IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 28th 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

Friday, 28 February 2025

(10.00 am)

Closing submissions by MR PICCININ (continued)

THE CHAIRMAN: Good morning, Mr Piccinin. Good morning everybody. Day 28; still a very good turnout, that is very impressive.

Mr Piccinin.

MR PICCININ: Yesterday, sir, one of the points that I was making in the introduction on quantum was what I will call the UK-only point --

THE CHAIRMAN: Yes.

MR PICCININ: -- which was the point that it is not plausible, we say, that many developers would choose to set a lower price specifically for the UK, if that is -- since that is the counterfactual we are in, where there is a reduction in commission-only in the UK. You asked me whether that is something that has ever come up before in the case and I said I just wanted to give you a couple of references.

THE CHAIRMAN: Yes. I suppose that I was asking you, just because I was asking you whether it had come up as a point about incidence.

MR PICCININ: Yes, yes, exactly, and that is what I was going to give you, so --

THE CHAIRMAN: Yes, good. Thank you.

MR PICCININ: Firstly, just in our written closings so you know where to find it, it is paragraph 488, that is {A1/9/160}.

Then in terms of the cross-examination of Dr Singer, there are two parts we need to look at -- well we do not need to look at them, but I will give you the references. One is I put to him that as a matter of principle, the approach on incidence is to be looking for a specific change in the UK, that is {Day18/153:22} down to {Day18/154: 6} and he agreed that that was the right approach.

Then on the question of whether it is plausible that developers would want to set specific prices in the UK that are different from just the globally -- global price tier prices, that came up when we were debating the VAT experiment we are going to look at a bit later. The reference is {Day18/64:19} to {Day18/65:2}.
I should just tell you, Dr Singer disagreed with me on that. He said, his evidence was that developers would make UK-specific decisions both for VAT and also for the commission, is what he said.

So that was his evidence to you, but our submission is that that's just not realistic; and the whole existence of the price tier structure, where you equalise pre-tax prices globally shows that the way

developers want to work is on a global basis.

Then similarly, the other evidence, you have seen it and we will see it again in the case, about uniform pricing across very different price channels, with very different costs; again, we say it is consistent with the idea that at least lots of developers want consistency in their pricing more than they want to optimise for these things.

THE CHAIRMAN: Yes.

MR PICCININ: So that is that.

Now, where I was in my submissions yesterday was on *Spotify*. I have got a little bit more on *Spotify*. Sorry --

DR BISHOP: I know -- I have a small question on this. We do observe proceedings on this issue, on the issue of the rate, the 30% rate, in various jurisdictions around the world.

Now, let me ask you the following hypothetical. Suppose all the major OECD countries had simultaneous proceedings about Apple; they all -- all -- all coming to their final day of hearing on the same day. Is it your position that all 30 or something of them would be obliged to consider the counterfactual as Denmark only, France only, Australia only. Is that your position?

MR PICCININ: Yes, sir. I remember you put the same

question to Mr Kennedy when he was relying on this point to -- for a point in their favour, and he gave the same answer, which is that unfortunately, or fortunately, depending upon your perspective, competition law, law in general, is territorial. What that means is that different jurisdictions in all of those different cases can reach different conclusions. In the US, the conclusion they reached in California, as you know, is that there is no antitrust violation at all.

DR BISHOP: Yes, it is clear -- that is clear that some of them might reach different conclusions.

If they were all inclined to reach the same conclusion, they would all be hobbled in some sense.

MR PICCININ: That is why sometimes competition law claims are not the answer to every problem in the world.

DR BISHOP: I did not want to delay you unduly, so --

MR PICCININ: I understand the point.

DR BISHOP: Thank you, yes.

MR PICCININ: Now, in *Spotify*, we were talking yesterday about the evidence that Professor Hitt had done in this proceeding, looking at the subscription experiment, and he looked specifically at the impact, or lack thereof, on the pricing of music streamers; and I just wanted to show you where that is dealt with in the *Spotify* decision, as my learned friends place some weight on

that as well. That is {AB6/45/179}. At the bottom of the page, you can see in recital 648 that Apple is responding there to an analysis that it said that music streamers charge more on iOS because they have to. In other words, they cannot cover their costs without charging more, and that is why they are charging more.

If we just go over the page {AB6/45/180}. Apple's position, put to the European Commission as well, the same point about the ARS program which suggests that they were not charging more, because they have to, but probably because that is just the decision that they have made.

Now, in 649, the Commission responds to that, and they make a number of points.

Their first point is that even a 15% commission is problematic for music streamers. In other words, what they are saying here is that because music streamers have these unusual higher costs of royalties to pay, they would not even tolerate a 15% commission and they would want to steer away from the iOS platform, even if -- even when faced with the 15% commission.

What that tells you is that it is not very interesting evidence, really, for our case, when thinking about counterfactual prices at that sort of level on alternative iOS distribution platforms, even if

you accept what the Commission says here.

But the things they do not grapple with, the fact that the evidence shows that there was no change to the -- on this point, it does not grapple with the fact that there was no change to the prices charged by the music streamers; because it is not that the music streamers changed from passing on a 30% commission to passing on a 20% commission; it is that they continued to "pass on", again for the transcript, it is air quotes, a 30% commission, even though they were not paying one. So you cannot say that I had to pass on a 30% commission if you were not paying it.

In the rest of this paragraph, they have an argument from the EC that it is not surprising that the music streamers did not cut their prices, because discounts are more likely to be granted for the initial period than for later periods. Of course, they were not granting discounts for the initial period either.

But in any event, the point I really want to make here is that that is just an argument or an opinion, or a view, or a conclusion from the EC. It is not based on any particular evidence from that case and it does not advance the debate in this trial at all to look at what the EC is saying about this, because that is a point that Dr Singer makes too, and we have had that debate.

For completeness, I mentioned yesterday that the European Commission did not only rely on the sample of six website comparisons. That is not the only analysis in the decision; it is just the analysis that my learned friends rely on. You can see at recital 650 there is a cross-reference to some other analysis that the European Commission did, back at 627; and that is -- if we go back to page {AB6/46/174}, this is where it starts. It goes on to 627. Most of it is redacted. But at 616, you can see the introduction to that discussion, and basically what it is, it is something like a margin squeeze analysis done on Apple Music's financial position. My submission on that is that it is very hard to see what relevance analysis of Apple Music's financial position has for the issues in the case. But ultimately if I am wrong about that, if my learned friends wanted to know about it, they have known about it since May 2024 at least, when the decision was published. Dr Singer had cited the decision. If they wanted to see it, they could have sought disclosure of it.

So that is -- we are still not done with the *Spotify* decision.

If we could go back to the written closings from my learned friends, {A1/8/129}, at 362. Another point they

make here, which is on the same theme we have just been looking at, is that the Commission found that music streamers did not just choose to pass on the cost, but they had to. There are two problems with that.

One is that it is a very specific point about music streamers. So if we could just go back to *Spotify* again, {AB6/45/69}. If we just look at recital 213. Here you see some numbers relating to *Spotify* and you can see at the end of that paragraph that the VAT, plus royalties, are said to come to about 70% of the pre-IAP price.

If that is right, then depending on what exactly VAT was, the royalties themselves would have had to have been something like 50 or 55% of revenues.

Now, even if that is true, and a meaningful analysis, that is just very different from the game developers who make up most of the commerce in this case. You have seen form 10-K after form 10-K after form 10-K that we have shown you over the course of this trial. For them, variable costs, other than the commission, are not 50%; they are virtually nothing, zero per cent. Even Dropbox, remember, which was Mr Howell's great white shining knight, to the developer who would have high marginal costs, remember Mr Kennelly cross-examined him on yet another form 10-K and he

accepted that even Dropbox only has variable costs of a few percentage points of revenue.

So if the European Commission's analysis here is right, that is a reason not to use music streamers as a guide for how everyone else would be expected to behave. There is no point worrying about how music streamers would behave, because as a group they are of no significance to the damages exercise that you are engaged with, because in cumulative, in aggregate, they add up to low single digit percentage points of the commerce. It just does not matter. It is a rounding error.

Now, going back to the closings again, so {A1/8/130}, paragraph 363. My learned friends criticise Professor Hitt for making no mention at all, and you see in the middle of the paragraph, they underline "at all", of music streaming in relation to incidence; and that is just wrong, as you have seen. I showed you that yesterday. He had specific analysis of music streamers.

I think what is true is that he does not specifically deal, he does not have a section where he specifically deals with the fact that there is evidence of differential pricing for music streamers as between IAP and their websites.

But what he did do is a general analysis of that

issue, a more general analysis of that issue of differential pricing, and he did not come close, in that analysis -- I will show you -- to suggesting that everyone engages in uniform pricing across their websites and iOS.

So if we can just look at that in Hitt 2; {C3/4/275}. It is exhibit 45. What he is doing here is, he is looking at the top 50 subscription products on the App Store and then he is checking what percentage are available on other platforms, like the App Store and the websites, so that is row 1, column 2. Then he is also checking what percentage of those have uniform pricing, so that is row 2, column 2.

So you can see that it is half -- So I should take it in stages.

80% of the top 50 are available on a website, so that is 40 of the top 50; and then half, so I take that to mean 20 out of the 40, are available at exactly the same price on the website.

Now, this is top 50 subscription products across all genres, so in principle that would include music streamers. But there is a note here that you can see, the second sentence of the note, that he has excluded five specific subscription products that are on iOS from his analysis, and if you just note the third one of

those, I will not read it out. If you just note who the third one is. So that is excluded and he is upfront about it. The reason it is excluded is because at that time, it was not available to choose. So just to explain, there were still iOS subscribers to *Spotify* at that time, people who had subscribed through IAP years previously and had maintained their subscription for all that time, but *Spotify* had stopped allowing new customers to use IAP at that time, so that is why it is not included in this analysis. But even if he had included it, it would have just been another one out of 40.

So we say you do have to ask the question: why should Professor Hitt have done a specific analysis of differential pricing for music streamers in particular, just because the European Commission did? They are very different from other developers and they are of no significance to the case. So we do say that that would be a pointless exercise and, in any event, a pointless exercise that Dr Singer could have done if he wanted to.

So that is *Spotify*.

The next category of evidence that Dr Kent wants to look at, if we go to {A1/8/130}, paragraph 364, is developer evidence. We see the heading. Now, Dr Kent has some nerve giving that as a category in

circumstances where Mr Holt said he was going to go out and conduct a survey of developers and Dr Singer decided it was not worth doing. So I mentioned that yesterday. I want to show you. If we go to {C2/1/117}. This is Mr Holt's preliminary report. You can see the heading:

"IOS App Developers' pricing strategy".

If you just look at 9.5.17 at the bottom, he notes that there are several factors that developers probably consider when setting their prices, and he wants to perform an assessment to determine the weight attached to each consideration and how developers' pricing teams work. So he wants to get his hands dirty and not just do this in a hand-waving way, but actually really get to grips with the detail of how pricing works.

If we go over the page {C2/1/118}, he says, you can see it at the top, 9.5.18, he wants to determine how the pricing decisions are made and specifically how much focus there is on cost and how the commission may be factored into that.

Then 9.5.19 he said he was planning a survey -- so he was going to do this systematically -- a survey to cover some of the main market segments in terms of revenues. If you just look at the footnote, 324 at the bottom of the page, you see he makes the point that, as he understands the distribution of commerce, and this is

before he has even had our data, he understands that even a modest number of developers would cover quite a lot of the commerce in the case; and, as you know, he is right about that. So that was his plan.

If we go to Singer 1, so this was Dr Singer's preliminary report. That is {C2/3/27}, paragraph 68. He says that if there is anything in disclosure, he will have a look at it, but he is not going to do a survey. Why is he not going to do a survey? He says:

"... I do not believe the surveys would yield any incrementally valuable insight on iOS App pricing."

That is because of his view of the world, is that economic theory tells you that price depends on costs, and commission is a cost; job done.

So Dr Singer made a choice not to gather information on this topic, and now my learned friends say that this is a really important topic that is going to prove that there is pass-on in this case.

DR BISHOP: I am a little confused. I thought the stuff you showed us earlier was from Dr Singer's preliminary report. Is that ...

MR PICCININ: No, what I showed you a moment ago was Mr Holt.

DR BISHOP: Mr Holt, thank you.

MR PICCININ: Sorry, let me clarify, Dr Bishop, because it

is easy to forget the chronology. At the certification stage on the Class Representative side, there was only Mr Holt and he was doing everything. So he was telling you, as part of his blueprint for the trial, what he was going to do.

DR BISHOP: I remember, actually.

MR PICCININ: When Dr Kent split the expert role, she quite properly asked Dr Singer to do a similar job, a similar blueprint to trial. That is what this is. This is not his main report; this is his blueprint to trial report, and he is telling you that, very fairly, at that stage, so we all know, we are not going to get developer evidence in this case of the kind that Mr Holt was looking for.

So what have my learned friends cobbled together, in the absence of that survey evidence?

If we go to {A1/8/130}, back to 364. Well, what we have here is the incredibly general statement from Mr Howell that the commission is a cost that would be considered as part of the price-setting methodology of large developers and that it "would have an impact on their prices."

My submission on that is that that is effectively ipso dixit evidence. Just to explain what I mean by ipso dixit. It is Latin. I am from the colonies, I do

not speak Latin. I have brought the Supreme Court along to help us. So if we can go to {AB3/54.2/1}, we see this is a decision of the Supreme Court, *Griffiths v TUI*. If we just go forward to {AB3/54.2/15}. It is an interesting authority on food poisoning. You can see the heading. It is Lord Hodge giving the judgment of the court. You can see the heading:

"Analysis: the law".

If you look at paragraph 37, it says:

"Because an expert's task is to assist the judge in matters outside the judge's expertise [that is one half of it], and it is the judge's role to decide the case [that is the other half], the quality of an expert's reasoning [not just their opinions, their reasoning] is of prime importance."

Lord Hodge refers back to what he and Lord Reed said in *Kennedy v Cordia*:

"An expert must explain the basis of his or her evidence when it is not personal observation or sensation; mere assertion or 'bare ipse dixit' carries little weight, as the Lord President famously stated in [the Scottish case]. If anything, the suggestion that an unsubstantiated ipse dixit carries little weight is understated; in our view [that is the Supreme Court]

such evidence is worthless. [Now] Wessels JA [judge of appeal] stated the matter well in the Supreme Court of South Africa [in a South African case said] ... 'an expert's opinion represents his reasoned conclusion based on certain facts or data, which are either common cause, or established by his own evidence or that of some other competent witness. Except possibly where it is not controverted, an expert's bald statement of his opinion is not of any real assistance. Proper evaluation of the opinion can only be undertaken if the process of reasoning which led to the conclusion, including the premises from which the reasoning proceeds, are disclosed by the expert.'"

Then:

"'As with judicial or other opinions...'"

Sorry, we are skipping to another case:

"As with judicial or other opinions, what carries weight is the reasoning, not the conclusion."

What we say is that in a case where you have a -- it is fine to have industry expert evidence, of course, but if the industry expert just comes along and says, "Trust me, people will take it into account and it would have an impact," in circumstances where there are no case studies, no illustrations, nothing, then no names, developers for sources, nothing we can investigate,

nothing you can evaluate, there is nothing we can really do with a generalised statement like that.

So if we go back to the written closings --

THE CHAIRMAN: Mr Piccinin, I mean, it could be said that some of this is not terribly controversial, what Mr Howell is saying. Some of it actually is perhaps more suited to an economic expert and might be a perfectly fair point to make, but it is not terribly controversial that the mechanism by which large variable costs are dealt with in the profit maximisation process is -- that is fairly well-known as what I think has sometimes been called an economic fact. Are you disputing that? Is the point you are making just simply about the causation point or are you actually -- which bits of this do you object to?

MR PICCININ: What I am saying is that it cannot really help you. The idea that they would consider the commission is not controversial. The proposition that it would have an impact, if the commission had been lower, is controversial. So we have empirical evidence on that which says not.

THE CHAIRMAN: Yes. I understand, I understand. I just want to be clear that you are not -- I mean, to the extent that we were inclined, as a matter of economic theory, to take the view that a large variable cost, in

ordinary circumstances, I appreciate there are all sorts of different arguments about high marginal costs and about ad valorum, and so on. I understand all of that. But just as a general principle, you are not objecting to us approaching it as a matter of economic theory, are you, on that basis? I quite understand the point about impact does not amount to proof, but as a theory I just want to be clear that you are not objecting to us having that as a thought in our heads.

MR PICCININ: I think Professor Hitt agreed with the general economic theory in a very simple case. Where you are a widget manufacturer and you are talking about the marginal costs of producing the widget, the economic theory suggests that it would be likely to be passed on.

THE CHAIRMAN: In fact I think I put that to him, did I not?

MR PICCININ: I think so.

THE CHAIRMAN: I asked him something like that.

MR PICCININ: I think he agreed with that, but that is not this case.

THE CHAIRMAN: No, I understand. I understand all the points you make about why it doesn't apply, I just want to make sure I understand which bits of this you object to.

MR PICCININ: Yes. I hope I have made that clear.

THE CHAIRMAN: Yes, you have.

MR PICCININ: If we go over the page, at 365 {A1/8/131}, they say that it is [text redacted at client request].

THE CHAIRMAN: I just wonder if you want to be a bit careful. Some of this is marked -- some of the bits that you have --

MR PICCININ: I am sorry, I should not have read that out. I am not going to read out what it was that was said.

But again, that decision is about a different issue, which is different pricing across different channels.

Then at 367, we have Mr Howell again, saying -- and Mr Ward relied on this in oral submissions -- that for most developers "the cost of running the business is about equal to the revenues."

Now, aside from the point that we cannot really investigate that either, I can imagine that that might be true; but again, you need to be a bit careful, because most developers account for approximately zero per cent of the commerce in this case. I just want to show you that.

So if we go to {C3/8/95}.

This is why you need to be really careful about generalising from scraps of evidence. So here, we have the "Share of App Store commissions associated with the top developers"; and if we could just zoom in a bit on exhibit 4, because we are going to read to ourselves the

numbers at the very top. So you can see the final column on the right is the top 10%, so the top 10% of developers. You can see the percentage of the commerce that they account for. So that means the bottom 90%, 90%, account for 100% minus that number.

My submission to you is that if we had shown what the bottom 50% accounted for, and we wanted to write that out in percentage terms, we would run out of ink before we stop writing the zeros.

So those developers again are just -- they are very important to the world, to the App Store, and to all of that, but they are not important to your decision about quantum in this case. They are just incapable of moving the dial.

So going back to {A1/8/130}, 369 to 370. Sorry, if we go over the page. Sorry, {A1/8/132}. 369 to 370. We are told that Apple understands there to be "significant consumer incidence"; and that is just not right.

What is right, and you saw some evidence of this in the cross-examination of Mr Schiller, is that there are some types of business that take the view that the economics of the App Store are not attractive to them. That could be for all sorts of reasons; they may have significant variable costs, for example, in the form of

licensing fees. That is why Apple makes the Reader Rule available so that if that is the view you take of the economics of all of this then you can take care of monetisation yourself on your website and just rely on -- and pay nothing to Apple for distribution of your app on the App Store.

So that is what the Reader Rule is doing.

Now, if some developers want to have it both ways and rely on the Reader Rule but then have a small fraction of their commerce run through the App Store, and if they want to charge a higher price for that, then they are welcome to do that too. But again, I showed you the evidence earlier that Professor Hitt had looked at of uniform pricing, which acknowledged that there are lots of examples of developers that do charge different prices on iOS from their website. That is definitely a thing that happens.

But none of that is evidence of significant consumer incidence or a belief by Apple that there is significant consumer incidence. The kinds of apps for which this is an issue are likely to be using the Reader Rule and that is why they are likely to account for a very small fraction of the commerce in the claim. There is certainly no evidence to the contrary.

Now, the specific claim -- over the page, at 371 --

that Apple conceded that music streamers pass on commission is just wrong for the reasons that we have given in our closings at paragraph 484 {A1/9/159} I am not going to go over that again.

Paragraph 372 is an extraordinary submission {A1/8/133}. This says that we, Apple, made a tactical decision not to call factual witness evidence on Apple's understanding of consumer evidence. But sir, Apple are not third party app developers paying commission. Now, there have been a very, very, very large number of documents disclosed in these proceedings, and in all of the other proceedings around the world. If Apple had some special knowledge about incidence, it seems unlikely, but if they did it would have been recorded in the documents and there would have been cross-examination on it, but there is just nothing there.

In contrast, as I have mentioned, Mr Holt was going to go out and get this type of evidence and Dr Singer decided not to. So this really cannot be laid at my door or at Professor Hitt's door as a topic that has gone uninvestigated.

If Dr Kent wants to talk about a lack of curiosity, if this was a whole section of your incidence -- if you had in mind earlier in the proceedings that there was

going to be a whole section of your closing argument on incidence that was based on developer evidence, you might have thought you would have the curiosity to go out and get a little bit of that evidence yourself instead of deciding not to. So we say this whole topic just takes them nowhere.

The next topic, I think it is over the page, is ad valorum charges. I am going to come back to that, because that actually belongs in the debate about economic theory. So we are going to get to that.

If we go over the page, {A/8/135}, the next, next topic is "The VAT increase". The argument here has gone through many changes and what is left now is both diminished and seriously contorted. The argument now seems to be that Apple believes that demand for apps is inelastic and Apple therefore believed that developers would want to pass on the increase in VAT in the UK, and that is why Apple then moved all of the price tiers up.

I just want to look at the document that my learned friend relies on for that chain of reasoning. So if we go to {D1/242/5}.

So this document explains in the first bullet, Apple's general approach to its price tiers; but what that approach is, it is an approach of equalising pre-tax prices for apps and IAP products across the

globe.

The third bullet -- sorry, so that is correcting, therefore, for tax and also correcting for changes in foreign exchange rates. So the third bullet gives you an example of what that means. It says that if FX rates change or if local tax rates change such that the pre-tax price in a particular country is different from the US by more than 10%, then Apple will make an adjustment to the price tiers to bring that back into line.

The whole point of this exercise is that developers do not need to think about FX rates and they do not need to think about local tax rates, because it would be very difficult for developers -- what is valuable about this service is that it would be very difficult for developers to have to worry about setting lots and lots of different prices for the same products all over the world on the same channel.

Bear in mind that any one app might have lots of different products associated with it, in terms of different in-app purchases of different quantities and qualities and types. So the simplest thing to do is just to decide on one price for each product and let Apple sort out the rest of the world for you.

So you cannot really draw any inferences from this

about what a developer would do if Apple chose not to make an adjustment.

If anything, the assumption that is underlying this approach is that developers will ignore changes that are smaller than 10% of their price levels, and I say that is the assumption because if developers were making country-specific adjustments when there is a change in FX rates, say, or in VAT or whatever that moves the dial by 8% or 9%, then when Apple comes along to move the whole price tier by 10 -- because it has gone up by 10%, there is going to be an overcorrection.

So if anything, what this process of thinking about what Apple did in 2015, it is actually quite unhelpful for Dr Kent's case, because the counterfactual only involves a change in the commission in the UK, as I have talked about, and the likelihood is that if there was a change in the commission in the UK, Apple is certainly not going to -- I mean, Apple certainly does not change price tiers for developers who have different commission levels; and we know that from the real world, because developers do have different commission levels, but the price tiers all stay the same, and there is no reason to think that developers would do it either.

So let us go to page {D1/242/13}, because this is the one that my learned friend likes because it mentions

elasticity, but we have to look at it a bit more carefully. There is a table at the bottom that sets out what the impact is going to be of the proposed price tier changes on spending. What the author of the slide says in the final bullet is that this table has been produced on the assumption that demand for apps is inelastic. What they seem to mean by that is that they are assuming that the volume of transactions does not change -- I am not sure if it is does not change at all or does not change much -- when you change the price.

Then in the next sentence, they do say, my learned friend is right, that that is "evidenced by prior app store price changes"; so what they are saying is that on previous occasions when the price tiers have changed in this routine sort of way, the number of transactions does not seem to have changed much.

Now, if that is true, that means that if all developers put their prices up in unison, the consequence would be that revenues would increase. That is true whether there has been an increase in VAT or an increase in a marginal cost or not. That is just a comment about the elasticity of the demand function; it has nothing to do with costs.

So I am genuinely puzzled as to why Mr Ward thinks that tells you anything about what individual developers

would do, making individualised price decisions independently. It is just a complete non sequitur.

DR BISHOP: Well, just a moment. I take your point that this is a -- that each individual developer is constrained by other developers, and so there is no contradiction in the market elasticity being low, but the individual elasticity of individual developers are high; that is routine in competition. But -- competitive industries.

But you have just told us that there are only a few developers who really make any difference: Candy Crush, a couple of others. So how do you reconcile that, that small numbers of developers who matter but yet somehow in the market they are constrained by competition and the high elasticity relative to other developers, other gamers?

MR PICCININ: Sir, I do not know what the elasticity of the demand for them is. All I am saying about this document is that this document does not tell us anything about this. The reason I am looking at it is that Mr Ward said that Professor Hitt should have cited this, but I do not know what he wanted Professor Hitt to do with it. Professor Hitt's view, when asked about this, is: if you want to know what happens to prices, have a look at what happens to prices when the commission

changes.

DR BISHOP: I take the point. Fine.

THE CHAIRMAN: Mr Piccinin, I am just thinking about time and at some stage you are going to have to sit down. I just wondered -- I do not know what that prediction looks like, but obviously Ms Demetriou will want to say something in response, I am sure, to --

MR PICCININ: It is not much. I think it is Mr Kennelly --

THE CHAIRMAN: Well -- and Mr Kennelly, is it? Right. But I am just getting a little bit concerned. You need to have no expectation at all that you are going to go past -- really, we need Mr Gregory up at about 11 o'clock, I would have thought, at the latest.

MR PICCININ: I will --

THE CHAIRMAN: Good, thank you.

