IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 26th 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

Wednesday, 26 February 2025

(10.00 am)

THE CHAIRMAN: Good morning, Ms Demetriou.

MS DEMETRIOU: Good morning, sir, and members of the Tribunal. Shall I start?

THE CHAIRMAN: Yes; unless there is any other --

MS DEMETRIOU: I do not think there is.

Closing submissions by MS DEMETRIOU

MS DEMETRIOU: I was going to start by way of a very brief overview of where we have got to because the Tribunal has heard obviously weeks of detailed evidence, factual and expert. We say that Dr Kent's case has not moved on since her opening submissions, and this is because of the extreme way in which she puts her case.

Can we go, please, to the very first paragraph of her written closing submissions, at {A1/8/4}? If you remind yourself of what Dr Kent says in paragraph 1. So once it is determined that the relevant product markets are as she contends, then the answer to the questions in this trial are clear:

"Apple is dominant in both those markets. Apple has foreclosed all competition in both those markets by means of the standard terms imposed on developers, not as a result of competition in those markets ... Apple's conduct ... it cannot be justified."

So Dr Kent's case, let us be clear about it, is that that is enough. Everything follows from market definition and dominance, both the exclusionary abuse case and the unfair pricing case.

There are two major difficulties with this. The first is that it proves too much. It is trite that dominance does not equate to abuse. If it were right, so if Dr Kent were right in her approach, it would mean that none of the other cases before the Tribunal -- *Google*, *Sony* and so on -- would need a trial other than on the questions of market definition and dominance. Even then, on Dr Kent's case, it would be pretty much open and shut because, applying Dr Kent's case to market definition and dominance -- and as Dr Singer himself explains in his report, "Every cinema", he says, "on my approach would be dominant in the market for the sale of popcorn"; every restaurant, on his approach, would be dominant in the market for the sale of wine.

The second problem is that Dr Kent's case, if right, would have very serious repercussions for the very consumers that she represents. Apple's product is a centralised and integrated product. That is its essence and it is what marks it out from its competitors, especially from Android, its main competitors. Millions of consumers have chosen Apple's

product precisely because of those significant attractions. Dr Kent's case would deprive those millions of consumers of that choice.

So in our respectful submission, the Tribunal will -- must and will, as we know, tread very carefully. The Tribunal should decide whether Dr Kent has made out her case on the basis of the substance of the evidence before you, evidence which we have fully engaged with in our written closing submissions but on which Dr Kent's submissions are notably thin. Instead, time and time again, Dr Kent falls back on the views expressed by the CMA in its market study and by the Commission in its *Spotify* decision. That is not good enough. Dr Kent needs to persuade the Tribunal that the CMA and the Commission were right on the substance of those points. It is not enough to point to them and say, "That is what they said", and we say that she has failed to do that.

So, with that brief introduction, I want to turn to market definition and dominance, and this is an area on which Dr Kent's evidence is remarkably thin. It is telling, we say, that Dr Kent, in her written closing submissions, devotes a grand total of one paragraph to Dr Singer's HMT. In his oral submissions, Mr Hoskins placed very limited weight on Dr Singer's HMT. He said -- and I am quoting him -- "It should not be

entirely disregarded" -- "not be entirely disregarded". That is their case at the end of the trial. Yet that was the mainstay of Dr Singer's and therefore Dr Kent's evidence on market definition and dominance coming into this trial. Go back to Dr Singer's reports. That is what he relies on.

Once you set aside Dr Singer's HMT, what is left? Well, Dr Kent offers you nothing else other than the conclusions and views of the CMA and the Commission. I am going to come to these, but the position is stark. Dr Kent has offered next to no positive evidence or analysis to support her proposed market definitions.

Now, starting with Dr Singer's HMT, the reality of the matter is that it was revealed during the trial to be uninformative. Can I show you, first of all -- can I remind you how he approached his HMT? That is at Singer 2, paragraph 81, so {C2/8/48}. This will be familiar to the Tribunal, but what Dr Singer did was to take the 12% charged by the *Epic* Games Store and the Microsoft Store from his benchmarking analysis or the 15.1%, which is the figure he got from his modelling; and applying a SSNIP, this would increase to 12.6% commission or 15.9% if you take the benchmark from the modelling. Apple's average commission, he says, was around 25%, and so he says, therefore, it was profitable

for Apple to raise its price above the SSNIP, and he concludes from that that the markets he identifies are limited to iOS transactions.

The key deficiency is this: Dr Singer accepted that this is a differentiated market where prices are going to vary by more than 5%. We know that Steam's prices, even its lowest price, which is the price that Mr Holt likes -- the 20% commission level -- are much more -- that price is much more than 5% higher than the *Epic* Games Store's price; much more. Yet, Mr Holt accepts that that is a competitive benchmark, and so if Dr Singer were to apply his test to Steam, it would also find that Steam was able to sustain a SSNIP and so was operating in its own market, whereas it clearly is not.

Now, that point was put to Dr Singer in cross-examination and, frankly, he had no good answer to it, and that is because there is no good answer to it. And if we look at where this was put. Can we go, please, to {Day17/118:1}? Can you read lines 12 to 20, please, to yourselves?

THE CHAIRMAN: Yes. (Pause)

MS DEMETRIOU: That is the question that Mr Piccinin asked.

THE CHAIRMAN: Lines which again?

MS DEMETRIOU: 12 to 20, just to understand the question -- just to remind yourselves of the question. (Pause)

THE CHAIRMAN: Yes.

MS DEMETRIOU: Now, Dr Singer initially said -- and you can see this just below those lines, {Day17/118:22}:

"... [this] is a weird one. So we are going to define ... Steam as the market, even though [it] has 50% of the market share ..."

So he is seeing that Steam is not in its own market. He recognised it would be very odd to conclude that.

If we go to {Day17/119:12-18}, it was put to Dr Singer that that was the inevitable result of its HMT, that Steam would be in its own market. If we go, please, to see his answer -- if we go to {Day17/122:11-14}, he accepted this. He said, {Day17/118:11}:

"Yes, if Steam ... could raise prices 5% above, the HMT would tend to suggest that Steam [would] might be a market unto itself. That is true."

Then if we go on to {Day17/124:14-17}, you can see the question at lines 14 to 17, {Day17/124:14}:

"The thing is, Dr Singer, it is actually the most common thing in the world in differentiated product markets to have price dispersion that is significantly more than 5-10%, is it not?"

If we go to {Day17/125:8-15}, Dr Singer then essentially started to resile from his HMT or at least

to say you need to look at all sorts of other evidence, the direct and indirect evidence. That is what he is saying between lines 8 to 15.

Over the page, we see what he had in mind there, so if we go to {Day17/126:2}; so line 2 and following, he says:

"The direct evidence, remember, the ability to exclude, which they do fully, and the ability to command a premium [on] price."

Now, as Mr Piccinin said, when you are thinking about the premium on price, that is the same point that they had been discussing, so that does not add anything, the premium on price. That is the -- you come back to the differentiated market point. Steam has a premium on price.

Then -- so then he asked at line 9, {Day17/126:9}:

"[So that is] the premium ... What [is] the other [point]?"

Then you see the answer at line 11 to 13, {Day17/126:11-13}, that it is the contractual restrictions. Dr Singer says that they are airtight. But as Mr Piccinin pointed out in the lines that follow, they are only airtight if you assume that the only relevant rival is another app store on iOS. So what you have is an entirely circular way of looking at this, and

that really was the problem with Dr Singer's analysis. It tells us nothing.

THE CHAIRMAN: How do you -- if you have got a differentiated product market like that, so how do you apply the hypothetical monopolist test? Is there any guidance on that?

MS DEMETRIOU: So what we say -- so what do we say the Tribunal should be? It is a very good question. We are essentially in agreement with the CMA's approach on this. So we say that the Tribunal should start with the focal product, as the CMA says, then look at the possible constraints, which we have identified. So the constraints are, number 1, from the devices market; number 2, other transaction platforms; and number 3 different monetisation possibilities. Then what the Tribunal needs to do is to conduct a thought experiment which is essentially a SSNIP. So without assuming anything about what the competitive price is, the Tribunal needs to ask itself, "Would Apple be able to sustain a SSNIP above the competitive price or would the constraints that Apple has identified operate so as to prevent it from doing so?". Bear in mind, when doing this, it is for Dr Kent to satisfy you that the constraints that Apple has identified would not prevent Apple from doing so.

Contrary to Mr Hoskins' submissions, this was in fact the approach that Professor Hitt adopted. I am just going to give you some references in view of the time, but you can see the --

THE CHAIRMAN: Just before you do that, just a couple of things on that. When you say that you agree with the CMA, I think the CMA talk about a different focal product from you, though, do they not? Their choice of focal product is different, so to that extent you are not in agreement, are you?

MS DEMETRIOU: No, so the CMA's choice of focal product is different.

THE CHAIRMAN: Yes.

MS DEMETRIOU: It makes no difference which one you choose. So we are content to go with the CMA's choice of focal product, rather than narrowing it down into different types of app transaction, but you end up with the same result.

THE CHAIRMAN: Well, it is different even then, is it not? I am sorry, I am slightly taking you off -- I am sure you are going to come back to this and I am taking you off course, but I just want to be clear about what you have just said. I had thought the focal product -- the CMA's approach to focal product is the narrowest sensible product, which is generally the one that the

abuse is alleged in relation to.

MS DEMETRIOU: Yes, we agree with that.

THE CHAIRMAN: I thought your focal product was a broader digital platforms product.

MS DEMETRIOU: No, no, you start with the narrowest one, so you are starting with transactions on iOS. That is the -- you start with the narrowest focal product.

THE CHAIRMAN: Okay. I certainly had not appreciated that. That is probably my fault, but I had not appreciated that that is your position.

MS DEMETRIOU: No, not at all.

THE CHAIRMAN: So you accept that you start with distribution on iOS as the focal product?

MS DEMETRIOU: Absolutely. You start with that, so you start with the narrowest focal products. So we agree. We are ad idem with the CMA on that point.

THE CHAIRMAN: That is helpful, and ad idem then with Dr Kent, I think, are you not? She agrees with --

MS DEMETRIOU: We are all agreed that is where we start.

THE CHAIRMAN: Thank you. So just -- you describe -- clearly you are -- in the absence of the ability to do a proper quantitative assessment, you are describing a qualitative assessment -- and I think we have talked a bit about that before and we had some dialogue with the experts about that -- but it still does not address

the question about the differentiated product, though, does it, because you -- somewhere in there you have -- there is an evaluation to be made, is there not? Is that your submission, that there is some evaluation to be made about the fact that there may be differentiation, but nonetheless it is still -- is or is not a substitution as to the decision, is it not?

MS DEMETRIOU: Yes. The CMA say, because there is differentiation, what you do not do is use 5% for a SSNIP. So the CMA say that in their submissions. That is paragraphs 8 to 9. That is the --

THE CHAIRMAN: Again, the ones they have just delivered?

MS DEMETRIOU: Yes, tab --

THE CHAIRMAN: I think they say, if you are concerned about that, you could -- well, they say what they say. No doubt they will tell us what they say. Okay, that is helpful. Bearing in mind that the purpose of it -- this is not a hard-edged test, is it? I mean, the whole point of this is to give us some sense of understanding of the substitution options and therefore what consumer reactions are --

MS DEMETRIOU: Exactly.

THE CHAIRMAN: -- to the product.

MS DEMETRIOU: Precisely so, sir. What you cannot do -- let me just make the point through --

THE CHAIRMAN: Yes, of course. Please do.

MS DEMETRIOU: No, no, I want to address your point but I want to address it in this way. So the Tribunal remembers that Professor Hitt carried out some empirical analysis in relation to Fortnite and Netflix. What Dr Kent says in her written closing submissions -- just for your reference, it is paragraph 38 -- is that neither example provides -- neither example provides an example of a response to an increase in price or decrease in quality.

We say -- and the CMA agrees with us on this -- that that misses the point because there has not been any increase in price in the real world, but obviously the enquiry cannot stop there because what the Tribunal needs to do is to engage in the thought experiment that I have just been outlining by reference to all the evidence in the case. When I say "the CMA agrees with us on that", that is paragraph 14(b) of its submissions that it lodged yesterday.

THE CHAIRMAN: Yes. Just -- and this is now -- I am going to show that I am missing the point -- but there were some -- we have seen some examples where price has gone up and there have been -- there is *Spotify*, is it not, I think, the music streamers, so is that right, that with Fortnite and -- is it not --

MS DEMETRIOU: But not Apple's price. So we are looking at -- so the thought experiment is: without assuming anything about whether Apple's price is at the competitive level or not, what would happen if Apple raised its price or deteriorated its quality?

THE CHAIRMAN: Yes, of course. Yes.

MS DEMETRIOU: What we have not seen -- because the price has only decreased rather than increased, we have not seen Apple raise its prices so we have not -- we cannot test that. That is why it is a thought experiment rather than an actual experiment. We cannot look to data to see what has happened in the real world because Apple has not increased its price.

THE CHAIRMAN: No, and I am -- obviously I have got it wrong, but I just had this sense that somewhere in this story there is some -- I know the price has not increased, but some circumstances that meant there was a higher cost that developers needed to address. But I got that -- that is just simply wrong, is it not?

MS DEMETRIOU: So I think Mr Piccinin is going to deal with that. He is --

THE CHAIRMAN: He's going to deal with that. Fine. He can correct me in due course.

MR FRAZER: Ms Demetriou, just on what you just said, looking to see whether Apple increases its price, is

there not a cellophane danger there?

MS DEMETRIOU: So -- no. So what one has to do is to measure the constraints on whether -- test these constraints that we have identified. So we are not making any assumption in this thought experiment about whether Apple's price is competitive or not competitive, so we are not assuming either way. We are not assuming that it is competitive in this thought experiment. So what we are saying is, "Take the price that Apple charges now". What the Tribunal then has to say is, "Well, let us say that price is increased not just by 5% because of the differentiated product market, but increased significantly, let's look at the constraints that have been identified and the channels for switching away and how many consumers who are developers would need to switch away and ask ourselves, 'Would Apple be able to sustain that?'". So in our submission that does not get into -- that does not raise a cellophane fallacy problem.

MR FRAZER: But if Apple's price is not a competitive price, which you are parking at the moment --

MS DEMETRIOU: Yes.

MR FRAZER: -- then the effect of such a price increase would entail the cellophane, would it not?

MS DEMETRIOU: No. What we are doing is assuming that Apple

tries to increase its price significantly above the competitive level, so you are asking yourself, "Let's assume that Apple tries to increase its price significantly above the competitive level, would it be able to do that?".

MR FRAZER: Not above its current level?

MS DEMETRIOU: Above the competitive level, exactly. Sorry, I think I was confused -- confusing.

So, now, what is clear here is that Apple has shown that there are ways in which developers and users can switch and that it would not take very many of them to switch in order to constrain Apple because of the very pronounced concentration of commerce on both sides of the App Store and in a moment I am going to remind the Tribunal of the key evidence on those points.

But before I do that, I just want to address a very important strand of the evidence in this case -- before I get on to the constraints and switching and so on -- and it is a strand that Dr Kent completely ignores in her written closing submissions and indeed in her oral closing submissions, and that is the 2008 story.

It is one of the issues the Tribunal will recall that the Tribunal asked the experts their views about in the hot tub. We address it at paragraphs 34 to 42 of our written closing submissions. Of course, the short

point is that Apple was obviously not dominant in any relevant markets in 2008, when it launched the App Store. It was subject to vigorous competition on the devices markets which constrained the price it set on the App Store. That price was 30%. If it was a competitive price then, it must be a competitive price now.

Now, let me remind the Tribunal, please, of a number of points. Now, first of all, can we go to {Day7/8:20-23}? Now, this was the cross-examination by my learned friends of Mr Schiller. The question was asked, {Day7/8:20}:

"The idea here is to make the devices more appealing through the apps on the App Store and sell more of them, sell more devices?"

So that is the question that was put. Then if we go to page 11 please -- sorry, his answer is "... yes". He agrees with that question.

Then if we go to {Day7/11:9}, and you see -- if you look, please, at lines 9 to 12, you see the question is quoting Mr Jobs:

"'Our purpose in the App Store is to add value to the iPhone. Free apps do that just as well as paid apps sometimes.'

"So would you agree that what Mr Jobs is making

clear is that what is in it for Apple is selling more devices, that is the business model."

Answer from Mr Schiller:

"That is not the only business model, but that was the main motivation in creating the App Store as a feature of the iPhone."

Now, I draw the Tribunal's attention to this important passage for two reasons. The first is that it shows that Mr Schiller's evidence was that the main motivation back in 2008 for establishing the App Store was to make devices more attractive to users, to sell more devices. That is important because Apple had a tiny share of the devices market at that time and wanted to attract developers to its platform. In order to attract developers to its platform, Apple needed to set an attractive price.

Now, the second point that we draw from this exchange is -- and of course, that all remains true today, that the App Store -- the central proposition of the App Store is that it renders the devices more attractive. We see that is common ground. So if you go to the end of this page on the screen, {Day7/11:21}:

"Thank you. That still remains the case, does it not, that that is a key benefit of the App Store?

"That is a benefit."

So this is all common ground.

Now, the second point we draw from this is even more fundamental. We see the case that Dr Kent's leading counsel is putting to Mr Schiller. The case that they are putting here is precisely that the App Store is constrained by competition on the devices market. That is the case they are putting. They are saying that, when Apple makes decisions in relation to the App Store, it does so to sell more devices. So when Dr Kent makes points about consumers not taking apps into account when purchasing those devices, those points are not only inconsistent with the evidence, as I will come on to show you, but they are inconsistent with Dr Kent's own case, as put to Apple's witnesses. We see this in Dr Kent's written closing submissions.

Can I just take you to the section on unfair pricing? If we go to {A1/8/99-100}, if we could have both pages on the screen. So paragraph 288(c), {A1/8/99}:

"As to the period between the launch of the App Store in 2008 and the present day ..."

Then can we go to (c), please? Can I just ask the Tribunal to read subparagraph c to yourselves? (Pause)

Then if we go over the page, {A1/8/101}. Thank you. (Pause).

So this is precisely our case on device market constraints. It is our case. Dr Kent is making the same point and relying on it in the context of unfair pricing. How can they say that the Tribunal should find the reason why Apple introduced the Multiplatform Rule and the Reader Rule was to compete more effectively in the devices market for the purposes of their unfair pricing case and then say, in the context of their market definition case, that competition in the devices market does not impose a constraint on the competition? It is completely contradictory.

Now, Mr Schiller also explained that, when Apple set its commission in 2008, it looked across at the rates being charged by other platforms to developers at that time and charged a lower commission, and the Tribunal will recall that he confirmed the evidence he gave in Australia to that effect. Mr Schiller's evidence is borne out by the contemporaneous documents, and the Tribunal will recall the documents -- I probably do not need to bring it up again. The reference is {D1/28/19} -- with the spreadsheet which showed the rates of Apple's competitors at the time, who were the incumbents, which were all higher. Apple could have come in and charged a commission at similar levels and hoped that the quality of its devices would win users

and developers over, but it did not do that. It decided to charge a rate which was significantly lower. That was consistent with its strategy, which was to win market share in the devices market by making -- by attracting developers and then consumers to the App Store. Again, Dr Kent's own case.

There is a plethora of contemporaneous evidence that shows that Apple's Commission was attractive to developers, unsurprisingly, and that they flocked to the platform. I think I probably do not need to bring those documents up. We have referred to them in our closing. But you will remember that one of them was the Sega executive, saying, "Apple's proposition is by far the most attractive". We took Dr Singer to those documents, and you saw that what they showed as well is that the competition reacted. *Google* launched its app platform, then called "Android Market"; Palm launched its own app store in 2009. They both charged a 30% commission, matching Apple's low price. The games console makers, we saw in another document, like *Sony*, were driven to reduce their commission to attract developers. Again, I took Dr Singer to the document at {D1/67/1} which makes that particular point.

Now, what did Dr Singer say about all of this when I took him through it? His starting point, of course,

is that he -- as he says in the joint expert statement, he has not studied competition for devices so it is not something he has looked at in this case. The reference for that in the joint expert statement is {C4/2/91}. We do not need to turn it up. It is paragraphs 144 and 145.

But I do want to look at Dr Singer's evidence to the Tribunal. If we go to {Day16/7:1}, please, if we look at lines 7 to 14, you can see that what Dr Singer was agreeing here was that it was -- when Apple launched the App Store, Apple was seeking to attract developers and users to the platform. He said, {Day16/7:10-11}, that that was the game at that stage. Then he says, {Day16/7:11}:

"I cannot disagree with that. Of course Apple was trying to attract users and developers. For the App Store in particular, being a two sided platform, you need both to succeed."

Then, please, if we go on to {Day16/27:1} on the same day and if we look at line 15, I put to him, {Day16/27:15}.

"Well, do you agree that the 30% was one of the things that made its platform attractive? ... the fact that it was charging 30% as opposed to 40 and 50%, which is what these others were charging?

"I think the price certainly would be a consideration for developers when they are choosing for whom to write software, yes."

So he agreed with that.

Then, {Day16/27:23}:

"Presumably the reason Apple was doing this analysis was because it wanted to pitch its offering lower than these other platforms; correct?"

If we go over the page, {Day16/28:2}:

"I think that Apple reasonably wanted to be cognisant of what others who had attempted this space were charging for developers.

"Cognisant because it is competing; correct?

"It is -- at this point in time it is competing ... they ended up taking over, but yes, at this point in time they were competing, they were an entrant."

So that is Dr Singer's evidence. Then if we go to {Day16/39:16}, so this is the document I just referred to, which showed that *Sony* reduced its price. I took Dr Singer to that document, and if we go over the page, please, {Day16/40:1}, we see there, {Day16/40:6}:

"If *Sony* wants to compete in this mobile space ... then it makes sense that they would have to be competitive on that commission dimension as well."

What we saw was that *Sony* reduced its commission in

response to Apple's.

Then if we go to {Day16/44:1}, at the top of the page you see his answer, his evidence, line 2, {Day16/44:2}:

"These platforms ... were in competition, [certainly] in 2007 and certainly in 2008, and they had not died by as early as 2009, I will grant you that."

That is, of course, because his initial evidence, as we say in our written closings, had been to say, "Oh well, Apple was dominant from day one", and he resiled from that when we put the documents to him.

Then if we go down the page, again I put to him that Apple's offering, its 30% commission, was competitive, looking at what else was around. {Day16/44:15}

"Answer: I think it was at market, I am reluctant to say competitive, but I think it was at market ..."

That was a proposition that he could not deny in light of the evidence showing that Apple had, in fact, set its commission lower than its competitors.

Then finally, if we go, please, to {Day16/46:12}, line 12 onwards:

"So do you therefore accept that Apple was coming in with a rate that would have been attractive to developers, and that was part of the attraction of its offering?

"It was relatively attractive, but I think Apple succeeded not because of its rate, but because it put together the best phone and was able to attract the right customer base ...

"Let me [put] it this way, if Apple had come in higher that could have impeded Apple's success."

We do say that really is an end to the Class Representative's case on market definition and dominance because Apple was competing with other device manufacturers in 2008 and the commission Apple set in 2008 was a commission set in that competitive process in which Apple undercut its incumbent rivals.

There are two points that flow from this. The first is a straightforward one about device market constraints. Apple set a lower commission than other device manufacturers in order to sell more devices. To put that another way, if Apple had set a higher commission, it would have lost more than enough device sales to wipe out the benefit of the higher commission. That demonstrates that you need to look at devices and app store commissions together because competition and devices have a real impact on the price on the App Store; in other words, it behaves like a system market.

The second point is a temporal comparison. Since

2008, Apple's Commission has only ever decreased and the value to developers has only ever increased, increased exponentially, so we say it follows as night follows day that the commission must remain a competitive price today.

Now, the CMA say -- and this is paragraph 12 of the submissions it filed yesterday -- that it is not possible always to conclude that, because a price was set in competitive conditions in the past, it must be competitive now because they say, "Well, sometimes market conditions can change".

Of course, that is true as far as it goes, but in this case, that conclusion, the conclusion we ask the Tribunal to reach, should be reached, and that is because the changes in market conditions that have occurred since 2008 only go in our favour because, if Apple were a monopolist, if it were unconstrained by the devices market, as my learned friends say, as they suggest -- if Apple were an unconstrained monopolist, then, given the exponential increase in value that we have seen, Apple would have increased its price. That is what it would have done.

THE CHAIRMAN: So what do you say to the point that the market has changed because in 2008 it was effectively a new market and everybody was trying to build their

user base and by 2015 that is not the case anymore? Everybody has acquired more or less their user base, subject to the limited switching that goes on. That is quite a big change, is it not?

MS DEMETRIOU: Well, we say that that is not a change that has any bearing on the question that the Tribunal has to ask itself because the -- remember, what we are testing is the proposition that Apple is unconstrained by the devices market --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- so the fact that the market has changed in the way that you suggest does not actually affect the analysis that I have put forward because, if Apple were unconstrained -- if that were right -- so if the proposition that you have put to me were right, then Apple's price would have gone up because there is less competition, so --

THE CHAIRMAN: Well, sorry, just to -- just put that aside far a minute because that is another -- that would be, sort of, another indication one way or the other. But I suppose the point I am putting to you is that there might have been quite a significant change in the way in which the device market operated as a constraint between 2008 and 2015 because of the way in which users have selected their operating system and have solidified

their -- and the user base has solidified around those operating systems. So in 2008 I think we do see, do we not -- I think it is clear that, at least to some extent, there is a new market where there is a competition for a user base, and that is clearly driven, as much as anything else, by the devices market, and there is a connection between the App Store and that because that is why they did it. I think all of that all makes perfect sense. I can see that. But when you wheel forward to 2015, you have a very different picture, haven't you? You have a picture where pretty much there is very little switching. I know you say there is more switching than they say, but the level of switching is -- it is not like there is a consumer market for play. This is about established user bases and the switching is relatively limited and therefore the role of the devices market logically must be less, must it not, at that stage?

MS DEMETRIOU: Sir, with respect, we say that factor works in our favour because, if it is the fact, as you say, that things have solidified a little bit and consumers, if I can just -- I am not -- just use the shorthand, are more set in their ways than they were at the beginning --

THE CHAIRMAN: Yes, yes, yes.

MS DEMETRIOU: -- those are factors which would make it more likely that, if Apple were not constrained, it would have raised its price.

THE CHAIRMAN: Well, I understand that point, but in a way that is just taking me to another point of evidence. I suppose I am just trying to deal -- and treat it as a hypothetical. You do not have to accept any of the facts. But let us just assume that there is -- if you have got a market in which there is vigorous competition for devices, device users, in 2008, and that vigorous competition has -- (inaudible), but it has changed in the sense that the means of competition, driven through apps, has solidified, has settled, if you like, that is a -- the point I am putting to you, it is a change that has happened since 2008, which is not included in your ones that you have mentioned before.

MS DEMETRIOU: Yes. Sir, so let me take it in stages. So I agree that that is a change.

THE CHAIRMAN: Yes.

MS DEMETRIOU: So, number 1, I agree that is a change. Number 2, you then have to ask yourself, "How does it bear on this analysis?".

THE CHAIRMAN: Yes.

MS DEMETRIOU: The way it bears on this analysis is in our favour. Let me explain why we say that, because if it

is the case that now things have solidified, so there is less movement, so in a sense you see less vigorous competition in the devices market -- if that is true, then that is a factor -- let us assume that change has happened, that is a factor that would make it easier for Apple to raise its price.

Our point here is that, if Apple were a monopolist that is unconstrained by device market competition and -- so, your point, that change makes it more likely that it would have raised its price because that is what unconstrained monopolists do when there has been an increase in value, and there has been an exponential increase in value.

So I am accepting that that is a change that one might identify, but it is a change which wholly goes in our favour because the thought experiment here that we are asking ourselves is, "Well, let us test out what Dr Kent's case is". Dr Kent's case is that Apple is an unconstrained monopolist that is not constrained by device market competition. That is her case. So then you say, "Well, what would an unconstrained monopolist do in circumstances where the value has increased exponentially?". They would increase their price.

THE CHAIRMAN: I understand your point on that.

