are making?

25 A. Yes, and to be clear, this is not a comment on what any

1 particular person had in their mind at a point in time.

2 This is reflecting kind of an economic analysis.

3 Q. If we go to page 16 {C3/7/16}. I am sorry, {C3/3/16}.

4 At paragraph 35 you say:

5 "If, contrary to Professor Hitt's findings, it is
6 determined that Apple is dominant and Apple's Commission
7 rates exceed a competitive level, I nevertheless
8 conclude that the distribution requirements would not
9 constitute exclusionary conduct that has led to
10 anti-competitive foreclosure for two reasons."

11 We have looked at the first reason already and
12 I wanted to look at the second reason in (b). Can you
13 read sub-(b) please. If you just say when you are ready
14 to turn over, the page will be turned for you.

15 A. Okay.

16 (Pause)

17 Okay, you can turn.

18 (Pause)

19 Sure.

20 Q. You say in the final sentence of (b):

21 "All of these behaviours are inconsistent with Apple
22 wanting to foreclose competition to increase commissions
23 and instead are more consistent with the distribution
24 requirements serving to mitigate negative externalities
25 within the iOS ecosystem."

1 Again, as I understand it, here you are making the
2 point that it is unlikely that Apple's conduct is
3 intended to foreclose competition because other aspects
4 of its behaviour are not consistent with such an
5 intention. Is that a fair encapsulation of the point
6 you are making?

7 A. It is an explanation that, you know, through an economic
8 analysis, when you think about -- when you try to
9 understand what the narrative is, and looking at the
10 anti-competitive narrative that I understand has been
11 put forward by the Class Representative, that there are
12 some things that seem inconsistent with the
13 anti-competitive narrative and which actually seem more
14 consistent with an explanation where negative
15 externalities are being controlled for by the various
16 rules that Apple has.

17 Q. I would like to look at the economic incentives in
18 relation to aftermarket services and what you say in
19 relation to that.

20 If we go to your second report, so {C3/7/27}, can
21 you please read paragraphs 55 to 56. Again, just ask
22 for it to be turned over when you are ready.

23 (Pause)

24 A. Okay.

25 Q. So here you make similar points about Apple's intentions

1 in relation to the iOS in-app aftermarket services
2 market and, as I understand it, your opinion is that
3 even if Apple has excluded competitors from the iOS
4 aftermarket services market, that was not their
5 motivation or intention. Again, is that a fair pithy
6 summary of what you are saying here?

7 A. Once again, as I said before, this is -- from my
8 expertise as an economist, I obviously cannot comment on
9 what was in individuals' minds at the time when they
10 were devising the various requirements, but from an
11 economic perspective, you know, it would not have been
12 in Apple's economic incentive to exclude competition in
13 an inefficient way, partly because of their ability to
14 monetise -- you know, use an alternative structure to
15 monetise the value that they provide to developers.

16 Q. Have you been instructed that under UK and EU
17 competition law, subjective intention is irrelevant to
18 establishing abuse; is that why you are insisting on
19 subjective intention not being your intention?

20 A. Sorry, I did not understand that question.

21 Q. Have you been told that under UK and EU competition law,
22 subjective intention is irrelevant to establishing an
23 abuse. Are you aware of that legal principle?

24 A. Did you say irrelevant or relevant?

25 Q. Is irrelevant.

- 1 A. Yes, I mean, I have not -- I am not sure I have been
2 instructed about that specifically, but from an
3 economic -- I am analysing this problem through an
4 economic lens.
- 5 Q. Can we go back to the joint expert statement {C4/2/26},
6 proposition 19:
7
8 "One factor to consider when determining whether
9 conduct is anti-competitive is to evaluate whether the
10 firm had an economic incentive to exclude competition
11 (ie whether the exclusionary conduct is profitable)."
12 You agree with that proposition, do you not?
- 12 A. Yes, I do.
- 13 Q. One of the economic sources that you rely upon in your
14 comments on the far right is a paper by Bernheim and
15 Heeb, yes?
- 16 A. That is correct.
- 17 Q. You specifically refer to and rely on page 14, yes?
- 18 A. Yes, that is the one that I cite.
- 19 Q. Let us have a look at that article, it is {C5/175/4}.
20 So you will see the title page. If we go to page 14,
21 please, this is the passage that you cite in the joint
22 expert statement. It is at the bottom of the page.
- 23 A. Can you actually just scroll up so I can see the
24 subsection?
- 25 Q. Absolutely. It is actually an introduction. We need to

1 go to the previous page please, page 4 {C5/175/4}.

2 Sorry, I have a slightly different version. It is
3 page 4 of the electronic, please. Sorry.

4 Then if you can work through the pages.

5 (Pause)

6 I am just trying to find you a sub-heading.

7 (Pause)

8 Then if you stop there, thank you. Does that help?

9 A. Okay.

10 Q. So can you please read -- if you go to the bottom of the
11 page you see a passage that begins "Courts have long
12 recognised", and if you could read from there over to
13 the next page and the paragraph that begins "Though
14 forms of sacrifice and recoupment ...". If you could
15 read both of those paragraphs, please.

16 (Pause)

17 A. Okay, so I read down to "... with past conduct". Do you
18 want me to go --

19 Q. Thank you, that is right.

20 So if we pick it up at "Courts have long
21 recognised", what the authors say is:

22 "Courts have long recognised that profit sacrifice
23 and recoupment are essential features of predatory
24 pricing, and require proof of both in that context ...
25 Some subsequent commentators have advocated the

1 application of this principle to exclusionary practices
2 more generally, and have in particular proposed that
3 courts use evidence of profit sacrifice as a criterion
4 for distinguishing between anti-competitive and
5 pro-competitive exclusionary conduct ..."