MR PICCININ: The only other thing I wanted to say about this document is that this is -- so it is being said that Professor Hitt should have told you about this, but this is a document that was disclosed to Dr Kent and it was cited by Dr Singer in his first expert -- sorry, in his main expert report, Singer 2. I will give you the reference, it is {C2/8/143}.

So if this was the very important point that you needed to know about then Dr Singer should have told you about it.

The other thing about VAT, you will remember Dr Singer's evidence that he said -- it is not in his reports anywhere but at some point he did an empirical analysis -- he said he checked what decisions individual developers made after Apple moved the price tiers, and he said essentially that 70% of them just stayed on the same price tier. So that means their price went up, to the extent that Apple increased it, and the rest, some of them went up and some of them went down.

My submission to you about that is that that has nothing to do with the VAT increase; he is only looking at the UK data. The right inference to draw from that is that in any period of time -- we do not know what period of time Dr Singer was looking for but I am guessing six months -- in any six-month period, you will have some people going up and other people going down, and that is all he is observing there.

The next topic in the written closings is about differential pricing and I am going to -- just to give you the reference; that is {A1/8/136}. I am going to skip that, because I have really already shown you that that is something that Professor Hitt analysed. He is criticised for analysing it by reference to the types of products that he looked at in his natural experiments, but the reason for that, it fits into his approach that

I told you about yesterday, that as soon as he has a theoretical idea, you know, that: oh, uniform pricing might be an idea that explains what happened in his empirical evidence, he goes away and looks at the factual underpinnings for it; and so that is what that evidence was all about.

So that, then, really brings us back to where we started the case in opening. This is a debate between Professor Hitt's empirical evidence, in the form of the natural experiments, and Dr Singer's economic theory in the form of the logit and linear models and his claim that you should find that developers pass on commission as though it were a marginal cost, rather than an ad valorum charge on revenue.

We say that, as I have said yesterday, that in a debate between hard empirical evidence and theory, the empirical evidence wins, particularly when the world is a complicated one like this one. We are not talking about widget manufacturing.

The truth is that there are lots of sound theoretical reasons why pass-on might turn out to be zero. Professor Hitt gave you four of them. For each one, he did the work of showing you the factual underpinnings for that theoretical explanation.

But to be clear, he was not asking you, and I am not

asking you, to find that pass-on is zero for any one of those four reasons or all of them. We are asking you to find that pass-on is zero, because that is what the data shows you. These are just supporting points.

But the other function they have now is that because Dr Kent is driven to rely on an economic theory to establish and to quantify pass-on, purely on the basis of theory, we say that would not be open in any case, but it is particularly not open in a case like this, where there are theoretical reasons to doubt then that is the right theory. Indeed, it is obviously not the right theory, because those theories are all based on marginal costs in the sense of dollars or pounds per unit. One thing we can all agree about the commission is that it is an ad valorum charge; it is not pence per transaction.

Now, Mr Ward tries to characterise that as some obscure economic point that does not reflect the real world. I am sure I do not need to explain to Dr Bishop what the underlying economic logic of that is. But if I can just put it very simply and very shortly with no maths at all. Suppose you have a product, an app that has no marginal costs associated with it at all; it has some fixed costs that you incur and then no marginal costs. What do you want to do with prices? You want to

set the price that will maximise revenue, because you do not have any marginal costs.

Now, if your fixed costs double, say, so that makes you much less profitable, do you want to increase your price to try and recoup some of those additional fixed costs? No. Because if you increase your price above the revenue maximising level, your revenue will go down. That is what "revenue maximising level" means, and that means you will earn even less money. You have higher costs and less revenue.

So what if, instead of that, someone comes along and says: I am going to introduce a 50% commission. You might have a sharp intake of breath and say: oh, that is going to make it much less profitable and you would be right. But if you try and recoup that by increasing your price, same problem. You are increasing your price above the revenue maximising level; that means you will have less revenue; you are still going to have to split half of it with the person who has just set the commission, and that is the economic logic that underpins it.

As I said, we are not urging that on you, in the sense of saying that that is the reason why this is happening. It is probably a reason why it is happening; but that is the economic logic for those formulas which

show you that -- the simple theoretical prediction that if marginal cost is zero, the pass-on rate from ad valorum charge is zero; and if marginal cost is close to zero, then the pass-on rate for an ad valorum charge is close to zero. That is the logic for it.

Now, my learned friends have tried to tell you that that is wrong and they say that: look, there are lots of developers that have significant marginal costs. But we say, actually, when you look at the evidence, they have got nothing to quantify that at all; and every one we look at in the form 10-Ks, that is big, all have marginal costs that are -- other than the commission, if you want to count the commission -- that are essentially zero.

DR BISHOP: You are saying except music streamers? Except music streamers?

MR PICCININ: Yes. So my submission certainly is not -- sorry, I should have made this clear. My submission is not that they all have zero marginal costs or close to zero marginal costs. No doubt there are some of them. But that is -- we have not got evidence of any that are very large.

You will remember, another criticism that my learned friends make of Professor Hitt is that he did not refer to his evidence in the US, where in the US, helping --

giving a report to resist certification, he gave some evidence that pass-on is likely to be -- to require an individual enquiry, you need to look at it, developer by developer, and that is because some of them will have significant marginal costs. That is one reason why. That is because in the US, they do not have the same law that we have here: that we can just do an aggregate award of damages and who cares whether -- you know, it is very significantly from individual to individual: we will just award the aggregate.

I do not have time to look at it, but there was no inconsistency in -- if you go back and look at it carefully. The section in Professor Hitt's report that looks at low marginal cost and zero marginal cost does not say that everyone, or even almost everyone, has it; and his evidence in the US does not say that there are lots and lots of developers who have it. All he says is that there are some, and music streamers is an example that is given.

Let me see where I can cut ...

Oh yes. On the natural experiments, my learned friends say two things.

One thing is that they say that they show there is some evidence of incidence, and that is really not right. So in the simple before and after, you see that

some people do cut their prices in the six months after the program starts; so that is true. But that is not evidence of pass-on. That is just evidence that in a six-month period of time, some people cut their prices. If you want to treat it as evidence of pass-on, you have got a problem, because in that same six-month period, the same or more increase their prices. So again, the average comes out at zero, which is the same as what you get in every single one of the difference in difference regressions that Professor Hitt conducted; except the one specification, the 12-month specification, for one group of developers for lifestyle groups; but again, there is no evidence that that adds up to anything significant in the case, even if you want to just treat that one as evidence of pass-on.

Dr Kent's main answer to our experiments is to say that they are all cost decreases, rather than increases, and that obviously does not work in the delayed counterfactual. They accept that. But even taking them -- their case that we should be looking for increases, Dr Kent puts her case extremely high in the closings, saying that because these are price reductions, they are irrelevant to the Class Representative's primary counterfactual.

But that proposition is just not supported by

evidence at all. The only evidence that my learned friends have on the extent of the sticky prices phenomenon is the European Commission's interchange fee regulations study, which found that for food retailing, the pass-on rate was 66% for cost decreases and 90% for cost increases. So instead, when Professor Hitt has looked at these natural experiments, which are decreases, he did not find 66% pass-on. He found nothing. Also, he was looking at a range of different time periods, up to 12 months. 12 months is a long time to say that the prices are sticky for something like apps.

This case is not supported by any evidence, any other evidence at all. There is not even ipse dixit evidence from Mr Howell to support it. So even if you believe we should be looking for increases rather than decreases and even if you believe that apps are just like food retailing, funny things to believe, making all of those assumptions in favour of Dr Kent, you are still left with the question of: why do our results show zero instead of something like 66%?

So set against all of that, what do we have from Dr Kent? We have economic theory and, as I say, it is the wrong economic theory; and we say that that leaves them effectively with nothing.

(Pause).

Yes. The one other point I just wanted to show you on the ad valorum issue, because my learned friend did make something of this in closings, is -- I will just give you the reference in their closings. It is {A1/8/134}, paragraph 375. They say that Dr Singer gave evidence that developers treat the commission -- or treat ad valorum charges in the same way as they treat other marginal costs. So let us go and have a look at Dr Singer. So that is {C2/8/134}, and it is paragraph 276 that they cite. But if we could have a look over the page at the footnotes {C2/8/135}, at 19 -- footnote 519 to footnote 522. These are the examples that they give. The fourth one is Google. That is actually not an example of Google setting a price for its own products; that is just Google doing the same tax equalisation thing that Apple does.

The other three are fair enough, so you have got *Spotify*, you have got Amazon, and you have got Netflix. But each of them are just a situation where what they do is they take a single advertised price and they charge it right across the whole of the 51 United States and then add sales tax, which varies by State, on top of it. But in an environment like that, we say you can understand why developers might want to do that for

convenience; and all that really shows is, again, that using theoretical models, whether that is the model assuming marginal costs of dollars per unit or ad valorum, using theoretical models to try and predict the behaviour in the real world is a bit of a mug's game, because there are all of these complexities that feed into it as well.

But I would just say that these examples cannot help you to choose between our theory and Dr Kent's theory, because Dr Kent's theory, if you think about a model of competition with costing pass-on, is not going to be predicting that *Spotify* or Netflix or Amazon is going to have 100% rate of pass-on. That is not what it would say. So it is clear that this is just another example of a situation in which you need to look at the detail.

So moving beyond this one little set of website links. You actually have quite a lot of data on developer pricing in this case, and the thing that I really want to ask you to do, when you are thinking about the economic theory arguments, is: which empirical evidence of developers actually making pricing decisions, which empirical evidence makes you believe Dr Kent's theory of pass-on? Which empirical evidence is consistent with Dr Kent's theory of pass-on? Any of the data in our four natural experiments? There is

a lot of data there. Any of it? No. The evidence we have seen on price differentials across websites, does it explain that? No. Half of them do not change at all. So what is it about this approach to modelling pass-through that gives you confidence? We say nothing.

I am not going to go through the linear and logit models in any detail. There is no time for that and, frankly, it does not help. The very notion that you could say that the linear model fits reasonably well and the answer is 50%, and simultaneously the logit model fits reasonably well, so the answer is 90%. If you think 50 is approximately 90, you have got bigger problems than I can help you with, I am afraid.

So all I want to do now is very, very briefly deal with interest; and my primary submission on interest is that the answer is base plus 2. That is what we say. My primary submission to you is that Dr Bishop was right.

So let us go back to the Court of Appeal in *Carrasco*, {AB3/28/5}. This is the one you looked at. The principles you have looked at before have been summarised at the top of the page. Subparagraph (3), at the top of the page we are told that for commercial claimants, you look at the borrowing rate.

Subparagraph (4), we are told for personal injury

claimants, you look at the investment rate and I am going to show you what that is shortly.

Subparagraph (5), we are told that many claimants are neither one -- neither appropriate for one nor the other, so they are between the investment rate, which we will see, and the borrowing rate.

If we go back to the bottom of the previous page {AB3/28/4}, subparagraph (1), you can see the key point for this exercise, what we are trying to do is to compensate claimants for being kept out of their money, so this is a very broadbrush attempt at compensation is not supposed to be a windfall.

Now, to understand that guidance properly, it helps to know something about personal injury which I do not. So if we could just have a look at {AB2/8/4}. This is from the Butterworths thingy on personal injury. You can see at the bottom of the page, there is a heading, "Past losses". I think Mr Frazer and Mr Tidswell -- sorry, the Chairman -- in argument hypothesised that the investment rate for personal injury might not have been about interest for the past at all. I had the same thought, but it turns out that it is not right. So if we can have a look at this. You can see we are talking about past losses here in personal injury claims.

What it says there is that:

"The general rule is that interest is awarded on special damages ..."

At particular rates. So this is interest on past losses, just like in our case.

"Special damages", just so you know, you probably do know, means real identified pecuniary loss, so medical expenses or that kind of thing that you have actually incurred in the past, or lost income.

Then paragraph 1927:

"The 'appropriate rate' is the [investment account rate]."

Over the page, you can see that is set out over time {AB2/8/5}. If you just look at the kind of time period we are interested in, so July 2009 is the first bit, it is half a per cent. This is not base plus half a per cent. This is half a per cent. Then you go down. For much of our claim period, it is even lower than that; it is a couple of years; it is 0.1%. Ms Higgins has checked. I can tell you that all of these are below base plus 1 even, and indeed for much of it, it was essentially nothing.

Now, my submission to you is that the fact that there are other cases involving individuals in which borrowing rates are awarded tells you nothing. It is not a proposition of law; it is just a decision on the

facts of those cases. None of the other cases identified by my learned friend identified any principle of law to that effect. That is not what the governing authority, *Carrasco*, says.

The key point that is interesting about interest in this case is that the damages award on a per capita basis, even if you ignore everything that all of on us on this side of the case have told you, for this entire trial, is going to be trivial in scale for individuals.

So if I can just show you, in our closings, at {A1/9/133}. You have got the figures in paragraph 406; and they are set out in pink; just zoom in on them. I have to say, though, and apologise that there is an error here, because Mr Holt's numbers are way too big, because they come from his preliminary estimate of the class size which was 20 million, instead of Dr Singer's calculation of the class size from the transaction data, which is at the bottom of the page in the footnote 630. I will not read it out, because it is in pink; but if we look at it, you can see it is the pink number which is bigger than 20.

So perhaps I can just say, in the traditional way in this case, that the number we are talking about, the number of pounds per class member, per annum, is a single digit number and not a big single digit number,

even on my learned friend's case.

So the question you are asking yourself is: how do we compensate the class members for being kept out of a few quid per annum? The answer is that it is just unreal to suggest that there would have been any significant incremental borrowing caused by being short of a few quid per annum. It is unreal even to think, I am afraid, this is for --

THE CHAIRMAN: That is not really -- I mean, the way you put that does not really help us, does it? The -- it is significant incremental borrowing, and why would you borrow anything more than the money you were kept out of? But is the point not here that we do not actually know the answer to any of this, because is the point not here that in a community of however many people, I cannot remember if we are allowed to say the number or not, there is not a lot of them, with that sort of people, there are going to be all sorts of different configurations, are there not? There will be lots of people who have got maxed out credit cards and personal loans, and there will be lots of people who have paid off their mortgages and are living in happy cottages in the Lake District. I mean, there will be lots of things, will there not? So actually, I do not think there is any -- if you are going towards a principled

answer, I am not going sure you are going to be able to persuade us that there is one is probably the short answer.

MR PICCININ: All I am going to say to you is that what is different from all of the cases that my learned friend cited is this is a case where the amounts in question are tiny; and we say that in those circumstances, that is a reason why suggesting that people would have been borrowing, or would have paid off in the counterfactual, high interest rate borrowing --

THE CHAIRMAN: I do not think they would easily. I mean, that is not the reality of it, is it? If you have got -- I mean, the fact of the matter is, if you are running your finances on somebody else's balance sheet, then they are funding your lifestyle, are they not? So if you have got however many pounds less, then that is probably being funded by your borrowings, but that is only for those people that are living like that. For people who are not, then it is not. We just do not know the answer to the question, do we?

MR PICCININ: What we say, there is no reason to go beyond -- really you are getting into windfall and overcompensation territory. You are moving away from the job of compensating class members, if you do anything more than base plus 2.

THE CHAIRMAN: Well, I mean, that may or may not be right. I am not going to venture a view on what the right answer is. But I do think that we are in the position of a class of aggregate damages and it is the same as everything else with damages: we need to come up with the best number that is going to represent a fair compensation for being out of their money, and that is going to -- obviously for some of them, that is going to be an overcompensation, and some of them, it might be an undercompensation.

MR PICCININ: That is right. Your job is to do the best you can with that.

THE CHAIRMAN: To find a number we think represents a fair outcome in that situation.

MR PICCININ: That is right. So my submission is that the answer that this Tribunal reached in *Le Patourel* is a good one, it is a conventional one. It is probably erring on the side of overcompensation. The investment rate that you get in personal injury claims. It is hard to -- it is hard to understand why personal injury claims should be less deserving of substantial interest rate being awarded than this claim.

Yet that is what our submission is. Our submission is that you should give them significantly more than the investment rate.

So those are my submissions.

THE CHAIRMAN: Well done.

MR PICCININ: I should say again, I am very grateful to everyone for the additional time.

THE CHAIRMAN: Thank you very much. That has been very helpful.

MR PICCININ: Oh sorry, the written submissions, sir. I offered you --

THE CHAIRMAN: Oh, I do not think -- certainly at the moment, we have not reached a -- we have not really discussed it, if I am honest, so --

MR PICCININ: I just wanted to put that --

THE CHAIRMAN: Thank you. That is a useful reminder. We will revisit that and we will let you know. Thank you.

MR PICCININ: I am grateful. Thank you very much.

MR HOSKINS: Before you revisit [inaudible -- no microphone] I want to say to the [inaudible].

THE CHAIRMAN: Yes, I think that probably is right, so we -- yes, that is helpful. Thank you.

Good. Mr Gregory, good morning.

Submissions by MR GREGORY

MR GREGORY: Sir, and members of the Tribunal, the CMA is extremely grateful for the opportunity to come back and make oral submissions today, as well as the opportunity to make further written observations. We are

particularly grateful to the Tribunal and the parties for having accommodated us on timing.

We are aware that in an ideal world, we might have gone slightly earlier, although I have to say as I received 400 pages of written closings over the course of last Thursday I was quite pleased that we stuck to my guns on timing.

You are obviously aware that both Apple, as well as Dr Kent are going to have an opportunity to reply to us afterwards and we of course have no objection to that, so I hope that deals with any issues of fairness.

THE CHAIRMAN: Yes, thank you. I should say first of all, thank you for the written submissions which were helpful, as well as your previous ones, so thank you. We are grateful for those. Also, there is a point, is there not, about -- I do not know whether there is any basis on which we could do this better with some further planning, and of course there will be other cases. So there might be some learning for the way it works. I think it is quite difficult because of the way that the submissions land, and maybe in a case with more time it would work differently, but I think you are right to identify that there would have probably been a better sequential way of managing, but on the other hand it is where it is.

MR GREGORY: Yes. The CMA is obviously intervening in a few of these cases, and when it comes to timetabling in the other cases we will obviously be able to take into account the sort of learning -- I think it is difficult, because you have to ask the parties to reduce the amount of time they have to write written closings. Anyway --

THE CHAIRMAN: At least we can think about it. Thank you.

MR GREGORY: I am going to address you on the points covered in the additional written observations.

I brought along spare hard copies. I do not know whether it is helpful to have them.

THE CHAIRMAN: We have them --

MR GREGORY: I will hand them up if it is helpful, just because I will be jumping around between the --

THE CHAIRMAN: We have got them on the screen.

MR GREGORY: If it is helpful to have hard copies, I have them. If you would rather just look at them on the screen, then obviously you can do that.

THE CHAIRMAN: I think if you just put them up on the screen. Do you have the document reference or would you like me to find it?

MR GREGORY: It is {A3/5/1}. Sorry, authorities bundle 3, tab 5 {AB3/5/1}.

Sorry, bundle {A3/5/1}. Sorry, I go to the authorities bundle so often.

THE CHAIRMAN: I do not think anyone can expect you to be familiar with the bundle numbering at this stage.

Yes, thank you.

MR GREGORY: However, before I make the CMA's submissions on each of those points, I will try to summarise where I think we have got to, in terms of the arguments amongst the parties.

There are lots of points in play, and in several instances the same or similar issue falls to be considered at different points in the framework.

I will summarise briefly, and no doubt will not do justice to the parties' submissions, but given the complexity, some sort of orientation seems helpful.

First, market definition, which was the main focus of our skeleton.

I am going to address you on Dr Singer's quantitative SSNIP reasoning and, second, on Apple's submission relating to the fact that its commission charges have not been increased since they were introduced in around 2008.

But first, just to walk through the various market definition issues.

One, is how the relevant services that are the subject of the alleged unlawful conduct should be characterised. Dr Kent claims that app distribution and

in-app after-market services are separate, while Apple claims that such a division is inappropriate.

On Dr Kent's approach, you would carry out two different market definition analyses, starting with distinct focal services. On Apple's approach you would carry out a single analysis, starting from a single set of focal services. Which approach you take, we say, is a matter of appreciation. You should bear in mind that the ultimate purpose of market definition is to shed light on the competitive effects of the conduct under scrutiny. You have the parties' submissions on this issue; for example, discussing the extent to which competitive conditions vary as between the two categories of service, and which approach you adopt may or may not be relevant or have any impact on your dominance conclusions. It is relevant to the tying allegation, but the CMA is not expressing a view on that particular issue either way.

What the CMA has expressed a view on is how the market definition analysis should be carried out, whether there is a single exercise or two exercises.

A large part of our skeleton was dedicated to that issue; in particular, that the starting point should be a market compromised of the focal products, which should ordinarily be just products that are subject to the

alleged abusive conduct. From that starting point, you apply the hypothetical monopolist test to determine whether the relevant market should be expanded. That test cannot result in the initial product market getting smaller or being subdivided. The focal product -- here, service -- may be supplied to multiple customer groups that have different substitution options available to them, but the existence of those different substitution options will not generally warrant carrying out separate market definition exercises or subdividing the markets. That approach now appears to be common ground. Initially Apple had contended that there should be separate markets for different genres of app, because of the availability of different substitution options, and that approach was maintained, albeit briefly, in his written closings. But on Wednesday morning Ms Demetriou made it clear that she agreed with the CMA's approach, and the reference to that is {Day26/10:1}.

So you apply the hypothetical monopolist test to the focal products market which involves assuming a price increase of 5 to 10% above the competitive level. The question is whether switching, in particular, by developers of particular genres of app, including gaming apps, would be sufficient to render the SSNIP unprofitable. If it would, you expand the market

potentially to include gaming distribution channels, for example, and then repeat the exercise.

But if a SSNIP would be profitable, the hypothetical monopolist test is at an end and the market is limited to the focal services.

The SSNIP is applied to the competitive price; so evidence of real world switching needs to be assessed with caution, because actual switching levels may be higher, as a result of the price being above the competitive level; that is the cellophane fallacy.

The SSNIP is only a small price increase, 5 to 10%, so developers have to be willing to switch quite easily; and that reflects the fact that only close substitutes should be included in the relevant market.

Competitive constraints from outside the relevant market fall to be assessed elsewhere in the framework, and that includes here competitive constraints from the devices market.

However, Ms Demetriou made clear that Apple is not saying that the constraints from the devices market are such that there should be a single device in-app distribution systems market. The reference to that is {Day26/33:1}. Everything that I have said so far has been by way of a run-up to the two points on which the CMA wishes to make submissions.

First, Dr Singer's quantitative SSNIP reasoning. The broader context here is that, as is often the case when defining markets, we are far from being in a world of perfect evidence. We do not have sufficient quantitative data to implement a full quantitative SSNIP. The hypothetical monopolist test requires consideration of a hypothetical scenario, which is different from the real world and does not exist. So real world evidence from different scenario is almost bound to be imperfect, one way or another, and in particular we may be in cellophane fallacy territory.

In a world of imperfect evidence, all evidence needs to be scrutinised to consider its relevance to the hypothetical monopolist thought experiment. But you should hesitate before entirely disregarding evidence simply because it is imperfect, because if you did that you probably would not have any evidence left.

Dr Singer reasons as follows. As Apple is a monopolist, in respect of the relevant App Store services, it is in a position broadly equivalent to the hypothetical monopolist of those services. He says competitive commission charges in the region of 12 to 15%, based on his simulation model and his analysis of comparator charges. Apple's commission charges are somewhere in the region of double that. As Apple is in

a broadly equivalent position to the hypothetical monopolist, Dr Singer suggests that that indicates that the hypothetical monopolist could impose a SSNIP, such that the product market should not be expanded further. Apple criticises that reasoning as circular and on the basis that it ignores product differentiation.

In summary, we think that Apple's points are important to bear in mind, but do not necessarily provide a basis for disregarding Dr Singer's analysis. In particular, the weight that you can place on his reasoning is likely to depend on the conclusions that you reach as to the competitive level of prices.

Circularity. It seems to the CMA that this form of reasoning is only circular to the extent that the conclusion about the competitive price level is based not on evidence, but on an assumption that Apple is a monopolist or dominant. Unless that is the case, the reasoning is not circular and seems potentially relevant.

Apple says that certain elements of Dr Singer's reasoning is circular in that sense, including his simulation model; and whether or not that is the case, the CMA does not express a view on that.

But you now have quite a lot of evidence on which you will have to form a view as to the likely

competitive level of prices for the purpose of the unfair pricing claim. That is not dependent on an assumption that Apple is a monopolist or dominant.

First, you have the information about the prices charged for various comparator services. There is obviously a dispute between the parties as to the appropriateness of different comparators; and part of that debate concerns the extent to which some of those comparator suppliers have market power. But those debates about whether other suppliers have market power do not involve any assumption about whether Apple is dominant.

Second, you have various profitability analyses that purport to shed light on whether the App Store makes supra-competitive profits.

Based on an assessment of all of that evidence considered in the round, you will need to reach conclusions as to the competitive level of commission charges. Once you have done that, and irrespective of whether you agree with Dr Singer's assessment of the competitive level, you will be able to compare that level with the level of the commission charges that Apple has, in fact, charged. If you conclude that Apple has been charging significantly above that competitive level, it seems to the CMA that Dr Singer's reasoning

would not be circular and would be potentially relevant to your market definition conclusions.

I say "significantly above the competitive level", in part because of Apple's points about product differentiation. As already mentioned, a SSNIP is only a small 5 to 10% price increase. A 5% increase above a competitive price level of 15% would only take the rate to 15.75%, and the CMA agrees with Apple that differences of that sort of magnitude could be explained by product differentiation. But product differentiation is less likely to explain much bigger differentials, such as 50% or 100%.

So the possibility that differences in prices might be explained by differences in the nature of the products seems to be a reason not to apply this line of reasoning in a pure unthinking way, rather than a reason not to apply it at all.

On Wednesday morning -- the reference is {Day26/11:1} -- Ms Demetriou summarised our further written observations on this point as saying that in the presence of price discrimination you would impose a larger SSNIP, above 5%. I would not put it quite like that.

