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IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Thursday 27th 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

Thursday, 27 February 2025

(10.00 am)

THE CHAIRMAN: Mr Kennelly.

Closing submissions by MR KENNELLY

MR KENNELLY: Good morning. Members of the Tribunal, I will deal very briefly with tying first and then move on to objective justification.

THE CHAIRMAN: Yes, thank you.

MR KENNELLY: For the purposes of tying, in view of the fact that my learned friend dealt with it very briefly, I will simply refer the Tribunal to our closing submissions on the question of tying. Of course, the question of demand has been addressed by my learned friend Ms Demetriou in the context of her submissions.

The outstanding issue for tying was coercion, and again we rely on what we said in our closing, save for this point. It was suggested by Mr Hoskins that Professor Sweeting had in some way conceded the question of coercion at proposition 56 of the joint expert statement because there he agreed or he said that the requirement or the -- the contractual requirement to use IAP if in-app purchases are allowed was a negative tie. In fairness to Professor Sweeting, that was put to him in cross-examination and he was crystal clear that, when he referred to a "negative tie", it was not coercion,

because the developer could choose not to use the in-app purchase service, and we do stress that it is a service and thereby avoid taking the allegedly tied product. That is {Day20/14:5} to {Day20/15:4}.

Moving on, then, to objective justification, it is common ground that there are two types of objective justification defence in this case: objective necessity and the efficiencies defence. There is no dispute as to the legal test for the efficiencies defence, but for objective necessity there are three points in dispute on the legal test. We say, as you have seen in our closing, that to be objectively necessary, the conduct in question must be first necessary to achieve a legitimate objective, and second be proportionate to it; two conditions, nothing more.

The first dispute is whether the legitimate objective for these purposes can include maintaining or improving the performance of the undertaking's product or service. We say that it can, and we rely on paragraph 552 of *Google Shopping*, {AB4/27/109}. At paragraph 552 -- there is no need to go back to it. You have seen it already -- it sets out that improving the performance and quality of the undertaking -- the dominant undertaking's product is a legitimate objective, and that is precisely our case.

The second dispute is whether the legitimate objective can include public interest objectives. Now, our defence does not depend on achieving public interest benefits, but they definitely arise and they should be relevant. Dr Kent suggests that public interest benefits can never form the basis of an objective necessities defence, relying on *Hilti* and *Tetra Pak*. That is going too far. There is no authority that says that public interest objectives can never count for the purposes of objective necessity. For example, the European Commission has never said so, either in its 2009 guidance or even in its draft 2024 guidelines, which contain a useful summary of the recent case law. For your note, that is {AB6/6} and {AB6/49}.

What *Hilti* and *Tetra Pak* explain is that, if the public interest objective could be addressed effectively through regulatory enforcement, a dominant undertaking should not have recourse to the impugned conduct instead, but here, unlike in *Hilti* and *Tetra Pak*, there is no prospect of regulations providing effective ex ante protection against the sort of global safety, security and privacy threats with which Apple is concerned.

You have seen ample material to show you that the identity and location of attackers which pose security

threats to iOS Device users are usually unknown and their attacks are constantly evolving and mutating. The only way that these threats can be blocked before they wreak havoc is by the platform operator or the app store or the developer itself or a combination of those.

Of course, neither *Hilti* nor *Tetra Pak* consider the sort of case we are dealing with, where the decision of one user to engage in risky behaviour could in fact lower the standards for everyone else. It is a negative externalities point here because, once you have malware propagating within the ecosystem, it can spread and affect other users through smishing, for example. It is common ground that sandboxing is not a perfect solution to that problem. So this case raises a distinct issue: can Apple prevent less secure marketplaces from operating in its ecosystem where that is necessary for Apple to secure high standards for its own platform?

But the largest legal dispute between us is the third, on the legal test for objective necessity, and it is whether the conduct in question must not eliminate competition from third party undertakings. Now, we say such a condition has never existed for the objective necessity defence and it confuses the requirements for objective necessity and the requirements for the efficiencies defence. For this argument Dr Kent has

only the *European Superleague* case, and may I show that to you again, {AB4/34/45}?

As you will recall, in *ESL*, *FIFA* and *UEFA* advanced an objective necessity defence to justify rules which on the facts precluded any competition from third party undertakings seeking to promote organised professional football tournaments. Now, the Court of Justice rejected that defence because there was a more proportionate means of securing the alleged legitimate objective. If you go to {AB4/34/45}, we see the paragraphs upon which my learned friends rely. This is dealing with objective justification under Article 102. At paragraph 202, the court repeats the well-known distinction between an objective necessity defence or the balancing exercise required by the efficiencies defence, citing *Post Danmark*. Then at 203 it says:

"As regards the first part of that possibility ..."

So now they are focusing on objective necessity:

"... it follows from paragraph 147 [which describes the conduct in question] ... that the establishment, by *FIFA* and *UEFA*, of discretionary rules on prior approval of international competitions, control of participation by clubs and players ... precisely because of their discretionary nature, can in no way be regarded as objectively justified by technical or commercial

necessities, unlike what could be the case if there was a framework ..."

They set out then what would be proportionate:

"Accordingly, objectively speaking, those rules, controls and sanctions have the aim of reserving the organisation of any such competition to those entities, entailing the risk of eliminating any and all competition from third-party undertakings, meaning that such conduct constitutes an abuse ... one not justified, by an objective necessity."

Now, properly read, that is the court applying the proportionality standard, the well-established proportionality standard, and finding that the *FIFA* and *UEFA* rules were a fortiori disproportionate because the restrictions risked eliminating all competition from third party tournaments.

If there was a freestanding no elimination condition for the objective necessity defence in Article 102, we would see it stated as such, as it is the efficiencies defence, and there was no basis for inferring a freestanding no elimination of competition condition because the Court of Justice has never held that no elimination of competition was a further freestanding requirement for this defence as a matter of law and there is no authority to that effect under Article 102

TFEU and the European Commission did not refer to such a condition when it set out the test for objective necessity under Article 102 either in its 2009 guidelines or even in its 2024 draft guidelines.

There are further indications in this judgment itself as to the error of law in my learned friend's submissions because my learned friends said in their closing that the same approach to objective necessity under Article 102 should apply to Article 101(1); that is paragraph 120. They say the same approach to objective necessity should apply in Article 101(1) and Article 102.

So then we go back to what the court said about objective necessity for Article 101, and that is paragraph 183 of this judgment, page {AB4/34/41}. Here, paragraph 183, the court is applying the objective necessity test -- not the Article 101(3) defence, but objective necessity under Article 101(1), and it repeats the same language that we saw previously. It says that, skipping to the middle, that an agreement or practice may be "justified by the pursuit of one or more legitimate objectives in the public interest", that the specific means used to pursue those objectives are "genuinely necessary for that purpose", and third, that "if those means prove to have an inherent effect of" or

the possibility of "restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition".

Again, my submission is that that is applying the proportionality standard and finding that the restriction is a fortiori disproportionate here because it was found to eliminate all competition, because, just as there is no authority for the proposition that, for the objective necessity defence under Article 102, there is a freestanding no elimination of competition requirement, so too is there no authority that the objective necessity under Article 101(1) that there is a freestanding no elimination of competition requirement.

Under Article 101(1) also the case law is crystal clear that there are two requirements: is it necessary in the pursuit of a legitimate objective and is it proportionate? Two requirements; no reference to a further test to see if the competition has been eliminated entirely.

In this paragraph, the Court of Justice cites three authorities, *Wouters*, *Meca-Medina* and *Ordem dos Tecnicos Oficiais*, and none of those authorities, when they discuss objective necessity -- and they do discuss

objective necessity -- in none of them did the court hold that the objective necessity defence required no elimination of competition.

THE CHAIRMAN: Those are -- that is the sort of sports branch, is it not, of the -- as I discussed with Mr Hoskins, this is bringing together two branches of the equivalent under 101(1) and the ancillary restraints doctrine. That is just the sports branch, is it not?

MR KENNELLY: Well, true it is that this *ESL* case is a sports case, and *Wouters* and *Meca-Medina* in particular -- well, *Wouters* was not a sports case obviously. It was --

THE CHAIRMAN: Sorry, but you know what I mean, the sort of bodies case, if I can call it that, however one describes it.

MR KENNELLY: Indeed, indeed. What we see here is the court confirming that which was already clear, which is that there needs to be consistency between objective necessity for 101(1) and objective necessity for 102, just as there is consistency between the efficiencies defence under 102 and Article 101(3) TFEU. But what the court did not say was that there has to be an elision between the requirements of the objective necessity defence and the efficiencies defence, still less an elision between objective necessity under

Article 101(1) and the requirements of Article 101(3).

THE CHAIRMAN: Yes, I understand. So you are saying -- and I have to confess I -- yes, all right. So you are saying that the position under 101(1) for ancillary restraints is that you do not -- there is no requirement of elimination of competition. Rather, there is no requirement that you do not eliminate competition?

MR KENNELLY: Absolutely, absolutely. My learned friend, to be fair to him, did say that the court in *European Superleague* was changing the law. He did not put it as bluntly as that, but he said that the court was deliberately making the test for objective necessity and the efficiencies defence consistent. "Consistent" was the word he used.

THE CHAIRMAN: Well -- yes.

MR KENNELLY: What that means, to be clear, is that he is saying that the court here, for the first time, is eliding to a significant extent the requirements, the objective necessity defence under Article 102 and the efficiencies defence under 102, and, by his own logic, eliding the objective necessity defence under Article 101(1) with the requirements of Article 101(3).

Now, although -- sir, you have referred to the sporting context. He was clear that this was a legal determination which had broader application, and to that

extent it would be a major change in the law because the case law on Article 101(1) in particular has been clear and consistent, that the requirements for objective necessity and ancillary restraints are twofold: is a legitimate objective being pursued in a proportionate way? There has never been a suggestion that there is a further requirement, as there undoubtedly is under Article 101(3), that there be no elimination of competition.

We gave the citations in our closings to the leading cases on objective necessity and ancillary restraints under 101(1): *MasterCard*, EDP, *Hoffmann-La Roche*, but importantly, even after the *European Superleague* case, the Court of Justice has repeated its orthodox formulation and has not adopted the change in the law which my learned friend says was created here in *European Superleague* because *Booking.com* -- the judgment in *Booking.com* was handed down nine months after the *European Superleague*. That is {AB4/36/31}. Can we look at that, please?

We see, paragraph 51, repeatedly orthodox formulation for objective necessity under Article 101(1), that restriction is not covered by the prohibition, "either if [it] is objectively necessary to the implementation of the operation or that activity and

proportionate to the objectives pursued by one or the other", and that is citing *MasterCard* and *Hoffmann*-La Roche.

Paragraph 54, please, {AB4/36/32}, next page. This is -- so the prior paragraph looks for whether the restriction is strictly indispensable. Then:

"Second ..."

Here is a second condition:

"... examine the proportionality of the restriction at issue ..."

What does that mean?

"... in order to refute the ancillary nature of the Commission [or] the ... authorities may examine whether there are realistic alternatives which are less restrictive of competition [and they] ... are not limited to the situation that would arise in the absence of the restriction in question but may also extend to other counterfactual hypotheses ...", citing *MasterCard*.

Just pausing that, that is it. That is the proportionality requirement. No reference to the need to show no elimination of competition as a condition for the objective necessity defence under Article 101(1).

Then importantly, at 55, just to recall that it would be a very odd thing for the court sotto voce to elide the objective necessity defence and the

efficiencies defence because, just like in 101(1) and 101(3), they are distinct, distinct defences with distinct purposes and conditions, and part of that is explained here in 55:

"... a distinction must be made between the concept of 'ancillary restraints' ... and the exemption based on Article 101(3) ... Unlike the latter, the condition relating to objective necessity ... does not require a balancing of the procompetitive and anticompetitive effects ..."

Balancing happens under 101(3). They are distinct defences, and so the court should be very slow to infer in paragraph 203 that the court for the first time has decided to elide the conditions -- to take a condition from the efficiencies defence and add it to the objective necessity defence where it had never previously appeared.

THE CHAIRMAN: It is possible, I suppose, that the question of elimination -- the question of elimination of competition may still be relevant to the question of proportionality --

MR KENNELLY: Absolutely.

THE CHAIRMAN: -- might it not? That is what we saw effectively in *ESL*. That is your construction of the paragraph. So you are not saying that we cannot take

into account the elimination of competition as being a factor for considering proportionality?

MR KENNELLY: Absolutely; and that, we say, is what *ESL* actually did. It claimed it was a fortiori disproportionate, because there was a risk of eliminating competition in that case.

MR FRAZER: So you are submitting that something can be proportionate even though it does eliminate all competition?

MR KENNELLY: Yes.

MR FRAZER: It just does not have to be?

MR KENNELLY: Yes. That is the distinction between the objective necessity defence and the efficiencies defence. With the efficiencies defence, it does not matter how good your thing is in the balancing. If competition is eliminated, you have failed. Objective necessity, competition can be eliminated and it is still possible to succeed, provided you can show that, notwithstanding the elimination, the conduct is still proportionate.

MR FRAZER: Right, because 55 seems to suggest that the difference is that there is balancing under efficiencies only. You do not have to balance under objective necessity. That is what it seems to suggest there, not the elimination, but the act of balancing.

MR KENNELLY: Yes, indeed. I am not suggesting that 55 deals with the question of whether elimination of competition is a condition or not. I took you to it to show the difference between the two defences --

MR FRAZER: Ah.

MR KENNELLY: -- because, if my learned friend is right that the court has decided to elide the conditions, that would be inconsistent in the context of two distinct defences, two distinct purposes.

MR FRAZER: Thank you.

MR KENNELLY: Certainly it is not something you can infer from paragraph 203 of *ESL*.

THE CHAIRMAN: But broadly -- I mean, I understand the submission that you are making, but broadly you accept that there is a -- we are entitled to look at 101(1) and objective necessity in more or less the same light just as we would look at 101(3) and the efficiencies argument in the same light. The authorities that apply to them, I think -- I think it is common ground, is it not, that these are being brought together and that there should be a degree of consistency between them?

MR KENNELLY: A degree of consistency --

THE CHAIRMAN: Yes.

MR KENNELLY: -- but the court has not said that the tests are the same, the Commission's guidelines has not said

that the tests are the same, and in particular, for example, in ancillary restraints there is case law to suggest that the restriction is only proper ancillary restraint if it would be impossible to do the task without it. There is no authority to say that that is the test under Article 102. So we accept that there is consistency, we accept that they have similarities, but we do not accept that that test of impossibility has been carried across into Article 102.

THE CHAIRMAN: Yes. Mr Hoskins says it has, does he not?

MR KENNELLY: Yes. He is going further and saying the whole thing has been merged by a radical change in the law -- "radical", my word, not his -- but he does say that impossibility is the test under 102 now as well.

THE CHAIRMAN: Yes, for objective necessity?

MR KENNELLY: Yes.

THE CHAIRMAN: Yes. So your limb 1, necessary to achieve the legitimate objective -- and you have addressed us on legitimate objective and of course I know you deal with it in your closing -- but you do not accept, obviously, that -- that submission?

MR KENNELLY: No, we do not accept it. There is no authority under 102 to say that impossibility is the standard. On the contrary, there is significant authority before you on the conditions and they say

whether it is necessary and proportionate, but those are the conditions in the law.

On the question of proportionality -- I am not going to go back to it. I showed it to you in opening -- *Streetmap* is good authority for showing that, when it comes to proportionality, it is not just, "Can you do -- can you achieve these additional objectives at any cost?" *Streetmap* explains that there has to be some reasonableness in asking, "What can the undertaking be expected to do by way of an alternative route to achieve the acknowledged legitimate objective?" *Streetmap* was referring back to the Court of Justice in *Tournier* for that purpose and we maintain that submission for this purpose.

Moving on then to the facts, I am going to start with objective necessity and the requirements that we say are necessary to allow Apple to compete because, even before we get into safety, security and privacy, we say that the restrictions are objectively necessary to allow Apple to differentiate itself and to compete on the merits, and without the requirements we could not compete on the merits as we do. For that, I refer the Tribunal back to the submissions I made yesterday on competition on the merits. There is nothing more to say about that.

The next objective necessity defence is that the requirements are necessary to enhance the safety, security and privacy. Dr Kent's starting point is that Apple did not believe, when the App Store was launched, that centralised distribution was necessary for safety, security and privacy. They relied on two internal documents from 2007 which did not, on their face, link security with centralised distribution. We say they were obviously provisional and preliminary. Mr Schiller described them as "engineering documents", that didn't represent Apple's views, {Day6/118:1}. In cross-examination Mr Federighi said that they were offering a variety of early and incomplete thoughts which were substantially revised and in fact what Apple came up with in the end was much better than what those papers had envisaged; {Day8/16:1}, {Day8/20:1}.

Pausing there, if it was Dr Kent's case that Apple's claims regarding the benefits of centralised distribution are a sham, that should have been put directly to Mr Schiller and Mr Federighi and they did not do so. But ultimately Apple's subjective views as to what was necessary in 2007 are of very limited relevance to objective necessity because I need to show you what was necessary after 2015. What may or may not have been necessary in 2007 does not really help me or

Dr Kent. Secondly, what is necessary is an objective concept. What Apple believes subjectively isn't determinative either way. That is the *Generics* judgment, {AB4/25/28}. There are in fact internal documents showing what Apple believed at the time -- in 2015 at least, {D1/518/1}. No need to go to it.

THE CHAIRMAN: What is that document?

MR KENNELLY: It was an internal email where Mr Schiller and Mr Federighi were responding to a claim by Android that they were now as safe as Apple and they were expressing internally scepticism about that.

DR BISHOP: You said that now something favours Apple?

MR KENNELLY: No, the Chairman asked me, "What was the email about?". It was Mr Federighi and Mr Schiller, in an internal email, responding to a claim by Android. Android was claiming in 2015 that they were as safe as Apple, and Mr Schiller and Mr Federighi were saying, "We do not think so", and firstly they included the fact that, unlike Apple, they allowed third party distribution and side-loading.

Housekeeping

THE CHAIRMAN: Just while we have interrupted you, we might just put the blinds down, if you do not mind. That dreadful sunshine! I am not sure your colleague behind you is finding it quite so enjoyable.

While that is happening, I just -- it crossed my mind that we are sitting slight odd hours in the sense that we have to finish by 4 so it is really up to you when it is convenient, but we do not have to stop at 1 pm. If you want to stop earlier than that and start a bit earlier in order to break the day up more evenly, then I am in your hands really as to how you want to deal with it.

MR KENNELLY: We may have to take some of the lunch break. I will finish well before then, but I think for the purposes of our submissions we may need to --

THE CHAIRMAN: Well, obviously, if you need extra time we will try and do that. I would observe we have given you the extra hour already. I think we gave you the half hour -- the early start and then two quarter hours yesterday. So, I mean, I am not pushing back if you say you really need it and I certainly do not want to be having this discussion -- I do not want to be having this discussion at 4 o'clock because it cannot get to 4 o'clock --

MR KENNELLY: No, I understand.

THE CHAIRMAN: -- but there is a limit as to how much extra you are going to get now, I think.

MR KENNELLY: Yes. Ms Demetriou reminds me that an extra hour tomorrow as well, but I think it is best --

THE CHAIRMAN: Just to be absolutely clear, what I do not want you doing is continuing your submissions today. The deal tomorrow is a reply to the CMA.

MR KENNELLY: But then I am afraid we do not have the extra hour that we asked for. I think, in the circumstances, because we are under time pressure, I am going to press on. We can come back to this later. I do not want to --

THE CHAIRMAN: Well, just -- no, I think we do need to deal with it now, actually, just so we are clear about it. Maybe I have misunderstood, but the -- I thought the purpose of the time tomorrow was for you to have the opportunity to reply to the CMA, and that is why I was a bit surprised when you said you might think you need more than an hour.

MR KENNELLY: Ms Demetriou probably needs the time --

THE CHAIRMAN: Yes, of course, so what is the plan, then?

MS DEMETRIOU: So the position is that we will get the extra hour that Dr Kent have if we have an hour tomorrow, including our submissions on the CMA, so I think we will want to use some of that for our main submissions as opposed to devoting the full hour to respond to the CMA, and I would like the flexibility, please, to decide --

THE CHAIRMAN: I see. Well, that is my fault. I misunderstood what you were doing. I thought you were

putting yourself in the position that you just were preserving some time to reply to the CMA and, in fact, you are slotting the CMA in, at a time that then gives you the opportunity to reply, plus finish your submissions. Is that the position?

MS DEMETRIOU: Exactly, and if we have an hour tomorrow, then we will recover the extra -- the deficit that we had as against Dr Kent, but that will include our submissions on the CMA.

THE CHAIRMAN: Yes, I see. Okay. The CMA are going to be, we think, anything up to two hours?

MR KENNELLY: Exactly, and we will have to cut our cloth in terms of the time we take to respond.

THE CHAIRMAN: Well, I mean, I think Ms Demetriou is saying that you need the hour and you are going to take it, is she not, so --

MR KENNELLY: Well, we will take the hour that we need, but how much of that is spent --

THE CHAIRMAN: Well, quite. That is your decision as to how you spend it. So just if we are going to do that, and then, in order for Mr Hoskins to get his proper reply time, I think the idea was that that would be the afternoon. Is that where you were?

MR KENNELLY: Yes, as long as we start at 2.30.

THE CHAIRMAN: Well, let us just see what he has to say

about that.

MR HOSKINS: My understanding is that they have already had the extra hour because you gave them an hour yesterday, but I am not going to quibble about time here and there, sir. I am not going to quibble. We need -- we asked for two hours for our reply, which means we need to start at 2.30. How the rest of the time is used, I am still --

THE CHAIRMAN: Fine.

MR HOSKINS: As long as at 2.30 I stand up --

THE CHAIRMAN: Well, the only question is whether we need to start at 10.30 or whether we need to start carving some time today into lunchtime. But if we are working on the basis that the CMA for two hours, until 12.30, another hour, which will take us to 2.30, and you are happy with that -- I mean, it is a bit tight. Maybe it would be sensible to start earlier and make sure that we were not running up against the back-end of the day. But, I mean, it does sound like it is going to work -- that is the short point -- does it not?

MR HOSKINS: That is right. As I say, I am not going to quibble about 15 minutes here or there, but we have asked for two hours. Even if we start at 2.30, it means we need to finish at 4.30.

THE CHAIRMAN: Yes, fine. Okay.

MR HOSKINS: I am trying to play nicely.
THE CHAIRMAN: You are doing a very good job. Thank you.
MR HOSKINS: As long as we get our two hours.
THE CHAIRMAN: Yes, good. So just to -- whatever the position is, just whenever you want to -- if you want to break a little bit earlier before 1, that is fine, and we can talk then about whether you need the extra time -- whether we need to shorten the short adjournment. I just do not want to find we have a long morning session and a short afternoon session because that is not helpful for everybody.
MR KENNELLY: Subject to the Tribunal, I will carry on.
THE CHAIRMAN: Just when it is convenient. The offer is there for you to decide when you want to do it.
MR KENNELLY: I am grateful.
Closing submissions by MR KENNELLY (continued)
MR KENNELLY: Turning then to the evidence and the app distribution requirements, Dr Kent contends the requirements are not necessary for three main reasons. First, they repeat Dr Lee's evidence that, absent the requirements, developers distributing directly and third party app marketplaces would have the ability and incentive to achieve Apple's current standards of safety, security and privacy. They maintain that submission because they cite his evidence in

footnote 819 of their closing.

Second, Dr Kent says that, even if in the counterfactual there are more risky apps, competition will ensure that users who value security and privacy will get it and competition will drive standards higher.

Finally, in a counterfactual where Apple does App Review for all apps, however distributed, there will be no material deterioration of security and privacy. That is the security counterfactual.

Of those three arguments, the first is obviously nonsense, the idea that third party marketplaces and developers would achieve, in general, security and privacy standards as good as or better than Apple's. In the closing submissions Dr Kent say that in theory third parties could use tools similar to Apple's tools and in theory train human reviewers to be as good as Apple's, but Mr Kosmynka explained that having the tools of themselves will not replicate what Apple does and the Tribunal will recall his analogy of random car parts.

Dr Kent said, in theory, third parties who carry out more comprehensive app review, as you will see, that is impossible without the current level of access to data and signals. A counterfactual must, as a matter of law, be realistic, and it is completely unrealistic that third party app marketplaces will become as safe and

private as the App Store. You have the references from yesterday and from cross-examination.

The second argument that competition will ensure that security and privacy standards will be achieved, again, it is useful to look at Android. In Android, where competition on Android has led to the Google Play Store having a market share of over 90% even where third party app marketplaces are in the significant minority, there are still thousands of malicious apps wreaking havoc, and infections spread on Android even from that small minority of third party app stores and developers distributing directly. You saw in the RiskIQ report how just five Android apps were downloaded millions of times and potentially caused $430 million worth of fraudulent loss.

This argument also depends -- the competition argument depends on users knowing which developers are safe, and again on this, even Dr Lee eventually accepted that users lack an understanding of the potential dangers they face; {Day10/167:1} and {Day10/168:1}.

The third party documents submitted by Dr Lee showed in terms that even tech-savvy users are unable reliably to differentiate between safe and unsafe apps. The idea that we can rely on users to make sure the competition and privacy -- that users, through competition, will

secure these standards is a fantasy.

The Zimperium report in particular is relevant, and I will go back to that because it relates to the question that Mr Frazer asked me yesterday because he noted that objectionable content, which is correlated with malware, is also available on web browsers. To make just three -- give you three references for that because I said I would come back to it.

First, the association between objectionable content and malware is a bigger concern for native apps because native apps are installed on the iOS Device. There are different exposure points. A native app, with the right permissions, gets your camera, address book, all of the other facilities that a smartphone has. Web apps do not get that. They operate in a different box. That makes native apps far more likely to be vectors for malware and the user more vulnerable.

I will give you a reference -- no time to go to it, unfortunately -- {D2/360/1}. A web app is an app within an app so it can only operate in the environment provided by the browser. A native app can operate within the environment of the full operating system it runs on.

THE CHAIRMAN: Sorry, is that reference to the Zimperium report?

MR KENNELLY: No, it is a different document. The Zimperium report, you have seen it many times.

THE CHAIRMAN: No, that is fine. I am just wondering what the document is. It is just helpful if you tell us what it is. I know you have given the reference. The trouble is that of course you then look at the transcript and think, "What on earth is that?".

MR KENNELLY: On the Zimperium report -- the document {D2/360/1} is a web page cited by the experts --

THE CHAIRMAN: Yes, fine. Thank you. Thank you.

MR KENNELLY: -- but the Zimperium report, at page 25, also speaks to the level of trust that people have in native apps -- the greater level of trust than users have in web apps, and that is a fortiori for Apple iOS users.