I understand where you are on that, thank you.

MS DEMETRIOU: Sir, the change you have put to me is a change in our favour because it would make it more likely that Apple, if it could, would increase its prices.

THE CHAIRMAN: You say we would see evidence of that and I understand the point.

MS DEMETRIOU: Now, thinking about this 2008 story, it also gives us a third way of testing Dr Kent's case, this time on the hypothesis that I am wrong on the competitive constraints that Apple faced in 2008. Let me just show you one more passage from Dr Singer's evidence. If we go to {Day6/56:13-23}, so lines 13 through to 23, can I just ask the Tribunal to read those lines?

THE CHAIRMAN: Yes. (Pause)

MS DEMETRIOU: So the point I was putting to Dr Singer here was that, if he was right that Apple was not subject to competitive constraints from the devices market, then it would have put the 30% commission up over time. So this is the point that I have been making to the Tribunal. Dr Singer's response to that was very revealing. He said that, "No, because this is a two-sided market and Apple has to think about the money it is making from consumers as well"; in other words, on the devices market.

So once again we end up back in exactly the same place. This is yet again the case that Dr Kent put to Mr Schiller and it is precisely our point. It is a systems market. It is systems market competition.

THE CHAIRMAN: Just -- so, again, just so we are all clear about what you are saying here, there are different ways of looking at what you might call a two-sided market, aren't there? If you take it at its simplest here, the two-sided market is the matchmaking service, and on the one side you have got developers producing the apps and on the other side you have got consumers who are paying nothing. Developers obviously pay a commission. That is a two-sided market in its own right, is it not? But I think, when you are making that submission you are talking about a different configuration, if you like, of a two-sided market because the fact that Apple has some economic incentive to drive -- some other economic incentive to drive the matchmaking service does not make it, per se, another two-sided market, but you are saying that there is sort of another leg to this; that it is almost like it is a three or a two-and-a-half-sided market, where there is a devices market. You are really -- I think you are saying a systems market. It may be better to use the expression "systems market" --

MS DEMETRIOU: I am very happy to --

THE CHAIRMAN: Unless you tell me that it matters that you are calling it a two-sided market. I just find it a little bit confusing --

MS DEMETRIOU: No, it does not matter at all. I am happy to call it a "system market". I picked that up because it is what Dr Singer said --

THE CHAIRMAN: No, I appreciate that. I think everybody has used it probably slightly --

MS DEMETRIOU: Yes.

THE CHAIRMAN: I did get quite confused when I read the closings as to which two-sided market we were talking about.

MS DEMETRIOU: No, sir, I am very happy to use "system market".

THE CHAIRMAN: Just to be clear on that, you are not arguing for a system market definition, though, are you? I mean, I -- I understand the point about constraints, but you are not saying that this is a systems market, are you?

MS DEMETRIOU: Well, this is competition from the devices market and --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- what it does is it constrains what Apple does in relation to iOS transactions.

THE CHAIRMAN: Sorry, I did not ask a very clear question at

all. Let me rephrase that. I think we all accept there is a systems market of a sort because there clearly is a devices market --

MS DEMETRIOU: Yes. We are not saying devices are in the same market as --

THE CHAIRMAN: No, no, precisely. That is the only question I am asking you.

MS DEMETRIOU: No, sorry.

Just again going back again to our thought experiment, so if Apple degraded the App Store, people would switch. So going back to the point you put to me about how things may have changed since 2008, because, like in 2008, competition is still there, and the reason why there is less switching is because *Google* and Apple are running very fast to stand still. So people buy devices, I think, every two years on average, and so there are constantly people buying new devices, and that is why you see such vigorous competition in the devices market.

Now, so we say that the Tribunal could stop there with the 2008 story. We say that that, by itself, demonstrates that Apple is constrained by competition on the devices markets. But there is plenty of further evidence in the case that supports this finding. I am going to turn to it now. I just want to remind the

Tribunal of the evidence on concentration of commerce because this evidence is not in dispute in the case.

If we go to Professor Hitt's third report, please, at {C3/8/88}, can I just remind you -- I know you have now seen this probably a few times -- but just look at subparagraph (b). What you can see there is the tiny proportion of consumers that make up -- I am not going to read any figures -- a much larger proportion of spending on the App Store. What we also see is that this tiny proportion of consumers spend a lot of money. They spend more than the price of their iPhone, of the iPhone itself, per year on the App Store.

Dr Singer referred to them as "the whales", and you can see Professor Hitt explains that terminology at footnote 301, if we scroll, please, to see the footnote. You can see that he explains what is meant by "the whales", so users that spend large amounts on gaming, typically through many small transactions.

THE CHAIRMAN: Am I right in thinking we do not have any evidence anywhere about this group's inclination to switch, do we? There is no -- there are no studies on that, are there?

MS DEMETRIOU: I am going to come -- we do have some evidence that bears on that and I am going to take you through that.

THE CHAIRMAN: Thank you.

MS DEMETRIOU: If it is all right, if I --

THE CHAIRMAN: Of course. Please do. I just wanted to remind myself. That is helpful.

MS DEMETRIOU: We do have some evidence that bears on that.

Now, can we also, please, go to the same tab, page 94, {C3/8/94}? I am not going to read any of this, it is highlighted in pink, but can I ask you to remind yourself of what the first two columns are indicating?

(Pause)

You can see the heading is not confidential. It is "Share of App Store commissions associated with the top consumers in 2022 ...". Again, we see a very stark picture.

Turning to the developer side, please, if we go to {C3/8/95} over the page, here the figures are even more stark. This data is obviously critically important when conducting our thought experiment to assess constraints imposed by switching because it would take only a very tiny proportion of developers and a very tiny proportion of consumers to switch for it to make a very large difference to Apple's revenues on the App Store.

Of course, you will remember that the top hat developers are extraordinarily large and powerful companies. An example that you have seen in trial is

Activision Blizzard King, which was acquired by Microsoft in 2023 for $69 billion.

This evidence, we say -- this evidence is very important when considering all three types of constraints that we have pointed to. Although Dr Singer accepted it and although it is not challenged in this trial, Dr Kent has simply failed to engage with it.

Taking constraints, first of all, from the devices markets, if Apple charged a supra-competitive price, developers would be able to focus their attentions on Android devices, getting their apps on to Android before getting them on to the iPhone, so even if they did still produce apps for the iPhone, they could focus their attention on Android. That would attract consumers to switch over to Android phones, and again only a tiny fraction of developers and consumers would need to switch in order to make a big difference to Apple.

If we go back to Dr Singer's evidence, {Day16/87:1}, please, at line 17, the question I was asking Dr Singer here was, {Day16/87:17}, what would happen if *Google* charged a lower commission to developers than Apple, so if Apple put its commission up to a supra-competitive level and Apple charged a lower commission to developers, and I was putting to him that, "You would expect consumers to gravitate away from iOS to Android".

We can see his answer, if we start at line 20, {Day16/87:20}:

"So now the best candidates for that story would be those that you have identified, the whales, if I may use that jargon ...

"If *Google* wanted to, say, drop the commission for games developers to, say, 10 or 15%, and game developers as a result on the Android system dropped their prices materially, that could be attractive to the whales. The problem, of course, is that it would not be attractive to the vast majority of consumers on the iPhone system because they just do not spend enough in a given year to make it worth their while."

So thinking about his answer, pausing here, it is precisely the whales who matter for our thought experiment because they are overwhelmingly the consumers who are transacting on the App Store. They are overwhelmingly the consumers who are transacting, because we have seen how skewed the commerce figures are.

THE CHAIRMAN: So that is a -- as a thought experiment, that is a negative SSNIP, is it not, effectively, asking yourself the question of what switching might happen if somebody -- if a competitor reduced their prices; is that right?

MS DEMETRIOU: No, it is if we -- so if we -- he has put it in terms of (overspeaking) --

THE CHAIRMAN: He has put it the other way round.

MS DEMETRIOU: -- but it is the same point, and we say for your thought experiment, the thought experiment you need to conduct is what if Apple increased its price above the competitive level and *Google* was lower. It is the same thing. He looked at it as *Google* lowering its price but it is the same divergence you are looking at.

THE CHAIRMAN: Yes, but -- okay. So that deals with part of the equation, does it not, because it is not just about whether people switch; it is about whether it is actually profitable. It depends what happens, does it not?

MS DEMETRIOU: No, that makes it unprofitable for Apple because we see --

THE CHAIRMAN: Because of the size of them?

MS DEMETRIOU: Yes, because of how much they are spending on the App Store.

THE CHAIRMAN: Yes.

MS DEMETRIOU: That is what makes it unprofitable to --

THE CHAIRMAN: So you say that is just obvious from the size of the concentration, the nature of the concentration?

MS DEMETRIOU: It is, absolutely, sir. We do absolutely say that, and that is just evidence that Dr Kent has

absolutely failed to engage with. Of course, these are the whales -- I am going to use the jargon for short. They are also the group of consumers who would have the most incentive to switch if prices on iOS were above the competitive level because of the amounts they are spending, which, as we have seen, are very significant.

I put that point to Dr Singer, if we go to {Day16/88:6-10}, so I said, {Day16/88:6}:

"Okay. But thinking about the whales and thinking about the skewed figures that we saw in terms of spending in Professor Hitt's report, it is right, is it not, that it would take only a very small fraction of consumers to switch to drastically reduce commissions?"

His answer:

"It could -- it could involve a small -- of course we have not seen that defection to ... Apple as yet ..."

Of course, that is because we have not seen any raising of the price, but that is not the thought experiment, as the CMA accept. You have to think about the hypothetical. Then his only answer to the point -- his only answer was that you would not expect much pass-through to consumers prices in the event of a reduction in commission, which is of course diametrically opposed to Dr Kent's case on incidence, which I am leaving to Mr Piccinin. So that is where he

ran when the point was put to him. He just did not have a good answer to it.

So there is agreement that it is the whales we are interested in and Dr Singer accepted that this group of consumers is likely to be thinking about the quality of apps and the cost of apps, including in-app purchases, when purchasing their phone.

If we go to {Day16/90:4}, so line 4:

"Question: Yes. So that small group of customers who spend a lot of money on small transactions are likely to be thinking about the quality of apps and the cost of apps, including in-app purchases, when purchasing their phone; correct?

"Answer: I think that for the whales, they would be more likely to look forward and see what their prices would be across the two platforms when they are making the purchasing decision. I think that is fair."

That is important evidence in this case. It really is important evidence. So that is common ground.

It is not surprising because, of course, there is transparency about pricing. There is also evidence, which I am going to come to now, that there is a proportion of consumers who already take prices and quality and range of apps into account when deciding which phone to buy.

Of course, when I said to you a moment ago that it is necessary, as the CMA agrees, to conduct a thought experiment of what would happen if Apple raised its price above the competitive level, the correct inference, we say, to draw as to why this thought experiment has not happened, why has Apple not raised its price, to come back to the point, the reason that has not happened is that Apple's Commission is a competitive commission.

Now, the evidence that I was about to take you to, so the proportion of consumers who already take prices and quality and range of apps into account -- Professor Hitt referred in his report to the 2022 Accent survey and you have heard a lot about it. I just want to go back to it, please, {D1/1288/20}. You can see that consumers were asked -- if you look at the bottom of the page, please -- to identify up to five factors that were important in their decision to choose their current smartphone. If we go over the page, {D1/1288/21}, we see at the bottom of the page that range and quality -- Mr Hoskins sought to make something of this -- the range and quality of apps and price of apps was the least important of these factors, and that is a point that the CMA picked up on.

But at {D1/1288/22} we see the data, and what we see

there, towards the bottom, are that the figures are 14%, 15%, depending upon whether you are looking at iOS or Android, for range and quality of apps, and 10 to 11 -- or 11% considered that the price of apps was an important factor.

Now, we do say that these figures are significant given the highly skewed concentration of consumer spending. You will remember the very much smaller proportion of consumers that make up the vast bulk of consumer spending. So it is all about looking at the relative proportions of consumers.

Remember, again, what we are doing -- remember, again, what we are doing in this thought experiment. So it is not enough for Dr Kent to show that most consumers would stick with Apple in the event that it has raised its price above the competitive level. She has to show that enough consumers would stick with Apple to make the increase from competitive level to supra-competitive level profitable. That is what she needs to show. In that context, 10% or 11% or 14% or 15% of consumers is actually a lot, especially if those are the ones who, between them, account for most of the commerce and you would only need a fraction of those to switch to make you regret raising your price above the supra-competitive price.

Of course, another important point to bear in mind is that these figures are in a world where there is -- where there is price parity between iOS and *Google*. Now, if Apple raised its price, then what you would expect to see is that the proportion of consumers who are suddenly interested in price would increase.

MR FRAZER: Just going back to the Chairman's question a few moments ago, there is no identification of whether the -- of the extent to which this 14% or 15% or 10% or 11% includes whales, ie what percentage of whales are included within that. Is it wholly made up of whales? Is it made up of no whales whatsoever?

MS DEMETRIOU: Sir, that is correct. You do not have data explaining that or giving us the breakdown. But what we do do is draw the inference that those people who are going to be the ones thinking about price of apps are much more likely to be the people who are spending money on apps. It is hardly likely to include the 50%-odd consumers who do not spend money on apps.

So the logical inference to make is the one that I have just made and, of course, it is really the -- the burden is on Dr Kent here. So if Dr Kent wanted to come along and say, "Well, actually, this 10% here does not include the whales", which would be a counter-intuitive proposition, they should have adduced the evidence.

They knew what the constraint was.

DR BISHOP: The term flitting through my head at the moment is "price discrimination". You have not addressed this. It is fairly routine in retailing of various kinds for a supplier and -- for a retailer and a supplier to -- take food processing, manufacturing. It is very common for them to make an arrangement in which, "Okay, you will drop ..." -- "I will give you a lower price, wholesale price, for my ..." -- whatever the product is". It could be anything -- "but only if you agree that you will drop down the price point on the shelf because I am not just doing this in order to give you a big margin and enrich you". Sometimes it is the food manufacturer who starts the process; sometimes it is the retailer who starts the process. They are constantly in discussion about that.

Now, you have not said anything so far about those possibilities. You are treating the commission, the price of the toll for the distribution, as if it has to be a uniform price for all developers, and that -- it would seem very simple for Apple, if it were under serious pressure and worried about whales switching, to identify those things that whales use, Fortnite or whatever it is, go to the owner of Fortnite and say, "Okay, let us do a deal. I will give you a -- provided

you drop your prices for the in-app purchases, I will give you a 10% commission, but I will keep 30% for everybody else who has no such ...".

Now, you seem to be assuming that that is not possible for Apple or indeed for *Google*.

MS DEMETRIOU: Can I just confer on that point?

(Pause)

Sir, yes. I think there is evidence on this, but I will come back -- I think there is factual evidence on this, but I am not 100% sure. But Apple's business model is not to do that, and so what has happened, when you have seen the introduction of the Reader Rule and the Multiplatform Rule and so on, is that Apple has been very careful to provide the same price to all and not to engage in price discrimination, so that has been its business model.

DR BISHOP: Yes; I observed that too, yes. Okay, thank you.

(Pause)

MS DEMETRIOU: Oh yes, and so -- sorry, also just going back to Professor Frazer's point on the make-up of the 10% -- so this is {Day16/90:1}, if we can go to the bottom of page 90, please. So I asked that question. So, {Day16/90:25}:

The 10% that considered it [so that is the 10% we have just been looking at in the Accent survey] are

likely to be those users who spend a lot of money in in-app purchases; correct? The whales.

"We do not know. It is a reasonable ... inference ..."

So we do say that that is common ground, that it is a reasonable inference. It is true that we do not know, but that is the inference that the Tribunal should draw.

Now, can we please go back to -- sorry, just bear with me for a moment. Yes, now, what does Dr Kent say about this point, so the point that we have been discussing, so the 10% and the very much smaller proportion of consumers that you would need to switch to make a SSNIP unprofitable? They do not say -- and they have not said during this trial -- that these are bad points. Their position is a much more limited one and it has been throughout. What they do is they invoke the conclusions of the CMA and they say that the CMA drew the opposite conclusions from this survey evidence than Apple has.

We see this in Dr Kent's written closing submissions, but it is a point that Mr Hoskins made orally too. If we go to the written closing submissions at {A1/8/15-16}, so we can see paragraphs 32 to 33 is where it is covered. The point Dr Kent makes here is that Professor Hitt relied on the Accent survey without

acknowledging that the CMA reached diametrically opposite conclusions on the basis of the same survey.

If we look at the last sentence of paragraph 33 and then the footnote, {A1/8/16}: so:

"Failure to acknowledge such relevant considerations is again a major flaw in Professor Hitt's analysis."

The footnote footnotes paragraph 4.166 of the CMA's Report -- so let us turn that up. That is at {AB6/25/126}. We can see here that the CMA summarises the reasons why it took the view that the device market constraints were limited. The submission I am going to make is that these conclusions should not be accepted as correct by the Tribunal. That is because they are superficial because they do not engage at all with the critical question of how many customers would need to switch in order to impose a constraint.

If we look at the four bullet points, the four bullet points are first of all limited awareness of prices, and that, we say, is in itself a superficial conclusion which flies in the face of the fact that most buyers are repeat buyers and also in the face of the evidence of -- on price transparency and also on Dr Singer's own evidence that I showed you a moment ago, where he said that, yes, he would expect the whales to be looking forward and thinking about the prices of

apps.

Then we have the price in the second bullet point, about -- we see the price -- a point about price being a factor of less importance to smartphone buyers because of the comparison between the costs of the phone and what they are spending on apps. I have addressed you on that because this does not -- what the CMA has done here is jumped from the results of the survey to a conclusion without thinking about the critical question of the small proportion of consumers who are spending a lot and how many would need to switch.

Again, the fact that the cost of the new device is likely to outweigh any differences in the costs of the apps, that ignores the position of the whales, as we saw in Professor Hitt's report, his data, which shows that there are a small proportion of consumers who make up the bulk of the spending who spend considerably more than their iPhone every year.

So again, these conclusions, we say, fail to engage with the critical evidence about skewed consumer spending, which is what is -- what the Tribunal, we say, needs to engage with when considering -- when engaging in the thought experiment about switching and constraints.

The Class Representative's position seems to be to

say to the Tribunal, "Well, forget about all the rich data that you have got before you at this trial and just adopt the conclusions of the CMA reached in the course of the market study", conclusions which, of course, could not be tested directly at this trial through cross-examination of any witness from the CMA. They are conclusions which are superficial and flawed.

Now, that was also the basis on which Mr Hoskins cross-examined Professor Hitt. My learned friend at no point said to him, "You are wrong on these points. You would not expect to see switching because of this, that or the other". What he put to him was that he did not refer to the CMA's conclusions. That is the point that was put. But, as we made clear in opening and as Professor Hitt himself made clear when those points were put to him by Mr Hoskins, the conclusions reached by the CMA or indeed other regulators or courts by contrast with the evidence that they have considered should be given no weight. Why the CMA's views and not the view of the US court in the *Epic* trial which found for Apple on market definition?

The question for the Tribunal is not whether or not the CMA thought something or concluded something but whether the CMA was right, and you can only decide that by grappling with the substance, with the evidence.

Now, the Class Representative, in a similar vein, also relies on the Commission's decision in *Spotify* and, in this context, a particular recital. If we go to {AB6/45/139}, please, they rely on recital 465. I am just going to make our response to that very shortly. You can see the conclusion in the recital two-thirds of the way down:

"It is therefore unrealistic that music streaming apps, and in particular in-app subscription conditions in music streaming apps, influence sales at the level of smart mobile devices in a way that disciplines Apple's market power vis a vis consumers at the App Distribution level."

Now, quite aside from the fact that the *Spotify* decision is under appeal, this conclusion relates specifically to music streaming and so does not assist Dr Kent because, even if Dr Kent were right on this point, that subscription conditions in music streaming apps do not influence sales at device level, it does not follow that prices of apps more generally do not influence device sales, and that is given how much more people spend on apps generally as opposed to how much they spend on music streaming in particular.

So, again, this is another example of Dr Kent cherrypicking parts of regulatory conclusions and

saying, "Oh, there you go. Adopt that". That is not, with respect, a proper approach in a seven-week trial where evidence has been adduced. They need to show that this is right and they have not. You cannot just point to it.

Now, looking at *Spotify* more broadly, if you are going to look at *Spotify* more broadly -- and of course this is not a point that we are making -- but to illustrate the dangers of doing it, the Tribunal might think that it is significant that the Commission was, in that investigation, considering the App Store and both sets of requirements challenged by Dr Kent in these proceedings but did not find that they breached Article 102. Let us look at recital 12 on page 12, {AB6/45/12}. Here you have the complaint, and the complaint was a broad complaint. It was a complaint that Apple infringed Article 102 by:

"... requiring developers that offer paid digital content or subscriptions ... to make use of Apple's in-app purchase mechanism ... and pay a 30% or 15% commission fee to Apple ..."

So that is a broad complaint which challenges the very restrictions that Dr Kent is challenging here. If we go to {AB6/45/14}, recitals 23 and 24, you see first of all from recital 23 that a statement of objections

was issued in the case, first of all, in April 2021, and that statement of objections did take issue with the terms that governed the use of the App Store, including requiring music streaming developers to use Apple's IAP, but then what you see at recital 24 is that that statement of objections was replaced by a revised and much narrower one, a much narrower one that focused on the anti-steering provisions. You can see the dates, so that was two years later. So the Tribunal -- sorry, the Commission thought about the broader investigation for two years and did not proceed with it. Its decision was limited to the anti-steering provisions then in force and only then -- only then -- for the period in which Apple Music was competing with *Spotify*. It was a self-preferencing point. So if we are going to be thinking about regulators, you need to take a holistic view, but you have my point, which is that you do not look at the views, you look at the evidence, and you have to ask yourself, "Are these conclusions correct?".

THE CHAIRMAN: Can I ask you just a collateral question about Professor Hitt and his approach to it? He has been criticised and it comes out throughout the -- not just in relation to this, but also in relation to incidence as well.

MS DEMETRIOU: Yes.

THE CHAIRMAN: I mean, it might -- it has been said, I think, that this is information that, as an expert, he should look at and should at least acknowledge in his report even if he disagrees with it. What is your view on that?

MS DEMETRIOU: So we disagree with the criticism. We think the criticism is misplaced. Mr Piccinin is going to address the incidence points --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- when he comes on to deal with incidence. In relation to the points on the topics that I am looking at, Professor Hitt made it very clear that what he did -- he obviously looked at the CMA market study because he refers to it, so he says, "Look at the Accent survey commissioned by the CMA".

The criticism put to him was a very narrow one, and you may remember I rose at some point to clarify the question that my learned friend was asking. He said, "You did not refer here, Professor Hitt, to the CMA's conclusions". That was the criticism.

Now, that is not a fair criticism and the reason why it is not a fair criticism is for the reason that Professor Hitt himself gave. He said, "I am not in the business of saying whether the conclusions of a regulator or of a court or many regulators are right

or wrong. I need to look at the evidence and reach my own view on those matters".

THE CHAIRMAN: Well, so -- no, I understand that point, but if one puts it a little bit more broadly, outside the constraint of the question, I suppose I am putting to you whether or not Professor Hitt, as an expert, was under a duty to engage with these documents, to engage with, if you like, the prior record of regulatory decision-making, in order to properly present his views to the Tribunal. That is the broader question, I think. I am just interested in your view on that.

MS DEMETRIOU: Sir, my view on that is that, of course, Professor Hitt -- you see references to the CMA market study in his report so he was not shying away from it. But, no, we do not say -- and this has been our position throughout -- it is not for him to say whether or not the CMA is right -- the conclusions reached by the CMA were right or wrong.

There are two reasons for that. One reason is that he -- and I sought to bring this out, to some extent, in my re-examination of him. The CMA is referring throughout its report to evidence which is simply not available to the parties, so they say, "Some developers told us this", and as I said to him, "You do not know who they are, do you?"; "No". So it is not possible for

him to look at the CMA's conclusions and look at the bank of the evidence that the CMA relies on and test all of that evidence out as though this were an appeal. That is not -- that simply is not possible.

What he did do is look at the evidence he had access to, that the CMA relied on, such as the Accent survey, and engage with that and analyse it. That is what he did and that is all he was required to do as an expert. He did not need to go on and say, "Oh, I note the CMA reached the opposite conclusion". It is blindingly obvious. That is --

THE CHAIRMAN: Well, I am not sure -- is that the end of it because surely, if you wheel back to the start of this process and he is preparing his report and he needs to put in front of us, you know, a considered view of the issues as an expert, it might be said that he ought to be acknowledging that there are other people who -- regulators who have looked at and expressed a different view and then by all means for him to say "I disagree with that", and obviously he does. But just to take the example of the whales point --

MS DEMETRIOU: Yes.

THE CHAIRMAN: -- he obviously had developed a theory of the whales, he must have known that that was not consistent with the CMA, and actually I would have thought it was

a fairly obvious thing for the expert to do, to acknowledge and explain why he did not think the CMA was right.

MS DEMETRIOU: Well, sir, two points: so first of all the CMA just did not have any evidence on concentration of spending, so he was not disagreeing with the CMA --

THE CHAIRMAN: Well, I think -- but he is disagreeing with them because they have reached a conclusion that there would be no material switching of importance and he is reaching the opposite conclusion.

MS DEMETRIOU: Yes, so what he is doing in his report, of course, is responding to Dr Singer's report, so that is his task --

THE CHAIRMAN: Well, no, it is not his task, though, is it? I do not think it is his task. I think his task is to come to the Tribunal as an expert and present a fair view of the issues and then explain why he takes a particular view of it, and I think that is the point I am pushing back on. I do not think that it was an adequate answer from Professor Hitt to say, "That is not what I was told to do or chose to do" --

MS DEMETRIOU: No --

THE CHAIRMAN: -- because he -- that is really the point I am trying to make to you -- because he comes to the Tribunal as an expert with broader duties, does he not?

MS DEMETRIOU: Sir, yes, and his duty would be -- so if he saw something in the CMA's Report -- if he saw evidence in the CMA's Report that went against his conclusions, of course he would have a duty, as an expert, to say, "Well, here is some evidence that was before the CMA that goes against my conclusions". Of course he has to draw --

THE CHAIRMAN: Well, I think that is part of the criticism that has been put against him, is it not? I know you take this point about the conclusions, but, I mean, certainly there is evidence in the CMA report on various things and he has not addressed it at all.

MS DEMETRIOU: Sir, he has, and I think you did cut me short in my re-examination of him. I did actually want to go through very methodically to show that he has addressed all the underlying evidence that he could address, and that was the purpose of my re-examination. I appreciate maybe that was not clear to the Tribunal at that point and we were short of time, but I will show you very clearly in relation to the transaction platform --

THE CHAIRMAN: Well, I do not think -- just to be clear, I do not think I cut you short. I think it was your decision not to proceed. I think we indicated that we were not finding it terribly helpful, but it was your decision.

MS DEMETRIOU: Well, we were given very limited time. Sir, I am not taking a procedural point, but can I address the substance of the point? Professor Hitt has addressed all the evidence that the CMA relies on that was accessible to him --

THE CHAIRMAN: Well but hang on. That is not really the question I am asking you. I am not saying has he dealt with it in some way. I am saying has he come to us and told us -- in his report has he said, "This is an issue that I need to address and here are some things that I disagree -- that are contrary to my position and here is the reason why not"? That is the point. It may be that it is not as big a point as warrants this discussion but it certainly does seem to me that, as a matter of principle, an expert who knows that a regulator has disagreed with them expressly on the same point ought to come and acknowledge that and deal, as best they can, with it overtly rather than covertly, if I can put it that way.

MS DEMETRIOU: Sir, I am going to -- I am going to maintain my disagreement. Can I say in a nutshell --

THE CHAIRMAN: That is fine. I just wanted to make sure I had put the point to you.

MS DEMETRIOU: Can I say in a nutshell why we disagree with that?

THE CHAIRMAN: Yes, of course.