The hypothetical monopolist test is well established and involves a SSNIP of 5 to 10%. This is more

a question of how you interpret real world evidence for the purpose of informing the hypothetical monopolist thought experiment.

The parties are inviting you to consider various comparators as potential benchmarks for a competitive price, and it is common ground that you need to consider the appropriateness of those comparators. You need to consider, for example, whether some of those comparator suppliers have market power. The possibility that a price difference between the defendant, here Apple, and a comparator supplier, could be explained by product differentiation is just one other factor that should be taken into account.

The other issue concerns Apple's argument that its 30% commission charges were introduced in 2008, when the devices market was competitive. I would be grateful if you could turn to our written -- additional written observations.

THE CHAIRMAN: Just before you do that, just to make sure I understand what you are saying in relation to the circularity point, or actually more the differential market point, I think. So I think you are saying that if we have -- the circularity point goes away if we have some other evidence, rather than just the fact of monopoly power, so that is clear and understood. Then

if that other evidence shows a significant difference from the actual price being charged, we could have some confidence that the answer is -- we can have more confidence that the answer is not just explained by differential pricing, but of course we have to apply our minds first as to whether that might or might not be the case and think about what the other alternatives might be, what other explanations there might be.

MR GREGORY: Yes. It is much more likely to apply to a price difference of, say, 5%, because it is explained by product differentiation, than a price difference of 50% or otherwise.

THE CHAIRMAN: Yes, that is really helpful, thank you. But you are saying on any basis that the product differentiation point is just another input into what is necessarily an imperfect analysis and reasonably, by definition, reasonably broadbrush and we just have to make sure we put all the evidence in the right context so we understand what the full picture is.

MR GREGORY: Yes, exactly.

THE CHAIRMAN: Thank you, that is helpful.

MR GREGORY: If you could turn to our additional written observations; so that is {A3/5/4}.

If I could ask you just to read, or refresh your memory, of paragraphs 11 to 13, please.

(Pause)

So you had an exchange with Ms Demetriou about how competitive conditions on the market have changed since 2008, so you clearly have that point.

The second point, which was not discussed, is the fact that the relationship between prices and costs can also change over time. As a result, a particular price could be at cost or even below cost, when it was initially introduced, but could then become supra-competitive and potentially excessive over time as costs fall. Costs can fall, in particular, as markets grow and mature, leading to economies of scale and scope.

Say, for example, a company could launch a product at a price of 10, at a time when unit costs, including a reasonable rate of return, were 12; but then if that price is maintained and not increased, the price of 10 could become excessive, if over time unit costs fall from 12 to, say, 5.

In that scenario, the constant price of 10 would initially have actually been loss-making, but over time it would have ended up at double the competitive level; and that is simply to illustrate the point of principle.

Finally --

THE CHAIRMAN: Sorry, just before you move on. Can I ask

you, there is the reference in the market study, paragraph 38, at the end of 13, to innovation, to innovative products. Is that a -- is that a competitive market point, not a cost point, is it? Where -- the point about competitors catching up, that presumably is a competitive market point, is it?

MR GREGORY: I can seek clarification about that.

THE CHAIRMAN: It does not matter. I was just trying to work out --

MR GREGORY: It is definitely a competitive market.

THE CHAIRMAN: Yes.

MR GREGORY: Just the final few words that say:

"As competitors catch up and the product become less of an innovation."

As products become less of an innovation that can go along with decreases of cost.

THE CHAIRMAN: Yes, so it could be both, in fact.

MR GREGORY: It could be both. If you like, I can ask --

THE CHAIRMAN: I am just trying to fit things into boxes and maybe it does not need to be fitted in a box. That is helpful, thank you.

MR GREGORY: The final market definition point is that Ms Demetriou made a comment to the effect that CMA agrees with the point Apple had made about how it had not increased prices over time. That was referring to

paragraph 14(b) of our additional observations which is just at the bottom of the second page that is on the screen.

I was not sure what Apple submissions she had in mind but it was not our intention to indicate agreement with that particular point.

If you look at paragraph 14(b), this concerns the fact that -- and this is based on Apple's written closings -- one of Dr Kent's experts apparently suggested that consumer switching decisions were not informative, because consumers were not aware of how app prices were set and, in particular, that they reflected Apple's commission charges. All we are saying here is that we agree with Apple that the -- the fact that a customer or consumer does not understand the basis on which app prices are set is not relevant to the hypothetical monopolist analysis; what matters for that is how they respond to changes in the price level.

THE CHAIRMAN: So this is the point about whether the user has visibility of the way in which the split has been arrived at between the -- and what the consequences are; who has driven it, the increase, who is responsible for an increase, that --

MR GREGORY: Yes. I think our position -- for the purposes of the hypothetical monopolist test, what we are

interested in is the price that is paid, regardless of how --

THE CHAIRMAN: (Overspeaking) How it came about, yes.

MR GREGORY: -- (Overspeaking) -- in respect of that level, causes the consumer to respond; whether they switch away or just keep paying it.

THE CHAIRMAN: Yes, thank you.

MR GREGORY: Unless you had any questions, that was all I was going to say on market definition.

THE CHAIRMAN: I am just looking at the time, Mr Gregory, because we started a little bit earlier. If that is a convenient point, we might just take a ten-minute break.

MR GREGORY: Yes.

THE CHAIRMAN: Yes, good. Thank you.

(11.26 am)

(A short break)

(11.36 am)

THE CHAIRMAN: Yes, Mr Gregory.

MR GREGORY: The next issue on which we have made submissions is the counterfactual. Again, I am going to come to the counterfactual points we make in our additional observations, but first just let me try to put those submissions in a bit of context.

You are aware that different legal principles govern

your selection of the appropriate counterfactual for, (1), determining whether there has been an infringement where you are in *National Grid* territory, and, (2), determining quantum which is governed by standard damages principles, including the broad axe.

The CMA is only making submissions in relation to the infringement counterfactual.

In terms of infringement counterfactuals, there are three allegations of abuse.

The first concerns Apple's requirements that iOS Apps can only be distributed through the App Store and that in in-app purchasers must use Apple's ASPS which I will just refer to as the requirements or the restrictions.

Second, the tying allegation.

Third, unfair pricing. This may just be my personal preference but I would not ordinarily use the term "counterfactual" in the context of the unfair pricing allegation. In that context, one of the issues is whether the prices that have been charged have been significantly and persistently above the competitive level, including by reference to comparators or benchmarks; and there is an issue about whether the comparators are appropriate comparators, which may include consideration of whether the comparator

suppliers are themselves operating in conditions of workable condition, but just personally, I would not use the phrase "counterfactual" to refer to that issue. But there are certainly counterfactuals to consider for the purposes of considering the first two allegations of abuse.

We are not making any submissions in relation to tying; so the CMA is primarily concerned with the appropriate counterfactual for the first allegation of abuse concerning the App Store requirements.

This is *National Grid* territory. I would be grateful if you could turn to page 6 of our additional observations. That is {A3/5/6}.

Just read to yourselves paragraphs 15 and 16, and cast your eyes over footnote 14.

THE CHAIRMAN: Did you say 15?

MR GREGORY: Paragraphs 15 and 16 --

THE CHAIRMAN: Yes. Can we have the previous page, please? Yes, thank you. {A3/5/5}.

(Pause)

I wonder if you can show us footnote 14 as well, please. Thank you {A3/5/6}.

(Pause)

Yes, thank you.

MR GREGORY: I was not going to take you through the

footnote 14 point, because whether or not you are legally obliged to identify counterfactual, in order to establish abuse, now seems largely academic, because plenty of counterfactual arguments have been made, and you will have to address them.

The critical point is that the determination of one or more appropriate counterfactuals is a matter of appreciation, not of hard and fast legal rules. The touchstone is that counterfactuals should shed light on the competitive effects of the conduct in question.

In summary, the appropriate approach generally involves removing from the actual world, first, the conduct that is alleged to be abusive and, second, any other unlawful conduct, and then consider how competition would likely have played out in that hypothetical world. Would there have been a real threat of market entry? Would rivals in fact have entered? If so, how many, and what share of the market would they likely have achieved, what would have been the impact on the parameters of competition, including price?

However, it is important to be aware of how this infringement counterfactual exercise differs from the exercises required elsewhere in the analysis; and that is particularly the case because similar issues do arise in different parts of the case and should be approached

somewhat differently in those different contexts.

If you could turn ahead to {A3/5/11} in this document, please, and read paragraph 27. {A3/5/10-11}.

(Pause)

THE CHAIRMAN: Yes, thank you.

MR GREGORY: Ms Demetriou indicated that Apple agrees with us on the subparagraph (a) point. I think the subparagraph (b) and (c) points are probably common ground, although, as we said, it is sometimes difficult to be sure about that from the written closings, because they tend to cross-refer to different parts of the analysis, where the same issue is addressed.

Returning to the infringement --

THE CHAIRMAN: Oh, sorry, you are going to deal with that. I was going to ask you a question about that. One of the difficulties, of course, if you look at (a), is deciding whether or not it falls within (a)(i) or (ii). Of course, in a way I am making a point rather than seeking any guidance from you on it, because obviously it is a matter for us, on the basis of the evidence we have; but it may not be entirely straightforward to be able to tell the difference between (a)(i) and (ii), given that we have spent 28 days trying to work out the answer in relation to Apple. Clearly, trying to form a view of that in relation to any other third party is

not straightforward. But there is no answer to that, other than do the best we can on proceedings.

MR GREGORY: You have largely anticipated where I am about to go to.

THE CHAIRMAN: I am sorry, I did not mean to do that.

MR GREGORY: I will say what I was about to say and if it does not answer your question, you can come back to it.

THE CHAIRMAN: Yes, please do.

MR GREGORY: There are three questions.

(1): on what basis can you conclude that conduct is unlawful and should therefore be stripped out of the counterfactual?

(2): the issue of delayed counterfactual.

(3): which is related to the question -- I think there is maybe one other point that you are referring to -- of whether you only strip out the unlawful conduct itself, or also associated conduct and the effects of the unlawful conduct.

Taking those issues in turn, I would be grateful if you could go back to page 8 of our additional observations {A3/5/8}. We are here addressing Apple's argument that, in the counterfactual, it would have introduced different charges up to the same level as its commission charges in the actual world. The obvious potential objection to that is that if Apple's current

commission charges are excessive and unfair, the same would be true of charges at the same level, but which are simply differently structured.

I would be grateful if you could please read paragraphs 22 and 23, and also footnote 23.

(Pause)

THE CHAIRMAN: Yes, thank you.

MR GREGORY: Three points.

(1): given that the appropriate counterfactual is a matter of appreciation and judgment, it would be surprising if the unlawfulness of potential counterfactual conduct had to be proved on the same basis and to the same standard as the alleged infringement.

(2): doing so would make the exercise impossibly burdensome for claimants, but also the CMA. It would be a trial within a trial, and it could be never-ending. Presumably if you had to prove the unlawfulness of a counterfactual conduct to the same standard as the alleged infringement, that could involve considering the lawfulness of conduct in the counterfactual to the counterfactual.

(3): there is also the general evidential principle of "He or she who asserts must prove", and that has some relevance in the context of the CMA's regulatory

investigations, as well as in litigation.

In relation to the delayed counterfactual, we address that at paragraphs 37 to 41 of our skeleton. Just for your note, the reference is {A3/4/11}. It is an obvious point. The purpose of the infringement counterfactual is to shed light on the effects of the conduct in question. So it makes no sense to compare the actual world with the counterfactual in which some of the effects of that conduct remain present. Dr Kent has relied on that submission, both in her written closings and orally.

Returning to our written observations. I would be grateful if you could read paragraph 25, which addresses Apple's points {A3/5/8-9}.

(Pause)

THE CHAIRMAN: Yes.

(Pause)

MR GREGORY: Finally, there is the related question of whether you should only strip out the unlawful conduct or also its effects and any associated conduct; and as to that, I would be grateful if you could read paragraph 26. {A3/5/9-10}.

(Pause)

As we note, the passages concern the assessment of damages, rather than the infringement counterfactual.

The *Achilles* case was governed by standard domestic damages principles.

The first quoted passage from the Commission's guide to quantifying competition damages claims obviously does not reflect English law damages principles, but is rather proposed as an appropriate approach to assessing damages under the EU competition framework.

You are grappling with the interrelationship between the infringement counterfactual and the damages counterfactual, and all I say is that these passages are potentially informative as to the infringement counterfactual and I put it no higher than that.

Once you have identified one or more appropriate counterfactuals, the question is whether competition has been foreclosed relative to that counterfactual, in the actual world, by the App Store requirements.

I would be grateful if you could go back to page 6 in our additional observations and read paragraph 17 {A3/5/6}.

(Pause)

So Apple is here proposing a counterfactual where it retains a share of at least 90%, and it also relies on the delayed counterfactual in support of the submission.

If you found a counterfactual along those lines, would that justify a finding that the restrictions were

abusive, based on market foreclosure? It is an important question, and on it you have competing submissions.

Dr Kent's case is that it turns on whether there would have been new entry in the counterfactual, and the reference for that is {Day24/54-56}.

The CMA has summarised its view of the applicable test on pages 6 to 7 of its additional observations and I would be grateful if you could please read paragraph 18, which starts at the bottom of the page currently on the screen {A3/5/6-7}.

(Pause)

We rely on the *Post Danmark* judgment for a number of those propositions which I shall take you to in a moment, but first just to finish the tour.

On Wednesday afternoon in response to a question from you, sir, Ms Demetriou said that Apple's position was that for there to be an abuse, any foreclosure effect had to be more than trifling, and she said that precluding entry by competitors that would only have achieved a 10% market share would be trifling and insufficient. The authority she relied on for that proposition was the well-known *Intel* judgment, which she said was handed down after *Post Danmark*. The reference for that is {Day26/219-221}.

I would be grateful if we could go to the authorities bundle 4, tab 21 {AB4/21/1}. This is the *Post Danmark* judgment. The facts were these. *Post Danmark* was a nationalised universal postal delivery service. In the relevant period, it had a statutory monopoly over bulk advertising mail up to 50 grams, but not above 50 grams. It operated a volume-based rebate scheme, based on bulk advertising mailings over the course of a year. The rebate scheme covered bulk mail that weighed less than 50 grams in respect of which *Post Danmark* had a monopoly, but also bulk mail over 50 grams in respect of which it did not. That part of the market was open to competition.

As customers had to use *Post Danmark* mailings -- *Post Danmark* for mailings weighing less than 50 grams, the rebate scheme created an incentive to use it for mailings weighing more than 50 grams. A rival company, Bring Citymail, entered the contestable part of the market in 2007, but exited in 2010, claiming *Post Danmark*'s rebate scheme and brought an action for damages based on an allegation of abuse of dominance.

I would be grateful if you could turn to {AB4/21/3} and please read to yourselves paragraphs 14 and 15.

(Pause)

If we turn over to {AB4/21/4}, paragraph 20 sets out

the questions from the referring court. If we look down towards the bottom of the page, if you could please read the final subparagraph under number (1), starting "At the same time", and then also question number 3.

(Pause)

If we go over now to {AB4/21/5}, towards the bottom of the page. Paragraph 28 says on the one hand it was not a simple quantity rebate linked to the volume of individual orders, but on the other hand it did not specify that purchasers had to buy a specified percentage of their supplies from *Post Danmark*.

Over to {AB4/21/6}, at the top of the page. Paragraph 29 says that in that context, it is necessary to consider all the circumstances to decide whether the rebate scheme is abusive; and I would be grateful if you could please read paragraphs 30 and 31 to yourselves.

(Pause)

So, (1), an exclusionary effect would include making market entry very difficult or impossible, and (2), in determining that, you have to take into account all circumstances, including the extent of the undertaking's dominant position.

We now turn over to {AB4/21/7}, about halfway down the page. Paragraphs 39 and 40 recognise the factual findings that I showed you earlier, indicating that

Post Danmark had a very significant market share, and a number of significant structural advantages in the market. I would be grateful if you could read paragraphs 41 and 42, following them.

(Pause)

If we move down to look at the bottom of the page. Paragraph 43, the referring court wants to know the relevance of the facts that the rebate scheme applies to the majority of customers on the market; and paragraph 44, the answer is that cannot be determinative.

Then if we go over to {AB4/21/8}, at the top, please read paragraph 46.

(Pause)

The scope of the rebate scheme is not determinative, but it is relevant to the assessment of whether there is an exclusionary effect; and now I would be grateful if you could read paragraphs 47 to 49 to yourselves.

(Pause)

This is actually a slight digression, because it is relevant to my next point, which is competition on the merits, but I thought I would show them to you while we are here.

(1), if the rebate scheme has efficiency benefits, *Post Danmark* can try arguing that the scheme is

objectively justified on the basis that the efficiency benefits outweigh any negative effects on competition, if the other exemption criteria requirements are satisfied. Note the court does not say that if the scheme produces some efficiency benefits, then it will or may constitute normal competition on the merits.

Returning to the foreclosure issue, by reference to the counterfactual; I would be grateful if we could now go to {AB4/21/9}. At the top of the page, paragraph 53 notes that in relation to certain pricing abuses, it had been held in earlier judgments that they only constitute an abuse if they would exclude an equally efficient competitor from the market.

Now down towards the bottom of the page, I would be grateful if you could read paragraphs 59 and 60.

(Pause)

On its face, those paragraphs suggest that even the exclusion of a single less efficient competitor would suffice for a finding of abuse, or could suffice; but in any event, what is clear is that what counts as foreclosure is influenced by the extent of the dominant position. The less competition there is on the market, the less that will be required to demonstrate foreclosure.

Relatedly, if we turn over the page to {AB4/21/10}

now, and towards the bottom of the page, I would be grateful if you could read paragraphs 70 to 72.

(Pause)

Finally, over the page to {AB4/21/11} at the top; please read paragraphs 73 and 74.

(Pause)

So to demonstrate foreclosure, there is no need to show that any effect is serious or appreciable.

Ms Demetriou suggests that *Post Danmark* has been overturned or superseded by the well-known *Intel* case, so let us see. *Intel* is at authorities bundle 4, tab 22 {AB4/22/1}. *Intel* makes central processing units, CPUs, for computers. I would be grateful if we can go to {AB4/22/3} at the bottom of the page and read paragraph 11.

(Pause)

The significant point is that under the earlier case law, such rebate schemes were presumed to be abusive. I would be grateful if we can turn to {AB4/22/6}, at the bottom of the page. I would be grateful if you could -- at the bottom of paragraph 31, just the first couple of sentences:

"*Intel* puts forward six grounds in support of its appeal. By the first ground of appeal, *Intel* submits that the General Court erred in law by failing to

examine the rebates at issue in the light of all the relevant circumstances."

That is, of course, one of the points from *Post Danmark*, that you have to look at all the circumstances.

If we go ahead now to {AB4/22/15} which sets out the arguments of the parties under that ground. At the bottom of the page, please read paragraph 113.

(Pause)

Now we come to a couple of paragraphs that Ms Demetriou showed you.

First, over to {AB4/22/16}. I would be grateful if you could just quickly refresh your memory of paragraph 116 which sets out an *Intel* argument.

(Pause)

Note, the argument here does not concern the share of the market that would have been taken by new entrants in the counterfactual, which is the issue here; it concerns the share of the market covered by the rebate scheme. *Intel* is saying that the rebate scheme covered a very small proportion of the market. You, the Commission and General Court, cannot be sure that it had any foreclosure effect at all, because you did not analyse the effects, instead relying on a presumption that this type of rebate scheme was abusive. If we now

turn over to page {AB4/22/17}, at the top of the page, paragraph 122, this sets out the Commission's position. The first sentence:

"In the alternative, the Commission submits that the exclusivity rebates have anticompetitive features such that it is generally unnecessary to demonstrate that they are capable of restricting competition."

Now over to {AB4/22/18}, three quarters of the way down. Again, I would be grateful if you could just refresh your memory again of paragraph 138.

(Pause)

Over to {AB4/22/19}, at the top, I would be grateful if you could read paragraph 141.

(Pause)

Paragraph 142 summarises the Commission's analysis of whether the rebate scheme had an effect on competition, which *Intel* had criticised as inadequate. Then I would be grateful if you could just read paragraphs 143 to 147 to yourself.

(Pause)

So the ratio of *Intel* is that you cannot simply rely on the nature of a rebate scheme to prove that it was abusive. You have to consider whether it has a foreclosure effect by reference to all the circumstances of the case, which is exactly what the

court had said in *Post Danmark*. If the dominant undertaking says that it did not have a foreclosure effect because it only covered a small proportion of the market, the Commission and the General Court on appeal have to consider that argument.

So two conclusions.

First, *Intel* did not overrule or supersede *Post Danmark*; they are consistent with one another. Second, in *Intel* the court was very clearly not saying that a foreclosure effect requires the exclusion of new entrants that would have attained more than 14% of the market.

To confirm that, and just to place these two cases in the context of the wider foreclosure case law, I would be grateful if we could go to authorities bundle 6, tab 49 {AB6/49/1}. These are the Commission's draft guidelines on exclusionary abuses under Article 102, published last year. They are draft guidelines, they have not been adopted. Even when the final version is adopted, it will be post-Brexit, so these are not binding on you. But they include a general summary by the Commission of the foreclosure test, including the *Post Danmark* and *Intel* points.

I would be grateful if we could go to {AB6/49/17}. Here, there is a summary of the general principles for

establishing abuse. I would be grateful if you could read paragraph 45. This is well trodden ground.

(Pause)

Then page {AB6/49/22}, at the top of the page. Please read paragraph 59.

(Pause)

Then paragraph 60(a) -- so what the Commission is here doing, it is trying to categorise different categories of abuse, based on what you need to show pre-foreclosure, or the presumptions that you can rely on. At paragraph 60(a), it says that for some conducts you have to prove the exclusionary effects without any presumption; while paragraph 60(b) says that some conducts are presumed to lead to exclusionary effects, including certain rebate schemes.

Then if you look towards the bottom of the page:

"A dominant undertaking can seek to rebut the probative value of the presumption in the specific circumstances at hand by submitting, on the basis of supporting evidence, that the conduct is not capable of having exclusionary effects."

That is the ratio of *Intel* which is cited in footnote 137.

Then if we turn to {AB6/49/26}. Paragraph 69:

"The assessment of whether a conduct is capable of

having exclusionary effects must take into account all the facts and circumstances that are relevant to the conduct at issue."

Then paragraph 70:

"The relevant facts and circumstances to be taken into account in the analysis and their relative importance may vary depending on the specific case. They may include ..."

Then there is a list of relevant factors over on {AB6/29/27}. So subparagraph (a):

"The position of the dominant undertaking. In general, the greater the extent of the dominant position ... the more likely it is that its conduct is capable of having exclusionary effects."

(b):

"The conditions on the relevant market. This includes the conditions of entry and expansion, such as the existence of economies of scale or scope and network effects."

(c):

"The position of the dominant undertaking's competitors. This includes the importance of actual or potential competitors for the maintenance of effective competition. A specific competitor may play a significant competitive role even if it only holds

a small market share compared to other competitors."

Then down at (d):

"The extent of the allegedly abusive conduct. In general, the higher the share of total sales in the relevant market affected by the conduct, the longer the duration of the conduct, and the more regularly it has been applied, the greater is the capability of the conduct to produce exclusionary effects."

Finally in this document, if we could turn to {AB6/49/29}, at the bottom of the page. I would be grateful if you could just read from the start of paragraph 57 [sic] to the bottom of the page; there is no need to turn over on to --

THE CHAIRMAN: Sorry, which paragraph?

MR GREGORY: Paragraph 75.

(Pause)

So footnotes 181 and 182 cite *Post Danmark*, so the Commission considered that it is still good law today.

Two other brief case references on this.

First, the Court of Justice judgment in *AstraZeneca*. That has been inserted into the bundle at authorities bundle 4, tab 18.01 {AB4/18.01/1}. So *AstraZeneca*, a pharmaceutical company, was found to have committed an abuse by securing an extension to patent protection over one of its drugs by misleading the patent

authorities. The patent extension took the form of a supplementary patent certificate, known as an "SPC". I would be grateful if we could turn to {AB4/18.01/21}, and please read paragraph 108 to yourselves.

(Pause)

The point is this. If the companies that produced generic drugs know that a branded drug has several more years of patent protection to go, they will not start their drug development process. So by extending the period of patent protection, *AstraZeneca* deterred potential competition, the initiation of the drug development process, by potential rivals, even before the date when the patent protection expired and actual entry became possible.

So we say it is authority for the proposition that even preventing potential, as opposed to actual, competition can constitute a foreclosure effect on the structure of competition, so as to justify a finding of abuse.

AstraZeneca predated *Intel*. Just to check that that approach remains the position, I would like you to go to the Court of Justice's judgment in *Generics*, which is from 2020. It is in the bundle at {AB4/25/1}. This is a similar context, another pharmaceutical case. GlaxoSmithKline had a primary patent relating to its

paroxetine drug and that patent expired. It had various secondary patents, but nonetheless was facing potential entry by generic companies. The CMA found that it had infringed both the Chapter I and Chapter II prohibitions by entering into what purported to be patent settlement agreements, under which it paid potential generic entrants to stay out of the market. On appeal, the Tribunal referred various questions to the Court of Justice.

If we could turn to {AB4/25/26}. So paragraph 150 notes that the entering into of agreements that represent a settlement of a legitimate patent dispute is not necessarily abusive. Then I would be grateful if you could just read paragraph 151 to yourself.

(Pause)

Then over to {AB4/25/27}. Please read paragraph 161, in the middle.

(Pause)

Then finally to {AB4/25/28}. I would be grateful if you could read paragraph 172, at the bottom.

(Pause)

It is clear that at least in certain circumstances, in particular where the dominant company has a very strong market position, that even the foreclosure of potential competitors can be sufficient to justify

a finding of abuse.

Those were my submissions on the issues of counterfactual and the foreclosure test.

THE CHAIRMAN: Yes, thank you.

MR GREGORY: The next issue concerns whether Apple's App Store requirements cannot be abusive, because they represent normal competition on the merits.

