IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Monday 24th 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 AN 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, 24 February 2025

(10.30 am)

THE CHAIRMAN: Yes, good morning, Mr Hoskins. Good morning, everybody. Thank you very much for the written submissions. They were very interesting indeed.

Housekeeping

Just before you get started, where are we on the timetable? How is that looking?

MR KENNELLY: (No microphone - inaudible) Mr Hoskins will outline on Friday, I understand for the Class Representative, today and tomorrow. Then we will take the following two days.

Then on Friday, after we finish, the CMA will make its short submissions after we have --

THE CHAIRMAN: (Overspeaking) Yes.

MR KENNELLY: -- concluded our closing submissions, and then we will make a short reply to their reply.

THE CHAIRMAN: Yes, you will have a reply. I did actually wonder if that might be the right answer. That occurred to me as well. That does make sense. Just in terms of the timing of that, just to make sure it all works -- well, I think you have got the message that we are starting early on Friday and finishing at 4 o'clock, I think, is the plan -- Thursday, I am sorry. I keep doing this, do I not? I get the days completely wrong.

On Thursday we are starting at 10 -- you know about that -- and we are finishing at 4, so presumably we will get the CMA on at 2 o'clock on Thursday -- is that right? -- if they want two hours. Do they still want two hours?

MR KENNELLY: No, Friday morning.

THE CHAIRMAN: I am so sorry. You are going to do all of Wednesday and Thursday.

MR KENNELLY: Indeed.

THE CHAIRMAN: Then they have two hours on Friday morning.

MR KENNELLY: We respond to them.

THE CHAIRMAN: You respond to them, and then the Class Representative finishes off.

MR KENNELLY: Yes, exactly.

THE CHAIRMAN: How long -- what does Friday look like? Is that all agreed in terms of the timing?

MR HOSKINS: We are still in the sort of -- I mean, we had Friday afternoon, but I am happy to play it by ear as we get closer.

THE CHAIRMAN: Well, it sounds like that will --

MR HOSKINS: We can this conversation on Friday when we get a better sense.

THE CHAIRMAN: Well, I do not want to have it if it is going to be a car crash because I do not want to be sitting at 5 o'clock on Friday and not having it done. But it

sounds like that will work if you -- if they have up to two hours and then you get -- how much do you think you will need?

MR KENNELLY: To reply to the CMA? It really does depend on what they say. It is hard to predict precisely, but an hour, an hour -- we will get their written submissions tomorrow.

THE CHAIRMAN: Yes, I see. So you will have a better idea.

What I would quite like to do -- you are right, Mr Hoskins, we can play it by ear a bit. What I do not want is to find is that we have a big hole to fill, rather than the opposite --

MR HOSKINS: I completely understand. Those behind me remind me. I think that Apple had agreed that the CMA reply time would come out of Apple's two days, if you see what I mean, so --

MR KENNELLY: No, no, we said we would share the time, but ... (a discussion with Ms Demetriou).

Okay. So we have 11 hours, they have 12 hours, but I think they are already eating --

THE CHAIRMAN: I think that is right. Let us not spend more time on it. If you could perhaps seek to firm that up, just so that we know it is going to work. The reason for just focusing on it is that, if you think it is not going to work, we can find a little bit of extra time.

I am not going to sit extended hours, unless we have to, but we can easily find 15 minutes here and there, and so we can make it up. I do not want to have to do that on Friday. That is the point.

MR KENNELLY: Just to reassure you, our view between all the parties, including the CMA, is that it will work --

THE CHAIRMAN: I am greatly reassured. Thank you. Yes, Mr Hoskins.

MR HOSKINS: No pressure!

THE CHAIRMAN: No pressure.

Closing submissions by MR HOSKINS

MR HOSKINS: Apple's closings criticises our case for its simplicity, but you will not be surprised to hear that, in our submission, the strength of our case is its simplicity.

If it is determined that the relevant product markets are the ones that we advocate for, so that is the distribution of iOS Apps and the provision of iOS Aftermarket Services or indeed a single market for both of them, which is our alternative case, then in our submission the answer to the remaining questions for the Tribunal are straightforward because, if those are the markets, Apple is clearly dominant in both those markets, and if those are the markets, Apple has foreclosed all competition in both of those markets and

it has done so by means of the standard terms that it imposes on all developers, not as a result of competition in those markets. Finally, as Apple's conduct has eliminated all competition in those markets, it cannot be justified under either of the available headings of justification.

So we say very straightforward, and actually the real weight of this case is on market definition because, if you are with us on that, we say pretty much everything else follows as night follows day.

So let me go to market definition and let us first of all consider what the proper approach is. In the hot tub, all the economic experts, including Professor Hitt, agreed that the market definition framework set out in the CMA skeleton is the correct approach in antitrust cases.

Can we have, please, the transcript for Day 14 at page 5, {Day14/5:1}. It is Dr Bishop's question. If we pick it up at line 13 -- so this is Dr Bishop speaking, {Day14/5:13}:

"The question of how it applies in the particular case of course is what the CMA is concerned with here. It lays emphasis on where you start, they call that the focal product, and then goes through the procedures of what the hypothetical monopoly test is like.

"So my real question to you, and there are other things later, but let us start with that. I want to ask whether you agree with the CMA's procedure as set out in this so-called skeleton argument."

Then he goes to Mr Holt and Dr Singer.

So that is the question. The question specifically focused on the focal product issue. If we see what Professor Hitt's response was in the hot tub, that is -- sorry, yes -- {Day14/13:17}. If I could ask you to read over the page, so page 13, line 17 -- thank you very much -- to {Day14/14:17} over the page. (Pause)

All the other experts agreed.

So, in relation to the focal product, let us remind ourselves what the CMA's framework is. What did the CMA's skeleton say about the focal product? That is {A3/4/5}, please. First of all, paragraph 14:

"In a Chapter II case, the focal product should typically be the product that is the subject of the allegedly abusive conduct. As a result, in a Chapter II case the initial market to which the HM test is applied should typically be a market containing the products that are the subject of the allegedly abusive conduct."

Paragraph 17 on {A3/4/6}:

"Where allegedly abusive conduct is applied to more than one product (or sets of products), it will

generally be appropriate to undertake separate market definition exercises for each relevant product (or set of products)."

Then paragraph 18 {A3/4/7}:

"However, where allegedly abusive conduct is applied to a single product (or set of products) that is supplied to multiple customer groups that have different substitution options available to them, the existence of those different substitution options will not generally be sufficient on its own to mean that separate market definition exercises are appropriate."

That is obviously relevant to Professor Hitt's suggestion that there are multiple separate markets for app distribution and payment services, depending on the type of app for -- whether it is gaming or video streaming, et cetera.

But having expressly agreed with the CMA's proposed framework, as you have seen, Professor Hitt conspicuously did not apply that framework in his own market definition analysis.

Now, before I come back to Apple's case, let me just lay out what our case is, and you have seen it set out at paragraphs 14 to 18 of our written closing submissions. We say that there are three particularly relevant markets that need to be taken into account.

First of all, there are the device markets in which smartphones and tablets are sold; secondly, there is the distribution market, specifically the iOS App Distribution Market. Again, more specifically, that is the market for the provision of iOS App Distribution Services which facilitate the purchase of iOS Apps by iOS Device users, and that is defined way back in our claim form.

There is a distinction between the apps themselves and the means by which such apps are distributed, and we are concerned with the latter. If we can go to Apple's own Defence, {A1/2/17}, paragraph 56, Apple explains:

"The App Store is a two-sided transaction platform that facilitates transactions between consumers and developers. The relevant product that Apple supplies through the App Store is the facilitation of digital transactions, for which Apple charges a commission when a developer imposes a positive purchase price on the purchase of digital content."

So a distinction between the apps themselves and the means by which those apps are distributed, and we are concerned with the latter.

Furthermore, this market, the iOS App Distribution Market, concerns the stage after the user has purchased their iPhone or iPad and they have sat down and they

then download iOS Apps for use on those devices. That is what that market is about. It is the service that facilitate the initial downloading of the apps themselves.

Now, we know that that may only be done via the App Store and we know that the App Store performs a matchmaking function between developers and users. Again, look at Apple's own evidence. If we go to Mr Schiller's statement, {B2/5/18}, paragraph 64, second sentence there:

"Among other things, the App Store is a transaction platform which provides a convenient place for consumers to discover and obtain iOS Apps and for developers to offer and market their iOS Apps."

That is an excellent description of the matchmaking function, and that is Apple's own evidence.

The third particularly relevant market arises once a user has downloaded an iOS app and then wishes to make relevant in-app purchases or subscription purchases and, that is what we have called the "iOS In-App Aftermarket"; in other words, the market for the provision of iOS In-App Aftermarket Services that enable those purchases to take place. Now, those purchases can only be made once the initial app has been downloaded. Those purchases do not take place via the App Store.

They take place via the app and they must use Apple's IAP. They are in a separate market.

Now, while there is undoubtedly an interrelation between these three markets, they should be considered separately for the purposes of market definition in accordance with the CMA's framework, and in particular there are important distinctions between the iOS App Distribution Market and the iOS In-App Aftermarket which require them to be considered separately. We have identified some of the relevant distinctions at paragraphs 16 to 26 of our written closings, and I just want to focus on some of them orally. I am not going to read our closings back to you.

The first distinction is the mode of delivery. As I have just indicated, the Relevant App Purchases, ie the original downloading, take place on the App Store and the relevant in-app purchases and the subscription purchases take place within a previously downloaded app.

There is a temporal distinction. This is number 2. In a vast majority of cases, Relevant App Purchases and Relevant Subscription Purchases take place -- sorry -- Relevant App Purchases on the one hand and relevant in-app purchases and subscription purchases on the other hand take place at a different time. That is the vast majority.

Number 3, different services are provided to developers in each of the markets. If we go back again to Mr Schiller's -- in fact, we are still in the first witness statement, so it is {B2/5/63} of the document on the screen, paragraph 222:

"My understanding is that Stripe, PayPal, Paddle and other such services do not provide a platform for distributing apps ... to consumers ... [but rather] handle the payment flow between two parties that have already connected and agreed on a transaction."

That is precisely our case. The distinction that Mr Schiller draws between the different types of services is also reflected in the different types of undertakings that offer such services, and in terms of app distribution, 1st Howell, paragraphs 108 and 112, suggests that, absent Apple's distribution restrictions, a supplier of app stores, such as Epic Games, *Microsoft* and Aptoide, might have provided competing iOS app stores. 1st Howell, paragraphs 147 to 149, suggest that suppliers such as Paddle and Stripe might have provided the payment facilitator services. So a distinction in the type of service and not surprisingly a distinction in the type of undertakings that would provide such services.

There is a difference in relation to matchmaking,

still in Mr Schiller's statement, paragraph 222. Let us look at the second sentence. Mr Schiller explains:

"Unlike Apple's App Store, Stripe, PayPal, Paddle and other such services are not bringing in customers for their users."

In other words, unlike Apple, payment facilitators do not provide matchmaking services to developers and users. That has a further consequence. That means that, whereas the iOS App Distribution Market is two-sided because it is matchmaking, the iOS In-App Aftermarket is one-sided.

In cross-examination, you will remember that Professor Hitt agreed that after the app had been downloaded, a consumer's purchase of gems for Clash of Clans on the developer's website is a purchase in a one-sided market. You will remember, he accepted that. But the same must then apply to a purchase of gems from the Clash of Clans app because both transactions occurred directly between a particular user and a particular developer. That is one-sided. There is no matchmaking involved in that transaction at that stage. The user and the developer have already paired off with each other and they did that when the user downloaded the app.

The final point of distinction I want to emphasise

orally, still in Mr Schiller's own evidence, if we can go to page 48, please, and if we can go over the page, {B2/5/49}. This is where he sets out the monetisation models and you will have this point already. It is paragraphs 171 to 180. The monetisation models that Apple offers to developers are defined on the basis that there is a distinction between app distribution on the one hand and subsequent in-app purchases and subscriptions on the other; for example, if you look at freemium at paragraph 176, {B2/5/50}:

"Under the freemium model, developers' apps are free to download, but users can make in-app purchases for additional content."

Compare that with paid, paragraph 179, {B2/5/51}:

"Under the paid model ... developers charge a price for the users to download the app."

The whole monetisation scheme is based on this distinction between distribution and the after-market.

I will say a word about using an HMT test.

THE CHAIRMAN: Just before you do, can I ask you about something you have not mentioned, and there is no criticism of that because there is -- it perhaps becomes more interesting later. But there is another economic activity that is taking place here, which is that Apple is providing tools and technology to developers, and

I guess the question is: does that have any implications for the way you look at the market definition? I am sure we are going to come back to it. But even at this stage, where we are thinking about what is actually happening -- I mean, you have just dissected these markets and explained what is happening, but actually you have not dealt with that aspect, which we know is also happening.

MR HOSKINS: I am going to come back to that, sir, to give you a foretaste. Do you remember the amendment spat at the start of the trial, and, when Apple were making their submissions in relation to that, one of the reasons they said that we should not be allowed to amend in relation or in response to their amendment was because Apple's -- the way and manner in which Apple deals with its IP rights, ie its tools and technology, is in a different market. I will take you to that when we come back to that point, and we mention it in our written closings, but in the section on overcharge.

So Apple's own submission was that the licensing of tools and technology is a separate market, and we agree. I will come back to tools and technology at various stages throughout the submissions, but it is a separate market.

THE CHAIRMAN: Thank you.

MR HOSKINS: So HMT. As we have seen in cases of likely market power where the cellophane fallacy may arise, the European Commission indicated in its 2024 market definition notice that it may be appropriate to -- and here I am quoting:

" ... apply the SSNIP test starting from a counterfactual price that would prevail under (more) effective competition ..."

We have seen that a few times so I will just give you the reference. It is the 2024 Commission Notice on Market Definition. It is footnote 55. That is {AB6/44/13}.

At paragraph 87 of its written closings, Apple suggests that under Dr Singer's HMT test, virtually any product in any differentiated product market would be defined as its own market, but it is not suggested that Dr Singer's HMT test would be enough on its own to define the relevant market and Dr Singer himself was very clear about that. He explained that it is when considered along with all the other evidence that the HMT test provides some evidence, corroborative evidence, of the market definition he has proposed. But we are certainly not running a case which is that, absent any other evidence, the HMT test would be conclusive on its own, but clearly it should not be completely

disregarded.

So applying the CMA's framework to this evidence, which in our submission is what we must do, given all the experts agree that that is the approach, we submit that it would be appropriate to adopt the market definitions we suggest, that is the iOS App Distribution Market and the iOS In-App Aftermarket, as the appropriate product markets for assessing competition in this case, because of course that is the purpose of market definition, what would be the useful framework for considering competition in this case.

I will just remind you that we also have an alternative market definition. If we go to our reply, that is {A1/3/13}. It is 28(a)(ii), so in red. You will see the pleading states:

"Insofar as Professor Hitt suggests that separate relevant markets for iOS App Distribution Services and iOS In-App Aftermarket Services do not exist, that is denied, alternatively there would in any event be a single relevant product market for both iOS App Distribution Services and iOS In-App Aftermarket Services in which Apple would be dominant."

We say, if you reject our primary case on market definition but you accept our alternative one, it is the same analysis. Apple has 100% of the market, it has

excluded all competition in the market, so it is the same submission I made at the outset of these submissions.

MR FRAZER: But Mr Hoskins, it would make some significant difference to the tying abuse, would it not?

MR HOSKINS: It would, absolutely. I agree. If it is a single market, the tying case would fall.

Let us look at Apple's arguments. What does Apple suggest? Let us look at its skeleton argument, {A1/5/20}. It is quite hard to pin down what Apple's proposed market definition is. It is very diffuse, one might even say "fuzzy". Paragraph 44:

"The relevant product is the facilitation of transactions for digital goods and services between developers and consumers. This product is not confined to transactions in respect of iOS Apps only. It encompasses alternative iOS and non-iOS channels by which developers and consumers can transact for digital goods and services. Those alternative channels may be other two-sided digital transaction platforms or one-sided channels such as direct distribution from a developer's website. As explained below, that is because these alternative transaction channels are substitutes for the App Store from the perspective of both developers and consumers and therefore

competitively constrain Apple's conduct. These product markets are further divided according to the type of underlying digital goods and services being bought and sold. Apple is competitively constrained by these other channels for transactions, which accordingly form part of the relevant product markets."

It is clear that Apple is essentially running a negative case, but saying that our proposed markets are incorrect without suggesting specific alternatives does not really leave the Tribunal in an easy position to assess competition in this case if it goes down the Apple route.

We have addressed Apple's arguments at paragraphs 30 to 47 of our written closings. Again I am not going to bore you by repeating them all. I am just going to pick up a few headline points now.

First of all -- I am repeating myself, but it is important -- Professor Hitt, whilst agreeing with the framework outlined by the CMA for market definition has not applied that framework to his own analysis, and that is clearly a material deficiency.

THE CHAIRMAN: Can I just jump in there? One of the things I think I understood him to say was that he would anticipate it being a quantitative test and, if it was not a quantitative test, I think the inference -- I am

not sure he actually said this expressly -- the inference was that it was not really very much help to you. What is your response to that?

MR HOSKINS: There is obviously the issue around an HMT and a quantitative test in that sense, and obviously this case is going to require a qualitative and quantitative approach. But when one is adopting a qualitative approach, one should apply the CMA's framework, which involves identifying the focal product, starting with the services that are the subject of the allegations, and then work through the CMA framework from that base, and that is what Professor Hitt does not do. He starts with the world at large and puts together a theory on that basis; unlike Dr Singer, who starts with the focal products, ie the services that are said to be the subject of the abuse. So even our -- certainly in that qualitative world, the CMA framework still applies and Professor Hitt has not applied it.

The second point is that, like Professor Hitt in his reports, you will have seen that Apple's closing submissions seek to rely heavily, but selectively, on certain parts of the Accent survey. But the attempted reliance on aspects of the Accent survey taken out of context is wholly at odds with the key findings of Accent itself, by definition on the basis of the same

material. Can we go to the Accent survey, {D1/1287/4}, "Key Findings"?

The third bullet, key finding, Accent says:

"App related factors were the least mentioned factors for both Apple and Android users."

Then, over the page, {D1/1287/5}, you will see the second bullet on that page, "Marginal users":

"11% of Apple and 12% of Android non-switchers considered switching -- only a small proportion considered it very seriously (13% of marginal iOS users and 17% of Android marginal users).

"The most frequently mentioned reason for not switching ... [operating system] provided by iOS users who did not switch was 'because I had other devices linked to my phone/... [operating system] (51%) ...

"64% of marginal users and 69% of non-considerers mentioned at least one Barrier to Switching (BTS) when asked why they did not switch OS for their most recent smartphone purchase. App related barriers were relatively unimportant."

So you have Professor Hitt and Apple relying on the Accent survey, saying that app purchases are vitally important in this process, and Accent's own view of its own survey is the opposite.

The third point is that the Accent survey was

commissioned, as we know, by the CMA for its own market study, but Apple's case, insofar as it relies on the Accent survey, is also at odds with the CMA's conclusions.

Can we go to Apple's closing submissions? I am not sure if they have been loaded up. I am still working on paper, but they are up. I think it should be page 9 [sic], paragraph 27, {A1/9/11}. So this is Apple's closing:

"The evidence shows that Apple is subject to strong competitive constraints from: (i) competition in the devices markets, (ii) the availability of alternative channels by which iOS Device users and developers can transact; and (iii) alternative methods by which developers can monetise their iOS Apps without paying Apple any commission. Those constraints are particularly strong because the App Store commerce is highly concentrated on both sides of the platform, a critical factor ignored by Dr Kent (and indeed by the CMA)."

So that is what Apple would have you find. But let us go back to the CMA market study report. You have seen this. I can take it quickly. Can we go to {AB6/25/28}? This is the key findings on "Mobile device and operating system competition". It is a well-trodden

path, but I would ask you just to refresh your memory, insofar as it is necessary at this stage. (Pause)

THE CHAIRMAN: Do you want us to read over the page?

MR HOSKINS: I am not sure. Does it go down? Yes, I thought it was -- that is it. Then similarly the key findings on "Competition in the distribution of native apps", which is at page 82 {AB6/25/82}. (Pause)

Now, not surprisingly -- excuse the vernacular -- Apple goes in hard on the CMA's report in its written closings. It has to. But let me explain our position. From the outset, we have not said that the Tribunal is bound by the conclusions in the CMA's report, but we do say that the Tribunal is entitled to have regard to that report as part of the overall evidential matrix in this case, and that is consistent with Apple's own approach.

If we go to Apple's written closings, at page 72, {A1/9/74}, paragraph 218, this is the section, you will have seen, in which Apple argues that:

"The *Google Play* Store is the best available comparator evidence of the market share and pricing that Apple would obtain in the counterfactual."

In making that argument, Apple relies frequently on the CMA's report. You will see that in paragraphs 220, 221, 224, 228, 230(b) and 234.

We are not complaining about Apple pointing to

certain aspects of the CMA's report and saying, "Look, this is what the CMA says". That, we say, is precisely what should happen. The Tribunal is not bound by the conclusions in the CMA's reports but it is certainly entitled to take account of the evidence contained in these reports and to accord it the weight that the Tribunal considers appropriate.

There is another aspect of this. The Tribunal is also entitled to have regard to the evidence and conclusions in the CMA's report when assessing what weight to give to the expert opinions in this case; for example, in order to consider whether an expert has overlooked relevant considerations.

That is the main reason why I took Professor Hitt to various parts of the CMA's report in my cross-examination of him. Did he, when he puts forward his case, acknowledge what the CMA have said and did he seek to address those points? Our answer is: invariably not.