The third point is that Apple does, as I said to Mr Frazer, impose guidelines which do require apps to review user-generated objectionable content. That is guideline 1.2E/8, page 3 and Apple has enforced that. On instructions overnight I was told that the app Parlor was removed in 2021 from the App Store and allowed back on when it had addressed content moderation issues and the Telegram app was suspended in 2018 because of a concern in relation to child and sexual exploitation material; paragraph 114 of the guidelines.

The final point on competition that my learned

friend Mr Kennedy made was that it would drive security standards higher. He suggested that Google -- the Google Play Store, if it operated on iOS, would improve on Apple's security standards. That again we say is completely unrealistic. The best guide to what Google would do, when faced with competition on the security parameter, is what it has done in the actual world. It has never matched Apple's security and safety standards or privacy standards on Android. It is no answer to say that they are hamstrung by the different security architecture. Google manufactures the Google Pixel phone and despite its vast resources it has never chosen to pursue a centralised distribution approach and market those devices as safe as the iPhone. There is no reason to assume that it will suddenly seek to compete on these parameters in the counterfactual.

That also just shows the disconnect between the security counterfactual and the competition counterfactual. On the one hand they posit that Google -- that Google Play Store on iOS would beat Apple -- even Apple on security and privacy standards, so a higher quality product, but they do not acknowledge that Google is likely to charge more for that than it does by way of commission on the Android platform, where the standards would be lower.

Similarly, Steam was put forward as a potential competitor on the parameter of security and privacy. My learned friends ignored the evidence of the problems that Steam has experienced; {G1/13/65}, the additional security breaches that were raised by Professor Rubin there. But, more importantly, Steam has only 79,000 games. It is just not a valid comparator for the purposes of its ability -- ability and incentive -- to achieve the same levels of security and privacy as the App Store, with its 1.8 million apps.

Turning then to the security counterfactual, Mr Kosmynka's evidence was clear when it was put to him that, even on the security counterfactual, the full guidelines could not be applied if IAP is not being used because Apple have used payment flows for IAP as part of App Review but it does not review payment flows in the same way absent IAP.

Now, he was asked about whether Apple might be able to re-engineer its systems to do that. His answer was "Maybe", {Day5/233}, but he was not asked about the sort of technical difficulties that might arise and the timeframes involved.

There was a suggestion in the closing that Apple's own development documents suggest that it would be possible to re-engineer or do payment flow checks even

if IAP was not being used -- the document is {D2/199.1/1} -- but that document is a developer-side testing document. It has nothing to do with Apple's testing.

Would the current levels of security and privacy be achieved in Dr Kent's security counterfactual? We accept that not all of Apple's tools depend on centralised and integrated models. The question is whether: if you remove that model, would you cause material harm to security and privacy? Is it a necessary component?

For this, it is again useful to look at what Dr Lee says for Dr Kent. Dr Lee said -- and I will give you the reference, {C2/5/48-52}, paragraphs 75, 76 and 79 -- Dr Lee said that Android, in particular, provides hardware protection, software protection and, through the Play Store, app review which is as good or better than Apple's. Dr Kent's evidence is that Apple's hardware, software and App Review is not better than that of the Google Play Store.

So then the Tribunal has to ask: on Dr Kent's case, why are there so many more malicious apps on the Google Play Store? What distinguishes it from the App Store? There are three things: mandatory code signing, different device manufacturers and the

centralised integrated approach to app distribution.

You have my submissions -- and you saw it in cross-examination -- as to why the answer is not mandatory code signing or different device manufacturers. That leaves the centralised and integrated approach. On this, before we even got into Apple's own witness evidence, the causal connection between Apple's centralised approach and the far fewer numbers of malicious actors has been marked repeatedly in third party material. I was asked yesterday about this causal connection, but the Nokia 2020 report and the RiskIQ report say in -- address in terms: why is Android, in general, and Google Play Store in particular worse? Because they allow third party app stores; because of developers distributing directly. That is the causal connection.

Apple's own witnesses on this were crystal clear. They explained three related problems arising from decoupling distribution from App Review: fragmentation of information, the reduced data points and signals; the fact that it would take longer and be more difficult to enforce breaches; and the third problem was the incentives of the attackers would increase when they became aware of the increased vulnerability of iOS.

Now, on fragmentation -- sorry, sir.

THE CHAIRMAN: Just to be clear, I think when I was asking about the causal connection, I was not asking you about the causal connection between the app -- the restrictions and apps on the -- and the nature of the apps. I was asking you about the perception of security generally, which I think was the submission you were making particularly in relation to devices and how much of that could be attributed to hardware, software and so on. Just to be clear, I think I was asking you a slightly different question.

MR KENNELLY: I am sorry and I hope I did answer that particular one.

THE CHAIRMAN: Well, you certainly gave me an answer, yes.

MR KENNELLY: But on this question, on the causal connection between centralised distribution and the absence of malware or the reduced amount of malware, that is well understood and marked in the marketplace, not least by Dr Lee himself in the clearest possible terms in 2013.

Mr Federighi, in terms of fragmentation of information, gave really compelling examples of how, even without any malware at all, where you have -- when developers have the ability to present a product falsely on a website from which an app can be downloaded, that app can be downloaded on to the phone, on to iOS, with real harm and it can be done with ease by a malicious

actor. That does not require any malware and it can easily get past App Review, as Mr Federighi described. He gave an example of the Adobe -- the fake Adobe Photoshop app, he gave an example of the banking app and the fake App Store, Apple App Store, itself.

All of that can be done because the developer is able to present a false picture on his website and then, from the website, give access to an app that can be downloaded, and a very banal app which gets past App Review can be presented on a website as something which has functionality which it does not have in reality and could even be used to take banking details, and I refer you back to Mr Federighi's evidence on that.

Dr Lee's response was that Apple should review the whole of the internet on a continual basis by reviewing every alternative app market page and flagging discrepancies; {Day10/199}.

DR BISHOP: Mr Kennelly, I want to ask you -- maybe this is the appropriate point. You choose the appropriate point to respond to this -- an argument could be made that the Apple system could develop as a system that is, continues to be closed in the way that it has been, and you have described and witnesses of the defendant, for those who want it, but that there is no reason why there could not be app stores that come in with a big notice

saying, "You are taking a risk here, but if you can -- you can deal with this, but it is your risk".

Now, you referred earlier to contagion moving through the system from bad apps, malware, that then affects people who are -- there is an externality -- it affects people who have not downloaded them. That is an important argument that undermines what I just put. Are you going to deal with that at some point? Are you going to deal with it further? Is it -- can you refer us to something? I leave it to you. Maybe you are about to launch into this right now or whatever, but at some point I would like to see some observations or hear some observations on that.

MR KENNELLY: Sir, I was not planning on going back to that point because the vulnerabilities of -- the inadequacies of sandboxing and the fact that contagion can spread through techniques like smishing and phishing, I have already given you in my opening and in cross-examination. But to assist you, I am sure I can be given those references again and I will give them back to you before I finish or before we finish today.

DR BISHOP: It is your position that the evidence on that is either sound or unchallenged or whatever and that that would render -- it would undermine the conception I just put to you, that there can be an Apple for those who are

security concerned and an Apple for those who are less security concerned; is that right? Is that the position?

MR KENNELLY: Yes, that is a technical answer as to why, even if in theory you wanted to have an iOS for risk-averse people and people who are less risk-averse, it is not going to work technically because, as we see on Android, sandboxing -- because Android has the same sandboxing -- it has very similar sandboxing to Apple -- there are massive contagion problems and smishing and phishing and techniques like it, when the appropriate permissions obtained through social engineering can infect the device as a whole and other users. But that is the first of two points.

The second point is about device competition because Apple presents its product as one not only where these risks do not arise, but where these risks cannot be taken.

DR BISHOP: I understand it damages the brand, as it were, and --

MR KENNELLY: Yes.

DR BISHOP: I understand.

MR KENNELLY: It is the brand. It is the whole brand. So that would be really devastating if we were forced to just do what Android does; devastating to competition.

Now, Mr Kennedy challenged what Mr Federighi was saying in cross-examination on the basis that he had not mentioned it in his witness statement. That was an odd submission when Mr Kennedy had produced that security counterfactual for the first time in the middle of the trial. To that point, Mr Federighi and everybody else assumed that Dr Kent's position was the one expressed by her expert on these issues, Dr Lee. Dr Lee's evidence, as you saw, was that there was no need for Apple to review apps distributed by third parties. In fact, it would be inappropriate for Apple to police competing app stores because Apple would see their proprietary information. That is paragraphs 119 and 125 of his first report.

The next fragmentation problem was user reviews and concerns. Mr Kosmynka explained the importance of user reviews and I rely on what we say in our closing submissions about that.

The final fragmentation problem was transaction data; really important because, where apps are distributed by alternative app marketplaces or websites, Apple's data will not be comprehensive. It will reduce Apple's ability to spot patterns of fraudulent conduct or unusual activity or purchases or downloads that could suggest an attack. That gets worse if the payment

system requirements are also removed. Apple would no longer get comprehensive transaction data and even Dr Lee accepted that receiving fewer data points reduces the ability to spot fraudulent apps.

That is fragmentation of information. The next was enforcement. How is Apple to enforce breaches in this counterfactual? Again, we rely on our closing as to the major practical problems that Apple would have in seeking to remove apps or remove developers who are in breach. We would have to consult the marketplace operator or developer, not least to get additional information that we would normally have in the actual.

Finally, Mr Federighi explained how incentives -- incentives for attacks increase when Apple is rendered more vulnerable.

The final point that Dr Kent makes in her submission about this is that we could have contractual protections, and I will ask the Tribunal to go back and read the example that was given of that, taken from the DMA, the EU Alternative Terms Addendum, {E/35/3}. Those are incredibly weak protections. You will remember them. You saw them in the trial, where third party app stores were required to be responsive and no more than that when Apple approached them with malicious actors or breaches that Apple has identified. Their requirement

is only to be responsive.

Moving on then briefly to the payment system requirements. This was addressed very briefly by my learned friends and we rely on our closing submissions. The idea that competition will achieve current levels of privacy and security is hopeless. Again, users are very poorly placed to distinguish between safe and unsafe payment systems, not least because developers choose them, not users.

The idea that we can trust digital wallets does not work. Even Mr Burelli accepted that the use of digital wallets was less than 28% for the claim period prior to 2021. That is {Day9/128:11-25}. PCI DSS compliance is not the answer. That's a flawed ceiling, again, as Mr Burelli accepted. The point that Apple is somehow as bad at PCI DSS compliance as the others that I identified is hopeless. There is no evidence of any harm arising from problems Apple has had. On the contrary, what was identified as potential breaches by Apple demonstrates the rigour of Apple's auditing. That is a point in our favour.

The question of enhanced performance is also relied on by us as a defence to defend the payment system requirements. We rely on our closing submissions on that too. Mr Burelli, accepted at {Day9/120} that the

process is currently completely seamless. It would not be completely seamless if these restrictions are removed; similarly, subscription management, Ask to Buy and Family Sharing and the collection of Apple's Commission.

On the question of weighing the efficiencies and quantifying them, I have not got time to go back to what Mr Kennedy said about each of the various benefits that Professor Sweeting valued, but relying on privacy alone among them, his approach was highly conservative. If you look at, when you have a chance {C5/258/1}, the Prince and Wallsten study, you will see that, from it, Professor Sweeting identified only two of the multiple privacy benefits that were quantified in that study. He ignored the other private information and he chose an average which again was very conservative because, as we can see from that study, the Latin American attitudes to privacy are not like the UK's at all. He did not take account of the fact that information in the study was being given to banks and mobile providers, not malicious actors, and no account was taken of the fact that iOS users value their privacy far more highly than the average global users.

My very final point on this before I sit down is for the Tribunal to reflect on the implications of my

learned friend's argument. If Mr Hoskins is right, competition law compels you to ignore everything I have said. Everything I have said to you about security, safety and privacy is irrelevant on Dr Kent's case because of the narrowly drawn market definition, because if his analysis competition is eliminated, everything I have said to you about security and privacy is irrelevant.

On his case, competition law compels you and compelled us to open up iOS to all commerce regardless of the harm that would be caused to users on the parameters of security, safety and privacy. That simply cannot be the law and we say it is not.

Unless I can be of any further assistance, I will sit down.

Closing submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, we are turning to the unfair pricing case now.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Just before I embark on that and just coming back to where we left things yesterday afternoon --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- so Mr Piccinin is going to deal with incidence. At the beginning of his submissions he will deal with the points that you raised in relation to

damages and the counterfactual so that is coming a bit later.

THE CHAIRMAN: Yes, good. Thank you.

MS DEMETRIOU: Then, in relation to unfair pricing, we are structuring our submissions as follows: I am going to give you a very brief overview of our case. I am then going to make some brief submissions on the law. Mr Piccinin is going to then address you on limb 1 and I am going to draw together our submissions on limb 2. So that is how we are approaching the unfair pricing allegation.

THE CHAIRMAN: Thank you.

MS DEMETRIOU: So I will start by making an overarching observation about the way Dr Kent frames her unfair pricing claim. Could we please go to her written closing submissions at {A1/8/58}, so paragraph 174. Could I just ask you to read that to yourselves and remind yourselves of what it says? (Pause)

So looking at the last sentence, she says there:

"If the [Class Representative] is correct in that Apple is a monopolist in the relevant market(s), there is no rivalry within those markets, and the Commission is not set in workable competition. It is in fact well above the competitive level."

So Dr Kent's position -- let us make no bones about

things -- is that, if it shows that Apple is dominant, the price Apple charges is necessarily unfair because it has not been set in conditions of workable competition. So what the Tribunal needs to do, on Dr Kent's case, is work out what the price would have been if Apple was operating in conditions of workable competition and the difference is the unfair proportion of the price.

Now, of course, it can be said of any dominant undertaking that they are not operating in conditions of workable competition, but it does not follow that all dominant undertakings are charging an unfair price and it is certainly not the case that a claimant needs only to make the allegation and this will set in train a process where the Tribunal needs to hypothesise a market in which there are competitors that have the same intellectual property or property as the dominant undertaking, work out what the price would be in that hypothetical market and rule that the differential is an unfair price. Now, that is not the law, as I am going to come to show you.

Of course, the Commission, to take an example from the case law, did not find in *Scandlines* that it was necessary to imagine a competitor port next door to the Helsingborg Port and work out what the price would be if they were competing, and the Court of Appeal did not

find in *Attheraces* that it was necessary to imagine a market in which other entities were competing with the British Horseracing Board to supply racing data and construct the price that would be the prevailing price in that market.

In pharmaceutical cases, where the drug is protected by a patent, the test is not: well, what would the price be if there is generic entry? Let us imagine a world in which lots of drug companies are competing to provide the same drug. That is not the test.

Now, let me show you what Mr Ward said about this in his closing submissions, if we go to {Day25/47:25} at the very bottom of the page.

So he says there -- and if -- can we put the next page on so we can see the whole passage? Thank you -- sorry, both pages together, {Day25/47-48}. At the very bottom of page 47, he says, {Day25/47:25}:

"... as I said yesterday and I do want to reiterate, we do not say that any price charged by a monopolist is per se unfair."

Now, we say, well, they actually do -- that is the basis on which they proceed because they say that if you are a monopolist, ergo there is not conditions of workable competition. He said:

"If Apple had charged a commission of, say, 3%, we

could have had no complaint, but in fact it stuck to a headline rate that was chosen in 2008 without regard to costs, without regard to economic value."

Now, of course, we say -- our case is that 30% is a low price, set at a level lower than Apple's competitors back in 2008, and you have seen evidence of that. Mr Ward points to 3% because he is assuming that 30% is too high. But what is the basis for that assumption? It really does come back to what they say in paragraph 174, that Apple is dominant, that therefore the conditions of competition are not workable, and it really is just circular reasoning.

So we say that is not the right approach. How then should the Tribunal determine the allegation of unfair pricing that Dr Kent has made? Well, the question for the Tribunal is whether Dr Kent has discharged the burden on her of showing that Apple's Commission is unfairly high and we say that she clearly has not.

The key evidence on which Dr Kent relies are, first of all, Mr Dudney's profitability analysis. Now, that cannot tell us why Apple's price is unfair. Mr Holt conceded that in cross-examination and Mr Piccinin will develop that point further.

The second piece of evidence they rely on is Mr Holt's comparators analysis, but that analysis is

polluted because it fails to account for the extraordinary economic value that Apple provides to developers. You have seen the data that Professor Hitt has provided as to the value, the developers' revenues, that they derive from the App Store. None of the comparators selected by Mr Holt provide access to such value in the form of access to Apple's tools and technology or access to any equivalent tools and technology, so Mr Holt's comparators simply fail to capture demand-side value.

We go further. We put the point like this: that Mr Holt's comparators analysis is simply incapable of assessing the unfairness of Apple's Commission, and that is because, on its own terms, what he is setting out to do is to seek to identify comparators for distribution and payment services. That is the task he has set himself. But the commission, of course -- and this is where it falls down and goes badly wrong -- the commission is not just a commission for distribution and payment services -- Dr Singer accepts that and my learned friend Mr Hoskins accepted that in an economic sense that is true -- it is also the monetisation of the very substantial value that Apple provides through its tools and tech.

Now, even putting that important point aside -- and

we say that is a critical point -- but even leaving that aside, Mr Holt's comparators do not establish that Apple's Commission is unfair -- quite the opposite -- and a proper comparison with Steam, on which Mr Holt relies, shows that Apple's price is the same or lower than Steam's. Once you get on to the other comparators, the *Epic* Games Store, the Microsoft Store, itch.io, those are obviously vastly inferior fringe players and they simply do not provide a proper comparator to the proposition that Apple is providing.

So that is by way of overview what we say about the unfair pricing case.

I am going to, on the law, take the Tribunal to two cases. One is *Attheraces* and the second is Latvian Copyright. But before we turn them up, could I please identify five propositions that we derive from these cases that are material to this case?

The first is this: that when assessing the price for an intangible product, a cost-based analysis is uninformative as it has proven to be in the present case during this trial. We are not saying that it is unlawful to carry out, we are not saying that it is wrong to carry out, but it cannot give you the answer.

THE CHAIRMAN: So just to be clear, are you saying -- are you talking about limb 1 or limb 2 or both?

MS DEMETRIOU: I am talking about the -- sir, I am saying that, when you are asking yourself the overall question, "Is this an abusively high price?", the profitability and analysis of costs can't tell you that.

Now, if you want -- so if somebody in Dr Kent's position wants to set about proving that a price is unfair, that it bears no reasonable relation to the economic value of the product, they can of course adopt a two-stage limb 1/limb 2 test. It is not the only way of doing things, but that is a way of going about things. We are not saying that you cannot go about things in that way, but we are saying that if you choose to go about things in that way and carry out a limb 1 approach, which is essentially a cost-based approach, that does not give you the ultimate answer in this case, which is: is this an abusively high price?

THE CHAIRMAN: So that is interesting. So I had not appreciated that you were saying that limb 1 and limb 2 are more or less discretionary. I mean, I rather had the impression that there was a need to consider at least the question of excessiveness and unfairness in their own right, however one did it, but are you saying that you do not need to do that? You can actually do it -- how would you do it, then?

MS DEMETRIOU: So *Flynn* makes that clear. The

Court of Appeal in *Flynn* made that clear and so did the Court of Appeal in *Attheraces*. They say that the limb 1 and limb 2 tests are -- that is one way of going about things but it is not the only way.

THE CHAIRMAN: Well, they say that there are a number of different ways in which you can go about the exercise, but the exercise still, does it not -- it has to satisfy that the prices are both excessive and unfair. That is the test, is it not? Are you not confusing the means by the outcome?

MS DEMETRIOU: With respect, no, sir. Can I just show you *Flynn*, if we go to {AB3/37/31}. So we see the basic test for abuse, which is set out in the Chapter II prohibition, is whether the price is unfair, so that is the basic test. Here there is the reference to:

> "... a price will be unfair when the dominant undertaking has reaped trading benefits which it could not have obtained in conditions of 'normal and sufficiently effective competition', i.e. 'workable' competition."

I am going to come back to this point because we say that Dr Kent has taken this too literally in the way that she has approached the test, the case. So secondly:

> "A price which is 'excessive' because it bears no

'reasonable' relation to the economic value of the good or service is an example of such an unfair price.

"There is no single method or 'way' in which abuse might be established and competition authorities have a margin of manoeuvre or appreciation in deciding which methodology to use and which evidence to rely upon.

"Depending upon the facts and circumstances ... a competition authority might therefore use one or more of the alternative economic tests which are available. There is however no rule of law requiring competition authorities to use more than one test or method in all cases.

"If a Cost-Plus test is applied ..."

So then we see that that is one possibility. You do not have to apply a cost-plus test --

THE CHAIRMAN: No, I am not saying that. I think I am saying something different, and it may be that I am wrong and it may be that it does not matter, Ms Demetriou, but I think -- the point I was making is that cost-plus is just a way in which you might test. That is a methodology. That is what they mean by "the method or way" and you are trying to work out -- of course you are trying to work out whether that is unfair. But I thought it was fairly well accepted that, in trying to work out whether it was unfair, two

questions you might ask yourself are, "Is it excessive and therefore can you then decide whether it is unfair or not?". But what you effectively are doing, I think, is eliding the cost-plus test with the excessive question and I am not sure that that is right. That is the point I am making.

MS DEMETRIOU: Well, we say it is right because the overall test is the one at the top in (i), whether it is unfair --

THE CHAIRMAN: Yes, but that does not mean you do not break it down into other questions, does it?

MS DEMETRIOU: Only if you are applying this two-limb test. So the two-limb test is, "Is it excessive?", and that is generally approached in a cost-plus way.

THE CHAIRMAN: The "generally" is the point that I am making. All I am saying -- I am not sure this takes us anywhere materially, but I just -- I just am challenging the point that the only way that you could look at the question of excessiveness was cost-plus and I do not think that is what *Flynn* is saying and I am not sure it matters terribly with the debate we are having.

MS DEMETRIOU: Sir, I think where we part company -- and I am not sure it does matter in this case -- is that, if you are not applying a cost-plus method and you are approaching -- you can see that there is the widest

possible room for manoeuvre in how you go about answering the overall question of whether it is unfair.

THE CHAIRMAN: Yes, yes.

MS DEMETRIOU: I think where we part company is the idea that you need a two-stage analysis of "Is it excessive?" and then "Is it unfair?". Now, that is the way that lots of competition authorities and courts have gone about things, this two-limb test in *United Brands*, but you do not need to adopt the two limbs --

THE CHAIRMAN: Yes. I think you are -- I think 97(ii) does make that point and I think I have to accept that. Anyway, I am not sure it does matter. I do not think it does matter. Let's keep going and see whether it does or not.

MS DEMETRIOU: You see it from the collective society cases, where there is only one stage. They do not look at, "Is it excessive? Is it unfair?" They go straight to comparators to assess whether it is unfair, so that is really the only point I am making.

THE CHAIRMAN: But a comparator could also assess whether that is excessive, could it not?

MS DEMETRIOU: You only really get into this excessive unfair dichotomy, the two stages, if you are following the classic *United Brands* example, but my point is that you do not need to follow that approach.

THE CHAIRMAN: Okay, I take the point and I am not sure it does matter. It is my fault --

MS DEMETRIOU: Here in this case -- where we come to in this case is that the Class Representative has adopted that approach, it has taken a two-stage approach, "Is it excessive? Is it unfair?". We do not say there is anything unlawful about that. That is a perfectly permissible thing for them to do, so it is not -- they have not acted unlawfully in approaching it in that way. But the point we do make is that the first limb -- so they have looked at excessive by reference to costs -- that is completely uninformative in this case, as in other cases involving intangible products, of the overall question that the Tribunal has to answer, which is this case, "Is this price unfair?". So that is the point we make and Mr Piccinin will explain to you. But this came out amply during cross-examination of Mr Holt that actually the profitability analysis tells you nothing about the fairness of the price.

THE CHAIRMAN: I think -- yes. I think the only reason I asked you the question, which set off that hare which has not been particularly productive, I do not think -- certainly not for me because it looks like I was wrong -- but the only reason that I asked you that question was that I was thinking about it in the

framework of limb 1 and limb 2 and it seems to me that the argument about intangibles has been put by the Class Representative under limb 2 and it is convenient -- and it is convenient to think about it, yes. I was just wondering whether you were trying to bring it back into limb 1. That is really what I was trying to --

MS DEMETRIOU: No, I am not at all trying to do that. We say that limb 1 just takes you nowhere in this case --

THE CHAIRMAN: Yes, you are saying you do not need the excessive bit because of the type of the case it is and therefore you are not really very interested in it.

MS DEMETRIOU: Exactly. So I think our very interesting side debate on the law is probably a side debate in this case.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Now, the second proposition that I want to derive from the cases is that Mr Holt takes too literally the references that we have just looked at here in 97(i) of *Flynn* -- too literally the references to conditions of workable competition because neither *Flynn* nor any other case say that it is necessary to hypothesise a competitive market and work out what the price is that would be charged. You only need to think about other cases involving intellectual property to see

that that is so because the copyright cases, the collecting society cases, which of course are IP cases, the courts are not there saying, "Well, we have got to hypothesise a competitive market where nobody is a monopolist and they are all selling these rights to musical works". What they are doing in those cases is looking across at other collecting societies which are also monopolists and drawing a comparison.

Similarly, if you think about pharmaceuticals, say you have a drug that is on patent, you do not say to yourself, "Well, let us imagine that the market is a generic market and there are lots of generic manufacturers manufacturing the same drug", because obviously that is going to bring the price all the way down and that is going to deprive the patent-holder of the rents that they are entitled to for their IP.

So what has gone wrong here, we say, in this case is that Mr Holt and therefore Dr Kent have alighted on these words in 97(i) and applied them in a context where it is inapt to apply them, and I will come back to this point, but that is the second proposition we take from the cases.

THE CHAIRMAN: Just -- when you are -- so you are saying that in those -- and no doubt we will look at them -- but just so I am clear about where you are coming from,

you are saying that, in those cases like the collecting society cases, they are not actually asking themselves the question as to whether it is a price of workable competition?

MS DEMETRIOU: No, they are not. You can think about it in this way. Take *Attheraces*, so in *Attheraces* the Court of Appeal did not say, "Well, let us imagine there are lots of other entities with the same database that the BHB has or that has access to the BHB's database and what price would they be charging if they were all competing with each other?". That would obviously -- if that were the case, that would drive the price down to very close to cost. But they were not saying that because that would ignore the fact that the BHB had its own property which it was entitled to exploit, to monetise.