Dr Kent says, to paraphrase: of course they are not normal competition on the merits; what they do is to preclude competition in order to maintain a monopoly position. Apple says that the requirements constitute normal competition, because they exclude competition in order to produce privacy and security benefits that are the basis on which it competes in both the device and App Store markets. I would be grateful if we could go back to our additional observations. That is {A3/5/11}. Please read paragraph 28 to yourselves.

(Pause)

The first thing is to stand back and think about this as a matter of principle, given the purpose and structure of the Chapter II prohibition. Apple is saying one of two things. It could be contending that conduct cannot be abusive if it produces a benefit valued by consumers to any extent, so irrespective of whether the benefit is large or small, and irrespective

of whether it outweighs any anti-competitive effects.

We say that cannot possibly be right. It cannot possibly be right that the conduct of a dominant undertaking is essentially immune from the application of a Chapter II prohibition, simply as a result of the fact that it produces some benefit.

Or Apple could be saying that conduct is not abusive if it produces benefits that outweigh any harm to competition.

The problem with that is that such arguments fall to be considered under the objective justification test. I have showed you the passage in *Post Danmark* stating that a few minutes ago. The objective necessity test, as you have been shown, has a structure with a number of requirements. For the purpose of efficiency benefits, they include a proportionality requirement and a requirement that any conduct that produces such benefits should not eliminate competition. If a dominant undertaking wants to argue that conduct that forecloses competition should not be regarded as abusive because it creates efficiency benefits, it must do so under the objective justification test.

We also say Apple's submission is not consistent with the law. The law is too voluminous to take you through it at any length, but we have summarised some of

the relevant principles at pages 11 to 12 of the additional observations, at paragraph 29 {A3/5/11-12}. I would be grateful if you could just read that. It goes over the page.

(Pause)

I am just going to show you one authority. I think it is actually not one that we have cited; it is one that Apple has relied on, which is the Churchill Gowns authority. It is {AB3/48/1}. I would be grateful if we could go to {AB3/48/24-26}. I would be grateful if you could read paragraph 68. It is quite long, I am afraid. It is another summary, this time by the Tribunal, rather than by us.

(Pause)

THE CHAIRMAN: Do you want us to keep reading? Yes, we are done with that. Sorry.

(Pause)

Yes.

MR GREGORY: So Apple relies in particular on the point at subparagraph (5)(iii) that conduct will not constitute "competition on the merits" if it has no objective justification. But that is not in fact the test; it is just one consideration among many. If conduct forecloses competition and has no objective reason, it is obviously abusive; but the analysis does not end

there. In particular, subparagraph (4) notes that the Court of Justice has adopted an effects-based approach to determining whether something constitutes normal competition.

So obviously if all you are doing is selling products at low, non-predatory prices, for example because you are more efficient, and that drives some competitors out of the market, that is obviously competition on the merits. But if what you are doing is not that sort of thing and it has a clear foreclosure effect, then if you want to argue that it has efficiency benefits that outweigh that, then you have to do that under the objective justification framework.

The final subject I was going to address you on is unfair pricing, which is covered in our additional observations at page 13. Sorry, we go back to {A3/5/13}. I am going to be extremely brief because I think as we were finalising these submissions, Dr Kent's team were addressing you at some length on some of these points.

The only issue is the high level policy point. On page 13, if you could just read paragraphs 31 and 32 to yourselves, please.

(Pause)

The other points in this section have largely been

traversed by Dr Kent; so paragraph 33, {A3/5/14}, there are established methods for undertaking this type of analysis. Paragraph 34 just notes that the Tribunal, in *Claymore Dairies*, set out some guidance in relation to the allocation of common costs.

Paragraph 35, {A3/5/15}, notes that the CMA has various established methods that it uses for these purposes and it applies them in the Mobile Ecosystems Market Study.

I will just turn behind me for a second.

Sir, unless you had any further questions, those are our submissions.

THE CHAIRMAN: The only question I had, I do not know whether you have had the opportunity to hear Apple's submissions on this part of the subject yesterday, and it may be that that is not an area that you want to cover. The position they are taking is not just this question of allocation, well, there are a number of different positions they have taken, but there is additionally the point about it being a *Latvian Copyright* type of case. I am actually muddling myself up, am I not? I am sorry, I am muddling myself. That is --

MR GREGORY: There are obviously two points. One point here is about common cost allocation. There is a separate

point about the value of IP and the sort of --

THE CHAIRMAN: Yes. I am muddling myself, and I will muddle everybody if I deal with the *Latvian Copyright*. That is the point I wanted to ask you about, about the valuation of IP effectively, but that is not a subject that you want to get into, I presume.

MR GREGORY: The high level point is that there are established methods for dealing with that. The CMA has its own methods and it applies them, presumably. So it cannot be the case that, simply because this exercise is difficult, that it becomes impossible to apply the Chapter II prohibition for certain types of abuse and to certain types of defendant. That would obviously significantly undermine the effectiveness of the competition rules. What I am not going to do is to go into the detailed arguments about who has proved what.

THE CHAIRMAN: Yes, that is fine. That is helpful.

That has been extremely helpful. Thank you very much and we are very grateful for the time and effort you have put in, and those behind you.

MR GREGORY: We are grateful to you for hearing us.

THE CHAIRMAN: Mr Kennelly, do you want to jump in?

Submissions by MR KENNELLY

MR KENNELLY: I will be finished well before lunch, just to reassure the Tribunal about timing.

THE CHAIRMAN: That is helpful, thank you.

MR KENNELLY: I will take the points in the order that they appeared in the CMA's written document which tracks the issues in the case, and I will begin, therefore, with market definition and the focal product.

To be clear, to the extent it was suggested otherwise, Ms Demetriou, when she addressed this issue, maintained our case in relation to market definition and the different genre product markets as pleaded. She accepted, correctly, that the focal product is the starting point for the market definition exercise, as the CMA have set out in its submissions; but only the starting point; then you follow where the evidence leads you in relation to competitive constraints and substitution possibilities. Our case, as she explained, is that there are different genre markets here, because the substitution possibilities are different between them; and she made that clear, {Day26/84:20}.

THE CHAIRMAN: So you are saying -- because there is a difference between the role -- well, if you are thinking about substitution, that is a different thing from constraints, that is the point that you are making, is it not?

MR KENNELLY: Yes.

THE CHAIRMAN: So you are saying that actually these things

operate not just as constraints but they are capable of being substitutes and therefore the market is broader than just iOS to distribution.

MR KENNELLY: Yes, between genres. Of course, the final point is that ultimately this distinction does not matter, because what is clear, we say, is that Dr Kent's product market definition is not correct; that the iOS -- the iOS only one has not been proven.

THE CHAIRMAN: So -- because, you say, when you go through the exercise under the HMT test you end up with a broader market; yes?

MR KENNELLY: Yes.

Then the next point that was addressed was how to apply the hypothetical monopolist test in this case. Obviously we gratefully acknowledge the CMA's agreement at paragraph 6 that Dr Singer's HMT analysis was circular, insofar as he assumes dominance for the purposes of his analysis. But the CMA then went on, from paragraphs 7 to 9, to look at the solution for all this circularity and they ask the Tribunal to focus in particular on the competitive level of prices, in particular comparator prices and the various profitability analyses; and they suggest that while product differentiation might explain a price differential of about 5%, it is much less likely to

explain a price differential of 50 or 100%.

So the CMA here seems to be asking the Tribunal to focus, or to infer dominance and, in turn, infer the relevant product market by simply comparing Apple's prices to alleged comparator prices and asking how much higher Apple's price is and looking at Apple's profitability.

THE CHAIRMAN: I do not think it is quite as stark as that. I think they are saying that -- firstly in relation to the circularity point, I think they are saying that if you did not have any other evidence it would be circular but once you have other evidence, that clearly changes the circularity. Then they are saying that in relation to the other evidence, you take what you get and if it is sufficient to give you a sense that there is a -- you can find some sort of competitive price that is a reasonable distance away from the actual price, then you could probably -- well, you may draw some conclusions from that about the likelihood of product differentiation playing a role. I think that is the way it was put.

MR KENNELLY: Indeed, and as I said, we gratefully accept that acknowledgement of the role that product differentiation plays. My concern, our concern is -- and maybe I am being unfair to the CMA in putting it

this way -- that these proxies of simply comparing the prices and looking at profitability may not necessarily be informative of competitive constraints.

The reason why I say that is because when the CMA says a price differential of 50 or 100%, if this is what they are saying, might strongly indicate dominance in that way, well then we have to draw the Tribunal's attention to the evidence in this case and, in particular, the comparison between the Steam charges which are --

THE CHAIRMAN: Mr Kennelly, just before you get into all that, I do not think you need to do that, because I do not think that is what Mr Gregory was saying. He was not getting anywhere near the evidence. He was just simply saying that -- I think the only proposition that matters really, in relation to what you are talking about, is that he is saying that if you have evidence, and that is entirely a matter for us and he is not getting engaged in that, and if that were to show a significant -- on your conclusion of, if you like, the counterfactual price, that were to show a significant difference from the actual price, then you might reach the conclusion that was not just accounted for by the prices of differentiation. I think that is all he was saying. He is certainly not getting into the question

of how good the evidence is, and so I do not think you need to either.

MR KENNELLY: (Laughs).

THE CHAIRMAN: We have had it all before. I do not want you to feel like you were leaving anything on the table that we do not about because we have had it all before. Ms Demetriou did a very good job of telling us all about that.

MR KENNELLY: Indeed she did, sir.

THE CHAIRMAN: But anyway, you carry on. You have got your time, but I just want you to know that that is not the target that I think you need to be aiming at.

MR KENNELLY: While I am here, and I heard that Mr Gregory said, the CMA's submissions are before you and on their terms, and I entirely accept we are not dealing with the evidence in this case, but they say that product differentiation cannot explain a 50 to 100% price difference. They say a price difference of 50 to 100% is less likely to be true of a price differential.

So I think -- very briefly address that, since it is said in those terms too. All I am going to do, sir, is to draw your attention to the Steam 27%, and Epic, Microsoft 15% -- sorry, forgive me, 12%.

THE CHAIRMAN: As I say (overspeaking).

MR KENNELLY: That is more than double (overspeaking).

THE CHAIRMAN: We have had all of that. By all means do it again, but you are repeating what we know and understand. So I am not going to stop you doing it, Mr Kennelly, you have your time, but you do not need to because we understand all of that.

MR GREGORY: Correct, sir. The CMA is not expressing any view whatsoever on what competitive levels of prices you can find. It could be 15%, 20%, 25%, 30%, we are entirely neutral as that. All we are saying is that you will obviously have to reach a conclusion, based on all the evidence, yourselves, and then at that point, whatever that level is, you will be able to compare that competitive level to the level of commission charges that Apple has in fact --

THE CHAIRMAN: Yes, thank you. I think Mr Kennelly is making a slightly further point. He is saying that there is quite a lot of price dispersion in this differentiated market as well. That is the bit that we have -- we do have that point, but that is certainly not something that Mr Gregory got involved in.

MR KENNELLY: The next point at paragraph 12 was that the commission was -- the CMA says that you cannot conclude that the commission is competitive merely from the fact that it was competitive in 2008 and it has only gone down since then. They say everything depends on the

facts, and again we respectfully agree; we have never said otherwise.

But on this question of view(?), the CMA then went on to explain by reference to its market study, we do say that, on our facts, Dr Kent has simply failed to explain what changed so as to render the price anti-competitive. It is no good saying that the market has changed in general terms. Dr Kent needs to identify what the change is that they rely on, and why this helps support their argument; and the only changes that have been identified are ones which support our case, as Ms Demetriou explained, and not Dr Kent's; because the two changes that have been raised in the course of the trial, and I have touched on them in the CMA market study in part, are, first of all, the increase in value to developers. There is no doubt that the increase in -- there has been a massive increase in value to developers. We say, indeed as you have heard, in view of that, you would have expected to the commission to have gone up.

Then we have the second point, which is the point you put to Ms Demetriou when you said, well, that might have been competitive in 2008 because you were competing for customers and everything was up in the air, and now users might be solidifying around devices and

ecosystems, competition may be weaker. So that is a change. We do not accept that device competition has weakened in that way, but even if it had, as Ms Demetriou explained, that is a point in our favour. Because if it had solidified in that way since 2008 again you would expect us, if Dr Kent is right, to have increased the commission, instead of decreasing it.

The next point that was made at paragraph 13 in the CMA's submission references their market study. They say that, again, it does not necessarily follow from the fact that 30% was competitive in 2008 that it is competitive today; but obviously you have our point that the CMA is not grappling with either the value point or the stickiness point that Ms Demetriou discussed with the Chairman.

They say that, finally, you would expect prices to reduce as competitors catch up and the product becomes less of an innovation. Now of course you have our point that the commission has reduced, and Mr Schiller explained how changes were made in response to threats by developers to move their commerce elsewhere, and for the avoidance of doubt, we have innovated. Dr Kent has not suggested that the rate of -- it certainly was not a major part of their case that the rate of innovation has reduced as a result of a lack of competition.

Moving on, then, to foreclosure. The CMA obviously relied heavily on the case of *Post Danmark* and my learned friend took you through it today, essentially having to make the submission that you could find foreclosure effects based on the potential for less efficient competitors to be excluded, even if they have not actually been excluded, and that the foreclosure effects do not have to be serious or appreciable.

But here again, without going into the detail again, because you have it, you had it from Ms Demetriou when she took you to *Intel* and the same paragraphs that we were taken back to today, 138 and 139.

We say, as she explained, that in *Intel*, the CJEU did develop the law after *Post Danmark*. The CJEU said in terms that the law needs to be further clarified.

It opened the door, as Ms Demetriou said, to the argument that even if there is a very small exclusion, that is not enough for the purposes of abuse.

I appreciate one has to look closely at the facts to draw this out, and we are talking about an open door and not going further, but in *Intel*, as the Tribunal saw, 14% of the market was foreclosed. Foreclosure does not mean only complete exclusion; if you are foreclosing 14% that is still foreclosure. If any foreclosure is the standard, well then *Intel* was wrongly decided. Of

course, the level of foreclosure in this case, we say, would be lower, only 10% in the counterfactual or less, and not just the market share, but also no evidence that there would be, in that counterfactual, material price or quality competition, or any price erosion at all.

So that is why we rely on *Intel* to say that we can maintain our argument that this is a -- to the extent that anything is excluded, it is trifling and, therefore, not an abuse on that further clarified case law.

AstraZeneca does not raise anything that is in dispute between the parties. We have never suggested that potential competition was to be treated differently from actual competition in these circumstances.

THE CHAIRMAN: I thought that -- I am not sure I quite understand where you are with the point that Mr Gregory made, that when the discussion that Ms Demetriou took us to is not about the market share and the counterfactual point, it is about the actual market share that the rebates apply to. Do you accept that? Do you still say that that is -- because you are saying that when you do the maths, you end up that that must be the case. What do you say about that?

MR KENNELLY: We fully accept that market share, the existence of market share and the extent of market share

is part of the picture that you need to look at, and that is what the court said, even in *Intel*. But what *Intel* said was that there should be an analysis of the factors that go to the extent of any changes in the market, and it requires a closer look; and a closer -- and in doing that, you must necessarily ask: what is the extent of the foreclosure? That requires you to look at the counterfactual.

THE CHAIRMAN: Sorry, are you saying that is what they said, or is that what you say you have to do because of what they said?

MR KENNELLY: The latter.

THE CHAIRMAN: That latter. Yes, okay. That is helpful.

MR KENNELLY: I do not say it in terms but we say it follows logically from what --

THE CHAIRMAN: Yes, I understand. Thank you.

MR KENNELLY: The next point in the CMA's submissions was about Apple's tools and technology, and how it should be treated in the counterfactual. Again, with respect to the CMA, this part of their submission was rather confused, because the CMA here says that claimants should not be required to prove counterfactual infringements on the same basis as the primary infringement. They say if it were otherwise, this would make the establishment of infringement excessively

difficult, particularly where the evidence is in the hands of the defendant.

But stepping back for a moment, Dr Kent says that whether you view things through the lens of the exclusionary abuse or the excessive pricing abuse, the Tribunal should find that Apple's 30% commission is too high; and you can tell that because alleged comparators charge less. That is basically what it comes down to; it is a benchmarking exercise.

One of our answers to that benchmarking exercise is that it is completely wrong, because it is not comparing like with like. We say our 30% commission is the consideration for a stack of services, including, critically, the tools and technology; and Dr Kent denies that and says it is just a payment for a distribution and payments.

The question of whether the 30% is payable for a stack of services which includes the tools and technology is a question which the Tribunal has to resolve. If you resolve that question in Apple's favour, that is what is covered by the commission, then two things follow.

The first is, it is entirely logical that Apple would continue to charge something for those services in the counterfactual, not least because that is what we

have done in the European Union.

The CMA says here, if you find that the charge is unlawful, the commission as a whole is unlawful, you cannot repackage it in this way. But that would only help the Class Representative if she had shown that the charge for tools and technology was unlawful; and if -- that has not been analysed at all.

Now, if the charge for tools and technology is not unlawful, then it can be repackaged and it will be repackaged. It does not follow that Dr Kent's benchmarking exercise works, because in general the charges are the same. She is comparing companies that are offering a smaller stack of services, and simply saying they charge less just will not do. There is no fallback argument, and I addressed this in my cross-examination of several witnesses. Dr Kent has no fallback argument which addresses: if tools and technology are in the stack of services covered by the 30%, here is an undertaking that charges for a comparable set of tools and technology, and here is the price they charge for that. None of the case law about standards for pleading cartels, which is what was cited by the CMA, assists in relation to this issue at all.

The witnesses from Apple have come to the Tribunal

and said in the clearest of terms: this is what the 30% covers, this is -- it covers tools and technology, among other things, and this is what we have done in the EU, when we have had to break up the stack of services and disintermediate our prices and we would think about doing something similar in the UK if we had to.

That links to my next point, which is the delayed and primary counterfactual.

This is addressed by the CMA at paragraphs 24 to 26 of their submissions. They say that if the Tribunal finds that Apple was dominant on day 1 of the claim period, it might infer that it was also dominant on day minus 1, they say, absent evidence to the contrary.

They accept, though, that the strength of the inference is likely to decrease the further back one goes from the beginning of the claim period. That was an interesting concession, and one fairly made because it reveals the problem, the problem that you have in trying to draw a line in circumstances where it has not been pleaded and therefore not properly addressed by the experts, where you have no expert assistance on that point.

Now, the CMA's answer to this problem that you have is that you may draw reasonable inferences, absent evidence to the contrary, but that is, with respect,

a dangerous point, a dangerous submission. It suggests that the burden of proof is on Apple to disprove what is ultimately an unpleaded allegation regarding Dr Kent's case on causation and quantum, and that would be unfair. If it is a necessary part of their case on causation and quantum that Apple was behaving unlawfully, or the effects of unlawful behaviour were to be perceived before or after the claim period -- before, in our case -- that needs to be pleaded and proven.

Now --

THE CHAIRMAN: Just on this point, so I am just trying to -- one of the points, I think, that the CMA is making is that if the exercise that you are going through is just to see what the effects are then that does not make an awful lot of sense to leave some effects in. But is the reason why this matters, is the date on when the infringement starts? Is that the point?

MR KENNELLY: Yes, exactly.

THE CHAIRMAN: So you know, if we were to reach the -- if we were to approach it on the basis that -- well, if we were to approach it on the basis that we are only interested in seeing what the position would be if the restrictions were removed, and in doing that we actually just want to see -- we see what the consequence, if you like, of the restrictions are, we have tested the

consequence and in that way obviously trying to find out what the effect on competition, however it is framed, is. Why does that analysis require you to pick a particular day to apply it to, if I can put it that way?

MR KENNELLY: Because the law tells you and you can only -- and the CMA agree to this, the unlawful aspects -- we are doing exclusionary abuse at the moment -- the unlawful aspects of the conduct in order to determine a counterfactual.

THE CHAIRMAN: Yes.

MR KENNELLY: The points that are lawful, that is innocent until proven guilty, are to be left in; and that is really important, because if you actually came to -- I am so sorry.

(Pause)

That is exactly the point I was going to make. The length of the time the restrictions go into -- that they are in place to determine their effect; because if these points are not properly pleaded and proven, then how are you supposed to decide where to draw the line? In circumstances where it has already been discussed about the difficulties in 2008, were we really dominant and abusing a dominant position in 2008? Unless this early period issue is pleaded and proven, there is no way you

can properly draw that line.

Another reason why it would need to be pleaded and proven and the experts need to address it is because one of the questions would be: how long would it take for entrants to enter into the market; how long would it take these things to develop? All of that would need to have been addressed, and it was not addressed because it was not pleaded or put in issue ... (Laughs).

THE CHAIRMAN: You are right.

MR KENNELLY: Taxi drivers. As Mr -- very good taxi driver tells me, you cannot remove the effects of 2015 of lawful conduct in 2014.

THE CHAIRMAN: No, I understand that. I suppose if the counterfactual is just a thought experiment to see how potent, if you like, the restrictions are, then it is a fairly abstract test, is it not? It does not actually matter when you -- as long as the restrictions are in place at a particular point in time, then arguably you do not have to worry about a counterfactual at that date. I am just wondering why -- and you can say, surely you can say, look, on such and such a date, if they were removed, it might take six months before there was any effect. It might not be very much. But if we reach the conclusion -- maybe it is because of the way you put this case.

Let me put this a different way. If we accept the Class Representative's position that you do not have to show a price effect, that all you have to show is an effect on the structure. Let us put it that way. If the assumption I put to you is that we are going to find, and this is not anything other than an assumption but if we assume that we are going to find that the restrictions have the capability of affecting the market and we do not need to go any further, that is the position we get to, why does it matter whether we can show that that is true on 1 October 2015 or on 1 January 2016? It does not make any difference, because all we have done is tested what the potency of the restriction is and come to the conclusion that it affects the market.

MR KENNELLY: It must matter for quantum.

THE CHAIRMAN: Oh, it does for quantum. Put that aside. I completely accept that, as Mr Gregory pointed out, you are in a different world when you get to quantum, and quite how it works there is another question, but for the purposes of this exercise, I am just not entirely sure I understand why it matters.

MR KENNELLY: On those assumptions, it would not.

THE CHAIRMAN: No, fine.

MR KENNELLY: But --

THE CHAIRMAN: But that is not your case. I understand it is not your case.

MR KENNELLY: It is not my case at all.

THE CHAIRMAN: Your case, I can see, that is the reason I have put the assumption, because I can see on your case that you are -- the whole question is getting into what, if I may put it, the more granular effects on things like price and the actual competition that takes place. I understand that. Yes, that makes sense.

MR KENNELLY: But interestingly, the commission working document that the CMA put in, that talks about how parties might argue in cartel cases that the effect of the cartel was to raise post-infringement prices. We see this in cases where the infringement stops but they say there is a post-infringement effect.

THE CHAIRMAN: Yes.

MR KENNELLY: That is done even if the infringement has ceased. That does not really assist you here. But even in that circumstance, that post-infringement effect has to be pleaded and proven by the claimant; and that is a matter of procedural fairness but also critical for the Tribunal then to be able to understand and make findings in relation to that.

We see nothing like that here. The CMA's *Achilles* judgment that they put in does not help you either.

I am not going to go back to it, but in that case the scheme itself was found to be unlawful and there were emails that were preparatory steps for the unlawful scheme, and the Tribunal decided, well, they should be excluded from the damages analysis, because they would have a chilling effect on new entry. But they were preparatory steps to the scheme before it began, and therefore really not analogous to our situation at all because -- again, I am going over old ground. If the point had been pleaded against us, we would have put forward arguments about why Apple had independent reasons for applying the requirements prior to October 2015, and it could lawfully have done so and that would have been addressed by the experts and argued before you.

THE CHAIRMAN: Yes.

MR KENNELLY: The next point is addressing paragraph 27(a) of the CMA's submissions, and this is the question of unlike in assessing the counterfactual for foreclosure --

THE CHAIRMAN: Sorry, just remind us what 27(a) is about?

MR KENNELLY: This is about benchmarks in unfair pricing. I am coming to the *Latvian Copyright* point that you raised.

THE CHAIRMAN: Yes. Out of context, I think.

MR KENNELLY: Exactly. We understood the point you were making, sir. So 27, I think paragraph -- it is 27(c) of the CMA's submissions. They say that the same approach of purging the counterfactual is true for the purpose of the unfair limb and unfair pricing analysis, given the issue is whether Apple's prices are above the competitive level. Obviously we make the point that you do not purge the counterfactual of features that are not unlawful, but that is the Court of Appeal in *Dune*, and that includes dominant positions and what the power lawfully acquired.

To this end, the CMA suggests that Google Play is not a useful comparator at the unfair pricing stage, because Google Play's pricing is likely a reflection of it having market power. They say that in terms, so they are engaging with the facts of the case there.

But our answer is the point that Ms Demetriou made to you yesterday, which is that your comparator exercise should include other comparators with market power, in cases such as this one, where the firm whose prices you are testing is providing rights to use in IP, rights to use --

MR GREGORY: Sorry, just to clarify that. We are not actually engaging in the facts of the case. The sentence says:

"If the Tribunal concludes that Google Play's prices are likely to be above the competitive level ... [as read]"

So it is --

MR KENNELLY: I apologise.

MR GREGORY: -- simply put forward to illustrate the point of principle.

MR KENNELLY: I am sure that is an accurate correction.

THE CHAIRMAN: So this is 27(b), is it not? I think you may have said (c). I have written down (c).

MR KENNELLY: It was the fact that the CMA invoked Google Play in terms, but I --

THE CHAIRMAN: No, I am just trying to get -- so we are back into the market definition here, are we not? That is obviously --

MR KENNELLY: No, unfair pricing. 27(c).

THE CHAIRMAN: Oh I see, because it says the same is true. I follow, I'm sorry. Yes, I see, yes.

MR KENNELLY: As my learned friend said, we have -- Mr Gregory, we agree with the position of 27(a) and 27(b) and 27(c).