MS DEMETRIOU: There is a distinction between the evidence that the CMA was looking at, insofar as it is accessible, and the views of the regulator, so the views addressed by the -- the conclusions drawn by the regulator. It is a conclusion that the case law recognises very well. When you look at the *Hollington* v *Hewthorn* line of cases, the conclusions of regulators -- we have an argument that the conclusions of the regulators are not even admissible. Certainly they should not be given weight. What is available is underlying evidence considered by the regulators.

So in circumstances where our position is that the conclusions of the CMA or of the Commission on particular points are not even admissible and in any event should be given very limited weight --

THE CHAIRMAN: Well, you are coming back to -- I understand the point about conclusions. That is not the point I am making to you. Just to be clear, I am not making a point about conclusions. I am making a point about evidence. There is evidence in the CMA report, there is evidence in the *Spotify* decision. It may be -- I absolutely understand he disagrees with it. That is not the question here. The question is whether he had a duty to point out to us that there was a regulatory

decision which had a different approach and had evidence that it had led to a different conclusion and then to attack that, which I do not think he did.

MS DEMETRIOU: As I say, the only point put to him in cross-examination was that he had not referred to the conclusions.

THE CHAIRMAN: Well, I am not putting to you the point that was put to him in cross-examination. I am putting a different point, I think.

MS DEMETRIOU: No, but my response is that nobody has shown us any evidence that the CMA relied on that he has not grappled with. Obviously, if there were contrary evidence that the CMA relied on, he would need to grapple with that, I am agreeing with you, but the fact that the CMA says, "We draw from the Accent survey that most people would not switch", is not evidence that he needs to grapple with.

THE CHAIRMAN: Well, let us leave it there. I think I have taken you well out of your way on it and I think we have covered the ground. Thank you.

MS DEMETRIOU: Now, going back to the Class Representative's written closing submissions at paragraph 34, so {A1/8/16} -- so here, at paragraph 34, there is -- this says:

"Dr Singer identified five 'stickiness factors' ..."

You have a reference back to the hot tub, but there is no analysis of these at all and no discussion of any of the evidence before the Tribunal.

If we go, in fact, back to the Accent survey, at {D1/1287/71} this time, we see, in fact, that there is overwhelming evidence here that the vast proportion of consumers who were surveyed were satisfied with the switching process, so evidence that goes against what Dr Singer said in the hot tub. We saw that in the list of factors that the Class Representative relied on at paragraph 34 that I just showed you was the time value of learning a new operating system, but the Accent survey found, if we go to {D1/1287/72} and we look at the chart, that only a minuscule proportion of consumers expressed any dissatisfaction with using a new operating system. In fact, the only evidence put to Apple's witnesses about the supposed "stickiness" was the 2013 Goldman Sachs report, but that is an old report and things have moved on significantly, as Mr Schiller explained. I am just going to give you the reference to where we deal with that in our closing submissions. It is paragraph 51, {A1/9/19}.

So the fact of the matter is that Dr Kent asserts this at paragraph 34 of their written closing submissions but they have presented no good evidence

that consumers are locked in that is capable of undermining what we see here in the Accent survey.

Now, Dr Singer says that switching rates are low, but Professor Hitt considered the Accent survey as well as evidence in the Kantar ComTech surveys. We can see what he said about this in his third report at paragraph 151, so {C3/8/74}. Can we go over the page, please, to subparagraph (c) -- sorry, let us go back. So we can see -- if we go back we see that he addresses Dr Singer's opinion that switching rates are low. He says that that is based on a misinterpretation of the survey evidence. Then -- so this is grappled with. Again, none of this was -- has been addressed by my learned friends.

Then they say that -- they are basically saying -- he says here that Dr Singer relies on two older surveys. Then if we go to subparagraph (c), {C3/8/75}, you have the much newer -- you see here that Dr Singer relies on the CMA report to conclude that there are low switching rates:

"However, according to the survey commissioned for that report, more than 17 percent of respondents had either switched or considered switching between iOS and Android devices in their previous purchase, suggesting that a considerable share of smartphone users reconsider

their platform choice regularly."

We then see, at paragraph 152, that Professor Hitt says that Dr Singer has failed to contextualise the switching rates, and that is something that Professor Hitt goes on to do, showing that they are broadly in line with other UK industries.

If we look at the other industries -- if we go over the page, {C3/8/76}, he looks at a number of industries. It would be alarming to suggest that each firm and each of those other industries is probably a monopolist too because their switching rates are, in Dr Singer's words, to use his word, "low".

Then if we go to 154 to 155, {C3/8/77-78}, Professor Hitt explains that consumers who do not switch are likely to be happy with their current device. You cannot infer that it is because switching is difficult. That would be inconsistent with the Accent survey evidence, which shows it is not difficult.

Again, the Class Representative does not engage with any of this evidence in her closing submissions, written or oral. She just relies on assertion which is divorced from the evidence at this trial.

We circle back to the 2008 story. The evidence we have just been looking at is of a piece with that. Apple was, in 2008, constrained by competition in the

devices market. The price was a competitive price then and it is a competitive price now because Apple continues to be constrained by competition in the devices market.

The other point that is worth bearing in mind is this: that however settled you may think a market looks at any particular point in time, all it takes is for someone to come along with an offering that is significantly better in the round and the whole market can move. That is what we saw happen in just a few years from 2007 to 2010, when -- as Dr Singer said, "Where is the BlackBerry now?". Nothing has fundamentally changed to prevent that from happening again. The right inference to draw, from the fact that it has not happened, is again that Apple's offering in the round, taking its commission but also its innovation and its device prices and quality all together, is a competitive one, so that is what I wanted to say about device market constraints.

Is this a convenient ...?

THE CHAIRMAN: I think it probably is. Why do we not -- we will take a ten-minute break. Thank you.

(11.29 am)

(A short break)

(11.41 am)

THE CHAIRMAN: Ms Demetriou.

MS DEMETRIOU: Sir, I am moving on to the second source of competitive constraints, so those from other transaction channels.

MR FRAZER: Just before you do that, can I take you back to a point -- I did not like to interrupt the migration of whales.

MS DEMETRIOU: Yes.

MR FRAZER: But before that, on the concentration of commerce, you were talking about, on the other side of the platform, the developers and --

MS DEMETRIOU: Yes.

MR FRAZER: -- that they would somehow focus on Android but remain on iOS. Now, I think we saw some evidence that something like 85% of the top 5,000 developers were double -- double-homed, as it were, and so they had to remain on both. What is your submission on what would happen?

MS DEMETRIOU: So my submission on what would happen is that they could -- so they could focus their attentions more on Android, so get their apps on Android sooner, to entice consumers to move over to the Android platform, where the conditions would be better if Apple made its offering less attractive to developers by raising its price above the competitive one.

MR FRAZER: So sooner and -- a quality difference or price difference, but no price difference by that -- but a lag?

MS DEMETRIOU: Yes, so it could do it sooner. So they could take measures -- if a developer is faced with an uncompetitive commission from Apple and a competitive commission from *Google*, it could take -- they could take measures to seek to move consumers over or those consumers that spend a lot, and they could do that by ensuring that they get all their nice new versions of their apps on Android sooner than on iOS, which would then attract consumers over to it more quickly.

MR FRAZER: I see. I see. Thank you.

MS DEMETRIOU: Or of course, another mechanism would be -- if Dr Kent is right on incidence, then of course prices would be lower on Android, so that would bring consumers across. So there are two mechanisms, depending upon whether or not Dr Kent is right on incidence. So --

MR FRAZER: Got it. Thank you.

MS DEMETRIOU: So thinking about the transaction -- constraints from transaction channels, what we are thinking about is whether developers and consumers would switch commerce away from the App Store to other channels -- to other channels in the event that Apple charged a price above a competitive level. When I say

"switch", I just want to be careful about what I mean by this. So I do not mean necessarily that a developer or a user abandons iOS altogether. What I mean is that developers and consumers could take any one of a number of decisions that result in them shifting some of their commerce away from iOS.

So, for example, a developer might create incentives for consumers to transact on a website instead and some consumers might take up those incentives to some extent; other developers might go further and turn their app into a pure reader app, shifting all of their commerce away from iOS; equally some consumers may choose not to play particular games on iOS and instead play them or similar games on other devices that they already own.

So when I say "switching", I am referring to all of those possibilities taken together, not just focusing on the possibility of a developer completely delisting from the App Store or on consumers deciding they want to cut their spending on IAP down to zero.

Again, the fact that the very -- that there is a very skewed concentration of commerce, both for developers and consumers, is highly relevant here too because you would only need a tiny fraction of developers to switch some of their commerce away from iOS to defeat a price increase above competitive levels.

It is common ground that developers can and do supply their digital goods and services through other channels at lower prices if they wish to do so, so a games developer could seek to lure customers to other platforms to play their games and to transact. It is also common ground, of course, that Apple's Multiplatform and Reader Rules mean that a consumer who transacts on another platform, so who, for example, buys a bundle of currency, virtual currency, to use in a game, can then consume that digital product when playing the game on their iOS Device. So a games developer can seek to lure an iOS consumer to transact on, say, the developer's own website and buy a bundle of virtual currency and then use that bundle of virtual currency when playing the game on their iPhone.

The undisputed evidence is that a high proportion of the most popular apps which generate the highest revenues make use of the Multiplatform and Reader Rules. We see this in Professor Hitt's second report, if we go to {C3/4/172}. You have seen this in the course of the trial. I will just ask the Tribunal to remind yourselves of that. If you look at the "Top 25 [apps] by consumer spend" and just read across that row to yourselves, we can see that the proportion -- we can see the proportion that offer digital content outside of the

iOS App -- we see that in pink -- and then we see, final column, the proportion that make use of the Multiplatform Rule, and again, the figures for top 25 apps for games are very similar.

The Tribunal has seen that Professor Hitt looked at the data from the Accent survey when considering these constraints, and let us go back to that, so {D1/1287/77}. You can see at the top of page {D1/1287/78} that 72% of iOS users with gaming apps access gaming apps in other ways. So you see that at the top of the page. Then if we look at figure 46, only a minority say that they have no other ways of accessing a gaming app that they have on their smartphone.

Then if we go over the page, please, to -- sorry, if we go to {D1/1287/79}, yes, figure 47. Let us read the question. So the question that was asked is:

"How, if at all, have you spent money on gaming apps (eg levels, tokens) that are on your smartphone in the last 12 months?"

If we look at the figures for iOS, which is in black or dark navy blue, you can see at the bottom -- first of all, look at the bottom. So:

"I have not spent any money on these apps in the past 12 months."

That is 52% of consumers surveyed, and that is again

not surprising because we know that spending is concentrated in a small proportion of consumers. So going back to the evidence I showed you before about the 10% or 11% of consumers who are thinking of the price of apps when they buy their devices, that is not going to overlap with these people that do not spend any money on apps at all.

Then looking at the proportions of consumers who spent money in different ways on gaming apps that were on their iPhone, we see that material proportions spend money on other platforms, and you see that there. So 9% "On a games console and then accessed in the app on my smartphone"; 7% "Through a package of services bought outside of the app on my smartphone"; 3% for "a website and then accessed in the app on my smartphone". So we know how highly concentrated spending is and so, in these proportions, there are going to be consumers who are spending a lot of money.

If we look, please, on page 80 --

THE CHAIRMAN: Sorry, I am just reading -- I am just trying to understand what you have just said. Are you saying -- because is this not telling us that, to the extent anyone has spent money, most of them spent it on their smartphone?

MS DEMETRIOU: Most of them did, yes, but that is why it is

critical to be thinking about these figures --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- in the context of the very tiny proportion of consumers that make up most of the spending.

THE CHAIRMAN: Yes. So you are again making an inference -- why does the inference -- that is the bit I just missed. Why should we make the inference here? One can see the basis, as Dr Singer accepted, between the people who spent a lot of money and the people who think about the price. What is the inference between people who spent a lot of money and people who use it on a particular platform?

MS DEMETRIOU: So the inference is perhaps less compelling than the one that I made previously, but what we do see is that a large proportion of consumers do not spend any money at all and so we are already reducing down to the ones that are spending money. We do ask you to draw an inference that those who are thinking about buying content elsewhere, presumably because there is a good offer, and importing it into games on their iPhone are people that are likely to be spending a lot.

THE CHAIRMAN: I see. So you are saying that if I have gone to the trouble of --

MS DEMETRIOU: It is not there in the chart, no. That is fair.

THE CHAIRMAN: No, no.

MS DEMETRIOU: But, again, we say the burden really is on Dr Kent in these circumstances to say, "Well, these figures do not include the whales", and she has not done that. What we have seen is that all she has said is, "Well, most people do not access content in other ways". But the problem is "most" will not do when you look at the very highly concentrated spending figures. That is really the bottom line.

If we go to {D1/1287/80}, please, figure 48, so again, reading the question:

"How, if at all, have you spent money on gaming apps ... that are on your smartphone in the last 12 months?/and which of these is the main way you pay for content in the gaming apps that are on your smartphone?"

You can see that light blue is "All" and dark blue is the "Main" way, so you have two bars for each option. You can see that 20% bought content on a games console and then accessed it on their smartphone but for 11% this was the main way they transacted.

So pausing here and looking at the 85% figure at the top, so "In the app on my smartphone ...", Dr Kent's counsel, in cross-examination, was wrong to point to that 85% figure as meaning that 85% of users purchase

all of their content on their smartphone. That is not what the question is asking. It is a misreading of the question. You can see it is a misreading of the question because that would be impossible if 20% of consumers bought content on the console and used it on their smartphone. The 85% is the proportion of consumers who said that their smartphone was at least one of the ways they purchased content.

Then we --

THE CHAIRMAN: The 78% is the people who said the main?

MS DEMETRIOU: Exactly, exactly.

THE CHAIRMAN: So precisely --

MS DEMETRIOU: Exactly so. Then we can see a further proportion --

THE CHAIRMAN: Sorry. Just to be clear about this.

MS DEMETRIOU: Of course.

THE CHAIRMAN: So then the -- the numbers in black or navy, whatever, should add up, should they not, on that theory? Is that broadly right, because there can -- it could only be so many main ways, yes, whereas they would not necessarily add up in relation to the blue. That is the point you are making.

MS DEMETRIOU: Yes.

THE CHAIRMAN: Yes. I understand that.

MS DEMETRIOU: That is exactly the point. Then if we look

down, we can see a further proportion buy a package of services bought outside the app on their smartphone, so, for example, via a website. Then we have a group who buy content on websites and then access it on their smartphones. Of course, our case is about the 11%, looking at those figures, so the main way they -- the 11%, the 6% and the 3% who say that their main way is to buy content on a different channel and use it on their smartphone. That is a lot of consumers. That is 20%.

So bearing in mind the thought experiment again, it is not enough for Dr Kent to show that most consumers would stick with Apple if it charged supra-competitive commissions. She has to show that sufficient numbers would stick with Apple to make the supra-competitive commissions profitable. When we are thinking about that question, we have to remember how concentrated the commerce is. So if the group of people who use these other channels a bit, but it is not their main or only approach, includes those consumers who spend a lot, then shifting them into "Main" or "Only" using these methods would defeat a price increase.

Even if those consumers are not in this group in the real world, the fact that so many consumers are shows that it is feasible and that, if there were a gulf between Apple's Commission and a competitive level,

there would be an incentive for more consumers to take these approaches. Of course, the fact that most iOS Device users have access to at least one other device by which to enter into transactions means that there is scope for these numbers to increase further in the event that Apple charged a price that was not competitive.

Now, I was going to -- I think I am just going to remind you about what we say in our -- we deal in our written closing submissions -- you will remember the empirical analysis conducted by Professor Hitt in relation to Netflix and the *Epic* Games Store. I am not going to go over that again. You have seen what we have said about it in our written submissions.

But let me show you one part of our written submissions. If we go to {A1/9/26}, so paragraph 65(d) at the top of the page, we see the same mechanisms that work with Roblox, and you will recall this in the evidence, that Roblox earned nearly US $2.8 billion in 2023, of which approximately 30% was attributable to sales of its virtual currency, Robux.

"Despite 80% of Roblox usage being on mobile devices, only 47% of Robux sales occurred through the ... App Store or the *Google* Play Store. The obvious inference is that a substantial proportion of mobile users' use of the app is funded by their

transactions via alternative channels such as Roblox's website."

That is even without Roblox having attempted to steer consumers in that direction. Of course, what we also saw is that more recently Roblox has begun seeking to incentivise mobile users to transact via alternative channels, by offering Robux at a 25% discount if they purchase via its website, which Dr Singer accepted was consistent with an effort to steer. What we say is that this demonstrates both that large developers can shift transactions from iOS to their websites and that Apple's pricing is somewhere in the competitive zone in which some developers, at times, choose not to steer and others make the choice to steer, as we see that Roblox has done recently, so this provides an illustration of how these channels which constrain Apple work.

The Tribunal, of course, has seen that these large developers, the ones who matter, are vast companies with vast marketing budgets and so well able to steer consumers away to transact off iOS if they perceive there to be any advantage to doing this.

Let us look at what Dr Kent says about this in her written closing submissions. If we go to {A1/8/18} -- yes -- so we see, if we look at paragraphs 39 and 40, and over the page at paragraph 40, {A1/8/19}, what the

Class Representative is doing here again is relying on the conclusions drawn by the CMA from the Accent report but just not engaging with the substance of Professor Hitt's evidence. As we have seen, the CMA did not look at this question of the skewed commerce and consider -- did not analyse what proportion of developers or consumers would need to switch, and that is a critical question.

If we look at paragraph 40, another point -- I think the only substantive point really -- that they make about this is that Professor Hitt says that he had known that the Accent survey had not identified frequency when he produced his report, and so what is said is -- I assume the point that is being made is, "Well, it should be given less weight because -- the survey results should be given less weight because they do not identify frequency".

But of course, the survey did ask what was the main way that consumers purchased content, so if a consumer says that the main way they purchased content is on a console, it is unlikely to have done that -- they are unlikely to have done that only once in the year. At least there is no evidence to suggest that is the case. Again, the burden is on Dr Kent and not on Apple and again we see nothing.

Now, I just want to give you the reference to my cross-examination -- my re-examination, rather, of Professor Hitt in relation to these points because again what was put to him -- and without seeking to get into the debate we were having a little earlier -- what was put to him was, "You have not referred to the CMA's conclusions". If I just give you the reference to the re-examination. It starts -- so it is {Day23/191:1} and it goes on for several pages. But what I did in that re-examination, without going back through it all again now, is I put to him the seven reasons relied on by the CMA, so the seven planks for the CMA's conclusion. I asked him to consider whether or not he had addressed those reasons and he showed where he had addressed them in his report. What he said at the end of it was, "Well, I am right and the CMA is wrong because the CMA has not engaged with this critical question of what proportion of consumers would need to switch".

Now, in view of the time constraints on me, I am going to take the rest of this much more quickly. We have got a case on other forms of monetisation. I hope it is not taken as expressing any lack of confidence in our case just to simply refer you back to our written closing submissions, but we do rely on everything we say there at paragraphs 68 to 71, so that is {A1/9/27}.

I just want to deal with one point that is made against us in relation to that. You will recall that the evidence at the trial -- there was evidence and analysis conducted by Professor Hitt to show that developers adopt a variety of monetisation strategies and that they can shift their monetisation as between advertising and in-app sales.

The Tribunal has seen, for example, the study carried out by the analysis group, and again, just for your note, that is at {D1/1449/3} and you can see the figures for the UK on page {D1/1449/10}. What that evidence shows is that there is capacity for developers to alter their mix of monetisation to place greater reliance on in-app advertising. That operates as a constraint on Apple's Commission because, if Apple raised its commission above a competitive level, then these big developers would have the means to monetise more through advertising and so reduce the revenues that Apple gets through its commission.

The Class Representative's response to that -- and it is a response made at paragraph 64 of their written closing submissions, but I think also orally -- was that, if this were a constraint, then developers would have switched to in-app advertising a long time ago. But this does not follow at all. Professor Hitt

explained that. Again, without turning it up, I will just give you the reference. It is {Day22/52:13-22} and {Day22/55:24}. Broadly the point made by Professor Hitt is that many developers used both monetisation strategies and they have optimised the balance on the basis of the terms on offer, but if those terms became worse, they could shift the balance, and that really is an answer to my learned friend's point. (Pause)

Oh yes, sorry. So, Professor Frazer, in relation to your question about -- going back to the migration of the whales and switching where developers go to one platform or another first, Mr Piccinin has found you a reference to the evidence. Can I -- Mr Leith, in fact. Can I just give you those so that you can -- I hesitate to say "come back to it". There is so much to come back to in this case. But at {D1/1318/74} and then Mr Singer's evidence at {Day16/148:14-22}.

MR FRAZER: Thank you. I should add, it is at least 25 years since I have been a professor, but thank you for that anyway!

THE CHAIRMAN: I was wondering if it was one of your students who was addressing you that way, but I do not know whether that is right.

MS DEMETRIOU: I think, if in doubt, it is always better to overpitch!

Now, on Dr Bishop's question about price discrimination, I thought that there was some evidence. Can I just give you a reference, please? So Mr Schiller, {Day7/60:7-16}, and he explained that Apple's policy of not price discriminating is an aspect of the way that Apple makes its platform more attractive to all.

Now again, a couple more points. So we have pointed to contemporaneous -- this is in the category of "other evidence". We have pointed to contemporaneous documents at paragraph 77 of our written closing submissions which show that Apple viewed other platforms as competitors and vice versa. Dr Kent complains that these internal documents do not contain analysis of the extent to which concentration of commerce means that it would only take a small proportion to switch to defeat a price increase, but we say that is not surprising because Apple has never sought to increase its prices. It chose a low price because it knew how important attracting developers would be to the success of this two-sided platform.

We saw, in practice, that the consequence of setting a low price was that it was successful, so, like most businesses, Apple does not need a quantitative SSNIP test to know that trying to raise prices above the

competitive level would end badly for it. What we look for in documents like these is just to see whether the business actually regards other platforms in the way that the economic analysis suggests it should. It is a way of testing whether the upshot of the economic analysis is consistent with the way that the business thinks, and it is. Our analysis suggests that platform competition is important and Apple thinks it is, too.

Now, finally on "no distinct market for payment services", the evidence before the Tribunal shows that developers make a single decision as to how they monetise their apps when they decide to publish an iOS App on the App Store, and Mr Holt puts this very clearly in his third report. Can we look at that, please, so {C2/10/142}. Can I just ask you, please, to read to yourselves paragraph 391 again, at the bottom of the page, and going over the page, {C2/10/142-143}. (Pause)

So really Mr Holt is accepting our point on this, and we make a number of other points. Again, just in the interests of time, I am not going to repeat what we have said in our closing submissions at paragraphs 95 to 100, {A1/9/34}. I will just pick up a point that my learned friend Mr Hoskins made. He said that Professor Hitt accepted that, once an app is downloaded, where a buyer buys gems on the Clash of Clans site, that

is a transaction on a one-sided market. But the answer to that point is that the IAP transaction is two-sided because Apple, which is the platform, is facilitating a transaction between the developer on one side and the consumer on the other, and that is different from a consumer going to the developer's website to do the transaction. It is not a technical point. Apple's investment in the quality of IAP, how it looks to consumers, its privacy and security and convenience, all of that encourages consumers to transact with developers through the platform.

So I think that takes me to briefly wrap up by way of conclusion on market definition and dominance. We say that the burden is on Dr Kent. The mainstay of her positive evidence was Dr Singer's HMT, which is uninformative. We have produced a wealth of evidence showing the strength of the constraints that operate on Apple's Commission, three sources of constraints. Dr Kent has failed to engage substantively with this evidence. She simply has not shown that it is wrong. She has rested on the CMA's conclusions and the Commission's conclusions, but she has failed to demonstrate that those conclusions are correct. Her case should be rejected for all the reasons that we have given.

I have given you a wrong reference. I gave you a reference to the analysis group study. The actual reference is {D1/1449/1}. I missed out a 1.

So unless there are any questions on market definition and dominance, I was going to move on to exclusionary abuse.

THE CHAIRMAN: Yes, just to be clear about your position on dominance, I think you obviously will take a position that if you are right on market definition, then you do not need -- you really do not need to address dominance because your market -- well, what is the market that you say -- let me just step back from that. If you start with the focal product, as we have agreed, where do you end up with your market -- what do you say the market is, the relevant market?

MS DEMETRIOU: Well, it is the market -- we have set this out -- I am going to get this wrong so let me just go to our written closing submissions. We have set this out. It is the markets identified by Professor Hitt, so they are not limited to iOS; they are transaction markets.

THE CHAIRMAN: It is the digital --

MS DEMETRIOU: They are then subdivided to those different constraints and then --

THE CHAIRMAN: Yes, exactly. Digital transactions across different platforms subdivided as to genre, which I am

sure I have got wrong as well, but something like that. So you would say you are not dominant in those because there is -- it is a big market and you have not got market power?

MS DEMETRIOU: No, there is no allegation that we are dominant in those markets.

THE CHAIRMAN: No, and then when you -- if you are wrong about that and you are in an iOS market, you still say there are -- you still pray in aid the constraints which you say mean that you are not dominant, but is there anything else you are addressing in that space that --

MS DEMETRIOU: No, it is the same constraints, so it is an evaluation of the same constraints.

THE CHAIRMAN: The same constraints. Okay, thank you. That is very helpful.

MS DEMETRIOU: So I am moving on to exclusionary abuse. Just in terms of the points, before we get on to objective justification, which is in a sense the fourth answer, Apple has three responses to the Class Representative's exclusive dealing case. The first is that this is a compulsory licensing *Magill* case; the second is that the requirements are how Apple competes on the merits; the third is that the Class Representative has not shown that the requirements result in any meaningful foreclosure of competition, and

that involves looking at the counterfactual. Any one of these is sufficient to defeat the exclusive dealing case.

I am going to start with *Magill*, and a point about the characterisation, really, of what is going on here. So Dr Kent seeks to describe the requirements that she challenges as embodying an exclusive dealing abuse on the part of Apple. We say that is a flawed characterisation. I took the Tribunal in opening to the classic case of *Hoffmann-La Roche*. I am not going to go back to it. You will be familiar with the facts. The Tribunal will recall that the Commission found that the company had a dominant position on the markets for particular vitamins and it was abusing its dominant position by obliging or incentivising its purchasers to buy all or most of their requirements from it rather than its competitors. So, in other words, Roche was leveraging its dominance because its customers would inevitably want to buy something from it and, through particular measures, creating pressure for them to buy all or most of their requirements from Roche.

We say this case is different because Apple is not leveraging its alleged dominance in distribution to pressure all developers to distribute through the App Store. What it is doing is quite different. It is

exercising its IP rights to reserve the entire activity of distribution to itself. Indeed, that is an essential element of the ecosystem it has created and of the competitive offering it makes to consumers. Apple has decided not to license third parties to use its technology to carry out distribution or payment services.

So we say that this case is properly characterised as a refusal to license case. As the Tribunal knows, competition law only compels undertakings to license their IP in exceptional circumstances and Dr Kent has not run a case that these exceptional circumstances, the *Magill* conditions, are engaged here.

Now, the factual basis for the argument is common ground and the question for the Tribunal is how to characterise those facts. When I say that the factual basis of the argument is common ground, what I mean is that everyone agrees that it is not possible to create or publish an iOS App without using Apple's proprietary tools and technology; tools and technology protected by intellectual property rights. So developers therefore need a licence from Apple and Apple grants them a limited licence under the DPLA.

The licence that Apple grants is limited in that it does not permit developers to use Apple's proprietary

technology to create alternative app marketplaces or to make apps for distribution through alternative app marketplaces or to create apps with in-app purchases which are processed other than through Apple's IAP, so those are all limitations on the scope of the licence granted by Apple.

Now, we have shown the Tribunal in opening -- and in a sense it is common ground -- where in the DPLA those limitations are contained. I am not going to show you all of that again, but I will just show you the opening words of the DPLA under the heading "Purpose", if we go to {E/18/1}. So you see:

"Purpose.

"You 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 ... on the terms and conditions set forth in this Agreement."

So it is a limited licence. But just pausing here, it would be wrong to say that these are simply contractual restrictions. They are the restrictions which arise from the exercise by Apple of its intellectual property rights, and you can test the point like this: let us say a developer refuses to enter into the DPLA and then seeks to create or publish an iOS App,

Apple would be able to prevent this happening by exercising its intellectual property rights; in other words, it is not the contractual provisions in the DPLA that prevent developers from launching alternative app marketplaces; it is Apple's IP rights.