The same approach must apply to the European Commission's *Spotify* decision. You are not bound by it but the Tribunal is certainly entitled to have regard to the evidence and conclusions therein.

So that is what I want to say on market definition, and you have my domino theory submission, if we win on

market definition, I do submit that the rest should follow in pretty short order.

We address dominance at paragraphs 48 to 70 of our written closings and, in our submission, if you find for us on our proposed market definitions, then dominance is absolutely clear-cut by all the normal touch points. First of all, market shares. Apple has had 100% of both the relevant iOS-only markets for the duration of the claims period; secondly, barriers to entry. By virtue of its own terms and conditions, Apple has excluded all competition in those iOS-only markets over the same period; thirdly, countervailing buyer power.

Neither developers, nor users have been able to exert pressure on Apple to change the challenge restrictions. It has been necessary to distribute iOS Apps via the App Store since its launch until the present day. It has been necessary to use Apple's IAP for in-app purchases and subscriptions for the introduction of in-app purchases until the present day, and that is the Holy Trinity of dominance: market shares, barrier to entry, countervailing buyer power.

So what does Apple offer you to try and say, "No, no, this is a case in which we are not dominant in these markets". Again, I am not going to go over all the written submissions. I will just highlight some points

now.

In its written closings, Apple relies heavily on the suggestion that Apple was vulnerable to switching by a limited number of high-revenue developers and a limited number of high-spending users who were bestowed the epithet of "whales".

In the section of its written closings dealing both with market definition and dominance, Apple refers to this Tribunal's judgment in *BGL Holdings v CMA*. Can we go to the written closings at page 27, paragraph 77, {A1/9/29}? Apple says there:

"Market definition should be 'informed substantially by an understanding of the thinking of the persons in the market in question'."

It cites *BGL Holdings*. We agree and we say the same should apply to questions of dominance.

However, there is no evidence whatsoever to support the suggestion that Apple considered itself to be constrained by the threat of large developers or whales switching. There is no evidence that Apple carried out the sorts of analyses seen in Professor Hitt's reports.

Furthermore, in cross-examination, Professor Hitt accepted that the iOS ecosystem is "a very valuable place to offer apps" and that it is "extremely unlikely" that a developer would choose to delist from the

App Store. That is the cross-examination of Professor Hitt, {Day22/48:9-12}.

So Apple's case on this issue is nothing more than a theoretical analysis which is, as we see, divorced from the reality.

Another aspect of Apple's arguments on dominance is that Apple suggests that the weighted average commission rate paid by developers has fallen over time, and I took Professor Hitt, you will remember, through various ways of looking at that issue. But Professor Hitt himself, if we go to his second report, at {C3/4/182} -- at footnote 482, tucked away in the footnote, you will see:

"A commission rate that blends downloads and in-app payment transactions would show an increase over time."

That is not consistent with Apple not being dominant in relation to these services.

Furthermore, the headline 30% rate in the DPLA has not changed since the launch of the App Store in 2008 and a vast majority of paid transactions through the App Store are still subject to that rate. The reference for that is second Singer, paragraphs 28 to 29. So we say, if you are with us on market definition, dominance is clear-cut.

Let me move on to the first head of exclusionary abuse, which is foreclosure let me begin by disposing of

Apple's *Magill* and *Bronner* argument. What are the relevant legal principles? Well, in our submission, the consistent case law of the Court of Justice has established the following principles: first of all, the *Magill* and *Bronner* criteria only apply where a dominant undertaking refuses to give a competitor access to infrastructure that it has developed for the needs of its own business; secondly, by contrast, where a dominant undertaking does give access to its infrastructure but makes that access, provision of services or sale of products subject to unfair conditions, the conditions laid down in *Magill* and *Bronner* do not apply. But let me make that good.

In opening, I took you to the *Slovak Telekom* and *Baltic Rail* judgments and I do not need to repeat those points. There are a few other authorities I would like to show you now, just to nail this point down.

Can we go, please, first of all, to the opinion of Advocate General Kokott in *Google Shopping*. That is {AB4/33.1/11}. Could I ask you, please, to read paragraphs 83 to 89? (Pause)

Let me just highlight certain of the statements, if I may.

Paragraph 83, the strict *Bronner* criteria have only a very limited scope of application.

Paragraph 84:

"After all, those criteria are exceptional in nature and are not generally suitable for establishing the presence of abuse."

Then:

"In the special case of such a refusal, they are intended to allow for an appropriate balance to be struck between [this is important] the fundamentally exclusive use of an (intellectual) property right and the contractual freedom enjoyed by the dominant undertaking, on the one hand, and the enablement or maintenance of competition, on the other."

So I focus on the words "fundamentally exclusive use". That is where the balance falls.

87, second sentence:

"An undertaking's original incentive to invest in the facilities or (intellectual) property rights it has developed will be stimulated or preserved only if it is allowed to exploit those facilities or rights exclusively for itself."

Again, it is about exclusive use.

Then paragraph 89, {AB4/33.1/12}:

" ... the Court of Justice has already held that those criteria do not apply where -- unlike in the case that formed the subject matter of the judgment in

Bronner -- a dominant undertaking already grants access to its infrastructure ... but subjects such access to unreasonable conditions."

So that is what the Advocate General said in *Google Shopping*, and I will come back to the Court of Justice's judgment in a moment.

Taking this chronologically, the next relevant authority is the Court of Appeal's order, refusing permission to appeal in the *Alex Neill Class Representative v Sony* case, which I took you to in opening. That is at {AB3/59.1/1}. Sir, you will have seen this before because no doubt it had been sent to you. You probably gave a little bit of a whoop when you saw it. Paragraph 2 -- so this is the recent order made by the Chancellor, Sir Julian Flaux. It refuses permission to appeal, and in paragraph 2 the Chancellor said:

"The CAT correctly concluded at [124] that the applicant had failed to establish that there was an 'established legal principle to the affect that the mere existence of access issues which might arise as a result of any remedy must be established under the *Bronner* conditions, even if these access issues involve IP rights."

Then at 4 -- and this was given after the

Advocate General's opinion in *Google Shopping* had been handed down but before the Court of Justice's judgment:

"Contrary to the applicants' argument, the *Google Shopping* case in the CJEU is relevant here: both cases are concerned not with a refusal to supply but with the conditions attached to an existing supply. The opinion of the Advocate General in that case which has been issued since the CAT judgment has confirmed the narrow application of the *Bronner* Conditions and has also confirmed that the *Bronner* Conditions do not apply to a case such as the present where a dominant undertaking already grants access to its infrastructure but subjects the access to unreasonable conditions."

I would like to take you back to the opinion of Advocate General Medina in *Android Auto*. We saw it in opening but I think it is useful when we are looking at chronologically what has been happening. That is {AB4/34.1/9}.

Just again to highlight some of the points you have already seen, paragraph 35, {AB4/34.1/6}:

"It follows that ..."

THE CHAIRMAN: I am so sorry.

MR HOSKINS: We are on the wrong page. Paragraph 35, thank you:

"It follows that, according to the Court's case-law,

in order to determine whether the *Bronner* conditions apply to a case concerning a refusal to grant access, it is necessary to discern whether the infrastructure to which access is requested is to be consecrated to the dominant undertaking's own business and use and to be enjoyed exclusively by it, as a way of preserving the benefits of the investments made for the development of that infrastructure. By contrast, those conditions are not intended to apply where the infrastructure concerned is opened to other operators on the market, which, according to the Court, can result from the application of regulatory obligations, as was the case in the judgment in *Slovak Telekom*. Arguably, that must a fortiori be the case in respect of an infrastructure which is deliberately developed to be used by third-party [developers]."

Then paragraph 38:

"It follows that ... the platform to which access is requested in the present case ... cannot be considered to have been developed for the needs of a dominant undertaking's own business ... nor to have been reserved for its exclusive use. On the contrary, *Android Auto* is deliberately open and has been conceived to be shared freely and to remain at the disposal of third parties, in line with Google's purpose to attract as many 'in-car

apps' as possible so that car drivers benefit from as much assistance as possible while focusing on their driving."

Finally, paragraph 56 on page {AB4/34.1/9}. Perhaps I will just ask you to read that to yourself.

(Pause)

Then finally, the judgment of the Court of Justice in *Google Shopping*. That is at {AB4/35/1}. You will see it was handed down in September 2024. I would ask you to look at {AB4/35/20}. Could you please read paragraphs 110 to 112, please? (Pause)

So you will see that the court drew a distinction between, on the one hand, refusing access to infrastructure, to which the *Bronner* conditions apply, and, on the other hand, allowing access but making it subject to unfair conditions, to which the *Bronner* conditions do not apply. Now, this is now consistent case law. The principles are absolutely clear. They are well established. How do they apply in our case? Well, in our submission, it is quite clear that the *Magill* and *Bronner* conditions do not apply in our case.

Let me give you three reasons for that: first of all, this is not a case in which Apple has refused to give access to its infrastructure. It has given access to its infrastructure to developers, but has subjected

the use of that infrastructure to conditions, and those conditions include that developers of iOS native apps can only distribute them through Apple's own App Store; secondly, developers cannot create iOS Apps that would themselves operate as app stores; thirdly, all payments for Relevant Purchases can only be made using Apple's IAP. Those are all conditions attached to the access to the infrastructure.

The second point is this: Apple's infrastructure has not been reserved to its exclusive use. Apple's infrastructure is purposely open to other operators on the relevant markets, ie app developers. That is the whole point of it.

Thirdly, Apple has not refused access to any particular IP rights which relate specifically to app distribution or after-market services. As we have seen, the DPLA gives access to all the, quote, unquote, "Apple software" but then makes that access subject to conditions. So the alleged abuses are not about a refusal to provide access to Apple's infrastructure or indeed to specific IP rights. The alleged abuses are about the terms imposed in respect of such access.

For those three reasons, given the consistent case law of the Court of Justice, we say that the *Magill* and *Bronner* conditions clearly do not apply to this case.

So what is our case on exclusionary foreclosure?

THE CHAIRMAN: Well, are you finishing and moving on? Just before you do, can I just ask you a couple of questions about all of that? So the first question: in relation to where we see Advocate General Medina talking about the infrastructure -- and you have used that expression there -- you are using that quite broadly, I think, are you not? You are saying that it is primarily presumably the distribution services, but also the payment services -- the infrastructure is everything that happens at the App Store -- is that right? -- or around it?

MR HOSKINS: It has to. The infrastructure has to be the world that Apple has created for iOS Apps.

THE CHAIRMAN: Because, as you know, the position that Apple takes is, "Well, we might have let people use our IP in relation to making apps but that does not mean we have agreed we are going to let people onto our platform and particularly the App Store and let them do what they wish and indeed we have never done that and one of the things we have made clear is that we will never do that". Now, I think you are saying that does not matter because they are not advancing an IP rights case in relation to the App Store itself because the IP sits on the tools and the tech that the developer makes. Is

that ...

MR HOSKINS: That is why I make the third point, to meet -- if it were suggested that Apple has not allowed access to its infrastructure because, to use Apple's words in their opening submissions, it grants a limited licence, so the scope according to Apple of what can be done is limited, my response to that is the third point I have just made to you. That argument might run if Apple could point to specific IP rights and say, "We hold those for our exclusive use", but that is not what they have done. The DPLA grants a licence to all of Apple's software and then imposes conditions on the use. In my submission, the principles derived from the case law show that that is not a *Magill* and *Bronner* case.

THE CHAIRMAN: At some stage, I think possibly in the General Court, there is more of a distinction drawn between ancillary and collateral abuse and what might be a refusal to supply, but actually I think you are saying -- and I think it emerges from those authorities -- that they are really are two sides of the same coin, are they not? You obviously are not going to have abusive conduct in relation to the provision of the services if you have not given access to it, so there has to be some degree of access that has been provided before you give in to that situation; is that right?

MR HOSKINS: You are absolutely right about the General Court in *Google Shopping*. We have seen the debate -- and it is in Apple's skeleton -- about the access to the black box, etc. But what has become clear through the cases I have shown you and the Advocate General's opinions and indeed from *Google Shopping* in the Court of Justice is that that sort of distinction is not really part of the principle. The question is: has access to the infrastructure been given and has that been subject to unfair conditions?

THE CHAIRMAN: Yes.

MR HOSKINS: That is the principle that the Court of Justice has established. So it would be interesting to look at the General Court in *Google Shopping*. I do not think it is actually the law, as has now been settled by the Court of Justice.

THE CHAIRMAN: That makes sense. I think probably in that sense, where we got to in *Neill v Sony* was more based on that at this round -- their rationale, and I think you might have pointed that out to me at an earlier stage. But actually in a way I am not sure it matters because really the point is the same point, is it not, which is that, whether you look at it from the ancillary end or from the actual grant of access, you are still going into the same enquiry, which is: is this something where

access has been granted in a way that now there is an abusive condition being attached to what has been allowed?

MR HOSKINS: That is right. I mean, the language used by the court is "an unfair condition" and an example of an unfair condition is one that excludes competitors. You see that in the case law.

THE CHAIRMAN: What about the point that Apple makes about the access being provided in *Magill*, so the daily listings being available, and then the same point made in *IMS* that -- and I must have -- because I had not picked this up and thought -- directed it back to the regulatory decision in *IMS* and the supply to other -- I was not completely sure what had been supplied in *IMS* and who it had been supplied to, but it is clear that something in the bricks process is being supplied to somebody. How does that fit into the analysis?

MR HOSKINS: Well, in my submission, we have moved on a bit from *Magill* and *Bronner* in the sense that the Court of Justice has been faced with these issues and has established the principles that it has established. What Apple tried to do in its opening submissions, when I showed you *Slovak Telekom* and *Baltic Rail*, et cetera, was to point to the facts of particular cases and say, "Well, the facts of this case are different from our

case. The facts of this case are different from our case", but in our submission that is the wrong approach because what one has now is very clear principles established.

If you are with me that the principles are now clearly established and they are summarised in the paragraphs in *Google Shopping* that I have just shown you, what you do, as a Tribunal, is apply those principles to the facts of our case. What you do not do is to go back and try and recreate what happened in the past by looking at particular facts of cases and then measuring them to our case. The case law has developed, it has crystallised, there are clear principles. All you need to do is to apply those principles to our case.

THE CHAIRMAN: I hesitate to raise it, but is there a Brexit point here?

MR HOSKINS: Is there a ...?

THE CHAIRMAN: A Brexit point here, because *Google Shopping* is of course post-Brexit and you have --

MR HOSKINS: Well, you have regard to it. You are not bound by it, but you are entitled in fact ... Mr Kennedy is the expert on this. He is always putting me right, but --

THE CHAIRMAN: Well, I do not want to get into the gory detail of it. I have had quite a lot of --

MR HOSKINS: You are certainly allowed to have regard to *Google Shopping*, but you are absolutely not bound by it.

THE CHAIRMAN: But are we bound by *Magill* and *IMS* and *Bronner* in a way that constrains us, even if Google Shopping -- is *Google Shopping* an evolution of the law that we are not bound by?

MR HOSKINS: Well, it would be an odd situation if you have got the Court of Justice telling you what *Magill* means because it is not that the Court of Justice has, post-Brexit, gone, "*Magill* and *Bronner* were completely wrong, ignore them". It has developed the case law and it is telling us -- I mean, again, you see from its face, all of the authorities I have shown you, including the post-Brexit ones, are all based on *Bronner* and *Magill*, so I do not think -- if there was that break in the link, the point you are making might be a good one that might have Mr Kennedy sweating tonight, but this is just one continuous stream of application of principles.

THE CHAIRMAN: We will see what Apple says. I am certainly not inviting Mr Kennedy to get out his --

MR HOSKINS: His enjoyment of it is unhealthy, sir!

THE CHAIRMAN: Well, I mean, anyway, we may be -- I understand the point you are making. So you are saying that it is -- I mean, if that is an odd situation, it would not be the first -- as we know, it

would not be the first time it had happened. But you are saying that it is actually an evolution, but there is not a change in the law. It is just making it plain what was meant and the fact that those -- the fact that the particular facts of those cases led to their outcomes does not mean that we cannot look here at what the particular facts -- how we make a decision about how it fits into the principle. That is the submission you are making?

MR HOSKINS: Evolution, not revolution.

THE CHAIRMAN: Yes.

MR FRAZER: Just before you go on, can I just pick up a response you made to the Chairman just a few minutes ago? I think you have already answered this point. I just want to make sure. If we were to be with you on the fact that the alleged markets are separate markets for all the reasons which you have articulated a few moments ago, is there any argument that follows that, that the infrastructures which are underlying those two separate markets are so separate that the -- it could be said that no access is being given to the infrastructure which underlies the in-app payment services market even if access is being given to the infrastructure which underlies the distribution, the in-App Distribution Market, and therefore, for that reason, the *Magill* line

of cases may apply to the latter -- to the former, rather?

MR HOSKINS: Two points actually in relation to that. One is, as you have foreshadowed, the answer that -- which is the infrastructure for the purposes of these principles is not tied to market definition. You are looking at it as a matter of substance, not form, what is Apple offering as the infrastructure.

The second point again -- it is one I have already made, but there is no IP specific to payment systems. The DPLA grants access to Apple's software and no distinction is made so it would not be possible to run that case on the basis of specific IP rights.

MR FRAZER: Okay, thank you. I thought you would say that.

MR HOSKINS: Our case, therefore, applying, we say, the classic test for exclusionary foreclosure of competitors. Let us first of all identify what, in inverted commas, the "classic test" is.

Can we go to case C-377/20, *Servizio Elettrico*, {AB4/28/12}, if we pick it up at page 12. It is paragraph 61. These are the two limbs that I showed you when I opened the case:

"... in order to establish that an exclusionary practice is abusive, a competition authority must show that, first, that practice was capable, when

implemented, of producing such an exclusionary effect, in that it was capable of making it more difficult for competitors to enter or remain on the market in question and, by so doing, that that practice was capable of having an impact on the market structure ..."

That is the first limb. The second limb:

"... that practice relied on the use of means other than those which come within the scope of competition on the merits."

So let us take those two limbs separately. The first limb -- let us call it "the impact on market structure" -- in our submission it is clear that that first limb is satisfied in the present case. Let us just tease out the legal principle a bit further.

First of all, if you go to paragraph 44 of this authority on page {AB4/28/9}, if you would like to remind yourself of what that says, please. (Pause)

It is quite clear that conduct that has undermined the effective structure of competition -- and I say, for example, by excluding competitors from the market -- may constitute an abuse and also it is not necessary to show that the conduct concerned was likely to cause direct harm to consumers; for example, I say by increasing prices.

Then, if we go to the case C-680/20, *Unilever*

Italia, {AB4/31/8}, paragraphs 41 to 42, please, if you read those. (Pause)

So nothing new here. In order to establish an abuse it is not necessary to demonstrate actual anti-competitive effects. It is sufficient that the conduct had the ability to restrict competition, and that must be proved on the basis of "tangible evidence which establishes beyond mere hypothesis, that the practice in question is actually capable of producing such effects".

Now, it is actually common ground that Apple's standard terms have prevented any competitors from entering the relevant markets. In relation to distribution, can we start with the Singer/Sweeting joint expert statement? That is {C4/2/29}. It is proposition 25. You see the proposition is:

"Apple's App Distribution Restrictions require iOS App Developers to use the App Store as the exclusive distribution channel for iOS Apps on iOS Devices."

Dr Singer:

"Agree. Apple has prohibited all other alternative forms of iOS App distribution outside the App Store."

Professor Sweeting:

"Agree."

Then if we look at the proposition 26, just further

down that page, and you look at Professor Sweeting's second comment, he says:

"Second, under Dr Singer's purported iOS App Distribution Market which does not include App Distribution Services on non-iOS devices, then the App Distribution Restrictions do exclude competitors from offering alternative iOS App Transaction Platforms that compete with the App Store."

This is common ground.

There is a similar picture in relation to payment services. If we go to page 36 of this joint statement, {C4/2/36}, proposition 35:

"Apple's Payment System Restrictions require iOS App Developers to use Apple's ASPS/IAP for Relevant In-App Purchases and Relevant Subscription Purchases."

Dr Singer: "Agree". Professor Sweeting: "Agree".

If we can go over the page, please, {C4/2/37}, Professor Sweeting's third comment:

" ... under Dr Singer's purported iOS In-App Aftermarket, which does not include payment systems outside of an iOS App, the Payment System Restrictions do Exclude competitors from offering alternative Payment Systems that compete with ASPS/IAP."

Furthermore, Professor Sweeting accepted that this affected the structure of competition in the In-App

After-market. If we go to the transcript for {Day19/184:1}, this is the cross-examination of Professor Sweeting, so right at the bottom of the page, line 25, {Day19/184:25}:

"Question: Can we go to the joint expert statement, please."

If possible, can we have pages 185 and 186 up at the same time? I would invite the Tribunal to read page 185 and page 186 to line 5, please. (Pause)

So you see at the bottom of page 185, I say, {Day19/185:24}:

"Excluding competitors from offering alternative payment systems also clearly has the potential to affect the structure of competition, does it not?"

Professor Sweeting, {Day19/186:2}

It will have -- yes."

So that is all common ground.

What else is common ground is that, in relation to app distribution, Professor Sweeting accepted that entry by competitors would be likely in the counterfactual. If we go to his first report, bundle {C3/3/142}, if we could have that and the next page up at the same time, please, {C3/3/142-143}, I would invite the Tribunal to remind itself what Professor Sweeting said in paragraphs 309 and 310. (Pause)

Common ground.

In relation to payment services, it is also clear that entry by competitors would be likely in the counterfactual.