THE CHAIRMAN: 27(c) is -- yes, yes, yes.

MR KENNELLY: But *Latvian Copyright* is the answer to that point, about why Google Play should be, can be a benchmark here.

THE CHAIRMAN: Yes.

MR KENNELLY: Moving on then very briefly to competition on the merits.

THE CHAIRMAN: I am happy to go a bit past 1 if you need to. It could be quite good to get you done and then Mr Hoskins knows he has a clean sheet.

MR KENNELLY: I only have a couple of minutes on this.

THE CHAIRMAN: I do not want you to rush. That is the main thing.

MR KENNELLY: I am happy to answer any questions, but I am coming to the end now.

So on competition on the merits, the CMA's submission seems to end up at paragraph 30. Here I did struggle again to understand really what their point was on the legal approach to competition on the merits. They seem to be saying that if you find that the conduct gives rise to foreclosure effects, then it is necessarily unlawful, subject only to the possibility of making good an objective justification defence.

So they do not acknowledge that there is any independent exercise of looking to whether the conduct in question does or does not form part of competition on the merits; and that is contrary to the agreed legal -- if that is what the CMA is saying, it is contrary to the agreed legal position from Dr Kent and Apple that there

are two requirements for the exclusionary abuse: that it is capable of foreclosure, and by means other than competition on the merits.

THE CHAIRMAN: I think the point that is being made is that if you are -- I think the only point that is being made is that there is an argument which advances benefits, in the way that you have done, might be looked at as falling short of the competition on the merits test, as we have been shown by everybody, and that in those circumstances the proper place would be in the efficiencies argument. I think that is all that was being said; and Mr --

MR GREGORY: I was not making the submission that Mr Kennelly thought I was making. I took the Tribunal to one passage in the Commission's guidelines, which actually set out the two tests which I think is common ground. The only point is that the test for assessing whether something constitutes normal competition on the merits is not carried out entirely without regard to effects. In applying that test, the courts have had regard to the effects, as well as the form, if you like.

THE CHAIRMAN: Yes, and as I understood it, that if you were looking at things that fell naturally, more naturally within the objective justification efficiencies argument, and that was a bit of a signal that that is

where it should be, rather than in the competition on the merits debate. I do not know if that is helpful, Mr Kennelly. Perhaps that is not helpful. Why do you not go ahead anyway.

MR KENNELLY: It is helpful, and I will come back on that point. But just -- and I must be clear, I am only picking up the points where we disagree with the CMA. The Tribunal has seen that the CMA and Apple agree on many of these points and, therefore, we are also grateful for your intervention and I am not -- rather than waste your time --

THE CHAIRMAN: Yes, of course. I follow.

MR KENNELLY: -- going through the bits we like, I am only picking up the bits where we have some --

THE CHAIRMAN: I think what is left completely open, and I do not think Mr Gregory was getting anywhere near, was our decision as to whether or not the benefits that are being put forward, and therefore the connection with competition on the devices, I do not think he is expressing a view as to what the answer is on that. I think he is giving us a caution that if they look like things that appear in the objective necessity -- objective justification box as efficiencies, then that might give us a steer that they may be better dealt with there than in the competition on the merits analysis.

But I do not think he was saying that -- he was not making a submission that that was the case in relation to your case, as I understand it.

MR KENNELLY: Indeed, and I did hear him say that if I was saying competition on the merits and then(?) I am balancing efficiencies, then that would look more like an efficiencies defence and not competition on the merits. Again, he is quite right. I hope I did not do that. But if that is what I was doing, then he would be correct to point me out.

The point, though, that he just made, the only point is that the test for assessing whether something constitutes normal competition on the merits is not carried out entirely without regard to effects. So he is asking you to make sure that effects are taken into account in relation to competition on the merits. Again, we respectfully agree, because the competition on the merits test, as Mr Gregory said, has to take account of the effects that the Tribunal finds are actually produced by the allegedly foreclosing conduct, and if you find the effects are relatively small, that is also relevant to competition on the merits. So we respectfully agree again with the CMA on that.

THE CHAIRMAN: Well, hang on a moment. I am not sure that is something that Mr Gregory would agree with

necessarily.

Just in my mind, so I am clear -- just to step back a little bit. What we are talking about here is us trying to decide, the panel trying to decide whether the things that you say drive competition in the devices market and the app market, security, privacy and so on. I think the task we have is to decide whether or not those things are going to normal parameters of competition or actually carry with them a degree of effects on competition that mean that they cannot be called competition on the merits.

Does that make sense? Have I got that broadly right, do you think? That is the dispute between you and the Class Representative. They say those are not competition on the merits things. It is actually all about these things and you are saying: yes, they are. But -- and then the question for us, as well, as I think Mr Gregory has put it, when you look at what impact that is having on the competitive situation, it will tell us whether or not they are competition on the merits or not. That is the right framework, is it?

MR KENNELLY: It is the right framework. The use(?) of Mr Gregory was that he was saying: you can look at competition on the merits in isolation from the actual effects that are produced by the foreclosing --

THE CHAIRMAN: Yes, which I think is what -- that is really what I think I have just been saying to you, I hope, yes.

MR KENNELLY: The reason why this is a point close to my heart is that --

THE CHAIRMAN: You care deeply about security and privacy, as we know.

MR KENNELLY: -- we care deeply about security and privacy. For the sake of a tiny bit of competition in the App Store --

THE CHAIRMAN: Well, that was the point I wanted to pick up, because I think you are then suggesting there is an appreciability point in there.

MR KENNELLY: Yes, there is, because as Mr Gregory said correctly, and as we have just been discussing, when looking at competition on the merits and asking: does this look like really competing on the merits or not? If Dr Kent is right about competition on the merits, the outcome is that you have this tiny App Store competition tail wagging this enormous security and privacy dog which is critical for competition in the device markets, and that would be a very odd outcome indeed.

THE CHAIRMAN: Yes; so then that is where you do start to get into this question of: have you crossed the line into efficiencies or not? I appreciate -- obviously

I understand, your argument is that you have not. But that is really, I think, the point that Mr Gregory is making. That is at least one of the points he has made on this.

MR KENNELLY: Because it is so important -- just to be clear. The tail wagging the dog point is a jury point I am making to you. The real point is that it is relevant, in competition on the merits, to look at the extent in asking yourselves: is this really competition on parameters -- is this really conduct addressing parameters of competition or does it feel more like exclusionary conduct, however it is dressed up?

THE CHAIRMAN: Yes, exactly. That is the core question, yes. I understand that.

MR KENNELLY: But I say, since you are looking at competition on the merits in the devices market, which is what I say you should be doing, then -- and the transaction markets, I am reminded, the device markets here in particular, because they are so important to consumers and they spend so much more money on them than they do in the App Store. That is not a balancing exercise; that is a sanity check.

THE CHAIRMAN: Yes, and the Class Representative says we should not be in the devices market at all.

MR KENNELLY: I suspect they say that because when you do

look at the devices market, this whole thing falls apart because, at most, you are getting a tiny bit of competition, on their counterfactual, in the App Store market, with potentially devastating consequences, and damaging competition on the much more important devices markets.

That is my gratuitous pitch. I have nothing else to add on these submissions.

On the profitability points, Mr Piccinin addressed those more than adequately and I do not think the CMA really engaged with those points at all.

THE CHAIRMAN: Yes.

MR KENNELLY: So unless I can be of any further assistance, those are the reply submissions to the CMA.

THE CHAIRMAN: No, that has been very helpful. Thank you very much. So we will take a break. Mr Hoskins, would you like us back before 2 o'clock, or is 2 o'clock ...?

MR HOSKINS: (Inaudible - no microphone).

THE CHAIRMAN: You are comfortable with that? Good.

Mr Gregory --

MR HOSKINS: (Inaudible - no microphone).

THE CHAIRMAN: Yes, well, I -- good, good. Excellent, okay. Thank you.

Mr Gregory, you are very welcome to go or stay as you wish. I do not know whether you wish to stay, but

if you would prefer to go, then we will not take that badly. But thank you again for your submissions as well. Thank you.

We will start again at 2 o'clock.

(1.09 pm)

(The short adjournment)

(2.00 pm)

Reply submissions by MR HOSKINS

THE CHAIRMAN: Yes, Mr Hoskins.

MR HOSKINS: A slight air of delirium on this side, I have to confess.

I want to start by just dealing with some points on exclusionary foreclosure. I will begin with the *Magill* argument, and in our submission there are two reasons why *Magill* does not apply here.

The first reason one gets from *Android Auto*. If we can go to {AB4/37/12}. Paragraph 47. This sets out the test to be applied, if you like, in order to decide whether *Magill* and *Bronner* applies:

"It follows that, in order to establish whether the conditions laid down by the court ... [in *Bronner*] apply to a case concerning a refusal of access to infrastructure, it is necessary to establish whether that infrastructure (i) was developed by the undertaking in a dominant position solely for the needs of its own

business and (ii) is owned by that undertaking in a dominant position ..."

So that is one of the possibilities.

" ... or whether, on the contrary, that infrastructure was developed in order to enable third-party undertakings to use it, which is evidenced by the fact that that undertaking in a dominant position has already granted such access to ... third-party undertakings."

If you are in (i), *Magill* applies; if you are in (ii), *Magill* does not apply.

Now, it is necessary to distinguish the infrastructure from the intellectual property rights. You see that, for example -- this is not a great point of principle. Ms Demetriou quite correctly made that distinction in her submissions. You see that, for example, {Day26/125:3-10}:

"That is why it is different to the present case because, of course, in this case, we have the iOS platform which -- of course Apple licenses its IP to developers to create apps to be on the platform, but what it does not do is license developers to create apps for distribution other than through the platform or indeed it does not license other app market ..."

There is no great magic in the words. I am just

showing it. We are all agreed there is a distinction to be made between the infrastructure and the IP. Infrastructure in this case is the iOS platform; it is not the IP. The iOS platform is created using the IP.

Now, let us then apply the legal principle that we have just looked at in *Android Auto*. Let us ask ourselves the question: was the iOS platform developed by Apple solely for the needs of its own business, or was it developed to enable third party undertakings to use it? Well, it is clearly the latter.

If we are in that situation, *Magill* does not apply and the test for abuse is the one that is set out at paragraph 51 of the *Android Auto* judgment; that is the test for exclusionary foreclosure which we are all familiar with.

Of course, that is not a new test or departure from *Magill*. The exclusionary foreclosure test is just the application of longstanding principles.

Our case, this case is not a case like *Magill* or *IMS*, because the IP holders in those cases had not used their IP rights to create an infrastructure. Those cases concerned the issue of an IP holder's right to choose which individuals to grant a licence to. The judgments in *Google Shopping* and *Android Auto* make it clear that the *Magill* test does not apply where an IP

holder has used its IP to create an infrastructure which is open to third parties.

So that is one reason why *Magill* does not apply.

The second --

THE CHAIRMAN: Sorry, just before you move on, can I just ask you: does it make any -- is there any distinction to be drawn between most apps, which are -- well, all apps, as it happens, at the moment, which are developed by the use of the tools and the technology, the IP, and the App Store, the alternative App Store app that, in the counterfactual, would sit on the App Store? In other words, the point that is made is about: can you -- it may be one way of looking at this to say that the only thing that matters here is the platform and distribution; distribution is the activity and the infrastructure.

MR HOSKINS: Yes, that is the --

THE CHAIRMAN: Yes, of course.

MR HOSKINS: If we do the same --

THE CHAIRMAN: I am sorry. Please do.

MR HOSKINS: (Overspeaking) -- then obviously --

THE CHAIRMAN: Please do.

MR HOSKINS: That is the second facet that I want to draw attention to.

THE CHAIRMAN: Yes.

MR HOSKINS: In this case, under the DPLA, Apple grants a licence to developers to use all of the "Apple software", as defined, to test and develop apps; and the DPLA then imposes conditions on the use, if you like, of the apps that are developed or the way in which they are commercialised.

So for example, the DPLA says that any iOS app developed must be distributed using the App Store; and that is a contractual restriction on distribution; and the DPLA says that all relevant purchases must be made using Apple's IAP, and that is a contractual restriction on the method of payment that developers may use. But neither of those restrictions are conditions actually that relate to an IP holder's right to choose whom to grant a licence to, or for what purposes. They are about the commercialisation of the product, once it has been created using the IP rights.

Therefore, they are contractual conditions imposed on the use of the products created using the IP, and such conditions do not fall within the *Magill* principle in any event, regardless of my first point.

THE CHAIRMAN: Yes. So does that mean that -- so are you saying that we should actually be looking at this in two ways, or two different ways? If you start, perhaps the easiest bit is that you start and you say: I have some

IP, and I am going to let you use it, you are the developer, but I am imposing some contractual restrictions on it and they have nothing to do -- or they have to do with the platform, but actually the real point is that they have nothing to do with the IP.

MR HOSKINS: It is not to do with the inherent intellectual property right, which is who you allow to use it, et cetera.

THE CHAIRMAN: No. If you take that back to *Magill*, then the point of *Magill* was that the thing, the copyright was the thing that was going to be competed over; whereas here the app is not the thing that is going to be competed over.

So in a way, you are actually saying that this is -- I think what I understand you are saying is that this is actually something quite distinct and you can make a decision on that and say that this is just a collateral condition imposed and therefore it is an infringement on that basis.

MR HOSKINS: In a sense, I have thought about which way round to make these points because you could logically take the second point first, and then you just do not enter into a world of even having to consider how IP impinges because of the reasons I have described. But even if I am wrong on that point, you then go into

Android Auto. But --

THE CHAIRMAN: Well, maybe -- possibly, I think certainly the way I think, because of the way of the arguments, you have to do both, do you not? Then the argument is, really, you are still trying to access my platform because you cannot do that without -- because if there was not going to be an App Store on the platform, the first argument, whether it is right or wrong, I am not saying it is right, but if you look at it that way, that deals with the possibility of an alternative App Store just on somebody's website, but it does not deal with an App Store on the platform.

So you then might have to go and ask yourself the second question, which is, actually, the *Android Auto* question, and again whoever is right or wrong about that, but you are actually doing that because there is a separate activity going on, which is effectively a distribution activity that the App Store represents.

MR HOSKINS: That is right. I say I presented them in what seemed to be --

THE CHAIRMAN: No, I do not want to -- I am not -- yes, I do not --

MR HOSKINS: You do not(?) need both to --

THE CHAIRMAN: Yes. In a way, I suppose I am not trying to put to you an argument I am inviting you to accept.

I am trying to get a sense of whether I have more or less captured the way you are thinking about that. I think that is the point --

MR HOSKINS: Certainly, the thing I have not thought through, I confess, is exactly how those two fit together, because it does not matter for my purposes.

THE CHAIRMAN: Well, it is possible they do not fit together. Possibly they are just separate -- I mean, you could look at them as separate infringements, effectively.

MR HOSKINS: That is why I was sitting down scratching my head, I did not go beyond -- it seemed to me that that was enough --

THE CHAIRMAN: Okay. I understand the submission, yes, thank you.

MR HOSKINS: Competition on the merits. Let us just remind ourselves, when we get to considering exclusionary foreclosure, of course, it is an assumption that the relevant markets are the ones we contend for and that Apple is dominant in those markets.

Apple's argument on competition on the merits is that the restrictions in the relevant product markets, on which it is dominant, allow it to compete in the devices market on which it is not dominant, and competition on the merits, if you like, is to be applied

as an umbrella across them; and because of the fact that it competes on the merits in the devices market, that makes it legal for it to do what it does in the markets in which it is dominant. We present that as a leveraging argument in our closings.

But let me just try and look at it one last time in a slightly different way, to try and land this.

The restrictions in the relevant markets are certainly not competition on the merits. Excluding all competitors by licence terms, excluding all competition by standard terms, cannot be competition on the merits, and Apple has not really suggested otherwise.

Now we say as a matter of law, a dominant undertaking cannot eliminate all competition in the relevant markets in which it is dominant in order to allow it to compete more effectively in a different market.

Just imagine an example, and this is very high level. If a company, if a dominant company engaged in predatory pricing or a margin squeeze, some absolutely classic abuse, in a market in which it is dominant, in order to compete better on the merits, because it could charge lower prices or produce a better quality good, in a market in which it is not dominant, the predatory pricing could never be said to be competition on the

merits. It is unthinkable in that sort of stylised example, I accept, that you could use competition on the merits to say: okay, we are doing predatory pricing in the market where we are dominant, but that is fine because we are competing better(?) in another market. It is just another way of looking at the point that we made in our written closings. This is just leveraging. Competition on the merits cannot be the get-out card for that.

THE CHAIRMAN: Can I ask you -- sorry.

MR FRAZER: If we were to find against you on market definition and that it was somehow a systems market, for example, which included devices and the app markets, if I can put it like that, does your point go away?

MR HOSKINS: We do not even get to this point, because we have not alleged dominance in a market that is broader.

MR FRAZER: Fine, thank you.

DR BISHOP: Just an observation, I suppose, Mr Hoskins. Your example of predatory pricing in one market to enable you to compete better in another market; but your example does not contain any logical connection between the predatory pricing in the market and the ...

Whereas here, the essence of the claim is that it is not possible to allow in rival app stores, without necessarily and automatically, no matter what we do,

compromising quality in the main -- in the devices market; and with the added points that Mr Kennelly was saying this morning about the greater importance of that to consumers, and so on.

Now, I am not saying anything about the plausibility of the claim, how much support there is for it; but your analogy with predatory pricing does not work.

THE CHAIRMAN: Sorry, just before you answer that, can I put the same thing in a slightly different way, to give you the different angles on it?

I suppose you might also say that -- there is a danger in being too rigid with these market definitions, is there not? The market definitions are there for a purpose. We have ended up with a market definition and I understand your point that an awful lot flows from that. But we do know, do we not, that this is also a systems market, and so, you know, possibly --

MR HOSKINS: We do not necessarily accept that, because of the need for consumers to have visibility; so we do not necessarily -- we do not accept, on this side, that systems market point.

THE CHAIRMAN: Okay. So I suppose -- well.

MR HOSKINS: It is possibly a systems market. You would have to check the criteria were all complied with and we do not accept that --

THE CHAIRMAN: I see, okay. Perhaps that is not the way to put it. I suppose, putting it perhaps more generally, without the connotation of that, the submission that has been put is that this is a market in which there are multi facets and connections between bits that are quite unusual and different from, for example, an ordinary market in which you might see somebody exploiting their market power for predatory pricing. There is a very close connection between all of this. Does that mean that we -- and I think probably the observations from all of us asking the question: does that mean we can be quite so self-contained as looking at this as just this market? That is the question.

MR HOSKINS: I sort of hesitated about putting this very stylised example, precisely because I thought, maybe well, maybe I -- could you work something out? It was just intended at that high level. I mean, I could have tried to develop a situation in which the predatory pricing allows you to produce more efficiently in the upstream market and therefore you can sell more cheaply in the downstream market. You can carry on, but it is a stylised example and that is --

DR BISHOP: I quite understand.

MR HOSKINS: I accept that.

The problem with -- I mean, at the core of the

problem is, if you accept Apple's argument, you are saying that a company that is dominant in one market can use a method which is not competition on the merits -- for example, a contractual provision excluding all competition -- in order to allow it to compete more effectively in a market in which it is not dominant.

Now, this could be a case, if that were the scenario, you could find the competitors in the non-dominant market saying: hang on, you cannot do that, because then that is falsifying the competition in the non-dominant market. That is another way of looking at this from the other side.

THE CHAIRMAN: So it is sort of ancillary market dominance.

MR HOSKINS: That is right. That is why in the written -- we said it is leveraging. We have a complaints in the dominant markets but you can well imagine that the competitors in the downstream market would say: hang on, you cannot compete with us on quality, on security, et cetera, because of what you do in an anti-competitive way in the upstream market or in a related market. That is why this just does not work.

If, as in a sense the CMA has suggested this morning, if what Apple is really saying is: we have done something that is not competition on the merits in the dominant markets in this case, but they have all these

extra benefits, then the way you deal with that is through efficiencies and objective justification, et cetera. That is the proper part of the legal framework where that argument fits.

(Pause)

THE CHAIRMAN: Yes, thank you.

MR HOSKINS: Just a little reminder before we move away from competition on the merits. Remember that competition on the merits does not apply to the legal test for tying, because tying has its own conditions and that is why we have the tying abuse in there. Because even if we were to fail on competition on the merits and not have the primary foreclosure case you would still have the tying case because it does not have competition on the merits. Just bear that in mind.

THE CHAIRMAN: Just in terms of the consequences of that, and this is where it gets so difficult to keep track of how everything fits together, but at that stage, the counterfactual for that is not -- no longer the tied product --

MR HOSKINS: That is right.

THE CHAIRMAN: -- that it can buy or purchase separately. Is that a point really that goes to the payment after-markets, then? That is where that --

MR HOSKINS: That is right.

THE CHAIRMAN: -- that gets, yes.

MR HOSKINS: That is effectively the payment systems counterfactual, and that would be, I think, the counterfactual if we were in the tying case, but not in the --

THE CHAIRMAN: (Overspeaking) Not the contractual restrictions --

MR HOSKINS: (Overspeaking) -- main foreclosure case.

THE CHAIRMAN: Thank you.

MR HOSKINS: In terms of the capable of affecting the structure of competition issue, I can cut it short, because we agree with the CMA's analysis of the test for anti-competitive foreclosure. We agree with the analysis of *Post Danmark*; we agree with the analysis of *Intel*. It reflects what we put indeed in our open submissions and our closing submissions, so we are ad idem. I do not need to say anything more on that.

So that is exclusionary foreclosure. Moving on to objective justification, just to show you where the argument lies.

We know that there are two routes to objective justification that are -- there is the efficiencies route and there is the objective necessity route; and I just want to make a brief submission on the latter, the objective necessity point. The point I want to

establish, or submit to you, is that as a matter of law, a dominant undertaking cannot rely on objective necessity to justify a prima facie abuse if its conduct eliminates all competition, and you remember that point from Mr Kennelly's submissions.

Can we go to Apple's written closings, {A1/9/108}, paragraph 333. Second sentence:

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

You know that that is common ground between us. That is a submission I made in opening, and here it is in Apple's closing submissions.

Can we go, then, to *European Superleague*? {AB4/34/41}, paragraph 183. I showed you this, Mr Kennelly showed you this, so it is old ground. The heading is:

"Consideration of the possibility of finding certain specific conduct not to come within the scope of Article 101(1) and Article 102 TFEU."

I just invite you to re-read it, and then I will make some submissions on it.

(Pause)

Now, what the Court of Justice is doing in this paragraph -- in particular, the second sentence -- is it

is setting out the legal conditions that must be satisfied in order for an undertaking to benefit from the ancillary restraints doctrine under Article 101. It is setting out the legal test. It is not an application of a test to the facts of this case; it is the test.

There are three parts to it, and the third one is that:

"... third, that, even if those means prove to have an inherent effect of, at the very least potentially, restricting or distorting competition, that inherent effect does not go beyond what is necessary, in particular by eliminating all competition."

So what the court is saying is that if the relevant conduct or agreement, because we are in 101, eliminates all competition, then it goes beyond what is necessary. You just cannot get home if you eliminate all competition.

THE CHAIRMAN: I suppose, and I think this is probably where I got to with Mr Kennelly, although he might not like the way I particularly put it, but if it was -- I suppose it is not excluding the possibility that you could run the proportionality argument, even if you had eliminated all competition.

MR HOSKINS: I am putting in two ways. One is that I disagree that as a legal premise.

THE CHAIRMAN: Because of this, yes.

MR HOSKINS: (overspeaking) because of what is said here; and secondly, even if that were correct, the circumstances in which you would be able to do so would be -- I think, hardly anyone succeeds in these defences. The idea that you would succeed where you have eliminated all competition. You cannot succeed under 101(3) if you have eliminated all competition. You cannot succeed under the efficiencies defence if you have eliminated all competition. Why would this be the one area of justification where you can succeed, even if you have eliminated all competition? It is not surprising there is consistency across all the forms of justification in 102 and 101(3). You just cannot justify conduct that eliminates all competition. It is anathema.

THE CHAIRMAN: It may be that is the reason why there are not any cases in which people have looked at ancillary restraints and argued that and won or lost it.

MR HOSKINS: Well, I mean, we could go through the cases, except, you know, are they eliminating all competition or not, but this is the Court of Justice in *European Superleague* last year. It is intended clearly to be a statement of the law as the court sees it, and you see quite clearly here, if you eliminate all

competition that goes beyond what is necessary.

THE CHAIRMAN: Thank you.

MR HOSKINS: In our submission, it could not really be any clearer. We are not, sort of, trying to parse facts or shine a light in a dark corner. It says what it says.

Can I next move to Google Play as a comparator? In our submission, the real relevance of Google Play as a comparator arises in relation to the damages counterfactual. You have our arguments on foreclosure; you have our arguments on the test, et cetera. So I am looking at Google Play as a comparator in the damages counterfactual in particular.

We say it is necessary to distinguish, on the one hand, the identification of the appropriate counterfactual to which the judgment in *Dune* is relevant, and the identification of appropriate comparators to which the judgment in *Le Patourel* is relevant. So one case is about counterfactuals; the other case is about comparators.

If we can go to *Dune v Visa*, {AB3/51/18}. It is five lines down from the top, the Court of Appeal said:

"Plainly, a counterfactual that would itself breach competition law could not be an appropriate one. Subject to that, however, a counterfactual should reflect what would be likely to have happened if the

measures at issue had not existed."

But we are not here concerned with whether Google should be in any relevant counterfactual or not. What we are concerned with is whether Google Play is a comparator that should be taken into account. So it is the relevance of comparator issue. We say the relevant approach is to be found in *Le Patourel*. That is {AB3/62/26}. You have seen this before. It is paragraph 93 at the bottom. I mean, this is in the context of unfair pricing, but we say it is a clear statement of the general.

You see, paragraph 93:

"Second, if the comparator prices are themselves distorted because they were not set in conditions of effective competition and were affected by the exercise of market power, they are not reliable."