6 Then in the next paragraph:

7 "Though forms of sacrifice and recoupment are always
8 elements of the anti-competitive mechanism highlighted
9 above, a broad requirement that plaintiffs provide
10 direct evidence of sacrifice and/or recoupment is
11 inadvisable."

12 So Bernheim and Heeb's opinion, as a matter of
13 economics, is that in order to establish
14 anti-competitive exclusionary conduct one should not
15 require proof that such conduct will be profitable.

16 A. I would not necessarily interpret what they are saying
17 in that way.

18 Q. "Though forms of sacrifice and recoupment are always
19 elements of the anti-competitive mechanism highlighted
20 above, a broad [italicised] requirement that plaintiffs
21 provide direct evidence of sacrifice and/or recoupment
22 is inadvisable."

23 Bernheim and Heeb do not support your economic
24 proposition, do they?

25 A. I would disagree with that. I would say that, you know,

1 they certainly look at a number of things. They
2 recognise the importance of incentives. They also
3 recognise the importance of other factors, such as the
4 NCE, which you will have seen kind of mentioned multiple
5 times earlier on, which is this idea of kind of negative
6 externalities on some sort of customers through the
7 conduct, so I -- you know, the interpretation -- you
8 know, I would not interpret the sentence you are
9 focusing on as implying that it is not sensible for an
10 economist to think about incentives when thinking
11 through whether the anti-competitive narrative makes
12 sense and, in addition, you know, this paper also
13 recognises the importance of evaluating whether there
14 are anti-competitive effects, and to evaluate
15 anti-competitive effects you need to think through what
16 incentives are, because they define what is likely to
17 happen in the counterfactual without the conduct.

18 Q. But your report referred to and relied upon page 14 of
19 this article, yes? Sorry, your joint expert statement
20 comment.

21 A. Yes, I refer to this page.

22 Q. The other article that you rely upon in the joint expert
23 statement is a paper by Jonathan B Baker.

24 A. Yes.

25 Q. You cite page 566, and that article is at {C5/150/2},

1 "Exclusion as a core competition concern". Can we go,
2 please, to page 41 {C5/150/41}. So you will see the
3 internal numbering, the original numbering of the
4 document at the top left is 566. So this is the page
5 that you cite in the joint expert statement, yes?

6 A. I will take your word for it. I cannot remember what
7 the number was.

8 Q. Here Mr Baker says:

9 "Finally, the exclusionary conduct must be
10 profitable for each excluding firm. Each must
11 reasonably expect that the additional profits it will
12 obtain or maintain through the successful operation of
13 an involuntary cartel would exceed the costs it incurs
14 in achieving that arrangement."

15 Now, we have seen that Apple has required iOS app
16 developers to use the App Store as the exclusive
17 distribution channel for iOS apps on iOS devices since
18 the App Store was introduced in 2008, yes?

19 A. Yes, yes.

20 Q. Apple has required iOS app developers to use Apple's IAP
21 for Relevant In-App Purchases and Relevant Subscription
22 Purchases since 2009, correct?

23 A. Yes.

24 Q. Now, Apple must have believed that excluding competition
25 in this way was profitable for it, must it not?

1 A. Yes, it will have -- it was obviously a business choice,
2 and therefore an economist would infer that the choice
3 of the conduct -- it expected to be profitable. Now,
4 that does not necessarily mean that it is the
5 exclusionary effect -- you know, an anti-competitive
6 exclusionary effect which is the source of the
7 profitability.

8 Q. I would like to ask you about your intra-brand
9 competition argument. Can we go to your first report
10 {C3/3/42}. In paragraph 92 we see that you suggest that
11 Apple's distribution payment requirements are
12 requirements related to intra-brand competition. That
13 is your position, is it not?

14 A. Yes, it is.

15 Q. Can we go to page 41 and paragraph 88 {C3/3/41}. We
16 will see that you describe intra-brand competition as,
17 and here I am quoting from your report:

18 "... a restriction where a manufacturer will choose
19 to only sell its products through a limited number of
20 distributors, which is often called an 'exclusive
21 distribution' arrangement, is a restriction on
22 intra-brand competition."

23 So your definition of intra-brand competition is a
24 restriction where a manufacturer will choose to only
25 sell its products to a limited number of distributors,

1 is that correct?

2 A. To be clear, what I am using here is the standard type
3 of definition that economists use, which is usually in
4 the context of a vertical chain where you have a firm
5 that is labelled as a manufacturer and it then has
6 retailers or distributors. Obviously what I am not --
7 I would hope it is clear that I am not implying that
8 outside of a manufacturer context this idea -- you know,
9 the intra-brand/inter-brand definition has no meaning,
10 but if you look at something such as Tirole's textbook,
11 this is the type of definition in this context of the
12 manufacturer example that Tirole provides.

13 Q. You rely on this by analogy in our case. So in your
14 Apple analogy, who is the manufacturer and who is the
15 distributor? What is the analogy?

16 A. So the key idea is that, you know, Apple is imposing
17 restriction -- Apple -- I think at one point I actually,
18 you know, label Apple as the brand in the context of the
19 way these definitions would work, and Apple is putting
20 together an ecosystem which is attracting consumers, it
21 is also attracting developers, and I would consider both
22 the distribution requirements and the payment
23 requirements as a restriction -- as restrictions on how
24 these iOS transactions are going to work between both
25 consumers and developers.

1 Q. So if Apple is the brand, are you saying Apple is the
2 manufacturer for the purposes of this analogy?

3 A. One could view Apple as the manufacturer in kind of
4 applying this framework.

5 Q. Okay. But it is not Apple which produces the apps, is
6 it? It is the developers. They are the ones producing
7 the product.

8 A. The -- I mean developers are obviously providing
9 content, but they are transacting with consumers through
10 the iOS ecosystem, so the product -- you know, the
11 ecosystem here is being developed by Apple. One of the
12 features of the product here is going to be the
13 facilitation of transactions between developers and
14 consumers.