THE CHAIRMAN: So, then, what is the test if it is not -- because the point about workable competition is that it is the reference point for the benefits; in other words, you are getting something which you would not get if there was a -- whatever "workable competition" means in the particular context. What -- how do you then work out whether it is unfair or not?

MS DEMETRIOU: So then what you have to do is you have to look at other means. So where you have got -- let us

take my example of a non-patent pharmaceutical, so somebody comes along to the Tribunal and they say, "This pharmaceutical is protected by patent but we think that the price that is being charged is unfairly high", so first of all what you do not do in that case is hypothesise about lots of generic companies selling the same drug because that would essentially deprive the IP owner of the fruits of their IP, so you do not do that.

So what do you do? Well, one thing you could do is look at other comparable drugs that are on patent. So you look at other comparable drugs that are on patent and you say, "Well, that is a comparable drug, so what are they charging? Is that higher or lower?", so that could be a way of --

THE CHAIRMAN: But conceptually -- I understand that. But conceptually, what are you doing there? You are actually potentially working out whether the trading -- whether the dominant undertaking is reaping trading benefits which other monopolists are obtaining, so how does that help you?

MS DEMETRIOU: Well, that helps you because what -- that is because you are recognising that -- look at the second point:

"A price which is 'excessive' because it bears no 'reasonable' relation to the economic value of the good

or service ..."

So what you are doing there is that you are saying, "Right, I am looking at this good which is protected by patent and therefore has a value and I am trying to work out if it is -- if the value -- if the price that is being charged is unfairly high". What I cannot do is hypothesise a generic market because that would just be to strip the IP owner of the right to earn their rents, so I need to look at what else I can do. So I can look at comparators of other companies that are in a situation where they also have a monopoly over -- because they hold a patent, so are they charging something which is lower? Does this look unfair on that basis? You have to reach for other evidence. But what you cannot do is wish away the property or the IP. That is really the point.

THE CHAIRMAN: No, I understand. I understand that. I am just not quite sure, as a matter of principle, what the --

MS DEMETRIOU: Yes. Can I --

THE CHAIRMAN: -- test is. I think it maybe is --

MS DEMETRIOU: Can I take it by reference to the authorities?

THE CHAIRMAN: I will let you get on with it.

MS DEMETRIOU: The third proposition is that the reason why

the right approach is not just to hypothesise a competitive market is that the value actually received by customers is relevant to the fairness of the price, so that is another reason why that is not the right approach here.

Then, fourthly, we say that neither Article 102 nor the Chapter II prohibition provide for the Tribunal to act as a price regulator. It really is for the Class Representative to prove that Apple's price is abusively high. So those are the propositions.

Can we turn, please, to *Attheraces*? I do not know when you want to take the break. I am just looking at the clock.

THE CHAIRMAN: I mean -- well, it really probably depends upon how you want to manage the morning, so if that is -- if we break now, then we probably -- when do you think -- how do you want to ...?

MS DEMETRIOU: We are very flexible how we organise things. What do you think would be better?

THE CHAIRMAN: Why do we not aim to finish at 12.45, in which case taking the break round about now would make perfect sense. Then we will start again at 1.45 because that staggers it. Good. Thank you very much.

(11.23 am)

(A short break)

(11.36 am)

THE CHAIRMAN: Ms Demetriou.

MS DEMETRIOU: Sir, *Attheraces*, so {AB3/9}, and could we please pick it up from page 12, {AB3/9/12}?

So just to remind you of some of the facts -- I know you are now very familiar with this judgment, but paragraph 48, we can see that the cost to the BHB of collecting the data was about £5 million a year.

Then if we go on to {AB3/9/14}, paragraph 63, you can see that what was agreed essentially -- that the BHB's consideration for providing the data was agreed to be a 50/50 split with *Attheraces* of the net revenue received by *Attheraces* from the exploitation of its service overseas.

Then can we go, please, to {AB3/9/22}? If you see paragraph 119 at the bottom of the page:

"... has to be borne in mind that, as stated in *Bronner*, the law on abuse of dominant position is about distortion of competition and safeguarding the interests of consumers ... It is not a law against suppliers making 'excessive profits' by selling their products to other producers at prices yielding more than a reasonable return on the cost of production, ie at more than what the judge described as the 'competitive price level'. Still less is it a law under which the

courts can regulate prices by fixing the fair price for a product on the application of the purchaser who complains that he is being overcharged for an essential facility by the sole supplier of it."

We emphasise that last sentence because we say that this is really the vice in Dr Kent's case here. She is essentially coming along and asking the Tribunal to act as a price regulator, to identify a price cap.

Then if we go to paragraph 124, over the page, please, {AB3/9/23}, this records the judge below's findings and he found, you can see, a profit margin of 300%.

Then if we move on to {AB3/9/25}, at paragraph 134, under the heading "BHB's case", so this summarises BHB's argument on the appeal and you can see that what they argued was that:

"... the judge failed to consider the correct test for determining the key issue of alleged excessive and unfair pricing. He applied the test of the cost to BHB plus a reasonable return ... whereas, in determining the economic value of the pre-race data, account should also be taken of its value to *Attheraces* and how much *Attheraces* could make out of the data as a source of income. The economic value of a product is not the same as what it costs to produce. The product is

a revenue-earning opportunity for ATR with profitable billing opportunities for bookmakers. The judge's approach ... was that ATR could keep all its earnings from the pre-race data."

That is essentially analogous to what we are saying here in this case. You can see how that applies, that what Dr Kent is saying is, "Well, never mind these very significant revenues made by the developers. They should keep all of those and it is really you, Apple, who has provided a significant material part of the means for earning these revenues whose price should be capped in some way".

Then we see -- if we go on to paragraph 140, probably on the next page, {AB3/9/26} -- yes -- you can see *Attheraces*' argument there:

"The judge was correct in finding on the facts that the economic value of the pre-race data was no more than 'the competitive price' for it."

And at 141, you can see that *Attheraces* also made the argument made by Dr Kent here:

"The economic value did not mean simply what the consumer is prepared to pay. This approach would undermine competition law."

So that is the willingness to pay fallacy that Dr Kent comes back to again and again.

If we go to page 27 {AB3/9/27}, the analysis of the court starts. Can I just -- you can see paragraph 152. So this is now the Court of Appeal's analysis:

"As laid down in *United Brands* ... the test is whether the price is excessive because it has no reasonable relation to the economic value of the product supplied."

Just here the court is -- sorry, let me just go on. The trial judge, Mr Justice Etherton, as he then was, said that he accepted it was necessary to look at the economic value of the pre-race data, but if we look at paragraphs 155 to 156 of the judgment, if we scroll down, please, we can see that what the judge did not do is consider demand-side value. Instead, he took the view that the value of the product was what he called -- he took the view that the value of the product was reflected in what he called the "competitive price", so you can see that, towards the end of the page:

"The approach was that, in principle, prices are excessive if they 'are higher than would be expected in a competitive market' ..."

So his approach was to say, "Well, you need to look at what would happen in a competitive market and that somehow captures the value of the product". This is precisely what Dr Kent is doing in this case and it is

precisely what the Court of Appeal is saying is wrong.

Now, he established the competitive price by looking at the cost of compiling the database plus a reasonable rate of return. Of course, Dr Kent has that or a variant on that and also has the comparators analysis, so that is limb 2. But our point is that, even in Dr Kent's analysis on limb 2, she has failed to capture the economic value of the product and I am going to come back to that.

THE CHAIRMAN: So here what seems to have happened is that the judge effectively did not do limb 2. Limb 1 was the exercise that was carried out and the judgment was made on that basis.

MS DEMETRIOU: Well --

THE CHAIRMAN: You are saying that, even if you do limb 1, as the Class Representative has done, you have got to do limb 2 properly and that you have got to capture it; is that the submission?

MS DEMETRIOU: Yes. I think it is a little more than that because what the judge did -- the judge said -- so the judge did not stop at limb 1. The judge did go on to consider value, so he said that value was relevant. But what he said here was that the value is captured by looking at -- by positing this question about, "Are the prices what you would expect in a competitive market?",

that somehow captures demand-side value.

THE CHAIRMAN: But then he worked out what the competitive market was from the cost-price analysis --

MS DEMETRIOU: He did, exactly.

THE CHAIRMAN: -- so it is really just a limb 1 analysis, is it not?

MS DEMETRIOU: Well, I think what he seems to have had in mind when he was approaching what is the competitive price is a counterfactual market in which multiple competitors were --

THE CHAIRMAN: Yes.

MS DEMETRIOU: -- were selling the database that the BHB had, and his idea was -- and the reason why he stopped at cost-plus, when considering the competitive price, was that his idea was that, if multiple firms were free to create the same dataset and sell it on the market, the price would come down to cost-plus, so it would come down to a reasonable return on the cost of producing it if you posit that competitive market with lots of other people doing the same thing.

THE CHAIRMAN: Yes, yes, yes, and you are saying that you cannot do that here, in this case, because that ignores the economic value that is particular to Apple and needs to be taken into account?

MS DEMETRIOU: Exactly.

THE CHAIRMAN: So you are saying that is why you make this point about market at competitive levels -- so maybe come away from workable competition and talk about market at competitive levels -- if that is being done by reference to a cost-plus analysis, you are saying, "Well, by definition, that is ignoring the economic value and you have to find a different way of working out what the economic value is"?

MS DEMETRIOU: So we are certainly saying that and we are also saying something a little bit more, which is that, when you think about Mr Holt's entire approach, so the overall question he is asking -- which he does by limb 1 and then going to limb 2 -- the overall question he is asking is, "Is this a price which would be set in conditions of workable competition?", and in asking that question he essentially is hypothesising a market in which lots of people are competing to do the same thing as Apple, except it is not the same thing as Apple because it is excluding from the picture the value of the tools and tech.

THE CHAIRMAN: Yes. You say he has not properly taken into account -- he has not used the right -- whatever the methodology is to assess what the economic value is?

MS DEMETRIOU: Exactly. Then if we go to {AB3/9/32}, we can see the heading "Economic value" and we can see the

BHB's submission at paragraph 186. Can you just remind yourselves what the BHB argued there? Then also at 189, if you can just read 186 and 189 to yourselves. (Pause)

When you come on to paragraph 189, we emphasise as well, "it reflects its revenue-earning potential to the person who acquires it". So we underline -- mentally underline those words and, again, that is what we say is missing in Dr Kent's efforts to prove unfair pricing in the present case.

We then can see from the bottom of page {AB3/9/34} the court's conclusions begin here. So the court found that the judge went wrong on unfair pricing. If we go over the page, please, {AB3/9/35}, we can see that the court agreed with Mr Roth's submissions that you just read to yourselves. At 204:

"The judge correctly stated the law ... that a fair price is one which represents or reflects the economic value of the product supplied. A price which significantly exceeds that will be prima facie excessive and unfair. But the formulation begs a fundamental question: what constitutes economic value?"

Then:

"On the one hand, the economic value of a product in market terms is what it will fetch. This cannot, however, be what Article 82 and section 18 envisage,

because the premise is that the seller has a dominant position enabling it to distort the market in which it operates."

So that is the willingness to pay fallacy that Dr Kent refers to.

But then this is important:

"On the other hand, it does not follow that whatever price a seller in a dominant position exacts or seeks to exact is an abuse of his dominant position."

So what we see from paragraph 206 is that it is wrong to say that whatever price a seller in a dominant position charges is an abuse of his dominant position, but, as I showed you at the very outset, that is essentially Dr Kent's case because she says that a dominant undertaking is ex hypothesi not working in conditions of workable competition and therefore it must follow that the price it charges is unfair.

What paragraph 206 means is that you cannot exclude dominant comparators because the fact that a comparator -- we have lots of examples of this in this case. So Mr Holt, when he comes to looking at the Google Play Store and Microsoft Xbox and Nintendo and the Sony PlayStation and Roblox, all of these other platforms which charge a 30% Commission, Mr Holt sweeps them away and he says -- well, he does not even mention

Roblox, but the others he sweeps away and he says, "Well, we are going to ignore those because they are dominant". But what paragraph 206 shows is that you cannot do that. If you do do that, you cannot say, "Because they are dominant, they are charging an unfair price". The problem is, if you do that -- so if in every case before the Tribunal you have a claimant saying, "Well, you have to ignore Apple's charge and Google's charge and Nintendo's charge because they are dominant", you end up with a false positive. You end up with the Tribunal saying, "Oh, yes, they are all higher than the *Epic* Games Store", which is obviously in a completely different position, "But we cannot look at these benchmarks which show that Apple's Commission is fair because there is an allegation of dominance", and that is simply not the law.

MR FRAZER: Does not 206 say that a price charged by a monopolist may or may not be unfair, it does not mean it is?

MS DEMETRIOU: Correct.

MR FRAZER: But the test is still 97(1) of *Flynn*, is it not? You have to compare it with conditions of normal and sufficiently effective competition?

MS DEMETRIOU: So the -- you are right, sir, to say that it may or may not be, so it may or may not be. Obviously

I cannot say and I am not saying that every price charged by a monopolist is always fair. That is certainly not correct. My point is a different one, which is that you cannot exclude prices charged by monopolist comparators -- you cannot exclude them just because they are dominant and so that would give you a false positive.

MR FRAZER: But if you would exclude them if you thought they were not going to reveal conditions of normal and sufficiently effective competition --

MS DEMETRIOU: Well, that is --

MR FRAZER: -- would you not?

MS DEMETRIOU: That would be assuming that -- so this really comes back to the crux of the problem with Dr Kent's case which I started with, which goes back to paragraph 174 of her written closing submissions. So she says that a dominant firm -- so Apple is dominant, she says. Let us assume that is right -- she says that a dominant firm is not operating in conditions of workable condition. In a sense, that is correct. But if you then say -- well, if you then take paragraph 971 very literally in *Flynn* -- so we are not saying ignore it. Obviously it is the Court of Appeal. But what the Court of Appeal is not saying there is that you have got to hypothesise for every market -- "Well, let us imagine

you have got lots of ports of Helsingborg or lots of BHBs doing exactly the same thing, driving the price down, that is the benchmark". They are not saying that and of course that would be the wrong for the reason I gave you earlier, which is, take, for example, a non-patent pharmaceutical drug. If you were to do that, you would be stripping the patent-holder of the fruits they are entitled to earn as a result of their innovation. So you would not be comparing the on-patent drug to another on-patent drug because on Dr Kent's case you would be saying, "Well, that is not workable competition". You would be comparing it to a generic drug. But that is obviously the wrong approach because competition law does not strip a patent-holder of the right to earn profits on their patent.

MR FRAZER: But that is where economic value comes in, of course.

MS DEMETRIOU: That is where economic value comes in, but that is why you cannot take this -- that is why where Dr Kent has gone wrong is to seize on these words of "conditions of workable competition" and take them to an -- apply them literally and take them to an extreme which was not meant by the Court of Appeal because you then essentially -- for the reasons I have said, you are then ignoring property rights and IP rights and so on.

Then we have -- so we then see paragraph 207, so:

"How is the critical judgment of the economic value ... to be made?"

You can see that they say:

"There is nothing in the [law] ... to suggest that the index of abuse is the extent of departure from a cost+ criterion. It seems to us that, in general, cost+ has two other roles: one is as a baseline, below which no price could ordinarily be regarded as abusive; the other is as a default calculation, where market abuse makes the existing price untenable."

Then if we go to 209, we see the same point. So again, here, the Court of Appeal is dealing with the cost-plus point.

If we go on, please, to {AB3/9/36} and paragraph 212, so:

"Mr Roth's central contention is that there is no reason why the economic value of the product should not be its value to the purchaser rather than cost+, as held by the judge. He instanced the high franchise fees paid by broadcasters for what is no more than permission to operate their equipment from cricket grounds and football stadiums -- in other words a simple licence to enter the property and view a sporting spectacle. If it were, as arguably it should be, for the purchaser to

show that he cannot make a reasonable return because of the price exacted by the seller, failure would mean that the product was of economic value to the purchaser at the material price, and ATR would fail."

Then, at 213, *Scandlines* -- the Court of Appeal refers to *Scandlines* and the Court of Appeal was here endorsing the Commission's approach in that case. Of course, what the Commission did in that case -- there is not time to go back it but you have seen it before -- what the Commission did was say, "Well, here is a port that has lots of valuable features that is very valuable to the people using it and the case simply has not been made out that the price is too high". Again, I say that the Commission did not posit some notion of lots of ports next to each other driving the price down.

Then 214:

"As the expert witnesses ..."

Well, can I just perhaps ask you to read paragraph 214 to yourselves? (Pause)

So what you see here is that the Court of Appeal expressly found that the benefits derived by the bookmakers, by ATR, were relevant to whether BHB's pricing was unfair, so the fact that the bookmakers were doing very well out of taking this data and turning it into a product was relevant to the question of whether

it was unfair.

We say contrast Mr Holt, whose position is that benefits to developers are irrelevant and the only relevant thing is what they would pay in a competitive market. Essentially, if you conduct -- if you superimpose Mr Holt's approach on the facts of ATR and thought about what would happen if lots of people could put together databases containing the BHB's data, as I said, the price would obviously go down to cost, but that is exactly what the Court of Appeal is rejecting here and that is why, as a matter of principle, Mr Holt's approach is wrong in this case.

Then could I just ask you to read paragraph 215 over the page, {AB3/9/37}, to yourselves? (Pause)

What we see here is that, in that case, all the BHB provided was data, nothing else. So obviously contrast the present case, where Apple is in a far stronger, more meritorious position, given the uncontested scope of the very valuable tools and tooling that it is providing to developers. These were data that the BHB had to produce for its own purposes anyway in the ordinary course of its business. It was not doing anything additional for *Attheraces* at all.

All the real work in *Attheraces*' venture, including all the commercial risk, was borne by ATR, yet the court

concluded that a 50/50 split was not unfair. As I say, the present case is a fortiori because it is not the case that the developers take all the risk and it is the case that what Apple is providing is exceptionally valuable. What we have here also -- the development of apps for iOS is in the nature of a joint enterprise between Apple and app developers.

Now, we see the last sentence. To be clear, we are not saying that it is necessary to show distortion in the downstream market -- we are not saying it is necessary in every case -- but that would be an indicator that a price is unfair.

Then could I just ask the court also to have a look at paragraph 216? When you are reading it, you will note that the court said that Mr Roth's, as he then was, submission was more consonant with Article 102; in other words, if that were the value of the product, the supplier could raise his prices to reflect it. (Pause)

Then if we scroll down, we see the same point in paragraph 217.

Then at 218, the court allows the appeal. Just thinking about what that meant, allowing the appeal, so this meant that the price charged by the British Horseracing Board -- that *Attheraces* had failed to show that the price charged by the BHB was unfair.

They had failed to show that. They had failed to show that because they had not accounted for the economic value, the demand-side value -- the economic value to ATR of the product. So they had not accounted for that.

Now, what the court did not say and what Dr Kent is saying here -- what the court did not say is, "Oh, right, it is over to you now, BHB, to value all of that because the evidential burden shifts" and "Oh dear, BHB, you have not valued it therefore your argument about economic value fails and we are going to dismiss the appeal". They did not do that at all. They said essentially it was *Attheraces*' case to make out and they had failed to discharge their burden. So that is *Attheraces*.

My learned friends, of course, say, "Oh, well, it is a very unusual case on the facts because they do not like it". But make no mistake about it, this case is a very unusual case on the facts. This case is an unusual case because you look far and wide to find cases on unfair pricing where what is being provided is protected by intellectual property rights. You look far and wide to see that. So this case is an important case and *Attheraces* -- sorry, it is an unusual case and *Attheraces* is far closer to the facts of the present case than cases about generic drugs.

THE CHAIRMAN: Can I ask you, is there a price at which it would be unfair for Apple to charge? In other words -- and how would we know that? How do you -- is there no -- does your argument mean, according to your reliance on *Attheraces*, that there is no constraint that is provided by unfair pricing on Apple's pricing?

MS DEMETRIOU: No, we do not say that. So, of course, if you were to find that Apple were dominant --

THE CHAIRMAN: Yes, so we are all -- we are assuming this whole argument, assuming that.

MS DEMETRIOU: Of course. Then assuming that, we are not saying that somehow Apple is not subject to the law on unfair pricing. So we are not saying that. So we do say that you have to do a lot more than Dr Kent has done to examine the issue and to prove the case.

So one of the things --

THE CHAIRMAN: Yes, carry on.

MS DEMETRIOU: One of the things that you could do -- I am just coming to the *Latvian Copyright* cases now because that was a case involving IP. So one of the things you can do is carry out a proper comparators analysis, so a proper comparators analysis that accounts for that value. Of course, you have the point that Mr Holt does not account for the demand-side value because he is looking at something more limited, so he is looking at

comparators for distribution and payment services, so that is one thing that could be done.

THE CHAIRMAN: Yes. So you are saying that we could -- one of the ways we could tell would be by choosing a comparator which gave us the right indication of -- whatever the expression is from *Flynn*, but can I -- I know you do not like me using "workable competition" because you say it means something else, but just taking the first subparagraph in *Flynn* --

MS DEMETRIOU: Yes.

THE CHAIRMAN: -- that tells us what the right sense of competition is and the comparators would be the constraint, if you like, on the pricing?

MS DEMETRIOU: Yes, so -- yes. So, for example, you could look -- so can I just make -- approach it in two stages?

THE CHAIRMAN: Yes, of course. Yes.

MS DEMETRIOU: So, first of all, of course, this is not simply a burden of proof point, but the burden is on Dr Kent to prove the case, so the Tribunal's role is to say whether the case is made out or not, and the reason I took you to the paragraph saying that it is not for the Tribunal to act as a regulator is that, in a sense, your task is a binary one, so: has, on the basis of the evidence that Dr Kent has adduced, proved -- has she proved that this is an unlawfully high price? The

answer for the Tribunal is either "Yes, for these reasons" or "No, she has not for those reasons". So you do not have to go on -- maybe this is an obvious point, but you do not have to go on and say, "Well, we think this would have been the fair price". In fact, you should not do that". That is not the task of the Tribunal.

THE CHAIRMAN: No -- well, except when we come to deal with it when we come to quantum, of course, but ...

MS DEMETRIOU: Well, no, because if Dr Kent has -- well, yes, subject to that point. So Mr Piccinin will deal with that point.

THE CHAIRMAN: Yes, but I absolutely agree and accept that that is a distinct exercise and --

MS DEMETRIOU: It is a distinct --

THE CHAIRMAN: -- it is not necessary -- I am not sure whether it is something we should not do, but in fact I think because it is -- it is sort of this -- it is part of the point of the comparator exercise, is it not? Put that aside for a moment. We do not need to worry about that.

MS DEMETRIOU: If the question to me is, "Well, are you saying that a claimant could never come to court and prove that someone in the position of Apple's price is unfair" -- if that is --

THE CHAIRMAN: I think I am probably asking you a variation of the question I was asking before, which is, "What are we actually looking for here if it is not the cost-plus market?" I mean, you are saying that we should not allow -- I mean, Dr Bishop made a reference a bit earlier on in the retiring room to -- that we found that, well, he was a price-taker, a hypothetical price-taker, and so you are saying to us, "Do not get yourself into that situation", that that is not what we should be doing here. Instead, we should be looking at some other paradigm to determine whether it is a proper functioning market with proper competition in it. I am asking you how do we do that. That is really the question.

MS DEMETRIOU: So I think the way -- we submit the way that you should approach it is to look at all of the evidence in the case in the round and ask yourself, on the basis of all that evidence, whether Dr Kent has made out her case. We say that when you look at the evidence -- that evidence includes the fact that -- the 2008 story, if I can put it like that, so the fact that the price was set in conditions of workable competition back in 2008. So that is an important indicator that this is a fair price, that it was set at a level below the price of Apple's competitors. So that is point 1.

Point 2 -- and I am going to kind of circle back to these submissions once we have gone -- once Mr Piccinin has had a turn as well -- but point 2 is that Mr Holt's comparators analysis should be taken with a very large grain of salt because it does not account for demand-side value.

Point 3 is that, even leaving that important point aside, he says that Steam is a competitive -- he says that the PC games market does demonstrate conditions of workable competition. I will show you that in his report when I come to it.

THE CHAIRMAN: Well, you are sort of drifting into criticism of his case and I was actually asking you a slightly different question, which is: if you did not do it that way, how would you do it?

MS DEMETRIOU: Yes, so looking -- I am showing you the evidence which is meaningful. So we would say that Steam is charging a rate at or even slightly above Apple's. Then, when you look at the other comparators, such as Nintendo and Sony and Microsoft Xbox, which are also providing tools and tech, they are charging 30%. When you look at all of that evidence in the round, that shows you that Apple's price is a fair price, so that is how we say you should look at it.

DR BISHOP: Can I just ask a question? You have pointed, of

course, as everyone has, to the willingness to pay fallacy and we all understand that and accept that. You have been pointing out -- you have been characterising Mr Holt's approach, the cost-plus approach, that could be called the price-taker fallacy, the hypothetical price-taker fallacy; in other words, that the -- the firm has no power whatever. It just has to accept whatever the market price is.

MS DEMETRIOU: Yes.

DR BISHOP: Now, there is a lot of intermediate stuff and most of life is about the intermediate stuff, where firms have a little bit of pricing power and there is lots of economics on it of imperfect competition, monopolistic competition, differentiated products, a lot of that. Could we characterise the submission you are making as this, that the comparators -- and maybe the concept of workable competition -- but certainly the comparators should include cases of imperfect competition which are short of monopoly? Is that one way of characterising it?

MS DEMETRIOU: We say they should at least include that and that those are all being excluded by Mr Holt so you get a skewed picture.

DR BISHOP: Yes, they are excluded by the price-taker approach, that is correct.

MS DEMETRIOU: Exactly.

DR BISHOP: So this is something, however, which is not well worked out in practice, of how you would do a comparators in the -- if your aim is to include people who have a little bit of market power -- might have a little bit of market power, normal as to -- for the workable market power, but not very much -- if that is it ...

MS DEMETRIOU: The reason that I wanted to take you next to *Latvian Copyright* is that that is a case which involved obviously a dominant undertaking, a monopolist, collecting society and the approach there was to look at other monopolists doing the same thing and so that was the right approach in that case. That is why I want to take you to it, to show you.

So could we go to {AB4/24/1}? If we start at {AB4/24/3}, paragraph 7, so you see that the collective -- the collecting society has handled copyright for musical works. At paragraph 9, you can see that it set rates by reference to the size of the shop, so obviously nothing to do with the costs incurred in producing the works. Rates were two to three times higher than in other Baltic states and, if we look at paragraph 10, they were 50% to 100% higher than in 20 other member states.