THE CHAIRMAN: So just a couple of observations, and tell me whether you agree or disagree. Here, we are talking -- this is in the unfair pricing --

MR HOSKINS: That is what I say.

THE CHAIRMAN: -- counterfactual. Obviously it eventually could turn into a damages counterfactual but actually it is not a damages counterfactual exercise at all, is it?

MR HOSKINS: I am going to come to the damages --

THE CHAIRMAN: No, that is fine.

MR HOSKINS: -- and look at it a different way. I am literally just looking at, on what basis should one -- to help decide on what basis would a comparator be ...?

THE CHAIRMAN: Yes.

MR HOSKINS: I am not saying this is a hard-edged legal test either. It is an indication of the approach --

THE CHAIRMAN: Yes, exactly.

MR HOSKINS: It is an obvious approach.

THE CHAIRMAN: Yes, okay, because --

MR HOSKINS: No more than that.

THE CHAIRMAN: -- *Dune*, of course, is thinking about what the appropriate --

MR HOSKINS: Yes. That is my point. I am taking *Dune* out of the equation; whether it is for -- whatever counterfactual it is for. I am focusing very much on, what is an appropriate comparator? How do you tell if something is an appropriate comparator?

What *Le Patourel* says, if it is looking at comparator price, for example, not set in conditions of effective competition, because of market power, not reliable.

There are two aspects to the way in which Apple tries to rely on Google Play.

The first one is in relation to so-called competitive prices. Now, Professor Sweeting explained,

in response to a question from the Tribunal in particular, that in a counterfactual in which Apple had 50% or 90% market share, so either of those scenarios, Apple would charge the competitive price. I will show you two extracts from the transcript for that. {Day20/18:1}. If you can read, please -- can we get {Day20/19:1} up at the same time? Is that possible? If you can read from line 6 on page 18 to line 8 on page 19.

(Pause)

The particular lines that I rely on are lines 5 to 8.

(Pause)

This was not something that I winkled out of Professor Sweeting. I was actually just asking a general question: why do you accept that the market share would fall between 10 and 50%? It was within his description of this, he volunteered this particular point that the competitive price would be charged by Apple regardless of whether it was 50 or 90% market share.

Then {Day21/86}. If we could have {Day21/86-87} up, please. If you could please read from line 16 to line 22, over the page, on page 87.

(Pause)

So you go back to the point I put, ask him again, and he gives the same answer, so you have the same point twice, if you see what I mean.

We say that Google Play is not an appropriate comparator for a competitive price, because its commission rate is set above the competitive level; and if you go to the CMA market study, {AB6/25/140}. It is paragraph 4.210. If you read that to yourselves, please.

(Pause)

Now, remember that in addition, Google Play was found to be dominant in the market for *Android* app distribution in the European Commission's *Android* decision. We have seen that on several occasions as well.

THE CHAIRMAN: Sorry, just in relation to this. Obviously you know it is said that this may be all very interesting, but it is not evidence.

MR HOSKINS: That is what I am about to --

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

MR HOSKINS: In order for the Tribunal to decide whether Google is an appropriate comparator, it is not necessary for the Class Representative to have run a parallel case, establishing dominance and abuse by Google. It is a reflection, in a sense, of what the CMA was saying

this morning about where does this end?

The Tribunal can have regard to the European Commission's *Android* decision and the CMA's conclusions in its report, and decide, taking them into account, whether it would be appropriate to take account of Google Play as a comparator for setting a competitive price. It is not the case that whenever there is an issue about comparators, you have to have a full trial on some aspect of a comparator, in order for the Tribunal to be able to decide whether to take it into account and how much weight to give it.

But where you have an infringement decision by a Commission, and where you have a market study produced after years of study, you can imagine what my submission would be as to the weight that should be given to that. We are not pulling a page out of an article on an internet site about the quality of an app store.

The second way in which Apple tries to rely on Google Play as a comparator is in relation to the counterfactual market share, and this is particularly important in relation to damages in -- when Dr Singer runs his models, and the market share assumptions that he puts into those models.

Now, Apple suggests that in a counterfactual, absent the restrictions, Apple would be in the same position as

Google is currently in, in the actual world, and that as Google has a market share of around 90% in the actual world, Apple says that it should be assumed to have a market share of around 90% in its, or in our counterfactual. That is the argument.

But that argument is based on a false premise, because absent the restrictions, Apple would not be in the same position as Google.

If we go to page 82, please, of the CMA's report. We have seen a lot of this already. Chapter 4, "key findings". {AB6/25/82}. The second bullet:

"Apple prohibits other app stores and sideloading on iOS."

But we are concerned with Google here:

"Google allows alternatives, yet the outcome on *Android* is much the same, in part due to material barriers to entry and expansion faced by rival app stores."

Then if we go to {AB6/25/105} which is later in this chapter, and if you could read paragraph 4.81, please.

(Pause)

The crucial point is this, and it is just a simple factual one. Google does not allow competing app stores on the Play Store.

However, if we succeed on our case, Apple would have

to permit competing app stores on the App Store.

So Apple, in our counterfactual, would face materially more competition than Google does in the factual, and it follows, we say, that Google is not an appropriate comparator for Apple; and we say it further follows that Apple's market share in the counterfactual would be materially less than Google's actual 90%. It is just a false comparison.

MR FRAZER: In relation to the presence of the Samsung -- the Galaxy Store, for example, which is present as a competitor to the Google Play Store and on most *Android* phones, what do you say about that? Would that not be equivalent to an alternative app store on the Apple App Store?

MR HOSKINS: It is not on the Play Store. That is the --

MR FRAZER: It is not on the Play Store but it is on the same device, yes.

MR HOSKINS: I accept that there are competitors, but the crucial point is obviously, if you have your competing app store on the App Store -- on the Play Store, that is a material advantage; and that is why the comparison that Apple seeks to draw between its counterfactual and Google nexus(?) just does not -- it overlooks that absolutely material point.

I was going to move on to tools and technology.

I was going to address you on the question: when assessing damages, what is the appropriate legal framework, what is the appropriate legal test for assessing Apple's claim that it would have introduced new charges for its tools and technology, or indeed anything else, in the absence of relevant restrictions?

There are three main points in relation to this.

First of all, in this claim, the class's prima facie measure of loss will be the difference between the prices paid in the factual and the competitive prices that the class would have paid in the counterfactual.

I can make that good by going to Sainsbury's v MasterCard in the Supreme Court. {AB3/38/69}. If you would read, please, paragraphs 198 and 199.

(Pause)

Then, please, over the page to paragraph 206 {AB3/38/70-71}, and one more page, please; thank you. If you would read paragraph 206.

(Pause)

So the prima facie measure of loss in the case is simply the overcharge; how much extra you paid in the factual, when compared to what you would have paid in the counterfactual. That is the prima facie measure of loss.

The second point is this. It is Apple's case that

in the absence of the restrictions, it would have reacted by introducing new charges.

Now, at a very basic level, that is Apple's contention, and he who alleges must prove. It is no more sophisticated than that.

Indeed, let us test it this way. If Apple were right, the Class Representative would have to prove a negative, ie that Apple would not have introduced new charges in the absence of the relevant restrictions. Apple is the one with all the knowledge. It is clearly an impossible burden and therefore is not the one that the law imposes.

The third point is this. The contention that the removal of the restrictions would have caused Apple to introduce new charges is not an issue of quantum; it is an issue of causation. Causation must be proved on the balance of probabilities, and the broad axe does not apply, because the broad axe is relevant only to the quantification of recoverable damages.

Let me just make that good by an example which I do not think really could be controversial in law.

In order to claim damages for a particular head of loss, a claimant must prove that the wrong caused that particular head of loss, and that must be done on the balance of probabilities. If the claimant succeeds in

proving that that particular head of loss was caused by the wrong, then the broad axe can be applied to assess the quantum of damages under that head of loss. That is the proper analysis.

I appreciate I am parroting back a situation you have put, and we think that is a sensible way to approach the law; in fact, it is the law.

THE CHAIRMAN: Yes. I think Mr Piccinin accepted it at that level of principle. I think the complication arises here, and I think he would say that when you are talking about -- let me just -- sorry, let me just find your wording -- the difference between the price paid in the factual and the competitive price that the class would have paid in the counterfactual; I think Apple's argument is that when you construct that counterfactual, you put the fees and charges into it. That is the argument, I think.

So by the time you have got to this question of causation, rather -- and I must say, I put this to Mr Piccinin and I struggled a bit with this. By the time you get to causation, you have already dealt with that point because you have put it in the counterfactual.

MR HOSKINS: But there is a still a causation point; it doesn't matter when the causation point arises.

THE CHAIRMAN: That is the point I put to Mr Piccinin. It does seem to me when you look at the very conventional damages principles, it is a question you should be asking as part of the but-for test.

MR HOSKINS: Because the way -- I think the reason I have been slow getting to this, in a sense, it is because you have to understand that we are looking at the damages counterfactual(?) and it is Apple's case that in the absence of the restrictions, it would have done something. When it is framed in that way, it becomes a causation point.

THE CHAIRMAN: That is right. There are undoubtedly cases on where a defendant says: I would have done something. But there is a reason why it has to be put into a set of rules, because otherwise, of course, that is what everyone would say; and so the rules do exist, and actually the cases on the rules are not particularly helpful for us here, but they certainly establish that sort of signal. The case on the rules are cases about hospitals and doctors and different facts altogether really. Yes, but they do establish, I think, the sequence of logic that gets you to the point.

MR HOSKINS: Exactly. That is why, from the way I have just put it to you, as an example, someone claiming a particular head of loss, because that seems to be

completely uncontroversial as a matter of legal principle.

THE CHAIRMAN: Yes. But I think -- well, just to check, are you saying that when you have said "the competitive price that the class would have paid in the counterfactual", I suppose you are not necessarily excluding, at that stage, that you might have included or excluded the tools and tech charges. You are just saying that somewhere you have to have a causation analysis.

MR HOSKINS: Absolutely, and if it is in exclusion counterfactual, it is definitely a balance of probabilities test.

THE CHAIRMAN: Yes, precisely. Well, the test is -- because it is a causation test, it is a balance of probabilities test. But somewhere along the line, however you do it, you cannot just put it in the counterfactual without considering whether there is a causation question; yes.

MR HOSKINS: In a sense, the reason I approached this more as a damages counterfactual point is you have our submission, and you heard what the CMA said about the test for foreclosure. Really, the question of equivalent prices is irrelevant to the structure of the market, unless you can -- it is the point I made in my oral closing: unless you can show the price would have

been the same and no one would have entered. But we are so far from that world. Even at the high point of Apple's case is that it has got about 90% market share in the counterfactual. We do not agree with that. But 10% odd of entry is more than enough to decide the foreclosure infringement point. That is why we look at this really, if it comes up, it is going to come up in the damages framework.

THE CHAIRMAN: Yes.

MR HOSKINS: The submission I have just made is consistent with, again, *Le Patourel*; this time at paragraph 1311. That is {AB3/62/279}. If you read paragraph 1311, and you will note the reference to causation in that paragraph.

(Pause)

THE CHAIRMAN: Yes.

MR HOSKINS: So the position I am putting to you now is consistent with what the Tribunal said in *Le Patourel*.

The final point I need to deal with, but do not worry, there are others who will come after me, but the final point I want to deal with is the question of the primary or delayed counterfactual.

Now, in our submission, this issue is really relevant again to damages, not to foreclosure. The reason we say it is not relevant to foreclosure is: if

the restrictions prevented actual or potential entry from 1 October 2015, it does not matter if the actual competition would have taken a couple of months to get going; the restrictive effect is present from day 1.

So it seems to us that this notion of the primary against the delayed counterfactual is a red herring when it comes to foreclosure. It is really relevant when you come to the question of damages.

THE CHAIRMAN: I think, when I put it to Mr Kennelly on the basis of your case, I think he accepted that -- I mean, obviously they say, and we do not need to go back into it, they say you do need to be looking at lots of other things, like, for example, the effect on price; and so if we are in their world, then I assume you would agree that, actually, that is not right.

MR HOSKINS: I am not going to say yes to that just because I am not entirely sure what the world is. I'm not sure what I would be agreeing to.

THE CHAIRMAN: That is your case anyway.

MR HOSKINS: On our case, on our test for foreclosure, it is irrelevant.

THE CHAIRMAN: Yes.

MR HOSKINS: Just the legal principles, because this is an important point. In our submission, it is clear that, as a matter of law, the Tribunal is entitled to

adopt the primary counterfactual for the purpose of assessing damages.

If we can go -- and I am sorry, I showed you these in opening but it was a long time ago and this is an important point. If we go to the *Enron* judgment; that is {AB3/11/31}. If you could remind yourselves of paragraphs 87 to 89, please.

(Pause)

Can we put the next page up at the same time, sorry? {AB3/11/31-32}. Thank you.

(Pause)

The principle really is in paragraph 90.

DR BISHOP: The principle is in which?

MR HOSKINS: Paragraph 90.

(Pause)

So you can, and indeed should, purge from a counterfactual, not just the abuse and its consequences but also any other unlawful conduct, that in order to identify the unlawful conduct to be purged, that does not require that the Tribunal makes a specific finding of abuse.

THE CHAIRMAN: So this is another example, you say, where -- you are applying a quantum counterfactual, there is a -- a but-for counterfactual on the quantum assessment is different, can be different from words applied

elsewhere.

MR HOSKINS: This is not a -- I do not think this statement is specifically in relation to quantum. I think the next one I am going to show you is the same principle that applies, but I could be wrong about that, sorry.

THE CHAIRMAN: Right. We are not quite sure what questions (a) and (b) were.

MR HOSKINS: That is right. I do not think this is -- I can check, but -- so this is a sort of general approach to counterfactuals, but this is one I would say can -- for reasons I will explain, can and should apply when you are looking at damages in this case.

THE CHAIRMAN: We have seen, have we not, other authorities which suggest that you do not have to purge -- or the effects, have we not, or am I now confusing myself again?

MR HOSKINS: I think that is the *Dune* case.

THE CHAIRMAN: Yes, it is the *Dune* case, yes, yes.

MR HOSKINS: Because I am going to make specific damages submissions. I would like to show you these, and then I will come to the application in this case. But the very high point is you can exclude from a counterfactual assessment unlawful conduct without making a specific finding of abuse. *Albion Water* is {AB3/17/23}. This is in the context of damages, paragraph 61.

(Pause)

THE CHAIRMAN: That does describe it as a follow-on damages claim, does it not; so maybe it was.

MR HOSKINS: That is true. It was a follow-on damages -- I am sorry, I should --

THE CHAIRMAN: No, it is my ...

MR HOSKINS: You will see that:

"We can ... assume for the purposes of the [damages] counterfactual that, in addition to offering an lawful First Access Price, the dramatis personae in this counterfactual would not have engaged in any illegal behaviour, including any violation of competition law."

THE CHAIRMAN: So it is the last sentence, in a way, states the obvious, does it not? What you are saying is that purging of the abusing -- the point is that the purging of the abusive conduct and its consequences, does it not? Is that the point?

MR HOSKINS: The way I am -- I am relying on this for the principle that one can purge unlawful conduct from a damages counterfactual.

THE CHAIRMAN: Without having to --

MR HOSKINS: Make a formal finding.

THE CHAIRMAN: -- make a formal finding, yes.

MR HOSKINS: Before I go on to make the submissions on that, this principle was also applied -- I am not going to

turn it up, I will just give you the reference -- in the *Achilles Information v Network Rail* case. That is {AB3/47/5}, page 5, paragraph 5(7). But it just repeats the principle. This is not a one-off; it is a consistent principle applied by the Tribunal.

THE CHAIRMAN: Just give me that that reference? The paragraph number?

MR KENNELLY: {AB3/47/5}, paragraph 5, sub(7).

THE CHAIRMAN: Sub(7), yes, thank you.

MR HOSKINS: We say, applying that principle, the Tribunal is therefore entitled to purge unlawful conduct from the damages counterfactual in this case, including, so far as necessary, conduct prior to 2015. That is the point of this, and I will make a -- two further submissions on this: one in relation to a fairness objection that has been raised by Apple; then finally, why should the Tribunal adopt the primary counterfactual in this case?

First of all, the fairness point. Apple suggested in its oral closing submissions that there is a fairness issue here, because it had not had a proper chance to address this issue. But in fact, the question of the primary versus the delayed counterfactual was fully taken account of in the expert evidence.

The possible counterfactuals in this case, so the primary and delayed counterfactuals and the distribution

counterfactual, and the payments counterfactual, were all described at length in Dr Singer's second report, which was his first main report, as a framework for assessing all aspects of this case, not just damages.

If we go to his second report, {C2/8/79}. You see the heading "The Counterfactuals". I am not going to read all of this out. He introduces and describes, you will see, the "Primary Counterfactual", and then over the page {C2/8/80}, and keep going please {C2/8/80-83}. The "Delayed Counterfactual". Then keep going {C2/8/84}, the "App Distribution Counterfactual"; and then one more {C2/8/85}, hopefully, and the "Payment System Counterfactual".

So that is the initial report prepared by Dr Singer for the trial and that is the framework for the analysis of the case generally, as I will show you when we come to the joint expert statement.

Now, all of those counterfactuals were then addressed and taken account of in the subsequent reports of Professor Sweeting and Dr Singer, both of them. I will not take you through all of those, because that would take too long. But what I can do is show you the nature of the debate and consideration of the counterfactuals that is reflected in the Singer/Sweeting joint expert statement. When we look at this, it

becomes apparent very quickly that the focus of Dr Singer and Professor Sweeting was actually on the primary counterfactual, not the delayed counterfactual. That was the basis upon which they both approached this.

The JES, if we can have it up, please, at {C4/2/13}. You will see -- this is in the glossary section, and you will see the definitions, "Primary Counterfactual", "Delayed Primary Counterfactual", the "App Distribution Counterfactual" and the "Payment System Counterfactual", and you see the references for those definitions are all from Dr Singer's second report that we have just seen.

Can we go to {C4/2/52}, please. Proposition 65. So this is counterfactual. If you could just read the proposition, please.

(Pause)

Can we move the page up a little, please?

So you will see, when considering the counterfactuals here, the framework, the references to three potentially relevant app distribution, payment systems and the primary counterfactual. No mention there actually of the delayed one at all.

Then {C4/2/53}. 66 and 67:

"In any of the Three Counterfactuals ..."

So that is distribution, payment and primary, and you will see the nature of the discussion.

(Pause)

Then {C4/2/59}. Propositions 78 to 79. Again you will see, they are considering the three counterfactuals, so ie the primary one is included.

Then if we can go to {C4/2/62}. 82 refers specifically to the primary counterfactual; 83 is, as far as we can tell, the only specific reference to the delayed counterfactual:

"One reasonable adjustment to Dr Singer's Models under the Delayed Primary Counterfactual would be to assume Apple would retain a higher counterfactual market share in the markets Dr Singer's Models assume."

The only reference to the delayed counterfactual. All the comment, analysis, discussion in the JES, reflecting what had gone in the reports, was on the primary counterfactual.

THE CHAIRMAN: I thought the point that was being made was that -- I do not think that would be contested but I thought the point being made was that if you are now saying that there needs to be some assumption made about dominance, prior to October 2015, that was the bit that gave rise to the unfairness because that had not been --

MR HOSKINS: I am going to come to that next, but why should you adopt the primary counterfactual? But insofar as there is any suggestion that the primary counterfactual

was not front and centre in the case, and has not been the subject of consideration by the expert; and the primary counterfactual is: restrictions are unlawful and not present from day 1. That is what the experts were basing their analysis on.

I could go on, but I will give you the references, so you have them all, but it will become boring quite quickly if I take you to all of these. It is also propositions 88 to 90, 92 to 97, 102 to 103, 104 to 110, 112, and 120 to 123. In all of those, bar the one I have shown you, it is the primary counterfactual that is considered, for all purposes.

So why should the Tribunal adopt the primary counterfactual?

The fundamental purpose of this collective proceedings regime has two limbs which, in a sense, mirror each other.

First of all, it is to ensure that victims are fully compensated, but the mirror image is that that thereby ensures that wrongdoers do not benefit from their own wrong. You see that in the Court of Appeal judgment in *Gutmann*, {AB3/49/20}. This is in the judgment of Lord Justice Green. If you can just -- because it is not -- I do not need it for all this purpose but if you skim through it, you will see seven lines down,

Lord Justice Green says:

"The aggregate damages regime represents a paradigm shift in the dynamics of tortious recovery. A defendant subject to an award is required to disgorge the total loss following from its breach. This contrasts with the pre-existing position whereby a dominant undertaking exploiting its position through the imposition of (say) unfair prices on consumers was in practice immunised from the adverse consequences of its breach by the lack of any realistic ability or incentive for a small consumer to take on the dominant undertaking in litigation."

So when you are deciding what is the appropriate basis upon which to assess damages, you should take into account both aspects of that fundamental objective: full compensation and full disgorgement by the tortfeasor.

In our submission, that objective would be defeated if it were to be assumed that Apple's restrictions were in place immediately before the start of the claim period and were lawful.

Let me take that in stages.

First of all, we are not seeking damages for the period before 1 October 2015. What we are doing is seeking full compensation for Apple's unlawful conduct during the claim period. That is what we are concerned

with.

The second point is this. Apple is asking the Tribunal to adopt a counterfactual in which, in this scenario, the same restrictions that have been found to be unlawful from 1 October 2015 onwards are assumed to be lawful on 30 September 2015. That is the assumption that Apple wants you to make.

The practical result of that submission is that in the counterfactual, according to Apple, it would be assumed that competition only sprang into life on 1 October 2015, and would have taken some time to produce its effect on prices. That is why Apple is running this point. Apple suggests that this should reduce the quantum of damages, even although Apple's conduct was unlawful throughout the claim period. That is what this is all about.

We say that such a result would be inconsistent with the objective of the scheme which, as I have shown you, is to ensure that the class is fully compensated for its loss and that Apple is required to compensate the total loss flowing from its breach.

The third point is this. In order to adopt the primary counterfactual, it is not necessary to find that Apple's restrictions were abusive from the first day of its introduction or at any specific date thereafter.

In order to adopt the primary counterfactual, it is sufficient for the Tribunal to be satisfied that it is realistic to assume that Apple's restrictions were unlawful a few years, say, before the start of the claim period, rather than becoming unlawful as the clock struck midnight on 30 September 2015.

We say that is an appropriate assumption, in circumstances where, first of all, the relevant restrictions were in place from 2008 and 2009 respectively.

Secondly, as we have seen in the evidence, the App Store was an immediate success. We have all seen the graphs, shooting vertically.

The third point is a document that was shown to you by Apple in their closing submissions, {D2/626/1}. An article that Mr Kennelly relied upon. It is an article by Dr Lee. If we can go over the page, please {D2/626/2}. It is at the bottom of the first column:

"Apple iOS is one of the most popular and advanced operating systems for mobile devices. By the end of June 2012, Apple had sold 400 million iOS Devices, such as iPhone, iPad and iPod touch."

So it is quite clear that by the end of June 2012, Apple had sold 400 million iOS Devices. Apple was

clearly no longer a new entrant in the devices market. It was, on the contrary, a very successful, well established device manufacturer, with its own ecosystem, which it had ring-fenced from the world.

It is for those reasons that we submit that the Tribunal should assess damages on the basis of the primary counterfactual, because it is only by doing so that you can give effect to the fundamental objective of the collective proceedings scheme, including ensuring that Apple is required to disgorge all of the overcharge that it has obtained in this scenario.

THE CHAIRMAN: Can I ask you whether, if we accept all of that, we need to be making a finding that there was dominance or abuse or anything; do we need to make any finding at all in order to reach that conclusion? In other words, if we accept the primary counterfactual is the one answer, but for the reasons you have advanced, do we need -- and I suppose you are saying that we would need to make the findings you have just suggested. We do not need to make a finding of dominance, do we, or are you saying that we would?

MR HOSKINS: It is a difficult question -- I understand why you are asking it, because of course you do not need a formal finding of anything. Essentially the question here is: what is the appropriate and realistic

assumption for the purposes of the damages counterfactual?

THE CHAIRMAN: Yes, exactly.

MR HOSKINS: That is why -- it is an extreme way to put it, but it is a useful way to put it and the CMA, to be fair, did the same in their submissions. If it is unlawful on 1 October, are you really required to pretend that it was lawful on 30 September? Once one accepts that that really does not make a lot of sense, that breaks open this problem.

THE CHAIRMAN: Or I suppose, putting it another way, why do you need to get into the question of how long anything takes to unwind? Why is it relevant if you have an abuse on a particular day, from which --

MR HOSKINS: Unlawful conduct from day 1.

THE CHAIRMAN: -- you know the loss has been flowing. I suppose that begs the question as to what the loss is. That is the problem.

MR HOSKINS: That is why we have tried to cover all bases by showing you what the law is that we have at the moment. But there is a higher principle here, which is ensuring full compensation and full disgorgement.

THE CHAIRMAN: What about the thing that happens at the other end, when you have the run-off in these cartel cases? Does that tell us anything about the approach?

MR HOSKINS: You have run-off periods to ensure there is full compensation. We are going to get into a debate about the extent to which you need to plead and prove.

Our point is that what we are asking you to do is to give full compensation for a loss that we will have established, that starts on 1 October 2015. The run-off period is slightly different, because what you have there is -- let us assume conduct has stopped on a particular date, has ceased to be unlawful; and there is a lingering effect; whereas here, it is not quite the same, because of course it is exactly the same conduct on 30 September 2015.

THE CHAIRMAN: Yes, the so the run-off is more like --

MR HOSKINS: So you do not have that cut-off in the case we are considering, as opposed to what -- having a run-off. It is just: it stopped being unlawful on this date. It had effect -- so I can see there is a sort of parallel, but it is not exactly the same.

Unless you have any questions for me on those topics, I am going to pass over to Mr Armitage.

THE CHAIRMAN: No, thank you very much.

MR HOSKINS: Thank you very much.

THE CHAIRMAN: Well, actually, it is a convenient time. Shall we take a ten-minute break? Yes.