Now, Dr Kent's case is that competition law should prohibit Apple from exercising its IP rights to reserve these activities to itself. That is Dr Kent's case. Her very case is that the limitations in the licence that achieve the reservation of these activities to Apple are anti-competitive. So her case is that competition law should compel Apple to license its proprietary technology to carry out those activities Apple has reserved to itself. That takes us straight into the *Magill* line of cases. This is a compulsory licensing case and the Class Representative is wrong to argue otherwise.

Now, I want to address head-on the argument advanced by my learned friend Mr Hoskins to the Tribunal on Monday. Mr Hoskins argued that the case law distinguishes -- makes a distinction. He says it distinguishes between those cases where a dominant undertaking refuses to give a competitor access to infrastructure it has developed for the exclusive use of its own business, on the one hand, and then, on the

other hand, those cases where a dominant undertaking does give access to its infrastructure to third parties and then makes that access subject to unfair conditions.

You heard my learned friend argue that the present case falls into the latter category because he says, "Well, Apple has granted developers access to its infrastructure". When the Tribunal asked him what he meant in this context by "infrastructure", Mr Hoskins agreed that it means everything that happens at the App Store, so that is {Day24/34:1}. But, of course, Apple has not granted developers access to everything that happens at the App Store. It has not permitted developers to engage in the specific activities of distribution and in-app transaction services.

There is also a revealing passage in Dr Kent's written closing submissions, if we just look at that. {A1/8/33}. If we look at paragraph 91, they say:

"... Apple's infrastructure is not consecrated to its use to be enjoyed exclusively by it. The infrastructure concerned is open to other operators on the market, ie developers."

Now, presumably the reference here to "other operators on the market" is a reference to Dr Kent's alleged market, so iOS transaction markets. Mr Hoskins made the same point orally on Monday. He said that

Apple's infrastructure is purposefully open to other operators on the relevant markets. But of course the relevant markets here that we are concerned with are app transaction markets and of course Apple has not granted access to its proprietary technology in those markets. Those are the -- those are precisely the activities Apple has reserved to itself.

THE CHAIRMAN: Presumably that proprietary technology is different from the proprietary technology that people use to build apps; is that right?

MS DEMETRIOU: Sorry, the difference --

THE CHAIRMAN: So the proprietary technology that runs the App Store is different from the proprietary technology that a developer would use to build an app?

MS DEMETRIOU: No, it is not that the -- the division is not as straightforward as that. So to build an app, you require -- to build an app and to integrate with the iOS operating system, then you need access, for example -- you need permission to use Apple Software Development Kit --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- and various APIs and all those things are protected by intellectual property rights.

THE CHAIRMAN: Yes, so maybe I -- I thought you were making this distinction, but maybe you are not. I thought you

were making a point there about the proprietary technology to run the App Store.

MS DEMETRIOU: No. The point I am making is a slightly different one. So Mr Hoskins has said, "Well, Apple has granted access to its infrastructure to other operators on the market", and one has to say, "Well, what market are we talking about?". So we are talking here in this case about app transaction markets -- sorry -- distribution markets, App Distribution Markets --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- so taking Dr Kent's markets, iOS App Distribution Market and iOS After-Market Services.

THE CHAIRMAN: Effectively the two-sided market which is matchmaking; is that what we are talking about?

MS DEMETRIOU: Exactly, and what is not correct is that Apple has opened up its infrastructure to participants on those markets. That is the opposite of what --

THE CHAIRMAN: No, I understand that point, but I am asking you about the --

MS DEMETRIOU: That is all I am asking saying.

THE CHAIRMAN: But I am asking you about the IP that relates to that as opposed to relating to the developer; in other words, I am asking you whether one needs to think separately -- if you are thinking about the two-sided market and its operation, are you saying that there is

a set of intellectual property rights that attach to that operation that are separate from the tools and technology that developers use to make apps? That is -- sorry, that was the question.

MS DEMETRIOU: No, I am not saying that and we do not need to say that. We do not need to say that because it is -- regardless of the form of the intellectual property right, it is an intellectual property right which Apple -- the essence of the right is that Apple can decide whether to license it and the extent to which it licenses it.

Now, I am going to come on to the cases and how this distinction is drawn that Mr Hoskins draws, so --

THE CHAIRMAN: Well, I think it is just helpful -- it may be that it is better to look at the cases and to have a discussion there -- but just to put the marker down to say that the thing that is bothering me about this is that -- well, it is precisely that point about at what stage -- the Class Representative is saying that you are not doing what you have just suggested.

MS DEMETRIOU: Yes.

THE CHAIRMAN: So the Class Representative is saying that, "You have got some IP that you have got over here for development of apps and you are actually letting everybody have that", so there is no question that you

have got everybody into that, and then they are -- I think this is what they are saying -- then they are saying, "But you are actually then using that as a limitation on distribution", which is an altogether different activity, and that has bounced back into the cases about collateral distribution, collateral restrictions and so on. So maybe it is easier to deal with, with the cases. I just want to be clear that that is the -- I think that is the -- well, it may be one of the sharp points of proper --

MS DEMETRIOU: That is very helpful. If this is okay, I think it may be easier to --

THE CHAIRMAN: Yes, of course.

MS DEMETRIOU: -- make this point after looking at the cases --

THE CHAIRMAN: Yes, absolutely.

MS DEMETRIOU: -- because of course we recognise that the case law draws a distinction between refusals of access on the one hand and the conditions applicable to access once it is granted on the other.

THE CHAIRMAN: Yes.

MS DEMETRIOU: But what we say is that my learned friend has drawn the distinction in the wrong place, and I want to take you through a couple of the cases, to show you that.

THE CHAIRMAN: Yes, yes. I think that is the same point, is it not, so it is helpful.

MS DEMETRIOU: It is the same point, but what the cases -- my submission is going to be this: the cases on which Mr Hoskins relies, so *Google Shopping* and *Android Auto*, they do not address the situation we have in the present case. The situation we have in the present case is where an IP owner licenses the use of its IP for some purposes and not for others. I just want you to bear that -- that is really, in a nutshell, the issue of law that the Tribunal has to decide here: what side of the line does that situation fall on, a situation where the IP owner licenses the use of its IP for some purposes but not for others? That is the question.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Of course that is because that is what Apple has done here. It has not licensed -- it has licensed its IP, as you were just putting to me, but not for the purposes of distribution and payment services. It has reserved those activities to itself.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Of course, on Dr Kent's case, Apple has reserved the entire market to itself. Our submission is that it has done that through the exercise of its IP rights and that decision is just as protected as

a decision not to license the IP rights at all would be.

If you think about -- take some analogies. Take a patent-holder for a particular medicinal ingredient and the ingredient can be used to make two different medicines for two different conditions, so you have the patented active ingredient but it can be used to make two different medicines for two different conditions. The patent-holder may decide to license the manufacturer to make the medicine for one condition but not the other. That is just -- it may decide to reserve the manufacture of medicines for the second condition to itself. That is just as much a right conferred on it by its IP as the decision not to license it at all. So the manufacturer it has licensed its medicine to cannot turn round and say, "Well, you have granted me access to your infrastructure now, that is it, I can manufacture both medicines". Indeed, nor would it be any different if there were only one medicine manufactured for two separate conditions. The licence could be limited. "Yes, you can manufacture that medicine, but only for condition X. We are going to manufacture it for condition Y".

THE CHAIRMAN: Can I ask you -- maybe this is to think about as well and come back to -- but what if in that scenario the patent-holder also had a chain of pharmacies and one

of the conditions they attached to providing the licence was that the manufacturer could only sell through the chain of pharmacies?

MS DEMETRIOU: So if the manufacturer licensed -- so if they licensed the medicine for condition X --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- and they said, "You can only then sell it through our pharmacies", that would be a matter -- that would be a condition attaching -- so it would have granted access and that would be a condition attaching, so it would fall on Mr Hoskins' side of the line.

THE CHAIRMAN: So, yes -- well, that is the other side of the line.

MS DEMETRIOU: That is the other side of the line.

THE CHAIRMAN: Yes, exactly. That is helpful. So what we are really doing is trying to work out where we are between those two things.

MS DEMETRIOU: We are trying to work out where to draw the line, exactly.

THE CHAIRMAN: That is very helpful. Thank you.

MS DEMETRIOU: Another analogy: so if we take a bundle of technology rights -- so we have a bundle of technology rights that are protected by various intellectual property rights and they can be used both to make, say, powerful computers which are used in complex scientific

contexts or much simpler consumer devices, say, laptops, and the IP owner grants permission to third parties -- to a third party to make the laptops, to make the consumer devices, but not the complex super-computers and it reserves that activity to itself. Now, that is something, again, which the IP owner is entitled to do, so the fact that they have granted the licence for the laptops does not mean that that -- that the licensee can turn around and say, "Ah, we have now got permission to make the super-computer". The IP owner gets the return on their investment, because they have reserved that activity to themselves and consumers get benefits too.

But on Mr Hoskins' approach the owner of the IP rights is now outside the *Magill* case law and competition law could compel them to license the technology to a competitor firm that produces super-computers. We say that that would undermine the policy objectives that underpin the *Magill* line of cases because it would create perverse incentives.

It would create perverse incentives for undertakings not to share any of the fruits of their innovation more widely for fear of the implications down the line. We say that would not be good for competition or for consumers and it is not what the cases provide because those cases do not say, "Well, you have reserved your

infrastructure to yourself, for your exclusive use, so competition law applies to deprive you ..." -- sorry -- "You have not reserved the infrastructure completely for your exclusive use and so competition law applies to deprive you of your right to reserve the manufacture of super-computers to yourself".

So we say ultimately -- and this is the bottom line -- Mr Hoskins' argument proves far too much. We know that we are correct because it is the approach that the CJEU took in *Magill* itself and in *IMS Health*. In *IMS Health*, I showed you in opening that the undertaking had licensed use of its brick structure to third parties but not for the purpose of competing with it. Do you recall that? So they licensed it to others but not to competitors that were in competition with it. The court nonetheless found that the *Bronner* conditions applied.

If my learned friend were right in drawing the distinction where he does, *IMS* would have been differently -- decided differently because on his argument *IMS* was not reserving its infrastructure completely to -- exclusively to itself. It had licensed it to others.

I showed you *IMS* in opening. I wanted to show you, actually, one passage of the Advocate General's opinion. Now, I do not have the reference. Somebody is going to

get it for me. (Pause)

Sorry, just bear with me for a moment.

THE CHAIRMAN: Do not worry.

MS DEMETRIOU: I will come back to it. Let me show you *Magill* first. Oh, we have got it. {AB4/12/15}. I hope this is the right passage. If not, I will have to come back to it. No, it is the wrong paragraph.

THE CHAIRMAN: That was the AG's opinion?

MS DEMETRIOU: Yes, it is the AG's opinion. (Pause)

Here we are. Actually, I had better come back to this. I am going to come back to it. I am sorry about this.

Let me show you *Magill* first. In fact, I had the reference all along. It is paragraph 39, so it is at {AB4/12/17}. I am not reading my note correctly. So let us just look at this now because what this shows you -- this records the argument of the competitor, of the claimant, NDC. Can you just see their argument, the second bullet?

"The asset is made available to persons who are not in competition with the owner of the copyright (in the present case ...) ..."

That was the argument they were making. It was not some happenstance. They were saying, "Look, they have made it available so competition law should require them

to make it available to us". Of course, we know the outcome of the case, so it is exactly the same argument. Let us be clear about it. The argument was that *IMS* had not reserved its infrastructure exclusively to itself but it had been made available to others for limited purposes.

Then if we go back to *Magill*, please, so {AB4/9/39}. This is the Advocate General, first of all. Again at paragraph 116 we see the same thing. The argument was made. So:

"... *Magill* claimed at the hearing that these cases do not concern refusals of licences and thus do not entail the imposition of compulsory licences. *Magill* points out that ITP and RTE have granted a large number of licences and it claims in that context that these cases are concerned with the granting of licences on unreasonable terms, namely terms which preclude the publication of programme listings on a weekly basis.

"*Magill* further seeks to show that while the right to refuse to grant licences may possibly form part of the specific subject-matter of copyright, the same is not true of the right to set licensing terms. As shown ... above, that view is incorrect. The right to grant licences also includes the right to do so on specified terms. On the other hand it may constitute

a special circumstance possibly justifying interference in the specific subject-matter of the copyright if licences are granted on unreasonable terms."

Then I would just invite you to read the rest of the paragraph to yourselves.

What we see from this is that the Advocate General rejected the very same argument that Dr Kent is seeking to run now and found that the essence of an IP right includes not only the right not to license it at all but also the right to license it on specified terms. The Advocate General drew the same distinction that we do between the terms of a licence that define its scope and other terms that might be unfair in other ways, so, for example, an excessive price or self-preferencing, discriminatory conditions. If it is just scope, you are squarely in refusal to license territory.

If we go to the judgment, please, at tab 9, page 65, {AB4/9/65}, I will just ask the Tribunal to remind yourselves of paragraph 9 at the bottom of the page, and you can see from that that the TV companies did license their intellectual property rights to periodicals, permitting them to publish the TV schedules under certain conditions relating to the format of the listings, so it was a limited licence, "You can do this for this purpose, but not for that purpose".

Now, of course, it is true that the court reached a different ultimate conclusion to the Advocate General in this case, but it reached the same conclusion on the point that we rely on because it only upheld the finding of infringement on the basis that the special conditions, which we have come to know as the *Magill* conditions, were satisfied, so the fact that the broadcasters were already licensing their data for a limited purpose did not mean that *Magill* could bypass establishing those conditions.

My learned friend sought to suggest in his oral submissions that the underlying facts in *Magill* and *IMS* were not important to the reasoning, but that is incorrect because we can see that the very argument that Dr Kent makes in this case was made and rejected.

In fact, the present case is stronger than *Magill*, and that is for this reason: because Apple has here used its intellectual property rights to reserve an entire activity to itself, iOS App Distribution, whereas in *Magill* the TV stations had not reserved the entire activity to themselves. They had placed conditions on the form that the schedules -- the TV schedules could take.

So when we are thinking about the authorities relied on by Dr Kent, *Google Shopping* and *Android Auto* that

I am going to come to now, we say that it is wrong to read those authorities as establishing that, if an IP owner grants a licence to its intellectual property rights but places limits on the scope of that licence and says, "You can use our IP for some purposes but not for others", that we are outside *Magill* and competition law applies as -- in an unfettered way, that would be a wrong interpretation of those cases and it would fly in the face of *IMS Health* and *Magill*. The bottom line is that those cases do not consider that question, which is the question that the Tribunal has to consider.

I am going to start with *Google Shopping*. Mr Hoskins took you to both the Advocate General's opinion and the judgment. I would like to take you back to both.

THE CHAIRMAN: Yes.

MS DEMETRIOU: But let me tell you, in a nutshell, what the submission is that we make about the case. We say that in *Google Shopping*, *Google* had indeed given access to third parties to its general results page, and the case was all about how *Google* positioned the different results on that page, so *Google* was found to have engaged in self-preferencing by putting its own shopping comparison service in a better position on the page than those of its rivals. What I am going to show you is

that the case did not address the question that the Tribunal has to determine here; namely the position where an IP owner grants a limited licence to its IP for some purposes and not for others.

If we start with the Advocate General's opinion and the passages that Mr Hoskins took you to, so {AB4/33.1/11}. Just running through these paragraphs, starting at paragraph 87, at the bottom of the page, that explains the important rationale for the *Bronner* criteria. Of course you need to be thinking about the rationale when you are thinking about whether Mr Hoskins is right because obviously, if it were the case that *Magill* -- that you fall outside of *Magill*, if you grant a licence for some purposes and not for others -- if that were the case, that would impact upon all of these very important incentives and reasons that form the underpinning and the rationale for the *Bronner* and *Magill* criteria.

Then if we go over the page, please, to paragraph 88, {AB4/33.1/12}, the Advocate General here is distinguishing self-preferencing -- unequal treatment through self-preferencing. That is what this case is about. Then what she says at paragraph 90 is that self-preferencing is an independent form of abuse. Then you can see her reasons for that at 91 to 92. Can

I just ask the Tribunal to read paragraphs 91 to 92 to yourselves? (Pause)

One point to pick up on here -- and I pick up on it because the court picked it up as well, as we will see at the end of paragraph 91 -- is that *Google* had some boxes on its page which it reserved to itself, and the point that is being made here is that no one is asking *Google* to give access to those boxes so they are not asking for access to those boxes. What they are complaining about is something separate. They have been given access to the general results page and it is the discriminatory conditions that apply to that.

Of course, *Google* had always provided access to its general results page, the search service. Indeed, that might be thought to be a fundamental feature of a general search service. By contrast, Apple has always reserved to itself the activity of iOS App Distribution.

Now, going to the judgment, so tab 35, page 17, {AB4/35/17}. So starting with paragraph 92, what we see here is a reflection of *Google*'s argument. So *Google* is saying that the General Court had identified this as an access case. That was their argument, that the General Court had identified it as an access case and then wrongly failed to apply the *Bronner* criteria.

What the court does is reject the first part of

that. So the Court of Justice says, "No, that is a misreading of the General Court's judgment". We see that in the passage at 95 to 96. You can see that it is true that the General Court said what it said at paragraphs 220.

Then if we go over the page, {AB4/35/18}, at 96:

"However, contrary to what the appellants claim, the General Court ... in no way identified the alleged abuse in terms which demonstrate that it was ultimately a question of ascertaining whether *Google* was under an obligation to supply access to boxes ..."

Do you remember the boxes it reserved to itself? So the court is saying here that that is a misreading of the General Court's judgment.

Then, at 97, they say that the abuse is about self-preferencing on the general results page.

Then 98, you can see:

"... it is sufficient to note that those measures did not require *Google* to give access to the boxes. It follows from ... the judgment under appeal that the Commission ordered *Google* to put an end to the impugned conduct, emphasising that although *Google* could comply with that order in different ways, any measure of implementation had to ensure that *Google* did not treat competing comparison shopping services 'less

favourably' ... within its general results pages ..."

So what we see is that the court is saying that the remedies did not require *Google* to give access to the boxes; it could have complied with the order in different ways. Again, we contrast the present case, where Dr Kent is saying that Article 102 does require Apple to give access to the activities it has reserved to itself.

Then if we go on to paragraph 99:

"The description of the conduct at issue in the judgment under appeal thus makes it clear that that conduct concerned the discriminatory positioning and display on the general results pages of *Google*'s general search service and not access to the boxes."

We underline those words.

Then let us go on to paragraph 103, {AB4/35/19}:

"It is thus common ground that, when it noted, in paragraph 229 of the judgment under appeal, that the practices at issue 'are not unrelated to the issue of access', the General Court referred not to the access of competing comparison shopping services to boxes, but to their access to *Google*'s general results pages under non-discriminatory conditions."

So just pausing here, the court is drawing a very careful distinction. When we are thinking about the

infrastructure that Mr Hoskins is talking about, the infrastructure at issue here was the general results page, and the court is very careful to say, "We are not talking about access to the boxes because of course *Google* did reserve that to itself. It is not about that. You can comply with the Commission's order without granting access to the boxes. We are talking about the general results page, which of course is infrastructure which has been opened up to everyone and you need to not discriminate". Then we have 107 to 108. The abuse is identified, and it is said that it is different, independent from the issue of access. *Google* was leveraging its position of dominance on the market for general search services to foreclosure competition on the downstream markets, so not analogous to the issue in the present case at all.

Then we have paragraphs 111 to 112, which are the paragraphs relied on by Dr Kent, {AB4/35/20}. These paragraphs have to be read in the light of everything we have just seen, so we see that -- we see at 111, *Bronner*:

"... where a dominant undertaking gives access to its infrastructure but makes that access ... subject to unfair conditions, the conditions ... in ... *Bronner* ... do not apply."

Again, we have to read that very carefully. It is not "grants access at all to its infrastructure"; it is "grants access to its infrastructure in the form of the general results page; not the infrastructure that it is reserving to itself".

Then I will ask you just to note paragraph 112, where again they say that the competition authority will -- that this is not ...

"... [it] cannot be equated to a simple refusal to allow a competitor access to the infrastructure, since the competent competition authority or national court will not have to force the dominant undertaking to give access to its infrastructure, as that access has already been granted."

So that is less detrimental to the freedom of contract to the dominant undertaking. Of course, here, by contrast, Dr Kent's case is precisely that Apple would have to license its IPR to give access to an activity it has reserved to itself.

So that is *Google Shopping*. I want to now go on to *Android Auto*, and we have the judgment, so I am going to start with that, {AB4/37/1}. Again, before showing you the judgment, let me identify our submission and make it upfront. So our submission is that we say again that the court was not considering the issue that this

Tribunal has to decide in the present case; in other words, the situation where an IP owner grants a limited licence to its intellectual property or where a property owner grants access to its property for certain purposes and not for others. They were not considering that case.

I want to start with the facts. If we go to {AB4/37/3}, paragraph 5, we see the court noting that Android is an open source operating system available under an open licence, free of charge.

Paragraph 6, *Google* launched *Android Auto* specifically to allow users to develop apps in their cars -- to access apps -- for users to access apps created by developers in their cars.

Paragraph 7, you see that *Google* produced templates allowing developers to put their apps on *Android Auto*.

Then if we go over the page, {AB4/37/4}, you can see from paragraphs 9 to 10 what the dispute was about. So Enel X was the developer of an app called "JuicePass". JuicePass was concerned with the charging of electric cars, and they asked *Google* for a template to allow them to put JuicePass on *Android Auto* and *Google* refused. We can see from paragraph 17 on {AB4/37/5} that JuicePass was a competitor -- potential competitor of *Google* Maps. So the argument was that *Google*'s refusal to provide the

template distorted competition between *Google* Maps and JuicePass. The court considered whether the *Bronner* conditions applied. Let us go to where its reasoning is located. So if we go to {AB4/37/10} and start with paragraphs 39 and 40, we see the same paragraphs that my learned friend -- let us just have a look at what they say. So paragraph 39:

"As regards practices consisting in a refusal to grant access to infrastructure developed by a dominant undertaking for the purposes of its own business ... it is apparent ... that such a refusal may constitute an abuse of a dominant position provided ..."

Then you have the *Magill* -- the *Bronner* conditions.

Then, at paragraph 40, {AB4/37/11}:

"... the imposition of those conditions in ... *Bronner* ... was justified by the specific circumstances of that case, which consisted in a refusal by a dominant undertaking to give a competitor access to infrastructure that it had developed for the needs of its own business, to the exclusion of any other conduct ..."

So these are the words that Dr Kent relies on. We have seen them in other judgments. We have seen them in the *Slovak Telekom* case too. But our submission is that you can only read these compatibly with *Magill* and

IMS Health. In order to read them compatibly with *Magill* and *IMS Health*, you cannot read these words broadly so as to mean that, once you have granted access for any purpose, that is it, it is a free-for-all.

THE CHAIRMAN: I think what you can read, if you -- I think --

MS DEMETRIOU: No need to go on, but yes.

THE CHAIRMAN: No, but I think what you can read into -- well, at least what I read into what is happening here is some degree of concern about curtailing the *Magill* doctrine. I think there is a sense, is there not, that there needs to be -- there is a dividing line between what might be a *Magill* case and what might be some other abuse or might be an abuse case and the court is concerned to make sure that the line is set in a way that does not discourage another policy objective, which is enforcement of anti-competitive behaviour. So I -- the one thing I would just perhaps take issue with is that I think things have probably changed a bit since *Magill* because that concern has come more on the table. I think you do see that if you go back into the -- I think you see that in *Google Shopping* in the General Court and in the CJEU, and you do see it -- that is why it is repeated here, I think.

MS DEMETRIOU: Well, sir, I would accept what you say to

this extent: I think that certainly what has happened is that there have been cases that have come along or people that have come along to make the argument to try and put into the *Magill* and *Bronner* box things which are actually, on the face of it, independent abuses.

THE CHAIRMAN: Yes.

MS DEMETRIOU: The court, of course, is very careful to delineate between the two because it recognises that, if you take too broad a view of *Bronner*, then you may be capturing all sorts of things, like self-preferencing and so on, which really should be subject to the strictures of competition law, so I accept that. But at the same time --

THE CHAIRMAN: That is all I am saying, really. Well, I am saying that I think that has come more obviously onto the agenda than it did when *Magill* was decided. That is really the point I am making.

MS DEMETRIOU: I do not think you were saying this, but if you were saying this, what I would not accept is that the line has shifted because what you do see in all of these cases is, yes, a real concern to ensure that the line is drawn and that the case is -- it is decided which side of the line it falls on, but in all of these cases the court -- we see this. I am going to show you now -- the court explains the very important rationale

for the *Bronner* and *Magill* conditions. So the court has, from the outset, been concerned to draw the line because it recognises that you have got the IP rights protection and property right protection on the one hand and that, if you intrude too much on that, you are disincentivising innovation, which is bad for consumers, and, on the other hand, if you put too many things in that bucket, you could allow all sorts of anti-competitive behaviour to go on.

THE CHAIRMAN: Yes. I was not saying that the line had shifted.

MS DEMETRIOU: No.

THE CHAIRMAN: I think partly because I do not think the line is so clear that -- or, rather, let me put it a different way. I think the facts are really quite a big driver of where one ends up rather than necessarily any line of principle, which I think is what you are saying as well.

MS DEMETRIOU: I think my main submission in relation to this is that they just do not consider the point, the issue that the Tribunal has to consider.

THE CHAIRMAN: Yes. So you say these do not tell us the answer.

MS DEMETRIOU: They do not tell us the answer.

THE CHAIRMAN: So we are left with having to work out the

answer ourselves to the first principle.

MS DEMETRIOU: (Overspeaking) Or we are left with *Magill*, which is the law, and *IMS Health*.

THE CHAIRMAN: Well, we are left with -- if you fall on the right side of the line, which you say you do of course, but they say you do not.

MS DEMETRIOU: Well, on any view, we fall on the right side of the line when you look at how *Magill* and *IMS Health* was decided. I have not heard any way that Mr Hoskins has put forward of explaining how his argument is consistent with *IMS Health*; because as I explained, we are in a stronger position than the IP owner in *IMS Health*. But what you definitely had in *IMS Health* was a position where they granted access to their IP, but only for particular purposes and it was argued, and you saw that, "Well, that means that competition law applies in its full vigour"; and the court said not.

THE CHAIRMAN: Well, yes, but here you are -- so when you talk about granting the access to the IP, I think we have established that is the IP to develop the app, is it not? We are talking --

MS DEMETRIOU: And the storefront. So it is all -- so they are apps, and so necessarily it is the same IP.

THE CHAIRMAN: Well, no doubt that is a point for argument, but let us just say that that, at least, is one factual

issue that needs to be determined.

Then there is this whole question, is there not, of whether you can treat the distribution activity -- it is really my example about the pharmacy; is it actually bound up, or is it actually a separate activity which has been excluded by reliance on the IP limitation and the licence?

So I think there is a factual -- it does not seem to me that you can just say that *Magill* provides the answer because there was -- some degree of licensing to somebody. Unless I am wrong, I do not think Mr Hoskins is saying the mere fact that you have licensed your IP to somebody else for some other purpose is the answer to this case. I do not think he is saying that.

MS DEMETRIOU: I think he is saying that.

THE CHAIRMAN: Well, I do not think he is. I think he is saying, unless I got it wrong, I think I was trying to articulate before what I understood him to be saying, which is that we are trying to decide whether there is some separate ancillary abuse that arises because there has been a degree of permission granted in the licences and that that allows you into the sort of connection that has been made logically here; and that all depends, I think, on whether you are right in saying that this is all bound up together as one thing or whether, actually,

you view distribution as being effectively a different economic activity and facet than the development of the licence and the tools themselves. I do not know whether -- if Mr Hoskins tells me -- I probably have not got that word-perfect, but broadly, is that the territory we are in?

MS DEMETRIOU: Well, sir, just in the couple of minutes remaining -- I need to come back and finish *Android Auto* after lunch. That is fine because there is a bit more I want to say about it.