15 Q. So Apple is allowing developers to provide the products
16 to the users. So is Apple a distributor then? Because
17 that does not sound like a manufacturer, that sounds
18 like a distributor.

19 A. For the purposes of these definitions, it makes sense to
20 think of, you know, Apple in the kind of role of the
21 manufacturer who is putting restrictions on how its
22 products are going to be sold to, in this case, two
23 different sets of customers: developers and consumers.
24 It is imposing kind of requirements on how those
25 transactions are going to work, you know, which -- in

1 the form of the distribution requirements and the
2 payment requirements.

3 Q. Can we look at paragraph 89, so just further down the
4 page {C3/3/41}. You give an example of a luxury watch
5 brand.

6 A. Yes.

7 Q. Did you come up with the example of luxury watches or
8 did someone else suggest it to you?

9 A. You know, when I was working with the team who were
10 working at my direction, we talked about a number of
11 possible examples, and this was the one that
12 I eventually chose.

13 Q. What do you mean by "the team" in that context, please?

14 A. So I worked with a team from Cornerstone Research who
15 operated at my direction.

16 Q. Can we go to the instructions attached to your first
17 report {C3/3/228}. You will see the heading
18 "Instructions to economic experts ..."

19 Can we look at paragraph 20, please, which is on
20 page 234 {C3/3/234}. Can you read paragraph 20 to
21 yourself please.

22 (Pause)

23 Was this the reason why you considered intra-brand
24 competition in your opinions?

25 A. So, you know, my instructions obviously did reference

1 this as a concept, but for an economist it is quite
2 natural, you know, to draw on the industrial
3 organisation literature to think about intra-brand and
4 inter-brand restrictions, and in particular to note
5 that, for example, exclusive dealing is viewed usually
6 through the prism of inter-brand restrictions.

7 Q. Which came first? Did you have the idea first, or was
8 it prompted by your instructions?

9 A. You know, I would have thought about -- I would have
10 thought about the distinction between intra-brand and
11 inter-brand quite naturally. You know, obviously the
12 instructions also refer to that so, you know, obviously
13 when you are providing advice you do so in the context
14 of the relevant case law in the jurisdiction you are
15 operating in. So I would say, you know, in this case
16 the economics and the law were complementary and would
17 both have led in the same direction.

18 Q. Well, let us have a look at that. Your instructions
19 refer specifically to paragraph 21 on the EC's
20 guidelines on vertical restraints. We see that in
21 paragraph 20. How familiar are you with EU competition
22 law?

23 A. I am relatively familiar with it. Obviously I am more
24 familiar with US competition law, but I am somewhat
25 familiar with EU competition.

1 Q. Can we go please to authorities bundle 6, tab 24, page 1
2 {AB6/24/1}. So you will see these are the European
3 Commission's 2022 guidelines on vertical restraints.
4 These are the guidelines that were referred to in your
5 instructions.

6 A. Yes.

7 Q. Did you read these guidelines before you produced your
8 reports for this case?

9 A. Yes, I looked through them, yes.

10 Q. Can we go please to page 9 {AB6/24/9} and can I ask you
11 please to read paragraph 18.

12 (Pause)

13 A. Okay.

14 Q. So you will see paragraph 18 distinguishes between
15 a number of forms of vertical restraints that can have
16 negative effects on competition, yes?

17 A. Yes.

18 Q. Sub-paragraph (a) deals with anti-competitive
19 foreclosure of other suppliers or buyers; you see that?

20 A. Paragraph (a), yes.

21 Q. Sub-paragraph (c) deals with a reduction of intra-brand
22 competition, yes?

23 A. Yes, particularly in the context of possible collusion.

24 Q. We have already seen that Apple's distribution and
25 Payment System Restrictions both preclude entry by other

1 suppliers of app store -- of iOS app stores and payment
2 systems, do they not?

3 A. Yes, and it may just be helpful to point out, if I can
4 return to my -- the watch example. Obviously you could
5 think if Rolex imposes -- says "We are only going to
6 sell through licensed, approved watch retailers",
7 you know, obviously that may be a restriction that
8 prevents other watch retailers from selling Rolex
9 watches, and there could have been some people who would
10 have wanted to buy from those alternative sellers. So
11 both inter-brand and intra-brand restrictions can imply
12 exclusion.

13 Q. The guidelines distinguish (a) and (c), and insofar as
14 Apple's distribution and Payment System Restrictions
15 preclude entry by other suppliers, they more naturally
16 fall within sub-paragraph (a), do they not?

17 A. Well, the -- the approach that I would take to this is
18 that one has to go through a number of tests to assess
19 whether foreclosure is anti-competitive. We
20 recognise -- I recognise that there is this restriction
21 imposed by the requirements on who else can provide
22 distribution services or payment services, but it is my
23 view, from having conducted my analysis, that this does
24 not constitute anti-competitive foreclosure, and in
25 particular it does not involve -- you know, it does not

1 meet my understanding of exclusive dealing or
2 anti-competitive tying.

3 Q. Your instructions refer specifically to paragraph 21 of
4 these guidelines which contains two sentences which
5 I would like to take in turn.

6 The first sentence says:

7 "A reduction of intra-brand competition
8 (ie competition between distributors of the goods or
9 services of the same supplier) is by itself unlikely to
10 lead to negative effects for consumers if inter-brand
11 competition (ie competition between distributors of the
12 goods or services of different suppliers) is strong."

13 Now, bear in mind that we are assuming that the
14 Tribunal has found that the relevant markets are those
15 suggested by Dr Singer rather than Professor Hitt, bear
16 in mind that we are assuming that Apple is dominant in
17 those markets; if we make both those assumptions, then
18 competition with other forms of apps or distribution
19 services is, by definition, not strong, is it?