If we go to -- sorry, stay in this first report of Professor Sweeting and go to page {C3/3/126}, and it is paragraph 277, if we could have that up, please. If you would read that to yourselves. (Pause)

Then to the Sweeting/Singer joint expert statement. That is {C4/2/75}, proposition 105:

"In the Primary Counterfactual and the Payment System Counterfactual, multiple iOS Payment Systems could facilitate Relevant In-App Purchases and Relevant Subscription Purchases."

Dr Singer: "Agree". Professor Sweeting: "Agree".

Mr Burelli's evidence was to the same effect. If we go to his cross-examination, {Day9/112:1}, it is lines 6 to 14, {Day9/112:6}:

"I mean, if you operate in the industry, this is ongoing evolution; it is something that is happening completely all the time. I did not deem it relevant to state the obvious. I mean, this is a market where right now players cannot operate. If they were to operate, it is highly likely, as we have seen in all other parts of the acquiring and acceptance industry, that some player

would step in. Everything is driven by market opportunity."

Mr Owen's evidence was that Apple had received many requests over the years from iOS app developers to use the Paddle solution, and that is first of all in his paragraph 17 -- we do not need to look it up, but for your reference it is {B1/1/6}.

Another factor which is relevant to exclusion is that the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure. If we can go, please, to {AB6/6/4}, this is the European Commission's Article 82 EC Enforcement Guidelines. I would ask you to look at paragraph 20, the first bullet:

"The Commission considers the following factors to be generally relevant to such an assessment:

"The position of the dominant undertaking: in general, the stronger the dominant position, the higher the likelihood that conduct protecting that position leads to anti-competitive foreclosure."

In this case, Apple has 100% of both iOS App Distribution Market and iOS In-App Aftermarket.

Then the fifth bullet, which is, "the extent of the allegedly abusive conduct", you will see it in the next column:

"in general, the higher the percentage of total sales in the relevant market affected by the conduct, the longer its duration, and the more regularly it has been applied, the greater is the likely foreclosure effect."

In the present case, Apple's restrictions have eliminated all competition in the relevant markets since 2008 for app distribution and 2009 for in-app payments. So, again, you take all the classic indicators of anti-competitive foreclosure and they are all met several times over here.

Is this a good time for a break?

THE CHAIRMAN: Yes. We will take a ten-minute break. Thank you.

(11.47 am)

(A short break)

(11.57 am)

THE CHAIRMAN: Yes, Mr Hoskins.

MR HOSKINS: I would like to come on to Apple's tools and technology arguments. I am going to actually deal with it in two different places. I am going to deal with it now because they raise it as a foreclosure argument and I have some more to say about it when we come to the question of the overcharge in the counterfactual. But I am still, at the present moment, in the foreclosure

part of my submissions and let us see what Apple say about this. It is at page 60 of their written closings, {A1/9/60}, and if you could remind yourselves please of what is said at paragraphs 176 to 178, {A1/9/62}.

(Pause)

Just to tease out what the argument is, first of all, paragraph 176, Apple says that in the counterfactual it "would continue to charge for its tools and technology, and developers would continue to pay for it even if they were to use alternative app marketplaces for the distribution of apps or for payment services". Then at the end of paragraph 176, they say:

"By way of illustration only [and I emphasise those words] ... Apple could offer disintermediated prices, such as a (i) a fee in respect of its tools and technology comprising, say 10% on paid downloads and In-App Purchases, and (ii) an additional fee, say 15.2%, where Apple distributes the iOS App via the App Store and handles payment services."

Then thirdly they say that any undertaking that wished to compete with Apple would need to make it worthwhile for developers to pay them for those services on top of the developers having to pay for Apple's tools and technology.

The punchline is at paragraph 178. They say that

the likelihood of competitors entering the market in such circumstances would be slim.

With all due respect, that chain of argument is nothing more than tendentious speculation and, in our submission, it should be given short shrift for the following reasons.

First of all, the argument that the total sums paid by developers would have been the same in the counterfactual would not be sufficient in itself to defeat a finding of abuse because, as a matter of law, as we have seen, it is not necessary for the Class Representative to establish an effect on the prices paid by consumers in order to establish an infringement. It is sufficient to show capable of harming the structure of competition or affecting the structure of competition. So that means that, with this argument, Apple must go further and must say that prices would have been the same in the counterfactual and that this would have prevented any possibility of entry by competitors. That has to be the argument.

The second point is that Apple was on notice from the start of these proceedings that, if it wanted to rely on an argument of this sort, it would have to be properly evidenced, so I would like to show you the statements of case.

First of all, Apple's defence, {A1/2.1/35}, and I think it is page 35. That is right, thank you, and it is 128(b). So Apple said:

"Second, the various aspects of Apple's ecosystem (not limited to the App Store and its commerce engine but including all other elements of Apple's interaction with developers and end-users) are interconnected."

I might say as an aside that there is a description of the infrastructure there.

"Paragraph 30 above is repeated. It is therefore also necessary to consider what changes Apple would have made to the structure of its ecosystem generally, including both non-price elements of the ecosystem and its charging structures specifically, when constructing the relevant counterfactuals. In particular, if the consequence of removing one set of restrictions or the other was that many developers chose to free-ride on Apple's technology by selling digital content to iOS Device users without paying similar levels of commission to those that they paid in the real world, Apple would have been entitled to introduce new charges or increase the level of existing charges, in order to reflect the economic value of the ecosystem that it provides to developers and end users. Apple would not have simply left the remainder of the ecosystem and the terms and

conditions that apply to it unchanged."

So you will see the general allegation in relation to alternate, new or increased charges. I will show you what we said in response to that. This is our reply, {A1/3/23}. It is paragraph 50(c). So:

"Further, as to sub-paragraph (b) [and this is 128(b), so it is the one I have just read to you], the allegation that Apple would have been 'entitled' in the counterfactual to 'introduce charges or increase the level of existing charges' is embarrassing and liable to be struck out for want of particularity. Pending proper particularisation, the allegation is denied."

But having failed to give any particulars of this argument in its pleaded case, Apple has also failed to address the issue in its witness and expert evidence before the Tribunal.

The third point is that, as a reflection of the submission I have just made, during the trial both Professor Hitt and Professor Sweeting made clear that they could not say what charges Apple would introduce in the counterfactual, ie what type of charges Apple would introduce in the counterfactual, or what level they would be set at. That is their own experts. I will not read them all out, but the references are provided at paragraph 128 of our written closings and it is

references to the hot tub.

So the argument, as I have set it out and I have shown you that Apple wishes to make, breaks at the first link in the chain of speculation because they do not have any evidence of what the new charges would be or what level they would be at.

Finally for the moment on this point -- as I say, I am going to come back when we come to the overcharge -- but, as I have already shown you, Professor Sweeting's opinion is that entry by competitors would be likely in the counterfactual. As I also showed you, he accepts that preventing competitors from entering in the factual affected the structure of competition in the relevant markets. Again, that evidence from their own expert is simply not consistent with the argument that Apple is now seeking to run in its closing submissions. It does not have the evidence for this argument and it contradicts the evidence it does have from its own expert on foreclosure.

THE CHAIRMAN: Can I ask you about counterfactuals in this context? What you have not said is that you do not need a counterfactual for this exercise. I was not sure if you were drifting towards that when you were talking about the *Servizio* conditions. What is your position in

relation to what the correct counterfactual for us is here?

MR HOSKINS: What is the correct counterfactual?

THE CHAIRMAN: Yes, for us to look at for the purposes of making the assessment as to whether or not the restrictions are capable of affecting market structure.

MR HOSKINS: So capable of affecting market structure, the counterfactual is whether it is likely that competitors would have entered absent the restrictions.

THE CHAIRMAN: So you say that, for the purposes of this exercise -- I am sure you are going to come on to other counterfactuals -- but at this stage of the analysis, all we are really interested in is the question of competitive entry?

MR HOSKINS: Yes, absolutely. Now, Apple wants to put forward a different, more complicated counterfactual, which is the tools and technology one I have just dealt with --

THE CHAIRMAN: Yes.

MR HOSKINS: -- because -- they have to do that as a response to our entry counterfactual, and you have my submission that they cannot make it fly because they have no evidence as to what the level -- whether there would be any new charges, what they would look like, what the level would be -- so they cannot defeat our

counterfactual, which is that it is common ground that there would likely have been entry.

THE CHAIRMAN: Do you accept that, if they were to be able to establish that the consequences of whatever they say in their counterfactual would mean no new entry, then that would actually answer the point? In other words, you say -- I mean, I appreciate that is basically assuming that --

MR HOSKINS: It is going to be used against me, as soon as I say that. But to test it, yes, absolutely the focus of this is on new entry. If Apple could present a case to you, a convincing counterfactual that persuaded you that there would not be new entry in the counterfactual and you accepted that, then that would defeat this argument.

THE CHAIRMAN: So we are not really -- we are really -- when we argue about the counterfactual here, on your submission -- I am sure Apple may have things to say about this -- but on your submission we are really arguing about how you get to that question. They go off on a particular path which talks about total costs, other costs and so on; you are saying it is actually much easier than that because Professor Sweeting has accepted it and it is, you would say, fairly obvious just from the nature of the restriction. But if they

went on that path and ended up with some evidence, then obviously we would be entitled to take that into account.

MR HOSKINS: Sure. If you are persuaded that the counterfactual is that there would have been no entry and, remember, the test is capability affecting the structure of competition -- if you are persuaded, then -- we are agreed on what the issue is.

THE CHAIRMAN: Yes. Thank you.

MR HOSKINS: Capable of preventing or restricting competitive entry, to put it in a nutshell.

THE CHAIRMAN: Thank you.

MR HOSKINS: As I say, I am going to come back to some more points on tools and technology, but I think they fit better in the damages part of the piece, but obviously --

THE CHAIRMAN: Yes, I am sure. I am sure we have not heard the last of them.

MR HOSKINS: -- they read across.

Before I leave the issue of foreclosure, I should say a brief word about App Review. Can we go to Apple's written closings, paragraph 206, at page 68, {A1/9/70}. You will see the heading, "Dr Kent's case as to security in the counterfactual", and Apple suggests:

"... Dr Kent advances a case in the counterfactual

in which Apple would: (i) vet all iOS App developers; and (ii) conduct full App Review of all iOS Apps before they are distributed."

Apple goes on to suggest that, {A1/9/71}:

"This scenario would have significant implications for the analysis of competition in the counterfactual."

This is the foreclosure counterfactual, so again we are talking about what we have agreed is the issue: capability of preventing or restricting competitive entry in the counterfactual.

But, in our submission, this issue relating to App Review does not move the dial on the foreclosure analysis in any way. The question of what alternative approach Apple could adopt to security was explored by us in cross-examination in the context of objective justification and it is common ground that prima facie abusive conduct cannot be justified if it is not necessary or proportionate. To assess that, you have to take into account whether alternative measures could be adopted and be less restrictive of competition. That is part of the exercise inherent in the objective justification issue and that is what was being explored in cross-examination.

Again, this issue of App Review could only be relevant to the issue of foreclosure if Apple could

satisfy the Tribunal that it would review all apps in the counterfactual, that it would charge for that review and that the charges would be so high that no competitors could or would enter the distribution or payment markets. It has to be the same type of argument as tools and technology.

But this argument based on that review is even more speculative than the tools and technologies one. Apple has not produced any evidence to establish that it would review all apps, that it would charge developers for such a review, let alone what the level of such charges would be, so this just does not get off the ground as a foreclosure argument.

THE CHAIRMAN: So I think they go on, do they not -- if I am thinking about it in the right place, they go on and talk about sort of quality adjusted competition, so they are saying that, if you have a centralised App Review for everybody in the counterfactual, then there would be less incentive to compete so it is a less competitive environment. But you say that is just -- that is like a normal effects analysis in a -- I do not know -- some other context, but in this context that is not the right effects analysis. That is the point you are making, is it?

MR HOSKINS: Sure. I mean, the fundamental question of

foreclosure is preventing likely entry... or restricting likely competitive entry. Now, if in a particular scenario people would come in and there would be central App Reviews, so they were competing on less parameters than might otherwise be the case, there is still plenty of competition here. There is price, there is privacy, there is quality, there is innovation. You know, it is absolutely by no means -- even if you were satisfied that there would be centralised App Review for everyone in the foreclosure counterfactual, there are still plenty of parameters of competition and it is quite clear that in that world there is still an awful lot more competition than we have at the moment, which is zero.

THE CHAIRMAN: Yes, thank you.

MR HOSKINS: If I can come to the second limb, then, of this foreclosure test, which is competition on the merits, does Apple's conduct come within the scope of competition on the merits. You have what we say is the legal test for this, but let us -- it is important so let us remind ourselves.

If we go to the Court of Appeal's judgment in *Royal Mail v Ofcom*, {AB3/42/5}. (Pause)

I showed you this in opening. I showed you paragraphs 17 to 20. The test is laid down very

succinctly by the Court of Appeal at 18:

"The concept of 'normal competition' (or, as it is more usually termed nowadays, 'competition on the merits') means competition on price, quality, choice and innovation."

In our case, if we are looking at the relevant product market, so iOS app distribution, iOS payment services, Apple quite clearly has not excluded competitors from those markets by competition on price, quality, choice or innovation. It excludes competition on those markets by means of the standard terms and provisions which it imposes on all developers who wish to distribute iOS Apps. That is not competition on the merits. Apple does not compete on the merits with potential iOS app distributors or payment service providers on these relevant markets. It simply excludes them altogether by virtue of contractual terms, so there is no competition on the merits in an iOS app distribution or payment services markets.

Apple also seeks to rely on competition in the devices market. It says, "This is how we choose to compete in the devices market". But that cannot amount to competition on the merits for these reasons. Insofar as Apple might be able to compete more effectively on the devices market by means of conduct on the iOS app

distribution and payments markets, that competition on the devices market would not be the result of competition on the merits. Apple's position on the devices market would be improved by excluding all competition in the markets in which Apple is dominant; ie the distribution and payment services market. That would be done by means of exclusionary terms imposed on developers. That is not competition on the merits, on the devices market either.

Having a situation in which you leverage your market power in markets in which you are dominant on to a different market is not competition on the merits. It cannot be the law that prima facie abusive conduct on the markets in which Apple is dominant can escape prohibition because it permits Apple to compete more effectively in another market in which it is not dominant. That cannot be competition on the merits.

So I am not going to say very much on competition on the merits, but I do not think it is a very difficult issue. All we are talking about is standard terms and conditions. That is not competition on the merits because it is clearly not from the Court of Appeal's test.

I was going to move on to tying, unless there are any other foreclosure questions you had for me.

THE CHAIRMAN: No, thank you. Sorry, let me just tidy up.

MR HOSKINS: As you are aware, our case is that Apple's IAP is the tied product and the App Store is the tying product. The four grounds that have to be fulfilled to establish tying in this case are not in dispute. We agree them.

The first ground is that Apple must be dominant in the market for the tying product, ie the App Store. I have already dealt with dominance. There is nothing else to be said.

The second condition is that the tying and tied products must be distinct products with separate demand, and I have already dealt with this in the context of market definition. If the Tribunal finds that there are separate markets for iOS App Distribution Services and iOS In-App Aftermarket Services, we say it follows that the App Store and the IAP are separate products which exist in separate markets. Mr Frazer, you had the answer to -- my answer to your question earlier about the impact, if you are against us on that.

The third condition is that customers must not be given a choice to obtain the tying product, ie the App Store, without the tied product, the IAP. That is the so-called "coercion condition", and I will address that in a minute because that is the only thing I really

need to address specifically now.

The fourth condition is that the tying must foreclose competition and I have just addressed you on that.

So let us look at the so-called "coercion condition". In this case, customers cannot obtain the tying product, which is the App Store, without also acquiring the tied product. That is the IAP. That is because all developers, whether they intend to charge for apps or not, have to enter into the DPLA and it is the DPLA which contains the obligations to distribute iOS Apps only via the Apple's App Store and to use the IAP if the developer wishes to offer in-app purchases or subscriptions.

What is important is to understand that the fact that a developer, having signed the DPLA, can choose not to offer in-app purchases or subscriptions is both economically and legally irrelevant, and it is economically irrelevant for the reasons set out in the Singer/Sweeting joint statement, {C4/2/48}. It is proposition 56:

"A requirement that a customer must not buy the tied product from other firms is a tie, regardless of whether the customer actually purchases the tied product from the tying firm."

Professor Sweeting:

"Agree. This is known as a negative tie."

That is the economic position. The legal position is set out in case T-201/04, *Microsoft*. That is {AB4/14/292}. It is paragraph 970, if you read that, please. (Pause)

THE CHAIRMAN: Over the page, please, {AB4/14/293}.

Yes.

MR HOSKINS: So it is our position that the law and for once the economic theory matches and it is quite clear that the coercion condition is satisfied in this case.

I am going to move on to objective justification now. It is common ground that a dominant undertaking may provide justification for conduct that would otherwise be abusive if it can demonstrate that its conduct is either objectively necessary or outweighed by advantages in terms of efficiency which also benefit the consumer. It is also common ground that Apple bears the burden if it wishes to rely on any of those two justifications.

Let me start with the efficiencies justification. If we go to Apple's written closings, please, at page 109 {A1/9/111}, you will see Apple says, under the heading "Efficiencies":

"By contrast with objective necessity, the

efficiencies defence has four conditions."

The fourth of those conditions is that:

"... the efficiencies must not eliminate effective competition by removing all or most existing sources of actual or potential competition ..."

So it is common ground also that Apple cannot rely on the efficiencies justification if its conduct eliminates effective competition by removing all or most existing sources of actual or potential competition. We are agreed on the law there.

In the present case, the distribution and payment restrictions have eliminated all competition in iOS App Distribution Market and iOS In-App Aftermarket. So Apple's argument that it can rely on the efficiencies justification falls at that hurdle.

If we can go to page 132 of their written closings {A1/9/134}, they run a different argument in relation -- I am sorry. This is still objective justification. I am going to come to necessity in a minute. So you see the heading, "The Requirements do not lead to an elimination of competition". This is Apple pushing back on the point I have just made. At paragraph 412 they say:

"For the purposes of Apple's efficiencies defence, the Requirements have not caused an elimination of

competition even in Dr Kent's alleged product markets.

"This aspect of the test for objective justification for efficiencies ought to be construed very narrowly, such that conduct is only incapable of justification where it serves to eliminate all competitive constraints in the relevant market. Any other construction would lead to absurd results. It would mean that no technology company could ever build an integrated operating system and device and then maintain control over what gets distributed on grounds of security."

Now, the suggestion that the test for objective justification for efficiencies ought to be construed very narrowly is an extraordinary one because we are in a scenario where there is a prima facie abuse and it is quite clear that the justifications, such as they are, are very difficult to satisfy. It is also very clear that it is certainly not the case that they should be construed very narrowly and the absence of any legal authority to support that submission is both telling and unsurprising.

Apple then suggests that not following its suggestion would lead to absurd results because they say, "Well, no technology company could ever build an integrated operating system and device and then maintain control", et cetera, but that statement is just

obviously incorrect because we are only considering the conduct of a dominant technology company, not all technology companies. It is well established that conduct that might be acceptable on the part of a non-dominant company may not be acceptable for a dominant company. It is also quite clear that conduct that was acceptable at the outset from a non-dominant company may become unacceptable if the company becomes dominant. So this sort of in terrorem argument about absurdity, it is just glib. It does not really go anywhere.

On page 133, which -- at the bottom of that page, paragraph 415, {A1/9/135}, Apple says that:

"The evidence shows that Apple is still subject to competitive constraints (even if those competitive constraints are insufficient to rebut Dr Kent's case on market definition, dominance and prima facie exclusionary abuse)."

Now, the fact that Apple may be under some indirect competitive pressure from outside the relevant product markets we say is legally irrelevant in circumstances where Apple has eliminated all competition for the products or services concerned, ie App Distribution Services and after-market services. In circumstances where any of the out-of-market constraints have been

found insufficient for the purposes of market definition and dominance and exclusionary abuse, the idea that such weak indirect competitive constraints from other markets could justify prima facie abusive conduct in the relevant markets is simply not credible as a matter of law. So that is the efficiencies heading.

In relation to objective justification, our case is that it is not possible to rely on objective necessity where the dominant undertaking's conduct has eliminated competition, and we see that if we go to case C-333/21, *European Superleague*. That is {AB4/34/45}.

If you look at paragraphs 201 to 203, please. I took you to these in opening and I would like to revisit them. (Pause)

It is the last sentence of paragraph 203, where the point is made clear. (Pause)

Apple cannot rely on the objective necessity justification because its conduct has eliminated all competition from third party undertakings. Now, to try and avoid the inevitable, Apple cites paragraph 183 of this judgment. That is page 41 in its written closings. If you would read paragraph 183, please, {AB4/34/41}. (Pause)

Apple relies, as you have seen in its written closings, on *Wouters*, *Meca-Medina* and

Ordem dos Tecnicos. It says that there is not an elimination of competition issue there and therefore elimination of competition does not arise in the context of objective necessity. But, on the contrary, what one sees in this judgment, both in the paragraphs I took you to and paragraph 183, is that the court is, of course, fully aware of all the relevant cases, including *Wouters*, *Meca-Medina* and *Ordem dos Tecnicos*, and the statement of principle in relation to elimination of competition could not actually be clearer, not only in paragraph 183, in the context it is dealing with, but in the context -- in relation to paragraph 203, in the specific context of objective necessity, which is what we are actually concerned with.

THE CHAIRMAN: This is about ancillary --

MR HOSKINS: That is right.