Then if we go to {AB4/24/7}, paragraphs 35 to 37, can I just ask you to read those to yourselves, please? (Pause)

In that case, what was -- it was appropriate to conduct a comparison of prices charged by similar undertakings, so similar collecting societies that were monopolists in other member states. You can see at paragraph 38 the court said that that was valid. Again, we say that that is highly relevant to the Class Representative's argument that you need to eliminate the prices above a dominant undertakings, and so coming back to Professor Bishop's question, it bears upon that question. Of course, those other collecting societies were doing the same thing. They were collecting royalties in respect of IP rights.

Then if we go to paragraph 41, {AB4/24/8}, the court said that the comparison must be on the basis of objective criteria, and then we see, at paragraph 44, that it must also be made on a consistent basis.

Then if we go over to {AB4/24/9}, the court looks at what sort of differences -- this is under the heading "The fifth and sixth questions" -- what sort of differences indicate an abuse. So when you are carrying out a comparators analysis, is it just a little bit extra that would be abusive? The court says "No". They

say at 53 that the difference -- that the undertaking that you are looking at must be imposing fees which are appreciably higher than those charged in the other member states.

Then, at paragraph 54, the court noted that the differences here between member states, including some that were 100% lower, were not as great as those in other cases that had come before the court.

Then at paragraph 55, {AB4/24/10}, the court found that that does not mean that they were not necessarily abusive. It all depends on the circumstances.

Then 56:

"It should be emphasised in this regard that ... the difference must be significant for the rates concerned to be regarded as 'abusive'. Furthermore, that difference must persist for a certain length of time and must not be temporary or episodic."

Then 57:

"... these factors are merely indicative of abuse ... It may be possible ... to justify the difference by relying on objective dissimilarities ..."

Then let me just show you one passage of the Advocate General's opinion. I showed you some of this or you have seen some of this, I think, before, but if we go to {AB4/21.1/10}, could you just read paragraph 63

to yourselves? (Pause)

Just pausing here and looking at that first point, the capacity and willingness of the customers to pay for the service received, of course what my learned friends say is, "Ah-ha, that is the willingness to pay fallacy". But the problem is that, yes, you have got to be on your guard for the willingness to pay fallacy so the fact that somebody is willing to pay a price does not inevitably mean that the price is a fair one, but at the same time it is obviously relevant that the customer is prepared to pay that price and obviously in circumstances that is relevant when they themselves are gaining very significant revenues, which is what we see -- we saw in *Attheraces*.

Then if we look at paragraph 68, {AB4/21.1/11}, this is when you are comparing -- when you are carrying out a comparison:

"... any meaningful difference between the [comparators] ... should be accounted for."

Because you need to do the comparison on a consistent basis and make necessary adjustments. So, again, we say that that is important here in two contexts, really -- well, more than two contexts.

The first is -- of course, we have our very big picture point, very fundamental point, which is that

simply pointing to the *Epic* Games Store and Steam and any of these comparators is not like for like, because they are not providing the tools and technology. So that is point number 1.

Point number 2 is that when you are -- even leaving aside that major point, even when you are -- when you are comparing rates, what you cannot do -- and I will come back to this, I covered it yesterday -- is look at Steam's lowest rate and say, "Oh, well, that is lower than Apple's 25% rate". You do need to be comparing like with like and it is a point I made yesterday.

Point 3 is really Professor Bishop's price-taker point. You do not look at the fringe, the *Epic* Games Store and itch.io, and say, "Well, that is what Apple should be charging", because they are obviously in a completely different situation.

So, sir, that is what I wanted to say about the law. I was going to hand over to Mr Piccinin to deal with limb 1 and I was going to come back. It may be that when I come back I can be extremely short given the way that our -- the exchange has developed, but I will pass over.

THE CHAIRMAN: Thank you.

MR PICCININ: Yes, Mr Piccinin.

Closing submissions by MR PICCININ

MR PICCININ: Ms Demetriou has billed this as "The limb 1 session". I think a better heading for it might be "The profitability section", because my first topic on profitability is actually going to be whether -- by looking at the profitability analysis, can we tell whether the profitability analysis can actually help you at all to decide this case, and that is really a question about whether it helps you at limb 2 to decide whether the price is a fair one or not.

I would like to borrow a term, if I may, from Dr Barnes, who introduced it to the case, which I think is a useful one, which is a "diagnostic tool". The question I am really on here is whether the profitability analysis that Mr Holt has done, with help from Mr Dudney, is at all a useful diagnostic tool. Can it help you -- not determine, but can it help you to spot the difference between a fair price and an unfair price and even -- I am going to be operating essentially within Dr Kent's framework -- can it even help you spot the difference between a competitive price and a monopoly one in Mr Holt's framework, because our submission is that, if you take the two-limb approach -- and no shade on Dr Kent for taking a two-limb approach, that is fine -- but if you do that and then you do the

profitability analysis at limb 1, get over the hurdle, but you find that, because of some feature of the market or because of some assumption you had to make when you did the profitability analysis to get through limb one. If you find that at the end of the day you cannot move the dial at limb 2, then we have to ask: why did we do the limb 1 analysis at all?

Obviously it would be different if you put forward a case on limb 2 by reference to other evidence comparators and that sort of thing and the defendant turned around and said, "Yes, but at what you say is a competitive price I would be unprofitable". That would be different. You would then have to look at that and that is what actually happened in *United Brands*, if you go all the way back to that. But that is not the situation we are in in this case.

Dr Kent has decided that this is the way she wants to do it, which is fine, but we say -- our submission is that what she has discovered at the end of the trial, when Mr Holt gave evidence, is that it actually cannot help you at all to move the dial in limb 2.

THE CHAIRMAN: I am just a little bit confused about it, and I am sure it is my fault, but if we are in the Class Representative's world of two limbs, then you do the limb 1 approach and I think you are not talking

about that at the moment --

MR PICCININ: That is right. I am not.

THE CHAIRMAN: -- particularly. You are saying that it has been done and rightly or wrongly you ended up with some number. But the point of doing that, I think, is to give you some measure of just how much money -- how much profit is being earned for that activity, that is really all it does, and if you get through that hoop -- if you did not get through that hoop, you would not go and look at limb 2 -- if it turned out not to be a very exciting price, that you would not need to think about -- a very exciting profit, you would not need to think about limb 2. There is then a question, is there not, which I think you are driving at, which is, once you are in limb 2, firstly -- well, two questions really, I think, coming out of what you were saying. The first one is: to what extent do you go back and look at the profitability to help you decide unfairness --

MR PICCININ: That is it.

THE CHAIRMAN: Yes. Then there is a separate question which I also think you were driving at, which is: once you take into account all the other things we have just discussed with Ms Demetriou in relation to limb 2, do you get to it or not? I was not quite sure -- were you saying something about that as well? It is just where

you -- I just was not quite sure why you were saying that there was any need to have gotten to limb 2 at all. The whole point about being in limb 2 is that you passed limb 1. You might fail in limb 2. That may be my fault, but I could not quite understand where that was going.

MS DEMETRIOU: As Ms Demetriou showed you earlier, you do not actually have to go through limb 1, but I --

THE CHAIRMAN: No, but we are doing it in that way, are we not, and I think, if you are doing it in that world, we have done that, we have decided -- and you may come back and have some things to say about it -- but let us say for argument's sake we decided that there was a very big profit, whatever it happens to be, and so we are on to limb 2, and now you are asking us to think about how useful is that first bit of information as part of the contextual analysis on limb 2.

MR PICCININ: The point is really the first one that you summarised, which is that does it help you --

THE CHAIRMAN: Does it help us once we are into a limb 2 analysis.

MR PICCININ: -- because the submission that they have made and that it is common to make in these limb 1 and limb 2 cases is that, because the profitability is significant and persistent, that is a factor --

THE CHAIRMAN: Yes, it is a factor, exactly.

MR PICCININ: -- that can move the dial in limb 2.

THE CHAIRMAN: Exactly. That is helpful. Thank you.

MR PICCININ: That is what I am trying to deal with.

THE CHAIRMAN: That is all very helpful. Thank you.

MR PICCININ: So what I am going to do first is show you the basis for the submission that it cannot and I am going to do that by reference to two pieces of the profitability analysis that are related to each other and those demonstrate themselves that the profitability analysis is incapable of contributing to the answer once you get to limb 2.

The second thing I want to do, I want to explain why economically that is the case, so what are the economic features of this case that actually meant it was always pre-ordained from the start that this was a hopeless enterprise if they were trying to get any help at the limb 2 stage.

Then, if I have time, which I fear I probably will not, I will say something about limb 1 as well, but I fear we are not going to get there. But you can understand why I might not prioritise that, given what I have said if it does not help you at limb 2.

So the first topic: which pieces of the profitability analysis show that profitability cannot

help you once you get to limb 2?

The first and most glaringly was Ms Demetriou's point that she made a number of times through the trial, that the ROCE as calculated by Mr Dudney is just way, way, way above what Mr Dudney says the WACC is, even in a counterfactual where Apple charges the commission that Mr Holt says is competitive.

Now, you have seen this lots of times, but let us do one more for the road. So if we go to {C2/9/8} -- so this is from Dudney 2 -- and the supplemental report. If you just look at table 2, these have the ROCE figures that would be associated, he says, with the 10% commission rate. You can see that even those, at a 10% commission rate, are three-digit numbers.

Table 4, at the bottom of the page, I think, has the numbers for the 15% commission rate. One of those -- no, two of these are actually getting above 300%.

Then, over the page, {C2/9/9} we have table 6, which is the 20% rate, which, remember, is also in Mr Holt's competitive range. Here we have numbers that get as high as 381% in FY22.

Now, I do not know -- you do not get prizes but I do not know if anyone remembers my cross-examination of Mr Dudney on all of this, but he accepted that actually -- that this is a funny point for me to make,

that these numbers are too low, these ROCE figures; that, actually, using his methodology properly and doing a revenue allocation, if Apple had actually charged a 10% or 15% or 20% commission, you would actually get much higher ROCE numbers than these. That is because with the less revenue you would get less OPEX, and, contrary to what Dr Kent keeps saying, less OPEX therefore means more profits. Then, on the denominator of the ROCE calculation, again you are going to get less capital employed allocated to the App Store because he does a revenue allocation again then, so that makes the denominator small, so both the numerator and the denominator would actually have been shifted in ways that make the ROCE figures higher.

So if he had done this exercise of using his own methodology faithfully, he actually would have ended up for all of these, particularly for the 15% and 20% numbers, with ROCE figures that are much closer to what he actually finds in the real world with Apple's 25% commission.

I will just give you a reference. This actually -- my proof for this point came from the equations for Dudney, but I will just give you a reference to the transcript where we discussed this. It is {Day12/202:10-16}. He accepted -- he had not run the

numbers so he had not actually applied his methodology properly to figure out what the ROCEs would be if you did this at 10, 15, 20, but he accepted that it could be the case that his methodology, applied properly, would lead to similar answers. I think he could see the logic of what I was putting to him with the equations.

Now, Dr Kent now says -- and Mr Ward said this -- that, "Oh, this is fine. This just shows that their analysis of what the competitive price is, the 10% to 20% range, is conservative". But sir, that will not do. The ROCE is way above WACC even with a 10% commission. If the App Store continues to grow, then before long the ROCE associated with the 10% commission or even an 8% commission is going to be similar to the levels that today they are saying are unfair at a 25% commission.

DR BISHOP: Are you saying that -- let me see if I understand this. Let us suppose the commission were driven down to something extremely small, 5% or something like that, you might still get a ROCE way above the WACC?

MR PICCININ: If you have the inclination to ever go back to the equations for Dudney, you can work this out by just plugging it in, but the answer is that there will come a point where you have gone so far down that the gross margin collapses. If the gross margin collapses, that

is the only time you are really going to start moving the dial.

I was going to come on to this in the limb 1 thing, but what I show -- I may not going to get to it so I will just give you the answer -- is that all these ROCE numbers tell you is what the gross margin is. They do not tell you anything else about --

DR BISHOP: I understand the general argument anyway.

MR PICCININ: So I say: what are they really saying? What is the true non-conservative answer to this whole case? Is it Mr Ward's 3%? You have to be joking. So that is the first piece of analysis that shows this is just not a diagnostic tool.

THE CHAIRMAN: Well, diagnostic for what purpose?

MR PICCININ: For limb 2. That is what I am on.

THE CHAIRMAN: So you are not saying it is not diagnostic for limb 1 when he does the analysis of 30%?

MR PICCININ: No, I have that submission separately.

THE CHAIRMAN: Exactly. You are going to -- yes, fine. You are going to tell us why -- or have you told us why economically it is his case or are you going to tell us?

MR PICCININ: I am going to tell you.

THE CHAIRMAN: I am trying to work it out. I will not ask you the question. I will let you tell me.

MR PICCININ: Before we do that, the second piece of

analysis that gives the game away is the one that I got to discuss with Mr Holt. Let us do that again quickly, so {C2/10/86}. You can see the level of profitability achieved in the relevant markets at the bottom.

If we go over the page, {C2/10/87}, you can see in 225 that he tells us that, with a 15% commission, there would be cumulative profits over the claim period of 31 billion and he says that that "could be argued to represent the 'fair'" -- not a "conservative" -- "the 'fair' degree of Producer's surplus".

Again, I do not know if anyone remembers, but the thing about this that was funny was that poor old Mr Holt had got his arithmetic wrong. If we go back to page {C2/10/74}, you can see this, because at the top of the page, table 5.7, this is where it comes from. What he was meant to be doing was adding up the penultimate line, that is the excess profit for the 15%, and when he did that and he got to 31, he basically dropped $12 billion down the back of the sofa and he should have got to 43.

I do not criticise him for that. It is an easy mistake to make. We have all been there, I am sure. But the point is that he then had to say that, "It is not $31 billion that is the fair producer's surplus. Oh, it is actually $43 billion. Never mind". Then

I said to him, "Well, yes, but what about the 20% then? If you add up the bottom line, you get to, like, $67 million-odd and so that must be fair too".

Then we also discussed the fact that, if you take the 15% commission, so you stick to the mid-point of the range but look at the next eight years instead of the last eight years, even assuming no growth at all -- do you remember I put to him eight 8s -- 8 times 8 is 64? If you take the last year and multiply that by another eight years, you get $64 billion, so that would be the fair level of producer's surplus.

I will just give you the reference for this in this in the transcript -- we will not go over it -- but it is {Day19/99-104}.

But the point that I was trying to illustrate is that Mr Holt does not have and he did not pretend to have, to be fair -- he does not have some kind of special economist's Geiger counter just to kind of point at a level of profit or excess profits above WACC and say, "Oh, is this fair or unfair? Beep, beep, it is unfair". As he rightly said, my questions to him had it backwards.

What he did is he relied on the comparators and he relied on the surveys and all the good things that Ms Demetriou is going to talk to you about to identify

what the fair price is or the competitive price is, and then whatever number pops out of the profitability calculation at the end of that is ipso facto fair.

What that tells you is that all of this analysis here is just meaningless. It does not help you at limb 2. It does not help you to tell whether the price is a competitive one or not.

So ultimately Mr Holt accepted that, that the profitability analysis -- although he had actually relied on it in limb 2, "persistent and unfair" -- sorry -- "persistent and significant" -- he accepted that his profitability analysis, it could not move the dial. The most he could say for it was that if you are unsure about all the other evidence, then this might help you to tip one way or the other. I will just give you the reference for that as well: {Day19/107:9} through to, over the page, {Day19/108:8}.

But my submission on that is twofold. One is that we are not in that corridor of uncertainty here, where the profitability analysis might help. That is the first point. But the second point is, imagine that you were for a moment in that corridor of uncertainty, what would you do with the profitability analysis? How would it help? The answer is, if you do not have it -- a special economist's Geiger counter, there is not much

you can do with it because you cannot say -- Mr Holt will look at 30, 40, 60, 100, any number you like, and you can call it "fair" or "unfair" only because of the comparators analysis and the surveys and all of the other limb 2 stuff that he looks at.

Now, my learned friends just completely failed to deal with this submission in their oral submissions and that is because there is no answer to it. So why? Why is it so? Economically speaking, why was this always going to be the case once you do the work?

I have got three reasons why, and, to be fair, Mr Armitage did try to deal with each of these three reasons so I will try and pick up his answers.

The first one is that a key question on economic value in this case, as everybody knows by now, is how much value Apple's intangible assets are providing to developers. Which intangible assets? Well, specifically the innovations and its trusted brand. Those are the two I hang my hat on in the profitability stage. But for both the innovations and the brand, Mr Holt's profitability analysis is just incapable of shedding light on what that is worth. It only gives us credit for what Apple's R&D and marketing, for example, cost, but cost is no guide to the value of intangibles.

I just want to emphasise here, because it was not

clear to me in the discussion yesterday or the day before yesterday, when Mr Armitage -- Mr Ward were making submissions -- it was not clear to me whether it was clear to them or to you, the Tribunal, that this is also true -- the criticism I am making is also true of Mr Dudney's sensitivity in which he capitalises Apple's R&D expenditure because that capitalisation exercise is obviously capitalising the costs, so all it is doing is giving us some credit in the balance sheet, the denominator, for the cost of Apple's R&D.

I think I should just show you this passage of cross-examination of Mr Holt because he confirmed that, and he was quite careful in his answer. So it is {Day19/128:1}, if we can just get that up. So I put to him, at line 10:

"Question: Your ROCE numbers ... just give Apple no credit at all for its intangible assets beyond what it cost to create them."

He thought about it and he said:

"Answer: That is not -- [then he says] I think that is true. So in the first -- in his base case [that is without the capitalisation] he treats all of the R&D as expense, but the R&D is treated as a cost. In an alternative case, he has considered the treatment of all of that R&D as an intangible to go on the balance

sheet, but I would agree that the amount of those intangibles is related to the cost incurred. So if your point is that your -- so I think we are agreeing with that, as a matter of fact, as to what he did."

Then there was a debate about whether that was the right thing to do or not, but there is no debate about what the profitability analysis shows you.

The point here is that the ROCE calculation, as you know, is profit divided by capital, but if you are not counting the assets that are actually being used that are needed to generate those profits, then you are massively inflating your ROCE figure and that is what is happening here.

The consequence of this is that Mr Holt's profitability analysis is just useless once you get to the limb 2 stage. It just does not matter how big the excess is or how persistent it is because it is not addressing a critical part of the question that you need to answer in limb 2, which is: what is the brand worth and what is the IP or the innovation worth?

Now, that is the -- Dr Kent's counsel just wants this -- I should deal with that briefly -- it was to say, "Well, Apple has not put forward any valuation of its IP or its brand". My learned friend Ms Demetriou is going to deal with this further. All I do really want

to say at this stage is that what we have done is more than enough to establish that Apple uses IP to generate App Store revenues and that it has a trusted brand. You can see that on page 126 of the same day, lines 8 to 14, {Day19/126:8-14} Mr Holt fairly agreed with that. So we say that, having established that there are significant economic features of the case or, rather, that these are significant economic features of the case, it is actually Dr Kent who has the burden of proving that.

Also, they are the ones that are trying to tell you that you can use the profitability analysis to do this, to shed some light on limb 2. We are not the ones who say that that is something that is possible. They say it is. Well, if they want to say it is, they are the ones who have to go away and do the work, and they just have not done it.

The other point is that the most obvious and the most conventional way to value IP assets or brands is with market values. Then obviously that gives rise to a potential circularity, although I do not know if you remember, but Dr Barnes tried to deal with that in a way that I thought was useful. But ultimately I do not want to go over any of that because we are not saying to you -- the point of that was never to say, "Well, you have to use those market values in order to do

a profitability analysis at stage 2 and here is where it takes you". What we were trying to say is that, if you look at those market values, you can see that they are massive -- like, we are talking about -- orders of magnitude, we are talking trillions of dollars and yet Dr Kent is giving us zero for them. So all we are trying to show you is that this is a big gap and that is why you just cannot use this material at limb 2. So that is my first reason.

Reason number 2 is that a key -- another key economic feature of Apple's products is that they form an integrated, two-sided ecosystem. It is not just the App Store that is a two-sided platform. The device is connected to it in a single ecosystem and gives rise to those two-sided network externalities as well.

So what do I mean by that? I mean that the costs that Apple incurs on the device increased the value of the apps and the costs that Apple incurs on distribution of apps, as well as on the tools and technologies needed to make them, increased the value of the device. Mr Holt accepted that. It is on page 108, so {Day19/108:12-19}. In those circumstances, I say it does not matter whether the App Store is, from a management perspective or an accounting perspective, a separate business unit. From an economic perspective,

it makes no sense at all to analyse the profitability of the App Store on a standard, stand-alone basis because there is no principle of economics that says that there should be any particular link between the costs that you incur on one side or in one part of a two-sided platform and the prices that you charge on that side, the revenues.

THE CHAIRMAN: Is it really -- that is not really a two-sided platform, is it, where Apple has two products that have dependencies? That is not a two-sided platform, is it?

MR PICCININ: It is part of a two-sided platform. What I was --

THE CHAIRMAN: Well, can we just be a bit more precise because I do find this quite confusing. There is clearly a two-sided platform here, which is the matchmaking platform, but I do not think you are talking about that, are you, the matchmaking platform?

MR PICCININ: The point I just made to you was that the costs that Apple incurs on the device create value for developers.

THE CHAIRMAN: Well, you do not say that, actually, I do not think, unless I have missed something.

MR PICCININ: I think I did.

THE CHAIRMAN: Well, in that case I -- if you did, I missed

it. Okay, so you are --

MR PICCININ: What I said was that the costs that Apple incurs on the device increased the value of the apps and the costs that Apple incurs on the distribution of apps, as well as on the tools necessary to make them, increased the value of the device.

THE CHAIRMAN: Yes, I do not think you did say "developers", just in my defence, but -- I understand if you are saying developers, but then it is just a manifestation of the matchmaking, the two-sided market, is it not?

MR PICCININ: No, it is beyond that, sir, because it is -- sorry -- it is -- the fact that you have distribution of third party apps, that is why you end up with a two-sided market, that is true, but my point is that if the costs -- perhaps forget the terminology of two-sided markets --

THE CHAIRMAN: Well, that is possibly the best thing to do.

MR PICCININ: I am getting that. Just let us put that to one side and just back to the point I was just saying, which is that costs incurred on the device create benefits for developers and create benefits to everyone in terms of the apps; costs incurred on the app side create benefits and increase the value of the device.

THE CHAIRMAN: Yes. I mean, that is because it is an after-market, is it not? That would be the same as

any after-market, would it not?

MR PICCININ: Well, maybe, sir, but there is more to it here because the after-market is two-sided.

THE CHAIRMAN: Yes. Okay. That is fair. Yes, I see that.

MR PICCININ: So the point that I was putting to Mr Holt is that, where that is true -- so where it is the case that you have these interconnections between costs and revenues of these different activities, it is no longer sensible to try to look at the profitability of just one unit that looks at just one part of it in exclusion from the other. That is because there is no principle in economics which says that your prices should be cost-reflective on that side. You will remember the cross-examination by reference to Amex, but perhaps I do not really need to go over it because I am going to find myself saying the words "two-sided" again and I want to avoid that. So that was the second reason.

The third reason -- sorry, I should just say that Mr Armitage did not really defend what Mr Holt said in answer to that question when I was cross-examining him because what Mr Holt said is, "Yes, it would be wrong to analyse the profitability of the acquiring business of Amex separately from the issuing business of Amex", even though, pausing there, you might say that the acquiring business is a business unit. But Mr Holt said that it

is common practice among competition authorities and the focal product in this case is the App Store and that is why we are doing the App Store. I say that is just unprincipled from an economic perspective.

As I say, Mr Armitage did not defend that. What he said instead is: do not worry about this point, because Mr Dudney has saved us, he has already done the job of allocating some R&D over from the device side of the business, because it is just coming all from one big pot of R&D, and that is true. But that is exactly the exercise that Mr Holt agreed we should not do for the acquiring business, that you -- if you do a costs allocation exercise where you take some of the common costs of Amex and allocate them to the acquiring business, and that is what you should not do, because you have to look at it all. Looking at it holistically does not mean you look at 5% of it that you have done through some little accountant's cost allocation methodology. Doing this properly, as an economist, involves looking at the business as a whole, because you cannot distinguish between them.

THE CHAIRMAN: Just with the Amex example, I am prepared to accept Amex is a two-sided market -- I am prepared to accept that -- but that is because it is a two-sided market. There is no other systems market in there, is

there? It does not have the -- does it, or are you going to tell me it does have the additional feature of the device. Why is it a useful analogy?

MR PICCININ: You might say -- I do not know -- what could you say about the lending business of Amex, as to whether that is one-sided or two-sided. I would say it is all connected and you have to look at it all together.

THE CHAIRMAN: Because here, there is no question -- no one is trying to say you should not look at both sides of the matchmaking two-sided market, because that is -- we are looking at that. That is the whole point.

MR PICCININ: I agree with that.

THE CHAIRMAN: So is that not the equivalent of looking at all of Amex?

MR PICCININ: No, because you are only looking at part of it. You are not looking at other costs that Apple incurs that are relevant to the revenues that are being earned on that side. You just cannot separate them economically.

THE CHAIRMAN: So if, for example, Amex had a -- now this is really going to be stretching the analogy -- but if Amex had a huge hotel business --

MR PICCININ: No, that would not be similar.

THE CHAIRMAN: Because ...?

MR PICCININ: Because it is unrelated.
THE CHAIRMAN: Well, it is not unrelated because they are encouraging people to go and use cards in their hotel. You can see there might be some network -- well, you might be -- all I am putting to you is that if you have got a two-sided market and the operator of the two-sided market has an ancillary business which has got network effects, then you are saying that you always need to take those into account. That is the proposition.
MR PICCININ: I think if they are strong enough, then --
THE CHAIRMAN: When your market definition is -- is the matchmaking market, the two-sided market.
MR PICCININ: I mean, Dr Kent, of course, accepts repeatedly that the point of the App Store is to help sell the devices; so this is quite a strong case of those kinds of network effects and interactions. But in any event, this is a second order point, sir, and I am mindful of the time.
THE CHAIRMAN: Yes, of course. Sorry, it is my fault. I am --
MR PICCININ: No, it is not your fault at all.
THE CHAIRMAN: The trouble is that it is interesting, so I cannot resist it.
MR PICCININ: All I am trying to do here is give you the reasons for the result that we have already seen. In

some ways, the reasons do not matter. The result is what --

THE CHAIRMAN: That is helpful, thank you.

MR PICCININ: The third one is that this is a market where the service that Apple provides is reproducible at very little incremental cost in -- I say "very little"; I mean, in the scheme of things, obviously. It is a lot of money, but not relative to the revenues, it is not.

In that setting, once you have incurred the fixed costs, the question of how much profit you earn is just driven by the extent to which your customers choose to use your service.