20 A. You know, so this would, for example, say that
21 competition with -- you know, Android platforms, for
22 example, would not be within the market. That is
23 correct.

24 Q. So the first sentence of paragraph 21 of the guidelines
25 is not relevant to our case, if you take the assumptions

1 that I have asked you to take.

2 A. So I -- you know, I would be clear about, you know, what
3 I am saying about inter-brand and intra-brand
4 competition in the report. So I am saying that
5 I characterise the two types of requirements that are at
6 issue in this case as intra-brand restrictions on
7 competition and that they therefore should not be
8 understood as exclusive dealing, which is, you know, one
9 of the claims that the Class Representative has made.

10 Now, obviously you are -- is it the case that
11 intra-brand restrictions always have to be benign? No.
12 There are examples that one may be able to construct
13 where an intra-brand restriction by a dominant firm can,
14 as a matter of economic theory, have anti-competitive
15 effects, and I am not disputing that that is true.

16 The specific role of my analysis of intra-brand
17 versus inter-brand was to point out that appeals to
18 exclusive dealing, which is thought of as an inter-brand
19 restriction, were not appropriate. I am not saying that
20 the analysis should necessarily end at that point.

21 Q. So this is paragraph 21, it is dealing with intra-brand
22 competition specifically, and the second sentence says:

23 "In particular, in markets where individual
24 retailers distribute the brand(s) of only one supplier,
25 a reduction of competition between the distributors of

1 the same brand will lead to a reduction of intra-brand
2 competition between these distributors, but may not have
3 a negative effect on competition between distributors in
4 general."

5 So this second sentence refers to a situation where,
6 I am quoting, "[an] individual [retailer] distributes
7 the brand(s) of only one supplier", do you see that?
8 Start of the second sentence.

9 Do you see that?

10 A. Okay, yes, I see that sentence.

11 Q. But in our case, it is Apple which distributes the apps,
12 is it not?

13 A. You know, obviously we are constantly making kind of
14 parallels between language which is devised for thinking
15 about manufacturers of physical goods who are
16 distributing to consumers, and our case, where obviously
17 we are talking about different functions that are
18 involved in bringing together consumers and developers,
19 so one always has to be careful about who is being
20 squeezed into the analogy in what way. But, you know,
21 I would agree that it is Apple that is operating the
22 App Store, if that is the question.

23 Q. Apple does not distribute the brand of only one
24 supplier, does it, because it distributes the apps of
25 many developers?

1 A. So if we think about kind of iOS as the brand, obviously
2 the -- you know, the App Store is, you know -- Apple
3 only operates the App Store in the iOS ecosystem.

4 Q. I mean really in paragraph --

5 A. So --

6 Q. Sorry, you finish.

7 A. No, no, I was just going to say, so to your point
8 obviously there are many developers and many consumers
9 on the App Store. Many of those developers are also
10 transacting on other platforms.

11 Q. I mean the truth is, Professor Sweeting, that the
12 analogy that you seek to draw with intra-brand
13 competition just does not fly, does it?

14 A. I guess I am not following your argument.

15 Q. I want to show you another relevant European Commission
16 document. Can we go to {AB6/1/1}. You will see this --
17 I am sorry, that is the wrong reference on my part.
18 Give me a moment.

19 Sorry, you need to bear with me, sir.

20 THE CHAIRMAN: Of course.

21 (Pause)

22 MR HOSKINS: I think it should be {AB6/6/1}. That is
23 better, thank you.

24 So these are the European Commission's "Guidance on
25 the Commission's enforcement priorities in applying

1 Article 82 of the EC Treaty to abusive exclusionary
2 conduct by dominant undertakings."

3 These guidelines are also referred to in your
4 instructions from Gibson Dunn. Have you read these
5 guidelines before?

6 A. Yes, I have.

7 Q. Can we go to page 6 please {AB6/6/6}, paragraph 32. You
8 will see that the heading is "Specific Forms of Abuse",
9 "Exclusive dealing", and then paragraph 32 says:

10 "A dominant undertaking may try to foreclose its
11 competitors by hindering them from selling to customers
12 through use of exclusive purchasing obligations or
13 rebates, together referred to as exclusive dealing."

14 I do not know if it is possible to do a split screen
15 with the joint expert statement? It might not be
16 because they are horizontal and vertical, but can we
17 try? It is {C4/2/29}. If not, we will just go to
18 C4/2/29. Well done, thank you.

19 If we look at proposition 25, we see again that you
20 agree with the proposition that:

21 "Apple's App Distribution Restrictions require iOS
22 app developers to use the App Store as the exclusive
23 distribution channel for iOS apps on iOS devices."

24 We saw that before, yes?

25 A. Yes, that is correct.

1 Q. If you go back to paragraph 32 of the Commission's
2 guidance, in our case the dominant undertaking, Apple,
3 excludes all competing iOS app stores by requiring
4 developers to deal exclusively with Apple for
5 distribution of iOS apps, does it not?

6 A. Yes, it does.

7 Q. So Apple's App Distribution Restrictions fall within the
8 notion of exclusive dealing as described in this
9 guidance, does it not?

10 A. So I would not interpret this in this way. So if we
11 think about exclusive dealing and exclusive
12 distribution, I -- you know, once again, I would
13 interpret -- you know, what the distribution
14 requirements are, are a requirement that iOS
15 transactions, so transactions through Apple's ecosystem,
16 are, you know, done through the App Store, right? Part
17 of that is obviously the distribution of the app, the
18 transacting for the app, and then obviously the payment
19 requirements are also saying that in-app purchases would
20 happen through the IAP part of the App Store, and that
21 would represent -- the closest analogy is to an
22 exclusive distribution relationship. You know, there is
23 no restriction on the ability of Apple's customers to
24 not transact on other -- other ecosystems or, you know,
25 other types of rival platforms.