THE CHAIRMAN: So ancillary restraint?

MR HOSKINS: Yes.

THE CHAIRMAN: This is -- as I recall, this is bringing together different strands, is it not, where you have this supporting and -- the supporting line of authority, if you like, and then the other line of authority -- is that right? -- and they are bringing it together.

MR HOSKINS: It is bringing it all -- yes. Quite clearly, what the Court of Justice is trying to do in this

judgment is to set out the law and it is bringing together -- you are absolutely right -- the sports law cases and general competition cases and it is also seeking to introduce consistency between the two heads of objective justification, ie objective necessity and efficiencies, and it is also trying to introduce consistency between the 102 justification and 101(3). There is a very deliberate exercise by the Court of Justice. It is trying to bring it all together and say, "This is the law".

THE CHAIRMAN: Yes.

MR HOSKINS: So in our submission it is quite clear from *European Superleague* that you cannot rely on objective necessity where the conduct has eliminated all competition and Apple has eliminated all competition in the relevant markets, so both the attempt to rely on efficiencies and the attempt to rely on objective necessity fail for that same reason.

But there is an additional reason why Apple cannot rely on objective necessity. If you go back to our skeleton argument, {A1/4/41}, can you please remind yourselves of what we said in paragraphs 131 and 132?

(Pause)

Then paragraph 137, please.

THE CHAIRMAN: 137, did you say?

MR HOSKINS: 137, yes, {A1/4/42}. (Pause)

So actually this is -- actually what is at the core of the objective necessity test is that the restrictions you rely upon have to be essential and necessary for the carrying out of the operation -- and not just the particular operation of the dominant company, but of that type of operation. I showed you in the opening the *MasterCard* cases domestically in the Court of Appeal and the House of Lords, the Supreme Court, that make that point.

But let us see what Apple say in relation to that. Their written closings, page 106, {A1/9/108}, it is paragraph 333:

"To be objectively necessary, the conduct in question must be necessary to the achievement of a legitimate objective and be proportionate to it: *Servizio*."

Then they say:

"Objective necessity under Article 102 TFEU closely resembles the same concept, also known as ancillary restraint, under Article 101(1) TFEU ..."

Now, that is the point we were making. It is the point I made to you in opening, that 102 objective necessity has been brought together with 101 ancillary restraint by the Court of Justice in

European Superleague, which means that, in order to rely on objective necessity, you have to show that restrictions are necessary for the type of operation. In our submission, as you have seen, it is not necessary; witness the DMA, where the same restrictions are not in place and yet Apple still carries on with its operations.

I have to confess -- I am sorry if I have missed it. I will be corrected when Apple makes its submissions -- but Apple does not appear to address our argument that the restrictions are not essential to the operation of an app store or the facilitation of in-app payment services in its written closings. I am sure I have just missed it or they will deal with it orally, but at the moment we have made that point and it is unanswered, as far as I can see.

Now, if you are with us on these points -- if this is not a sweetener, I do not know what it is -- there is no need to get into the details of Apple's arguments on justification. However, if you are against us on those points, we have then dealt with the arguments that would arise in appendix A of our written closings and Mr Kennedy is going to address you on them when I am finished, so just to carry on in case those points do not land.

Turning now to the question of overcharge and the overcharge counterfactual, it is dealt with at paragraphs 127 to 171 of our written closings. Again, I am just going to highlight certain points now.

The first point is the broad axe. Under the broad axe principle, the balance of probability test is not applicable to the measurement of loss and that means that difficulties in assessing damages do not mean that damages should not be awarded. It means that the Tribunal must do the best it can on the evidence available.

The second point is the issue about whether the Tribunal should adopt the primary or delayed counterfactual, and, as I explained in opening and as is set out in our skeleton and our written closings -- we have set out the authorities -- as a matter of law it is open to this Tribunal to assume, for the purposes of the damages counterfactual, that Apple's app distribution and Payment System Restrictions were not present prior to the beginning of the relevant claim period in 2015, ie you can assume they were not there for an earlier period than the claim period, and that is what we have called the "primary counterfactual".

It is quite clear from the authorities that, if you were to adopt the primary counterfactual, that would not

require you to make a formal finding of dominance or abuse in respect of the period prior to 2015. The authorities make that clear.

In our submission, adoption of the primary counterfactual in this case would again be consistent with the CMA's framework to counterfactuals. If you go to the CMA's skeleton at {A3/4/12}, paragraph 43 -- now, the CMA is not dealing with damages as such; it is dealing with counterfactuals. But what the CMA says in relation to counterfactuals is:

"For the purpose of casting light on the effect of the conduct in issue, the CMA does not consider that it will generally be appropriate to compare the effects of the conduct in the actual world with a counterfactual world in which some of those effects are still present -- because the conduct is assumed to have been in place up to the start of the alleged infringement period. Rather, it will generally be appropriate (and more informative) to compare the effects of the conduct in the actual world with a counterfactual world in which the conduct and its effects have been fully removed."

We agree with that.

THE CHAIRMAN: Just on this point about counterfactuals, the primary counterfactual and the position as at the -- whatever it is -- I cannot remember -- 1 October, is it?

MR HOSKINS: I think it is --

THE CHAIRMAN: Whatever it is; in other words, the distinction between, if it is 1 October, 30 September and 1 October, and then of course the question as to what at any point in time the position was earlier than that.

You, as I understand it -- but perhaps we should have a look at your submissions on this in a bit more detail, but, anyway, I think we would be interested in this and would like to know a bit more about it. As a starting point, I was not sure that *National Grid* helps us very much in this context, partly because I do not think it necessarily reads over to a damages counterfactual, I think we are now moving into a different exercise of counterfactual, and also partly because I am not entirely sure you are saying we do not need a counterfactual. You are just saying that -- I think you are saying that we can just -- we can reach a conclusion in relation to this aspect of it.

MR HOSKINS: So *National Grid* was a very light reliance(?) to show that it is for the Tribunal to use counterfactuals in the way it finds helpful.

THE CHAIRMAN: Yes.

MR HOSKINS: It is not the other way round. It is not that there is law on counterfactuals and you are hidebound

and must do certain things. You can, should, will, use counterfactuals as you find helpful.

THE CHAIRMAN: So when you get into the damages analysis, does that still hold good, though? Obviously we are going to choose, we hope, a counterfactual that we think will be helpful. But in a damages -- I mean, there is plenty of law on what "but for" means in the damages analysis, is there not, and where that takes you. Are we not really very much in the position of trying to work out what we think the position would have been, but for the infringement?

MR HOSKINS: Absolutely. You have to be because of the nature of tortious damages, which is to put the victim in the position he would have been if the wrong had not occurred, which is by definition a counterfactual.

THE CHAIRMAN: Yes, yes. So our flexibility to some extent disappears at that point, does it not? Maybe that is the wrong way of putting it, but certainly the degree of choice we might have about how useful we found at an earlier stage --

MR HOSKINS: I think it goes to the type of counterfactual, no strict rules, but I absolutely do not demur from -- the whole concept of tortious damages is based on considering what the position would have been absent -- and by any other name, that is a counterfactual.

THE CHAIRMAN: But I do not think, as I understand it, there is anything that tells us what the answer is to this particular problem; in other words, there is no authority that has said that we are entitled or not entitled to make any assumption about what the state would have been on 30 September, other than the points which I think you do make about illegality and the nature of the abuse.

MR HOSKINS: Let me just ...

We certainly cite -- there are authorities we cite in the skeleton and I think we repeated them in the written closings and there is the CMA's skeleton in this case. I just think the authorities might go further than you just suggest, which is why --

THE CHAIRMAN: No, that is what I would like to explore with you. That would be helpful. I think the CMA -- obviously the CMA's current view is interesting, but their perspective on this is applying it in a regulatory context, which is, I think, thinking about counterfactuals in a different way from the one we have just discussed.

MR HOSKINS: It is, as I accepted. There are statements about counterfactuals and they are made in different contexts, and some of them you will find useful for this particular damages counterfactual and some, I think, you

might think are too far removed. But in terms of general statements about the use of counterfactuals, you are entitled to have regard to them even if it is a counterfactual dealing with infringement rather than damages, et cetera.

THE CHAIRMAN: Yes. Do you want to give us the reference? I have 133 in my note from -- I do not know if we can have that up.

MR HOSKINS: From our ...?

THE CHAIRMAN: From your closing.

MR HOSKINS: Closing, yes. Let me just --

THE CHAIRMAN: Unless you want to give us the reference in your openings, which I have not --

MR HOSKINS: I think the skeleton might be ... I can remember drafting it in the skeleton with the same point. Can we go to our skeleton? I just need to get the page number for you.

THE CHAIRMAN: Yes. I had paragraph 133 is where you were dealing with this or round about there. (Pause)

MR HOSKINS: So {A1/4/46}, please.

So 149 is about why they are useful. 150 is *National Grid*. If we can go over the page, please, {A1/4/47}:

"A counterfactual that would itself breach competition law could not be an appropriate one."

So if you take the position that -- you do not have to make a formal finding of dominance and abuse pre-2015 to be able to form the view that it is likely that there was, because of the similar conduct, a similar competition problem prior to 2015, and then, when you come to decide on your own damages counterfactual, you can say, "Because of the situation prior to 2015, we deem it appropriate to assume that these restrictions were not in place from an earlier date than 2015". So it is more -- you know, "Is there nothing on this at all?". I appreciate there is not the same case where you have got a date and you look at it, but these principles, in our submission, do indicate that that is both permissible and indeed potentially desirable.

THE CHAIRMAN: Is the exercise -- because, of course, of the difference between the primary and the secondary, the delayed counterfactual is that the delayed counterfactual recognises there is imperative time in which competition might emerge on your case and --

MR HOSKINS: That is right.

THE CHAIRMAN: -- so are we engaged in a thought experiment that says, "Can we be confident that there was an abuse sufficiently before October 2015 to allow that process to have worked out?". But you also, I think, are saying, as a matter of principle, we should -- is that

what 152 says, that as a matter of principle we should not allow the damages to be reduced effectively by reliance on what is likely to have been abusive behaviour before? Was that the point that you are making?

MR HOSKINS: That is right.

THE CHAIRMAN: So it is not just an exercise -- you can see where --

MR HOSKINS: All the things you have said to me I agree with. So the exercise is: should the appropriate counterfactual take account of the fact that this conduct has been in place since 2008/2009 or should we just ignore it? What does justice require? That is a rhetorical question for me. Then, when you come to answer that question, you have to look -- without being required to make a formal finding of dominance or abuse prior to 2015, consider how likely is it that the conduct which was consistent was, in fact, tainted by similar illegality at some stage prior to 2015. Again, you do not even need to fix the particular date, in our submission. It could be from the date it was introduced, which is what Dr Singer believes -- he thinks it was locked in from day 1 -- but it could also be the case that you think, "Well, we can see that the App Store took a year to get off the ground", and you

have seen the charts where it literally goes off the charts. You might come to the conclusion, "Actually, by 2010, given these restrictions were in place, given the figures we have seen about its success, clearly we are into this competition concern that is the very subject of this trial".

THE CHAIRMAN: Your case is that -- obviously your primary case is the primary counterfactual. That is what you are arguing for.

MR HOSKINS: That is right, absolutely. It is the primary counterfactual, whether that is from day 1, introduction of the App Store, 2008, introduction of paid in-app purchases, 2009, or shortly thereafter, but sufficiently before 2015 for the Tribunal in its counterfactual not to assume that the restrictions were in place right up until the beginning of the claim period.

THE CHAIRMAN: Am I right in thinking that the consequence of the difference -- one consequence of the difference between primary and delayed is that you might be looking at incidents in a different way as well? Is that right? Have I got that right? Is that common ground? So that, if you are in the delayed counterfactual, you might be asking yourself the question as to whether there had been a reduction, whereas in the -- I have forgotten. Now I have got that back to front, have I not? Yes,

whether there had been a reduction whereas in the primary you are actually asking yourself the question as to, it never having been there, what would be the effect of adding it on.

MR HOSKINS: I am going to leave the answer --

THE CHAIRMAN: Fine.

MR HOSKINS: -- to that question to Mr Ward, otherwise he will kill me if I get it --

THE CHAIRMAN: Yes. He is lodging(?) somewhere, I am sure, so -- yes, that is fine.

MR HOSKINS: It is noted that you need an answer to that question.

THE CHAIRMAN: Yes. Well, I think what I -- I think that is the Apple position, so I really am more interested in whether it is common ground or whether it is a matter of dispute. Yes, good. Thank you.

MR HOSKINS: In a sense, the discussion we have just been having and the submissions I have just been making I think will be reflected in the submissions I am about to make to you, about why we say it would be appropriate to adopt the primary counterfactual in this case.

THE CHAIRMAN: Yes.

MR HOSKINS: There are really three reasons, principal reasons, we rely upon.

First of all, the distribution restrictions have

been in place from day 1, ever since the launch of the App Store in 2008. The payment restrictions have been in place ever since the introduction of in-app purchases in 2009. Both sets of restrictions have excluded all competition in the relevant market since those dates. That is number 1.

The second point is that, as we have seen and as indeed Mr Schiller told us in his cross-examination, the App Store was spectacularly successful from its launch; and in our submission, for the purposes of assessing quantum, it would be reasonable to assume that Apple was dominant in these iOS-specific markets, from the date of its launch or shortly thereafter, and that is sufficient for our purposes; but well in advance of 2015.

The third point is that, as Dr Singer explained in his evidence, even if it is the case that Apple was not dominant in the devices market at the time of the launch of the App Store in 2008, the consumers who had bought iPhones in that early period were already locked into the Apple ecosystem because of the cost and difficulty of switching from one type of smartphone to another. Having bought your very expensive smart, shiny new iPhone, his five stickiness points apply with even more force, if you like, at that early stage.

We have developed it further in the written

closings, but it seems to me that those are really the three big points on why the primary counterfactual would be appropriate.

The third point, if we are -- if you are happy for me to move on, sir.

THE CHAIRMAN: Yes.

MR HOSKINS: The third point in relation to overcharge that I wanted to deal with was the question of competitive prices.

Professor Sweeting accepted that Apple would charge competitive prices in the counterfactual. If we go to his cross-examination, {Day20/64:1}. If we could have {Day20/64-65} on the screen, please. If you could read from line 19 on page 64, just up to line 1 on page 65. (Pause)

Then again, {Day21/86-87}, please. If we could have pages 86 and 87 up. (Pause).

Do you see -- so this was in response to a question by you. If you read from line 16 to line 22 over the page. (Pause)

THE CHAIRMAN: Do you want us go on to 22 as well?

MR HOSKINS: To line 22 on page 87.

THE CHAIRMAN: Yes.

MR HOSKINS: Sorry, do you not have -- we have both on the screen.

THE CHAIRMAN: I am so sorry. No, I am sorry. I am getting muddled up with the days and pages here. Where do you want us to read up to?

MR HOSKINS: To line 22 on page 87.

THE CHAIRMAN: Yes, thank you. (Pause)

Yes.

MR HOSKINS: It is really important. This is common ground. Professor Sweeting accepts that Apple would charge competitive prices in the counterfactual, so then the immediate question: what would those competitive prices be?

You have our written submissions on what the competitive price would have been, in both of the counterfactuals. You have seen that Dr Singer's reports propose both competitive benchmarks; in particular, Epic Games Store and the *Microsoft* Store. He has also put forward the simulation models in relation to this topic. Unless you have specific questions, I was not planning to repeat those written points orally. It is a well-trodden path. Mr Armitage, I know, has -- because there is a crossover here, in terms of comparators between the foreclosure bit of the case and the excessive pricing bit of the case, and he has some more detailed points he is going to make to you. But you have the submissions on my bit of the case in

writing, and I do not think it is going to merit me trotting through them.

The final point, sorry, I need to deal with on overcharge. I said I would come back to Apple's arguments that it would have introduced new charges in the counterfactual.

In running such an argument, there is a burden on Apple to adduce evidence as to what, in fact, it would have done in the putative counterfactual arising out of any finding of abuse. If we can go to *La Patourel*, {AB3/62/279}. If you please read paragraph 1311.

(Pause)

There is an interesting tension here, in the sense that we are in the world of the broad axe, so you have to do the best you can on the evidence available. But *La Patourel* shows that there still has to be some evidence available. So I appreciate, just as we get the benefit of the broad axe, the Tribunal must do the best it can with the evidence available; that must apply to both parties.

However, within that concept of the broad axe, there is still, as identified in *La Patourel*, the fact that if you want to suggest something would arise in the counterfactual, you have to at least put forward some basis for the Tribunal to accept that.

Now, in this case, Apple has not produced any factual evidence addressing or suggesting that it would have introduced new charges for its technology or indeed anything else in the counterfactual. The only evidence that goes anywhere near this point is Mr Schiller's statement. That is {B2/5/54}, and if we could have {B2/5/55} up as well, please. If you could please remind yourself of what is said in 198 and 199 by Mr Schiller. (Pause)

Now, there are just two points I want to flag.

One is for later. You will see that he says, towards the end of 198, {B2/5/54}:

"Apple has not historically been in the business of selling access to or licences for its technology and services."

I will come back to that in a minute. But the point I wish to focus on now is that Mr Schiller's evidence addresses what business models were considered prior to the launch of the App Store but quite clearly does not consider what Apple would have done in a counterfactual without the restrictions. There is no factual evidence of what Apple would have done in the counterfactual.

The second point is that, as I have already referred you to, both Professor Hitt and Professor Sweeting made clear that they could not say what new charges Apple

would introduce in the counterfactual or what level they would be set out. It was in the hot tub. Again, the references are at paragraph 158 of our written closings. So there is nothing in the factual evidence, there is nothing in the expert evidence. Our submission is that, even in the world of the broad axe, faced with a complete absence of relevant evidence, it is not possible for the Tribunal to make any reasonable assumptions about what Apple would have done absent the restrictions. So that is the --

THE CHAIRMAN: Sorry, what about the DMA?

MR HOSKINS: I am going to come on to that. That is the first point, is the lack of evidence.

The second point is the current charging structure. I see the time. I only have about five or ten minutes left but probably people want their lunch.

THE CHAIRMAN: Let us take a break.

MR HOSKINS: Sorry, I was --

THE CHAIRMAN: That is fine. Shall we rise now and we will start again at five to?

MR HOSKINS: If we can start on the hour because I am way ahead of schedule and everyone can enjoy an extra five minutes.

THE CHAIRMAN: Good. We will have an extra lunch. Thank you very much. 2 o'clock.

(12.59 pm)

(The short adjournment)

(2.00 pm)

THE CHAIRMAN: Yes, Mr Hoskins.

MR HOSKINS: So we are looking at the damages counterfactual and we are looking, in particular, at the question of whether Apple would have introduced new charges in that damages counterfactual.

Before lunch I showed you that there is no factual evidence produced by Apple and the expert evidence also does not address this point. I was going to go through a number of other points --

THE CHAIRMAN: Yes.

MR HOSKINS: -- to look at what we do have and see whether that is enough for you to reach some sort of landing on what would have happened and at what sort of level.

The first point I want to make relates to the current charging structure because the DPLA provides that it is the annual program fee, not the commission, that is the consideration paid by developers for the use of Apple's tools and technology to develop and test iOS Apps.

If we can to the DPLA, {E/18/1} -- we looked at this in opening so I am not going to dwell on it. The purpose:

"You [the developer] would like to use the Apple Software ... to develop one or more Applications ... for Apple-branded products. Apple is willing to grant You a limited license to use the Apple Software and Services provided to You under this Program to develop and test Your Applications on the terms and conditions set forth in this Agreement."

So this is an agreement by which developers are able to use their Apple software to develop apps. Then if we go to {E/18/11}, clause 2.1(a):

"Subject to the terms and conditions of this Agreement, Apple hereby grants You during the Term ... license to:

"(a) Install a reasonable number of copies of the Apple Software provided to You under the Program on Apple-branded products owned or controlled by You, to be used internally by You or Your Authorized Developers for the sole purpose of developing or testing Covered Products designed to operate on the applicable Apple-branded products ..."

Then finally at {E/18/45}, clause 8:

"Program fees"

"As consideration for the rights and licenses granted to You under this Agreement and Your participation in the Program, you agree to pay Apple the

annual Program fee set forth on the Program website, unless You have received a valid fee waiver from Apple."

So the agreement on its face says that the annual program fee is consideration for the licence to develop and test iOS Apps.

In contradistinction, if we look at what the commission is said to be for in the agreements -- that is schedule 2 the DPLA, which we have at {E/22/1}. If we look clause at clause 1.1. The heading is "Appointment of Agent and Commissionaire":

"You hereby appoint Apple and Apple Subsidiaries (collectively 'Apple') as: (i) Your agent [alternatively your commissionaire] for the marketing and delivery of the Licensed Applications to End-Users located in those regions listed in ... [the exhibits]."

So schedule 2 is dealing with marketing and delivery of the apps.

If we go to clause 3.4, which is at {E/22/4}:

"Apple shall be entitled to the following commissions in consideration for its services as Your agent and/or commissionaire under this Schedule 2."

Ie for its services in marketing and delivering the apps.

So under the current arrangements it is the annual program fee that is said to be consideration for use of

the Apple software. If we can see what the experts said would happen to the annual program fee in the counterfactual -- can we go to {C4/2/59}? This is the Singer/Sweeting joint expert statement. It is proposition 78, and both the experts disagree with the proposition so there is agreement between them. The proposition is:

"In any of the Three Counterfactuals, Apple would have an incentive to change its annual Developer Fee."