(3.10 pm)

(A short break)

(3.20 pm)

Submissions by MR ARMITAGE

THE CHAIRMAN: Yes, Mr Armitage.

MR ARMITAGE: Good afternoon. Just to tell you what you have to look forward to in the remainder of this trial. I am going to deal with the unfairness issues. Mr Ward is going to deal with incidence. Ms Fitzpatrick is going to deal with everyone's new favourite topic of interest. Finally, you will have Mr Kennedy with what he has told me is a very short point on objective justification.

On unfairness, I am obviously not going to attempt to deal with every point. It has been a long seven weeks for everyone.

But in this regard, Ms Demetriou began her submissions on unfair pricing yesterday by suggesting that Dr Kent's position is that: "if we show that Apple is dominant", and I am quoting here:

"... if we show that Apple is dominant, the price Apple charges is necessarily unfair because it has not been set in conditions of workable competition."

That was {Day27/43:2-5} and she repeated the same point later on.

As I hope the Tribunal appreciates, this is not our

position. We made that clear in our written closings at paragraph 177, and Mr Ward repeated the point in oral submissions on Tuesday.

We certainly do say that Apple's prices were not set in conditions of workable competition, and I think my learned friends would accept that if Dr Kent prevails on market definition of dominance, that is the case.

But we do not say that it follows necessarily that Apple's prices were unfair. That is why Mr Holt's analysis does not merely say that Apple is dominant, therefore prices are unfair.

On the other hand, we do say that the market conditions Apple is operating in, with respect to the App Store, are highly relevant to the question of unfairness. You have our point that that is because this is not a case of mere dominance. If we are right on market definition and dominance, this is a monopoly and it is one that is protected from any threat of competitive entry by Apple's contractual restrictions. These are important parts of Mr Holt's unfair pricing analysis. It is also why Mr Ward took you, on Tuesday, to *Albion Water*, which makes clear that it is necessary to consider the features of the market and whether the market is capable of functioning in a manner that is likely to generate a reasonable relationship between

price and economic value. That was Mr Ward's submissions on {Day25/47}.

Apple notably did not respond on the submission by reference to *Albion Water* and we submit it has never properly grappled with the need to approach the unfair pricing case on the correct footing, namely Apple's monopoly and the absence of any threat of competitive entry. That is one of the reasons why we also say that the unfair pricing analysis is not confined to the comparators, despite my learned friend's suggestions to the contrary.

The law also tells us that market features of this kind call for "particularly stringent" scrutiny of the App Store's prices, and you have paragraph 17 of appendix D to our written closings for the relevant case law in that regard.

Turning to my learned friend's submissions on the law on unfair pricing, and what Ms Demetriou said about how that should be applied on the facts of this case. In short, we say that my learned friend's oral submissions essentially amounted to asking you to ignore the *United Brands* framework and to ignore the authoritative statement of the test for unfair pricing, as set out by Lord Justice Green at paragraph 97 of *Phenytoin*.

Ms Demetriou said yesterday that we had read Lord Justice Green's references to workable competition "too literally". We disagree with that. We say it is telling that when Ms Demetriou was asked what test Apple proposed instead, she was driven to suggest that the fairness of a monopolist price could be tested by comparison with the prices charged by other monopolies. But we say the law on this point is really very clear. The price charged by another dominant firm, and a fortiori the price charged by another monopolist, is obviously not going to be a reliable metric for a workably competitive price. You have our legal submission on this already. We rely on *Le Patourel*, paragraph 93, which Mr Hoskins showed you a little earlier this afternoon, making clear that a comparator whose own prices are tainted by market power will not be a reliable benchmark for workable competition. That is precisely because of the willingness to pay fallacy. The price is paid to a dominant firm cannot, as a matter of principle, be assumed to be a competitive benchmark; see *Phenytoin*, Court of Appeal, paragraph 155, {AB3/37/50}, which is what the Tribunal in *Le Patourel* cited in support of the proposition at paragraph 93, the willingness to pay fallacy.

Ms Demetriou sought to bolster this legal point by

relying on the example of a patented drug, but of course even a blockbuster patented drug does not have unconstrained pricing freedom. That is a point the Tribunal made in terms at paragraph 234(2) of the 2024 judgment in the remitted *Phenytoin* case. We do not need to turn it up but that is {AB3/61/204}.

On the facts, and the relevance of that patented drug analogy to the facts of this case, first, I think you have our point that this is not a case about the fairness of Apple's price for licensing its intellectual property. You have our submissions on this already; I am not going to repeat them at length. We say it is about the price Apple charges for the services it provides on the relevant markets for distribution and in-app payment services; the price for access to Apple's IP is the developer program fee; and on payment of that fee, Apple makes the tools and technology available to all developers, including those who develop free apps.

Secondly, and contrary to what Ms Demetriou suggested yesterday, we are certainly not saying that assessing the fairness of the price of a patented drug would require comparison with the price of generic versions of the same drug, and a world in which prices are driven down to close to costs or cost-plus we fully accept that prices can legitimately exceed costs, even

in workably competitive markets.

That is a point that is discussed at some length, as the Tribunal knows, in the *Hydrocortisone* case, and the distinction between case 2 and case 3. Just to give you some references, paragraphs 323, 344 and 345 of the Tribunal's judgment in that case, at {AB3/57}. Again, the patented drug example is discussed there. One point that is made is that moving from case 2, where distinctive value legitimises the charging of prices above costs, one of the situations in which a case 2 scenario can become an abusive case 3 scenario is precisely where the market is not sufficiently contestable for the normal forces of competition to come into the picture.

Now, we say this is a case in which the disparity between price and cost is such that it well exceeds any reasonable reflection of economic value, as distinct from being driven by Apple's market power. The question is: how much is needed to compensate Apple for any value it provides to developers? We say a 15% commission is manifestly adequate given the scale of the profits. This is where the fact that Apple has not sought to identify or quantify the relevant IP or intangible assets is so important.

At one point yesterday, Ms Demetriou suggested that

it was for the Class Representative to identify and value Apple's intellectual property. We say that just cannot be right and it is a point on which Apple clearly bears the evidential burden.

THE CHAIRMAN: Mr Armitage, can I just ask you, to make sure I have got the framework right in my head. You say what we are looking at here is the price for a distribution service and a payment service, and that is really what we should be focusing front and centre on. You recognise that there is IP, but you say, as far as that goes for -- as far as the value of the tools and the tech are concerned, that is dealt with separately in the program fee. You recognise, I think, that as an economic matter Apple do seek to recover, in the commission, something which represents, however one puts it, but if you like, their view of the economic value that they are bringing to the equation.

So you do recognise, do you not, that in the -- in a price -- in the counterfactual -- call it the counterfactual price, for want of having to worry exactly how to express that. But in the counterfactual price, there may well be, and needs to be in fact, if you are properly taking into account demand-side, some reflection of the value that Apple is bringing. Is that all right so far? Does that make sense so far?

MR ARMITAGE: I think so. I think the way we put it, the primary position is --

THE CHAIRMAN: I do not want you to be tied down by the particular words I am using, but --

MR ARMITAGE: It is only because I do not want to accept something later that turns out to be wrong.

THE CHAIRMAN: I am just going trying to get the concept.

MR ARMITAGE: I think the main point to emphasise from the perspective of unfair pricing is -- as I say, we do not demur from the proposition that in conditions of workable competition, demand-side value is something that can drive prices above cost. We say that on the facts, and on the Class Representative's approach, any such economic value is fully reflected in what we say would be a workably competitive counterfactual rate.

At that point it is for Apple to identify any additional economic value and point to evidence that it reflects value, as opposed to being driven by willingness to pay and the other problems we have identified.

THE CHAIRMAN: Yes. So putting aside the burden point because they actually say it is part of your --

MR ARMITAGE: I know.

THE CHAIRMAN: Yes, I have that argument now. But just in terms of what that looks like, so the point is made

that, you know, there is the brand, there is everything that comes with the device, all of that goes into why a developer might think it was attractive to develop an app and, therefore, to monetise that, to make money out of it and to share with Apple.

So that is sitting there as a great ... however one values that, that is sitting there as a chunk of value. Then when you actually get into the question of how you deal with it, there are all sorts of difficulties, are there not, because you have to find some way of finding that amount that is attributable to the App Store as a developer, as opposed to, for example, the recovery that is made from the brand through the device sales. Then you also have to ask yourself the question as to, what sort of value does it derive for a developer?

Of course, as you say, I do not think there is any doubt that there is no evidence of that in this case, is there? Nobody has actually provided us with any quantifiable or even close to quantifiable amount of -- which recognises what that would be, perhaps because it is just too difficult. I think more than one person has said that it is a very, very difficult thing to do.

MR ARMITAGE: That is -- we have on the other side the developer surveys, but you have the point. We rely on --

THE CHAIRMAN: Yes.
MR ARMITAGE: -- part of the picture, we do not --
(overspeaking).
THE CHAIRMAN: Yes, absolutely.
MR ARMITAGE: But subject to that, I accept there is no --
THE CHAIRMAN: No, I understand. That is entirely for -- I am not trying to -- I suppose, I think everybody is saying, trying to put it in a different way, everybody is saying that this is not a -- this is in no way an exercise of precision. You cannot -- it is a very difficult thing to work out what it might be and none of you are suggesting that -- it certainly hasn't been done and I am not sure anyone is suggesting it could be done, at least not in sort of a scientific way.

Where does that leave us, then? You then say that -- the argument that is put against you is that you have got -- Mr Holt has got some comparators. Even putting aside the question of the tools and the tech and the licence fee and so on, for that, I think it is said that there is a significant difference between the sort of value and -- the demand-side value that is contributed by the phone and the brand, and so on, than there would be, for example, for -- let us take the Epic Games platform or actually, maybe the Microsoft Store is a better example. You could argue

about that, because you could say that Microsoft is a wonderful brand as well, but nonetheless there is an exercise to be done there.

Are you saying that that is an exercise that Mr Holt has done and that it is reflective of his work? Or is it really more that he has got to the end and said: well, there is still so much value being delivered for everybody in this situation that I do not need to worry too much about it?

MR ARMITAGE: I am going to come on to what I hope is a helpful distinction between how you think about these issues in relation to infringement and how you think about them in relation to the quantum.

THE CHAIRMAN: Well, that is part of the problem, is it not?

MR ARMITAGE: Steam, because obviously it has been the subject of some discussion. Because I think in relation to the question of infringement, just to foreshadow what I am going to say, we say the exercise is, I hesitate to say simple, but we say on the evidence it is clear we can establish what we need to establish, which is not some precise counterfactual fair price but the fact that you can be satisfied that Apple's prices in the real world have been above that which one would expect in conditions of workable competition.

When one gets to the counterfactual, I accept things

are more difficult.

THE CHAIRMAN: The quantum counterfactual?

MR ARMITAGE: Sorry, yes. In fact, I fully adopt what Mr Gregory said earlier that actually it may not be helpful to talk about the counterfactual for unfair pricing abuse, because really the law is that one does not need a counterfactual, or certainly not a precise counterfactual, and that is the *Gutmann* case.

When one gets to quantum, and I will come back to this in a bit more detail, I accept things are a bit trickier. Then again, at that stage, one is in the territory of the broad axe and the comparators are -- clearly are part of Mr Holt's analysis there. They are not the only part, but --

THE CHAIRMAN: So perhaps, just to summarise that, so I am clear. You say, you recognise all those points might exist. You say Mr Holt has not been able to deal with them empirically because I do not think anybody thinks they can be dealt with like that. But you say, when you piece together all the bits of evidence, or the various factors, you say we can reach a conclusion, including some comparators which we can reach our own view on as to how good they are, you say we can reach the conclusion that it is unfair; and then you accept that there is the next challenge of going on to work out what

they actually mean in terms of the specific price we are going to attach for damages purposes.

MR ARMITAGE: Yes. I think that is a fair summary.

THE CHAIRMAN: Yes, thank you. Yes, that is helpful.

MR ARMITAGE: In terms of the case law and Ms Demetriou's submissions on that the other day, I can take this quite briefly. As anticipated, as my learned friend relied on *Attheraces*, which I also addressed in some detail on Tuesday.

Respectfully, sir, we say you had it exactly right when you identified the problem in that case, which is that the judge at first instance, as you put it, effectively did not do limb 2, and that is what you said at {Day27/64:12-15}. You said that the judge's approach was to identify the cost-plus price, assume that that was the workably competitive price, and did not carry on and do the rest of the analysis. The problem with that approach was that it failed to appreciate that prices can legitimately exceed costs or cost-plus in conditions of workable competition.

THE CHAIRMAN: Of course, there is quite a lot in that case which goes to the very question we have just been debating which suggests that it is important to recognise that there can be very, very significant demand-side value that could be quite difficult to

quantify.

MR ARMITAGE: I agree with that. I agree with that. That is certainly a point that is considered in the case. But if you remember, the submission was that Dr Kent's approach was contrary to binding precedent from that case, and the suggestion was made that that case somehow caveated the workable competition approach.

We say, and I made this point on Tuesday, the Court of Appeal's approach in that case is fully consistent with the legal -- the basic legal test, as Lord Justice Green put it in *Phenytoin*, of workable competition; and indeed as I showed you on Tuesday, that is how the Court of Appeal's judgment in *Attheraces* was interpreted in both *Phenytoin* itself and in the later decision of the Tribunal in *Hydrocortisone*.

I also note that, whereas in its written closing, paragraph 417(f), you may recall that Apple said that *Attheraces* was authority for the proposition that Article 102 will only require intervention where the price charged puts competition at risk by rendering the purchaser's activities unprofitable. I spent some time on Tuesday explaining why that was incorrect, and yesterday, {Day27/75}, Ms Demetriou changed tack and said she was not saying that that was a necessary requirement of establishing abuse, and instead that it

was, as she put it, an indicator of unfairness.

To be clear, we agree that an impact on the downstream market can be an indicator of unfairness and we say in this case, our incidence case provides just such an indicator, but it is not a necessary element of establishing abuse.

Ms Demetriou also relied on *Latvian Copyright*. Just to be clear, the Court of Justice in that case did not in any way call into question the ordinary *United Brands* framework; in fact it positively endorsed it at paragraph 36 of the judgment, {AB4/24/7}.

What was at issue in that case was the appropriate methodology. I think if one looks at paragraph 36 of the judgment, that is in relation to the question of whether prices are excessive; in other words, limb 1 of *United Brands*, in circumstances where costs may not be -- may not be reliably identified. It is a case about a copyrighted musical work. In that case the court said that the fact that *Latvian Copyright*'s prices were appreciably higher than the prices charged by collecting societies in other member states is a factor that could be indicative of abuse; in other words, that prices were excessive for the purposes of limb 1.

Ms Demetriou took that, I think, as support for her proposition that one could assess fairness by looking at

prices charged by other monopolies. Reading the judgment, it was not clear to me that the question of whether the other collecting societies held dominant positions was something that is revealed by the judgment, and it was not a part of any of the questions referred by the National Court.

But in any event, one can see that if a defendant is charging a price that is much higher than the price charged by other monopolies, that is likely to be a good indicator of unfairness. But it does not logically follow that if a defendant is charging the same price as the price charged by other monopolies, that the price is fair; and we say that that is the problem with Apple's reliance, for example, on the Google Play comparator, as Mr Hoskins has already explained, and we see from *Le Patourel*, and Mr Hoskins' points apply just as much in the unfair pricing part of the case.

The other potential comparator that Ms Demetriou referred to, when it was asked what test she might propose as an alternative to workable competition, was, of course, the 30% rate chosen by Apple when it launched the App Store in 2008, and this point formed a major plank of Ms Demetriou's submissions on Wednesday, and again yesterday, in various parts of the case.

I just wanted to make a limited point, which is that

she relied on it as a comparator for the purposes of assessing unfair pricing, but that is a point that has never been part of the expert debate on those issues. It was not identified by Professor Hitt as a potential comparator for the purposes of assessing the fairness of Apple's prices during the claim period, and that is despite the fact that, as Ms Demetriou emphasised yesterday, Mr Holt made the point in his third report that a defendant's own prices at a different time could in principle be a comparator, but he then gave a detailed explanation for why he did not consider it appropriate to rely on Apple's own commission rates at different points in time; and that was Holt 3, paragraph 265 and following. {C2/10/99}.

Professor Hitt did not respond to this by saying: no, no, 2008 is a good comparator for the following reasons. He just -- it is just simply not a feature of his analysis. But in any event, we say it is not a good comparator, for reasons covered by other advocates.

Just to pick up a discrete point from Ms Demetriou's submissions yesterday. {Day26/18:5-8}. It was suggested that Dr Kent's leading counsel -- I think it was Mr Ward -- had put to Mr Schiller in cross-examination that a -- that a point put to

Mr Schiller in cross-examination was:

"Precisely that the App Store is constrained by competition in the devices market".

That is actually not correct and we would invite you respectfully to read the relevant part of the transcript at {Day7/11:21}. The point is based on Mr Schiller's evidence that the App Store is used in order to drive device sales, but that evidence, we suggest, tells one nothing about whether Apple's pricing in respect of the commission is actually constrained materially as a result of competition on the devices market. That is obviously Mr Hoskins' territory and I am not going to go back into those questions but just to clarify that point on the transcript.

Turning next to Mr Piccinin's submissions on profitability. I propose to take these very briefly.

Mr Piccinin said nothing orally about limb 1. It is still unclear to us whether Apple disputes that limb 1 is satisfied. We say it certainly has not seriously been contested in the written closing arguments. Apple's case instead is that profitability is irrelevant to the entire unfair pricing analysis. We say that is because they invite you to ignore the established *United Brands* framework for dealing with these issues, but they have no plausible alternative framework to

offer in its place, other than, as I have said, comparing Apple's prices with the prices charged by other entities with market power, or with its own prices from seven years before the claim period began.

We would respectfully submit that the approach of Lord Justice Green in *Flynn* is of more assistance.

In relation to limb 2, the argument seemed to be that profitability was again irrelevant at this stage because Apple is an inherently highly profitable business and because it would still have been highly profitable even if it charged a much lower commission, and you will recall Mr Piccinin's metaphor of Mr Holt losing -- even losing $12 million in profits down the back of the sofa, as he put it.

We say, it may not surprise you to hear that this support's the Class Representative's case rather than undercutting it. Again, Apple's position is that in conditions of workable competition, it could maintain a high price to reflect the value of its IP and other intangible assets. But the profitability analysis shows, among other things, that Apple could have done this, even at much lower commission rates. You already have our point that Apple has simply not shown that the 30% rate was in any way referrable to the alleged value of the assets concerned; and of course, you also have

our point that Apple has not put forward any alternative way of assessing the App Store's profitability or indeed analysing fairness beyond the points made by Ms Demetriou in oral argument yesterday.

I should say also on this topic that we agree with the CMA's submissions on profitability; the points at paragraphs 31 and following of Mr Gregory's written submissions which he showed you this morning.

In terms of the substantive limb 2 analysis, I only have one additional point that I want to deal with in reply, which relates to Steam. We adopt what Mr Hoskins said earlier and generally in the case about the value or lack thereof of the Play Store as a comparator. We say that applies equally for the purposes of unfair pricing.

Now, issues relating to Steam were dealt with at length in Apple's written closings. Ms Demetriou returned to them on Wednesday and again yesterday. On Wednesday, Ms Demetriou described Steam, and I think the PC comparators more generally, as "an obvious source of evidence on what might happen in the counterfactual". That was {Day26/208:13-16}.

I am going to focus on unfair pricing, but it is of course a point that my learned friend makes in relation to both unfair pricing and exclusionary abuse.

We respectfully suggest that in making that submission, Ms Demetriou did not distinguish between questions of infringement and questions of quantum; but in our submission, it is vital to keep those analytical stages separate. We touched on this earlier. But in relation to the question of infringement, you have our point that in order to establish an unfair pricing abuse, the case law is clear that one does not need to establish a precise counterfactual for what the unfair price would be. I will quickly give you the references again. It is *Gutmann*, paragraph 68 in the Tribunal, at {AB3/45/29}, and *Napp*, paragraph 405, {AB3/2/11}.

We respectfully submit that in order to decide that question, the Tribunal does not need to get into detailed questions about Steam's precise charging structure, let alone what experts in foreign litigation might have said about those matters.

You just have to be satisfied that Apple's commission rates for the App Store would have been lower in workably competitive conditions.

The PC comparators market and the case of Steam is important to that analysis, but in a relatively limited sense. It shows that competitive entry forced the incumbent in that market to lower its commission rates for app distribution. The fact that this was as

a result of competitive entry is not in dispute, and we say it is absolutely compelling evidence that if Apple had been subject to the forces of workable competition, its commission would have been lower too.

In relation to quantum matters on the counterfactual, we are in the territory of the broad axe, in seeking to identify a likely counterfactual price. In this context, we accept that evidence on the actual rates charged by Steam and other comparators is relevant evidence, which we say is of assistance in the broadbrush exercise you will necessarily have to undertake if you get to that stage of the analysis.

We say there is a need for caution here, though, because the unfair pricing counterfactual at the quantum stage is: what price would have been charged in conditions of workable competition by the App Store? Not: what would have happened to prices charged by an incumbent who has had no competition from rival platforms for over a decade, and then starts to reduce its prices?

In fact, in relation to the way in which one should look at these matters, I think there appears to be some common ground, because Ms Demetriou said that the right way to think about this was to look at Steam's effective commission rate and compare it with Apple's effective

commission rate. That was {Day26/112:11-14}. That formulation may be where the common ground ends, but so far as it goes, we agree with that as a matter of approach; and indeed, it is a point that Mr Holt has emphasised in his reports; one should look at effective commission rates, rather than headline rates.

I just want to emphasise, though, that Apple's effective commission rate has been calculated by Dr Singer. It is 25.2% across the claim period. That obviously factors in the various programs where a 15% rate is charged. The reference for that is Singer 2, paragraph 39, {C2/8/22}. Apple referred to that figure, for example, in its skeleton argument, and it has not sought to suggest that it is wrong.

In relation to Steam's effective rate, Mr Holt's evidence in his third report is that this would be -- in fact, perhaps I will show you that, to remind you. It is at paragraph 340 of Holt 3, {C2/10/125}. Can you see there that Mr Holt relies on evidence from PC app stores in support of his view that the most likely rate in the counterfactual would be 15%?

At (c) he makes the point that:

"Headline rates for Steam likely overstate the Effective Commission that Steam charges."

Then he refers to the use of Steam keys.

As I say, Mr Holt made that point in his third report. Professor Hitt did not respond in his reply report or in the JES. He did not say: no, no, you should not factor in Steam keys when you are looking at these matters; nor did he say, if you factor in Steam keys then one must take a different approach to calculating Apple's effective commission rate. He just said nothing about this point at all. Instead, what happened was that on Day 19 of the trial, Mr Holt was cross-examined on this issue by reference to the pre-certification reports from the *Valve* litigation in the US. Ms Demetriou said on Wednesday, and I quote {Day26/212:20}:

"... there is really no basis on which the Tribunal should be giving limited weight to [these experts reports]."

I covered that on Tuesday. We say that is a surprising submission. These are not findings of fact by a court or regulator. They are preliminary pre-certification expert reports covering something like 600 pages in total, given by experts at an early stage overseas in litigation that is still ongoing, as far as we know. We have no access to the underlying data and have not been able to ask those experts any questions. So our primary position is they should be given no

weight here.

Without prejudice to that point, as it happens, Steam's expert, Dr Chiou, estimates Steam's effective commission rate, factoring in Steam keys, as below 20%, and to give you the reference, that is {D1/1804.1/86}, paragraph 167. We say that is completely consistent with Mr Holt's opinion that I showed you a moment ago, that Steam's effective commission rate is lower than its headline rate.

Apple's counsel's response to that is that in order to compare like with like, one must, and again I quote, "count the zeros for Apple", by which they mean recalculate Apple's effective commission rate to include unspecified revenues earned by developers outside the iOS system in respect of content that is or may later be accessed in iOS Apps by the reader and multi-platform rules.

One difficulty with that submission is that it has never been suggested by Apple's experts that this is the right way to calculate Apple's effective commission; and instead of expert analysis of that kind, for example from Professor Hitt, we have an annex to Apple's written closing giving an indicative view on how one might count the zeros in relation to certain large developers. It is completely new analysis. Our experts have not had

a chance to respond to it and we say it should be ignored.

If you are against me on that, we say it is simply wrong to say that Steam keys are comparable to transactions subject to the read or multi-platform rule. I am wary of my ability to do justice to this point at nearly 4 o'clock on Day 28 of the trial. Mr Holt addressed the point in his oral evidence. The references for that are {Day19/43:20-24}. That is the wrong reference. {Day19/43} and then his re-examination at {Day19/135-137}. I will attempt to explain the point in my own inferior way. With a Steam key, Steam still provides the service of distributing the game to the user. The only difference with a normal Steam transaction is that the user pays for the game somewhere else; and Dr Chiou, again Steam's expert in the US litigation, makes that point at paragraph 156 of her report, {D1/1084.1/81}. In contrast, under the multi-platform rule a user obtains digital content on a completely different platform. That other platform incurs all the associated costs and performs the task of distributing any relevant content to the user. Apple then allows that content to be used within the developer's iOS app. The same is true mutatis mutandis for the Reader Rule. So we say the two situations are

not comparable.

Just to give you one reference to Mr Howell's report. It is Howell 2, paragraph 19, {C2/12/9}, where he makes clear that it is the developer and not Apple who is responsible for dealing with in-app content and functionality.

In any event, we say that if you are looking at Steam's headline rates -- I made this point on Tuesday and I will remind you of it -- the most relevant rate among Steam's headline rates is the 20% rate, which, as Mr Holt says in his report, is precisely where the former incumbent started to face the fiercest competitive pressure as a result of competitive entry by Epic. We say that is not cherrypicking, as my learned friend puts it; it is seeking to identify the best proxy for workable competition, as part of the broad axe exercise of considering what the likely commission rate would have been in the counterfactual.