1 Q. That argument does not run if we are in a world where
2 I have asked you to assume that Dr Singer's market
3 definition has been accepted by the Tribunal.

4 A. No. So as I think -- as I believe I said in the
5 hot-tub, I am not sure -- I cannot remember if I said
6 exactly this, you know, I would -- I view the definition
7 of whether things are inter-brand or intra-brand as
8 being something that one can look at, you know,
9 separately and prior to market definition, so I would
10 view these as intra-brand restrictions.

11 Now, the definition of the markets that I am being
12 asked to assume for the purposes of these questions of
13 course would mean that there is only one brand within
14 the market. Now, that may have implications obviously
15 for an analysis of competitor effects and various
16 theories of anti-competitive harm, but, you know, it
17 does not change the nature of the restriction in my view
18 as being an intra-brand restriction.

19 Q. Similarly, Apple's Payment System Restrictions require
20 developers to deal exclusively with Apple to obtain the
21 iOS aftermarket services, do they not?

22 A. So they specifically require that if there is going to
23 be an in-iOS app transaction then that will happen
24 through IAP. Obviously, you know, developers and
25 consumers, as we have heard in lots of evidence, are

1 able to transact in alternative ways even for content
2 which will be, you know, completely or partially
3 consumed within the iOS ecosystem.

4 Q. So let us go back to paragraph 32 of the guidance and
5 let us just apply it to our case. Apple has foreclosed
6 competing payment service providers by preventing them
7 from selling to developers through use of exclusive
8 purchasing obligations. That is exactly our case, is it
9 not?

10 A. But I think the key point is that it is not restricting
11 their ability to deal with developers outside of the
12 specific iOS -- iOS brand ecosystem.

13 Q. So we are back to your intra-brand point?

14 A. Yes. I mean I developed the intra-brand point in the
15 context of exclusive dealing, which is why I think it is
16 relevant to think about here.

17 Q. But nothing in this guidance about intra-brand or
18 inter-brand analysis being relevant to this aspect of
19 exclusive dealing?

20 A. You know, I would -- you know, you would have to take me
21 to the part of these guidelines that explicitly deal
22 with exclusive distribution to maybe highlight that
23 comparison, but, you know, the key thing here is that
24 competitors are not being restricted in how they deal
25 with developers outside the iOS ecosystem, and in that

sense that is why I would -- I think of the requirements, both the distribution requirements and the payment requirements, as being intra-brand restrictions.

Q. If you go to paragraph 34 of this guidance, on page 7 please {AB6/6/7}, I would like to pick it up towards the bottom of paragraph 34.

A. Can I read the whole paragraph?

Q. I was going to read it out to you. I was going to save you some trouble, because I am not going to read it all of it. If you skip down about two-thirds of the way down.

A. Can I actually read all of the paragraph?

Q. Sure, if you want to, yes.

(Pause)

A. Okay.

Q. So if I pick it up, I think it is the penultimate sentence:

"The Commission will focus its attention on those cases where it is likely that consumers as a whole will not benefit. This will, in particular, be the case if there are many customers and the exclusive purchasing obligations of the dominant undertaking, taken together, have the effect of preventing the entry or expansion of competing undertakings."

Again, thinking about our case, there are many iOS

1 app developers who wish to have their apps distributed,
2 are there not?

3 A. Yes, there are many, many iOS app developers.

4 Q. Apple's App Distribution Restrictions prevent anyone
5 other than Apple from distributing iOS apps, do they
6 not?

7 A. Yes, that is correct.

8 Q. Apple's Payment System Restrictions prevent anyone other
9 than Apple from facilitating payments for iOS in-app and
10 subscription purchases, do they not?

11 A. Yes, they do.

12 Q. So this case therefore falls squarely within the concern
13 identified in paragraph 34 here, does it not?

14 A. No, so I would say, you know, even if -- well, so
15 I would answer the question on two levels. Firstly, the
16 first part of the paragraph is actually closely
17 connected to the negative contracting externalities
18 point which came up in -- while we were looking at
19 Bernheim and Heeb, and this was a point that I did
20 mention in the hot-tub, so there can be particular
21 concerns where what a dominant firm does is it locks up
22 some group of customers by giving them attractive -- by
23 giving them a fairly attractive deal and compensating
24 them for effectively being locked up, for example by
25 contract.

1 That prevents other firms from entering and lets the
2 dominant firm extract surplus from the non-contracted
3 customers, so that is very much the idea that there may
4 be -- you have to look at the consumers who are not
5 covered by the contracts and there is an externality
6 between the covered customers and the not covered
7 customers.

8 So some of the language here I think is think about
9 that kind of setting and, as I explained in the hot-tub,
10 that is not relevant, or I do not view it as relevant in
11 this setting, because actually we are thinking about
12 a set of restrictions that apply to all customers in
13 pretty much the same way.

14 Q. If you go to paragraph 36 which is at the bottom of this
15 page {AB6/6/7}.

16 A. Sorry, there was another part of your question which
17 I do not think I answered.

18 Q. No, I think we are covered.

19 A. Okay.

20 Q. You might want to read -- I am going to direct you again
21 to the second half of paragraph 36, but if you would
22 like to read it all then please do.

23 A. Sure.

24 (Pause)

25 This is quite complicated but I have read it.

1 Q. I am going to break it down for you. I would like to
2 first of all look at the sentence that begins "If
3 competitors can compete on equal terms ..." do you see
4 that?

5 A. Yes.

6 Q. "If competitors can compete on equal terms for each
7 individual customer's entire demand, exclusive
8 purchasing obligations are generally unlikely to hamper
9 effective competition unless the switching of supplier
10 by customers is rendered difficult due to the duration
11 of the exclusive purchasing obligation."

12 Now, in our case, Apple's distribution and Payment
13 System Restrictions do prevent alternative iOS app
14 stores and payment facilitators from competing on equal
15 terms for each iOS app developer's entire demands, do
16 they not?