Both experts disagree with that. Professor Sweeting says:

"Disagree. It is not clear what is intended by 'change' in this proposition. While it is possible that Apple could increase its annual Developer Fee in the Three Counterfactuals, I view this as unlikely as Apple would generally not want to discourage new, smaller iOS App Developers from developing or maintaining iOS Apps."

So the experts are agreed, unlikely to be changed in the counterfactual, and Professor Sweeting explains his reasoning there. So, again, there is common ground on this point.

THE CHAIRMAN: Just, the relevance of that, I mean, you are not saying that there is -- somehow some restriction stops Apple from changing the way it charges, so --

MR HOSKINS: No, no, I am just looking at what the

current --

THE CHAIRMAN: Yes.

MR HOSKINS: -- decision is, and obviously the current decision is taken in a context with the restrictions. It is also taken in the context of a two-sided market.

THE CHAIRMAN: Yes.

MR HOSKINS: That is why you see they do not charge everyone, et cetera. I am going through these categories to look at what evidence -- what basis could you have for concluding that Apple would introduce a new charge and at what level. What would the new charge be, what sort of level would it be at, and I am trying to look at everything we have in order to -- it is then obviously your choice whether you think there is enough to make that decision.

THE CHAIRMAN: Apple say, notwithstanding what you have just shown us, that -- they say that the commission does incorporate an element of competition.

MR HOSKINS: Well, effectively, yes, I think -- from an economic perspective, including Dr Singer, they have said that the commission reflects the value of the tools and technology. I think what the economists have said is that everything that Apple charges reflects the value, if you see what I mean.

So the point I am making in terms of looking at the

DPLA is -- I understand the economic point, but the DPLA, as it is, does expressly provide what is consideration for what, and the experts have expressed a view on what would be likely to happen to the annual program fee in the counterfactual.

THE CHAIRMAN: Yes.

MR HOSKINS: But this is all small bits of a jigsaw that I am putting together.

THE CHAIRMAN: Yes, of course.

MR FRAZER: In that remark by Professor Sweeting, he does say that it is likely that Apple would charge other types of fees, as discussed in relation to proposition 6. Proposition 6 was that Apple would charge new fees to iOS developers who choose to transact on an alternative platform, et cetera, et cetera. I do not know if that is relevant here.

MR HOSKINS: That is what I am coming to. So I am looking at the moment at what does the DPLA provide. I am looking at the annual program fee. I am looking at what the experts have said in relation to that. I am next going to go to, "Could they introduce this new charge or higher charge through commission?", then I am going to look at patent licence and then I am going to look at the core technology fee, so I am hoping to tick all the boxes.

MR FRAZER: Thank you. That is clear.

MR HOSKINS: But, I mean, obviously it is the case that Professor Sweeting's case was that economically he thinks that Apple would seek to charge more, but the question is -- I can understand an economic argument that a company will charge as much as it can for a product or service, but the question is: well, if it is in, for example, a competitive market for distribution and payment services, of course it is not free to charge as much as it wants. There are, in fact, constraints. That is where we depart from Professor Sweeting's, "Economically Apple would want to charge". Yes, any company would want to charge as much as it can, but I am going to look at the practicalities and see what options are available to it or would be available to it.

So looking at the commission, this one is quite easy because Apple's ability to charge for its tools and technology through its commission in the counterfactual would be constrained by competition because, as we have seen, Professor Sweeting accepted that Apple's commission, it would have to charge at a competitive rate. There would be other people in the market, offering distribution services and payment services, they would be setting their prices to compete and Apple

would have to set a competitive price. So in that competitive situation Apple would not be able simply to put in, as part of the commission, a lump sum for its tools and technology because it has to compete with the distribution and it has to compete in payment services, so commission does not look like the vehicle for these new charges.

You then have the patent licence idea. Well, I mean, Apple again has not produced any evidence to suggest that it would introduce new charges by way of a patent licence in the counterfactual. On the contrary, as I showed you when we looked at 1st Schiller, paragraph 198, he states -- here I am quoting, {B2/5/54}:

"Apple has not historically been in the business of selling access to or licences for its technology and services."

So, in principle, a possibility that Mr Schiller's own evidence says it is not one that is favoured by Apple.

So then we look at what has happened in the other jurisdictions, in the Netherlands, South Korea and the US, Apple has retained its monopoly in iOS app distribution. So, in our submission, looking at what has happened in those jurisdictions really does not tell

us anything of value as to what Apple could do in the primary or delayed counterfactual, where it loses its monopoly over distribution and payment services.

Now, sir, as you pointed out to me yesterday [sic], Apple has adopted a core technology fee in response to the DMA in the EU and we make two points in relation to that.

First of all --

THE CHAIRMAN: I think just to be clear, you said "yesterday". Just to make it clear we were not having a conversation yesterday, if anybody was wondering whether that was happening.

MR HOSKINS: I think you and I are both at the end of our tether in terms of telling what day or time of the week it is. Yes, thank you for the correction.

Two points in relation to the DMA. First of all, Professor Sweeting's evidence was that it is difficult to say whether, in the counterfactual, Apple would adopt structures similar to those that it has deployed in the EU as part of its compliance with the DMA. If we can go to Professor Sweeting's first report, that is {C3/3/122}, and if you could put up the next page as well at the same time. I would invite you to remind yourselves what Professor Sweeting says in paragraph 269, {C3/3/122-123}. (Pause)

Professor Sweeting does not pin his colours to core technology. Far from it. But there is a second point, which is that, as I indicated during the trial, the legality of the core technology fee is currently under investigation by the European Commission and the result of that investigation is expected in March.

Now, if the Commission finds that the CTF, the core technology fee, is unlawful, our submission will be that it is not appropriate to adopt a counterfactual which includes unlawful conduct. I appreciate that the DMA is not a competition measure but it is closely related, and if a core technology fee is said to be unlawful, in our submission, given the breadth of discretion you have as to the appropriate counterfactual, we say clearly you should not be including something that has been found to be unlawful. Depending on the result of that investigation, Apple may be coming and making the opposite submission to you, but we should find out in March.

DR BISHOP: This investigation is by the European ...?

MR HOSKINS: By the European Commission.

DR BISHOP: The European Commission.

MR HOSKINS: It is specifically in relation to whether Apple's proposals to comply with the DMA are lawful under the DMA. It is not a competition investigation.

DR BISHOP: Yes. As a matter of precedent and authority, that would be a decision of a foreign jurisdiction, I think, would it not?

MR HOSKINS: Again, it is not binding on you at all. But if Apple is going to say to you, "We would adopt new charges and this is the amount that we say there would be and the evidence for that is what we have done in Europe in relation to the DMA", you see where the argument is.

THE CHAIRMAN: There is a -- it does put me in mind of a point about post-trial activity, just to put a marker down, and I would be interested in your views on that because we know that is going on. We also, I think, anticipate a judgment in the Australian Proceedings fairly imminently and I do not think -- we cannot really lay down any rules on how we are going to deal with that, but it would be quite interesting to have some views on whether and to what extent we might need to deal with some of this after the trial and how we could go about doing that, so you might give some thought to that and we can pick it up later in the week.

MR HOSKINS: Certainly. It is probably difficult. I mean, I think for the -- the commission investigation into the DMA, one or other of us is going to want to tell you this has happened. In relation to Australia, one or

other of us is obviously going to want to tell you what has happened -- in a sense, what I would suggest -- I am thinking on my feet and we can have a discussion and we can have a think about it -- is, when those things become available, they get sent to you and then the parties can discuss about whether there should be submissions in writing, for example. You will have a view, no doubt, on what you would find helpful. It is probably hard in advance to lay down --

THE CHAIRMAN: No, I think that is right. I am sure that is right. I suppose at the back of my mind is the concern that at some stage it would be nice to know that we were writing a judgment without having incoming --

MR HOSKINS: I think you have to stop at some stage because this is all a moving field and you do not want to be in a situation where you keep saying "We are done" and then something else --

THE CHAIRMAN: Precisely, yes, and no doubt all sorts of things are going to happen all over the world. It may be that there is nothing we can say, as we stand now. I will just make the point that if people could think about it, it might be helpful.

MR HOSKINS: Absolutely. This has to stop at some stage. But insofar as Australia and the CTF investigations are ongoing, it just seems odd that you -- you are going to

hear about them anyway -- that you would not take account of them if you have not delivered the judgment yet.

THE CHAIRMAN: Yes.

MR HOSKINS: It would be unusual.

The final point in relation to new charges is -- I have called it "the separate markets point" and it is something that you raised with me this morning and I foreshadowed.

Any new charge for use of Apple's tools and technology would not directly concern the markets with which we are concerned; that is app distribution and payment services. As Apple has made clear in the context of its amendment application at the start of the trial, such issues would concern the market or markets which Apple licensed its IP rights. If I can ask for us to have, please, {Day3/63-64}, could you please read from line 13 on page 63 to line 12 on page 64. (Pause)

I probably put it too broadly when I introduced this. So in a sense I have gone through the options of what Apple could do to charge more. I have looked at the annual program fee and we have seen that the problem with that, according to Professor Sweeting, is that it might affect the two-sided nature of the market, so both experts say unlikely to raise that. We have looked at

commission and I have made the point that, as Professor Sweeting himself says, Apple would be constrained by competition as to what it could charge.

Now, I can see how those two routes to charging would be in the relevant markets, but then, for example, a patent licence fee would not be in those markets. That would be in the sort of market that Apple has identified here.

Core technology fee, I mean, that is -- again, it is probably about licensing the IP, so that is more in the sort of market that Apple is describing here. So if we are looking at the suite of possibilities, we do come to this point that Apple itself has said that licensing its tools and technology would be in a different market and would require different considerations. Of course, Apple has not produced any evidence in relation to such markets in this trial. Apple has not produced how it would behave in such a counterfactual in those markets. We simply do not have anything.

Therefore, given what I have -- I have tried to be as exhaustive as possible -- the suite of possibilities, you start with this premise, that economically Apple would want to charge as much as it could for its tools and technology. Economically I do not shy from that. Any company will charge what it can get away with.

However, in the real world, I have taken you through the suite of possibilities and our submission is that Apple simply has not made out -- has not put forward the evidence for you, even in the context of the broad axe, to be confident that it would introduce a new charge of a particular sort at a particular level. It is just not in a position to do that.

THE CHAIRMAN: Just for argument's sake, if -- let us say for argument's sake that Apple decided it was going to change the developer program fee and it was going to charge £500 instead of -- $500, instead of $100, and I think the point you are making there is that -- your last point in that situation is that it is not something we would be obliged to take into account because it is not within, if you like, the analysis we are concerned with.

MR HOSKINS: Yes. It is the point -- I mean, it is a point that you have raised as a question --

THE CHAIRMAN: No, no, quite. I do not --

MR HOSKINS: -- so we have thought about that question, and it seemed to us that to a certain extent what Apple had said in its -- in the amendment application went to that, but, absolutely, it is a variation on that question you asked.

THE CHAIRMAN: I think it is a question that arises. It

arises wherever you have a counterfactual I think in the whole thing, but here obviously. But here we are getting back to this question as to the sort of counterfactual we have got here if we are in a fairly well-established damages principle, and this is really about -- unless I have got this completely wrong, in which case tell me, but this is really about saying, "Look, in this counterfactual you have to accept you have to give a credit because developers are going to be charged something else and they will pass that on or, rather, not pass on the reduced benefit to your client's class". Are we then really just simply in a remoteness type analysis? We are back to *British Westinghouse* and those cases effectively?

MR HOSKINS: This is the trouble in these cases. They are complex because there are so many moving parts. It is an ecosystem.

THE CHAIRMAN: Yes.

MR HOSKINS: In our submission, the focus has to be on the conduct in this -- I mean, if we get to here, it has been found to be abusive. You have found the relevant markets. You have found the abuse. There has to be diminishing returns in looking beyond the particular conduct and the particular markets and trying to build a more and more complex and wider counterfactual. Our

submission is that, even if that were appropriate in question, if it is, the evidence that has been put before you on it is so meagre, it is difficult even to take a broad axe to it.

THE CHAIRMAN: Yes. I mean, I wonder if you even -- I wonder if, even before you get to that, you have to say to yourself, "Well, I am applying -- I am just applying a very conventional damages analysis. There is nothing special about the counterfactual in this regard". I think in that sense, although you have this question about consistency, you do not want inconsistency in the different counterfactuals, different purposes. It is actually doing something, which is much simpler than a lot of the things we wrestle with all the time in the counterfactuals that we are looking at in terms of effects and so on. This is actually back to good old vanilla damages counterfactuals, but-for, and then there are some fairly well-established rules as to what does and does not go into the pot on those, which are mostly done by effectively principles of remoteness, are they not?

MR HOSKINS: That is right, from *British Westinghouse*.

THE CHAIRMAN: Yes.

MR HOSKINS: It is all -- it is kind of the reverse of *British Westinghouse*, because it is not us claiming

stuff that is too remote. It is Apple trying to get you to take account of things that would not necessarily have been --

THE CHAIRMAN: Well, it is like the -- it is the -- what is the case with the ship, the charter case, where -- I am not going to ask you.

MR HOSKINS: (Overspeaking) -- in *Fulton Shipping*, sir.

THE CHAIRMAN: Exactly. So there are these cases, are there not, where the charterers ended up with a benefit because the price has gone up or whatever it happens to be and the question of where you draw the line as to what you take into account or not. I think what I am -- I may be completely wrong about this. I may be told by Apple that I am completely wrong about it. But I am venturing to suggest that we might just be in that world and it is no more complicated than that, really.

MR HOSKINS: I mean, yes, it is usually in the context of a claimant looking for too much. Those principles can interplay, but there is no reason why they should not also be invoked when the defendant is trying to rely on them and bring in stuff that is extraneous to the analysis.

THE CHAIRMAN: Yes. So it is giving credit for another cost that arises in the but-for world. I am sure there must -- there must be cases -- plenty of cases on that,

I would have thought.

MR HOSKINS: Certainly we can have a look at that. We have got a reply --

THE CHAIRMAN: Well, I do not want to set -- maybe it would be interesting to see whether -- I can take it from someone who is involved in this, I may be completely in the wrong place and I will be told that, but -- I do not want to set rabbits or hares running, but it would be interesting to explore that, if it does have any merits.

MR HOSKINS: I mean, this also does come back to *National Grid* as well in a sense. I know we sort of said I put light weight on it, but also you do have a discretion to adopt a counterfactual that you think is useful.

THE CHAIRMAN: Yes, although I think -- I mean, I have pushed back a bit on that because I think, unless I -- again, I may have this completely wrong, but it seems to me, when we get to this, I am not sure we do have that much discretion. I think we have plenty of discretion upstream, so when we are looking at what the effects might be or if one needs the counterfactuals on how one should construct and so on, that seems to me to be very much *National Grid* territory. I think, once you get to here, you have got hundreds of years of law that tell us how we assess damages and actually I do not think it is

necessarily at all consistent with the way that, as competition lawyers, we necessarily think about how we go about approaching counterfactuals, I am not sure there is that much discretion, but with that comes a set of reasonably well-recognised rules that deal with the sorts of things we are talking about.

MR HOSKINS: When I suggested discretion as to the damages counterfactual in *National Grid*, the point you make to me is, "Well, you do not need that because you have things like *British Westinghouse* and *Fulton Shipping*". I am certainly not pushing back against that.

THE CHAIRMAN: As I said, it may be that Apple take a completely different view and we can come back to it and talk about it, but I put it out there anyway for consideration.

MR HOSKINS: The final point I have to make is App Review because it may come in at this stage again. Insofar as Apple might suggest that it would have introduced new charges for App Review in any counterfactual, I mean, the evidence on this is even more negligible than on the possibility of introduction of new charges for tools and technology, and that is saying something. So I really do not -- there is nothing for me to get my teeth into on that.

THE CHAIRMAN: If you are taking a burden point on that, it

is a little bit unfair, is it not, in the sense that I think Apple would say, "We had no idea you were going to take that position until we had got into the evidence".

MR HOSKINS: Sure, it is not a burden point. It is we get to the end of the trial, broad axe, you have to do the best you can on the evidence available and you are looking at what the evidence available is. So I am not -- I am absolutely not taking a strict burden point. But Apple could -- you know, for example, we saw in its pleading, in its defence, that it pleaded it. It said it would introduce new charges. It could have pleaded, you know, "We would have charged for App Review", for example, but it did not. I am not seeking to make this case turn on a burden of proof point at all. I am simply saying we get to the stage in App Review, you look at the evidence that is there and there is practically nothing. There is certainly nothing as to the level of the charges that there would be.

THE CHAIRMAN: Yes.

MR HOSKINS: Unless you have other questions for me, I was going to hand over to Mr Kennedy, who is going to deal with objective justification.

THE CHAIRMAN: No, thank you. Thank you very much. Mr Kennedy?

MS DEMETRIOU: Sir, may I pop up to make a short legal point?

THE CHAIRMAN: Yes.

MS DEMETRIOU: Mr Hoskins has been commendably concise, but one thing he has not done is -- we have addressed our case very fully in writing, as you have seen, and there are a number of important points to our case to be made.

So to give two examples, in relation to market definition, of course, we rely on the fact that the price was competitive in 2008, so that is one point that has not been addressed, and in relation to whether it is 50% or 90% in the counterfactual, we rely on the *Google Play* Store and again we have covered that in some detail in our written submissions.

Now, of course it is Mr Hoskins' prerogative -- if he thinks those points do not need answering, that is his prerogative, but what we cannot have is them making responses to those points that we have canvassed very fully in writing in reply for the first time because that would not be fair.

THE CHAIRMAN: I think, unless I misheard, we are going to get -- I do not think there is any escaping *Google Play*. We are going to get there just in a different context unless I have misunderstood.

MR HOSKINS: I think -- the 2008 point I believe Mr Ward is

intending to deal with. Mr Armitage will be dealing with *Google Play*. My take on *Google Play* was we dealt with it fully in writing. I have read what Apple has said. There is nothing I can add orally. But if Apple, for example, go to the *Google Play* Store and say something I want to reply to, I am allowed to reply to it. But the mere fact that I do not parrot back to you what we have said in writing about *Google Play* Store does not mean we are not fully joined in the debate about that.

THE CHAIRMAN: Well, I do not want to have a big fight on Friday about what has and has not been covered. I think in terms of -- what we do not want to find is that you are taken by surprise by a point. That is really the point that you are making, is it not?

MS DEMETRIOU: Sir, yes. The point I am making is that we have joined issue very fully in writing, and so what the other side need to do -- what the Class Representative needs to do in their oral submissions is, insofar as they take issue with the points we have made in writing, cover them now so we can respond. It is otherwise unhelpful to the Tribunal -- if the tactic is to stay quiet about all of the things we have put in writing and then deal with them in reply, that is going to be unhelpful to the Tribunal. It may be that is not the

tactic, but I think we just --

THE CHAIRMAN: Yes, I think what he is saying is that he does not have anything else to say other than what he has said in writing, which of course we have read. Now, I do not think I can make him say anything.

MS DEMETRIOU: Of course not, but what he has not done is engaged with what we have said in writing. That is really the key point. We may have answers to that, which -- if the first time the Class Representative engages with what we have said in writing is in their reply, we are not going to be able to assist you with our response. So that is really the point I am making.

So of course Mr Hoskins is right to say that he has covered what he has put in writing, but what he has not done at all or very much is engaged with what we have said in writing, so the points we make. If the first time they engage with them -- for example, the 2008 stories(?) in reply, we may have very good answers to what they say but we are not going to have a chance to give the Tribunal those answers so it is not going to be very effective in terms of the Tribunal getting to the bottom of the debate.

THE CHAIRMAN: Well, I think you have made your point and I do not think we can take it any further and Mr Hoskins has heard it and --

MR HOSKINS: Sir, we each served, on Wednesday, books, as you have described them, in advance and you probably were not wrong -- let us call them "booklets". The idea that on my feet I am required to deal orally with every point we might disagree with is ridiculous. I am sorry. The idea that it is a tactic is unworthy. The way to deal with it is, if there is a submission that Apple wants to make, it should make it, if in reply there is a response I want to make, I will make it, and if Apple feels that it is something that has not been heard on and it just needs the final word, you will no doubt allow them to do that. But the idea that we have failed in some sort of duty because I have not sought to traverse orally 150-odd pages plus annexes of written closings is news to me.

THE CHAIRMAN: I do not think -- I think, to the extent there is anything for you to take account of, the point has been made and you have heard it and we will see what happens. I do not think we need to --

MR HOSKINS: It does not cause me to pop up and go on for another half a day.

THE CHAIRMAN: Okay. Thank you. Mr Kennedy?

Submissions by MR KENNEDY

MR KENNEDY: Sir, perhaps not an auspicious start, but, as Mr Hoskins says, if you accept his submissions on the

law in relation to objective justification, then none of what I am about to say actually matters, but if we assume for present purposes and present purposes only that Mr Hoskins is wrong, then we make four points in relation to Apple's case on objective justification.

First, we say that in the counterfactual, security and privacy would be parameters of competition between Apple and any entrants into the relevant markets that we have defined; second, we say that Apple's failure to adduce contemporaneous documentation evidencing the performance, security and privacy rationale for the App Distribution Restrictions or the Payment System Restrictions undermines its contention that those restrictions are objectively justified; third, and in any event, we say that Apple has failed to identify benefits arising specifically from those restrictions; fourth, and again in any event, we say that Apple has failed to quantify any such benefits.

I propose to take those points in turn, if that is convenient. I want to start by addressing Dr Kent's case in a world in which Apple does not carry out full App Review of all iOS Apps distributed in the United Kingdom. The Tribunal will recall that I discussed at length a world in which Apple would continue to do that or could continue to do that.