THE CHAIRMAN: So it is a high margin business, basically, is the point?

MR PICCININ: Yes, exactly. So just like King can earn billions from Candy Crush, if lots of people choose to play it persistently and significantly and over a very long period of time, I think it sold for $6 billion or something like that; the same is true for Apple, even in a competitive market like mobile gaming. That is why, in the data that I showed you before, when I was just showing you that it is true that profitability is not a diagnostic tool, Apple's excess profit above WACC just keeps growing over time, as more and more consumers and developers make more and more use of the App Store.

THE CHAIRMAN: Or to put it another way, as I think Dr Bishop elicited in his question, you only really see a change in that relationship between the allocation of OPEX and the gross margin, when the gross margin gets down to a level which is much closer to the OPEX. While it is so much bigger, it is always going to be relatively insensitive.

MR PICCININ: The gross margin is between zero and 1, or between zero and 100%, if you prefer; so it is not about getting close to OPEX, it is about the gross margin getting close to zero.

THE CHAIRMAN: Yes, I -- yes. Well, exactly, yes. No, I understand, yes.

MR PICCININ: This is a business that is inherently, unless it is operating at very silly prices, going to be a high gross margin business. I put that to Mr Dudney and I think he agreed with me.

So those are my submissions on the important thing. We have got to after quarter to. I do not think it is a good use of anyone's time for me to talk to you about limb 1, in circumstances where it is incapable of moving the dial at all on the outcome of this case. So that is where we are going to ...

Oh, yes, sorry. We have written submissions on that, yes. It is in appendix 5 or 6 or ...

An appropriately numbered appendix.

THE CHAIRMAN: Yes.

MR PICCININ: I think that ...

(Pause)

THE CHAIRMAN: Very good, thank you. That is very helpful. So we are done on limb 1. Ms Demetriou is going to do limb 2 after lunch. Do you want to start at -- I mean, I am not going to start a lot earlier, but if you want a little bit of extra time, that is probably the last bit you are going to get.

MS DEMETRIOU: I am going to be very short on limb 2, because I have made most of my submissions, so I think it is really for Mr Piccinin as to whether he -- I think we are probably on track. We are on --

THE CHAIRMAN: Good, okay. So we will start again at 1.50.

MS DEMETRIOU: Thank you.

THE CHAIRMAN: Thank you.

(12.51 pm)

(The short adjournment)

(1.50 pm)

(Proceedings delayed)

(1.54 pm)

THE CHAIRMAN: Yes, Ms Demetriou.

Closing submissions by MS DEMETRIOU (continued)

MS DEMETRIOU: Sir, I am turning to limb 2 and I think I can

take this relatively briskly.

Mr Holt's approach, of course, was to conduct a comparators analysis to seek to work out what Apple would charge in conditions of workable competition. Now, Mr Ward said in his submissions -- he started his submissions by saying that there was much more to it than the comparators analysis and he referred you back to paragraph 263 of Mr Holt's third report, so I would like to go back to that, please, so {C2/10/97}. So the paragraph is paragraph 263. Can we go over the page, {C2/10/98}, because he summarises here the reasons. So Mr Ward pointed you to this and said, "Oh, it is much more than the comparators analysis. There is a lot more to it". But let us go through them. So if you look at reason (a), that is the very high level of profits, so that is something Mr Piccinin has addressed you on; (b) is the same point and, of course, we say that these do not tell you anything about limb 2; (c) comes down to the comparators analysis, so the assertion there is:

"The Commission is not consistent with the provision of economic value reflecting demand-side benefits ..."

But the only place that Mr Holt has even purported to account for demand-side value is via his comparators analysis.

(d):

"Apple's Commission is much higher than I expect would have applied ..."

Well, that is not evidence. That is just an assertion. On what basis does he expect that? Again we come back to the comparators.

(e) is simply coming back to the point that Apple is dominant and therefore the conditions of competition are not workable and the price must be high and that is not the law -- that must be unfairly high, and that is not the law as I have submitted to you.

(f), the point there is that the reduction in the effective commission has been very limited. Now, of course, we make the opposite point. We say, of course, that the fact that the commission has reduced from the level that was set in conditions of workable competition in 2008 is a point in Apple's favour. Again, Mr Holt says there at (f) that they are "[higher than] I would expect", but again that is only assertion. His only evidence for that is the comparators analysis.

(g), (h) and (i) are all back to profitability, the profitability analysis. So there is really nothing in Mr Holt's evidence beyond the comparators analysis.

Now, we say -- I have made the point to you in brief terms about 2008, and so we say -- of course, what you have in Mr Holt's report -- what he said in his report

and he accepted in cross-examination is that looking at a price set at a point in time when there was no alleged abuse is something which is, in principle, helpful, so you can look at a comparator where a price was set at a time where the conditions -- that there were workable conditions of competition. He accepts as a matter of principle that that would be a useful thing to look at, but he excludes looking at Apple's price in 2008.

We have developed this point in writing and also I developed it orally in relation to market definition and dominance. In a nutshell, we say the fact that Apple set the price in 2008, when it was not dominant, as the evidence shows, and therefore was setting it in conditions of workable competition -- we saw that the conditions of competition were very vigorous -- because it was a new entrant fighting for market share and set the price lower than the price of its competitors shows us that the price is not unfair.

Now, I want to briefly respond to what little my learned friend said about this point. It was really very thin indeed, their response. What Mr Ward said is that -- aside from the pricing documents, which you will recall, he said that there is no evidence in the case, no evidence, as to how Apple set its commission, but of course that is incorrect factually because the Tribunal

has the evidence from Mr Schiller about how Apple set the commission. What he said was that Apple set the commission by reference to what its competitors were charging and that it undercut them. We have that in his Australian evidence, which he confirmed in these proceedings. Mr Ward cross-examined him on it very lightly, very lightly, and did not succeed in undercutting that evidence at all and you have seen how attractive Apple's rate was compared with those of its competitors.

Now, Mr Armitage said that this 2008 story had not featured in Apple's expert report, so again that seems to be an attempt to ask the Tribunal not to place weight on it, but that is simply incorrect because Professor Hitt does make the point in his report that Apple's Commission was set in 2008 and since that date has only been reduced. I will give you one reference. That is Hitt 2, paragraphs 320 and following, which is {C3/4/178}.

We do say that there simply has not been a substantive response -- a substantive response -- to this point by my learned friends, and it is notable that when Mr Hoskins was making his submissions on market definition -- and you will remember that I rose and said, "Well, he has not responded substantively to the

2008 story", and he said, "Well, Mr Ward is going to deal with that", and if you look back at the transcript at what Mr Ward says, he says, "Well, Mr Hoskins dealt with that" -- but the upshot is that nobody has dealt with the point at all and it is a compelling point. They have simply passed the buck from one to the other and dropped it. So that is what we say about 2008.

Now, Steam. I want to turn to Steam and I can do this quickly because I addressed Steam fully yesterday in the context of the counterfactual. Mr Holt found that Steam's 20% rate was competitive. Now, just pausing there, Mr Ward repeatedly referred to Mr Holt's 15% estimate as being the commission that would be set in conditions of workable competition. You will recall that the 15% estimate was the mid-range of Mr Holt's competitive range. But we say that that gets the nature of the exercise wrong because what Dr Kent needs to show is that Apple's Commission is unlawful; in other words, that it is above the fair level for Apple's services. It obviously will not -- what it obviously will not do is to show that someone charges a lower price in a competitive market. If anyone charges a price at Apple's level in a competitive market for services that are comparable to Apple's services, then Dr Kent's case fails because that would make it impossible to show that

Apple's price is a trading benefit that could not have been obtained under conditions of workable competition. My learned friends say that that is the test: could Apple's Commission have been obtained under conditions of workable competition?

If someone else has done that in conditions of workable competition, how can they tell you that Apple cannot?

Now, Dr Kent cherrypicks Steam's 20% rate, we say, as being the rate that it charges -- he [as said] selects that as being the rate that it charges to the largest developers and he says that that is the rate that matters. If we look at his report, so if we go to {C2/10/124} -- Mr Ward took you back to this paragraph -- if you look at paragraph 339(b) at the bottom of the page, so he says there that:

"The 20% upper end of my range corresponds to the most competitive headline rate that Steam offers to developers."

Then he says that Steam offers a 20% commission rate on games with a revenue of over $50 million on Steam.

"These are the titles for which Steam faces the most competitive pressure on commission rates ..."

Now, the problem about this is that he says "the most competitive", but what he never actually shows is

that Steam's other rates are not workably competitive rates. So the question is not, "What is the most competitive rate of Steam's?", the question is, "Are Steam's other rates workably competitive?", and he does not say that they are not, he does not show that they are not.

It is a point that I made yesterday because the *Epic* Games Store, of course, and the Microsoft Store and others are available to all developers of PC games, not just the largest ones, so there is competition for all PC games. Mr Holt therefore has no basis for excluding as comparators the 25% and 30% Commissions that Steam charges to developers that fall into those tiers. Now, those may be less attractive prices than those charged to the very largest developers, but they are also charged in a competitive market -- Mr Holt accepts that -- and indeed they make up the vast bulk of the commerce in that market.

I just want to show you another paragraph of his report. So if we go to {C2/10/107} of this report and look at paragraph 295, you can see there, at the outset, at the top of -- at the beginning of the paragraph, that Mr Holt accepts that PC app stores are operating under conditions of workable competition. That is the very basis for his comparators analysis. He says that that

market is a workably competitive market. So on that basis you simply cannot exclude the 25% and 30% rates charged by Steam because those are rates for which it faces competition.

Now -- but the fundamental point -- and again I am not going to repeat what I said yesterday -- the fundamental point we make about Steam is that the Tribunal needs to compare apples with apples and pears with pears, so if you are going to take Steam's lowest rate, the 20% rate, then we should be comparing that to Apple's lowest rate, the 15%, and Apple wins.

If you are going to compare Steam's effective commission with Apple's effective commission, Steam is at 27% and Apple is at 25%. Again, Apple wins.

If you are going to count the zeros, as Dr Singer put it, and include Steam keys, then we have evidence that this takes Steam's effective rate to around 20%, and, as we explain in our written closings, Apple's would be lower, so again Apple wins.

So when you are looking at the evidence in the round, including Mr Holt's own evidence, that the PC app stores are operating under conditions of workable competition, then what that evidence shows you, even leaving aside the point about the tools and technology, is that Apple's rate is competitive.

Of course, that brings us on to the point about the tools and technology, and you have my point about that. I am not going to repeat it. But I do want to look very briefly at what the Class Representative says about that point and, of course, you have the point. It is that none of these comparators capture demand-side value because Mr Holt -- the nature of the exercise is to look at comparators for distribution and payment services and none of these comparators provide access to Apple's tools and tech or to equivalent tools and tech and so you are simply not capturing the demand-side value that we have pointed to.

So what does Dr Kent say about this? Well, the first thing they do, when they are faced with the data from Professor Hitt about developer revenues -- and of course you will recall going back to *Attheraces*, that that was a very important point in *Attheraces*. So the court said, "Well, you have to look at what *Attheraces* is gaining, the revenues that they are making from this" -- the first thing they do when faced with that data is to fall back on the willingness to pay fallacy, but that does not help them for the reasons I have already given. At most, it tells the Tribunal that you cannot necessarily equate what developers pay with the economic value of the product, but what it does not do

is give Dr Kent a free pass to ignore economic value in this case. You cannot say, "Well, there is evidence of all this economic value, but, because of the willingness to pay fallacy, we are just going to ignore it". That would be completely misconceived.

What else does the Class Representative say? Well, let us look at what Mr Ward said in his closing submissions. If we go to {Day25/52:1}, please, and take it from line 17, {Day25/52:17} -- you may remember this, that he said that is no good looking at the developer revenues because you fall into what he calls:

"... the car battery fallacy that we discussed with Professor Hitt. Imagine an electric car that might sell for £50,000. There might be an innovative battery that is forming part of the car, using a patented technology ... But the economic value of the battery is not the economic value of the car. That latter value reflects the car manufacturer's own inputs."

If we go over the page, {Day25/53:1}:

"In the same way, the success of an app is also down to the developer's activities, their innovation, their IP, their marketing, so the revenues that developers earn, as a result, simply do not justify Apple's monopoly price."

Now, of course, we agree that developers also add

value to the product, just as *Attheraces* unquestionably added value to the product, but just like in that case, that does not allow the Class Representative to duck the question. They have to do the analysis and they have not. They have ducked the question.

The point that Mr Ward makes here is similar to a point Mr Holt makes in his final report. He said, "Well, do not worry about economic value, do not worry about developer revenues and economic value, because Apple makes a lot of money when it sells devices to consumers", but this is again to duck the issue because Apple is perfectly entitled to charge developers for the value it provides to them. Again, Mr Holt has done no analysis of that. We simply do not have any analysis from Dr Kent which is capable of addressing this question, which even touches upon, looking at the car battery, how the rent should be split. They just simply duck it.

What they say, in addition, is that Apple should have adduced expert evidence as to the value of its -- to developers of its tools and technology, and they say, "Well, Apple had permission to adduce valuation evidence and did not do so". But, of course, the Class Representative also had permission to introduce such valuation evidence and they decided not to go down

that road. They could have done and they have not. It is their case to prove.

Now, Mr Armitage took you in submissions to the first instance judgment in *Attheraces*, where the judge drew a distinction between a legal burden and an evidential burden, and his submission was, "Well, the evidential burden on economic value must be on Apple". But you only have to think for a few moments about the result of that case on appeal to see that that submission is completely wrong because the Court of Appeal allowed the British Horseracing Board's appeal, finding that *Attheraces* had not proved its case on excessive pricing. The Court of Appeal did not dismiss the appeal on the basis that, if the British Horseracing Board had wished to advance the argument it did about demand-side value, then it should have adduced valuation evidence in respect of this. That is not what the Court of Appeal did. So the Class Representative's argument is simply inconsistent with the approach that the Court of Appeal took.

Now, of course -- and coming back to a question that the Chairman put to me earlier -- we are not saying that the only way for Dr Kent to account for demand-side value would be to adduce valuation evidence in respect of Apple's tools and technology. That would be one way

of doing it. It is not the only way. There are other ways that Mr Holt could have gone about this.

One way, as I said earlier, would be to consider comparators who also provide developers with proprietary technology, such as Nintendo, Sony and Microsoft Xbox. Of course, they charge a 30% Commission and so we say they indicate that Apple's Commission is fair. But what is certainly not an appropriate way forward is to say that the difference between Steam's best 20% price and Apple's 25% effective commission is the difference between a fair and unfair price without factoring in the additional value that Apple provides, and that is really to fall into the *Attheraces* error.

Then, of course, you already have my submissions -- I will not repeat them -- on how that particular problem is exacerbated further if the comparison you are making is not with Steam, but with fringe players like the *Epic* Games Store and the Microsoft Store and itch.io, who suffer from serious qualitative problems which, in turn, makes them unattractive to consumers, and because they grant access to so few consumers, they are therefore of much less value to developers than the App Store is.

So we say for all of these reasons Dr Kent has failed to discharge the burden upon her of showing that

Apple's Commission is unfair, and, on the contrary, there is compelling evidence in the case: the fact that the price was set in 2008 under conditions of workable competition; the fact that there are comparators which Mr Holt has unfairly, wrongly rejected, which show that Apple's Commission is fair; and the fact that, even if one is looking at Steam, which is Mr Holt's preferred comparator, Apple beats it in terms of price, if you compare -- if you make the comparison in a consistent way.

So those -- unless you have any questions, those are our submissions on unfair pricing.

THE CHAIRMAN: Thank you.

DR BISHOP: I have one question. 2008 keeps recurring.

MS DEMETRIOU: Yes.

DR BISHOP: I understand that and it is a striking fact that Apple did look around at other things. Is the problem not that the world changed utterly, that even Steve Jobs, this great visionary, did not see that games would be such an enormous -- enormously attractive? Even Mr Jobs did not, I think, see a world in which 3.5 billion people around the globe have got smartphones and there are only two systems for those smartphones.

So that -- you know, in some sense it is like looking at -- oh, I do not know -- the price of -- back

in the -- it is forgotten now, but the radio was thought to be -- after Marconi -- was thought to be something that people would use for communications. They accidentally discovered that people liked entertainment coming off the radio, and that was the story of the early 1920s. Events of the early 1920s would not inform you very much about radio broadcasting and all of that today and the pricing today. Is that not the problem with your argument about 2008?

MS DEMETRIOU: So, sir, I think I will answer the question in this way. So of course we accept what you say about the market changing and that, as you say, even Steve Jobs did not fully appreciate how successful all this was going to be, and Apple really did kickstart an entire industry and, you know, things took off.

DR BISHOP: Absolutely it did.

MS DEMETRIOU: We, of course, accept that. But what we say about that is that all of those changes are changes which go to -- changes which support our case because, on unfair pricing, when you -- if 30% was a fair price -- thinking about demand-side value at the moment, if 30% was a fair price in 2008, when things were quite precarious for developers and they were taking risks as well -- they were making investments and taking risks. They did not know how it was going to go -- if that was

a fair price then because it was set in conditions of workable competition, then a fortiori it is obviously a fair price now because things have taken off and so developers are -- this is the relevance of Professor Hitt's data -- they are making exponentially greater revenues now. So if it was fair then, when they were making lower revenues and faced more risk, it must be fair now. That is really the crux of our argument under the unfair pricing head.

DR BISHOP: (Laughs) But the industry has grown to -- we have a worldwide network or two worldwide networks who have this facility for people playing games on their phones and the thought experiment is advanced that says, "Well, look, we had lots of people offering, maybe eight or ten. Likely, the rate would come down." You reject that, do you, that thought experiment?

MS DEMETRIOU: Well, we do, because we say -- we reject it. The reason why we reject it is because -- is for the reasons really I made under the market definition and dominance head, which is that there are constraints from the devices markets and from these other channels which show that the price is currently a competitive price, and so -- so that is why we reject it.

In a sense, it comes back to a point, Professor, that you -- sir, that you made or, rather, a point you

put to the witnesses during the course of the trial, which is that this is really about -- there are vast revenues on any -- as you say, the market has developed, there are vast revenues being made, and it is really about where is the -- how is it fair to divide them up. So letting Tencent, a massive games manufacturer, make billions instead of Apple is not any more fair or unfair, and that is what this comes down to. That is the point that the Court of Appeal was really grappling with in *Attheraces*, which is why that is an analogous authority to the present.

DR BISHOP: There is a good point there. Of course, the Class Representative says -- and witnesses on the Apple side agree -- that there is intense competition between games developers so quite a lot would get passed on to consumers, who are the people the Class Representative is representing, not the games --

MS DEMETRIOU: Mr Piccinin is about to tell you why that is not so!

DR BISHOP: Thank you very much.

MS DEMETRIOU: I think Mr Kennelly may have some references to give you first.

Closing submissions by MR KENNELLY (continued)

MR KENNELLY: Before you have the pleasure of listening to Mr Piccinin, I would like to come back, if I may, to

Dr Bishop's question about warnings. This is now going back to objective justification and the exclusionary abuse case. What Mr Bishop put to me was the consequences of having safe and risky app stores on iOS and, if there were warnings, appropriate warnings, could the safety, security and privacy risks be contained to those who choose to take the risk by downloading from a risky app store or developer.

The answer is: no, iOS will end up with higher levels of security, safety and privacy breaches overall and risk-averse users will also be harmed to a far greater extent than currently.

Just to give you the points and the references. The first is that the warnings that we discussed will not work well because they do not work well in this context, and you have that on very good authority. It is the position of Dr -- in the third party materials, the MSI Verizon Report 2023 -- just for your note, {D1/1371/6-13} -- cited by Dr Lee, which tells you that users are very poor -- despite their stated concerns regarding the security and privacy -- are very poor at making informed decisions and distinguishing between safe and less safe marketplaces, and safe and less safe developers. That is due to complacency, general ignorance, security fatigue and AI making it even harder

for us to distinguish the good from the bad.

Professor Rubin has also dealt with this in his first report, paragraphs 15 to 17, describing how users can be manipulated into using less secure app stores instead of the safer ones; {C3/2/55}. That is the first point, that the warnings will not work.

The second point is the harm that is inflicted on risk-averse users, and that is smishing in particular. As the witnesses described to you, benign-appearing apps like a photo-messaging app can in fact be malicious and get permission to get your contacts, presented in a plausible way to get past App Review; similarly, a messaging app can actually be malicious in order to get your contacts, sends messages then to your contacts, other iOS users, who are invited to click on a link, click on the link, and often are ironically urged to act immediately because the link is necessary to do a security update or to protect against a scam, and once the link is clicked, the malware is installed. Again, the consistent evidence before you is that these smishing techniques are highly successful because of the level of trust that users have when they receive messages from their own contacts and Dr Lee accepted, {Day10/167-168}, that smishing and phishing techniques are generally successful.

Could I just show you very briefly the Zimperium report cited by Dr Lee, {D1/1368/28}? Mobile-specific phishing is what I have been discussing. The "Key Takeaways":

"The average user is 6 ..."

This is on the right-hand side, orange box -- the orange text, sorry.

"... 6-10 times more likely to fall for an SMS phishing attack than an email-based attack", and 80% of them that target mobile devices.

At the bottom of the page, please:

Mobile phishing using SMS gives threat actors significant advantages over the use of email phishing ... Data indicates that people are more likely to click links in SMS messages."

There is a very high propensity to do so.

Then page {D1/1368/29}, please, at the top of the page:

"Users Fall for Mobile Phishing ... Period."

It works. The average user will tell you that they receive many phishing texts and emails and they do not fall for them, but they do, they do fall for them, and the DCMS review made exactly the same finding, {D1/1355/11-29}.

Now, so to complete the -- and then page 62 please,

in this document, page 62 in the same Zimperium report cited by Dr Lee, {D1/1368/62}, the orange box at the bottom of the page, please, this tells you, second paragraph, that where an employee's mobile device is compromised, where it is a company phone, that generally leads to compromises across the whole corporate network.

Now, all this has been canvassed by Professor Rubin. Just to give you the references: Rubin 1, paragraphs 112 and 119, {C3/2/52}, page 104, Rubin 2, paragraph 63, {C3/6/25}, and he gives evidence on it orally at {Day10/168-177}.

To conclude, for Dr Kent, Dr Lee accepted that this risk that I have been describing to you would arise in the counterfactual.

DR BISHOP: Are you now dealing with compromises to the data and banking details of someone who has accepted that he will use another app store or is this something that is said to go through the network generally and infect the systems even of people who would prefer to stay with Apple and do stay with Apple?

MR KENNELLY: The latter, sir. The submission is that harm inflicted on innocent users, risk-averse users who have chosen, on your description, sir, to avoid the dangerous app store, to stick with the safe App Store, nonetheless are victims of the lower security standards because the

more risky users, by adopting the riskier app store or the developer distributing directly, are exposed to smishing vulnerabilities and then their contact lists are used by malicious actors to contact and infect the innocent risk-averse iOS users.

DR BISHOP: I see.

MR KENNELLY: This is not a sideshow. This is a massive problem. That is what would happen in the counterfactual.

DR BISHOP: All right.

MR KENNELLY: Dr Lee accepted for this risk that arises in the counterfactual. It is Lee 2, {C2/13/48}, paragraph 79. It is common ground that Dr Lee's answer and Dr Kent's solution is not to worry because, once this harm occurs and is identified, Apple can remove the malicious app or boot out the malicious developer. We say that is just obvious that that is a far less useful solution than stopping it in the first place. Once the harm has been identified, the harm has been caused. Of course, in the counterfactual, you have our evidence that Apple will be delayed in removing the malicious apps and malicious developers -- at the very least, they will have to consult with the alternative marketplace and developer -- and all the while innocent users who have avoided the dangerous app stores will be subject to

this ever spreading contagion.

MR FRAZER: These effects would be the case, presumably, if the -- this malware was received by someone with a Google -- an Android phone whose contacts include people with iOS mobile devices?

MR KENNELLY: Yes.

MR FRAZER: So it is not specific to the protection on the App Store? This is that there are bad apps out there and people's contacts would not necessarily be restricted just to Android or iOS phone users?

MR KENNELLY: No, the evidence before you -- again, the unchallenged evidence before you -- is that, because of the particular protections in the App Store, the exposure of iOS users to smishing is reduced. Smishing is much less of a problem for iOS users than it is for Android users because they are not hacked in the first place in the way that Android users more commonly are.

MR FRAZER: But the hacking of an iOS Device owner, the impact of that would not be confined to the iOS infrastructure -- ecosystem?

MR KENNELLY: True. The harm can be spread. But what we see in the evidence before you is that, because smishing is much less of a problem on iOS, iOS users themselves are less likely to be the recipients of smishing attacks than Android users.

MR FRAZER: Does that not depend on whether their contacts are iOS users or not?

MR KENNELLY: It does, and what we see is that the iOS users tend to have iOS contacts. These network effects exist to protect and serve to protect iOS users themselves. I will be corrected if there is anything else to add to that, but this is an observed phenomenon and ... (Pause)

I am told, of course, when an iOS user -- sorry. I will have to come back to that. One second. Sorry. (Pause)

Just to be clear, sir, and to ensure I understand the question, I think your point is, when an iOS user has been hacked and his contacts have been used to send out smishing SMSs, those SMSs will go to Android users and iOS users alike, depending on who the contacts use as their devices --

MR FRAZER: Or vice versa.

MR KENNELLY: -- and vice versa. On that basis I stand by the answer I gave a moment ago, that what we observe in the evidence is that smishing affects iOS users less, both because they are hacked less and because they receive the smishing emails and they enjoy the iOS protections to a greater extent. Of course, when I say "enjoy iOS protections", I rely on everything I said about the App Review protections which require the

comprehensive set of signals and data that they use in order to prevent smishing attacks being successfully executed on iOS users and it is not something that can be fixed by hardware/software aspects which do not depend on centralised distribution.

MR FRAZER: Is this what you meant by the sandbox not being effective because these are the ways in which malicious apps can damage people?

MR KENNELLY: Yes, yes.

MR FRAZER: I see.

MR KENNELLY: The sandbox is only as good as the permissions that the user gives and social engineering can persuade a user to give permissions that allow the app then to do things which were not picked up in the sandbox.

Closing submissions by MR PICCININ (continued)

MR PICCININ: Good afternoon again. I am going to start by sketching out for you our framework for thinking about quantum. As I do that, I will have some little detours into some particular topics on incidence. I hope that is okay.

THE CHAIRMAN: Yes, of course.

MR PICCININ: The reason why is that there are just some incidence points that arise on particular branches of the quantum tree, if I can put it that way. If it gets too distracting, stop me.

So the first thing is that, as Dr Bishop raised yesterday, actually with Mr Kennelly, the approach to quantum obviously depends on what abuse you find. The simplest case is the unfair pricing case that Dr Bishop raised, so I will start with that.