THE CHAIRMAN: Yes, of course, of course. Just to be clear, I am not saying that -- I am not challenging you on -- you may or may not be right about whether these cases are right or not and I am certainly not challenging you. I am not saying that you are automatically wrong, because of these cases or indeed anything that Mr Hoskins says.

MS DEMETRIOU: I understand.

THE CHAIRMAN: All I am saying, I am just challenging the premise that if these cases do not apply, you get a free ride on *Magill*. It is not that obvious to me that that is the answer.

MS DEMETRIOU: Well, sir, let me come back to it. It may be that we rise now and I come back to that and address that head-on after we have finished going through

Android Auto, rather than on the hoof in two minutes now, if that is okay.

THE CHAIRMAN: Absolutely. I do not want to rush you on it. We are very interested and it is a very important and interesting point, so no need to rush on this at all.

Housekeeping

THE CHAIRMAN: Just in terms of time, I am just conscious again, tomorrow we are probably going to be a little bit tight. We are starting early anyway to finish early. Do you need any extra time? Should we be planning that into the timetable? We have taken you out of your way a bit this morning. I am conscious of that.

MS DEMETRIOU: Yes.

THE CHAIRMAN: Why do you not think about that and --

MS DEMETRIOU: Can we speak over lunch?

THE CHAIRMAN: Yes. It is not the last opportunity to add a bit of extra time, but obviously the easiest places to do it are having a shorter adjournment.

MS DEMETRIOU: Oh, I see. Well, if that --

THE CHAIRMAN: Shall we come back at 1.45, just to give you the 15 minutes?

MS DEMETRIOU: Thank you very much. We are very grateful. Thank you.

THE CHAIRMAN: Thank you.

(1.01 pm)

(The short adjournment)

(1.45 pm)

THE CHAIRMAN: Ms Demetriou.

MS DEMETRIOU: Sir, if we go back to *Android Auto*, please, {AB4/37/1}, I think I had taken you to paragraphs 39 and 40. These are the paragraphs which you have seen in *Google Shopping* and you have seen in *Slovak Telekom*. You have my submission that the court is not addressing the question that we have in this case.

Then if we go to paragraphs 41 to 43, {AB4/37/11}, you see here that the court develops the rationale -- the importance of the rationale for the *Bronner* conditions, so it explains in some detail, over three paragraphs, why it is important to have the *Bronner* conditions for cases which fall within that category. Of course, we say that these points that are being considered by the court here, so incentives to innovate and so on, apply with particular force in the intellectual property context.

Then if we look at paragraph 44, the court draws a contrast with the position where the undertaking has developed infrastructure not solely for the needs of its business but with a view to enabling third party undertakings to use it.

If we go over the page, {AB4/37/12}, in those

circumstances, *Bronner* does not apply, but again we say the court is not considering the issue which arises in the present case. So where you have -- where you license your intellectual property for some purposes and not for others, that point is not being considered.

We can see that from paragraph 45 because what the court is saying at paragraph 45 is that:

"In [that] situation, neither the preservation of the freedom ..."

So where you have opened up your infrastructure, enabled access to it, the court says that:

"In [that] situation, neither the preservation of the freedom of contract and the right to property ... nor the need for that undertaking to continue to have an incentive to invest in developing high-quality products or services justify limiting a refusal to provide access to the infrastructure ... being classified as abusive ..."

But, of course, that proposition would not hold true if you were to read these judgments as applying in a situation where an IP owner licensed its IP for some purposes but reserved particular activities to itself because, if competition law precluded that decision, it obviously would have an impact on investment incentives.

Then paragraph 46, looking at what the court says

there, that:

"... where the cost of developing such infrastructure has been assumed by the undertaking ... not solely for the needs of its own business but with a view to that infrastructure being able to be used by third-party undertakings, the fact of requiring the undertaking ... to provide access ... does not fundamentally alter the economic model which applied to the development of that infrastructure."

Again, that paragraph does not hold true where an IP owner reserves particular activities to itself, so where it reserves particular activities to itself, then granting access to third parties to those activities would fundamentally alter the business model which applied to development of the IP.

So we say that these paragraphs really show that the court does not have in mind the situation in the present case, which is the issue before the Tribunal in this case.

Then if we look at paragraph 47, can I just ask the Tribunal to read that paragraph to yourselves? (Pause)

So what we see very clearly here, in our respectful submission, is that the court is drawing -- it is presenting a dichotomy between two situations and it is not considering the issue we have in the present case.

So it is saying, on the one hand, that you have got infrastructure developed by the undertaking solely for its own needs, and then, on the other hand, infrastructure developed in order to enable third party undertakings to use it. So that is the dichotomy it is considering and it is just not considering the issue we have in our case, where you have intellectual property rights or infrastructure which has been developed by an undertaking and the undertaking -- in circumstances where the undertaking has reserved certain purposes of that infrastructure to itself for certain purposes. It is just not considering that. It is looking at two different situations and it does not address the situation we have here.

Then if you look at --

THE CHAIRMAN: Sorry, just on that point, did we see somewhere that *Google* had reserved part of the infrastructure for itself in relation to maps? Does it not say somewhere that *Google* had reserved maps?

MS DEMETRIOU: No, I am going to show you something in the Advocate General's opinion that may have a bearing on that point, but it did not -- *Google* did not argue in this case -- and the Advocate General points that out -- did not argue that it reserved any particular activities to itself. That was not its argument.

THE CHAIRMAN: Just so -- just a separate question, but just so I understand where you are coming from, so here what has happened is that the infrastructure -- so that is the screen and the car, is it not?

MS DEMETRIOU: The platform, the *Android Auto* platform.

THE CHAIRMAN: Exactly. So *Google* has allowed other people to put apps on there --

MS DEMETRIOU: Yes.

THE CHAIRMAN: -- but you say that that is actually different from here because there is a separate activity. It is the matchmaking activity that you say is different here.

MS DEMETRIOU: Exactly. So what you are looking at in *Android Auto* is a situation where you are looking at the platform, so it is access -- so the app manufacturer, JuicePass -- JuicePass wanted access to the platform and the court found that that was not a refusal to grant access -- it was not properly characterised as a refusal to grant access case because *Google* was not reserving the platform to itself in any respect or for any purpose. The entire purpose of the platform was to be open to other app developers, so it found a separate abuse. That is why it is different to the present case because, of course, in this case, we have the iOS platform which -- of course, Apple licenses its IP to

developers to create apps to be on the platform, but what it does not do is license developers to create apps for distribution other than through the platform or indeed it does not license other app market -- it does not license other app marketplaces to use its technology, so it is a different situation and the court is not considering our situation in this case because the facts are different.

So it is looking at, on the one hand -- and we see this in the dichotomy in paragraph 47 -- it is looking at, on the one hand, infrastructure which is developed by an undertaking solely for the needs of its own business -- of course that is within *Magill* -- and then it is looking at, on the other hand, infrastructure which is developed in order to enable third party undertakings to use it. That is not in *Magill* because this is all about an app wanting to get on to infrastructure, the very purpose of which is to be there in an open way for developers to put their apps on.

What it is not considering is the situation we have here, where Apple has IP rights which it has reserved to itself -- it has granted limited positions and reserved particular activities to itself. It is just not considering that.

THE CHAIRMAN: The access that has been granted to

developers to put apps on the platform, you say, is not relevant because it is a different activity?

MS DEMETRIOU: Exactly.

THE CHAIRMAN: It is not the activity -- it is not the equivalent of the activity of promoting the platform as the activity of actually the matchmaking service that is the distribution activity?

MS DEMETRIOU: Exactly, so it is a limited licence and the limited licence is not for that purpose.

THE CHAIRMAN: Of course, the app that is in another app store, you are saying that that should not be given access, so there is a --

MS DEMETRIOU: It should not have a licence at all.

THE CHAIRMAN: It should not have a licence at all.

MS DEMETRIOU: Yes, and the payment processor should not have a licence at all.

THE CHAIRMAN: So -- yes. But you say that that is not inconsistent with the granting of access to all the other developers?

MS DEMETRIOU: No, because -- I mean, that comes back to my point about the pharmaceutical company, for example. I will come back to the example again in a minute after we have looked at the judgment. But that -- let us take *Magill*. So *Magill* -- or take *IMS Health*, even better. So *IMS Health*, licences were granted by *IMS Health* to

its brick structure for certain purposes but those purposes did not include competing with *IMS Health*. So the same IP, so access was granted, but not for the purpose of competing in the same market as *IMS Health*. We see the result in that case. So none of what is said here is inconsistent with that is our submission.

If we look at paragraph 48, you can see there that the court is saying that the very purpose of *Android Auto* was to facilitate access for developers to put their apps on the platform so there was no situation there where *Google* was reserving anything to itself. The conduct that was under challenge was that *Google* was precluding a particular developer from putting their app on the platform, so *Google* could not argue and did not argue, "We have reserved this particular activity to ourselves" because it plainly had not and such an argument would have run entirely counter to what it was done in creating the platform. On that basis, the court reached the conclusion -- its conclusion on this issue at paragraph 49.

Now, before drawing together my submissions, can I just show you the Advocate General's opinion, which you saw in opening, but I just want to show you it again to emphasise one point. So if we go to {AB4/34.1/6}, if you look at paragraph 35 -- and this is the paragraph

that was particularly emphasised by my learned friend in opening -- so you see there the distinction that they say -- so just looking at paragraph 35, this is really the distinction which is then reproduced in the court's judgment. So:

"... 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 ... By contrast, those conditions are not intended to apply where the infrastructure concerned is opened to other operators on the market ..."

Again, what we say about this, similarly to the judgment in the court, is that they are looking -- the Advocate General is looking at two situations which clearly fall either side of the line but is not addressing our situation.

We can see that if we go to paragraph 44 on {AB4/34.1/7} because here -- and coming back, sir, to your question to me a few moments ago -- the Advocate General is saying:

"Of course, it could be argued that the absence of a specific template ensuring the interoperability of *Android Auto* with electric car charging apps, as is the case here, demonstrates *Google*'s wish to reserve those

services to itself."

So electric car charging app services to itself.

"However, that argument is simply not persuasive in the light of *Android Auto*'s features ... Moreover, I would simply note that *Google* does not appear to have raised such an argument either before the referring court ... or before the Court of Justice."

So this is important because what the Advocate General is contemplating here is a situation which would be more analogous to the present, where the property owner reserves certain activities to itself. So what she is saying is, "Well, it could be argued in theory that *Google* was reserving activities relating to electric car charging apps to itself and that is why it did not give the template to JuicePass", the implication being that this would place the case in a different category, the *Bronner* category. But she says that *Google* has not actually made that argument and it would be unpersuasive on the facts. Why would it be unpersuasive on the facts? Because the very purpose of the *Android Auto* platform was for everyone to come and put their apps on and to be attractive to consumers for that reason.

So, as is common, the Advocate General has contemplated a wider legal issue beyond the facts of the

case and said something about it here which is entirely consistent with our case. Then what the court has done, as again is very common, is simply stuck to the limited facts of the case at hand and given its answer on that without commenting on the broader issues one way or the other.

So that is what we say about *Android Auto*. I now just wish to take a few minutes, if I may, to draw our submissions together.

So we do say that we are on all fours with *Magill* and *IMS Health*. Both in those cases and in the present case the very same IP was licensed for some purposes and not for other purposes. In both cases the refusal to grant the requested licence could be characterised as an exclusion of competition. Think about *IMS*, where a competitor wanted the licence to the brick structure, so it would have been possible to characterise that as an exclusion of competition.

You could also characterise it as discrimination, but that does not work because the conduct is the refusal to grant a licence with a particular scope. That is the protected activity -- that is the protected activity and there is nothing in the later cases which is inconsistent with that. So our case is on all fours with *Magill* and *IMS Health*.

I did want to come back to the pharmaceutical product example that I gave to you. Sir, I think I may have misunderstood the -- I may have understood your question in the wrong way and let me see if I can address the question that you put to me again.

THE CHAIRMAN: Yes, of course.

MS DEMETRIOU: So I was thinking -- and please tell me if I have got this right or wrong -- I was thinking about an example where you have a separate contractual commitment in relation to another activity, like distribution, but I am not -- because you put to me -- do you remember you said to me, "If you license your IP, can you then say that you have got to distribute it through these outlets and not through those outlets?", so I was thinking in terms of a separate contractual restriction. But, of course, something that the patent owner could do in its licence is to license somebody to manufacture the medicine without licensing them to distribute it at all. So that is something that they could do and which would be protected by *Magill* because that is a fundamental -- it goes to the essence of the IP rights.

So if I am a pharmaceutical manufacturer, I could say, "I am licensing you the patent to produce this medicine, but I am the one that is going to sell it".

That is really fundamental because, if you think about how the pharmaceutical industry works or indeed how the devices industry works, phone devices, you have manufacturing carried out by third party manufacturers, so they are licensed to manufacture the product, so Samsung licenses a third party manufacturer to manufacture Samsung phones, but they are not licensed to sell the phones. Samsung is doing that.

So, of course -- so --

THE CHAIRMAN: But that is a licence to sell it back to Samsung, is it not? Is that not quite different?

MS DEMETRIOU: No. So we say that it is a fundamental right, as the intellectual property owner, to say, "Well, I am licensing you to manufacture this, but not to sell it", so --

THE CHAIRMAN: Well, just take -- so it is -- so let us say that the licence says, "You can only sell it at a particular price -- you can sell it, but you can only sell it at a particular price"; in other words, it is --

MS DEMETRIOU: That is different, sir, so that is -- I think that is then different. But I --

THE CHAIRMAN: Because ...?

MS DEMETRIOU: Because it is not about the scope of the licence. So the scope of the licence -- it is not about the scope of the licence. That then is the conditions;

"We have granted you a license to sell it and we are then saying that you have got to sell it at this price". That is a condition once we have granted access.

THE CHAIRMAN: Okay.

MS DEMETRIOU: So the distinction, if I can kind of hone in on it, is that it is all about the scope of the licence. So where the manufacturer says, "Well, I am licensing you to manufacture this, but not to sell it, I am going to sell it", that is a question of the scope of the licence.

So similarly, think about *Magill* --

THE CHAIRMAN: Well -- yes, sorry. Just --

MS DEMETRIOU: Yes, of course.

THE CHAIRMAN: If -- so you are saying that, if somebody imposes an exclusive distribution arrangement on somebody that they grant a licence to -- so they have licensed the product, they have agreed that they are going to let them make the product and they have agreed they are going to let them sell it but they are imposing a condition as to how they can sell it -- so you say that is different from imposing a price condition?

MS DEMETRIOU: I think it may -- that may come down to the facts, so is it a limitation on the scope of the licence or is it a condition that is then being imposed once -- and there may be some facts that are more difficult --

it may be more difficult to ascertain which side of the line you are. But we are very firmly in the scope of the licence camp.

THE CHAIRMAN: Well, I think that is -- I mean, the answer to that question I think is probably the answer to this point because it seems to me that that is exactly the sort of -- that is the grey area we are driving at. Well, you say it is not grey, but this is all about whether Apple can say to -- whether Apple says to developers, "Here is the code and the software and so on and we license you to go away and make this thing", and whether they are then entitled to attach a condition to that about what they do to sell it.

MS DEMETRIOU: Yes, and that sounds very much like what a contracts relationship -- a relationship with a contract manufacturer. We do very much say that it is open to an IP owner to say that, "Right, you have a licence to manufacture the product but we are now going to decide how it is distributed. We are going to sell it. You are not selling it".

THE CHAIRMAN: Well, I am struggling with that a bit because, when you do that, just because they are manufacturing it for the benefit of the licence holder, the owner of the IP, I mean, the whole point of that is that they are funding a third party to manufacture for

1 them -- that is the whole point -- that is a bit
2 different from saying, "I am going to let you make
3 something and it is yours, but, by the way, when you
4 come to sell it, I am going to restrict the way you can
5 sell it to the market. I am going to let you sell it to
6 the market but I am not going to -- I am not requiring
7 you to sell it back to me, but I am ..." -- that is
8 an agency relationship effectively, is it not, or some
9 form of that? But if I am saying --
10 MS DEMETRIOU: Well, sir --
11 THE CHAIRMAN: Sorry, just to make it clear -- if I am
12 saying, "I am going to let you sell it, but I am only
13 going to let you sell it through a particular channel",
14 that is carving out the market, is it not?
15 MS DEMETRIOU: Well, sir, the -- I think that we have to
16 come back to, in analysing these cases: well, what is
17 the scope of the licence that we are granting, so what
18 is the scope of the licence? That is why, just thinking
19 about *Magill*, for example, the IP, the copyright in the
20 program listing -- the program information was licensed,
21 but then the scope of the licence was, "You cannot use
22 it to present information in this way", and that was the
23 question that went to the scope of the licence.
24 THE CHAIRMAN: Yes.
25 MS DEMETRIOU: I think that is really the touchstone for all

of this. When you think about our case, we are, in a sense, a fortiori the contract manufacturers for this reason because, of course, as I said a few moments ago, the Aptoide iOS and the *Epic* Games Store, they need a licence from Apple to use its Software Development Kit in order to produce their alternative marketplace and Apple is saying, "We are not granting you that licence at all". So we are, a fortiori, the contract manufacturing cases. In order to be an alternative app marketplace or in order to be a payment services provider, you need to do that in the form of an iOS app, so you need -- Aptoide and the *Epic* Games Store require a licence and Apple are simply refusing to grant that licence at all.

Then, as regards the app developers, Apple is granting a licence to them, to the SDK and so on, but saying, "Right, it is for this purpose. You can produce your apps for distribution on iOS but not for this other purpose", so we really are squarely within *IMS Health* and *Magill* territory.

Our submission is that none of the later cases, as I have shown you, deal with that situation. Really, the only way of reconciling *Magill* and *IMS Health* with the later cases is in the way that we say is the right way to do it, the right way to look at it.

Only if the Tribunal disagrees with us on this -- so if you were to find that the later case law must be interpreted in the broader way that my learned friend suggests, which is to cover the current situation -- so he alights on the words "exclusively for your own use" and says, "Right, that is it, end of story" -- only if you were to find that that is right -- and you have my submission as to why it is wrong -- would you then be faced with a choice of, "Well, we have got *Magill* and *IMS Health* on the one hand which say the opposite and we are now convinced that *Google Shopping* and *Android Auto* seem to be inconsistent with that", and then you run into Brexit issues.

Then can I just, in a nutshell, attempt -- I know that Mr Kennedy is the resident expert but I am going to have a go.

So Dr Kent has run a case under Article 102, as well as a case under the Chapter II prohibition, and rather sort of -- in a rather sort of complicated way, the answer differs according to which of the cases you are looking at. So when determining retained Article 102 claims, the Tribunal is bound to follow pre-Brexit CJEU decisions. That follows from section 6(3) of the 2018 Act.

THE CHAIRMAN: Yes.

MS DEMETRIOU: That would mean that the Tribunal is bound to follow *Magill* and *IMS Health* when determining the Article 102 claim.

For the Chapter II claim, the position is different. That engages section 60A of the Competition Act --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- in particular subsections (2) and (7), and it gives you more room for manoeuvre. I know that this, at least to the Chairman, is familiar territory, because --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- this ground was traversed at length in the --

THE CHAIRMAN: The MIFs(?), yes.

MS DEMETRIOU: -- the interchange.

But obviously the Tribunal is going to want to decide the Article 102 claim and the Chapter II claim the same way, we would respectfully submit. The only way to do that is by rejecting -- you can avoid all of the Brexit complications by rejecting the Class Representative's expansive interpretation of the later judgments.

THE CHAIRMAN: What an attractive invitation! But of course it does not necessarily -- that is not the only option, is it? We might decide, looking at the facts, that you

fit in a certain place that is consistent with *Magill* and with -- I know -- I am not sure you do accept this, but certainly I want to be clear that that is an option -- that is what I understand to be argued, rather than the fact that *Magill* does not apply.

MS DEMETRIOU: Well, sir, I am not sure I understand the argument that is being put on the other side as to how we are different from *IMS Health* and *Magill*. It may be because the question -- it may be that this was developed quite quickly, but I understood Mr Hoskins to be saying that *IMS Health* and *Magill* have been overtaken or evolved, I think, is where he came down to, and I did not understand him as explaining on what basis we are different. We say we are not different and that there is no material distinction between the present case and those cases.

THE CHAIRMAN: Yes, I do not think -- again, unless I have misunderstood, I do not think he says the evolution amounts to an inconsistency between the two. It is just making it plainer that what might amount to reserving -- in what circumstances reserving something to yourself might have certain consequences and when it might not, so I think we are probably all in the same place, as I understand it, in relation to the framework. I think there is an issue as to whether, on the facts, we are

where you say we are, which is closer to *Magill* and *IMS Health*, or whether actually on the facts we are somewhere else. But, I mean, I think -- in a way you have been through all of those so there is no need for you to do it again.

MS DEMETRIOU: No. So I think those are my submissions on *Magill*.

THE CHAIRMAN: Yes, thank you.

MS DEMETRIOU: I can hand over to Mr Kennelly, who is going to address you on competition.

THE CHAIRMAN: Mr Kennelly.

Submissions by MR KENNELLY

MR KENNELLY: May I have {A1/8/27} please? This is the Class Representative's closing submissions. Just to recall, the test was exclusionary abuse and it is common ground -- paragraph 73, two parts: (a) -- and this is in order to establish that an exclusionary practice is abusive -- (a), that the dominant undertaking is applying a practice that is capable of having an impact on the market structure in a way that was capable of making it more difficult for competitors to enter the market and, because it is cumulative:

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

The important point here is that the second condition is a separate additional condition from the first. By definition, therefore, it is not sufficient for Dr Kent to show that Apple, if dominant, is applying the requirements which are capable of having that impact on the market structure which makes it more difficult for competitors to enter the market. Competition on the merits has to mean something additional, and that is common ground between us on the legal test.

The case law gives us some guidance as to what that means. If we can go back, please, to *Churchill Gowns*, {AB3/48/26}. You have seen this before so I will go with it quite quickly, and in fact during my submissions generally I will be taking quite a lot as read because many of the documents you will have seen before.

THE CHAIRMAN: Yes, thank you.

MR KENNELLY: This is paragraph -- in fact, can we go back, please, to {AB3/48/24} just so you can see where we are? We are dealing here with abuse, and paragraph 68 refers to the *Servizio Elettrico Nationale* case and here the Tribunal is summarising the law as set out in that judgment of the Court of Justice. If you go, please -- now go to {AB3/48/26} and zoom in, please, on subparagraph 3(iii). This is the Tribunal's attempt to summarise the court and define or identify what is meant

by "competition on the merits". It says this:

"Conduct that does not come within the concept of 'competition on the merits' ..."

It is not exhaustive, but ...

"... is generally characterised by the fact that it is not based on obvious economic or objective reason."

So, therefore, there is no justification for the conduct -- where there is no justification for the conduct other than to harm competition, the conduct will necessarily not come within the scope of competition on the merits.

So although this does not purport to set out an exhaustive test, we are directed to look for the economic or objective reasons.

(iv):

"'Competition on the merits' [we are told] refers, generally, to a competitive situation in which consumers benefit from lower prices, better quality and a wider choice of new or improved goods or services."

Just pausing there, when I come to objective necessity and objective justification, I will hopefully make good the fact that these requirements or so-called restrictions are in fact delivering better quality but, for the purposes of competition on the merits, it is sufficient to show that we are offering wider choice;

wider choice on the basis of the challenged requirements.

With that case law in mind -- and to summarise our case very briefly and then go on to Dr Kent's case because, as we said in opening, we have developed through the trial -- each device manufacturer and operating system provider has to decide how to strike the balance as between ensuring the quality and reliability of the device and app store or app stores on the one hand and making the app store or app stores as open as possible to developers and third party software on the other hand, and Apple and its rivals strike that balance in different ways.

As you have seen, Apple prioritises the integrity of its operating system and security, privacy and safety of its users. Apple contends to the market that, because it is the exclusive provider of Apps, it is best placed among its rivals to prevent malicious apps. *Google*, quite deliberately, has decided to strike that balance differently. It has chosen to allow third party app stores and developers distributing directly or side-loading, so *Google* has, by reason of that, far less control over the distribution of apps on Android but its reward is to be the most prevalent mobile operating system globally and the *Google* Play Store has about

twice as many apps as the App Store.

But the price -- the price that Android and the *Google* Play Store pay for their increased openness is to increase the number of malicious and lower quality apps on their marketplaces. Their users sometimes pay a very heavy price for the choice that *Google* has made.

But how that balance is struck is one of the main ways that Apple and its rivals compete. Some consumers, you have seen, may prefer the less curated but riskier Android model, they may feel Apple is too restrictive and they will choose an Android device and they will take their apps from the marketplaces on Android. Other consumers, as we have seen, prefer a platform they believe to be more secure, more private and more safe and they will choose Apple. The question for the Tribunal is whether offering consumers these so-called restrictions as the basis for maximising security and privacy and safety is a legitimate way to compete.

Our case is that it is obviously legitimate. The one thing that we can be absolutely sure about in this trial is that the threat of malicious apps is growing and growing in complexity and offering consumers this choice to have a safer option in a more dangerous world, that is competition in action.

But despite these growing and massive dangers,

Dr Kent seeks to force Apple to become more like Android. That is where that is going, that argument. The effect of the argument on competition law, that the Tribunal is invited to make by Dr Kent, is in fact anti-competitive; because Dr Kent is inviting you to decide that consumers should be prevented from having a product that is different from *Google* in a way that consumers value, and that competes with *Google* and Samsung, especially in the devices market where Apple is not even dominant. That, we say, would be an extraordinary outcome, that competition law would compel you to deny consumers that choice and restrict competition in that way.

In response, Dr Kent says, first, that Apple is only competing on the merits in the devices markets and that that is irrelevant since that is not the relevant market before you. Two short points about that. The first is that Apple's case on competition is not limited to devices markets. Even on Dr Kent's alleged markets, Apple would seek by way of the requirements to differentiate its App Store on the parameters of safety, security, privacy and quality from other app marketplaces such as those on Android --

THE CHAIRMAN: Sorry to interrupt you. Just -- so is that your market definition or the CR's?

MR KENNELLY: The CR's.
THE CHAIRMAN: But if we are in the CR's world at this stage, there are not any other competing marketplaces.
MR KENNELLY: It is a question of competitive constraints. Even if --
THE CHAIRMAN: Right, I see. So you say -- yes, this is your point, that competitive constraints come into the equation. I understand.
MR KENNELLY: In opening. I think I went back to it as well.
THE CHAIRMAN: No, no, no, it is my fault. I am jumping ahead.
MR KENNELLY: It is an important point, sir, because Dr Kent's submission to you is that, once you have established the market definition against us, that is the end of any competitive consideration, definition and dominance, but that is not true. Even if we are wrong on market definition and dominance, Apple will continue to -- it is a fact -- Apple will continue to differentiate, as it does -- differentiate itself on the parameters of security, privacy and quality on the App Store in order to make its App Store more attractive to developers and users than the *Google* Play Store, for example.
So even if you are against me on definition and

dominance, that fact has to be recognised, and that is competition in action and that is something which -- that is competition on the merits. It is not sufficient for the purposes of market definition on this approach, but that is undeniably competition on the markets. Then -- and that is in relation to the app marketplace.

But on devices, Dr Singer and Dr Kent's own case is that the alleged distribution and in-app transaction markets are after-markets to the device markets and it is common ground that a high quality app store with high quality apps is a means by which Apple competes in the devices markets. As we say, it would be very artificial to disregard completely how Apple's conduct in these secondary markets affects competition for devices markets, even on Dr Kent's market definitions. That is all the more obvious -- the artificiality of that is all the more stark when you remember that, for consumers, the devices markets are far more important than the app markets.

Now, Ms Demetriou addressed you on the group of consumers who spend significant amounts, the whales, as we were discussing, but in aggregate consumers spend far more on devices than they do on apps, let alone how much they spend on App Distribution services via the commission, assuming full pass-on.

THE CHAIRMAN: Mr Kennelly, is there any thought on this point about the relationship between the market in question and other markets and constraints and things? It is a little bit surprising it is not in the subject of some decisions beforehand, but I do not recall anybody pointing us to anything on it.