17 A. For the demand to distribute iOS apps, correct.

18 Q. Also for payment services?

19 A. Yes.

20 Q. The reason it does that is because it stops them from
21 competing at all for the developer's business. Nobody
22 can compete in these markets, can they?

23 A. No one else is able to provide, currently, and under the
24 requirements, iOS app distribution or iOS payment
25 services. You know, just to be clear, obviously,

1 you know, as I am very clear in my reports, to conclude
2 anti-competitive foreclosure, one has to identify
3 anti-competitive effects and go through the rest of the
4 analysis.

5 Q. If we go to the final -- sorry, the penultimate sentence
6 or the final two sentences, the Commission says:

7 "In general, the longer the duration of the
8 obligation, the greater the likely foreclosure effect.
9 However, if the dominant undertaking is an unavoidable
10 trading partner for all or most customers, even an
11 exclusive purchasing obligation of short duration can
12 lead to anti-competitive foreclosure."

13 Here, Apple is an unavoidable trading partner for
14 all or most iOS app developers, is it not, by
15 definition?

16 A. Yes, and that is true of both the need for distribution,
17 but also everything else that the developers receive
18 from Apple.

19 Q. Apple's distribution restrictions have been in place
20 since the launch of the App Store in 2008?

21 A. Yes, and then 2009 for the payment restrictions.

22 Q. 2009 for payment restrictions. So the Commission's
23 guidelines on exclusionary conduct which we have just
24 been looking at is clearly more relevant to this case
25 than your intra-brand analogy?

1 A. Sorry, can you repeat the question?

2 Q. We have looked at a framework which looks at exclusive
3 dealing that the Commission has set out in these
4 guidelines, and the point I am putting to you is that
5 the facts of our case are far more akin or fit better
6 within this framework of analysis than they do within
7 your intra-brand analogy?

8 A. As I tried to explain earlier, you know, intra-brand
9 restrictions, you know, are not necessarily always
10 competitively benign, particularly if in the markets
11 that have been defined for the assumptions you have
12 asked me to make, when you have, you know, a dominant
13 firm. So one still has to go through the analysis, and
14 my point is that one should, you know, and you would ask
15 the same questions. You would ask questions about
16 anti-competitive incentives and anti-competitive
17 effects.

18 So from that point of view, exclusive dealing and
19 exclusive distribution in the context of dominant firms
20 would lead you to a set of similar questions, but then
21 not making intra-brand restrictions inter-brand
22 restrictions.

23 Q. Can we go to your first report {C3/3/17}, and if we pick
24 it up at paragraph 37, you see at the bottom of the page
25 the sentence that begins "In addition". You say:

1 "In addition, even if, contrary to Professor Hitt's
2 findings, Apple were found to be dominant, the payment
3 requirements do not constitute exclusionary conduct that
4 has led to anti-competitive foreclosure because
5 Professor Hitt has established that Apple's Commission
6 rates are competitive."

7 Do you see that?

8 A. I -- that is correct.

9 Q. Are you aware that as a matter of UK and EU competition
10 law, an abuse may arise through an effect on the
11 structure of competition; it is not actually necessary
12 to demonstrate a specific effect on consumers?

13 A. So, you know, obviously I am not a lawyer and I am not
14 going to opine on exactly the legal standard, but as
15 a matter of economics, you know, I would understand that
16 one needs to make a connection to anti -- to whether
17 there are anti-competitive effects.

18 Q. Are you aware that as a matter of UK and EU competition
19 law, it is not necessary to prove that conduct had an
20 actual effect on the structure of competition, it is
21 sufficient to prove that it had the ability to restrict
22 competition; is that something you are aware of?

23 A. So once again, I am not a lawyer. I have heard these
24 points made in argument. Once again, you know, my
25 position as an economist is that I would want to assess

1 whether there are anti-competitive effects and whether
2 also there are anti-competitive incentives.

3 Q. Can we go to the joint expert statement, please
4 {C4/2/37}. It is proposition 37, but I particularly
5 want to focus on your third comment. Perhaps you could
6 read that to yourself, remind yourself what you said.

7 (Pause)

8 A. I have read it.

9 Q. So you say:

10 "Third, under Dr Singer's purported iOS in-app
11 aftermarket which does not include payment systems
12 outside of an iOS app, the Payment System Restrictions
13 do exclude competitors from offering alternative payment
14 systems that compete with ASPS/IAP."

15 The question is this: excluding competitors from
16 offering alternative payment systems clearly affects the
17 structure of competition, does it not?

18 A. It affects the number of firms who are able to offer
19 in-app payment services, correct.

20 Q. It affects the structure of competition?

21 A. Yes. As I have been -- as I have been very clear from
22 the beginning, right, there is an exclusionary element
23 of the requirements, but that does not necessarily imply
24 that there are anti-competitive effects and that one
25 needs to go through the economic analysis to determine

1 that.

2 Q. Excluding competitors from offering alternative payment
3 systems also clearly has the potential to affect the
4 structure of competition, does it not?

5 A. It will have -- yes. In this case I think we would
6 recognise that, you know, the potential and the actual
7 effect on the ability of other firms to provide in-app
8 payment services is the same.

9 Q. I want to move on to the topic of tying, and for the
10 purposes of these questions I want you still to assume
11 that the Tribunal has found that the relevant markets
12 are those proposed by Dr Singer and that Apple is
13 dominant in those markets, yes?

14 A. Okay.

15 Q. Can we go, please, to the joint expert statement
16 {C4/2/43}. You see in proposition 45 that you and
17 Dr Singer agree that the four conditions identified
18 there must all be fulfilled to establish whether tying
19 has had an anti-competitive effect, yes?

20 A. Yes.

21 Q. The second condition is that:

22 "The tying product and tied product must be distinct
23 products with separate demand."