So we are on here the hypothesis that you have rejected the claim for exclusionary conduct and tying but you have accepted the claim for unfair pricing. Now, in that world, this is a damages counterfactual that we are constructing, so what we need to do is to strip out the infringing conduct and see how the financial position of the class would have been different. What the class did is they paid for apps or for in-app content, so the question is: how much less would they have paid in the counterfactual?

THE CHAIRMAN: Well, just before you do that, just to -- I mean, so can we just be clear about why you are doing that? I mean, this is a but-for analysis, is it?

MR PICCININ: Exactly.

THE CHAIRMAN: So the purpose of a but-for analysis is to establish causation.

MR PICCININ: Exactly right.

THE CHAIRMAN: Yes. So what you are saying is -- you are embarking on an exercise as to whether -- sorry -- so -- and in this world you have postulated, we are working on

the assumption -- or at least the assumption we are trying to test is that the infringement has caused a loss which has been suffered by --

MR PICCININ: To the class.

THE CHAIRMAN: To the class. So we assume some incidence -- obviously you are going to address us on that, but let us assume there is something that has gone through, and then we are asking ourselves the question -- but I do not think there is any doubt about the causation of that in the sense that it is -- at least on the face of it, that has been causative of a loss. But you are going on to say that other things that have happened mean that they should be treated as the effective cause of the loss; is that the right analysis?

MR PICCININ: I was not actually going to say that. I was going to tell you what we do.

THE CHAIRMAN: Okay. Well, except that I think that that is what I really need about putting it into the framework because it seems to me that is what a but-for analysis is about, is it not?

MR PICCININ: Yes, and I think I agreed with the approach. But what we are doing is a but-for exercise. I am not going to identify some other effective cause. What I am going to say is that there is no loss. So on a but-for analysis, our position is that there is no loss, but

I will tell you how you would quantify what the loss is and then I will tell you why there is not one.

THE CHAIRMAN: Well, I am not sure that that is -- I have to say that I -- well, I am not sure that I accept that that is the right legal framework in which to look at it. I do not want to spend time on it, but that is really why I wanted to make the point, because it seems to me, when you are in a damages analysis, the point of the counterfactual is to -- or the counterfactual is constrained by that existing analysis, which is, "What is a but-for analysis mean?", and that is to identify what the cause of it is. So if you are saying that it is not the abuse, you are necessarily saying that it is something else, and that something else may be other market conditions that cause charges to be affected by the developer on the consumer, but you still have to -- that has to be fitted into the analysis. That is what I say, anyway. You do not have to agree with that, but that is how I view it.

MR PICCININ: (overspeaking) when I say what I have to say, we are going to find that we are saying the same thing.

THE CHAIRMAN: Good. That is fine. Well, in that case --

MR PICCININ: What I say we need to do to build that but-for world for the damages counterfactual in the unfair pricing abuse is you deduct whatever fair rate -- the

commission rate you find -- from Apple's effective commission rate of 25% and you multiply the difference by the rate of incidence and you multiply that by the billings. I can show you that in visual form from Mr Holt's report. I do not think there is any dispute --

THE CHAIRMAN: You are talking about the calculation, the overcharge, are you not?

MR PICCININ: Yes.

THE CHAIRMAN: That is fine.

MR PICCININ: There are just a few footnotes to that. The first footnote is, when I say that you deduct the fair rate, that has to be the rate that is fair, bearing in mind everything that Apple is providing and not just the distribution and payment services, so it needs -- this is really a submission that belongs in Ms Demetriou's type of case, but what I am saying is that you are deducting a rate that you have concluded to be fair, having heard all of our submissions about what you need to take into account on fairness.

Now, that does not mean in this part of the case -- that does not mean that you need to calculate some separate payment for the tools and technologies. It just means that, when you are looking at all the evidence on fairness in the round, you need to satisfy

yourself that the fair rate has been calculated in a way that captures the demand-side value associated with the tools and technologies.

THE CHAIRMAN: So just to make sure that we are on the same page, which I think we are, I think you are acknowledging that by the time we get to this stage we would have done that already, would we not, or, at least, if we have not, we need to be exiting from limb 2 analysis into damages with the benefit of something in mind which achieves that; in other words, you are saying that, to the extent we are required in limb 2 -- and we did have a debate about whether we need to or not, but let us assume we have decided on limb 2 to reach a conclusion about what we think the right price is in workable competition -- you are saying that that obviously, by definition, needs to be one that takes into account economic value as the --

MR PICCININ: That is all.

THE CHAIRMAN: That is all you are saying, yes. Fine.

MR PICCININ: Otherwise you would be overcompensating the class.

THE CHAIRMAN: Yes, exactly. I understand.

MR PICCININ: So the second footnote is, on this topic, my learned friends have their point about Albion Water 3, which says that you do not go assuming in a damages

calculation that the dominant undertaking would calculate the maximum lawful charge. We saw this in *BT*, where what they say is that you do not calculate the fair charge and then add something to that for -- you know, the extent to which there would be a significant excess above the unfair charge. You do not do that.

Just to clarify, the point I have just been making to you is a different one from that. What we are saying is that you should just set the fair price properly, taking into account all of the economic value that Apple is providing. You do not take, for example, the average price in a differentiated product market and then say that someone with a high quality product cannot charge any more than the average price. That would be a misapplication actually of the law on unfair pricing rather than the damages calculation.

THE CHAIRMAN: Yes. The only oddity of this is -- I mean this is back to the oddity of the whole exercise, is it not, and we know it is a very odd exercise. But the reason why we would have -- in this situation, the reason why we would have reached a counterfactual price, if you like, would have been because it was part of the exercise of working out -- part of the exercise of looking at the comparators and working out roughly what looked-like it would be of a price on workable

competition, and that is reconcilable, is it not, with the *Albion 3* point?

MR PICCININ: All I am saying really, if you want to summarise it into a pithy little nutshell, is: do the job properly.

THE CHAIRMAN: Yes, because am I not right in thinking that *Albion 3* is telling us that we do not have to find out what the borderline is between fair and unfair precisely?

MR PICCININ: I think what it is saying is that you do not need -- sometimes the way the test is articulated is that it is unlawful to charge something that is significantly in excess of a competitive level --

THE CHAIRMAN: Yes.

MR PICCININ: -- pace what "competitive level" means.

THE CHAIRMAN: But the reality is on this exercise that we are -- that there is no precision. You are not suggesting that there should be precision, are you?

MR PICCININ: No, absolutely not.

THE CHAIRMAN: Thank you.

MR PICCININ: So the next footnote, still on this topic, is when I say "multiplied by the rate of incidence", I mean the rate of incidence that you have calculated without taking into account any steering-based incidence. So when we get into the arguments on incidence, one

argument about incidence has to do with steering and there is not any in this counterfactual, so we ignore the whole argument that developers might steer between the App Store and alternative app stores. So that is just a point about how you calculate the incidence rate that you are going to multiply here.

THE CHAIRMAN: So just -- again, you are going to have to help me with that, I am afraid -- (overspeaking) -- actually. So how can you -- yes, okay. So the argument on steering goes that you would get -- that you start to get incidence increasing once you have steering because there is an incentive for the developer and the consumer to use alternative channels. That is the argument, is it not?

MR PICCININ: Perhaps if I just put it this way.

THE CHAIRMAN: Why don't you do that? Yes.

MR PICCININ: On Dr Kent's side there are two quite different theories about how Apple's conduct might have caused harm to the class. One theory is that the commission is a cost and in these markets developers pass on costs, therefore, if the cost was lower, they would have charged lower prices. That is the kind of traditional pass-on analysis. That is how it was in Singer 2 and that was all there was in the case. It was only when we got to the reply reports that a new idea

was introduced, very briefly and with no method of quantification, where Dr Singer said that there is a different idea, which is that -- even if we are right, for example, that marginal costs are zero and the firms do not pass on ad valorum charges and so the pass-on rate would normally be zero, there is a different point, which is that, if there are competing app marketplaces on iOS and Apple charges, say, 25% and someone else charges -- *Epic* Games Store charges 15%, then what the developer might want to do is to charge a lower price on the *Epic* Games Store than on the App Store in order to get consumers to go and -- go on to that other store and so they would split the difference, in Dr Singer's view.

THE CHAIRMAN: So I had understood that argument to come out in the context of what would happen to the price in the counterfactual, and we are talking about the exclusion counterfactual.

MR PICCININ: That is exactly right, sir.

THE CHAIRMAN: So therefore -- and the argument being that, well, if you look at Google, it does not help you because, once you have proper steering, which you would have in the -- he said -- in the exclusion counterfactual, you would actually see the price fall faster. It is that sort of argument. So you are saying -- but when we come to calculate incidence, we

are going to have to just calculate a number. There are not two incidence numbers? That is the bit I am struggling with, are there?

MR PICCININ: I am going to submit to you that you should not calculate two incidence numbers. I am going to submit to you -- and I am coming onto this --

THE CHAIRMAN: You say we just ignore steering?

MR PICCININ: -- that you should ignore steering.

THE CHAIRMAN: That is your submission. Okay. I see --

MR PICCININ: That is going to be my submission and I will explain why shortly. But the submission I am now is that, if that is wrong and you like the steering argument, it is just not one that applies in this counterfactual because --

THE CHAIRMAN: It is not just a question of liking it or not if it is --

MR PICCININ: Excessive, I think --

THE CHAIRMAN: Either it is material to the weight of incidence or it is not, and I am not sure I have --

MR PICCININ: Let me explain why it is not in this case, in the unfair pricing counterfactual. The reason why it is not is that what we are positing is that it is lawful for Apple to maintain the requirements and --

THE CHAIRMAN: Yes, I see. I am sorry. I forgot about that --

MR PICCININ: So it just does not arise at all.
THE CHAIRMAN: I see. I forgot about your -- but of course it is possible that we might -- it is possible that you -- that Apple might lose on both the restriction and the --
MR PICCININ: In which case you should --
THE CHAIRMAN: In which case we should take steering into account.
MR PICCININ: You should take whichever is higher, essentially. In that case, you need --
THE CHAIRMAN: Well, there is an interesting question as to what we do do if our analysis -- in that situation, if our analysis led us to different numbers produced in different ways for different purposes and then we had to transplant that into the quantum analysis. That is another world of complication we have not really even got there. I am not sure that there is any obvious answer to that, unless you have got one.
MR PICCININ: Well, I think it is simpler if you do the two separately and then -- because they are distinct abuses, and so in your but-for analysis, as you rightly say, you do each one, one at a time, and you take whichever one is higher.
THE CHAIRMAN: Whichever damages calculation is higher or -- yes, yes.

MR PICCININ: Yes. So it is not that complicated, I do not think.

THE CHAIRMAN: No, that is probably right. I suppose I am -- I suppose -- well, it might not be that complicated to you, but when we -- no, no, I do not mean -- I am not trying to trick your tail. The reason it is occupying my mind is that -- and obviously that is not necessarily where we end up, but if we were to end up there, you have got this rather odd exercise that you go through the exclusionary abuse and you look at lots of different reference points and come up with whatever you think is the reference point to help you as to whether there is an exclusionary abuse on that; for example, Dr Singer's models and some number about market share and from that you deduce what the prices might like, so you do all of that. Because that is -- I think we all accept that that is a pretty much high level exercise and not a precision exercise, and we do another exercise that is not a precision exercise over here and end up with what might not be an unfair price and there is no real obvious assurance that the two of them are going to be the same but it might be reasonably close, in which case it is quite helpful. The difficulty I think is reconciling the difference between them when one then comes to carry out the exercise. But I suppose

you are right, we do not actually need to do that. We just put the two numbers in and see what happens and take the higher one. Maybe that is the answer.

MR PICCININ: That is why I am dealing with them one at a time --

THE CHAIRMAN: That is helpful. That is helpful.

MR PICCININ: -- because some of the points are different.

THE CHAIRMAN: Well, forgive me for thinking --

MR PICCININ: No, no, that is fine.

THE CHAIRMAN: -- on the go, but it is helpful to --

MR PICCININ: I anticipated there might be questions as I go through this.

THE CHAIRMAN: Well, I think these are not so much questions as me catching up with you, but, anyway, keep going.

MR PICCININ: The third footnote, I think, is again on the rate of incidence, which is that -- if it makes a difference to your analysis -- we say this is clearly a reduction, so it is an occasion when the commission rate has gone down and we are asking what would happen in response to that. Now, Dr Singer accepted that in relation to the delayed counterfactual.

THE CHAIRMAN: Ah, sorry. So -- I am sorry to keep interrupting you, but I am not sure I follow that. So you are saying, just in the nature of the unfair pricing counterfactual, it is a reduction?

MR PICCININ: Yes. Let me come on to explain why and then I will do it separately for the delayed counterfactual and then the primary counterfactual.

THE CHAIRMAN: Well, okay, but I mean -- okay. But even in the primary counterfactual, you are saying it is a reduction?

MR PICCININ: I say it is --

THE CHAIRMAN: It is --

MR PICCININ: -- or in the almost primary counterfactual. Let me show you why. So let us start with the delayed counterfactual because it is easy.

THE CHAIRMAN: Yes. Well, I think we all accept that -- well, I think it is accepted that you have to flip it in the delayed counterfactual.

MR PICCININ: Exactly. That is --

THE CHAIRMAN: I may be wrong, but I thought that was reasonably common ground.

MR PICCININ: I thought it was too. Just to give you the reference, then, it is {C2/15/117}, and it is -- that is Singer 3 and it is footnote 550. So Dr Singer accepts that in the delayed counterfactual the evidence on incidence that you are supposed to be looking for -- and this seems to cover the whole claim period, then, though, right -- is evidence from experiments or whatever where the commission has come down.

But, actually, we say that, even if you said, as Dr Bishop has canvassed a couple of times -- even if you imagine that what you find in the judgment is that Apple should have been charging, say -- I do not know -- 20% from 2013 or 2012 -- I do not know how you are going to arrive at these answers, but suppose you do -- I still cannot see what difference that makes because it is still a decrease. It is just a decrease that happened in 2013 instead of 2015, and 2015 is still earlier than 2024 or 2023 or 2022 and it is certainly not an increase. There is no increase in the commission that happens, travelling between the real world and the counterfactual or within the counterfactual.

THE CHAIRMAN: I see. I have to say I struggle with that because it seems to me that is just not what the exercise we are undertaking requires us to do. If you have overcharged somebody and the charge should have been at a different price, then, I mean, why does it -- why do you -- why do you call it a reduction? It is an overcharge or --

MR PICCININ: It is an overcharge, sir. So in the real world we know what people have paid, they have paid whatever they did and we have got it in the transaction data, and the question is: what would they have paid in the counterfactual world if the commission had been

lower? That is the thing we are trying to answer.

THE CHAIRMAN: Well, hang on. Let me put this in a different way. What we are calculating by way of incidence is what has been paid, are we not? It is not a counterfactual point. Incidence is not a counterfactual point.

MR PICCININ: A but-for analysis, sir, is always counterfactual --

THE CHAIRMAN: No, no, it is not that incidence is -- incidence is trying to work out what the actual incident was -- that is a fact -- and we are trying -- when you use the counterfactual, it is a thought experiment to help you identify what the fact of the payment is. Incidence has happened. It has happened in the actual and we are trying to work out how much of it happened. We are not trying to work out, in a counterfactual, what is going to happen. We might want to test what has happened with some counterfactual analysis but that is a different thing.

MR PICCININ: Sir, it is always -- causation of loss is -- even overcharge -- that is no different between overcharge and pass-on, actually. It is always both. It is the price that was charged in the real world and then the question is: what would have been charged in the counterfactual world without the infringement?

THE CHAIRMAN: Okay. Well, I -- I mean, I think we are probably just going to have to -- that is probably getting too conceptual and we may have to differ on it. But I think that -- anyway, finish your argument. Finish your argument.

MR PICCININ: Okay. Just to foreshadow my submission on this, we say that those footnotes essentially take us to the end of the claim for the excessive pricing -- by "end", I mean zero damages award for the excessive pricing abuse because Dr Singer conceded -- and we will see this later -- he conceded that there would be very little incidence in the scenario where we are looking for evidence from decreases in commissions, so that is the delayed counterfactual. His best guess was what Professor Hitt had found in the small business program experiments. So I will come to show you that and I will show you why we say that is zero, but that is our submission.

DR BISHOP: Have I understood -- let's put some numbers to it. Suppose in 2015 Apple had announced -- or some date like that -- had said that the commission is now going to be 20%, not 30%, and you are now making the argument that there would have been very little impact on consumer prices paid for apps and for items within apps and things of that sort?

MR PICCININ: Yes.
DR BISHOP: Okay.
MR PICCININ: That is exactly --
DR BISHOP: Well, I understand the argument, but now your reasons for it, yes. That is your target.
MR PICCININ: All that I was summarising by way of my reasons for it is that Dr Singer agreed with me. I will come on and show you that later and deal with why.
THE CHAIRMAN: On the premise that (overspeaking) --
MR PICCININ: Yes, on the premise that it is a delayed counterfactual.
THE CHAIRMAN: On the premise that it is a delayed counterfactual, yes.
MR PICCININ: That is true.

The final footnote that I want to give on this topic -- and this is one that is actually true across the whole of the quantum case, but it is just convenient to do it now while we are doing footnotes -- is do not forget that again, when we talk about the rate of incidence, we are talking about the rate of incidence in a UK-only counterfactual. So bear in mind that developers are usually -- and we will see this when we come to the VAT experiment -- developers are usually just choosing a single price tier globally and then they just allow Apple to equalise that across all of the

different currencies in the world, giving effect to tax rates in the rest of the world.

Bearing in mind that developers do that, another hurdle that Dr Kent needs to overcome is to show you that developers would actually, in the counterfactual, have gone to the trouble of overriding that and picking a specific price for the App Store in the UK that is different from the price tier that they check --

THE CHAIRMAN: Is that a point that has emerged before now? I mean, I appreciate we know it is about price-setting globally, but in this context, have you made that point anywhere in --

MR PICCININ: Yes, sir. I will try to find the reference. We will probably see it when we get to the VAT.

THE CHAIRMAN: Well, it is only new to me. It may not be new to the Class Representative. But obviously I understand the point about prices being set globally, but in the context of this, that you are saying it is an impediment effectively to incidence --

MR PICCININ: I mean, it is one of the points -- where it comes up in the VAT experiment -- it is one of the points that I was debating with Dr Singer -- he looked at the evidence on who rode up and who did not ride up and all of that, and the point I was making to him is that all he was seeing there is people changing their

global price tiers. They were not picking a UK-specific price. That is another reason why you might think incidence would be even lower than what we say it is. So that is excessive pricing.

Now, let us do the removal of the distribution restrictions, and, to be clear, Dr Kent's case is that for both sets of commerce -- sorry, I should be clear about what I mean there. Once we have removed the distribution restrictions, let us talk about the world looks like. We have got the App Store and then you have also got something else, you know, the *Epic* Games Store or whatever, on iOS. So now, in the counterfactual, you have got some commerce going through the App Store, we say 90%, they say 50%, and you have some commerce going through the alternative stores. The thing I want to make clear to you in case you missed it is that Dr Kent's case is that for both sets of commerce you use Apple's counterfactual commission rate to calculate the damages, and Dr Singer explained that to us twice. Just to give you the references, one was {Day16/166:25} and then over the page to {Day16/167:11}. The other one was Day 18 -- specifically in the context of quantum I asked him to confirm that -- {Day18/150:10-17}.

So obviously what that means is that, if Ms Demetriou is right that Apple would have charged the

same price in that counterfactual, a distribution competition, like Google does in that exact scenario, then damages would be zero. That would just be the end of the claim.

THE CHAIRMAN: Sorry, so the same price as what in the counterfactual?

DR BISHOP: I am not following you at all. Let us put some numbers to it. It is 30% now. It goes down to 20% in 2015 or so, something like that --

THE CHAIRMAN: I think he is saying it does not. That is the point.

MR PICCININ: Now -- we have finished with excessive pricing.

DR BISHOP: Oh!

MR PICCININ: Now we are doing the distribution restrictions.

DR BISHOP: I am sorry. I had not --

MR PICCININ: Now we are removing the distribution restrictions and we are just asking the question, "What would happen?".

DR BISHOP: I had not realised you had gone over the border to the second -- okay.

MR PICCININ: It might be easier --

DR BISHOP: I now follow you. Retrospectively it makes sense.

THE CHAIRMAN: If we just unpack it a little. I think I can see where you are going but I just have not got it yet.

MR PICCININ: Ms Demetriou made submissions to you, yesterday, I think, about what would happen in this counterfactual and she said it would be just like Android. In the Android world, what happens is that Google has -- there are competing app stores and in fact some of them are on most Android phones but Google still charges the same price that Apple does.

THE CHAIRMAN: So the assumption here is that we have found there is an exclusionary abuse but you are saying that we have not, in doing that, disagreed with Ms Demetriou's argument that the likely counterfactual price would still be 30% --

MR PICCININ: Exactly.

THE CHAIRMAN: -- because, I mean, we might reach the conclusion that it was going to be something different -- obviously that is what the Class Representative argues -- but this is your -- you are working on the basis that -- you are saying that, unless we departed from that assumption -- in other words, if we were to -- if we were to reach the conclusion on the basis that we thought there was an effect on the structure of the market, say, but we still thought that the price was not going to come down

very much -- it is a bit difficult to see how we would think that there would be no impact whatsoever ever on the price, but if that is the assumption you want us --

MR PICCININ: (Overspeaking) -- that's what happened in Android right? That they charge this -- but they do not have the restrictions?

THE CHAIRMAN: Well, no, what I mean is that, if we reach the conclusion that there is an effect on structure of the market -- I mean, there is a -- which obviously takes you -- takes you back to --

MR PICCININ: Exactly -- (overspeaking) agree with Ms Demetriou.

THE CHAIRMAN: -- takes you back to the point. But let us just -- I mean, if you want to do it that way, fine, do it that way.

MR PICCININ: That was only for illustration. The point I actually really wanted to make was the one before, which is -- just to make sure that you understand it -- that Dr Kent wants to calculate her damages on the basis that you apply Apple's counterfactual commission rate -- say it is 20% -- Apple competing against *Epic*, whatever, sets a 20% commission rate --

THE CHAIRMAN: Well, I thought that I -- is that right? I thought that the whole point of a lot of the Singer evidence was that there would be a competitive rate

set --

MR PICCININ: Yes.

THE CHAIRMAN: -- where Apple -- so I think, actually, you are right, he did accept that Apple might have a premium over the other players in the market. Is that the point you are making?

MR PICCININ: That is the point I am making.

THE CHAIRMAN: I see. I understand.

MR PICCININ: I'm saying it's the premium price that applies to all of the commerce. That is the point. If you find that Apple would charge 20 and *Epic* would charge 12, you do not go calculating damages by reference to 12. You calculate damages by reference to 20.

THE CHAIRMAN: Okay. Okay.

MR PICCININ: So that is what -- it is what Dr Singer said. It is not --

DR BISHOP: Regardless of what Dr Singer said; let us look at some basic principles. It is a counterfactual world. We are imagining that other people are allowed in to have app stores and Apple has been charging a rate of 30. Perhaps you mean that Apple goes on posting a charge of 30 and effectively 25, given various discounts. It goes on -- it does not change its policy. "It is perfectly okay for us", Apple say, "We will let people in. Okay for us to do this". It finds that not

many sales are lost, that it retains 90% of the market. This is what you think is reasonable. The 10% does get lost to other apps -- to the other app store, so that is what would happen if they were -- they had not been anti-competitive. Now, then the only injury suffered to consumers was the difference between the prices paid in the actual world and the lower prices, whatever those are, of the --

MR PICCININ: Dr Bishop, I understand that argument, but what I am telling you is that Dr Kent is not asking you to do that. She is not asking for that award of damages, and I will show you -- let us look at what Dr Singer said. So it is Day 16 --

THE CHAIRMAN: Just be careful about -- was he saying it in the context of quantum? Are you absolutely clear about that?

MR PICCININ: We did it twice. It is also in his report.

THE CHAIRMAN: I think there are some differences. This is my point about the counterfactuals and the care you need to take with the way in which --

MR PICCININ: Let us look at it and then you can tell me whether --

THE CHAIRMAN: Yes, of course. Yes.

MR PICCININ: So it is {Day16/166:1}. To put it in context, this is Ms Demetriou cross-examining I think on the

counterfactual. If we start right at the bottom, Ms Demetriou says, {Day16/166:25}:

"But then in the counterfactual, you are assuming that the volume is going to be -- some of it is still going to be on the ... rival platforms; yes."

He says, {Day16/167:4}:

"That is fair ... some of [it will go to the rival platforms] ... But for the purposes of calculating overcharges, right, we are going to assume that even if you would have made it on a different place, that is a real savings that you would have enjoyed. So we are just going to use the difference between what Apple charged and what Apple would have charged on every transaction."

That is the basis -- if you go to his report and see the formula that he gives you for how he calculates the damages award that they are seeking, that is how he does it. There is no calculating the counterfactual rate that anyone else is charging.

THE CHAIRMAN: Well, I mean, as Dr Bishop says, that is what Dr Singer says. Dr Singer is not a lawyer and I am not saying -- obviously it is -- you are absolutely right to point it out and it is entirely fair for you to push it over to the other side of the court and ask them what they say about it. But just to be absolutely clear,

just because Dr Singer says that that is the way you do, it does not mean that we accept that that is the way you do it.

MR PICCININ: It is also in the expert report that is put forward -- sorry -- that Dr Kent has put forward.

THE CHAIRMAN: Yes. Well, okay. Let us see where we get to when the point comes up with the other side.

MR PICCININ: Okay. But if you find that Apple -- so our submission is that they are stuck with what they have put forward.

THE CHAIRMAN: Well --

MR PICCININ: I am just telling you that, sir, so that you understand that is our position. You can agree or disagree with it as usual.

THE CHAIRMAN: Fine, fine, fine. We have agreed an awful lot, Mr Piccinin. I do not think you should be concerned about that.

MR PICCININ: So if you find that Apple would have cut its prices, then you need to do some more work, obviously, and if you believe Dr Kent that steering is a significant issue that needs to be accounted for, then you will need to distinguish between the portion of the commerce that is on the App Store and the portion of the commerce that is on the competing marketplaces. Now, this is where I am going to make my submission to you

about why you should ignore steering and not do that. Do not go down that difficult road. Make life easier for yourself.

My submission is that you should ignore steering because it is far too complicated, there is no proper evidence to support it, owing to the fact that Dr Singer only introduced it into the case in his reply report and did so with no effort to quantify it, and it is actually also just impossible to see how it could add up to anything material in this case.