MR KENNELLY: No, I cannot find any domestic law. I make the point obviously that it is so obvious in my favour that you do not need to worry about whether there is any law on the point, but if you are not satisfied with that submission, all I can point you to is the US Court of Appeals, in the US Court of Appeals in *Epic* -- and I am not suggesting that you follow this as a --

THE CHAIRMAN: No, it is interesting.

MR KENNELLY: May I show you that, actually?

THE CHAIRMAN: Yes.

MR KENNELLY: It is {AB5/8/1}.

The facts of this are too well known to repeat, but if you go to {AB5/8/20}, first of all -- yes, page 20, just to locate you in the legal argument. Obviously the concern was with section 1 of the Sherman Act. In the bottom paragraph the Court of Appeals is addressing the rule of reason -- step 2 of the rule of reason. For that purpose the district court had found that Apple had

"established non-pretextual, legally cognizable procompetitive rationales for [the ... restrictions]" and the court credited Apple's rationale that the restrictions sought to enhance consumer appeal and differentiate our products by improving iOS security and privacy.

If you skip ahead, please, to paragraph 50 [sic] -- this is just to tee up the relevant point that the Chairman raised with me -- on {AB5/8/50}, please -- we see the legal test for a pro-competitive rationale. This is step 2 of the rule of reason. It is the second -- it is just above the second part of the first paragraph:

"A procompetitive rationale is 'a non-pretextual claim that [the Defendant's] conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal."

Of course, the court found that Apple's privacy and security rationales were cognisable. It upheld, in effect, the submission which I have been making to you this afternoon.

But on the question of cross-market rationales, could you go, please, to {AB5/8/57}, because *Epic* argued, much as Dr Kent does here, that even if our

security and privacy restrictions were pro-competitive, they increased competition in a different market than the district court defined. In *Epic*'s view, Apple's rationales relate to the market for smartphone operating systems or the market for smartphones, for devices, but the effect of the restrictions were actually in the mobile games transactions markets.

Then we have an analysis of the US law on this question of whether you can --

THE CHAIRMAN: So they did not know either!

MR KENNELLY: Well, it is not an encouraging first line:

"The Supreme Court's precedent on this issue is not clear."

The rest of the paragraph gives us a bit more assistance. There is a reference to the Supreme Court expressing no view, there is some dicta against Apple from 1972 in the *United States v Topco Associations*. Then this, about halfway down the paragraph:

"But the Supreme Court has considered cross-market rationales in Rule of Reason and monopolization cases."

There is a reference to *Kodak*, where the relevant market was the -- I think this is actually quite a famous case -- was the *Kodak* brand service and parts, but the court took account of the pro-competitive rationale in a different market for photocopiers.

Similarly, in *NCAA*, the relevant market was college football television, that is where the restriction operated, but the pro-competitive rationale was in a different market, protecting the market for college football tickets, and that was taken into account. Then the Court of Appeal says:

"Our court's precedent is similar."

They have not expressly confronted the issue, but they have considered cross-market rationales when applying the rule of reason in the cases listed then and they say they decline to decide the issue. There is a procedural reason why they do not feel they need to, because *Epic* did not raise it. But then, more importantly, {AB5/8/58}:

"... we need not decide this issue because *Epic*'s argument rests on an incorrect reading of the record ... Apple's procompetitive justifications do relate to the app-transactions market."

They go on to describe why the restrictions are said to increase the total number of iOS Device users, so obviously that is the device market argument, but also to increase the number of downloads and in-app purchases made by device users on the App Store. So these restrictions, last sentence:

" ... provide a safe and trusted user experience on

iOS, which encourages both users and developers to transact freely ..."

So I rely on that. I entirely understand that the market definition ultimately settled on was slightly different from the one in this case and this is obviously a foreign authority and may be obiter, but to that extent, the issue has been raised --

THE CHAIRMAN: I like the way you make your point.

MR KENNELLY: The absurdity of excluding device competition, we say, is what is really compelling here. When you think about how important device competition is for consumers and the amount of money they spend on devices relative to the effect on consumers, when one considers the App Store allegation, even if you assume full pass-on, that makes no sense at all. They want to distort -- effectively to distort competition in the device market in a really serious way for the sake of a bit more competition in relation to App Distribution. That would be a very odd outcome indeed in a case concerning competition law, which ultimately has the benefit of consumers as its object.

DR BISHOP: It would be possible, I suppose, to reach a conclusion that -- to this case in some sense favourable to the Class Representative but that does not compromise Apple's 45/50-year policy of having -- giving

products to the public without operating through other people's devices, and that would be true, would it not, if -- maybe we do not have the power to do this. I suppose we do not. But if damages were given on the basis that Apple should have been charging 15 or -- 15%, damages given on that basis, but no to any order to say -- to compel people into -- to put another rival app store on to the platform or a rival payments device on to the platform. So -- whether these could ever be reached. What I am getting at is this: there is no logical connection between saying that Apple has been making excessive profits in its 30% rake-off and the result that Apple must compromise on the policy of having a closed system that gives the maximum guarantee to consumers.

Now, the lack of a logical connection probably fails at many different legal hurdles, but I just want to ask you what you think about that.

MR KENNELLY: Indeed. What you have described there, sir, is the distinction between the exclusionary abuse case before you and the excessive pricing case before you.

DR BISHOP: Yes, yes.

MR KENNELLY: Of course we could win on one and lose on the other, and we say we should win on both, for the reasons that we have been canvassing before you. But, to be

clear, the point I make on -- the point I will be making on objective justification is to the exclusionary abuse allegation. We have a separate defence to make on excessive pricing.

So I am not seeking to address you on excessive pricing at all. The point I am making here --

DR BISHOP: But your submissions now are on --

MR KENNELLY: Exclusionary abuse only.

DR BISHOP: Exclusionary abuse only?

MR KENNELLY: Yes; the requirements that prevent third party app stores and developers distributing directly on iOS. I am concerned only with that.

DR BISHOP: Yes. Right.

MR KENNELLY: Sorry, and payments, of course.

DR BISHOP: Payment. Right, okay. Right. Did you say that someone will address us later on the --

MR KENNELLY: Yes, tomorrow Ms Demetriou will be addressing you on the price --

DR BISHOP: Thank you. (Laughs)

MR KENNELLY: I am grateful for the question because it is important to understand that they are distinct, and in the same way that we have to defend them distinctly, Dr Kent --

DR BISHOP: No, I have --

MR KENNELLY: -- has two grounds of her case distinctly. It

is no answer to this exclusionary abuse case to say: oh well, Apple is charging a very high price. That is neither here nor there.

The question is --

DR BISHOP: I take your point.

MR KENNELLY: If you want to see the relative importance of the device market spending, relative to the app store spending, you will see that at A1 -- this is a confidential figure. I will just give you the reference -- {A1/9/185}. It is at footnote 855.

So just turning to the facts on competition on the merits, and I would like to break it into three parts. First, I want to show you how the requirements form part of how Apple markets and differentiates itself in relation to the devices and the App Store; secondly, I would like to show you how users respond to that; then to explain how Apple's ability to compete on the merits would be damaged in Dr Kent's counterfactual.

As to the first of those three points, there can be absolutely no doubt that the requirements form a central part of how Apple markets and differentiates its devices and its App Store. At no point has Dr Kent really had any answer to the mountain of evidence before you on this and I am not going to open all these documents again. I have done it at least twice and so they will

be familiar to you.

But from the very beginning this was how Apple marketed itself, by reference to the requirements and, in particular, you saw the iPhone SDK launch, where Mr Jobs, in particular, spoke on 6 March 2008. Dr Kent has also taken you to this document. This is the one where Mr Jobs is asked about how security and privacy would be protected and he contrasted the iPod and Windows; the iPod that is always reliable and Windows that is open to developers and third party app stores. Windows, of course, does allow and did allow alternative forms of distribution.

Mr Jobs said in terms to the market that Apple would seek to strike the balance by two means: first, developer identification; secondly, by distributing apps through the App Store -- through the App Store and we say only through the App Store because Mr Jobs went on to explain the virtue of that was that it gave Apple full control over App Distribution and therefore best placed to secure safety, privacy and security.

Since that day, Apple has marketed its devices and its App Store on that basis. You saw the publicity material, the market-facing material, about how Apple presents the App Store and its devices, the fact that it is Apple's App Store, they take responsibility. The

App Store reflects their values. That means that consumers can trust the App Store and spend time and money on it. That is not just puff. That is exactly how Apple has differentiated itself from the beginning.

Even Dr Singer accepted that Apple was, by these claims, seeking to differentiate itself as the best device and app store for security, safety and privacy. That is -- the references for the transcript are in footnote 221 of our closing.

It is also widely recognised that Apple bases its superior claims for safety, security and privacy on its centralised and integrated model that apps can only be distributed through the App Store because, we need to be clear, by definition, the centralised approach means keeping third party app marketplaces out and preventing App Distribution directly by developers.

Dr Singer agreed that, if the requirements are necessary to provide these safety and privacy benefits, they would be means by which Apple is competing in the devices markets and seeking to make the App Store more attractive. Again, the references to the transcript are in footnote 221 of our closing.

Despite Dr Lee's best efforts, there can be no doubt in the Tribunal's mind that third party app marketplaces are a major problem for safety, security and privacy.

Here I will show you a document, the National Cyber Security Centre, {D1/1273/4}. Right-hand column, please, can you zoom in on?

"What is the risk?"

At the bottom of this column:

"Furthermore, the current well-known third party app stores ... appear to have less robust vetting processes, and so represent a greater risk."

THE CHAIRMAN: I am sorry, I am just -- where are we? Oh, yes, I see it.

MR KENNELLY: The last sentence in the right-hand column in pink.

THE CHAIRMAN: Yes, thank you. (Pause)

MR KENNELLY: On {D1/1273/6}, it is the third column. Can we zoom in, please, on "Third party app stores", the first paragraph:

"These are app stores that users must download or access separately, typically characterised by their focus on user and developer freedom (as opposed to the safety and privacy of users)."

This from an entity very well placed to speak to these questions. The National Cyber Security Centre is, as we said in opening, part of GCHQ.

If we go, please, to {D1/803/8}. We saw this before. Just to recall two points, the figure makes

plain that Android's record for infections is far, far worse than iOS. The question is: why? By going to this document, it will save me time on objective necessity because it will save me having to come back to it. But the question is: why is Android so much worse? If you look on the column on the left-hand side, the third paragraph, halfway down:

"However, the fact that Android applications can be downloaded from just about anywhere still represents a huge problem, as users are free to download apps from third-party app stores, where many of the applications, while functional, are trojanised. iPhone applications, on the other hand, are for the most part limited to one source, the Apple Store."

So there has been, in the mind of the market, a central connection between our restrictions and our undeniably superior record in relation to security, safety and privacy.

This was echoed in the DCMS literature review. I am not going to take you back to all of that, but what that described, the Tribunal will recall, is how the App Store compares with the *Google* Play Store and the third party app marketplaces on Android by reference to several parameters of competition, such as user information, privacy and ultimately malware. The

Tribunal will recall that for each of those the DCMS review identified that the *Google* Play Store was worse than the App Store and that third party app marketplaces were much worse.

Just to show you the conclusion of that document, {D1/1355/26}. Again, I will take this quickly because you have seen this. This is by reference to information from Kaspersky. Dr Lee relied on Kaspersky in his reports. At the very bottom of the page, you see that it says:

"While malware can potentially affect both of the OS platforms [that is Android and iOS], the likelihood ... is amplified on Android devices ..."

Again I ask rhetorically "Why?"

"... as a result of the potential for apps to be more readily installed from third-party app stores."

Over the page, {D1/1355/27}, at the very bottom of that page, beginning "According ..." -- there is no need for the Tribunal to read this again. It simply reminds you that, according to third party sources, even the *Google* Play Store was significantly worse than the App Store, containing over 10,000 blacklisted apps.

"By contrast ..."

I am now reading from the paragraph beginning "According"

"... Apple's approach was likened to Fort Knox, with malware 'rarely' finding its way into the App Store."

The following paragraph goes on to describe how third party app stores can be 19 times worse even than the *Google* Play Store in terms of unwanted apps. But -- and all this goes to show that Apple needs to keep third party app marketplaces off iOS in order to be able to differentiate itself on the parameters of safety, security and privacy.

Dr Lee himself, in an article that I am going to show you now, {D2/626/2} -- Dr Lee himself recognised this. This is from 2013. Can we zoom in, please, on the bottom left-hand side? Dr Lee recognises that by June 2012, Apple had sold 400 million iOS Devices, but, despite their massive popularity, only a handful of malicious apps had been discovered. Why? Because of the advanced security architecture of iOS and -- and I emphasise this -- the strict regulations of the App Store.

Next column, please, halfway down:

"According to the official App Review guidelines ... developers should expect their apps to go through a thorough inspection ..."

Skipping down to the sentence -- and this is important. Dr Lee was put forward as Dr Kent's privacy,

security and safety expert and this is Dr Lee's own genuinely independent view. Halfway down that paragraph:

"Although the technical details of the review process remain largely unknown, it is widely believed [and that is obviously critical for my competition on the merits point] that such a selective and centralised App Distribution model has significantly increased the difficulty and cost for malicious or ill-intended apps to reach end users."

My next point is that this is not a sideshow. The evidence has shown that security, safety and privacy are highly valued parameters of competition and there is strong demand for Apple's centralised offer.

It is common ground that mobile devices are an attractive opportunity for malicious actors; it is common ground they hold highly sensitive personal and financial information; it is common ground they contain technology like microphones and cameras that can be exploited by malicious actors; and, most importantly, users spend huge amounts of time and money on them and through them.

You have the references again -- no need to turn it up -- {D1/1273/4}, of the really quite shocking statistics about how much time we waste -- sorry --

spend on mobile apps, and these figures were not challenged by Dr Lee. What they demonstrate more than anything else is the extent of the risk; the risk that is involved in engaging with mobile platforms which serves only to emphasise the importance of Apple's differentiating features. That is echoed in the Zimperium report which Dr Lee also cited, {D1/368/3} [sic]. So it is not surprising then that users value security, safety and privacy so highly. I will just give you the reference for the surveys we relied on: {A1/9/49}. The Tribunal saw there very significant percentages, especially of iOS users, who said they placed very high value on safety, security and privacy in choosing their device.

Dr Singer initially said that security was not on the top of the mind of consumers when purchasing devices, but he eventually accepted in cross-examination that that was an overstatement when he saw these same surveys; {Day15/117:6}.

We saw how consumers respond -- how consumers respond to Apple's centralised and integrated model because Dr Kent's experts accepted that Apple is a brand that consumers trust and that trust is a very significant driver of time and money which consumers spend on the App Store. That is {Day16/165:13-14};

{Day19/126:11-14}.

Now, the trust that Apple has engendered in iOS users is obviously of direct benefit to developers. Professor Hitt explained that at paragraph 287(d) of his second report. But Dr Singer himself produced a report from Morgan Stanley, {D1/311/1}, which I would like to show you very briefly, if I may. That is {D1/311/5}. First of all, look at the very bottom of that page. It tells you that Apple's products are known. What are they known for? Ease of use; expansive ecosystem -- well, we know that if cannot just be numbers of apps because *Google* has more -- and security and privacy, and customers are willing to pay for such an experience. This is device competition.

If you go to {D1/311/11}, we see what -- the effect of trust on the devices, on the app stores. Revenues per download are twice as high for the iPhone -- more than twice as high -- than they are for *Google* Play.

Mr Schiller's evidence, which again is entirely intuitive, is that that extra spending and the extra time that users spend on the iPhone is a direct result of the security, safety and privacy protections which Apple provides through its centralised and integrated approach. That was Mr Schiller, {Day7/24-25}.

So coming to my final point on this -- and it is

an obvious one flowing from the evidence we have seen -- is that prohibiting the requirements, doing what Dr Kent urges you to do in this case, will deprive consumers of choice and harm competition. It is obvious that Apple's competitive differentiated offering is more compelling when Apple can say, "We take exclusive responsibility for our apps. We undertake a continual review of all of them. We have immediate access to all of the relevant information necessary for that purpose and all in-app purchases will be made through our trusted commerce agent only", because the Tribunal has to ask, in the counterfactual, how would Apple market itself in contrast to what it has done since 2008.

Currently, since 2008, Apple's pitch to consumers has been -- and to developers -- paraphrasing from the marketing material that you have seen, "This is our store, our responsibility. We do whatever it takes to achieve the highest levels of safety, security and privacy and we are 50 times better than Android, says Nokia".

What would Apple say in the counterfactual? To paraphrase Mr Kennedy, from Monday, {Day24/119:24-25}, he would have us say, "Buy the iPhone where the app stores are fairly secure". "Fairly secure", that would be our pitch. That is how he described the *Google*

Play Store on iOS. What about the smaller ones? He would have us say, "Buy the iPhone, but beware the fringe app stores because they are really dangerous". That is Android's pitch. Dr Kent's case on competition law destroys the differentiation(?) between Android and iOS and the *Google* Play Store and the App Store in terms of the exclusionary abuse case. It wrecks competition on the merits.

Now, we say, in conclusion, the law is clear; that conduct which has the effect of broadening consumer choice by putting new goods on the market or increasing the quality of the products is competition on the merits and cannot be unlawful. The effect of Dr Kent's case is to deprive consumers of precisely that choice and to do so in circumstances where the demand for security, privacy and safety is greater than ever and rightly so. Even Dr Singer said that the iPhone is a device which everyone knows and loves, {Day/16/165}. Again, we have to ask: why is that? It is not just its appearance. Dr Singer is too astute to have a phone because it looks good and other devices, again with respect to my client, can also be attractive. What other devices cannot replicate is Apple's safety, privacy and security standards, and that is because they allow third party app stores and developers' distribution directly.

THE CHAIRMAN: Can I ask you -- and you may be going to come on to this in relation to objective justification -- there is a point made about the causal link, if you like, between the restrictions and the benefits.

MR KENNELLY: Yes.

THE CHAIRMAN: Feel free to leave it if you want to deal with it in the context of that, but it does arise, and the same points could be made here, could they not, that the competition on the merits does not require the restrictions; it just requires you to have the hardware and the software and the other things that the iPhone has which are fantastic. How do you deal with that?

MR KENNELLY: Well, first of all, for the purposes of the competition on the merits, I do not need to persuade you that the restrictions, in fact, deliver improved quality -- improved standards of security, privacy and safety because competition on the merits also includes wider choice. Apple has advanced a credible offering to consumers that they are more safe, more private, more secure, because it is a centralised integrated offering and consumers believe that claim and have voted with their money, and that is competition on the merits.

THE CHAIRMAN: Well, so just -- because you say that comes with the surveys about what people value when they -- so you are saying that that is the place where you can

identify the connection with the restrictions in the App Store as opposed to the hardware on the device?

MR KENNELLY: Yes, because it is -- in three ways. First of all, Apple has told the market since 2008 that, "We are more secure because we do not allow third party app stores". That has been our pitch. As Dr Lee said himself, it is widely recognised that we are more secure because we do not allow third party app stores. That is what Dr Lee said in his article in 2013. That is the brand that Apple has advanced in its marketing. Apple has said in terms that they stand behind everything on the App Store.

The third point is that consumers have responded to that and have indicated, because of their concern to achieve -- to purchase higher standards of safety, privacy and security in the App Store, they are -- they have been persuaded by our competitive offering. So it is those three stages that make good our case on competition in the merits.

In the counterfactual, our ability to compete would be very seriously damaged. We could no longer say that we take responsibility for all the apps in the App Store. We could not say that. I will come to explain the difficulties with the security counterfactual when I come to objective necessity, but

for the purposes of ... (Pause)

When I come to objective necessity, I can explain why we make good all of our claims, but for the purposes of competition, our ability to differentiate would be destroyed if we had to allow on the very things that we have been telling people for 20 years are injurious to safety, security and privacy. That is not a false claim. We have already seen, under the DMA, that -- for example, that Hot Tub app that you saw, because we have been forced to allow on third party app marketplaces, Apple has had to approve a pornography app which is marketing itself as Apple-approved. That is how it is marketing itself. You have that evidence before you. That is -- we will come to the objective necessity issues tomorrow, but you can see straightaway how that is damaging our brand, our ability to differentiate ourselves from Android and to compete against Android and *Google* Play Store in the device and app marketplaces markets.

MR FRAZER: Just on that, this is objectionable content --

MR KENNELLY: Yes.

MR FRAZER: -- but has objectionable content not always been available on iPhone -- not specifically iPhone, but through Safari, for example, or other apps which might have objectionable content, like -- I do not know --

Facebook or TikTok or X, which would expose users to that sort of content?

MR KENNELLY: I will take it in stages, if I may.

Safari first of all. The evidence before you from this Zimperium report -- I will give you the references tomorrow. I do need to hand over in view of the time -- which was cited by Dr Lee, explained that consumers place far more trust in apps than they do on websites. Apps have a particularly intimate or closer connection with people who download them and they are trusted more and are the more risky vector for malware and for social engineering because they are trusted, so the fact that harmful content can exist on the internet is not an answer to the concern that apps carry a particular risk and can be vectors for a particular harm.

MR FRAZER: I was not thinking of vectors. I was thinking of content, abusive content like pornography or other harmful ...

MR KENNELLY: Indeed. The reason why it is important with vectors is that there is, as we explained, a very close correlation between pornography and other forms of objectionable content and malware, and if one can be admitted through an app, the other has been given greater facility. So the fact that, regrettably, the internet is wide open and there is a limit to what can

be done on Safari, that is not an answer to the fact that on the App Store, which we have -- which Apple has sought to keep safe -- if objectionable content is allowed into the App Store, it is undeniably associated and correlated with malicious content. Dr Lee, although he objected to that, had no answer to the mass of evidence from Kaspersky and other experts. But there is an undeniable link or correlation between objectionable content like pornography and harmful malware. If one comes in through the App Store, the other will come with it. So although there is objectionable content accessible through Safari, it does not dent the importance of preserving safety, privacy and security on the App Store.

Sorry, I forgot the second. You had two points. One was objectionable content and the other was ...?

MR FRAZER: No, the second example was that some apps can contain objectionable content, such as Facebook, et cetera.

MR KENNELLY: I am sorry, Mr Frazer. Yes, of course. For those, those are difficult to police, but they are also subject to the App Store guidelines. The App Store guidelines have rules to apply to the content within apps which are available on the App Store and they need to be policed as well. It is more difficult to police

them, but -- and no means of enforcement is perfect and we have never claimed that Apple is omnipotent or never misses a problem. The question for the Tribunal is and I suppose the question for the market is: who is best at identifying and rooting out these problems? The consistent evidence over decades has been that it is Apple, and Apple is best because of the balance it has decided to strike, the investment it has made in terms of people, time and money, which others, like *Google*, have chosen, despite their resources, not to make.

That is probably all I have time for before I get kicked in the shins, so I had better sit down. Thank you.

Submissions by MS DEMETRIOU

MS DEMETRIOU: So the third response we have to Dr Kent's exclusionary abuse case is that she has failed to prove that the requirement she challenges foreclose competition, and this requires us to focus on the counterfactual. I am going to make my submissions as follows: I am going to say something first of all about the law in relation to constructing a counterfactual; secondly, I will deal with is it the primary or the delayed counterfactual; then, thirdly, I will address you on the evidence and what does that show about the plausible counterfactual in this case.

Just on the legal approach, can I take you to the CMA's submissions filed yesterday at {A3/5/10}?

THE CHAIRMAN: Yes.

MS DEMETRIOU: So I just want to look at paragraph 27(a), so really it is subparagraph (a):

"For the purpose of assessing whether the restrictions foreclose competition and should be regarded as abusive, the counterfactual:

"(i) should be purged of any unlawful conduct ..."

So that is correct; and:

"(ii) should not be purged of features of the market that do not represent unlawful conduct or its effects ... Such features would include any dominant position/market power on the part of *Google* acquired through lawful means (given that dominance is itself not unlawful)."

The CMA cites *Dune* in relation to that. So we agree with this point and we have also referred to *Dune* in our written closing submissions. Without going back to the authority, the Tribunal will probably recall that the argument that was made there and rejected by the Court of Appeal was that the counterfactual should not contain any competitive concern, problem or vice, and that was rejected by the Court of Appeal. The Court of Appeal said, "No, you purge the counterfactual

of unlawful conduct", but what you do not do is say, "Well, there is a competition concern and we are taking that out of the counterfactual too", because, if you go down that road, you are in danger of getting a false positive in terms of the restrictive effect of the conduct you are looking at.

So what you want to be asking yourself is, "In a world without this conduct, what would the counterfactual look like?", so "Does this conduct restrict competition?". If you then purge from the counterfactual competitive concerns or dominance, you end up with a false positive in relation to that question. So that is why the CMA is right in what it says at paragraph 27(b). So that is the first point -- 27(a), sorry.

So that is the first point I wanted to make in relation to the law.

The second point that I wish to make was to address the Chairman's question on Monday, and the Chairman rightly made the point on Monday that, when we come to construct a counterfactual for damages purposes, we are in commercial law territory, as it were, and so there is no discretion at that stage. We are trying to measure the difference between the financial position of the class in the real world and the world without the

infringing conduct.

On the question of whether in that assessment -- sir, you may recall that that came up in the context of the discussion about tools and technology.

THE CHAIRMAN: Yes.

MS DEMETRIOU: So we say that it is necessary to take account any counterfactual charges for the tools and technology. On that point, sir, you rightly suggested that it would be helpful to think about it in terms of the *Fulton Shipping* line of cases so we have put *Fulton Shipping* in the bundle. Of course, that line of cases is about a situation in which a defendant has caused the claimant to suffer a particular loss but claims also to have caused the claimant to have enjoyed a benefit. The question addressed by *Fulton Shipping* is this: in what circumstances should the claimant's separate benefit be set off against their loss?

If we go to the authorities at A --

THE CHAIRMAN: Just before you do that -- and I do not want to -- I think it is an important subject to address. I am just concerned that it is not about foreclosure. By all means deal with it now, but it does have the risk of confusing -- in a way, I think -- that is my fault for raising it in the way I did and I do not think I was very clear about what I meant, and actually I think,

when we look at *Fulton Shipping* -- I am not saying it is the answer in any sense to anything. All I was really trying to make a point about was the point that you have accepted.

So, by all means -- if you want to do it now, then that is fine. I just -- I do think that one of the problems with all of this is that the counterfactual -- the purpose of the counterfactual here is quite different from the purpose when we get to quantum and they are very different things. They may actually involve the same facts, they may involve the same findings and probably the same standards, but, because the purpose is different, it is possible that you are applying different rules. I think you see that in the way that *Fulton Shipping*, for example, was just an example of the different types of rules that play out in the commercial tort damages setting that you do not have any interest in when you are dealing with the foreclosure counterfactual.

Take another example. You could take a very -- well, I do not know if you accept this or not, but certainly on the Class Representative's case, you do not have to have a counterfactual at all to do the foreclosure analysis. Now, you could have a very different-looking counterfactual analysis from the sort

of analysis you needed at the quantum stage, so I am just really concerned that, when we look at them, we think about them separately and we keep in mind the purpose, rather than that we run them all together. That is really the point I was making.

MS DEMETRIOU: I understand the point. I understand the point. I am going to address -- sir, without detracting from what you are saying --

THE CHAIRMAN: You do it however you want.

MS DEMETRIOU: -- our submissions are the same in relation to both, so I am going to address *Fulton Shipping* now, but -- so our submissions are the same as to what the counterfactual looks like for the purposes of abuse and for damages. So we say you should be looking at the evidence -- our submissions on the evidence are the same.

THE CHAIRMAN: Well, I am not at all surprised by that and I certainly was not challenging that, but, as I said, the purpose is different.

MS DEMETRIOU: Yes.

THE CHAIRMAN: I am not saying that *Fulton Shipping* applies. I am just saying that it is an example of the set -- it is an example of the type of rule you find when you get into the damages assessment. It seems to me there are a number of different ways that you could put the point

in a proper damages assessment, whereas there is not -- and in relation to the counterfactual, for the foreclosure, it is either in or it is out. It does not really matter how you put it. It is either a point that is material to the foreclosure counterfactual or it is not.