24 Do you see that?

25 A. Yes, and that was a topic we discussed in the hot-tub as

1 well.

2 Q. On the Class Representative's case, the tying product is
3 the App Store and the tied product is Apple's IAP,
4 correct?

5 A. Yes, that is the -- that is what I understand.

6 Q. You contend that iOS app distribution and iOS payment
7 processing are not separate products. That is your
8 position, is it not?

9 A. Not distinct products. So, yes, that follows from
10 a number of bases. Obviously some of them follow
11 from --

12 Q. I am going to ask you some questions about that now.

13 A. Oh, sorry.

14 Q. I am just literally establishing what your position is.
15 If you feel I have not given you a fair hearing at the
16 end, then please just let me know.

17 Can we please go to Mr Schiller's first report,
18 {B2/5/32}, at paragraph 117. Mr Schiller's evidence is:

19 "When the App Store first launched in 2008, iOS
20 users could not make in-app purchases. An app was
21 either free or it could be downloaded for an initial
22 one-off fee. In the initial period after launch, there
23 was no means by which users could make subsequent
24 purchases after downloading an app. For example, there
25 was no capacity to pay for additional in-app content."

1 So when the App Store was first launched, it was not
2 possible to make in-app purchases, was it?

3 A. No.

4 Q. If we can go to paragraph 119 over the page {B2/5/33},
5 Mr Schiller went on to say:

6 "Following the launch of the App Store, developers
7 seeking to monetise their apps (other than through the
8 initial purchase of the app) sought from Apple the
9 ability to sell digital content and features within apps
10 at a point after the initial download."

11 Then if we can go to 121, please:

12 "In March 2009, in response to the developer
13 feedback mentioned above, Apple announced a new set of
14 APIs that introduced an in-app purchase functionality to
15 the App Store. IAP is a feature of the App Store
16 commerce system that provides a seamless, safe and
17 trusted mechanism for developers to offer digital
18 content and services to consumers."

19 So Mr Schiller's evidence shows that the ability to
20 make in-app purchases is distinct from the initial
21 distribution and download of apps, does it not?

22 A. I mean not necessarily in the sense of the economic
23 test, for example, as discussed in the EC guidelines on
24 tying. There is some difference in the functionality
25 and obviously the APIs that are used, you know, but that

1 does not mean that they are separate products or
2 distinct products as follows from --

3 Q. But when the App Store was first launched, it was not
4 possible to make in-app purchases, was it?

5 A. No, as I understand it.

6 Q. According to Mr Schiller's evidence, Apple introduced
7 the ability to make in-app purchases in response to
8 demand from developers, did it not?

9 A. Yes, or at least in part.

10 Q. So there is distinct demand from developers for the
11 ability to make in-app purchases, as opposed to the mere
12 distribution of iOS apps. That is what Mr Schiller's
13 evidence shows us, is it not?

14 A. You know, developers not surprisingly want to transact
15 with consumers in a variety of ways and they indicated
16 that this was functionality -- according to Mr Schiller,
17 they indicated this is functionality that, you know,
18 they would value. It obviously appears that this might
19 be a substitute in the eyes of at least some developers
20 for doing a paid download.

21 Q. Can we go to your first report at {C3/3/106},
22 paragraph 229. Can I just ask you to read that to
23 remind yourself of your evidence.

24 A. Sorry, 229?

25 Q. 229, yes.

1 (Pause)

2 A. Okay.

3 Q. Here you refer to evidence given by a witness in US
4 Proceedings between Epic Games and Apple, yes?

5 A. I think it may have been Australian proceedings but that
6 probably may not be important.

7 Q. It is Australia, I am sorry. Since December 2019,
8 developers on the Epic Games Store have been allowed to
9 use Epic's built-in payment system, or alternative
10 third-party payment system providers for in-app
11 purchases, is that correct?

12 A. Yes, that is what I understand from the evidence that
13 I read.

14 Q. Mr Steven Allison, who was the general manager of the
15 Epic Games Store, suggested that less than 50 developers
16 out of over 1,100 used a third-party payment solution,
17 is that right?

18 A. Yes, that was my reading of the testimony in Australia.

19 Q. You rely on that evidence to put forward a proposition
20 that there is little effective demand for alternative
21 payment processors beyond the integrated payment
22 processor offered by the transaction platform. That is
23 your position in light of that evidence, is that
24 correct?

25 A. Well, so the -- the economic test that I think

1 I explained in the hot-tub is, you know, when you think
2 about -- you know, when you -- if you remove the tie and
3 the tying product and the tied product -- well,
4 particularly the tied product is offered at, you know,
5 a somewhat competitive price, what would be the demand
6 for alternatives, recognising that someone buying the
7 tying -- tied type of product from an alternative would
8 also need to purchase the tying product separately from
9 the firm.

10 So, you know, this example does not correspond kind
11 of exactly to that because Epic was allowing developers
12 actually not to have to pay anything for the
13 distribution service provided by the Epic Games Store.
14 So in some ways, this meant there was actually quite
15 a favourable environment for potentially seeing
16 significant demand for the alternative product -- sorry,
17 for the alternative provider of the tied product, but in
18 fact what we saw was a relatively small number of
19 developers choosing to do so, and there was obviously an
20 additional discussion of the evidence that this was even
21 in the context where the Epic Games Store's payment
22 product may have been difficult for at least some
23 developers to actually use, and of course that would
24 have been another reason why people might have been
25 looking for alternatives other than just price.

1 Q. So just going back to my question, you rely on this
2 evidence in order to suggest that there is little
3 effective demand for alternative payment processors
4 beyond the integrated payment processor offered by the
5 transaction platform, is that right?