I will come on to that world in due course, but for present purposes I want to look at a simpler counterfactual than that.

Apple say, in a nutshell, sir, "Look at the hellscape that is Android in the actual world. You cannot seriously suggest that a counterfactual world in which the App Distribution Restrictions did not apply on iOS would be any different". But we say that that is overly simplistic and ignores the differences between iOS and Android other than App Review and the App Distribution Restrictions. We say that, once those differences are taken into account, it becomes apparent that the iOS app distribution landscape and the counterfactual would look quite different to the actual world Android distribution landscape.

Sir, it was similarly common ground between Dr Lee and Professor Rubin that Apple would continue to enforce -- sorry, that Apple could continue to enforce mandatory developer verification even if it did not carry out App Review of all iOS Apps and iOS Apps could be distributed outside of the Apple App Store. We do not need to turn it up, but for your note, that is the Lee/Rubin joint expert statement and it is proposition 3B-10, which is at {C4/1/93}. It was similarly common ground between Dr Lee and

Professor Rubin that Apple could continue to require all iOS Apps to be signed using an Apple-issued certificates even if there was no centralised App Review by Apple and no centralised distribution of all iOS Apps through the App Store. Again that is the Lee/Rubin JES and it is proposition 1C.i-3 and the bundle reference is {C4/1/33}.

We will come on to this shortly, but what we see in the contemporaneous documents is that mandatory developer verification and code signing had been considered to be central to the security of iOS devices from day 1 and so we say likely to feature in any realistic counterfactual world.

We say that there are two important security consequences that flow from the existence of those two features. First, mandatory developer verification and code signing allows the author of a malicious app to be identified, which obviously disincentivises a would-be attacker from trying to perpetrate an attack in the first place. Now, there is a dispute as to the extent to which those features act as a deterrent, but in my submission Dr Lee's evidence is intuitively correct and should be accepted.

As Dr Lee put it in cross-examination, no malicious app or malware author would declare, "Hey, I wrote

a malicious app". That is completely counterintuitive. That is {Day 10/11:24} to page 12, line 2, {Day 10/12:2}. Again, no need for us to turn it up.

The second security sequence is that mandatory developer verification and code signing allows Apple to, amongst other things, prevent a malicious app from being downloaded on to an iOS device from any distribution source, prevent a malicious app from being run on any iOS device on which it has already been downloaded and to terminate the developer of the malicious app's developer account. So we say not only do those features make it less likely that a malicious app will make its way on to the iOS device, it also makes it easier to remove any malicious apps that do make it onto the device.

Sir, this is radically different from how Android works in the actual world. It is common ground that there is no mandatory developer verification for all Android app distribution sources and that there was no mandatory developer verification on the Google Play Store until 2023. It is also common ground that self-signed apps are permitted on Android and that self-signed apps were not prohibited on the Google Play Store until 2021. Android Devices are also manufactured by multiple OEMs, whereas iOS devices are

only manufactured by Apple. We saw from the email from Mr Federighi to Mr Cook at {D1/518/1} that Mr Federighi recognised this as a significant structural issue affecting the security of Android Devices.

Sir, we say that the starting point, when considering the counterfactual for iOS app distribution, is very different from Android in the actual world. If we turn to what that counterfactual world might look like, if we start with Apple, it seems likely that in any such counterfactual world Apple would have continued to carry out full App Review of any iOS Apps distributed on the Apple App Store, so in its own store it would have done what it has done in the actual and it would have competed on that basis. We say that in light of what we see happening in Europe, in light of the DMA changes, and I can give you one document reference which we say encapsulates Apple's approach. It is {D2/585/1}. Again, I do not think we need to turn it up, but for your note, sir, we say that that shows Apple seeking to differentiate itself from alternative app stores in the European Union on the basis that apps available in the Apple App Store are subject to more comprehensive checks, and we say that is precisely the sort of competition that would be likely in the counterfactual.

THE CHAIRMAN: Just tell me, what is that document?

MR KENNEDY: It is an extract from Apple's website. It is explaining to users -- perhaps we could --

THE CHAIRMAN: I just want to make sure I know what the cross-reference is. So it is an Apple website document?

MR KENNEDY: It is an Apple website -- it explains to users in the European Union how they can download only from the App Store and it explains why they might want to.

THE CHAIRMAN: Yes, I remember that. Thank you.

MR KENNEDY: Turning then to Apple's likely competitors in the counterfactual, you will recall it is common ground between Dr Singer and Professor Sweeting that a reasonably plausible counterfactual world, absent the App Distribution Restrictions, is one in which there are two or three larger iOS app stores along with a fringe of much smaller iOS app stores. If we start with the larger competitors or the larger potential competitors, it is common ground again between Dr Singer and Professor Sweeting that the larger iOS app stores might include companies like Google, so I want to have a look at what has happened with Google in the actual and then think about what is likely to happen in the counterfactual.

A number of documents that Apple has relied on in the course of this trial suggest that the Google Play Store is, in fact, fairly secure. I do not put it

any higher than that, sir. But if we go to two examples. The first is {D1/1473/1}, tab 1. This is an old favourite, at least of mine. This is the Nokia Threat Intelligence Report 2023. If we can go to {D1/1473/15}, we see on the left-hand side, "Android malware":

"Android based devices are not inherently insecure. However, most smartphone malware is distributed as trojanized applications and since Android users can load applications from just about anywhere, it is much easier to trick them into installing applications that are infected with malware."

This is the sentence I wish to focus on:

"Android users can protect themselves by only installing applications from secure app stores like *Google Play* ..."

So *Google Play* there being described there as secure by Nokia in its analysis of malware threats faced by mobile devices.

The second document I would like to look at is an Apple document. It is {D1/171/1}. Perhaps we can go over the page to {D1/171/2} just to see what the document is -- sorry, {D1/1176/2}. This is a White Paper published by Apple in October 2021. It was exhibited to Mr Federighi's witness statement and it

sets out Apple's analysis of the threats that it perceives to exist from side-loading. If we just pick it up at {D1/1176/8}, I just want to show you what Apple says about the *Google Play* Store in this context. It is the third of the blue headings, starting, "Mobile apps containing security threats pose significant risks". What we see is:

"As a result, App Review processes in first-party app stores (ie the App Store on iOS devices, and Google Play on Android Devices) have become increasingly thorough and necessary to prevent security threats from reaching consumers."

So that is Apple there describing the *Google Play* review process as increasingly thorough.

If we look briefly at a number of security measures that Google has implemented over the years. In 2015, Google introduced human reviews as part of its App Review process on the *Google Play* Store; in 2021, Google introduced mandatory Google-issued certificates for apps distributed on the *Google Play* Store; 2022, Google introduced Privacy Sandbox. That was ten months after Apple introduced App Tracking Transparency; as we have seen, in 2023 Google introduced mandatory developer verification for apps distributed on the *Google Play* Store.

Sir, of course our case is that the Google Play Store and the Apple App Store are not in the same relevant market in the actual, but we say that in the counterfactual, in circumstances where Apple and Google were competing directly to distribute iOS Apps, you would see greater competition and real competition on the parameters of security and privacy and that this would yield benefits for iOS device users.

So, sir, we see that is an example of what competition might like look like between Apple and a larger competitor in the counterfactual. One can briefly consider the smaller fringe developers competitors, if I may.

THE CHAIRMAN: Mr Kennedy, just so I am clear, I under- -- maybe I have got this wrong -- I understood that you were looking at Google and in particular the security and privacy aspects to think about a world in which there was some competition to a platform which was the incumbent, if one can put it that way, or the larger platform. You are not saying that Google -- you are not putting Google into the counterfactual as the platform to compete with Apple, are you?

MR KENNEDY: Not as the incumbent sir, absolutely not. As an entrant. As I say, it is common ground that -- between Dr Singer and Professor Sweeting that probably

what you would see is one of the big tech companies. Sweeting -- Professor Sweeting says Facebook, Google, Tencent, and he also considers some of the gaming platforms. So I am just using Google as an example of what a larger entrant might look like.

THE CHAIRMAN: So are you saying -- so you are saying -- so the point of what you have just shown us is that, "In the counterfactual, assume there is an entrant, assume that somebody looks like Google, here is what Google does at the moment, and therefore what you have got to expect it to do in the counterfactual by way of privacy and security"?

MR KENNEDY: That is exactly right, sir. It may be slightly more precise than that in that I do not say "like Google", but perhaps it would in fact be Google.

THE CHAIRMAN: It might in fact be Google, yes.

MR KENNEDY: We can well imagine that Google might be one of the people who said, "Well, we already have an app store infrastructure for Android and we might want to get into the iOS app distribution game. We have got the apparatus, we have got the know-how", and so we see them enter, but obviously distributing iOS Apps rather than Android apps.

THE CHAIRMAN: I see.

MR KENNEDY: It is just looking at what you might call

an attenuated competitive dynamic in the actual world, where we say they are in separate markets but you still see Google changing its behaviour to become more like Apple, if I can put it that way. We see human review, we see developer verification, we see code signing. The point I am making is that in the counterfactual world in which there is direct competition between these two app stores, that competitive process would be reinforced with better security outcomes for iOS device users, and it is to contrast that with Apple's case, which is, "Look at Android and the fringe of Android ..." -- sorry, "Look at Google and the fringe of Android app stores. Look at ..." -- Android China was one of the examples given by Professor Rubin. I am saying that is completely the wrong starting point and leads you down the wrong path, sir.

THE CHAIRMAN: I understand. That is helpful. Thank you.

MR KENNEDY: So that is the bigs, if I can put it that way. If we can now have a look at the littles. If we can go to Dr Lee's first report, at paragraph 169, it is {C2/5/91}, if I can just ask the Tribunal to read paragraphs 169 and 170. 170 goes over the page {C2/5/91-92} (Pause)

We say that Steam is a really good actual world example of precisely what Dr Lee envisages in the

counterfactual; a third party app store with a much smaller volume and a specific category of app store that has devoted its limited resources to carrying out a thorough review of apps before distribution.

Just to show you what it is that Steam does in the actual world, if we could go to {G1/11/1}. This is Professor Somayaji's report from the Epic proceedings in Australia. I took Professor Rubin to this in cross-examination. If we can pick it up at paragraph 185, which is on {G1/11/63}. If I could ask the Tribunal to read paragraph 185 and then over the page on to {G1/11/65}, with the table that summarises the position. Perhaps if we have page 65 on the right-hand side, that would be great. (Pause)

Sir, just to pick out some details from table 5, we see that Steam has a 30-day waiting period following developer sign-up, automatic scanning and annual review, which can take up to five business days. You will recall that some statistics as to the average review time for Apple were canvassed in cross-examination with Mr Kosmynka. Those are confidential, but they were radically shorter than five days. It screens for malware, it screens for content policy violations, it screens for marketing materials, and Professor Somayaji identified only one incident of malware on Steam in the

period he studied.

In re-examination Professor Rubin suggested that comparing the App Store to Steam was not a fair comparison because the number of apps on Steam is very, very small compared to the App Store and they all focus on games and because Steam has to, quote, "interface with *Microsoft*" and that would, quote, "present security challenges for Steam". There is no need to turn it up, but that is {Day12/88:24} to page 89, line 17, {Day 12/89:17}. Professor Rubin also identified two further instances on Steam in his Australian report, and that reference for that is {G1/13/66}.

Sir, we say the fact that Steam is small and specialises in games is precisely the point. That is its competitive advantage. It is exactly one of the examples that Dr Lee gave as to a way in which another undertaking might be able to carry out review of equivalent or better quality than Apple.

So we say that Apple's view of the counterfactual is myopic and that competition and security and privacy is likely in the counterfactual and would be to the benefit of consumers. We are reinforced in that view by the conclusion that the CMA reached in its "Mobile Ecosystems Market Study". If we can look at that very briefly. That is at paragraph 8.70 of the MEMS report.

It is {AB6/25/297}, I hope. We see:

"There are a range of potential benefits that greater competition between app stores could deliver. Greater competition to attract users could lead to greater investment in quality and user experience. App stores could innovate to provide better 'matchmaking' between users and developers and there could be pressure to reduce the level of advertising that users currently face. We heard from several developers and third-party app stores that it could incentivise innovation and improve outcomes on privacy and security features."

So that was the CMA's conclusion. Sir, that is point 1. Moving on to point 2, which was the absence of contemporaneous documentation, if we could go to Apple's closings at paragraph 129 -- that is {A1/9/45} -- we see Apple says:

"The Requirements are means by which Apple competes to attract consumers and developers to its App Store and its iOS Devices. They embody Apple's centralised and integrated approach to the App Store, which Apple believes achieves enhanced safety, security, privacy and quality benefits for iOS Device users. This centralised and integrated approach is key to how Apple differentiates itself from Android and thereby competes in the devices markets and the transaction markets."

So key to Apple's competitive strategy, it says, in both device markets and what Apple calls the transaction markets. Yet, sir, Apple have not identified a single internal Apple document which shows that the App Distribution Restrictions and the Payment System Restrictions were imposed because they gave rise to safety, security, privacy or performance benefits which distinguish Apple's services and goods from Android. We say that is remarkable and that the Tribunal should take this into account when assessing Apple's case on objective justification.

Just to make that proposition good, sir, I would like to show you two authorities very briefly. The first is *AstraZeneca*, which is at {AB4/14.01/1}, if we can just get page 1 up so we can see what it is. It is the General Court's judgment from 2010 in *AstraZeneca*'s appeal against the Commission's decision, in which the Commission found that *AstraZeneca* had abused its dominant position by making misleading representations before certain patent officers and by making requests for the deregistration of marketing authorisation for Losec tablets in certain countries.

If we can pick it up at paragraph 685, which is {AB4/14.01/260}, we see that *AstraZeneca* raised an objective justification defence on the basis that it

"no longer had a commercial interest in selling Losec [tablets] and ... in maintaining the marketing authorisation in a situation where such maintenance imposed upon it continuing 'updating' and pharmacovigilance obligations".

Next paragraph, we see that that defence was raised for the first time in the proceedings before the General Court. Then if we go over the page again, at the top of page, 688, {AB4/14.01/261}, the court says:

"In this respect, as the Commission maintains, the burden arising from the pharmacovigilance obligations was never mentioned in AZ's internal documents relating to its commercial strategy. That absence of any mention in those documents of that objective ground of justification meant that the Commission was unable to take cognisance of it and in any event makes it scarcely credible that the deregistration of the marketing authorisations was due to that ground."

There is no need to go to it, but at paragraph 696 we see that the General Court rejected *AstraZeneca*'s plea of objective justification.

I will just show you one domestic authority on the same point, sir. It is *Purple Parking* Limited *v Heathrow Airport Limited*, {AB3/13/1}, a decision of Mr Justice Mann from 2011. The claimants alleged that

Heathrow was abusing a dominant position by refusing to allow them access to the forecourts at Heathrow Terminals 2, 3 and 5 in order to carry out a valet parking business. Dominance was assumed. We can see that from paragraph 73 on page {AB3/13/23}. We see:

"This trial takes place on the footing ... that HAL is dominant in the 'Facilities Market' ..."

If we have look at paragraph 167 on page {AB3/13/49}, we see that a prima facie abuse was found:

"It follows that, subject to the matters raised in the next 2 sections ... the conditions of section 18 [of the 1998 Act] are fulfilled."

If we pick it up at paragraph 179, which is page {AB3/13/52}, if we pick it up in the third sentence:

"HAL ... relies on objective justification in this case in that it says that removing the off-airport meet and greet operators from the forecourts is justified by considerations of congestion, safety, security, and environmental considerations."

Then we see the claimants disputed that at two levels. First, they say it is not established on the facts. Then two sentences later:

"Second, they say that insofar as that is wrong, and some of them might have provided an objective

justification, then HAL did not actually rely on any of them as a reason for taking its decision. Its decision was motivated by anti-competitive considerations and the invocation of the fourfold objective justification is a fig leaf for the purposes of this litigation. Accordingly they say that HAL is not entitled to rely on this justification."

Then if we go to 183, over the page, {AB3/13/53}, we see Mr Justice Mann's conclusion as to that point of principle. He says:

"It is therefore open to Purple and Meteor to seek to demonstrate that even if the conduct of HAL could be objectively justified, nevertheless its motivation was to suppress competition and thus this defence (if that is the right word for it) is not open to it. It is also, in my view, open to Purple and Meteor to test the assertion that there is an objective justification by seeing whether that justification was apparently the basis on which HAL acted. One would expect a serious commercial undertaking such as HAL to form a view as to what was objectively justified, where the justifications are those set out above, and were it to appear that those justifications were not really why HAL acted then that fact would be capable of shedding light on the strength of the justification now relied on."

We do not need to go to them, sir, but on the facts Mr Justice Mann found that HAL's motivations were commercial and had not been based on considerations of congestion, security and so on and so the objective justification plea failed in that case.

Sir, we say that just as in *Purple Parking*, so too in this case one would expect to see various commercial undertakings, such as Apple, to form a view on what was objectively justified and that, if the Tribunal can find no real evidence that the reasons now relied on by Apple as justifying its conduct were the reasons for the imposition of the restrictions at the time, then that is relevant to the assessment of the strength of Apple's case on objective justification now.

With that in mind, I would like to go back briefly to two documents we saw in cross-examination, starting with the App Distribution Restrictions. If we go to {D1/994/1}, it is a document I discussed at some length with Mr Schiller. It is a document, despite the date on the front of it, sir, from October 2007, and the Tribunal may recall that "MacOS X Embedded" was the name for iOS at the time. This document was attached to an email chain between Mr Forstall, who was senior vice-president of iOS software at that time, and Ms Vorrath, who was a member of Mr Forstall's team.

Mr Forstall's email indicated that the iPhone developer platform was to be discussed at an executive team meeting the following week and that he had a meeting with marketing that week to go over the open policy questions. In cross-examination, Mr Schiller accepted that it was likely he would have attended that latter meeting, the marketing meeting at which the open policy questions were to be discussed. He accepted that it was likely that the matters discussed in these documents would have been addressed at that meeting.

I do not propose to go through it line by line, but we say that this document shows three things: firstly, that sandboxing and code signing were seen as central to the security of iOS devices following Apple's decision to allow third party native apps on to the iPhone; second, Apple considered whether third party native iOS Apps would be distributed by developers through channels other than the App Store; third, that no security issues were identified as being associated with that possibility, with the possibility of distribution outside of the App Store. This was described in this document as a policy question and Mr Forstall discussed those policy questions with the marketing team, with Mr Schiller's team, not with any security team, to our knowledge.

Mr Schiller sought valiantly, but in my submission ultimately unconvincingly, to resist the suggestion that Apple had considered permitting developers to distribute apps outside of the App Store. Mr Schiller started by saying that the open policy question concerned enterprise distribution but eventually effectively abandoned that position. He then suggested that the open policy question concerned ad hoc distribution, but again ultimately accepted that the document seemed to cover ad hoc distribution separately, and that is {Day6/125:12-14}.

The second document I want to look at briefly is {D1/29.1/1}. This is the iPhone SDK document, again, discussed at some length with Mr Schiller in cross-examination. It is dated 12 October 2007 and was also attached to Ms Vorrath's email to Mr Forstall. It is somewhat epigraphic in nature, but in my submission it likewise shows four things.

Again it shows that the possibility of iOS app distribution apps in the App Store was envisaged at this time; second, again no security concerns were identified as arising out of that form of distribution; third, code signing in some form of App Review were seen as sufficient to protect the iOS operating system and the iOS device user; fourth, distribution through the

App Store was seen as important only insofar as necessary to protect Apple's revenue, ie the commission.

Just to draw the threads together on these two documents, the crucial point for present purposes is that neither document identifies any security consideration justifying centralised app distribution, and that proposition was accepted in terms by Mr Schiller in cross-examination. That is {Day6/137:18-22}.

Very briefly on the Payment System Restrictions, the best evidence we appear to have of the contemporaneous rationale for the adoption of the Payment System Restrictions is Mr Forstall's evidence from the United States, which is at {H2/17/28-30}. We have set this out in our written closing so I do not propose to go through it, but Mr Forstall did not identify security or privacy as one of the reasons for the adoption of the Payment System Restrictions. In cross-examination Mr Schiller suggested that there were other reasons for the Payment System Restrictions, but failed to identify any contemporaneous document recording those allegations.

Apple rely, in closing, on three documents to suggest that, in fact, there is contemporaneous documentation evidencing the rationale for the app

distribution and Payment System Restrictions. The short point is that none of these documents is an internal Apple document evidencing the decision-making process.

The first document is {D1/24/1}. This is Mr Jobs' open letter to developers, announcing the SDK. If we can zoom in, it is the second paragraph and third paragraph under "Third Party Applications on the iPhone". If I can just ask the Tribunal to read the second and third paragraphs. (Pause)

THE CHAIRMAN: Starting with "It will take until February ..."?

MR KENNEDY: Yes. "It will take until February ...", yes.

(Pause)

Sir, we say what is said here by Mr Jobs is entirely consistent with the two documents we have just seen. Those documents similarly make clear that code signing alone was not sufficient, and that the sandboxing and some form of App Review would be required. So we say it does not follow that the advanced system that Mr Jobs refers to in the third paragraph is centralised app distribution.

The second document relied upon in relation to the App Distribution Restrictions is {D1/36/1}, if we can just go to the second page, {D1/36/2}. This is the transcript of the iPhone SDK launch, 6 March 2008. If

we can pick it up on {D1/36/26}, it is the final question:

"What sort of safeguards have you built in to make sure ..."