When you get to damages, I think the position is quite different because -- just to give you an example, you could treat it as a but for question, in which case it is a purely causation question, or you could treat it as a credit question, which is the *Fulton Shipping* point, or you could treat it in some other way.

Now, I am not suggesting to you that any of those -- you should be following any of those in the damages bit. I am just saying to you that I do not think that you can ignore the fact that you are asking yourself some different questions when you get to that. That is the point I was making.

MS DEMETRIOU: That is fine. Just in terms of organising my submissions, I am not going to have a separate section on damages counterfactual just in terms of the time we have available, so I will address, if that is okay, *Fulton Shipping* now --

THE CHAIRMAN: Yes, of course.

MS DEMETRIOU: -- but on the basis it is relevant to

damages.

THE CHAIRMAN: Fine. We need to compartmentalise it, then, because --

MS DEMETRIOU: If that is all right --

THE CHAIRMAN: Yes, of course. I do not want to dissuade you from doing it the way you want to do it.

MS DEMETRIOU: -- or I could come back to it later.

THE CHAIRMAN: Well, I personally think it would make more sense because I think I would like to ask you about how you do -- what is it that you are saying in your damages case and I am not sure I completely understand it.

I can guess what it is, but I do not think you have written it down anywhere that I can see that tells me how it fits into that framework of conventional tort damages analysis. I may be wrong about that and you can show me, but in some ways I would prefer that we did it in that order rather than this order, if that does not make it too difficult.

MS DEMETRIOU: Not at all. I will do it in that way and I will come back to it.

THE CHAIRMAN: Thank you.

MS DEMETRIOU: I am going to jump, then, to the choice between the primary counterfactual and the delayed counterfactual. Dr Kent's position is that the primary counterfactual is appropriate for assessing quantum and

abuse, and, of course, at the quantum stage, as you say, we are asking: but for the infringement, what would be the financial position of the class?

Now, the only infringement pleaded in this case is one from October 2015. In opening, Mr Hoskins made the submission that the Tribunal could adopt the so-called primary counterfactual if he was to show on the evidence that Apple's conduct prior to 2015 was unlawful. He accepted that he bore the burden of that. Just for your reference, that is at {Day1/115:2-9}.

But let us look now at how Dr Kent puts her case in closing. So if we go to {A1/8/43} and look at paragraph 133, if you go to (b), you can see the question of dominance in the primary counterfactual is addressed. We see this:

"For the purpose of assessing quantum, it would be appropriate to assume that [Apple] was dominant from the date of its launch or shortly thereafter."

We say, in response to that, that it is not at all appropriate to assume that, first of all, because it flies in the face of all the evidence that we put to Dr Kent's experts during the trial, which I explored in the context of market definition this morning; secondly, because the point was never pleaded but was made for the first time, this point about the primary counterfactual,

in Dr Singer's main reports. It therefore was not and could not have been addressed in the witness evidence or in Apple's primary expert reports. It was also barely developed or supported in Dr Kent's own evidence. So there simply is not the material before you for Dr Kent to establish that Apple was dominant before 2015 nor is it open to Dr Kent now to ask the Tribunal to adopt some kind of intermediate position.

Now, you may have seen that the CMA appears to suggest in its submissions -- that is paragraph 25(b) -- that this is a possibility open to the Tribunal, but we say it is not a course that is open to the Tribunal here, and that is because, of course, our primary position is that Dr Kent cannot show that Apple was dominant at any point before October 2015, whether in 2008 or some intermediate date. Even if she could, she has no evidence with which to help you draw the line as to whether it is sufficiently far in the past to make it more like their primary counterfactual than their delayed counterfactual. That is a factual issue that Dr Kent has just never decided to investigate or run a case on.

But, in any event, we would say that, no, it is not open to the Tribunal to adopt an intermediate position for reasons of fairness. It was never put in issue and

we have not had an opportunity to address any kind of intermediate position. It has never been argued. So that is that. We say that it really is the delayed counterfactual and there is just no material on which Dr Kent could discharge her burden of proof of showing that Apple was dominant before that date.

Then if we -- sorry, sir, do you have a question?

THE CHAIRMAN: This is where this distinction -- I am just trying to get it right in my head, why this matters to the foreclosure counterfactual.

MS DEMETRIOU: It matters to the foreclosure counterfactual because, as Dr Singer himself accepts -- so he has different benchmarks for his primary and delayed counterfactual.

THE CHAIRMAN: Yes.

MS DEMETRIOU: That is because, if the restrictions were in place up till the beginning of the claim period, then Apple would have been the only app store in the counterfactual for that period of time and so it would take -- even Dr Singer accepts -- it would take a period of time for entrants to come into the market, even on his case, and establish themselves.

THE CHAIRMAN: I can see that and I can see why that matters to quantum. Why does it matter to foreclosure particularly when it happens?

MS DEMETRIOU: Because what we say is that there are no material foreclosure effects, which -- I am going to come on to the evidence now, and so it obviously is relevant to that because --

THE CHAIRMAN: Yes, yes, okay. That is fine. I do not want to be -- there is a point at which I am going to become annoying if I keep making the same point, so -- and I --

MS DEMETRIOU: No, of course I want to hear your questions, sir --

THE CHAIRMAN: No, no, no, it is just that I think -- I think -- what I do not want to do is to put you in a difficult position because you have prepared your submissions in a particular way, so that is fine.

MS DEMETRIOU: No, no, it is not putting me in a difficult position. Really the point is -- the reason it is relevant to the foreclosure -- if I can just answer it this way -- to the foreclosure point is that, if you are looking at the delayed counterfactual where Apple was the only app store for the period when the App Store from was launched till 2015, then Apple would obviously be in a stronger position, as the incumbent, once the claim period starts from 2015.

THE CHAIRMAN: Yes.

MS DEMETRIOU: So that is really the point that --

THE CHAIRMAN: So it is actually about -- is it about when

the foreclosure actually begins? Is it that point?

MS DEMETRIOU: Yes, if at all. We say of course it does not begin at all.

THE CHAIRMAN: Oh, I see -- I see. Now I get it. So you are saying that you end up with -- let us say you end up with 90% -- because of the delayed counterfactual, you end up with a market share of 90% and then that has a bearing on the analysis of foreclosure?

MS DEMETRIOU: Exactly, exactly.

Sir, is this a convenient time for a break?

THE CHAIRMAN: Yes, it is. We will take ten minutes. Thank you.

(3.20 pm)

(A short break)

(3.30 pm)

THE CHAIRMAN: Yes, Ms Demetriou.

MS DEMETRIOU: Sir, I am now going to turn to the facts and the evidence.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Just -- I am going to address the facts about the counterfactual both for the purposes of foreclosure and for damages --

THE CHAIRMAN: Yes. Just to be clear, I have no problem with that at all. The point I am making is about what you do, once you get there.

MS DEMETRIOU: Of course.
THE CHAIRMAN: I appreciate the facts are common to --
MS DEMETRIOU: Yes, and we say -- just to be clear about what we say is the right approach in this case, we say that the right approach in this case is to consider the counterfactual in the same way for both foreclosure and damages and we say that is because, in both cases, what you are doing is asking yourself, "What would the position be, absent the restrictions, absent the requirements?" and you are doing that for the purposes of assessing whether or not there is foreclosure in order to look at whether the competitive situation would be different without the requirements, so whether there is an impact on competition, and you are looking at it -- you are asking the same question in relation to damages because you are asking yourself the but for question, so, but for the infringement, what would the situation be.
THE CHAIRMAN: We might have a debate about whether they are the same. Whether it matters is another question and maybe we should not spend too much time on that, but why do we not park that and we will come back to it.
MS DEMETRIOU: Yes. Our submission -- so, of course, in some other cases they may not be the same, but our submission in this case is that it is the same, that you

should be looking at it in the same way. That is our position in this case.

THE CHAIRMAN: Yes. I do not want to labour the point, but certainly I understand we are looking at the same facts. I am not suggesting anything to the contrary.

I actually think the lens you look at them through may cause you to think about them differently, but we will see. We will come to that.

MS DEMETRIOU: So we say that, when you are analysing counterfactuals and looking at the facts, there are three factual questions that you need to be answering, to be thinking about. The three questions are: what price would Apple charge in the counterfactual, what price would Apple's competitors charge in the counterfactual and how much market share would Apple lose to those competitors in the counterfactual.

In answering those questions, it is also important to keep in mind what you are assuming about the quality of those competitors as compared with Apple. You need to make sure, in our respectful submission, that you are answering those questions in a way that is mutually consistent. So you have to ask yourself, "If Apple is charging this price and competitors are charging that price and the relative quality levels are roughly like this, then is it sensible to think that Apple's market

share would be like that?" So those are the -- there is an interlinkage between the questions.

We say that one of the major failings in Dr Kent's case is that they do not do that. They just look at comparators in the abstract and pick a single number for price based on the *Epic* Games Store and Microsoft or Aptoide in the delayed counterfactual without thinking about whether those comparators are anything like Apple in terms of their position in the markets that they compete in. Even worse, when it comes to market share, they conduct an entirely separate analysis, plucking numbers from completely different markets without any analysis at all about whether they are consistent with the prices that they have found would be charged in the counterfactual.

We say that if you -- contrary to that, if you approach the construction of the counterfactual in a forensic holistic way, it is actually pretty straightforward because it does not matter much whether you are looking at PC games, as my learned friends prefer, or Android, as we prefer, you see a strikingly similar pattern in both because in both cases what you see are that the entrants are struggling to attract any substantial market share and the incumbent continuing to charge prices that are at or above the level that Apple

charges. So *Google* charges 30% and has a 90% market share -- I will come back to this -- but on a like-for-like basis, Steam charges an effective commission of 27%. If you just look at shares of stores, ignoring direct distribution because that is a facet of distribution on PCs, but not on devices, then estimates of Steam's market share vary between 75% and 85%.

We say to the extent that they are different, with *Google* maintaining a bit more market share and slightly less price erosion, Android is the better comparator because it is a mobile platform. The key difference is that, as I said, direct distribution is very common on PCs, which would put some downward pressure on prices. Nobody is telling you that direct distribution would be significant on iOS in the counterfactual in this case. This case is all about competing app marketplaces and payment providers.

There is one more point about the counterfactual that I want to make by way of introduction. This is that it is a UK-only counterfactual so we need to keep in mind Mr Owen's point that developers might not be interested in doing country-specific work just to take advantage of lower commissions in just one country. So since they have to use the App Store in every country in

the world outside of the UK and perhaps the EU, what is the evidence that there would be many interested in doing something specific for the UK? We do not have any evidence on that. It is an additional factor that actually makes both the Android and PC App Distribution examples very conservative benchmarks in this case because in both of those the position is that you have always been able to have third party distribution everywhere in the world so entrants have not needed to overcome that additional hurdle that they would need to get over in this case; the hurdle of persuading developers to go to the trouble of doing something special for the UK.

So let us look at Dr Kent's case first. Dr Singer's benchmark for the primary counterfactual was the *Epic* Games Store and the Microsoft Store, which are two small and poor quality and unsuccessful app marketplaces which are far less desirable to developers than the App Store. His benchmark for the delayed counterfactual was Aptoide for iOS, an app marketplace that until recently could only be used by jail-breaking the device. So these comparators, these benchmarks, are less desirable not just because of their inferior quality but because they give access to far fewer consumers. Those are said to be the benchmarks for what Apple would

charge in the counterfactual. Supposedly Apple's competitors might charge even less than that. That was Dr Singer's evidence.

But even on Dr Kent's case, Microsoft and *Epic* charged those prices for PC App Distribution as small entrants trying to eke some market share away from Steam. Of course, Apple would not be in anything like that position as the creator of the ecosystem with a high quality store and a brand that consumers know and trust. That is true even in the primary counterfactual, let alone in the delayed counterfactual, where it is the only app marketplace consumers have ever known on iOS.

So we say it is just not realistic to think, not plausible to think, that, if you remove the requirements, even after a warm-up period of a few years or even a decade, Apple would find itself in a position where it needed to set prices as low as Microsoft or *Epic* set now.

If you want to look at other markets where the requirements do not apply, then you should be looking at the incumbents in those markets, not the fringe players trying to eke some market share. It is the incumbents who are at least arguably in a position that is comparable to Apple. *Epic* and Microsoft are, at best, indicative of the kind of poor quality competition that

Apple might be expected to face.

Now, as for market shares, Dr Singer did not rely on App Distribution Markets at all. He looked much further afield, at Alcoa and AT&T and devices markets. Again, none of those are in any way comparable to Apple's position in App Distribution in the counterfactual. Worse still, by plucking market share numbers from entirely different markets from his price comparators, Dr Singer created a disconnect between the two questions. But, of course, those questions are fundamentally linked. You only need to think about it for a few moments. It is doubly unrealistic to think that Apple would charge the same price as *Epic* does in the counterfactual and would find itself having lost half of its market share. How could it lose any market share at all if it was charging a price as low as *Epic*'s? So we say that you should reject Dr Kent's approach to the counterfactual as unrealistic.

Our case, in contrast, is that Apple would charge roughly the same commission in the counterfactual and would have at least a 90% share of the market, and we say that it follows from this that the requirements have not foreclosed competition and that, in any event, there are no material damages.

On its face, the *Google* Play Store is the best

benchmark for Apple's position in the counterfactual because it is the most similarly placed to the App Store. It is an app marketplace for mobile devices and -- and this is critical -- *Google* has never prevented alternative app stores. So the restriction -- the distribution restriction that Dr Kent is challenging has never been there. It has been possible from day one to download apps from alternative app stores or from developers' own websites.

We say that in some respects the *Google* Play Store is too conservative a benchmark because it faces the strongest possible competition -- form of competition from alternative app stores like Samsung because those app stores are pre-installed and prominently displayed on most Android devices in the UK and they come with the imprimatur of the manufacturer of the device so you might think that consumers would trust them. That is the likely scenario; if the Samsung Galaxy Store cannot put a dent in the *Google* Play Store, how could anyone be expected to put a dent in the App Store? So what this benchmark shows is that Apple's market share in the counterfactual would be at least the 90% destroyed by the *Google* Play Store even without cutting its commission at all, and that was Professor Sweeting's evidence once he had heard the remaining evidence in the

case, and I will come to this.

I want to grapple first with what Dr Kent says in response. Dr Kent says that the *Google* Play Store must be disregarded, disregarded as a benchmark, because *Google* had market power. That is their case. There are really two problems with this answer. One is that Dr Kent has done nothing to prove that *Google* is dominant, let alone that it has abused its dominant position or that any such abuse is causative of its market position.

Just referring to allegations -- which is what Dr Singer did -- allegations in different jurisdictions is far from enough. We relied on this comparator squarely in our expert evidence. If Dr Kent wanted to knock it out on the basis of characteristics that make it inappropriate, then Dr Kent, who has the burden of proof, needed to make those points good. So that is the first response.

The second response is that, even if *Google* is dominant, that is not a basis for ruling it out for the same reasons as the Court of Appeal identified in *Dune*. I have taken you to the CMA's submissions. The CMA agree with us on this point. You do not exclude somebody -- something from the counterfactual because it is dominant.

Really, we come back to this critical point: if, in fact, Apple would have the same characteristics as the *Google* Play Store in a world without the restrictions, without the infringement alleged by Dr Kent, then this shows that the restrictions do not restrict competition. This really is a critical point that Dr Kent has never properly engaged with.

Now, Mr Hoskins, on Monday, I think in response to the argument we make in our written closing submissions that Dr Kent has simply fallen back on the CMA's views time and time again, said that we were also resting our case, this aspect of our case, on the CMA's market study, but that is wrong because we did not, unlike Dr Kent, simply rest on the CMA's conclusions. What we did was carefully cross-examine both Mr Howell and Dr Singer on the reasons why 90% of commerce on Android goes through the *Google* Play Store. So we put to them the substantive reasons identified by the CMA and what we established through that cross-examination was that those reasons would also be present for Apple in the counterfactual and they would also give Apple a market share of 90%-plus.

You will recall that the key reasons identified by the CMA, when it looked at why *Google* enjoys an above-90% share -- the *Google* Play Store enjoys an

above-90% share -- were the pre-installation and prominent placement of the *Google* Play Store on devices which gave it an advantage over competitor app stores and indirect network effects. Those were the two key points that the CMA -- and of course they are related.

Let us look at what Mr Howell said about this when I put it to him. So if we go to {Day8/192:1} -- at this stage I had taken him through the reasons identified by the CMA. If we pick it up at line 12, {Day8/192:12}:

"So looking at these reasons so far that have been identified by the CMA as being reasons why the Play Store is used for 90% of Android app downloads, they are all reasons, are they not, that would be present for the App Store in a world without the restrictions?"

He says:

Yes. Quite likely."

So he agrees that these would also be features of the counterfactual in this case. Then I said, {Day8/192:18}.

"So we can expect, can we not, that those features would similarly mean that the vast majority of iOS App transactions would take place through the App Store too, yes?"

He agreed. He said:

"Probably true ..."

But then there is a proviso. He said:

"... although I would point out that I think the things that you are allowed to do in an Android app, I think the rules are more lenient than in the Apple App Store, so if it were possible for an app to bypass App Review ... for example, downloading code and running it, which you cannot do now in the App Store, it would enable whole new types of apps that are not currently possible ..."

So his point there -- his only proviso to accepting the point I put to him was that you could have presumably niche apps because they would otherwise fail App Review, but of course that is not the counterfactual that is being now run by Dr Kent in these proceedings. Dr Kent says that the counterfactual is one in which full App Review would be carried out.

So Mr Howell accepted the point that the vast -- like the *Google* Play Store, in the counterfactual here, in a world without the restrictions, 90% of commerce would be going through the App Store. He accepted that point.

Let us look at what Dr Singer said about this. If we go to -- where shall I take this from? First of all, let me just give you references. So he first of all

said that he was agnostic as to how rival app stores would get on to the Apple device. For your note, that is {Day16/209:9-19}. So he was not saying that rival app stores would be pre-installed on iPhones. That is important because you cannot simply assume that vast numbers of consumers would go to the trouble of downloading alternative app marketplaces when they already have a comprehensive safe and trusted marketplace on their device.

Then if we go, please, to page 211, so {Day16/211:1}, you may remember that I tried to press Dr Singer on, "Well, what are these aspects of *Google*'s conduct that you say cause the -- so much commerce to go through the *Google* Play Store?". If we look at lines 9 to 11, {Day16/211:9-11}, you see he says that there is a litany of restrictions -- because we had gone through, by this stage, the points about pre-installation that had been acknowledged by the CMA. He says that, {Day16/211:7}:

"There is a litany of restrictions ... So if you attempt to side load you get hit with a series of warnings that basically are designed to scare off the user from pursuing that download."

Now, that was also a factor identified by the CMA, but again I then asked him:

"So are you saying in this counterfactual that Apple should not -- that there should be some sort of free for all for sideloading and Apple should not be entitled to put warnings on to try and warn consumers about the dangers of side loading?

"No. I am saying -- I am being agnostic as to how the second or third app store makes it on to the phone."

So we can see that his position is not that Apple would be unlikely, in the counterfactual, to warn consumers of the security dangers of side-loading and our position is that it is likely to do so. Presumably that is why side-loading formed no part of Dr Singer's analysis of the counterfactual. So, again, this is not a factor that assists Dr Kent because, to the extent that this factor is responsible for the *Google* Play Store's 90% of commerce, it would be present in our counterfactual too.

Then if you go to, please, {Day17/3:1} -- I came back to this on Day 17 and I took him -- if we look at line 7. So I said, {Day17/3:7}:

"Let us take those in turn, starting with the pre-installation. So if it is right, if you were right yesterday to say that the pre-installation of the *Google* Play Store is an important driver for the *Google* Play Store having 90% of the commerce on Android, then

the pre-installation of the App Store would also drive a high proportion of commerce to be on Apple's App Store in the counterfactual; correct?

"Well, close [he says]. It is true that being on the desktop, or being on the handset initially, is certainly helpful, but *Google* is insisting on more than just pre-installation, right? *Google* is insisting that it is the default on that first landing ..."

Then if we go to {Day17/4:1}, he then says -- I then put to him that in the counterfactual, Apple would not be required -- do you see this at line 11, {Day17/4:11}:

"... Apple could not be required, could it, to pre-install any competitor app store on its devices because it is its own devices?"

He said:

"... I have never taken a position [on that]."

We say that it is highly unlikely, improbable, that in the counterfactual Apple would be pre-installing on its own devices competitor app stores so all of this makes the *Google* Play Store a conservative benchmark.

If we go on, please, to {Day17/7:5-7}, I put to him that, {Day17/7:5}:

"... in the Android system, some of the manufacturers have their own rival app stores; Samsung is an example ..."

Then what Dr Singer did, probably because he realised where this was all going -- so he asserted from nowhere, from nowhere, that, {Day17/7:8}:

"... Samsung's store is intentionally degraded ..."

Do you see that, line 8?

"... Samsung's store is intentionally degraded via an agreement with *Google*. These are restrictions that, you know, impair competition ..."

So that was his evidence, but he then amended his evidence in his own words when Mr Piccinin later showed him the evidence in the CMA report that *Google* and Samsung had never even made, let alone implemented, such agreements, and the US Proceedings that Dr Singer kept reaching for did not even allege that any agreement had been made, so this really was an assertion plucked out of the air. Mr Piccinin also showed Dr Singer that the Samsung Store is pre-installed on the home page of Samsung devices and that Dr Singer was wrong to have claimed otherwise.

So where does that leave us? Well, even if it is right that *Google* is dominant and has engaged in other conduct that is abusive, none of that conduct casts doubt on its reliability as a benchmark for Apple because, even if it were unlawful for *Google* to insist on the *Google* Play Store being pre-installed on devices

manufactured by third parties -- so even if those agreements with device manufacturers were unlawful, that just does not affect the analysis for Apple because Apple makes its own devices. So, in the counterfactual, the App Store would be pre-installed, there would not be any competitor app stores pre-installed and all of the drivers for the *Google* Play Store's very high volume of commerce would be present for Apple in the counterfactual too.

Now, I took Professor Sweeting -- Mr Hoskins put to Professor Sweeting both the CMA's finding that *Google* had market power and the Commission's finding in *Google Android* that *Google* was dominant. I took Professor Sweeting in re-examination to the reasons identified by the Commission for its dominance finding and we went through those. I perhaps do not need to go back to the transcript. The reference is {Day21/78-81}. I went through with him the reasons that underpinned the finding of dominance by the Commission. What he then accepted -- or his evidence was, looking at those reasons, that those reasons would all be present in the counterfactual for Apple too. So where he ended up in his evidence was that it is likely that Apple's market share in the counterfactual would be higher than 90%.

Perhaps let us just look at that. So if we go to

{Day21/81:1}, so if you look at lines 17 to 18, {Day21/81:17}:

"I would expect Apple's market share in the counterfactual to be similar to the Play Store and potentially higher."

So that is where Professor Sweeting's evidence ended up at the trial. Now, my learned friends keep going back to his report, where he looks at various scenarios and says, "Well, it could be 50% and it could be 90%, depending upon how the counterfactual plays out", but once he had -- and the reason -- he made clear that the reason why he did not just go for the 90% was precisely because he saw that Dr Kent was saying, "Well, *Google* was dominant and so you have got to discount that", which, when it comes down to it, is really a legal point. Once he had gone through the reasons why -- methodically and analytically the reasons why the *Google* Play Store enjoys such a high level of commerce, his evidence to the Tribunal was that those factors would be present in the counterfactual, and you see his conclusion there, so no good harking back to the 50% in his report.

THE CHAIRMAN: Can I ask you just one question of clarification? When you are talking about -- so we are talking about benchmarks here, are we not? You are

using *Google* to give an example of what Apple's position might be in the counterfactual. We are not talking about *Google* in the counterfactual, are we?

MS DEMETRIOU: No.

THE CHAIRMAN: So in a way, when you talk about *Dune* and whether or not things are lawful or unlawful, it does not really matter, does it? It is actually what Apple's position is, is it not?

MS DEMETRIOU: That is exactly right, and so -- so of course Dr Singer points to benchmarks to say, "This is what Apple would look like in the counterfactual", and his benchmarks are *Epic* and the Microsoft Store and I have explained why that is misplaced because they are not similar. So we say, well, if you are looking at what Apple would look like in the counterfactual, *Google* is your best comparator because that is a direct comparator to Apple on mobile devices and also, critically, *Google* has not had the distribution restriction ever in place. So if you are asking yourself, "What would Apple's position be like without the distribution restriction in a world where you could always have alternative app stores and side-loading?", we say that that is your best comparator.

Now, they say, "oh, well, you have got to discount that, because of market power", and I have explained to

you why that is wrong --

THE CHAIRMAN: Yes. So if -- so let us just say, for argument's sake, that there was a question as to whether *Google*'s market share and indeed its pricing is a function of dominance and potentially abuse -- let us just say that that were the case -- so I think -- would it then be -- are you saying that it does not matter? I think you are saying it does not matter because, when you go across into the counterfactual, the sort of features that might be abusive for *Google* do not apply to Apple. That is the point you are making, is it not?

MS DEMETRIOU: That is exactly the point. So first of all, Dr Kent has -- we explored this to death with Dr Singer and we went into detail -- Dr Kent has never been specific about what is the abusive behaviour that they are complaining about. They have referred very vaguely to market power and allegations. That is all we have got.

THE CHAIRMAN: In relation to *Google*?

MS DEMETRIOU: In relation to *Google*. So they say that is why *Google* should be discounted. It is market power and there are some allegations about abuse. Our response to that is, first of all, market power, for the reasons the CMA gives, that is not something which is irrelevant. That is not something which makes *Google* an inapposite

comparator because market power is not unlawful.

THE CHAIRMAN: So it does depend -- so if you have got benchmarks appearing in all sorts of places in the case, then of course you might have a different answer, might you not? So you are not -- so if you were looking at market definition and thinking about the benchmarks for a non-abusive price, that exercise we have been through much earlier, you might -- that is a different construction altogether, is it not, and *Dune* does not apply to that. That is not a counterfactual analysis at all. That is just looking at benchmarks to see how useful they are, whereas here, the benchmarks -- so the benchmarks have been deployed by Dr Singer --

MS DEMETRIOU: Yes.

THE CHAIRMAN: -- here as being indications, as I recall -- and maybe I am going to get this wrong -- but they are indications of -- when he picks the 12% from *Epic* and Microsoft, that is for the purposes of this model, is it not? Is that right?

MS DEMETRIOU: No.

THE CHAIRMAN: Oh, he does not use it for that?

MS DEMETRIOU: No, it is for both. So he has his modelling but he also -- just on his main evidence on foreclosing effects, he offers these benchmarks as indicative of what Apple would charge in the counterfactual --

THE CHAIRMAN: Sorry, yes, you are right. He says -- there are examples -- now I am getting confused. I may be getting confused with Mr Holt, who does something similar. But he says that they are situations where there has been competition present and it gives you an idea of where the competition might end up; is that right?

MS DEMETRIOU: So I think that is how Mr Holt puts it, but what Dr Singer --

THE CHAIRMAN: This is the trouble. I am hopelessly confused by the benchmarking.

MS DEMETRIOU: No, no, do not worry. What we are all doing here, so both us and Dr Kent, is we are all accepting that the Tribunal, in order to decide whether or not these restrictions foreclose competition, needs to be thinking about what the world would look like without the restrictions, so we are all going down that road.

THE CHAIRMAN: Yes.

MS DEMETRIOU: What Dr Kent does, through Dr Singer, is she says, "Well, when you go down that road, thinking what the world would like look, we say that Apple would be charging 12% because we take the *Epic* Games Store as a comparator".

THE CHAIRMAN: Exactly, yes. So once exposed to competition, that is where you would end up?

MS DEMETRIOU: Exactly, and we say --

THE CHAIRMAN: His model produces a number quite similar to that.

MS DEMETRIOU: Yes, exactly. That is exactly right. So he has two routes. We say that, no, the better comparator is the *Google* Play Store, and that is what our evidence says. They say that you have to discount that because of unspecified market power and abuse and we say -- and coming back to your question, sir -- we say, first of all, you do not -- first of all, insofar as *Google* has market power, which they have not proven -- insofar as that is right, then that is not something which makes it inapposite as a benchmark, and the CMA agreed with us on that.