Now, on that last point, I just want to explain why we say that. It is set out in our written closings, but I just want to explain why it is not going to be material, firstly by reference to the way I see it and then I will explain why Mr Ward's answer to it yesterday or the day before does not work.

So the way I see it, Dr Singer said that, if a developer wanted to steer, they would share roughly half of the difference between Apple's price and the competing marketplace's price with the consumer. That is what the steering would be. That was by reference to the ultimatum game, if you remember.

So although he did not give you any models or any comparators or anything at all to predict the difference between Apple's price and Apple's competitors' prices in

the counterfactual -- it is not something he did -- he did hazard a guess at what it might be in cross-examination, and that was 3 percentage points. That is in the IAP context. I do not think he did hazard a guess for distribution, but for IAP his guess, I think, was 3 percentage points. Just to give you --

THE CHAIRMAN: That is the difference between -- that is the difference between prices between Apple and the alternative source?

MR PICCININ: Correct, which is what is relevant to steering, in my submission. I will come on to why.

DR BISHOP: So half is -- that is after the multiplication by half or before the multiplication by half?

MR PICCININ: Before.

DR BISHOP: Before? So it turns out it will be half of 3%, then.

MR PICCININ: You can see where I am going with this.

DR BISHOP: Yes, I can see where you are going.

MR PICCININ: This is what I call "the Kennedy theorem", which is that, if you keep multiplying numbers by fractions, you end up pretty close to zero.

So what that means is that the developer who chooses to steer will set a price on the competing store that is 1.5% lower. Now -- sorry, I did not give you the reference for where he said 3 percentage points. That

is {Day18/19:17-22}.

So assuming he is right, that means that the developer who chooses to steer will set a price on the competing store that is 1.5% lower. You might wonder whether anyone would bother to do that, if anyone would move to 1.5%, but let us park that and just continue with the thought experiment.

You then need to ask yourself, if you are doing a damages calculation: well, what proportion of developers would steer? What proportion of developers who are on the competing store would steer? Let us say it is half. Then you need to worry about what the market share of the competing store is. You know we say it is 10%, but let us be generous and call it half.

You are now down to a number that comes out, once you do the calculations, at about 1.5% of Apple's Commission revenues. Just to give you the reference for those -- that calculation, it is our written closings, 474(b), which is {A1/9/156}.

THE CHAIRMAN: Yes. I suppose -- I mean, I understand all of that. I suppose what I am just a little bit unsure about is why this matters at all because I do not think -- unless I am wrong, I do not think that the Class Representative is saying that this is something that feeds into the calculation of incidence. They were

making a point about the market dynamics, were they not, and about why -- did this not all come out of an explanation as to why there was not more market -- loss of market share in relation to Google and why there was --

MR PICCININ: No.

THE CHAIRMAN: Well, whatever it comes out as, it was about market shares, was it not?

MR PICCININ: No, sir, it is not. It is actually about incidence because -- remember, the contours of the argument are Dr Singer -- in his first report, he says that developers pass on costs. Professor Hitt's report says that, actually, when you look at the data, no, they do not, and then gives four different explanations why they do not, one of which is that, "You have used the wrong formulas, Dr Singer. If you do it right using the ad valorum pass-on rate ..." --

THE CHAIRMAN: Yes, yes, I understand.

MR PICCININ: Et cetera, et cetera.

Dr Singer's response to that is, "Oh dear, let us have a different theory of incidence", which is the steering-based incidence, and in the hot tub he said that was the key lynchpin of his new theory of incidence in this case.

What I am saying is that, if I am right about the

other one -- if I am right about the cost-based incidence as being junk, not supported by evidence, then the steering-based incidence is not going to add anything. It is not going to get them home because it is not going to -- it cannot add up to anything once you apply the Kennedy theorem.

THE CHAIRMAN: Okay. We have got that submission.

MR PICCININ: Now, my learned friends disagree with that, so Mr Ward said that is wrong because of the dynamic of competition to which you referred, sir. So he said that somehow that dynamic of competition will mean that, through steering, app prices will end up lower on the App Store as well, and he said that that was the magic of competition.

THE CHAIRMAN: Well, that is the dialogue I thought I was -- I have got it wrong, but --

MR PICCININ: But it goes to incidence. It does not (overspeaking) --

THE CHAIRMAN: Yes, but fine. But even then, I am not completely sure that -- I may be wrong but I am not completely sure it has been advanced as a quantum point. It is actually about -- it is about why -- it is why there might be -- as you say, why there might not be the data that you would expect as a consequence of the evidence that Professor Hitt produces. So it is

an answer for that. I understand. You have explained all of that. But that does not mean that they are advancing it as a separate theory of quantum, does it?

MR PICCININ: If they are not, then that is great, but if they are not, then it is really -- it becomes irrelevant.

THE CHAIRMAN: Fair enough. We will see what they say about it.

MR PICCININ: Okay. So that then takes me to the -- hopefully the last point on this, almost the last point, which is the need to factor in the tools and technologies. What I would say about that is that from a damages perspective this is actually fairly straightforward. I should say, we are still in the distribution restrictions. That is still what we are removing here.

We say again that, in the factual, consumers paid whatever price the developer chose, in the counterfactual, they would also pay whatever price the developer chose for them to pay, and the damages claim is based on the proposition that, if developers paid less commission to Apple in the counterfactual, they would have charged -- or less commission to someone in the counterfactual, then they would have charged lower prices to consumers.

THE CHAIRMAN: When you say "whatever the developer chose", I thought the whole point about the tools and the tech is what Apple charges --

MR PICCININ: That is right. I am getting to that.

THE CHAIRMAN: Sorry.

MR PICCININ: I was about to get there. It is just that -- our point is that, if in the counterfactual developers would also have been paying Apple for the tools and tech, then the overall amount that they would have been paying in order to get their app to the point where it is distributed and sold to the consumer might have been the same or at least lower by a lesser extent so there would have been less or maybe nothing for them to pass on through incidence.

So from the perspective of this damages claim, which is an indirect purchaser claim by the consumers, it is not even a *Fulton Shipping* case, sir, because --

THE CHAIRMAN: Well, just to be clear, I was not suggesting it was. I am just -- I was just making the point.

MR PICCININ: No, that is no criticism of your suggestion actually --

THE CHAIRMAN: Why do we not put this -- I think there are two ways you can put it, I think. See if you agree with this. There are two ways you can put it. One is you can say it is a causation point, and that is the but-for

test --

MR PICCININ: Which is what I have just said.

THE CHAIRMAN: -- which you have just said, and what you are effectively saying there is that the defendant, you, hypothetically, is going to do something that means that whatever the something is, which is legitimate, turns out to be the cause of the loss or cause of the economic impairment, so that is what the but-for test does. So it is because of -- Apple -- something that Apple would do in this hypothetical -- something -- in the counterfactual that postulates that Apple would do something which is -- charge for something on a separate basis and, as a result, that would be the thing that caused the class member to pay the amount that is contested rather than the infringement. That is the -- is that right?

MR PICCININ: I think I understand the way you are putting it, sir. That is not the way I have been putting it. The way I have been putting it is that there is not a loss because when we remove -- in the real world, what is happening --

THE CHAIRMAN: Well, there is a loss because -- well, there is an economic impairment, let us put it this way. The consumer -- assuming some degree of incidence -- put incidence to one side for a minute --

MR PICCININ: We are putting incidence to one side.

THE CHAIRMAN: -- the consumer has -- let us just say that you have -- we have established an abuse, there is some incidence that has resulted in the consumers paying more than they should have done, but there is an economic impairment. Let us call it no more than that. Let us not call it a "loss". It is an economic impairment. The question is: are you responsible for that or is it fair for you to say, "No, that would have happened anyway"? That is the question, is it not?

MR PICCININ: The way I put it is slightly different from that, sir. I understand what you have just said. That is not the way we put it. The way we put it is that the consumer never suffers any impairment because the consumer in the real world has bought a sword or an app or a bag of gems or whatever for a particular sum of money and they would have bought the same things in the counterfactual -- fortunately no one is complicating the analysis in that way -- and the question is: what would they have paid?

THE CHAIRMAN: I think that is just not the way the damages work, is it? If we are starting with the proposition that -- if the whole point -- but-for causation is just a thought experiment as well, is it not?

MR PICCININ: It is.

THE CHAIRMAN: All it is doing is excluding things that are not -- the whole point of causation in the but-for context is to exclude things that are not causative. So what we do here is we sit down and we say, "Well, what do we think is causative and what is not?", and it is clear that there is a causative element between -- because that is the whole point of incidence -- there is a causative element between the infringement and the amounts that consumers have paid.

MR PICCININ: That --

THE CHAIRMAN: Well, hang on, just let me -- and that is absolutely -- that is the starting point for a proper damages analysis. Then you say to yourself can you be sure that there is not some other factor that means that that payment would have had to be made anyway, in which case it ceases to be a loss -- absolutely, it does -- but only because you have not caused it and something else has caused it -- something non-infringing has caused it. Is that not the right answer?

MR PICCININ: Sir, I think this is just another way we are going to disagree. I think there is one way of looking at it --

THE CHAIRMAN: Well, I think it is quite important because I think it does go to the burden, and that is the reason why I raised it in the first place. I do think at the

end of the day this is a burden question more than anything else.

MR PICCININ: Sir, that is fine, but I just want to put to you the way that we put our case. Whether you agree on or disagree with it is --

THE CHAIRMAN: In your case you would say there is no -- so you say there is no loss and therefore no causation, but why are we doing a but-for analysis if there is no causation? What --

MR PICCININ: Sir, we are doing a but-for analysis and what we are finding is that, but for the abuse, developers would have paid the same in the counterfactual and therefore consumers would have paid the same even if (overspeaking) our case.

THE CHAIRMAN: So it is a causation conclusion and what is the --

MR PICCININ: Yes.

THE CHAIRMAN: Who caused -- who caused what? You say nobody caused anything.

MR PICCININ: Because there is no difference between the real world and the counterfactual.

THE CHAIRMAN: Okay. I do not think that I -- okay, we are going to have to agree to disagree on that.

MR PICCININ: I mean, our whole point on the tools and technologies is that we currently monetise our tools and

technologies through the commission.

THE CHAIRMAN: Yes, which is unlawful in the setting we are talking about, unlawful. So we are working on a hypothetical now that is --

MR PICCININ: No, it is not -- not in the distribution counterfactual. It is not unlawful to monetise the commission through --

THE CHAIRMAN: Ah, you have committed an abuse?

MR PICCININ: No, no. What the abuse is, is having the distribution restrictions. That is the one that we are on.

THE CHAIRMAN: But -- okay --

MR PICCININ: So the counterfactual is we remove the distribution restrictions and then we see whether that -- whether consumers would have paid the same or different. That is what we are doing here. You remove the unlawful conduct, which is not the commission.

THE CHAIRMAN: No, I do not think that is what we are doing. I think what we have done is we have identified an abuse, we have identified that it has caused an overcharge and then we are trying to work out who is responsible for the overcharge. That is what we are doing.

MR PICCININ: Sir, we say that that is, at the end of the day -- I mean, I can see your way of looking at it is

closer to a *Fulton Shipping* way of looking at it --

THE CHAIRMAN: No, it is not. I do not think it is a *Fulton Shipping* at all. In fact, it is the opposite of *Fulton Shipping*. *Fulton Shipping* is all about -- it comes under the bucket of giving credit for things you have got. That is quite different. That is the whole point of *Fulton Shipping*. It is a -- it is a case where -- I can see why you do not want to go down the *Fulton Shipping* line because -- I mean, it would be possible for you to say you have actually delivered the tools and the tech and have not been paid and you ought to get some benefit and recognition of that, but the problem with that in the *Fulton Shipping* line is that the connection between -- the but-for connection does not cheat back to the restriction. That is your problem.

MR PICCININ: We say it does, actually, because but for the -- the breach is the cause of both the reduction in commission through competition and the fact that, without that breach, we would have had to charge for our tools and tech in other ways.

THE CHAIRMAN: But you are not arguing it is a *Fulton Shipping* case?

MR PICCININ: I am if necessary, that is what I am saying, but we can look at it either way. One way or another --

THE CHAIRMAN: Okay. Let us try and cut through this. I am conscious I am taking up your time with it as well.

I think it is only fair that the Class Representative understands how you are putting your case because it is pleaded in the various terms and you said nothing about it in your opening or your skeleton -- your closing. So all I want to make sure is two things. One is I want to be absolutely clear that we know what your case is on it, and I think you have articulated it, other than that I am now not entirely sure if you are running a *Fulton Shipping* case or not.

MR PICCININ: I have said, sir, either way. We will put it your way, we will put it the way that --

THE CHAIRMAN: There is no my way here. This is your case. The second question is: who has got the burden of proof on this stuff?

MR PICCININ: Sir, we say it is up to them to prove that they would have paid less in the counterfactual, so our primary position is that the burden of proof is on them.

The secondary position is that, if you look at it in the way that you were putting to me and it is not your way, then they have established loss, you say, because the commission would have been lower, and still at that stage we get to the broad axe and we need to quantify what the extent of the loss would be, and so, in that

exercise, you are going to have lots of imponderables --

THE CHAIRMAN: Well, I think --

MR PICCININ: If I can just finish that point, sir. There will be lots of imponderables about what lots of people would have done in the counterfactuals. So they are asking you to say -- to decide that our market share would be 50% or 90% or somewhere in between, depending on who would have entered and what would have happened and all of that jazz. They are then asking you to say that there is incidence, so that all of these developers would have made lots of choices about what prices they would set in the counterfactual, and incidence could be somewhere between 50 and 90, just about. Use a random number generator to pick one in between. So lots of imponderables. All I am saying to you is that, if you are going to do that, then another one of the imponderables is what impact removing our ability to monetise our tools and tech through sales on the App Store would have on charges paid by the developers when they are off the App Store. So that is my submission.

THE CHAIRMAN: Yes -- no, I understand. Just one last point on it, then. I do not think causation is a broad axe point.

MR PICCININ: No --

THE CHAIRMAN: It is not, and I think you are making a causation point and so I think it is actually a balance of probabilities point. So that is the only further thing to put in the pot. I think probably I should stop bothering you on it.

MR PICCININ: I think we have debated it, sir, and as always, you will reach the conclusion you reach. But my submission to you is that, even if they have established causation and so we are into loss, still you need to quantify the loss and you need to deal with all the imponderables, not just the ones that they want you to decide -- all of them.

So the final point I need to make before I get on to my longer submissions on incidence is just the IAP counterfactual, so this is where you are with us on the distribution restrictions, so we can keep those because there are no competing app stores, but you do let in people like Paddle to do in-app purchases on App Store apps. The only points I want to make about that -- it is similar to the distribution one. The only points I want to make about that are, first of all -- so this is another one where there is no need to think about steering because --

THE CHAIRMAN: Can I just stop you because I was under the impression that there was acknowledgement that, if you

win on distribution, there is no point in going on to payment. Have I got that wrong?

MR HOSKINS: It was a separate thing.

THE CHAIRMAN: You will run it separately if --

MR HOSKINS: That is right. You will see it, for example, in the Sweeting and Singer joint expert statement. It is one of the reasons it gets quite hard to follow. There is the primary counterfactual, there is the delayed version of that, then there is what they call "the distribution counterfactual", then there is the payments counterfactual and there are actually separate considerations of what the comparators would be, for example, in the payments counterfactual.

THE CHAIRMAN: That is my fault. Sorry, Mr Piccinin. I am on a red herring.

MR PICCININ: I think what you might have been remembering, sir, is that if you are with them on the distribution counterfactual, you do not need to worry about payments.

THE CHAIRMAN: Maybe that is where it went.

MR HOSKINS: So sorry. If we win on distribution, there are still different quantum calculations for the different -- for the original downloads and the -- so you still have to take account of those differences.

THE CHAIRMAN: Yes. If you lose on distribution, what is the consequence for your payments case?

MR HOSKINS: We have still got a payments case.

THE CHAIRMAN: You still have a payments case? Okay, sorry. That is my fault. I got that wrong.

MR PICCININ: So, anyway, there are two points I wanted to make about that and then perhaps we will have the break.

THE CHAIRMAN: I am conscious -- well, I am conscious you are very short on time.

MR PICCININ: I am very short on time, sir.

THE CHAIRMAN: Why do you not finish this point and then we will have a discussion about this?

MR PICCININ: Two points about IAP. One is that there is no steering. You do not need to worry about steering. There is no reason why a developer would want to give the consumer two different payment options. If they wanted to choose the cheaper one, they would just choose the cheaper one.

The other thing is that you need to worry about not only the tools and tech in this situation, but also what Apple would charge the distribution for a developer who wants to use alternative payments. So there is no basis at all, we say, for the Tribunal to suppose that Apple would distribute apps on the App Store for free and then allow the developer to use someone else and pay someone else 10% of billions of dollars a year. It just does not make any sense. Remember, Mr Owen said that if

Apple did that, it would be undercharging, so that is not a realistic counterfactual. So that is it on the quantum overview.

THE CHAIRMAN: Yes. So what do you have to do --

MR PICCININ: The entirety of incidence.

DR BISHOP: I have a question. That is the quantum overview. What about the -- suppose we were inclined to decide that Apple should have allowed other app stores in, ought to have allowed different payment systems in and as well its price was unfair, so all of them?

MR PICCININ: Can I deal with it in two parts, those separately?

DR BISHOP: Well --

MR PICCININ: I will answer your question, Dr Bishop.

THE CHAIRMAN: What is the question?

DR BISHOP: Well, my question is: how do we calculate damages in that world? We are all -- okay. You saw where I was going, yes.

MR PICCININ: Dr Bishop, the answer to your question is that -- ignore unfair pricing for a moment -- if you are with them on both distribution and payments, then they say -- this is my understanding -- Mr Holt says, anyway, that everyone is just going to pay the distribution rate. I think Dr Singer has calculated different rates for IAP and distribution and so he calculates damages

differently for the different bits of the commerce, but we say that does not make sense. The answer to the second part of your question, "What about unfair pricing?", is what we covered earlier, which is that you just pick whichever is the bigger of the two out of excessive pricing and exclusionary abuse.

DR BISHOP: Yes, I see. So -- but in some sense -- well, the pleaded case is that it is excessive as well as these other abuses --

MR PICCININ: That is right.

DR BISHOP: -- so --

MR PICCININ: They are distinct abuses.

DR BISHOP: Yes, okay. I cannot keep in my mind, however, all the calculations that might go into it. Are you saying that the other two would be overwhelmed by the excessive pricing abuse or --

MR PICCININ: I think the way my learned friends have calculated it is: it is the other way round.

DR BISHOP: The other way round, yes. So you are saying that the excessive pricing abuse amounts to zero, in fact?

MR PICCININ: I say that also (Laughs).

DR BISHOP: (Laughs) Right, okay. Yes.

THE CHAIRMAN: So we should take a break for the transcriber. We have taken you a long way out of your

way. I am conscious of that.

MR PICCININ: I would say, sir, maybe we did not set this out very clearly in writing, but the other side did not traverse this ground either, so I hope it has been helpful.

THE CHAIRMAN: No, it is very helpful and I completely understand -- that was not really a criticism.

I understand why it is the bit of the case that -- it is not the bit you focus on when you are doing the other bits and it is only now, when one is having to think about writing a judgment and regardless, frankly, of whether you win or lose, we are going to have to deal with some of these issues, and so -- I do not want to be writing a judgment where I am not clear about what I am actually doing. I do find these whole counterfactuals -- I have a bit of a thing about them because you are given a counterfactual and I am told it is for all purposes and all seasons without really the clarity of the deployment, so that is the reason why I am probably very annoying about it.

MR PICCININ: Not at all, sir, and they are fair questions and I wanted to answer them.

THE CHAIRMAN: Thank you. We should take a break.

I suspect we can get away with sitting a little after 4 and I am conscious -- I think we probably owe you a bit

of extra time as a result, but I suspect we probably cannot get much past 4.15 without getting into trouble, and that is on the basis that I hope everybody would be happy to flee the building because we are going to have to start setting up for -- as you know, there is a function out there. Shall we rise -- we will rise, yes.

MR HOSKINS: The clerks will have to come in to take away the bundles. I do not want to chip away at the time, but you need to factor that in.

THE CHAIRMAN: No, exactly. I am sure we will manage them. Hopefully they are going to be swift and efficient.

MR HOSKINS: They have been encouraged to be swift and on time.

THE CHAIRMAN: Good. That is helpful. We will rise until half past and then we will let you go until quarter past. Is that all right?

(3.25 pm)

(A short break)

(3.34 pm)

THE CHAIRMAN: Mr Piccinin.

MR PICCININ: Just before we start on incidence, just reflecting on the discussion that we just had and how complicated it got and noting -- my learned friends actually, at the end of their written closings, offer

you post-judgment submissions on quantum, given there are so many permutations -- we just wondered actually whether you might find it helpful to have five pages from each side just setting out the decision tree, basically, as I have just debated it, so you do not need to go over the transcript. You can just see it in writing. I am just offering that as something that you may or may not find helpful.

THE CHAIRMAN: Mr Hoskins?

MR HOSKINS: I must confess I did not draft that bit, but from recollection it is not going over the ground we have just gone over. I will deal with that in reply about what we say is the proper legal approach. The suggestion was, if you come to a certain type of conclusion, you might find it helpful to have further submission on the quantum, but in terms of the legal principle, we should be settling that now and I intend to deal with it in reply.

THE CHAIRMAN: Well, let us think about it and we will let you know tomorrow whether we think that will be helpful. Obviously we do not expect anybody to do anything before tomorrow, so we will let you know tomorrow. Thank you.

MR PICCININ: So I should also say that, after I am done with incidence, I will get on to interest very briefly.

So I want to begin by summarising our approach to

incidence and to introduce some important themes. Then, when I have done that, what I am going to do is to run through the topics essentially that are covered in my learned friend's written closings, just so you have got our answer to each of them. So we say that you should decide the incidence question in this case by reference to data on how developers have actually changed or not changed their prices in response to changes in the commission.

We say that for two main reasons. The first reason is that this is very high quality evidence. It is much higher quality evidence than you normally get in pass-on cases because we actually have four instances of very substantial changes in the particular cost that we are looking at in this case and they cover different types of transactions, different types of developers and different time periods.

Two of them -- this is the ABP and the subscriptions one -- have very large samples with lots and lots of data points, which means that we can actually do a difference in difference analysis. The other two are very small samples and so you cannot do that. We say the overall picture, when you look at the totality of that empirical evidence, is convincing and you should adopt it.

The second point is that, while I do say that empirical evidence is likely to trump theory almost any day of the week, at least if the empirical evidence is any good, that is particularly true in this case, when we are talking about these products in these markets. That is because app markets are actually very diverse and complicated. There are multiple different monetisation strategies that developers deploy alongside each other and the same developers are also using multiple distribution platforms as well. I mean, whatever conclusion you reach on market definition, it is just a fact of the real world that large game developers like Roblox, for example, are distributing the same digital content through multiple platforms. So trying to use simple economic theories of the kind that Dr Kent urges on you in that kind of context is dangerous, we say, because the facts are so complex and unusual.

Now, we have lots of -- we have engaged in the theoretical debate so we have lots of good theoretical reasons as to why Dr Kent's simple economic theories are unlikely to apply in this case. Those are the four reasons, in particular, that Professor Hitt gave. But, in addition to that, we have empirical evidence, including going beyond our four natural experiments, of

developers behaving in ways that are just impossible to explain with Dr Kent's simple economic theories.

Just to give you a flavour of the empirical evidence that is inconsistent with her simple case that costs are passed on, half of -- we are going to see some of this later as we go through it -- half of all subscription products have uniform pricing across different distribution channels that have very different costs. Many big games that are not using subscriptions do the same for in-app purchases. Ms Demetriou gave you the example yesterday of Roblox doing that for virtually the entire claim period.

Even when you see developers choosing to charge different prices on different platforms, the price differential runs in the opposite direction from that predicted by Dr Kent as often as it runs in the direction that Dr Kent's economic theories would predict. I am sure you will remember the evidence of games being sold more cheaply on consoles that have a 30% Commission than they are sold on the *Epic* Games Store, which has a 12% Commission. So those are facts that are just -- they are concrete facts and you cannot explain them with Dr Kent's simple economic theories. You can explain them, just not with those economic theories. We say that makes it dangerous to

use their economic theories to predict what would happen in this case.

In addition, almost everyone -- not everyone, but almost everyone uses advertising in addition to taking payments directly from consumers, and there is obviously a complex -- putting it at its lowest, a complex interrelationship between collecting ad revenue and paid transactions from the consumers. Professor Hitt explained that that was one reason why an increased Commission might actually cause prices to go down rather than up. The reference to that is Hitt 2, paragraph 522, which is {C3/4/279}.

On that last point, my learned friend said there was no evidence of this. It depends what he means by "this" because there is lots of evidence of prices going up when the commissions come down, including statistically significant results in the difference in difference analyses. Again, I will just give you some references. But appendix 13, exhibit 2, at {C3/4/669} for the small business program and exhibit 6 of the same appendix 13, at {C3/4/675} for the ARS.

Now --

THE CHAIRMAN: Sorry, that is Professor Hitt's report; yes?

MR PICCININ: Yes, correct, Hitt 2. So, to be clear, that empirical evidence cannot tell you that the reason why

prices went up when the Commission went down was because of substitution involving ad revenue. Professor Hitt has done the job of checking that large numbers of people do indeed use both IAP and advert revenue, which is the factual predicate for his theory -- the minimum factual predicate for his theory to apply, so I cannot prove to you that it is because of that particular channel, but there is certainly causal evidence of decreases in Commission causing higher prices compared to well-chosen control groups.

Again, that is something that you just -- forget the reason, but that is a fact that you cannot explain with the simple economic theories that Dr Kent is urging on you in this case and what all of that tells you is that using economic theory in this case is just not reliable.

Now, Dr Kent has seen the writing on the wall. You get the impression they started to see the writing on the wall as they started to prepare for trial because what they have started to do before trial and then all the more so during trial, culminating in the written closings, is to supplement their case on closing -- sorry -- on pass-on with some very discrete factual points about particular subsets of developers that they say are likely to pass on costs or where they say they have some evidence that they have. So that is music

streamers in particular that Mr Ward majored on, but there are some others, and I will deal with them all as I run through their closings.

But at this stage, when I am talking about key themes of my submissions, all I want to say is that you cannot safely generalise from those particular groups of developers in circumstances where there is real heterogeneity amongst developers. I want to be clear about this. On our side of the case, we have never urged on you -- Professor Hitt has never urged on you the notion that all developers are the same; you know, that they all have zero marginal costs, that they all do uniform pricing, they all do ad substitution. That is not something we have ever said.