Again, if I can just ask the Tribunal to read that question, and then "S" is Mr Jobs, and read Mr Jobs' answer, which continues over the page, {D1/36/26-27}. (Pause)

In fact, if I can just ask you to read "SF" as well, which is Mr Forstall's response. (Pause)

Two short points on that, sir. First, this document does not tell us why Apple adopted the App Distribution Restrictions. This is a statement made by Mr Jobs and Mr Forstall after that decision has been taken, and it is a public-facing statement; not as valuable, in my submission, as the internal documents that we have seen earlier.

Second, as I said earlier, code signing does allow Apple to prevent more people from downloading malicious apps that are discovered, and obviously there is the debate about whether centralised distribution makes it easier to turn off the spigot, but we say that the ability to turn off the spigot does not require centralised distribution, so that is not a benefit uniquely attributable to centralised distribution.

The final document in this run is the IAP launch transcript. It is relied upon by Apple in their closings at paragraph 151. It is {D1/62/1}. It is a similar document to the one we have just looked at, but this time in the context of the announcement of iOS 3.0, 17 March 2009. If we can go to page 4, {D1/62/4}, and pick it up about halfway down, if we zoom in we will see a paragraph that starts:

"But we've been listening, and some developers have come to us saying there are other business models they'd love to support for their applications."

So this is the start of the discussion about the announcement of the launch of in-app purchase capability. If we pick it up right down at the bottom of the page -- if we can zoom down, that would be very helpful -- you see, "One more example -- city guides". If we pick it up halfway through the paragraph, we see:

"Let's say I want to purchase Chicago. That's as easy as tapping on Chicago and it brings up the standard alert asking me if I'd [like] to purchase it. Now, here's where it's really nice. This whole thing is tied directly into the iTunes Store. So, when you tap on 'Buy', it brings up a standard iTunes credential panel. In a secure way, you now get your user name, you type in your password, and when you do, it talks back to our

iTunes Store ...", and so on and so forth.

That is it. That is the extent of the contemporaneous document Apple have been able to identify to support the suggestion that the Payment System Restrictions are justified by privacy or security concerns; a single parenthetical reference to security in this transcript. I do not think I need to say anything more about that.

Sir, I am about to move on to another topic. I do not know if that is a convenient time for a short break.

THE CHAIRMAN: Yes, we will take a ten-minute break. Thank you.

(3.13 pm)

(A short break)

(3.25 pm)

THE CHAIRMAN: Yes, Mr Kennedy.

MR KENNEDY: Moving, then, to objective necessity and a brief comment on the law. As Mr Hoskins submitted, there is a distinction between objective necessity and what is called "the efficiencies defence". Objective necessity asks whether the main operation would be impossible without the restrictions in question and the efficiencies defence asks, in a nutshell, whether there are benefits arising out of the restrictions and balances those benefits against any harms caused by the

restrictions, and we say that that is the schema of the law.

We say that it cannot be the law that objective necessity also requires the weighing-up of benefits against the harm caused by the restrictions, otherwise there would be no distinction between the two defences. However, if objective necessity does require a weighing-up exercise, it cannot be the case that that weighing-up exercise is less strict than the weighing-up exercise carried out for the efficiencies defence. If an undertaking fails the efficiencies defence, it cannot be saved by the objective necessity test. We say that would be legally incoherent.

Therefore, what I will do now is turn to the efficiencies defence and address our arguments under that head. As I outlined at the beginning, sir, we make essentially two submissions. The first is that Apple has failed to identify or isolate benefits that are attributable specifically to the restrictions in question, and we say, in addition, that they failed to quantify any such benefits.

I just want to show you two authorities which explain what the law is in respect of those two limbs. The first is *Sainsbury's v MasterCard* in the Court of Appeal. It is at {AB3/32/1}. If we can pick

it up on page {AB3/32/22}, we see a heading, "Part V: the law on exemption under article 101(3)".

The paragraph that we are most interested in is paragraph 84, which is on the top of page {AB3/32/24}. The Court of Appeal said:

"First, the relevant benefits for the purposes of the benefits requirement must be causally linked to the relevant restriction, here the default MIF. As Popplewell J correctly recognised in stating the principles at [264] of his judgment, it is not sufficient to identify benefits which result from the use of credit cards or debit cards generally or from the particular *MasterCard* or Visa scheme generally. This is because it is the restriction of the default MIF which, on this hypothesis, has been found to be a restriction of competition under article 101(1) and has not been shown to be objectively necessary under the ancillary restraint doctrine, and which therefore requires justification to be held exempt under article 101(3). It is any alleged pro-competitive effect of the default MIF which falls to be weighed against the anti-competitive restrictive effect; see [207] of the General Court's decision in *MasterCard*, which was upheld in the CJEU's [judgment] decision at [232]."

So we say that, in applying that principle in the

present case, what Apple needs to do is to identify benefits arising specifically from the App Distribution Restrictions or the Payment System Restrictions and not from Apple's security architecture or infrastructure as a whole. It is necessary to isolate the benefits that are caused specifically by the restrictions and then weigh them against the harm caused to the class. That is the first principle.

If we can then go to the Supreme Court's judgment in this case. That is *Sainsbury's v MasterCard*, Supreme Court, {AB3/38/1}. If we can pick it up on paragraph 40, which is on {AB3/38/14}, just to get our bearings in the judgment, we see:

"The issues which arise on the appeal are as follows ...

"(ii) Did the Court of Appeal find, and if so did it err in law in finding, that Visa and *MasterCard* were required to satisfy a more onerous evidential standard than that normally applicable in civil litigation, in order to establish that their MIFs were exempt from the prohibition on restrictive agreements pursuant to article 101(3) TFEU, because of the economic benefits to which they contributed?"

That is called "the standard of proof issue".

If we go to paragraph 106, which is at the bottom of

page {AB3/38/30}, we will find where the issue dealt with this issue, see "Issue (ii) -- the standard of proof issue". I just want to show you the conclusion that the court reached, which is at paragraph 116, which is page {AB3/38/37}. If we zoom in, the court says:

"It is clear, in our view, that article 101(3) does impose requirements as to the nature of the evidence which is capable of discharging the burden on an undertaking to establish an exemption under that provision. Section 0 of the 1998 Act imports those requirements into domestic competition law. Article 101(3) is founded on the notion that notwithstanding the existence of a restriction on competition and its likely negative effect on competition and consumers, efficiencies and benefits arising from the conduct which gave rise to the restriction may, nevertheless, justify exemption from the prohibition in article 101(1). This is an inherently empirical proposition and necessarily requires the authority or court addressing the issue to carry out a balancing exercise -- a 'complex assessment' ... involving weighing the pro-competitive effect against the anti-competitive effect of the conduct in question. Cogent empirical evidence is necessary in order to carry out the required evaluation

of the claimed efficiencies and benefits. To the extent that objective efficiencies caused by a restriction cannot be established empirically, they cannot be balanced with the restrictive effects. As a result, although the standard of proof is a matter of domestic law, the nature of the evidence which will satisfy that standard must take account of the substantive requirements of article 101(3)."

Sir, *Sainsbury's* is of course an article 101(3) case, but, as we said in our skeleton argument for opening, the approach to the efficiencies justification under Article 101(2) is analogous to that for exemption under 101(3) and we see that in the Court of Justice's judgment in *European Superleague* at paragraph 205, which is {AB4/34/46}. If we could zoom in, we see:

"In the same way as for the exemption provided for in Article 101(3) TFEU, that justification requires that the undertaking relying thereon shows, using convincing arguments and evidence, that all of the conditions required for that exemption are satisfied."

So we are looking for cogent empirical evidence and convincing arguments and evidence. So, sir, we say that the Supreme Court's approach in *Sainsbury's* applies equally to Article 101(2) -- sorry. Pardon me, sir -- Article 102 as it does to 101 and we say that, pursuant

to section 60A of the Competition Act 1998, the same approach should also be taken to the Chapter II domestic prohibition.

So those are the two propositions of law which I wish to emphasise when coming on to look at Apple's approach on the evidence. We say that, despite the law being clear as to what is required and despite Apple bearing the burden of proof, Apple's evidence failed clearly to identify benefits that were said to arise specifically from the App Distribution Restrictions or the Payment System Restrictions as opposed to from Apple's wider security infrastructure.

Just to give you two examples of that, if we could look at paragraph 90 of Mr Federighi's statement. That is {B2/3/28}. If we just pick it up in the second sentence:

"Distribution of Apps through the App Store averts the risk that Apps could circumvent the App Review process and the human review element that is crucial to that process, by blocking developers intent on causing harm from being able to bypass App Review."

You will recall that Mr Federighi accepted in cross-examination that mandatory App Review could, in fact, be decoupled from centralised distribution, but that was not the way in which it was presented in his

evidence.

Professor Rubin's evidence was similarly unclear, certainly in his first report but also to an extent in his second report, as to what the relationship was between App Review and centralised distribution. Just to give you one example for the Payment System Restrictions, if we look at Mr Schiller's statement, paragraph 141(b). It is {B2/5/38}. Perhaps we can pick it up on the previous page to see how this was introduced, {B2/5/37}. We see at 141, " IAP: Benefits to consumers":

"IAP provides several benefits to consumers, as follows."

Then if we go back over the page to (b), {B2/5/38}, we see:

"IAP helps to ensure that transactions are secure and protected from fraud by incorporating Apple's security features, such as Face ID and two-factor authentication ...", and so on.

But again Mr Schiller accepted in cross-examination that Face ID and two-factor authentication could be used without requiring the use of IAP. As a result of how Apple presented its evidence, sir, it was necessary for me to seek to tease out in cross-examination which of the matters which Apple identified as being a security

benefit or security feature of iOS was even prima facie causally connected to either the App Distribution Restrictions or the Payment System Restrictions, and that is why the security counterfactual was explored on several occasions with Apple's witnesses, in an attempt to try and isolate the effects of the App Distribution Restrictions or the Payment System Restrictions.

THE CHAIRMAN: We are back to that point that I raised with Mr Hoskins, that at least until shortly before the trial started I do not think Apple was aware that you were putting forward a counterfactual in which App Review would take place, notwithstanding the removal of the restrictions, so I think there is a -- it may be right that there is not much evidence on it, but there may be some reasons why they had -- why those -- particularly that statement from Mr Federighi was made, because I think he was probably assuming, when he did his first statement, that the counterfactual involved not only the removal of the restrictions but removal of the App Review.

MR KENNEDY: Well, sir, we say that, in light of what the law says, it was really incumbent on Apple and Mr Federighi and Mr Schiller and Mr Kosmynka and Professor Rubin to carry out that exercise themselves and to ask themselves the question, "Is it possible to

have App Review without having the restrictions?". In my submission, the answer is perfectly obvious because we know from the DMA experience that you can have a form of App Review absent centralised distribution.

If we just have a quick look at what Mr Federighi said about the DMA in his witness statement. It is {B2/3/1}. I think it is right on the last page, but someone will correct me. Yes, paragraph 138, {B2/3/44}:

"In this witness statement, I have described Apple's current business model. As set out above, Apple's current business model has a number of critical features that ensures Apple can maintain the highest levels of protection in relation to users' security and privacy. However, I am aware that Apple will be making changes to its business model in the European Union in order to comply with the legal requirements imposed by the European Commission's forthcoming DMA."

That was all that was said, but he could have gone on to say, "I understand or I know that it is possible to separate out these various elements and here is what it would look like and here is what the security consequences could have been". A decision was obviously taken by Apple not to do that and it became incumbent on me to try and work out where the various strands were dependent and were not dependent in order to get to what

we say is the starting point for the legal analysis.

So, with respect, sir, we do not accept the criticism that somehow they were taken by surprise by me putting this counterfactual in cross-examination.

THE CHAIRMAN: Well, I do not think -- I do not think I was saying that. I was not going that far. I was just making the observation that it is perhaps not surprising that Mr Federighi had not laid out all the possible permutations for the different counterfactual without being clear about what yours was, and I am not criticising the Class Representative for the way that that has been conducted either. I know there are some views on that, but I am not making that point at the moment. All I am saying is that -- I am trying to be fair to Mr Federighi because it seems to me, at that stage, it was perfectly -- it might have been perfectly reasonable for him to assume that App Review was something that would go with the removal of centralisation. I mean, there is some logic in that, albeit that it does not follow through to its ultimate point.

So that is the only point I am making. I do not think the point about the DMA helps because the DMA -- the App Review is part of the DMA, is it not? It is the notarisation that is still there and some degree of the

guidelines.

MR KENNEDY: Absolutely, sir. It is a restrictive set of guidelines. You will recall, sir, that it is only restricted by dint of what the Commission would allow Apple to do, and I explored that in cross-examination with Mr Federighi. He said that Apple could apply the full set of guidelines subject to any regulatory restriction that they were under in the United Kingdom. So again, in my submission, it is not a criticism of Mr Federighi personally, but I do say that Apple could have been more forthcoming about what the various permutations were in terms of the dependencies between the various layers of what they call "the defence in depth security architecture". We say that the burden is on them to say, "Here are the benefits that are causally connected to these restrictions", and we say they did not do that in the evidence, the factual evidence or in the expert evidence.

THE CHAIRMAN: Well, it probably does not end up being a burden point, does it, because I think -- I may be told otherwise -- but I think you did put your case pretty fulsomely to those witnesses about the different strands and what could or could not be done, and now obviously that is a different thing from what the benefits -- how the benefits relate, if you like, to the

restrictions, but you certainly put your case as to the, if you like, segmentation of the different aspects of the infrastructure, if I can put it that way.

MR KENNEDY: We certainly explored it at great length, so maybe --

THE CHAIRMAN: No, no, I -- well, I -- you did what you -- (overspeaking).

MR KENNEDY: But we do say that the failure of Apple to carry out the exercise that I say they ought to have carried out does go to whether or not they have proved their case as to there being concrete benefits that are causally connected to the restrictions. The cross-examination only takes us so far. I say it takes us some of the way down the road. I am coming on to where we get to and why that still falls short of what I have just shown you is the legal standard, clear and convincing evidence, cogent and empirical evidence. I say we do not get there. We still end up in a thumbnail sketch of what some of the security consequences might be and I say it does not get much beyond speculation, so perhaps it would be -- perhaps it would assist by -- (overspeaking).

THE CHAIRMAN: I understand that point. I am certainly not -- I understand the point you are making, so that is fine, and by all means just carry on.

MR KENNEDY: Sir, if we start with the App Distribution Restrictions, and if I can try and articulate where we say you end up once you carry out the separating-out process and what we saw in the course of cross-examination is that the hardware security features are independent of centralised distribution. That was accepted by Mr Federighi, accepted by Professor Rubin. The security -- the software security features independent of centralised distribution again accepted by Mr Federighi, accepted by Professor Rubin. Thirdly, App Review, possible without centralised distribution, accepted by Mr Federighi, accepted by Professor Rubin.

What you are left with is that, absent the App Distribution Restrictions, not all information about iOS Apps would remain in Apple's hands in the counterfactual. That is what it boils down to. Apple refers to this as "fragmentation of information" and we have referred to it as "dispersion of information" in our written closings. It is important to focus on two different points in time when considering how that fragmentation takes place. The first is during App Review and the second is after App Review. I propose to start with after App Review and come on to during App Review because that developed somewhat in the course of the trial.

Again, in order to get beyond the simple proposition that there will be fragmentation of information following App Review in the counterfactual, it was necessary to explore that at some length with Mr Kosmynka, and I have set out in our written closings where we say we get to, if I can just summarise the position.

Firstly, it is important to remember that here we are only concerned with malicious apps that are not caught by Apple during App Review and we established, in cross-examination with Mr Kosmynka, in the actual world, apps of that nature represent a very small proportion of the total number of apps submitted to App Review. It was about [redacted]. That is the cross-examination of Mr Kosmynka, {Day5/206:10} to page 207, line 3, {Day5/207:3}.

I am told that the percentage number that I gave is confidential and if that could be reflected in the transcript, we would be grateful and I apologise for inadvertently mentioning the number. We will stick with "very small proportion" going forward, sir.

There was a wrinkle about how that number was calculated. It is reflected in the transcript. I do not need to try your patience with an explanation. It might be a slight overstatement but it is broadly

correct in terms of the order of magnitude.

Secondly, in the security counterfactual, Apple would retain the ability to monitor for apps that turn malicious following App Review through a number of channels. Again, I explored each of the channels that Mr Kosmynka addressed in his witness statement and for a number of them he accepted that Apple would continue to be able to use those channels; things like use of computer, automated computer tools to scan apps or changes in behaviour, users reporting things to Apple, developers reporting things to Apple, third party, press and so on. We do not shrink from the fact that Apple would not be able to monitor all of the channels that it currently monitors, but we say that the loss of the ability to monitor, for example, user reviews is not significant.

Mr Kosmynka identified the number of apps that were identified as malicious using only user reviews. I do not know whether that number is confidential. I will not read it out. It is in his witness statement. But that was an even smaller proportion of the total number of apps submitted than the number I inadvertently read out a moment ago. Professor Rubin accepted in cross-examination that the role of reviews in ensuring iOS platform security was limited. That is

{Day11/127:16-21}.

Thirdly, we saw in the course of the cross-examination that it was likely that third party distributors of iOS Apps would also carry out post-review monitoring of apps for malicious behaviour because they would be under a contractual obligation to do so.

The final point on post-App Review of malicious activity: due to the continued use of mandatory code signing, Apple's ability to turn off the spigots, to borrow Mr Jobs' phrase, would, we say, be largely unchanged in the security counterfactual, and again the references supporting that proposition are set out in our written closings.

Sir, we say that that only takes you so far and it does not take you to a place where you have cogent empirical evidence as to what the benefits of the App Distribution Restrictions are. What we did not see was any attempt by Apple to say that, as a result of this fragmentation, you would likely see a certain percentage increase in malware activity or any other concrete security risk. It was all couched at the level of, "It may lead to X, it may lead to Y". Sir, in our submission, in light of the Court of Appeal decision in *Sainsbury's*, we say that that is simply not good enough

to meet the standard for causal connection.

I said I would come back to the fragmentation of information during App Review and I want to briefly address a point that arose during Mr Federighi's cross-examination, which was Mr Federighi's suggestion that in a counterfactual world in which Apple was carrying out notarisation-style App Review, Apple would receive less information during App Review because developers would not be required to provide them with the same marketing information as they do when they submit apps to full App Review. Just for your note, that discussion began at {Day8/49:10}. It finished the same day, thankfully, page 72, line 21. I do not propose to take you through it, but you will recall that Mr Federighi gave two examples. He gave an example of a fake Adobe app that was actually not a pro image editor but rather had very limited functionality and then he gave an example of a banking trojan that presented itself as having simple Excel style functionality, but, in fact, you input your account details and then the malicious attacker had access to your banking information.

We have gone away to check what information must be provided under notarisation and what information must be provided under full App Review. Before I show you what

that information is, I readily accept that none of this was put to Mr Federighi in cross-examination. The reason for that was that this particular risk was not identified by Mr Federighi in his witness statement. It emerged for the first time in the box --

THE CHAIRMAN: I can see Mr Kennelly warming up.

MR KENNELLY: No, I was concerned that he was about to give some evidence from the Bar. I do not think he has done that, but he has made a different point which I can address I think in my --

MR KENNEDY: What I propose to do, sir, I was proposing to -- I was planning to show you two documents from Apple's website, which --

MR KENNELLY: No, no, that is not right. If they are on the website, they could have been shown to Mr Federighi and they were not.

MR KENNEDY: They were not shown to Mr Federighi because this risk was identified for the first time in his evidence in the box. It does not appear in his witness statement, sir, and that was the reason why it was not put to him.

MR KENNELLY: He could have been recalled, sir. It is well understood that, if a point is raised, it could have been addressed in cross. Mr Federighi could have come back. There is no reason to produce it.

THE CHAIRMAN: It could have been put to an expert.
MR KENNELLY: Absolutely, sir.
MR KENNEDY: It could have been put to Professor Rubin, I accept that, sir, but Professor Rubin also did not make this point. The point that was made by Professor Rubin about the gap between information on third party app stores and information available on app installation sheets is a different point, sir. None of the evidence suggested that the risk of a banking trojan was increased in the security --
THE CHAIRMAN: I think what we might do with this, Mr Kennedy, is I think we might ask you to show it to Mr Kennelly and, if you still cannot agree -- if you want to persist and Mr Kennelly does not agree, then we will have to deal with it first thing tomorrow morning, but I do not think I am going to let you bounce in without them having the opportunity to deal with it.
MR KENNEDY: I do not wish to be unfair to Mr Kennelly, but the submission I was going to make is that, given that these are documents from Apple's website, it seems unlikely that Mr Federighi would say that the information presented on them was incorrect, but I will raise it with Mr Kennelly in the break and --
THE CHAIRMAN: Yes. Why do you not -- I do not know how -- I do not know whether you are planning to still be on

your feet at 4.30.

MR KENNEDY: I am hoping not to still be on my feet at 4.30, but we could take a further very short break. We could have a break now, sir --

THE CHAIRMAN: Well, I am not sure that is going to help. Mr Kennelly probably needs a bit more time to look at it. I think just as a matter of principle, Mr Kennedy, we do not really want new material coming in -- (overspeaking).

MR KENNEDY: I accept that.

THE CHAIRMAN: So there has to be a pretty good reason for that, and I am not sure you have crossed that threshold yet, if I can say so. So unless it is entirely unobjectionable, in other words it is making a point which you could have probably made without showing us the document, then I suspect there may well be a bit of a fight about it.

MR KENNEDY: I can certainly try sir and make the point without showing you the document, but --

MR KENNELLY: No, no -- I am sorry, sir.