THE CHAIRMAN: That is the *Dune* point.

MS DEMETRIOU: That is the *Dune* point. Then we say, insofar as you are looking at abuse, so what are these allegations? Well, the allegations appear to be, from what we can see from the US Proceedings and from proceedings here, allegations about agreements between *Google* and device manufacturers about placement of -- prominent placement or exclusive placement of the *Google* Play Store. We say that it does not matter if in *Google*'s case those are unlawful because Apple's situation is different. It owns -- it produces the

devices, so --

THE CHAIRMAN: So it will not be an abusive situation --

MS DEMETRIOU: Exactly.

THE CHAIRMAN: -- so you do not need to worry about taking that out of the ...?

MS DEMETRIOU: Exactly.

THE CHAIRMAN: No, I understand the logic. Thank you.

MS DEMETRIOU: So I am going to move on to Steam because, as I said earlier, the other obvious source of evidence on what might happen in the counterfactual is PC App Distribution. Again, this one comes with a heavy caveat, and that is this: that PCs are quite different from mobile devices and consumers use them in different ways. Mr Howell says that himself in his primary report. In particular, direct distribution has always been an important thing on PCs, whereas, as we have seen with Android, it is not a big thing on mobile devices, even when it is fully permitted. So we say, when you are looking at PCs, you should really be focusing on the competition between app marketplaces rather than thinking about direct downloads, and that is Steam versus *Epic* and Microsoft and others. That should really be common ground because the whole basis on which my learned friends urge PC app comparators on you is they say that the *Epic* Games Store entered the market

and competed successfully to drive Steam's prices down.

We agree that there is competition between the *Epic* Games Store, Microsoft and Steam, but we say that, if you are going to look at PC App Distribution, you should look at the whole sweep of it and you should do it much more carefully and forensically than Dr Kent has done.

The first point we make is that there was a very long period before the *Epic* Games Store came along in 2018 in which Steam faced strong competition from sophisticated developers using direct distribution and yet Steam charged 30%. Some of that period, of course, overlaps with our claim period. That is significant because, if 30% was vastly more than a competitive price, as Dr Kent suggests, you might have thought that Steam would have been relatively unsuccessful or that entry would have happened earlier because there are massive software companies in this space. Of course, Microsoft is one of the biggest companies of any kind in the world. So how could, we ask -- how could Steam get away with charging strongly supra-competitive prices for so long? That is the first point. It goes to show that 30% is not a supra-competitive price.

The second point is that it is necessary to look more objectively than Dr Kent does at what happened

after 2018. So, yes, *Epic* entered and, yes, Steam cut its prices and, yes, *Epic* won some market share from Steam, but the key question to ask about those points is: how much? How much?

If we go to {C2/15/86}, this is Dr Singer's third report. If we look at the first footnote on the page, if you can scroll, please -- sorry, this is the wrong reference. Can you just bear with me for a moment?

(Pause)

Page 13, {C2/15/13}, yes. So it is at the top of the page. You see -- so at the top of the footnotes, yes. So you see that Steam is said to have roughly 75% market share, with *Epic* somewhere between 2% and 15% and Microsoft having the remaining 10% or so. Then we have -- after the reference, we have Tim Sweeney saying that *Epic* has 15% and Steam has 85%, which would leave Microsoft with nothing.

That is consistent, of course, with the evidence we saw in the reviews of these stores, which said that almost nobody uses Microsoft and people largely use *Epic* to download *Epic*'s own games. So even with *Epic* entering at a very low price of 12%, it has only been able to take, after a period measured in years, at most 15% market share where the calculations are obviously being done without including direct distribution. So

the market share impact of competition on PC App Distribution has been extremely limited -- a little bit more than Android, but not much.

Again it is relevant to note how long it took for *Epic* to come along. There were never any restrictions preventing entry, so that suggests that, even if we had not had the restrictions in place on iOS from way back in 2008, we, too, might not have seen any entry until 2018 or so.

Now, as for the price impact, there are various ways of looking at it because there are different price tiers and then there are also the Steam keys, but it is important to recognise that there is no evidence of the *Epic* Games Store or Microsoft being limited to the very largest developers. They are not. They are open to all. So if Steam has managed to keep a 30% commission on the first $10 million in revenue for every game, that is in conditions of workable condition. Now, I am not saying that is the end of the story. You need to look at the other tiers too. But there is no basis on which we can say that Steam faces zero competition for the first $10 million in revenue per game.

Then there is the 25% tier. On Dr Kent's case, that was obviously a response to competition. So they say less competition than for the very biggest games, but

that is not the test. The test we are trying to apply here is just to find out what would happen if we removed the restrictions. Well, do the restrictions apply to developers who pay the 25% rate? No, they do not so there is no reason to exclude it.

The sensible thing to do, if you are trying to capture the overall picture, is to come up with an effective rate that you can compare to Apple's effective rate, and we dealt with that in some detail in our written closings, particularly paragraph 258, so {A1/9/87}. We did by reference to expert reports filed for both sides in the *Valve* litigation in the US.

Now, my learned friends do not like that evidence, and they say that you should give it no weight, but there is really no basis on which the Tribunal should be giving limited weight to that evidence. The important point is that those expert reports have been prepared after depositions and disclosure of transaction data, so the calculations in both reports are made by reference to Steam's actual transaction data. Moreover, both reports tell you exactly how their calculations have been made. You really could not get better evidence in relation to Steam.

It is really no good to come along to trial and say, "Well, we are going to cherrypick Steam's 20% rate, but

you, the Tribunal, who have this rich evidence from both sides as to how Steam's commission is calculated, how you calculate an effective rate, should disregard that and rest on the cherrypicked rates that we are telling you to accept". It is very different -- very different -- from trying to rely on a conclusion in a foreign judgment. The common law rule in *Hollington* tells you not to do that, but has always allowed courts to rely on evidence recorded in judgments and this is even better than a summary of evidence in a judgment. This is the evidence itself.

Now, the 20% figure, which is -- sorry, 27% figure, which is -- the 27% figure, which is the effective rate calculated by the experts, is not very surprising when you understand that every game pays 30% for the first $10 million and then 25% for the next $40 million and only pays the 20% rate thereafter. It is easy to understand why the average rate is not very far below 30%. So only very large games indeed will have revenues above $50 million and even those that do still pay -- even those that do have revenues above that still pay the 30% and 25% rates on much of their revenues.

Now, if Steam had considered that there was a basis for saying that Dr Schwartz's calculation of the effective calculation was wrong, it obviously had a very

strong incentive to do so. So if in those proceedings Steam had said -- had thought, "Well, 27% is too high as our effective rate. If we calculate it, we get to something lower", they obviously would have said that. It was in their interests. They did not.

Instead, Steam's expert made the point that Dr Schwartz's 27% figure had been calculated by reference to the revenues earned by developers on the Steam platform, and that is the same approach to assessing Apple's effective commission taken by the experts in this case. So what we have is the effective commission calculated by the experts in this case is somewhere around 25% and, if you compare like with like, that compares to Steam's effective commission of 27%, so this wholly supports us -- the evidence of Steam wholly supports our case.

What Steam's expert then did in those proceedings, as the Tribunal saw, is went on to propose a different methodology which took account of developer revenues earned outside the Steam platform, the Steam keys issue. The Tribunal will see what we say about how that might be compared on a like-for-like basis with Apple's Commissions in our written closing submissions at paragraphs 260 to 262 and appendix 4. You will remember that was the point about counting the zeros, where

Dr Singer accepted that, if you are going to count the zeros, ie the revenues derived from Steam keys for Steam, you need to count the zeros for Apple, so count the revenues derived from the Multiplatform Rule and also advertising.

But in a sense the Tribunal does not need to worry too much about that because the simple point was that the reduction in price that Steam offered in 2018 was incredibly limited and made very little difference to the 30% rate. Really, what you cannot do, because it is just not forensic, is pick one price tier over another and then compare that to Apple's total or average commission and nor can you include Steam keys that exclude the zeros for us.

The comparison that the Tribunal should make is our 25% effective commission against their 27% effective commission, and on that basis you can conclude that the PC App Distribution Market gives you a similar answer to the Android market; virtually no price erosion and a very limited loss of market share.

Now, I wanted to say a few words about the payment services counterfactual. I am not going to repeat all the points we made in our written closing submissions, but I do want to remind you again of our favourite paragraph in Mr Holt's report, so {C2/10/142}. This is

paragraph 391 that I took you to earlier today. It really is dispositive on this question about the payment services counterfactual because Mr Holt says that in the counterfactual everyone will pay the distribution rate. That is really all you need to know.

But, of course, the Tribunal does have more, and in our written closings, just for your reference, paragraphs 200 to 202, we summarise Mr Owen's evidence, answering questions from the Chairman. His evidence was that, to use an alternative payment services provider, app developers would need to create a tailor-made version of their app, and his evidence was that Paddle had not been interested in incurring the cost and work involved in creating a tailor-made version even where it was possible to use alternative PSPS in large markets, notably the EU and South Korea. So in the counterfactual here, where the payment requirements are only being removed in the UK, it follows that app developers would look even less favourably on doing so.

One thing I would like to note is, of course, that this was a factual point that came out during the course of the trial and so Professor Sweeting, for example, indicated that he had not been aware of this factual point until it came out in the trial -- that is Day 20, page 43 -- and he said it made him even more sceptical

that payment service providers would enter, and that is obviously a logical conclusion for him to draw and we ask you to draw the same conclusion.

Mr Howell's evidence as well was that developers would not pay an alternative payment service provider if they also had to pay Apple a fee for -- including for tools and technology, and I am going to come back to that question.

In addition, there is the example of the *Epic* Games Store, where developers can avoid the entirety of the *Epic* Games Store commission by using an alternative payment service provider but have not done so, so only 50 of 1,100 developers have chosen that option, and it is particularly notable evidence in circumstances where there is an acknowledged problem with the *Epic* Games Store payment system. Their own witnesses described it in Australia as being difficult and tedious. So an incentive -- a technical incentive for developers to make use of the generous offer of avoiding the *Epic* Games Store's commission by going to an alternative payment provider, but they have not done so.

What does Dr Kent say about this in her written closing submissions? If we go to {A1/8/30}, paragraph 81(d) -- so if we go over the page,

{A1/8/31} -- sorry, it is the wrong reference. It is -- oh yes, (e). Yes. So the answer is a very cursory answer. They say that the reason for that is that the 12% commission rate is already competitive. But of course that does not account either for the technical incentive to use other payment processors, given the problems with the *Epic* Games Store's system, and also the fact that, on Dr Kent's own case, payment service providers would charge well below 12%, so Dr Singer's own case was that the benchmark is 9%. So none of that really stacks up on Dr Kent's own case.

I am going to turn now to the question of tools and technology.

THE CHAIRMAN: Just before you do that, can I ask you a question -- and maybe you are going to come to it. But there is the point, is there not, about capable of having an impact on market structure and a lot of what you showed us is about price -- the impact on pricing.

MS DEMETRIOU: Yes.

THE CHAIRMAN: Do you want to say anything -- I mean, I know you have said something about it in your closing, but what --

MS DEMETRIOU: Yes, we have said something about it in our closing. Essentially our answer to that is that any effect has got to be more than a simply trifling effect,

and if the position is that in the counterfactual Apple would have more than a 90% share and its commission would be the same, then that is, at most, a trifling effect. That is not an abuse.

THE CHAIRMAN: So I think there is some law on whether there is an appreciability requirement. There is not, is there?

MS DEMETRIOU: So I think we do address this in our closings. Let me just give you some references.

THE CHAIRMAN: I have picked that up maybe from the CMA's ...

MS DEMETRIOU: No, that is all right. If you just bear with me for a moment ...

THE CHAIRMAN: I suppose the question is -- no need to go to it. You can give me the reference if it is helpful. I do not want you to spend time on it. It is just that is there anything you want to say about it beyond your closing, given what Mr Hoskins said about it?

MS DEMETRIOU: Let me just take you to one authority, if that is all right. Let us go to *Intel* at {AB4/22/1}. Of course *Intel* was about loyalty rebates and *Intel* argued in the General Court that its practices only concerned a small part of the market. The General Court rejected that argument, saying that there was no de minimis threshold, and on appeal the Grand Chamber of

the Court of Justice agreed with *Intel* on its argument.

Can we go to {AB4/22/16}, so at paragraphs 115 to 116, *Intel*'s argument, so:

"... the General Court wrongly failed to consider highly relevant circumstances such as the insufficient market coverage of the rebates at issue, the short duration of the practices at issue, the lack of foreclosure and a rapid decline in prices as well as the prior 'as efficient competitor' analysis."

Then you see -- if you just read 116 to yourselves. (Pause)

Then we can see what the court says about it on page {AB4/22/18}, so paragraphs 138 and 139, if you just read those, please. (Pause).

So we say the same must hold in reverse. So our requirements obviously apply to the whole market on Dr Kent's market definition, but if removing them would leave us with virtually the whole market and no price erosion, then you have to wonder what the point is of the challenge. Then also, if you note paragraph 140, this is also making the point that the extent of any change to the structure of the market is obviously relevant also to objective justification, so it is relevant to both whether there is an abuse in the first place and also to objective justification.

Yes, and of course this comes after post-*Danmark*, so I think that is an authority relied on by Dr Kent.

(Pause)

Sir, I was going to address you on tools and technology.

THE CHAIRMAN: Yes.

MS DEMETRIOU: So this is an important issue when it comes to considering the counterfactual because -- just thinking about how it fits in, Apple currently charges for its tools and tech through the commission. Dr Singer accepts that. So Apple monetises its tools and tech through the commission.

In a world where the restrictions, the requirements, are not present and where the current commission structure is not there, Apple would still be entitled and would have every incentive to charge for its tools and tech and we say would charge for its tools and tech. I am going to come on to the evidence in a moment.

So when you are thinking about to what extent are competitor app stores going to gain market share, you have to think about a developer that chooses to distribute through this hypothetical alternative app store. The developer is paying the fee of the alternative app store for distribution and it is paying a fee to Apple in respect of the value that Apple

provides it through its proprietary tools and technology, so you cannot shave off the fee that Apple is -- the fee that the developer is paying for the tools and technology because it is obviously critical to consider the whole fee when considering the degree to which competitor app stores are going to be attractive.

The point also runs in respect of payment processes, so let us say that you have -- let us take Dr Singer's case. So he says, "Oh, well, for payment processors you are going to have a Paddle lookalike or Paddle and they are going to charge, say, 10%". So you have a developer who says, "Right, I am going to have my app on the App Store but all in-app purchases are going to be through Paddle", so on this -- this scenario envisaged by Dr Singer. So, in those circumstances, obviously it is not going to be the case that the developer just pays Paddle the 10% and gets the distribution services from Apple for the App Store for free and all the proprietary technology for free, so you are not comparing 30% with 10%. That is the key point.

The problem here is that Dr Kent's case simply does not account for it. So when Dr Kent is -- when Dr Singer is looking at these benchmarks, none of these benchmarks -- when he says, "Well, *Epic* Games Store, 12%, that is what would be charged in the

counterfactual, that would be the rate in the counterfactual", that is simply not accounting for any charge for the tools and technology.

Now, Dr Kent says, "Oh, well, you cannot make this point because you have not evidenced it", and that is obviously wrong. We address the evidence at paragraphs 175 to 199 of our written closing submissions.

But let me summarise the position in this way: it is common ground in this case -- so Dr Kent has not sought to impugn any of this evidence at all -- it is common ground that the tools and technology that Apple provides to developers are extensive and provide very significant value to developers. It is also common ground that Apple monetises its tools and tech through its commission. Now, I say it is common ground. It is Mr Schiller's evidence, paragraph 210 of his statement. Dr Singer accepts that as well. He accepts that. I took you to it in the joint expert statement and he accepted it in his oral testimony to the Tribunal.

Now, Mr Hoskins sought to say in his submissions that the DPLA frames the program fee, so that was the $99, as being consideration for tools and tech, but now, that does not mean, of course, that it is the only consideration. So the fact that the DPLA says, "Oh

well, you have got to pay this program fee and it is consideration for the tools and technology", does not mean that it is the only consideration. The concept of consideration is used in contract law to ensure that there is an exchange of promises -- to ensure that an exchange of promises is made binding as a contract.

So what the DPLA says is consideration is in fact a red herring in this case and ultimately Mr Hoskins accepted that, from an economic perspective, Apple does monetise its tools and technology through the commission, which was Dr Singer's evidence. It is common ground between the experts in this case that in a counterfactual world, without the requirements, Apple would have an incentive to charge for its tools and technology, and the relevant references for that are at paragraph 186 of our written closing submissions.

From this alone, the Tribunal should conclude that Apple would charge for its tools and technology, unless presented with a good reason why it could not, but the Tribunal has more than this in terms of evidence. It has Mr Schiller's evidence at paragraphs 198 to 199, where he did consider the counterfactual. Let us turn that up, please, at {B2/5/54}. Could we put this and the next page up, please, side by side, {B2/5/54-55}? Thank you.

If we look at paragraph 198 -- perhaps scroll down that page so we can see the whole of paragraph 198. Thank you very much. So I just want to go through this with a little bit of care just before we rise, if that is okay. So he recalled that, {B2/5/54}:

"... prior to the launch of the App Store, I and other members of the Executive Team spent ... time discussing and working on what would become the ... business model ... The initial business model allowed developers to set an up-front fee for the purchase of an app from which Apple took a 30% commission to remunerate Apple for access to the technology and services made available to them."

So we see that the 30% commission is a fee, amongst other things, for the tools and technology that Apple is making available.

"We did not discuss in-app purchases or subscriptions at this time as they were not yet ideas for the App Store. However, the Executive Team did briefly discuss other alternative models to the commission structure ultimately adopted when the App Store first launched. This included charging for all apps, advertising commissions and a flat fee payable by developers. A flat fee was particularly unattractive to Apple because Apple has not historically been in the

business of selling access to or licences for its technology and services."

Now, that sentence is alighted upon by Mr Hoskins, but it does not help him because he is not saying here, Mr Schiller, that Apple is not monetising its tools and technology through the commission. He says the opposite, including at paragraph 210. What we see from this is that in the counterfactual you are unlikely to see a flat fee because that is not a business model that Apple favours.

Then you see, at 199, {B2/5/55}:

"There may also have been further possibilities ... Our aim was to find a simple and understandable model which met Apple's goal of providing a seamless, high quality product experience for users and benefitted developers, users and Apple alike; in my view, the commission structure adopted was clearly the most appropriate option. If the commission structure we adopted had not been open to Apple, we would have explored other ways to ensure that Apple was adequately remunerated by developers for the value made available to them by the Apple ecosystem."

So he is saying that Apple would have explored other ways to ensure -- underline "ensure" -- that Apple was remunerated adequately for the value it provides, so he

is there contemplating a counterfactual world without the commission that Apple currently has. Of course, the Tribunal has the real world evidence under the DMA where Apple does charge for the value it confers on developers through its tools and technology, and we see that in the core -- the CTF.

Mr Hoskins said, "Well, that is under investigation. You have got to discount that", but that is really a hopeless submission because it is under investigation under the DMA, a wide piece of regulatory legislation, not under competition law, so even when we know the outcome of what happens in the EU, it is not going to tell the Tribunal about the application of Article 102.

So, sir, I have got maybe about ten more minutes of submissions. Shall I wait until tomorrow?

THE CHAIRMAN: Well, I am quite inclined to -- if you are happy to keep going ...

MS DEMETRIOU: Yes, there is also *Fulton Shipping*, so it is a bit more than that. I am happy to -- either way.

THE CHAIRMAN: Well, what I am anxious to do is try and give you back the hour that you said you would like.

MS DEMETRIOU: Thank you.

THE CHAIRMAN: You have had 30 minutes of it, and if you wanted a bit more now -- otherwise we are going to run out of time to give it to you. So if you want to take

ten more minutes, I am happy for you to do that. Why do you not leave *Fulton Shipping*? I think the point about damages -- I would like to just have a -- I would like to get a clear understanding from you of where you are coming from on damages and what I would like you to do is to be able to fit the counterfactual into the orthodox damages approach and just explain to me where the particular facts fit. If that is something you can helpfully do for the morning -- so maybe that is best left for the morning anyway. *Fulton Shipping* is just one way of looking at it, but I think on reflection it is probably not the most obvious way so I do not think you need to spend -- well, I know the case. You do not need to spend time on it. But it is really about me understanding -- us understanding -- what are you saying the implications are of the factual material we have gone through, particularly the tools and technology, I think, which is the main point that goes to causation, as I understand it. As a causation point, how do you say it works?

MS DEMETRIOU: All right. So, sir, I will wrap up on this now and I will --

THE CHAIRMAN: Yes, why do you not do that?

MS DEMETRIOU: -- come back tomorrow and address the points that you have just ...

THE CHAIRMAN: Please do, if you are happy to.

MS DEMETRIOU: Thank you. So ultimately Mr Hoskins' complaint about the evidence was that Apple has not said precisely what amount it would charge for its tools and technology in the counterfactual, and, of course, that is true because it would require a precision that is simply not possible in this type of hypothetical exercise, particularly where the Class Representative has been entirely imprecise about what she says the counterfactual would look like and we have faced a very moving feast on that score. But it does not follow from this that the Tribunal should assume zero charges. That would fly in the face of the evidence; nor was my learned friend right to say that charges for tools and technology can somehow be disregarded because they concern a different market.

The question for the Tribunal is: what would consumers be paying in the counterfactual, absent the requirements? That does require the Tribunal to look at the totality of the charges that developers are paying to Apple. You cannot disregard charges for tools and technology because that would give an incorrect result. So we do say that this is not something which can just be airbrushed out of the picture. The problem for Dr Kent is that she has not grappled with it at all.

She has airbrushed it out of the picture. None of her experts address the issue.

THE CHAIRMAN: So just -- just so that I can understand that, so I think you are -- so you are saying we cannot assume it is zero but you are also not able to give us a number. Are you saying that there is a positive case that you are putting forward that it is -- that the amount would be the same as 30% -- is that your case? -- or are you saying, "It is just too difficult and that is Dr Kent's problem"?

MS DEMETRIOU: What the most likely -- I mean, what we have to go on is what Apple does in the real world. So Apple's 30% commission is -- through that commission, it monetises its tools and technology, so there is no reason in the counterfactual why Apple would be charging less for its tools and technology than it currently does. So it is Dr Kent who has to prove that developers would pay less in aggregate, so that is her case. The burden is on Dr Kent.

THE CHAIRMAN: Well, I think it is quite difficult, is it not? If you are making a point about -- if you are saying you are the ones that are going to charge it, I do not see how she can prove that. Surely the evidential burden must shift if you are saying, "Hang on a minute, you have to take this into account".

MS DEMETRIOU: Well, sir --
THE CHAIRMAN: I am not saying -- I am not trying to -- in a sense, I think I am exploring the point that you are -- it seemed to me that your discharge of the evidential burden on your case, as I understood it, was that you say, "Look, on any view, we are going to charge ..." -- what you have just said, "... we are going to charge 30%". I just want to be clear with you that you are -- are you putting forward that case?
MS DEMETRIOU: Yes.
THE CHAIRMAN: I mean, either it is good enough or it is not. Clearly there is going to be an argument about that because you are not in a position -- I understand you say why not, but you are not -- you have not put forward a case as to the precise amount and --
MS DEMETRIOU: As to the precise amount.
THE CHAIRMAN: -- neither has Dr Kent. We can argue until the cows come home whose fault that is, practically speaking, but in terms of the burden of proof, I think you are saying you are not leaving a vacant plot here. You are putting forward a positive case, which is the equivalent of 30%; is that right?
MS DEMETRIOU: Well, yes, so there is no reason to believe that Apple would not charge in the counterfactual the amounts it is charging currently for its tools and

technology so there is no reason for the Tribunal to take the view that, in aggregate, developers would pay any less. That is really how we put the point.

What you -- what would be impermissible, because this would be essentially airbrushing an important part of the picture away, is to say, "Oh, well, because we cannot put a precise figure on the tools and tech element, you just ignore it", because that obviously flies in the face of the evidence, including the real world evidence under the DMA.

So I think that is how we put it. You cannot disregard the charges because that would give an indirect result and there is nothing to suggest that Apple would charge less in the counterfactual than it charges now.

Now, it is not an answer to say, "Well, it would somehow be -- the charges for tools and tech would be competed away if you do not have the restrictions", because those -- the market that Apple is operating in, as far as provision of its tools and tech are concerned, are different. Apple has IP rights in relation to the tools and tech so any amount of competition on distribution is not going to force Apple to charge less for its tools and tech. Those competitive forces do not operate to force Apple to reduce its charges for tools

and tech. The Class Representative has done nothing to show that the current charges for tools and tech are unfairly high or are unlawful in any way and so you just do not airbrush them out of the counterfactual. You assume they are the same, and that is how we put it, sir.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Then, just very finally, other factors in the counterfactual. Of course, you do have to bear in mind, we respectfully submit, the security counterfactual that Dr Kent started running midway through the trial, so the security counterfactual being, of course, that Apple would conduct full App Review of all iOS Apps distributed in the UK against the guidelines.

That has some relevant consequences as far as the counterfactual is concerned. First, it means that there is no differentiation on content, so alternative app marketplaces are not going to be able to offer apps that fail Apple's guidelines. Dr Singer made clear in his evidence, when he was asked about it -- when I asked him about it -- that he had not been asked to consider this at all by Dr Kent's team. What he said about it in cross-examination was that it would reduce competition, and we see that -- we give you the references at paragraph 208 of our written closing submissions.

Secondly, Apple would be entitled to charge for alternative app market -- to charge alternative app marketplaces for carrying out full App Review against its guidelines. On that question, Dr Kent says in her written closing submissions at paragraph 168 that, if Apple wishes to suggest this -- perhaps let us just look at that very quickly, so {A1/8/56}. Thank you. So paragraph 168:

"If Apple seeks to suggest in its closing submissions that it would have introduced new charges ... this should be given short shrift. Apple has not produced a shred of evidence to support such a suggestion or as to what the level of any such charges might be."

But obviously Apple could not have produced evidence in relation to this because the point was suggested only once the trial had started through the cross-examination of our witnesses by my learned friends. It simply was not a point that was pleaded or put in issue.

Thirdly, Dr Kent has advanced no evidence to suggest that alternative app marketplaces would enter the market if their operations were limited, were subject to gaining Apple's approval over each app that they intended to distribute. So why would a firm such as Aptoide or Tencent be amenable to Apple applying its

guidelines to their customers' apps? They have not evidenced that.

Fourthly, of course, this was not part of the counterfactual that Professor Sweeting was able to consider in his reports; and we know from Dr Singer that full App Review would reduce competition in the counterfactual; and so to the extent that Dr Kent relies on Professor Sweeting's reports, of course, this was not an issue that he was able to consider.

So, sir, that is -- aside from coming back on the points on counterfactual that you want us to come back on tomorrow, and aside, I think, from just saying that as regards the models, Dr Kent has ignored the models in her oral closings and so we will just rely on our unanswered submissions in our written closings, given the time, rather than dealing with them orally. Those points have not been addressed at all orally. So we rest on our written submissions.

I think that is the end of my piece, subject to the points I am coming back to tomorrow. I am very grateful to you for sitting --

THE CHAIRMAN: That is fine. Thank you. Feel free to address the quantum point whenever it comes --

MS DEMETRIOU: I --

THE CHAIRMAN: It does not have to be first thing. In a way

it logically comes, I think, just before incidence but it may be that the way you have carved it up, it makes -- whenever you want to do it is the point.

MS DEMETRIOU: Thank you very much.

THE CHAIRMAN: Everybody knows it is 10 o'clock tomorrow morning and we need to be in here before, I think, 9.50 or something like that. They are going to set the bells off. Anybody who is not associated with the case will be thrown out. So come and get your head down in plenty of time, I think is the short point.

Good. 10 o'clock tomorrow. Thank you.

(4.46 pm)

(The case adjourned until Thursday, 27 February 2025)

I N D E X