Unless you have any questions, I think we have Mr Ward on next.

THE CHAIRMAN: Yes, thank you very much, Mr Armitage.

Mr Ward?

Submissions by MR WARD

MR WARD: Starting with *Spotify*, we maintain our criticisms to Professor Hitt. On Wednesday, Ms Demetriou said

this, {Day26/57:6}, talking about the CMA report:

"... if he saw evidence in the CMA's report that went against his conclusions, of course he would have a duty, as an expert, to say, 'Well, here is some evidence that was before the CMA that goes against my conclusions'."

Well, Professor Hitt failed that test in relation to the *Spotify* decision and he also failed the test set out in the CAT guide. Just for the transcript, {AB2/3/119}, paragraph 7.67. He failed it because, of course, he ignored the report -- the decision altogether. It was squarely put in issue by Dr Singer and it was the second paragraph of Dr Singer's substantive analysis, {C2/8/134}. Then there was just no response at all.

Now, surprisingly yesterday, Mr Piccinin described our reliance on this as part of what he called "scraping the bottom of the barrel". Well, it is important, because it is a detailed analysis by the European Commission of a significant subset of the claim, running entirely contrary to Professor Hitt's view.

Again, in an effort to minimise it, Mr Piccinin said *Spotify* was just a rounding error. But even Professor Hitt accepted that music streamers amount to what he called low single digit share of the claim. So

it is very far from a rounding error. It is also informative beyond that class, because of course, as we are going to see, it is not the only sector that incurs significant royalties.

Well, part of Mr Piccinin's approach was to suggest that the analysis in *Spotify* was really no more than evidence that six developers had put their prices up. Well, that is not right. The Commission said it was "all the major music streaming services". That is {AB6/45/173}, recital 611. Of course, there is much more than that in the Commission's analysis. We respectfully ask you to read all of it from 594, recital 594, {AB6/45/170}, to recital 632, {AB6/45/176}. Most of that has been referred to at some stage in the last seven weeks.

Developer evidence. The position is this. Mr Holt proposed that a survey would take place. But as you saw, Dr Singer's view was that it would not assist. So what the Class Representative did instead was to file expert evidence from Mr Howell, the industry expert, and he gave that evidence from his long personal experience. That is not mere ipse dixit, as Mr Piccinin suggested this morning. Importantly, Apple did not challenge any part of that aspect of his evidence at all.

In closing, Mr Piccinin had a go at criticising

Mr Howell's statement that, I quote:

"For most of us, the cost of running the business is about equal to the revenues."

Mr Piccinin's point was: ah-ha, well, there are a lot of small developers. But of course, none of that was explored or to put to Mr Howell at all. You should take the statement on its face.

Now, the VAT increase. What this shows is that Apple, Apple assumed there would be pass-on, when it was setting a price just for the UK. Mr Piccinin said that developers usually just choose a single price tier globally. But just to be clear, that is not obligatory. Developers can set different prices for different regions, and that is again in Mr Howell's evidence, {C2/4/42}, paragraph 88.1.

The slide deck we have been discussing shows that Apple was itself setting a price for the UK; and the reference to that is {D1/242/34}. We saw it assumed that the tax would be passed on, because it knew from experience that demand is inelastic.

Now, Dr Bishop raised the question, whose demand is inelastic? There is an answer to that. Going back again to Mr Howell's unchallenged evidence, small developers are price followers. So what actually matters here is the elasticity of demand of big

developers. That's Mr Howell's evidence {C2/4/42}, paragraph 88.2.

Marginal cost. Mr Piccinin said this, {Day27/194:9}:

"Professor Hitt has never urged on you the notion that all developers are the same. You know, they all have zero marginal costs."

Well, he did not use those words, but Professor Hitt's evidence was plainly at odds with the position he took in the US proceedings, where his evidence was far more favourable to the Class Representative. I will not go through it. I will just give you the references. So I refer to Professor Hitt's report at {C3/4/263}, paragraphs 486 to 491. I will invite you to compare that to our closings, where we summarise his US evidence and give the references, {A1/9/142}, paragraphs 401 to 403.

This morning, Mr Piccinin said that music streamers were somehow special because they had high cost royalties. But I would again invite you to consider the totality of the evidence, including what Professor Hitt said elsewhere. Notably, he did not single out music streamers as unique. Again, partly because there is confidential material here, I just refer you to our written closings at {A1/8/142}, paragraph 401.

Ad valorum charges. There is ample evidence that the theory, the theory relating to ad valorum charges does not match the reality. I will offer you five aspects of our evidence that suggests that even ad valorum charges are -- would be, in practice, pass-through:

First, the *Spotify* decision;

Secondly, Mr Howell's evidence;

Thirdly, Apple's approach to the VAT increase;

Fourthly, another element in Dr Singer's evidence.

In fact, I will do that fifthly.

Fourthly, the MIF study; then fifthly, another element of Dr Singer's evidence.

Can we go to {C2/8/135}?

You will see at the top of the page, he says:

"... *Spotify*, Netflix, Amazon, and Google all display disclaimers on their websites explaining that local sales taxes on digital goods are passed-on in full ..."

Now, the very first time in this entire trial that that sentence, that paragraph has been addressed by Apple, either in its submissions or its expert evidence or its cross-examination, was when Mr Piccinin referred to it earlier today.

In my respectful submission, that is tellingly late,

and this is indeed another piece of important evidence on pass-through of ad valorum charges in the real world, as opposed to on the blackboard.

Next, the natural experiments. You have our detailed submissions about why they underestimate the level of incidence, but I want to just say a little bit about steering, picking up on something you said yesterday, sir. I want to confirm, sir, your understanding, as expressed yesterday, and the role of this argument is correct. We do not rely on it to calculate incidence in the actual. It is one more reason why natural experiments underestimate the incidence; because of course, in the counterfactual, there would have been incentives to reduce commission rates to steer; and for reasons we explained on {Day25/149}, that would also apply to Apple.

Now, in the real world, of course, this kind of steering is inhibited by Apple, because there is no ability to use alternative app stores or iOS providers, and the anti-steering rules also inhibit the ability of developers to steer to own websites or other platforms.

But despite that, that last inhibition, there is evidence of reduced pricing on developers' own websites. There is the *Spotify* decision, but there is more we are going to come to.

So this real world evidence is important on incidence.

Now, can we go to {C3/4/275}. This is Professor Hitt's analysis of price differentials. You will recall, this is exhibit 45 which is to do with subscription products. There is also an exhibit 46 that looks very similar, two pages on. Yesterday, Mr Piccinin suggested that the price differential is up as often as it is down. In other words, some websites are higher than the App Store price, some are lower. That is just not right.

MR PICCININ: That is not what I said.

MR WARD: Well, that is what I understood you to say. If it is not what you said, I will clarify my point anyway. The transcript is {Day27/191:13}.

What I want to make clear is that in fact, just talking about Professor Hitt's own exhibit, there were a significant number of app stores that own websites that were cheaper, and very few instances where prices were higher. If you want the actual numbers, they are in our closing at {A1/8/137}, footnote 713.

That cannot possibly be right. It is horrifying. Are there really 713 footnotes? It has been a long trial. I hope that was a typo.

Right, moving on. I am trying to put aside my

disappointment. Mr Piccinin said yesterday, {Day27/202:7}: "No doubt some prices would be lower in the counterfactual".

Well, on the face of it, that gets us to broad axe at the very least. But he also said: well, no, because some prices were higher, which he asserted would just cancel that out. So the idea is that there is no loss to the class because, supposing he is right about the numbers -- I do not know if he is. The answer is: well, look, you have lost on some, but you have -- some prices would have been lower but some prices would have been higher. But the problem is causation. What is the evidence to suggest that higher prices are actually caused by the overcharge? Caused, not just kind of somehow, in fact, to be seen within the natural experiments. So the idea is, by charging 30% through the claim period, that has caused people to pay more. The short answer is that there is no evidence of that causal relationship; there is just speculation.

Cause people to pay you less. Sorry. Thank you very much. It is 4 o'clock.

Counterfactuals. Mr Hoskins has addressed you on all the legal principles around primary counterfactuals at various stages in the trial, including today. I am not going to say any more about that. I have made my

submissions about how that worked in the area of unfair pricing two days ago.

But I just want to add one more piece to the picture. Mr Hoskins was dealing with what might be a procedural point from Apple about whether this was all properly done in the expert process. With the greatest respect, I am not sure that Apple really made that point. But again just for the completeness, the primary counterfactual was also raised in the incidence debate, and the reference for that is {C4/7/30}, proposition 73, in the expert report between Dr Singer and Professor Hitt. Professor Hitt's approach was to ignore the primary counterfactual, so it did not help much. But if there is a procedural point, that is the answer.

Finally, yesterday Mr Piccinin offered an enticing prospect of further submissions on damages. We do not support that. You have heard plenty from us. The inspiration for it was quite unintended, which was the last paragraph of our closing, where we made an offer of assistance with arithmetic arising from your ruling, just because there are various permutations and combinations; there are various tables set out, I think by Mr Holt. But obviously it could be complicated. If it would be of assistance at that point, when you have decided all the matters of substance, to work out what

it means, we would be glad to assist. Would we be glad to assist in coming back and having another argument? Not really, no. Of course, if we were asked to, we would be delighted.

That was all I was going to deal with on incidence, before handing to Ms Fitzpatrick, who this time is the penultimate act, as part of our presentation.

Unless you have any questions?

THE CHAIRMAN: No. Thank you, Mr Ward.

Submissions by MS FITZPATRICK

MS FITZPATRICK: Sir, members of the Tribunal, I have only a few very brief points on simple interest arising out of this morning.

My primary submission in reply is that the answer to the question Dr Bishop raised is provided by the case law that I cited on Tuesday. In particular, what my learned friends said this morning, that the rate should be confined to the base rate plus 2% cannot be squared with what the Court of Appeal said at paragraph 18 of *Jones* which I showed you on Tuesday, which refers to there being a different approach in consumer cases or cases involving private individuals, but in commercial cases. Again for your note, that is {AB3/19/6}.

Turning to the use of the borrowing rate. Of course, underlying the collective claim in this case are

individual damages claims to which section 47(a) of the 1998 Act applies, even though, of course, they are being dealt with on an aggregate basis.

The reference for that well established proposition is the Supreme Court in *Merricks* at paragraph 84. For your note, that is {AB3/39/39}.

The case law that I showed you on Tuesday is clear: that for individual claims, the borrowing rate is the conventional reference point. Again, that is the Court of Appeal in *Jones* at paragraph 17, {AB3/19/5}.

If that is true for an individual claim, then we respectfully submit that the same should hold for a collection of individual claims, combined in collective proceedings under section 47(b).

Again, this is a simple interest claim. The Tribunal does not need to enquire into what the claimant actually does with their money and, as that is true of an individual claim, so it is no less true of the collective claim for aggregates damages.

That would obviously be a wholly disproportionate exercise to undertake, where you have a large class.

Finally, as for the rules applying to personal injury claims, my learned friend took you to Butterworths. I would like, if I may, to show you two pages in the White Book. So could I please ask the

Tribunal to open volume 1 of the White Book? This will only take a few moments. Page 499.

THE CHAIRMAN: 499, did you say?

MS FITZPATRICK: Yes. Volume 1, page 499. It is in part 16.

(Pause)

Thank you very much indeed. I will just wait for Dr Bishop.

THE CHAIRMAN: Dr Bishop was wondering -- I was going to say, he is thinking: what on earth is this book for?

MS FITZPATRICK: It is very brief and hopefully Dr Bishop can follow on the transcript. So we are in part 16 and we are in the section at the end of that part titled "Notes on award of interest". Please could the Tribunal look under subheading 1, "Rates of interest", which is halfway down the page. It says under that subheading that a number of different rates have been applied. Then subparagraph (b) refers to the investment rate at which the claimant could have invested the money, and it says that this is the basis of the practice in personal injury cases.

Then over the page, at the top of the page, subparagraph (f) regards the special account rate, which is precisely the rate that my learned friend showed you from Butterworths, and it says:

"The special account rate is one of two main account administered by the Courts Funds Office [as read]."

Then the third sentence:

"The special account rate is not generally used to award interest on debts or damages, but does have a limited and well established use in personal injury claims [as read]", and so on.

So the simple and obvious point which we submit is to be taken from this is that the special account rate referred to by my learned friend are not an appropriate reference point for a damages claim such as this one.

So at the end of the day, we respectfully agree with the Chairman's observation this morning that the Tribunal's task here, as with so many other elements of this case, is to come up with a number that is going to reflect fair compensation for the class in the aggregate. When it comes to simple interest, the case law and the Bank of England data that I showed you on Tuesday is the best source of assistance with that exercise.

Those are my short submissions in reply.

THE CHAIRMAN: Thank you very much.

Submissions by MR KENNEDY

MR KENNEDY: I find myself batting at number 11, not for the first time. Experience suggests I will be at the crease

for no more than five minutes!

You will recall yesterday that there was a discussion between the Tribunal, Dr Bishop and Mr Kennelly about smishing and the risk that iOS Device users that stick with Apple might suffer degraded security outcomes in the counterfactual. This is a case that has assumed greater prominence in oral closings than hitherto. I will be corrected if I am wrong, but I can find no reference to smishing or contagion in Apple's written opening, two passing references in Mr Kennelly's oral opening, and a single reference to smishing at paragraph 506(a) of Apple's closings; and that is a description of the issues facing *Android* in the actual world. That is {A1/9/170}.

There is perhaps a second reference at paragraph 503 but it is not entirely clear to me whether it is a reference to contagion or not.

Mr Kennelly directed you to Professor Rubin's evidence yesterday and I would just like to have a quick look at what Professor Rubin said. We can pick it up at paragraph 112 of first Rubin. That is {C3/2/52}. If we pick it up halfway through, there is a sentence that starts "In the meantime". Professor Rubin says:

"In the meantime, because the user's device must be configured in a way that apps may be received and

downloaded from varying sources (with varying security protocols and protections), if a developer has written -- deliberately or inadvertently -- a malicious app, the user could download that malicious app directly from the developer as well as pass the infected app to other users whose devices are similarly configured to directly receive and download apps."

So that is Professor Rubin's description of the contagion risk in a decentralised app distribution world. The point I want to take from that, and I am going to come back to it in a moment, is the point about configuration. You have configured the device to allow it to download from the relevant source, whether that is the first party store or third party store, or online.

Next sentence:

"A common technique utilised to pass malware from device to device is call 'smishing', or 'SMS phishing'."

That is the only technique that is specifically identified by Professor Rubin for passing malware from device to device. But what I want to show you next is just a later paragraph in his report, paragraph 202. That is {C3/2/105}. If we could zoom in. We want to pick it up six lines from the bottom. We see a sentence that starts right at the edge of the page, "In comparison". So at the start of the paragraph, sir,

Professor Rubin is describing an *Android* attack, which is an attack called FluBot, which is a type of smishing attack that gets passed from device to device. Then he says:

"In comparison, smishing attacks like FluBot are not possible on the iOS platform."

He gives two reasons:

"First, iOS Apps would not access SMS functionalities on an iOS Device; this functionality is not an available entitlement that can be added to an App."

So it is simply not something any app can do. It does not exist as an entitlement and that means that it is necessarily outside the sandbox; there is no way of reaching it from one app into the SMS app.

If we read on, he says:

"If an ... App tried to access unauthorised functionalities like SMS, it would be immediately denied from App Review and would not be able to enter the App Store."

Then:

"Second, even if an iOS user is instructed to download a random app onto their iOS Device, the user would have to download the app from the App Store given Apple's [over the page, please] centralised

distribution. Therefore, the application downloaded by the user would be an application that passed Apple's App Review according to Apple's security and privacy requirements in Apple's App Store Review Guidelines."

{C3/2/106}.

You have my submission from Monday that in the security counterfactual, sandboxing, which enforces the entitlements, and full App Review in accordance with the full guidelines would be present in the security counterfactual. So those two features that Professor Rubin identifies in his evidence would remain unchanged.

I just want to show you Dr Lee's evidence on this point. Dr Lee's evidence was that smishing was possible on iOS in the actual world. If we could turn up paragraph 79 of second Lee. That is {C2/13/47}. We can see a bullet starting:

"Sixth, Professor Rubin identifies 'smishing' or 'SMS phishing' ... In his report he denies ..."

Sorry, picking it up at the sentence right at the bottom:

"However, Professor Rubin claims that such smishing attacks 'are not possible ...'"

He summarises that. Then if we pick it up five lines down:

"I disagree. First, smishing on iPhones is possible, e.g. spammers can pose as Apple and send a text message to users and trick them into visiting a fake iCloud page that steals their Apple IDs and passwords."

Something to note about Dr Lee's evidence is that the example he gives in the footnote, and the document he relies on is {D1/18/341} is not an example of smishing which goes from device to device. It is someone posing to be Apple. They send you to a fake URL that asks you to give your Apple account details, and then they exploit the Apple account details. So it is not a contagion example, if I can put it that way.

The second point about Dr Lee's evidence that I would like to highlight to the Tribunal is that it was suggested by my learned friend that Dr Lee accepted that the risk I have been describing to you, the risk of smishing, would arise in the counterfactual. That is {Day27/133:8-10}. That is correct, but only in a very narrow sense. What Dr Lee said, and we can see here in paragraph 79, is:

"Even with the possibility of multiple app stores in the counterfactual, the risk of malicious apps spreading on iOS would not be significantly higher than in the actual world. This is because Apple, as both the sole

device manufacturer and operating system owner, retains the ability to remove malicious apps from all iOS Devices remotely. Consequently, the risk of malware contagion in the counterfactual ... would be no greater than in the actual world."

So that was his evidence: no greater risk in the counterfactual versus the actual.

I hesitate to say this, and I will be corrected if I am wrong, but that evidence was not challenged in cross-examination. It was not put to Dr Lee that there would, in fact, be an increased risk of smishing or contagion in the counterfactual world. What was put to Dr Lee about smishing in cross-examination was about iOS Device users' ability to detect smishing attacks, rather than the risk of an increase in incidence. That is {Day10/168:20} to {Day10/170:19}.

So in our submission, there is no material risk that there would be more smishing attacks on iOS Device users in the counterfactual.

I just want to show you one Apple document about what Apple says about the European Union. I referred you to this document on Monday. We did not turn it up. I do now want to turn it up. It is {D2/585/1}. It is an extract from Apple's website that relates to the changes that have been carried out under the DMA.

Two points. The first, picking up on a submission I made on Monday about apps on the App Store. We see that heading about a third of the way down:

"Apple reviews every app and app update available on the App Store to help ensure developers meet Apple's high standards ... In addition to meeting the baseline platform integrity standards that Apple checks for in Notarisation, apps on the App Store are approved after meeting all of Apple's App Review Guidelines ..." and so on.

Then Apple goes on to refer to Family Sharing and Ask to Buy.

Then in my submission, this is an example of Apple competing on the basis that the Apple App Store is safer in the presence of alternative app stores, and you have my submission that Apple can compete on that basis in our counterfactual.

If we can go over the page, though {D2/585/2}, and this is the point I wish to pick up from Professor Rubin's evidence. If you could zoom in on the second half of the page: "Restrict installation ..."

We see:

"Restrict installation from alternative app distribution on your iPhone.

"If you want to safeguard your iPhone or a family

member's iPhone from being able to install alternative app marketplaces and apps installed through alternative app distribution, you can change the parental control settings on a device ..."

Then we see:

"Safeguard an iPhone from installing app marketplaces or apps from the web".

What those steps explain is how an iOS Device user can make sure that they do not install an app from anything other than Apple's App Store. We see that, "Tap at marketplaces", this is number 6:

"Tap App Marketplaces to change this to Don't Allow. You can also tap Web to change this to Don't Allow."

You will recall, it was Professor Rubin's evidence that in order for a smishing attack to succeed, assuming that it is possible on iOS for these purposes, it is necessary for the recipient device to have authorised download from a non-Apple App Store source, and what we see here is that it is possible for users to elect not to allow that.

So in our submission, we say that iOS Devices (sic) in the counterfactual could stick with Apple, and only use the Apple App Store without any materially increased risk that other users' choices might adversely effect them.

Unless there are any question, sir, and members of the Tribunal, I think that concludes the CR's submissions as a whole.

THE CHAIRMAN: A nice way to finish on the FluBot virus, and a good way to finish the trial.

Thank you very much, Mr Kennedy.

Ms Demetriou.

Further submissions by MS DEMETRIOU

MS DEMETRIOU: Sir, may I rise just very briefly to make one point, just to address one point that I think was new in Mr Hoskins' submission relating to the Google Play Store?

THE CHAIRMAN: Yes.

MS DEMETRIOU: He took you to the CMA's report, we do not need to turn it up again, and the point he made which we have not heard before, I do not think, is that he says that the Google Play Store is not a good comparator for what would happen to Apple in the counterfactual, because he said that you cannot download other app stores on to the Google Play Store -- sorry, from the Google Play Store, whereas you would be able to do that from the App Store. I just want to respond to that point very briefly.

So we say, first of all, that is not identified by the CMA as being one of the key drivers behind the very

high level of commerce on the Google Play Store.

The second point is, of course, Dr Singer's evidence, and therefore Dr Kent's evidence, because she has not adduced any different evidence or further evidence on this point, Dr Singer's evidence was that he is agnostic as to how alternative app stores would get on to the iPhone in the counterfactual. So there is simply no evidence before you from which you could conclude that you may be able to download other app stores from the App Store. The references are in our written closing submissions, at paragraph 227, to Dr Singer's evidence.

But of course, really the third and perhaps the key response to that point is that the Google Play Store is in a more advantageous position -- and really this is the point that Mr Frazer identified -- a more advantageous position than Apple would be in the counterfactual, because the alternative app stores are pre-installed on *Android* devices, on 60% of *Android* devices, as the CMA found.

So consumers do not need to go to the trouble of downloading them, because they are there already on the phone. So that puts consumers on *Android* devices in the same position as iOS consumers would be, if 60% of iOS users went to the trouble in the counterfactual of

downloading a new app marketplace, and you have our submissions as to why that would be unlikely.

So that is all I wanted to say about that new point.

The only other thing really to mention I think from my perspective is, separately, circling back on this question as to whether it would help you to have any additional submissions on damages.

THE CHAIRMAN: Yes.

MS DEMETRIOU: I think where we have got to, hearing what Mr Hoskins said, is that there is quite a large degree of common ground as to the approach, and I think the difference between us is one of burden of proof.

So we say that it is for the Class Representative to prove what would have been the case in relation to the charge for tools and tech, and they say that it is for us to prove it. So I think the difference between us, in terms of approach, is one of burden of proof.

But of course, I think it is also common ground, I think this is common ground, that the burden of proof point, whoever is right about it, it goes to the question of establishing whether it is likely that there would be some charge in the counterfactual for tools and tech; and you have all our submissions on that, of course, which I will not repeat. But if the Tribunal concludes that that is likely, the amount is one of

quantification and I think it is certainly my learned friend's case that when it comes to quantification, the broad axe very much applies.

THE CHAIRMAN: So you say -- you accept there is a causation point, and therefore the fact or not, but you say once causation is made out, ie that there would have been a charge, you then say that there is a broad axe as to how much it would be.

MS DEMETRIOU: Exactly, exactly. So I think there is very little between us, actually, other than that burden of proof point on establishing whether or not there would have been a charge.

THE CHAIRMAN: Yes.

MS DEMETRIOU: You have our respective submissions on that point already.

THE CHAIRMAN: Well, certainly we were not going to encourage you to put anything else in.

MS DEMETRIOU: I think in light of the measure of common ground and the fact that it does really come down to that burden of proof point, the difference, that seems a sensible course.

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

Mr Hoskins?

Further submissions by MR HOSKINS

MR HOSKINS: I am afraid I do have the right to the last

word. It will be brief.

Can we please have up the market study {AB6/25/105}.

Two points have just been made by Apple.

The first one is that the CMA did not identify the fact that you cannot install competing app stores on the Play Store as some sort of impediment to competition and that is simply not right. You will see --

MS DEMETRIOU: I said --

MR HOSKINS: You will see the heading -- or the bold in the paragraph previously, 4.80.

I mean, this could go on forever. You see the point made then about pre-installation. There is a whole section in the report about why pre-installation is not the answer. I am not going to read it out now. If you feel inclined, it is paragraph 4.82. You will see the heading:

"Agreements on the pre-installation of the Play Store."

There is all sorts of detail about what Google does to make sure it is in a better position, even although competing app stores could be installed on devices.

This is an argument that was created in the course of cross-examination, and it has been polished up in closings. With respect, it really does not go anywhere when you dig into the detail.

THE CHAIRMAN: Thank you. Right. So I think we are done.
MR HOSKINS: We are done, in all senses of the word.
THE CHAIRMAN: In all senses of the word.

All that remains for me is to do the equivalent of the Oscars acceptance speech. I mean the Academy Awards; not Oscar *Bronner*, of course. We would like to say some thank yous, though.

To the transcriber; we do not have the transcriber here today, of course, but I know they are listening, and we have had a number throughout. It has been pretty fast and furious, to refer to a film again. So we are very grateful for them. I am sure we are all very grateful for them.

Equally, I am sure we are all very grateful to the Opus operator who has given us a great deal of care and attention -- thank you very much -- to make sure we have the right document in the right place, all the time. We really appreciate it.

Then to all of you. I am pleased to see so many people in court, which I assume is the legal teams who have been working with you and supporting you, and so it is nice to have the opportunity to see you all and say thank you very much. It is plain how hard you have all worked; both before and of course during the trial; and we think that has resulted in a very efficient, very

well run and a very good humoured trial, and actually a lot of the credit for that goes to the front bench and the people who are spreading out to the sides as well. But thank you particularly for the way you have conducted the trial. We are very grateful to all of you. Thank you.

Of course, we will reserve our judgment.

MR HOSKINS: Thank you. We appreciate your patience with us as well. Thank you.

THE CHAIRMAN: Thank you. It has been a pleasure. Thank you very much.

(4.32 pm)

(The hearing concluded)

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