THE CHAIRMAN: Well, I am not sure -- this is not necessarily going to be the right answer. Why do we not leave it on the basis -- I think you are going to have to discuss it with Mr Kennelly, and if you want to raise it again at 10.30 tomorrow morning, then by all means

do, and you can fill us in at that stage if we give you permission to put it in. I think we will deal with it in that way.

MR KENNEDY: Hopefully we will not need to trouble you, sir, but we will come back.

I will move then, sir, to the Payment System Restrictions. We say that Apple has similarly failed to identify any benefits caused by those restrictions. Sir, the evidence on this topic was wide-ranging, but I want to focus on what we say are the two main alleged benefits, and that is the security of iOS device user payment information and fraud detection in the counterfactual, so those are the two heads I wish to look at.

If we can start with the security of payment information. Apple says that, absent the Payment System Restrictions, iOS device users would need to provide their payment details to a greater number of entities, which means that those details are more likely to be obtained by a malicious actor. Just as an example of where that point was made, 1st Schiller, paragraph 141, {B2/5/37}.

In considering that evidence, we say that the starting point is that, as Mr Burelli explains, relevant purchasers operate in a materially similar way to any

online purchase. So you have a merchant or a merchant of record, you have a payment gateway, you have payment processors and acquirers, you have card schemes and you have banks. That was bringing back some bad memories perhaps for you, sir, of different cases involving the same participants. For relevant purchases, so those that we are concerned with, Apple acts as the merchant of records with developers as the sub-merchants and as the payment gateway, but otherwise third parties -- third party acquirers, third party schemes, third party banks -- are responsible for processing the payments associated with the relevant purchases.

IOS device users provide their payment information, their debit or credit card information to Apple, when setting up a payment method associated with their Apple account and then that payment information is stored in the secure element. Relying on Apple's publicly available documentation, Professor Rubin's evidence was that the secure element is compliant with financial industry requirements for electronic payments. That is 1st Rubin, paragraph 162, {C3/2/51}, and it is citing {D1/1279/1}. But neither Mr Schiller nor Professor Rubin provided any further analysis of how Apple stores that information securely. Indeed, in cross-examination, Professor Rubin was unable to recall

how Apple stores users' payment information. That is {Day12/77:19} to page 78, line 20, {Day12/78:20}.

That information, the users' payment information, has to be shared with the third parties involved in processing relevant purchases in some form. However, when this was explored with Mr Schiller in cross-examination, he had no knowledge of how Apple shared that information or what security processes were in place. That is {Day/6/153:4-13}. Sir, this is not about "gotcha" points in cross-examination. Apple is asking this Tribunal to find that the Payment System Restrictions are objectively justified on security and privacy grounds but has not put sufficient evidence before the Tribunal to allow it to understand how Apple does that in the actual world. For example, are the financial industry requirements that are referred to in Apple's documentation, the secure elements, the PCI DSS or are they something else? Is iOS device users' payment information encrypted when it is sent to the acquirer or to the scheme? We are left trying to piece things together based on a solicitor's affidavit from the Australian proceedings -- it is Mr Lloyd's affidavit that you might recall -- and documents available on Apple's websites. We say that that is simply not good enough to meet the evidential standard that I have shown

you articulated in the case law, and that is before you come onto any question of the counterfactual and how secure third parties are.

But turning to the counterfactual, the CR's case is simple. The payment industry is unsurprisingly heavily regulated and, if alternative providers have the alternative certification, PCI DSS level 1 certification, they can be trusted to handle iOS device users' payment information. That is our case in a nutshell.

Apple says PCI DSS compliance is not sufficient because there are examples of companies that are or should be PCI DSS compliant suffering data breaches, but you will recall, sir, that the best that Apple could come up with were two examples. The first example was a breach of Home Depot's physical payment terminals. Nothing to do with digital payments, in-app purchases, but, rather, the little terminal we all use when we go to the shops. The second example was an attack on a payment services provider that specialises in Christian organisations. That was it.

That brings us, sir, to the elephant in the room. The Payment System Restrictions do not apply to in-app purchases of physical goods and services from within an iOS app. Only third parties, such as Stripe, can

process those payments. In 2022 those transactions accounted for nearly $1 trillion worth of commerce. Did Apple identify a single example of payment information being compromised as a result of third parties facilitating those iOS transactions? The answer is "No". A total lack of cogent empirical evidence on risk to iOS device users' payment information in the counterfactual. We say that is the end of that.

Turning then, sir, to fraud detection, we start with third parties' ability to detect fraud. Apple's case is that third parties are less effective at identifying fraud than Apple because Apple has a more representative dataset about fraud perpetrated in respect of relevant purchases. Now, it is obviously correct that Apple has more data on relevant purchases than third parties because third parties have no data about relevant purchases because they are prevented from competing to process the payments associated with those purchases by the Payment System Restrictions, and it cannot seriously be suggested that the absence of that data due to the existence of the restrictions affords Apple a defence.

In any event, in a counterfactual world in which the Payment System Restrictions were absent, third parties would have data on relevant purchases, whether we are talking about the delayed counterfactual or the primary

counterfactual. Professor Rubin accepted in cross-examination that this would improve their ability to detect fraud. That is the cross-examination of Professor Rubin, {Day12/30:2}, to page 32, line 19, {Day12/32:19}.

Turning then to Apple's ability to detect fraud in the counterfactual, Apple also contended that the removal of the Payment System Restrictions would impair Apple's ability to identify fraud as it would reduce the number of data points available to Apple to train its fraud detection algorithms. But, once again, Apple has provided the Tribunal with no evidence by which it could assess that claim. Neither Mr Schiller nor Mr Kosmynka nor Professor Rubin tried to estimate how much data would be lost if the Payment System Restrictions were removed or at what point the loss of data would be sufficient to reduce the effectiveness of Apple's fraud detection algorithms.

I put to Professor Rubin in cross-examination that, if we were talking only about the removal of the Payment System Restrictions in the United Kingdom, the amount of data lost would be about 1%. You will recall the excruciating passages in which we came to that figure. Apple cavil at this in their closings, saying that Apple is entitled to "rely upon the benefits derived from that

dataset as a whole in seeking to justify its Payment System Requirements". That is Apple's closings at paragraph 383, {A1/9/25}.

Leaving aside for a second the paucity of any legal analysis in support of that proposition, the point remains that Apple has not provided the Tribunal with any evidence by which to assess the claims made by their witnesses. Even if we look at the issue globally, is Apple losing 50% of the data? Is it losing 10% of the data? What is the tipping point for the algorithms in terms of accuracy? This is, we say, precisely the sort of vague, general and theoretical argument that the case law says is insufficient to found an efficiency defence.

So that brings me to quantification, and I do not propose to say very much about Professor Sweeting's quantification exercise. We have dealt with that at some length in our written closings and I do not propose to go through all of that material.

Two points, really. Professor Sweeting made clear in cross-examination that he was not valuing benefits that were causally connected to the restrictions, but, rather, certain features of iOS more generally, and Professor Sweeting also made clear in cross-examination that he had not carried out any counterfactual analysis in reaching the estimates that he put forward in his

first report. That is at paragraph 39 of our closings. You can find the references to those two concessions in cross-examination. Sir, we say that that is absolutely fatal to Apple's case.

I have shown you the law. The law requires the defendant to identify benefits that are causally connected to the restriction in question, not simply certain features of the system as a whole, and it requires those benefits to be quantified in pounds and pence, and that necessarily entails a counterfactual analysis. Professor Sweeting, in his report, said that, in order to do this properly, you carry out a counterfactual analysis but failed entirely to do so. We say that you do not therefore need to get into his numbers at all. We did get into those numbers in cross-examination, but, as we have explained in our written closings, we did so to give the Tribunal some indication of what the figures might look like if you embarked on that exercise. We do not say that the numbers that we put forward are correct or are actually valuing benefits associated with the payment restrictions or the App Distribution Restrictions for the first reason I gave, which is that Professor Sweeting fails at the first stage of isolating benefits causally connected to the restrictions.

One point of detail, sir. Apple suggests at paragraph 409 of their skeleton argument -- that is {A1/9/134} -- that if the values I put to Professor Sweeting in cross-examination are aggregated, they still outweigh the harms suffered to the class. Sir, we say that that is simply wrong. Obviously we say that our primary submission is that you do not need to get into Professor Sweeting's, but if it would assist the Tribunal, we can provide workings to show why that assertion in Apple's closings is not correct. If you aggregate the numbers that I put to Professor Sweeting in cross-examination, they do not outweigh the harms caused to the class as a whole on either Mr Holt's estimates or on Dr Singer's estimates.

One final point on developers. At paragraph 129(d) of our openings we explained that it is necessary to establish benefits that have a positive impact on all users, and that is a point that is picked up in the Supreme Court's decision in *Sainsbury's v MasterCard*, where the Supreme Court made clear that it is "not the purpose of competition law to permit anti-competitive practices to harm consumers in one market for the sake of providing benefits to those in another". That is paragraph 174, {AB3/38/62}. We say that it is therefore necessary for Apple to show that the benefits to both

iOS device users and iOS app developers outweigh the harm that they have suffered respectively. However, in cross-examination, Professor Sweeting accepted that he had not quantified any alleged benefits to developers, and we say that is a further reason why Apple has failed to show that the restrictions are objectively justified.

Sir, those are the submissions of the Class Representative on the remainder of the objective justification, unless I can assist the Tribunal further.

THE CHAIRMAN: Just on your last point, are you saying that you have to look at developers and reach the same conclusion as to benefit? Are you saying that that is a threshold that has to be met both in relation to developers and benefits?

MR KENNEDY: Sir, you have to show that it outweighs it for both categories of consumers. In the iOS App Distribution Market you have two categories of consumers on two sides of the market, developers on one side, iOS device users on the other. We say that you have to show that the outweighing test is met for both categories. For the payment systems market, we say it is a one-sided market which only includes developers, so you need to show that any harm suffered by the developers in that market is outweighed by benefits to them. The benefits that Professor Sweeting claims to identify necessarily

must arise in a separate market when it comes to the payment system's restrictions. He does not specify which market. I will not guess as to what his answer would be, but we say that that is the analysis and the references are given, as I say, in 129(d) of our openings and --

THE CHAIRMAN: Yes. I thought that Professor Sweeting started by noting what I think Mr Holt ends up with as the average redress to the class members and then uses that as a benchmark and therefore everything is tied back to users. Presumably that is the logic of what he does.

MR KENNEDY: Yes, that is the (overspeaking) and that is the exercise we focused on in cross-examination.

THE CHAIRMAN: Yes, but you say that that is actually a false premise. It is the wrong starting point because it is just identifying what Mr Holt happens to arithmetically have turned out to be the damages claims period and you say that is not the same thing as the benefits that developers might --

MR KENNEDY: I just want to make sure that I have understood your question.

THE CHAIRMAN: Well, that is the harm --

MR KENNEDY: That is the harm to consumers. That is the part of the overcharge --

THE CHAIRMAN: Yes, (overspeaking).
MR KENNEDY: -- consumers, and that is the right number for one side of the scales for the consumer or the user part of the analysis --
THE CHAIRMAN: If you are looking at consumers, yes.
MR KENNEDY: -- but you also need to have the harm number for developers and the benefit number for developers to carry out the exercise on that category of user, as it is put in the *European Superleague* case. So you need to do both exercises and Professor Sweeting has done neither part of the exercise for developers and we say he has not done the exercise properly for iOS device users for the reasons I have given --
THE CHAIRMAN: Yes, the benefits to users.
MR KENNEDY: -- not isolating benefits that are causally connected and failing to carry out a proper quantification exercise. You will recall, sir, that I made various points about the documents that Professor Sweeting relied on. Those are all canvassed in our written closing. I am focusing on the higher level failings in the closing submissions.
THE CHAIRMAN: Yes, I understand, and if you were thinking about the harm to developers, is it simple as saying, "That is the amount that has not been passed on"
MR KENNEDY: Certainly that would be the starting point, in

my submission, sir, is the portion of the overcharge not passed on, which you can work out arithmetically from the reports by --

THE CHAIRMAN: Yes, and then you -- I suppose you then have to go through some exercise of working out what the benefits to the developers are and how you could do it. I know you say that -- or Professor Sweeting said it was not accurate, but down that path of what he did there and take it through to what you say would be adequate.

MR KENNEDY: (Overspeaking) In fairness to Professor Sweeting and Apple, it is not the case that Professor Sweeting did not say there are no advantages to developers. I think it is probably fair to say that the crux of his evidence was that developers benefit from network effects which increases demand for apps and then they make more money and so forth. But he did not attempt to quantify that benefit or, for example, I think he also said that fraud detection also benefits developers, because sometimes it is a user trying to scam a developer. There was no attempt to value those benefits. So in fairness to him, it was not that there is nothing in the reports, but this was one of the categories, from memory, sir, where he said: I just cannot start to do it; and we say essentially: bad luck. *Sainsbury's* says: if you cannot count it, you cannot

have it as part of the efficiencies defence.

THE CHAIRMAN: Thank you.

MR KENNEDY: That is the law. So, sir, those are my submissions.

THE CHAIRMAN: That is you done. Good, okay. Thank you. Who is next? Mr Armitage or Mr Ward?

Submissions by MR WARD

MR WARD: Thank you, sir.

By way of a roadmap, there is going to be something of a double act between me and Mr Armitage, reflecting the way the issues were dealt with at trial, and then right at the end you are also going to hear from Ms Fitzpatrick.

Now, what I would like to do is just to make a few high level remarks to begin with. Then Mr Armitage is going to deal with some discrete points on the law. Then he will deal with limb 1, excessive. Then I will turn to limb 2, fairness; obviously this is well into tomorrow now. Then you will hear from Mr Armitage again on comparators. I will deal with incidence. Then by way of grand finale, Ms Fitzpatrick is going to deal with interest.

What I would like to do now is just to start with an overview. We start our oral closing in exactly the same place as our opening. The evidence you have heard

has only served to confirm that Apple's prices are excessive and unfair.

Starting with "excessive", the foundation for the claim is, of course, the profitability metrics calculated by Mr Dudney, and they demonstrate quite astonishing returns on the App Store, out of all proportion to its WACC.

Can we please turn up {C2/7/42}? This is Mr Dudney's first report. I am going to be careful only to refer to the figures that are non-confidential in the years 2016 to 2019. But what you can see here is that the profits are both astonishingly high and, indeed, persistent. We see ROCE, in the bottom left there, of almost 400% and operating profits that double in the years 2016 to 2019. So the competition that Apple insists exists has done nothing to drive these figures down.

While we are here, I would just invite you to look at the figures for the years that I cannot read out. So we can look at the operating profit line at the bottom of table 23, and the ROCE line at the bottom of table 24, and then the overall metrics in 5.9.2, all of which is confidential.

Now, as you have heard, of course, Apple has not put forward any rival estimates of these figures. Its case

going into trial was that they were meaningless; that it was impossible to measure its profitability. Dr Barnes accepted that the consequence of this was that the CMA, and indeed the US court, were just wrong to do this. Indeed, they were wasting their time. He accepted repeatedly that his analysis was at odds with the CMA's approach.

But the awkward fact for Apple is that the CMA, in particular, rejected broadly the same arguments that Apple is running in these proceedings, and of course I echo Mr Hoskins this morning. The CMA's ruling is not binding, but it is highly informative, as it is a view of an expert regulator in this field.

But the reality is that Apple is not so exceptional that this kind of analysis is impossible or cannot be done meaningfully. Apple itself does this for the App Store, for the benefit of its most senior management. Mr Dudney has reached his view by applying Apple's own methodologies.

Now, as Mr Armitage will show you, probably tomorrow, Apple now concedes that the App Store was highly profitable. In those circumstances, it is not clear to us whether limb 1 actually is even still in dispute. But as to limb 2, fairness, that is definitely in dispute. We emphasise again: the Class

Representative's case is not cost plus or that Apple should only be allowed to recover an amount equivalent to its WACC. The case is instead based on an "in the round" assessment by Mr Holt of fairness. It is also worth saying at the outset that this is an area where the CMA might not be as generous as the Class Representative's case.

Can we please turn up {AB6/28/12}? This is appendix C to the CMA's Mobile Ecosystems Report, and you will see, at paragraph 44, a passage that we have discussed a number of times. What the CMA says is that -- if we pick it up in the fourth line:

"In a market characterised by effective competition, any excess of returns above the WACC would then be expected to be eroded over time, as competitors would see an opportunity to enter and earn high returns on capital."

If we turn now to page 15, {AB6/28/14}, paragraph 51, it says, here -- discussing the CMA's ROCE for the overall Apple [sic] of 250 to 300, it says:

"Given the scale of the actual ROCE and by how much it exceeds any reasonable benchmark, we have not at this stage undertaken a detailed assessment of Apple's WACC."

But then it says:

"As a reference point, we would normally expect

investors to have an expectation of earning returns of the order of 10% per year for investing in shares of large firms with significant assets and exposure to the wider economy."

Then two lines down:

"In other words, a ROCE above 10% is indicative of Apple making higher returns on its invested capital than normally required by investors in the shares of comparable companies."

Well, that is why I say that the Class Representative is relatively generous to Apple, because as you know, our case allows Apple a central case average effective commission of 15%. So that still allows very significant returns above WACC. Just for the transcript, you can see the figures in Mr Holt's third report at {C2/10/73}, table 5.5.

Well, it is an irony that Apple seeks to use this conservatism against the Class Representative; and of course the Class Representative accepts that Apple is entitled to reward for the App Store, reflective of its economic value. But the law is clear: the benchmark is workable competition, not monopoly. As Mr Hoskins has explained, on our case, Apple is a monopolist. That is the case, whether you decide there is one market or two. It is not just a monopolist; the restrictions it

imposes protect it from any prospect of entry. That is why Apple's appeals to the value that consumers and developers enjoy from the App Store are simply no answer. It is, in substance, a classic case of the willingness to pay fallacy.

Developers are willing to pay Apple's commission. That is why its returns are so vast. As the value of commerce on the App Store has grown, Apple's take has grown, but the price it can extract in conditions of monopoly is not the price -- the price in workable competition.

To be clear, the Class Representative is not submitting that merely because a price is set in conditions of ineffective competition, it is ipso facto unfair. The point is, though, on the totality of the evidence, the prices are well above the prices one would expect to see in conditions of workable competition and there is no prospect of entry to bring them down. If entry had been possible, profits on this scale would have attracted it.

Now, the comparators we rely on illustrate this point. Mr Armitage will deal with them in detail. The market for PC app distribution is not a perfect comparator; we accept that. But it is highly informative; not least because there has been

competitive entry in that market and prices have fallen.

Then finally by way of introduction, a few words on incidence. The Class Representative's case is that the burden of the commission fell largely upon consumers. Underlying this is a very simple point. Apple retains 30% of the sums charged by developers to their customers. So this is not a small figure hidden in the detail of the costing; it is a huge amount. It is therefore unsurprising that the evidence is that this would affect pricing. Apple's case is characteristically extreme. It says consumer incidence would be zero. So this charge of 30% makes no difference at all to developer pricing. Developers would simply ignore it in price setting, never mind what it did to their profitability.

It makes that case, while remaining silent on its own experience of consumer incidence. The core of its case are natural experiments, which do not even address our primary case.

Now, of course, as you know, the European Commission's in-depth study into the issue in *Spotify* reached a polar opposite conclusion to Apple. Apple's strategy has not been to distinguish *Spotify* or explain it away; it has been to ignore it. Professor Hitt, of course, made no mention at all of it until prompted by

Apple, in preparation for the fourth report served on the Saturday before trial. In this and other ways, Professor Hitt failed to comply with his duty as an independent expert. We will make detailed submissions about that tomorrow. This severely undermines the weight of his evidence. Indeed, his evidence in other litigation on behalf of Apple strongly supports a finding of incidence in this case.

Now, in a moment I am going to hand over to Mr Armitage for what time is left and the legal issues he is going to address relate to Apple's intangible assets. These have loomed large in the argument. But Apple has proceeded by way of self-serving assertion. It decided not to make use of the permission you granted to call an IP valuation expert. It simply asserts that its IP or its tools and technology justify its prices. But this is another form of the willingness to pay fallacy.

Mr Armitage is going to address Apple's argument that the ordinary framework for analysing excessive pricing does not apply, because of the intangible nature of the product; but this is just another example of Apple's exceptionalism. It is also in defiance again of the findings of the CMA, which use precisely this analytical framework, at least forming part of our case.

But that is all I was going to say by way of introduction.

It is 4.20.

THE CHAIRMAN: It is tempting, Mr Armitage, unless you --

MR ARMITAGE: I have slightly more than eight minutes --

THE CHAIRMAN: Yes, I thought you might.

MR ARMITAGE: -- on the law.

THE CHAIRMAN: I rather suspect, unless you thought you could make a very neat point that we could think about overnight --

MR ARMITAGE: I would love to say I could, but --

THE CHAIRMAN: -- I think it might be better ...

MR ARMITAGE: -- I am not in the business of doing that!

THE CHAIRMAN: Well, we will give you a clear run in the morning, then.

MR ARMITAGE: I think so.

THE CHAIRMAN: Yes. Let us do that. We will start again. That is fine, in terms of your time? Are you all right for time, do you think?

MR WARD: As far as I understand it, I have all day if I need it.

THE CHAIRMAN: That is what I understand as well, including Ms Fitzpatrick, of course, as well. We do not want to miss that. So assuming that -- yes. Assuming that, yes, you have --

MR WARD: Then I do not need to squeeze out the last eight minutes of today.

THE CHAIRMAN: Excellent. Thank you. We will start at 10.30 tomorrow morning.

(4.23 pm)

(The hearing adjourned until 10.30 am on Tuesday, 25 February 2025)

I N D E X