Our position is quite different. Our position is that the real world is messy. Developers are all different from each other. There are lots of reasons why they might pass on or not pass on costs, and that is why you need to look at the empirical evidence. But what you definitely cannot do is take -- cherrypick tiny little groups who account for virtually none of the commerce and have distinct characteristics, reach a conclusion that they have passed on costs at a particular -- or commissions at a particular point in time and say, "I am going to extrapolate from that and

say everyone passed on costs by that amount or some other amount that I am just going to pluck out of the air". You cannot do that.

The other thing that I want to introduce at this point is that the paucity of empirical evidence on Dr Kent's side of the case was self-inflicted. The Tribunal will recall that at the pre-certification stage, the Class Representative's plan was for Mr Holt to address this topic of incidence. He said that in his first report and we are going to look at that later. Back in that time, when Mr Holt was going to deal with incidence, he was proposing to use empirical methods. He was going to use the same two big natural experiments that Professor Hitt used, although he did have doubts about how conclusive they would be, but he was going to look at them. Then he was also going to go out and conduct surveys to gather evidence from developers about the detail of how they set prices, as we will see.

But then Dr Kent chose not to ask Mr Holt to do that work and instead to instruct Dr Singer to address the topic of incidence, and he ditched it. He cancelled that evidence-gathering effort. He did that because he thought that his linear and logit models were going to do the trick, that you would just accept economic theory at trial.

Now, we all make decisions about how we are going to run our case and the evidence that we are going to go out and gather and then deploy. My point is that, having made their beds, my learned friends now have to lie in them. They cannot just ask you to invent a damages calculation because Dr Kent has made bad tactical decisions that have backfired.

The final point I want to make by way of introduction is this: I was really struck and, I have to say, disappointed by the extent to which the submissions on Dr Kent's side, on this topic in particular, but some others as well, both in writing and orally, were attacks on Professor Hitt's independence, rather than -- it is almost like it is a substitute for -- attacks on the cogency of his analysis. The upshot of all of that, the high point, was a submission from Mr Ward KC that you should effectively not place weight on Professor Hitt's analysis in view of his failure to cite *Spotify* and to cite the evidence that he gave in the US. I am going to come onto that. I am going to deal with those complaints. They are all baseless. Professor Hitt did not fail in his expert duties at all. In fact, he was a very careful witness who was doing his very best to help you in a fair-minded and objective way.

Nothing identified by my learned friends comes close

to the standard of a failure to disclose material facts -- material facts -- and facts that could detract from his concluded opinion. Indeed, I think you will find, if you read through his reports, that the only decisions that he cites in his reports are decisions against him. Our appointed experts, unlike Dr Kent's, do not play the advocates' game of citing decisions that go in their favour, and there are decisions that go in their favour. There were decisions that the judge in *Epic v Apple* made in California that went in our favour on market definition, went in our favour on privacy and security, and our experts do not cite that and as a point in our favour. It is just not how they approached it.

It is also important to be clear about precisely what the criticism is. Now, we do not take anyone to be suggesting -- I hope nobody is suggesting -- that Professor Hitt should have worked his way through the CMA Report or the Commission's decision in *Spotify* and responded to each and every point that is made in those decisions, that it somehow has some bearing on an issue in this case, however strong or weak that may be. If he had done that, that actually would have been inconsistent with his duties as an expert because -- and we would have been sanctioned for taking that approach

because the effect of that would have been that you would have had thousands upon thousands upon thousands of pages from Professor Hitt alone; nor would that have been possible for him to do satisfactorily, given that he did not have access to the underlying material.

So we infer that the suggestion is that, instead, he should have had a sentence or two in his report saying, "Here is a list of the regulators or courts that have made decisions that are in some way inconsistent with my conclusions. I disagree with those, for all the reasons set out in my reports". But again we ask, "What is the point of that? How would that help you and what is the legal authority? What case is cited against us that says experts have a duty to engage in that kind of formalistic or box-checking exercise?" And for what? This is not an instance where someone has suppressed facts or evidence or even decisions that there is any risk at all that someone else is not going to know about. There was no chance it would get through trial and you would not be told about the CMA's decision or the *Spotify* decision. Indeed, Dr Singer cited both frequently in order to support his case because it was consistent with his conclusions.

In any event, we say that the same can be said for Dr Singer as, as I just said, there are findings that go

in our favour in other decisions and Dr Singer did not point out specifically in relation to market definition, for example, or objective justification that his analysis was inconsistent with the court's analysis in *Epic v Apple*. I will apologise if I have got that wrong, but he does refer to the fact that *Epic* lost that claim against Apple but he does not do the job of going through and saying, "Oh, here I have just expressed an opinion which has been contradicted by the court in *Epic* in this way", and we have not criticised him. We did not cross-examine him on that basis and we do not criticise him for doing that because we do not waste our time on playing the man instead of the ball. That is just not how we do business. But it would not be fair to single Professor Hitt out for that.

There is a more basic problem with this argument too, which is that it is just incapable of helping you to decide any of the issues in this case. Professor Hitt -- this is true of Professor Sweeting too. I should say this is actually true of all of our experts, but Professor Hitt is the one I am focusing on. He always did the work of setting out his thought process and his analysis comprehensively, so we can all look at it, and it is your duty frankly to look at it and to test it and decide whether he is right or wrong

on the merits.

So this is not a situation where, for example, he claims to have done a review of the literature and he asks you to trust that it is representative and it turns out that he has failed to cite some literature running in the other way that you would otherwise have missed, nor is it the case that he has tried to tell you, "Believe me, there are some facts about the market that I know", and it turns out that he is sitting on evidence from Apple, private evidence that you might not otherwise have seen, which is inconsistent with that in the hope that it might not come to light. There are not even any allegations of that kind.

His evidence is just not like that. In fact, it is one of the most systematically empirical pieces of work I have seen in 15 years at the Bar. Every time Professor Hitt even half-thinks a theoretical thought, he then gives you almost painful amounts of empirical evidence on the extent to which the factual underpinnings for that theory are there. Like I said before with the ad revenue example, the same is true, as we will see, with each of his four theoretical reasons. He goes through and he shows you the -- to the best that he can and in a fair-minded way the extent to which it is true. He does not make broad assertions like, "Oh,

developers all have zero marginal costs or thereabouts". We will see when we go through it that he shows you the extent to which they do and they do not. It is very different from Dr Singer, who blurted out, as Ms Demetriou said earlier, false and frankly scandalous allegations of fact against Google and Samsung in the witness box.

So, in those circumstances, we say whatever conclusion you reach about whether you would have been helped by Professor Hitt to tell you that the CMA disagreed with him or that the European Commission disagreed with him, it does not actually make any difference to the decision that you are going to reach in this case because you cannot ignore his evidence. You do actually need to read it and consider it and decide whether it is right or wrong on its merits. In doing that, my submission is that you will not be much assisted by anything that my learned friends have said or anything much that they have said because they constantly play the man instead of the ball.

So those are the key themes. To wrap this overview up, we say the answer to the incidence question is zero, but I do want to be clear about what I mean about that because I think Mr Ward sometimes gets it a bit wrong. To be clear, that does not mean that literally every

developer in the world would have charged exactly the same price in the counterfactual as in the real world. That is not a proposition of fact that we are advancing. It is not a proposition of fact that I have ever advanced; it is not a proposition of fact that Professor Hitt has ever invited you or anyone else to adopt. But the world of apps is a weird and wonderful place. No doubt some prices would have been different in the counterfactual; some higher, some lower. But what we are doing here is an aggregate damages award, as Mr Ward was so keen to press on you, and that is why it is the average that we are looking for; the average and the aggregate being the same thing in this context, up to a denominator.

So the average is what we are looking for and our submission is that Dr Kent has failed to show that the average is different from zero and, on the contrary, we are not running a purely negative case here on incidence. We have come to you with a very fine set of empirical analysis and the best evidence we have is that the average effect is zero.

So what I am going to do in a moment and then more so tomorrow morning is work through the categories of evidence that my learned friends rely on in closings to support their case and in each case, I am going to deal

with the substance of it and in parallel I will deal with the claim that Professor Hitt should have referred to the various bits of evidence at the same time.

My submission time and again is going to be that Dr Kent is scraping the bottom of the barrel for any shred of evidence that they can find in circumstances where their case was careering off the cliff in the run-up to trial and essentially collapsed at trial.

The last thing I want to do by way of introduction, though, is show you the moment when their expert evidence really came to grief through Dr Singer in his views, at least if I am right about the delayed counterfactual for the unfair pricing claim, because it is important and I want to show it to you because what Mr Ward said about it, to try and rehabilitate Dr Singer, is just not right.

If we can pick that up at {Day18/28:1}. This is, as I say, Day 18 and not 16, so this is my cross-examination of him in relation to incidence. It is not Ms Demetriou's cross-examination in relation to market definition. What I wanted to do -- I was worried that Mr Ward might stand up in closings and say, "Do not listen to what Dr Singer told you when Ms Demetriou was cross-examining because that was in market definition and he just was not thinking all of his good incidence

thoughts". I was worried about that so I wanted to ask him these questions just to make sure, to give him a chance to recant. So you can see on this page, 28, the questions that I was asking him. I was asking him over the course of it a couple of questions to consider whether Professor Hitt's experiments were the best evidence of incidence in the excessive pricing claim. That is what I was putting to him.

At the bottom he says that this is actually the first he has heard of it, that it is an interesting question. That is remarkable because Dr Kent was relying on him to quantify incidence for the purposes of the unfair pricing claim as well as the exclusionary pricing claim. But what he says there is -- and if we go over the page as well -- is that, no, I am wrong because Professor Hitt's experiments run in the wrong direction.

So then on this page, 29, from lines 3 to 13, {Day18/29:3-13}, I am then asking him to put that to one side and to assume that this is the delayed counterfactual, and then, from line 14, he says actually he is not sure about that either, because why would he give up all those other great points that give him close to 100% pass-through? That does not sound like a good idea. Then I say right at the bottom of the page,

{Day18/29:25}:

"That is what I was wondering ..."

Why would you give up all those points?

Then looking over the page, page 30, at the top -- and I had up on the screen -- I was showing him the answer that he had given to Ms Demetriou, when she was asking him about the market definition question about Google lowering its commissions and I said to him, {Day18/30:17}, "Well, you did not mention any of those points when Ms Demetriou was asking you the same question in relation to the Google platform [as read]".

If we go to page 31, just to cut to the chase, and just skip down to line 18 -- or line 17, {Day18/31:17}, He says:

"... it is still my testimony ..."

So, in other words, he is not recanting.

"... it is still my testimony that the incidence would be smaller than the incidence that I think would have happened in our but-for world."

Meaning the exclusionary abuse. Then I say.

"Not just smaller ...", because his evidence when Ms Demetriou asked him was that it would be close to the small business program experiment.

Then he says, {Day18/31:22}:

"... I [do not want] to give you a point estimate

...."

Then I say after -- I think it was from some prompting from Ms Demetriou, I said, {Day18/31:24}:

"A lot smaller; right?"

He said:

"Yes, a lot smaller, sure. You got me --"

That answer has really left my learned friends in quite a pickle because he had just been reminded of all of his evidence on incidence, he had had it in mind, he had thought about it and he was sticking with his evidence that he gave to them when Ms Demetriou asked him.

THE CHAIRMAN: Mr Piccinin, I am afraid I am just not quite following the big picture point. You just need to locate this a bit for me. I do not know whether anybody else is struggling with it as well. I am afraid jumping into the transcript like that without -- if you tell us what the point is just very succinctly, that would be very helpful. I think we all remember bits of this, but it has been a long day and it is quite hard just to fit exactly how this fits into the discussion. Would you mind just giving us the --

MR PICCININ: I am so sorry.

THE CHAIRMAN: It is fine, and you are under time pressure, but if can you give us the two-sentence point that you

are making here, that would be helpful.

MR PICCININ: Yes. So the two-sentence point is that he accepted that, in the absence of steering, so in the unfair pricing counterfactual and in the delayed counterfactual version of that, incidence would be very low.

THE CHAIRMAN: Yes, okay.

MR PICCININ: So he is not going to be relying on the VAT experiment or the linear or the logit or the perfect competition. He had lots of great reasons why incidence might be closer to 100%, he said, but actually in this world he is accepting that that is all wrong. It is going to be very low.

THE CHAIRMAN: Do you say that that has a significance more broadly outside the scenario you are putting to him?

MR PICCININ: I do as well. So it is important that it has that result in that case; but actually, we say that the up or down question really cannot account for the difference between that and 90% or so. I am going to come back to that, when we get to the --

THE CHAIRMAN: Yes, thank you.

MR PICCININ: -- evidence.

So, yes. What that implies -- yes. Essentially it means that they have got no loss to the unfair pricing claim, at least if we are right that it is the delayed

counterfactual. That is where we end up.

What that implies, more broadly, is that everything else that they have been relying on, other than steering, is worth very little; and steering, as you already know, I say, is worth nothing anyway. So we say once you follow through the logic of this, their case on incidence is just toast.

So that takes us to my run-through of their written closings. The first topic is going to be *Spotify*. In Dr Kent's written closings, if we just get {A1/8/129}, and it is paragraph 362. We are told that:

"The starting point for any analysis of incidence of the Commission is the *Spotify* Decision."

Mr Ward began his oral submissions in the same way. We say that is a very surprising statement, because Dr Singer only mentioned *Spotify* in a single paragraph, merely by way of background. It was not part of how he quantified incidence and he did not engage with the substance of the analysis in any way. I will just give you the reference for where you can find that, so you can look at it later. It is {C2/8/135}, paragraph 277.

THE CHAIRMAN: So that is his second report, is it?

MR PICCININ: Sorry?

THE CHAIRMAN: That is his second report, is it?

MR PICCININ: Second report, that is right.

But in any event, what I want to do is to dive in and to show you, by the material that is in it, it is not useful to you in this trial; and I am going to engage with the substance of it, in a way that Mr Ward did not, when he was urging it on you before.

So the first thing that Dr Kent says in this paragraph, they say that the decision contains a detailed empirical analysis of pass-through in the sector and that the upshot was that all major music streamers increased their subscriptions to pass on the Commission to their iOS users in the form of a higher in-app purchasing price; and there is a reference there, 659, to recital 611. That way of putting it, I do not want to say "misleading in an improper way", but it could lead you to misunderstand what the factual position is. So I want to -- it might have that effect, not that it was intended. I might want to -- sorry, I do want to show you what has actually been done here.

So if we can go to {AB6/45/173}. So this is the *Spotify* decision, and we are looking at recital 611. I am going to call them -- the European Commission, I am going to call them "EC" sometimes. I do not like doing that, it is ugly, but the problem is that otherwise "Commission" and "Commission" will get confusing.

So the EC says that all of these major streaming

providers increased prices for transactions concluded through IAP, so that is what my learned friends rely on, and I think that might be what you had in mind, sir, the other day.

THE CHAIRMAN: Yes. I had *Spotify* -- I had that in mind, but I can't remember who I asked about that, but that is what --

MR PICCININ: That was Ms Demetriou, I think.

My submission is that it is fine, but it is a slightly funny use of the word "increased", because these music streamers never charged a lower price on iOS. The increase is as compared to the price that they applied on other channels, principally their websites.

So what actually happened is that *Spotify* was previously choosing to operate as a pure reader app, so paying nothing to Apple, and then it decided to give IAP a go; and when it decided to do that, what the EC is telling us is that it charged a higher price to iOS users than it charged on its website.

So all the EC has found here is some examples of differential pricing, as between IAP and these particular developers' websites.

Now, a contextual point. You can understand, from a relevance perspective, why the EC wanted to rely on that evidence in that case, in *Spotify*, because that

case was about the anti-steering rules. So the monetary harm -- remember, Mr Ward showed you that the EC was trying to prove that Apple had caused monetary harm to consumers -- that is relating to consumers not being steered to buy *Spotify* subscriptions on the *Spotify* website. The EC is not looking at a counterfactual in which Apple charges a lower Commission or a counterfactual in which there is alternative distribution or alternative payments in which someone else charges a lower Commission.

I should say here that in the *Spotify* litigation, Apple disputes the EC's reliance on this evidence for this purpose, and I will just make some contextual points about it. These IAP transactions are a tiny fraction of the music streamers' commerce, because almost everybody transacts for this type of app, through the websites.

THE CHAIRMAN: Sorry, when you say "the *Spotify* litigation"?

MR PICCININ: Sorry, I mean for the purposes -- not for the purposes of *Kent v Apple*, but for the purposes of the European Commission and Apple in this investigation.

THE CHAIRMAN: Yes, exactly; this world, rather than some other --

MR PICCININ: Exactly, exactly. I put it in that way because I am not about to have this argument with you.

I am just letting you know that I do not want anyone later to say that I am conceding that the European Commission's analysis was right.

THE CHAIRMAN: Yes, yes.

MR PICCININ: So just for your note, recital 714, we do not need to go there, but it is on page {AB6/45/195}, there is reference made to this argument. The unredacted percentages, if you are interested, can be found at {D1/1647/53}, 176, which is from our submissions, Apple's submissions. What that shows is that very, very high percentages, if I can put it that way, of music streaming commerce are done through the websites, not through iOS.

Indeed, as I think you will know, *Spotify* only allowed IAP transactions for a very short period of time; so these pricing decisions that you are looking at here are really of no material commercial significance to the music streamers, but they are obviously helpful to the music streamers and to the European Commission in running a case that says that Apple's anti-steering rules should be stopped.

But the point I just wanted to make sure that you understood is that when there was a reference to these developers increasing their prices, and "passing on" -- I am doing that in air quotes for the benefit of the

transcript -- the Commission, that is not an example of developers changing their prices up or down in response to a change in the Commission up or down. I should say as well, when I put the air quotes around "pass on", I am not acknowledging that there was pass-on, just in case someone else likes misreading submissions later.

As for the suggestion that this, as in the conclusion at recital 611, was the result of a detailed empirical analysis, which is what my learned friends say, again -- how do I put this politely? That also needs some careful treatment. As I say, this is the recital that my learned friends cite for the proposition of a detailed empirical analysis. I want to be clear, it is not the only analysis in the European Commission's decision, but it is the one they rely on. But if you look at the next recital, you can see what it is. There was a sample of six developers, and for each one, the "analysis" -- again, in air quotes -- consists in comparing the price that they offered on the website to the price that they offered on IAP.

Now, that is something that Dr Singer could have done for himself and, indeed, there is no reason why it should have been restricted to music streamers. It would have been an odd place to start, frankly. It could have been done on a much wider basis.

I just want to show you now a passage from my cross-examination of Dr Singer about this issue of differential prices on iOS and websites; and that is {Day18/88:24}. Just to locate this for you, sir. This was when I was showing him the expert report from Steam, from Dr Chiou --

THE CHAIRMAN: From the *Valve* litigation?

MR PICCININ: That is right, from *Valve*, looking at the price differentials that existed for games that were not available on Steam, but were available on *Epic* or Microsoft or on consoles. Then on page {Day18/89:2}, he says, yes, Dr Chiou had a sample size of 11; and I just note that 11 is almost twice 6, and what he says is:

"Had I come to this court and said: I am going to say something about steering based on a sample size of 11, we would have been here for half an hour. You would have called that a flaw."

So it seems that Dr Singer is not very impressed by samples of the kind that Mr Ward now describes as "detailed empirical analysis".

But anyway, I then put to him, lines 7 to 12, that *Valve*'s work was only preliminary and that Dr Singer could have done a systematic job looking at other developers and he agreed. He agreed that he could have done that, and that he did not; and he said he did not

because:

"We chose to prove incidence in other ways."

There you have it. Work of the kind that was done by the European Commission is being trashed by Dr Singer as too small. Well, he could have done a systematic and proper job of it, but he chose to prove incidence in other ways.

My submission to you is that it is just not open or good enough for Mr Ward to turn up in closings and say that the European Commission's analysis is the key to incidence in this case. It just beggars belief to say that if only Professor Hitt had said in his reports, "Did you know that the European Commission had looked at six developers' websites?" that Dr Singer would have said, "Oh no, I did not know that", and then based the whole of his analysis on it.

Dr Singer knew all about this. He cited the European Commission's decision, albeit not to be relied on as establishing pass-on or quantifying it.

It is funny, though, because if you are in the business of finding things to criticise in experts' approach to making points against themselves, Dr Singer did not volunteer his opinion to the Tribunal that the analysis that was done here, that Mr Ward now wants to rely on, is unreliable because the sample size is too

small.

Again, I do not actually urge that on you. I do not want you to criticise Dr Singer for that, because he was not relying on the European Commission's decision to do anything of any importance to the case.

My point is just that my learned friend's treatment of Professor Hitt on this topic is really quite unfair.

In any event, I do not need to dispute in this case, and Professor Hitt has never disputed, that to a greater or lesser extent, and for whatever reasons, music streamers have chosen to charge higher prices on iOS than they charge on their websites. But that does not tell you very much about the counterfactual in this case, because the counterfactual in this case, as we have discussed, is either a lower Commission on the App Store or the option of lower commissions on alternative distribution, or payment providers.

The thing is, we already know what happens when you decrease the Commission rates for these music streamers on the App Store. They still charge more on iOS and to the same extent.

If we can just look at {C3/4/589}. This is -- oh gosh, I cannot say the name of it. You can read the name of the developer at the top. This is from -- it is located -- it is Professor Hitt's analysis of the

auto-renewing subscription experiment. What he is showing is that there was a very significant reduction in the effective Commission for this developer. That is the blue line, all the way down to about 20% over the 12 months that he is looking at. But there was absolutely no change at all in the price they charged on iOS.

Over the page {C3/4/590}. You can see the same for another developer I will not name; you can see who it is. An even bigger change in the Commission, a strikingly similar change in the pricing.

Then if we go to {C3/4/592} --

DR BISHOP: I am trying to follow you here. I see this is not confidential; it is the average Commission rates.

MR PICCININ: Yes, the average Commission rate.

DR BISHOP: Yes.

MR PICCININ: I should have said, Dr Bishop; what this is, it is an analysis of the impacts of Apple's decision to, in -- auto-renewing subscription programs. What that does, it decreases the Commission for the second year of anyone's subscription; and then what Professor Hitt has done is he has calculated the average Commission that this developer is paying to Apple on all of its commerce and iOS at particular points in time; and you can see that it comes down to --

DR BISHOP: Yes, I can see that.

MR PICCININ: -- 15%.

DR BISHOP: You are saying that this is accompanied by a --

MR PICCININ: By no change in the price that they charge to users.

DR BISHOP: Where is the price to the users?

MR PICCININ: That is the green line.

DR BISHOP: Oh, the green line. Okay.

MR PICCININ: Just to finish this point and then I see the time. Page 592 {C3/4/592} -- bear in mind, Mr Ward criticises Professor Hitt for having said nothing about music streamers in the whole course of his analysis of incidence. That is a complaint that has been made about Professor Hitt. This is his analysis of incidence. We are looking at it now. We can see here, this is the simple before and after kind of analysis that he does, just looking at whether the prices go up or down. You can see the third category there is music. This is looking specifically at music streamers. What you see is that almost nobody changed their prices; that is column 3. More increased than decreased; that is column 4 versus column 2.

Then there is a difference in difference analysis, again, for music. That is on page 648. Sorry, it is not page 648. I will come up with a reference.

In any event, you might remember, when you look at the difference in difference analysis, he does it by genre as well; so there is a special one just there for the music. Again, what he finds is no effect. So it is just not true that Professor Hitt did not address music streamers in relation to incidence.

I have seen the time, sir.

THE CHAIRMAN: I think we are pretty much, to use -- using sporting analogies, I think it is stumps. So 10.30 tomorrow morning. We have the --

Housekeeping

MR PICCININ: If it is possible to start at 10?

THE CHAIRMAN: Well, have we got the CMA tomorrow morning; is that right?

MR PICCININ: I think they are after us.

THE CHAIRMAN: Oh, are they? I see. I am now very confused about what is happening tomorrow morning. I thought we were going to have the CMA and then you were going to reply.

MR PICCININ: That is right. We are going to finish our submissions first. That is our proposal.

THE CHAIRMAN: Okay, but you have got an hour, have you not, so how is that going to work? How much -- have you just --

MR PICCININ: I will probably take most of that.

THE CHAIRMAN: Okay, that is fine. I mean, I -- well, I will leave it up to you how it is going to work, but we are absolutely clear that Mr Hoskins is on at 2.30.

MR PICCININ: I understand that. The difficulty I am in, sir, I am not making this go more slowly than --

THE CHAIRMAN: No, I am not criticising you at all.

MR PICCININ: There will come a point where I will just have to stop making submissions.

THE CHAIRMAN: Well, I am afraid that is right.

MR PICCININ: But if we started at 10, you could hear more about incidence. That is the point I am putting to you. You may like that or not. But the alternative is working through what we have said in our written closings. It is up to you. (Pause)

THE CHAIRMAN: Right. So we will start at 10 o'clock.

MR PICCININ: I am very grateful, sir.

THE CHAIRMAN: That means -- just so the CMA knows what is going on, what time -- well, they will be here, presumably.

MR PICCININ: I assume so. They will be here.

THE CHAIRMAN: Well, I can see there is somebody here from the CMA. I hope that message can go back to them. But we are not expecting them -- I mean, if Mr Gregory -- it is not convenient for him to be here at 10, he does not need to be here at 10, because of course we will be

talking about other things; but he might expect to be on his feet around about quarter to 11 or something like that, do you think?

MR PICCININ: Yes, something like that.

THE CHAIRMAN: Good. Hopefully that message can get back to him. Good, okay.

MR HOSKINS: So does that mean that the CMA is going to finish and we are having another hour of --

MR PICCININ: No, no, no. We will not have another half an hour.

THE CHAIRMAN: As I understand it, I think that Apple have another hour. They can choose how much of that they use for the fascinating subject of incidence or how much they use for their reply to the CMA. But whichever it is, it is an aggregate of an hour; and so if Mr Piccinin cannot resist it and he takes 59 minutes, then they have a minute to respond to the CMA. That is more or less how I understand it.

MR PICCININ: When I requested 10 o'clock, sir, it was on the basis that there might be --

THE CHAIRMAN: Oh, I see. He wants another half-hour. He is getting another half-hour because of that.

MR HOSKINS: I will still play nicely.

THE CHAIRMAN: The way that -- if you want a little bit more time, Mr Hoskins, it will be there. It is not going to

be a lot, but it will be there. So we will find a way. If you think --

MR HOSKINS: It has just been a long eight weeks, as --

THE CHAIRMAN: You are telling us! Okay. Well -- no, that is helpful, thank you. We will see you at 10 o'clock tomorrow morning.

(4.19 pm)

(The hearing adjourned until 10.00 am on Friday, 28 February 2025)

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