6 A. So this is one piece of evidence that I point to. Now,
7 obviously there are other platforms that offer the
8 ability to use an alternative payment provider, so
9 Microsoft and more recently Samsung have allowed that,
10 and then obviously we can also look at the examples
11 where, due to litigation or regulation in South Korea
12 and the Netherlands, iOS developers have some ability to
13 use an alternative. Now --

14 Q. I am going to come on to these things, that is why --

15 A. I just want to point out the Epic Games Store is not the
16 only relevant context for this.

17 Q. I understand.

18 A. But to answer your question, I do cite the Epic Games
19 Store as an example.

20 Q. Are you familiar with the EU's Digital Markets Act
21 regulation?

22 A. It is very complicated but I have --

23 Q. You have had the pleasure of meeting it?

24 A. I have had the pleasure.

25 Q. Can we go to the DMA regulation, that is {AB1/6/1}. So

1 you will see from the title and the number this is the
2 DMA regulation. If we could pick it up at page 2,
3 please {AB1/6/2}. Could you please remind yourself of
4 what is said in recitals 3 and 4.

5 (Pause)

6 A. Okay, I have read it.

7 Q. You are aware that Apple has been designated as
8 a gatekeeper under this regulation in relation to the
9 App Store, I presume?

10 A. Yes, I am.

11 Q. Can we go to page 11, please {AB1/6/11}. Can I ask you
12 to read recital 43.

13 (Pause)

14 A. Okay.

15 Q. So recital 43, the first sentence says:

16 "Certain services provided together with, or in
17 support of, relevant core platform services of the
18 gatekeeper, such as identification services, web browser
19 engines, payment services or technical services that
20 support the provision of the payment services, such as
21 payment systems for in-app purchases, are crucial for
22 business users to conduct their business and allow them
23 to optimise services."

24 Then I am going to skip a couple of sentences and
25 pick it up:

1 "Gatekeepers should therefore not use their position
2 to require their dependent business users to use any of
3 the services provided together with, or in support of,
4 core platform services by the gatekeeper itself as part
5 of the provision of services or products by those
6 business users."

7 So this regulation draws a distinction between core
8 platform services and payment systems, including payment
9 systems for in-app purchases, does it not?

10 A. You know, the DMA, which is a highly complicated piece
11 of legislation and regulation, is making this
12 distinction, correct.

13 Q. Then if we go to page 34, please -- actually we can pick
14 it up at 33 {AB1/6/33}. It is Article 5 I want to look
15 at. You will see the heading "Obligations for
16 gatekeepers", and then I want to go over the page to
17 page 34, please {AB1/6/34}. Can I ask you to read
18 Article 5(7), so that is the one that begins "The
19 gatekeeper shall not require ..."

20 A. Sorry, which one?

21 Q. If you read 7 on that page.

22 A. Oh, 7.

23 (Pause)

24 Okay.

25 Q. So you will see the effect or one of the effects of the

1 regulation is that Apple cannot require developers to
2 use Apple's payment systems for in-app purchases, do you
3 see that?

4 A. Yes.

5 Q. Therefore the premise of this part of the regulation is
6 that app distribution and payment systems for in-app
7 purchases are distinct services, yes?

8 A. So it -- you know, I -- it is not clear to me on what
9 basis the Commission has decided to make these
10 distinctions, and in particular whether they have
11 attempted to apply the distinct products test.
12 Obviously this is a recognition that there is some
13 difference in functionality.

14 Q. But the premise of this regulation, whether you agree
15 with it or not, is that they are distinct services.
16 That is indisputable, is it not?

17 A. Well, this is a -- this is a regulation which is
18 requiring them to be provided separately, but this is
19 not an application, as I understand it, of the
20 competition law test for whether they are distinct
21 products for a tying analysis.

22 Q. A further premise of this regulation is that iOS app
23 developers should be able to exercise a choice in
24 relation to which payment system to use in relation to
25 iOS in-app purchase, is it not?

1 A. Well, so specifically it is saying that the gatekeeper
2 should not be able to require the use of its own
3 service.

4 Q. So iOS app developers should be able to exercise
5 a choice in relation to which payment system to use in
6 relation to in-app purchases?

7 A. I mean, it follows from what I said that if other
8 alternative providers are providing alternatives, then
9 after this regulation they will have the ability to make
10 a choice, yes.

11 Q. A further premise behind this legislation is that the
12 European Union expects that there will be demand from
13 developers for alternative iOS payment systems because
14 otherwise enacting this sort of legislation would be
15 pointless, would it not?

16 A. Well, obviously I understand this is broadly-written
17 legislation to cover a wide -- you know, a number of
18 possible gatekeepers. Apple has been designated as one
19 of the gatekeepers. But I -- you know, I would not
20 necessarily assume that the Commission had identified
21 specifically separate demand in the context of
22 an appropriately defined counterfactual where what has
23 been labelled the tie has been removed for those
24 services. I simply cannot comment on that.

25 Q. Would you accept that a further premise of this

1 legislation is that there would be demand from
2 developers for alternative payment systems, put it more
3 generally?

4 A. You know, once again it depends how they are viewing the
5 counterfactual. Obviously, you know, what I would
6 acknowledge -- and the Spotify case, you know, may be
7 an example of this -- there have been requests from
8 developers in some settings to use alternative payment
9 systems, possibly to avoid all of Apple's Commission,
10 but, as I explained in the hot-tub, that is kind of not
11 the relevant, you know, definition of a tie, definition
12 of distinct products test.

13 MR HOSKINS: Sir, I see the time, and that is a convenient
14 moment for me, if ...

15 THE CHAIRMAN: Yes, good, thank you.

16 Professor Sweeting, just to remind you, you are not
17 to discuss your evidence with anybody overnight. Thank
18 you very much.

19 We will start again at 10.30 tomorrow morning.

20 Thank you.

21 (4.35 pm)

22 (The hearing adjourned until 10.30 am on Tuesday,

23 11 February 2025)

24

25

INDEX

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