IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1403/7/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Wednesday 15th January 2025

Before:
Ben Tidswell
Dr William Bishop
Tim Frazer

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Dr. Rachael Kent

Class Representative

v

Apple Inc. and Apple Distribution International Ltd **Defendants**

A P P E A R AN C E S

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

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

Wednesday 15 January 2025

(10.32 am)

MR KENNELLY: Good morning on the matter we had discussed yesterday, I will not be pressing that.

THE CHAIRMAN: That is good to hear.

Submissions by MR KENNELLY (continued)

MR KENNELLY: We had discussed the options available to developers, and just to continue with that theme, my submission is if some large, well-resourced developers are choosing to steer customers away from the App Store, that shows it is a realistic thing for developers to do. If others, who are equally well resourced are choosing to give end users the option to use the App Store to transact, rather than encouraging them to go elsewhere, that suggests that Apple's price must be competitive with the alternative options, especially once quality is taken into account as well. Those clues and indications should come as no surprise because we see how concentrated the commerce is on the App Store, both on the user side and on the developer side. This concentration increases the force of the constraints that we have been discussing.

Just to show you that, can I look at end users first. That is presented in Professor Hitt's third

report, {C3/8/88}. These numbers are confidential. I am looking at paragraph 168b. On page 88, (b) about four lines down, Professor Hitt says that he is looking at the users who spend more than £1,000 on the App Store using their iPhone in 2022. He notes the current retail price of an iPhone then, it was the iPhone 15, and he notes that would mean that users would be spending more on the UK store front in one year than the cost of a flagship iPhone. He notes the percentage of users that is made up by those high spenders, but then he notes the percentage of App Store's commissions for which there are spending accounts. You see the percent there, the confidential figure.

He says if prices on the UK store front increased, he would expect these high spending customers to substitute away from the App Store because such a price increase would have a large impact on their total expenditure. You have my point, I took you to it yesterday, about the percentage of users who take into account the prices on the App Store when purchasing a device. We saw that, no need to go back to it. It was from the CMA's accent survey from 2022. Of course losing these high spenders would mean the revenue from the

sale of the device itself and the significance of the device sales, again, is well understood. The significance of the device sales is also in the report. I will just give you the reference, {C3/8/71}.

Sticking with concentration --

MR FRAZER: Mr Kennelly, is there anything in the report which indicates that these users, the ones who are spending this percentage that is noted there, have choices? In other words, are they spending this amount of money on apps for which there are other places where they can make purchases, or make in-app purchases, so they actually have choices should the Commission increase, your submission is they would go elsewhere. Is there anything in the report that suggests they do have that freedom to go elsewhere in relation to these apps?

MR KENNELLY: Yes, because there is data in the reports about the concentration of commerce, depending upon the genres. For example games, and particular games, we will come to that, and developers concentration account for a large proportion of the commerce. In respect of those very popular games, there is obviously choice across other platforms and in those other platforms it is possible to make

in-app purchases and other types of purchases similar to those that are made on the App Store.

MR FRAZER: So we would expect those users to fall within those groups?

MR KENNELLY: Absolutely, yes.

MR FRAZER: I understand.

MR KENNELLY: The same report, {C3/8/94} we see exhibit 3, which is the share of App Store commissions associated with the top consumers in 2022. If you look at the column on the far left, that again shows you just how concentrated the commerce is and the importance of that high spending cohort.

If you switch over to the next page, page 95, we see the concentration even more pronounced on the developer's side. You see the amount of App Store commission that is coming from the top, 0.005 per cent of developers, in the top 0.01 per cent. At paragraph 176 Professor Hitt speaks to that. He finds that those top developers alone account for that percent of App Store commissions. So that small number of developers is accounting for that percentage of App Store commissions, and that top percent of developers, which corresponds to a larger number but still a small one in absolute terms, a very small one, accounts for a very substantial

percentage of App Store commissions. So it is highly concentrated. When we ask about switching threats, we are looking at a very small proportion of users and a very small proportion of developers. Of course, when we speak of switching for developers we mean switching away from in-app purchases to advertising and monetization through other routes. As Professor Hitt goes on to say, at the bottom of paragraph 176, that means coming over the page, even a small number of large developers can constrain Apple if they start using monetization strategies that do not generate any commissions for the App Store.

THE CHAIRMAN: It is an interesting feature of the market, is it not, it's a two-sided market. I do not know whether you would say it is unusual but it is certainly not the orthodox view of the two-sided market because you have quite a small subset on both sides of the market who are actually providing the value, the revenue, and then you have also got the complication that, as we discussed yesterday and a little bit this morning, there is a further revenue stream that comes in from the device activity that Apple takes. So actually the financial position in the two-sided market is quite complicated, is it

not? I do not know whether that makes any difference to the analysis.

MR KENNELLY: It does because it demonstrates how the constraints are operating on multiple levels. Apple is competing to keep these small number of high spending consumers and a small number of high spending developers, and to lose the users does not just mean the loss of the Commission, which is substantial, but the device sale revenues which are also very substantial. How does it keep those small number of users and small number of developers? It needs to provide competitive prices but also highly competitive quality. Of course these users and developers are the ones best placed to switch. They are the ones for whom changes in price matters the most, and they are the ones who have the greatest ability and incentive to switch if they choose to. Users switching out of the device, developers different monetization strategies because they have resources to steer their millions of customers down different monetization routes if that is what they choose to do in their best interests. The suggestion that developers are somehow hamstrung in this regard is completely implausible. These developers are huge undertakings. One of them,

Activision Blizzard King, was acquired by Microsoft in 2023 for $69 billion. We had that merger case in this Tribunal. The idea that a developer of that scale, with its expertise and advertising budget, is unable to steer its millions of customers away from IAP, if it chooses to, is completely unrealistic.

So in terms of constraints from developers and users, the evidence could not be any clearer. But there are other indications that help you look at whether Apple can act independently of its customers and competitors. That is what Apple has actually done and the decisions that Apple actually made since the App Store was launched in 2008.

Ms Demetriou has explained to you how it is impossible to characterise what happened in 2008 as Apple acting as a monopolist. Then we ask what has happened since then? Apple has not increased prices, it has only decreased them, despite the growth of the App Store and iOS as a platform, and despite the huge increase in quality in terms of what Apple is offering to developers since then.

My learned friend, Mr Hoskins, said that tells you nothing because it is in Apple's interest to keep selling more devices and more apps. But, of course if there were no competitive constraints

operating on Apple, it could well be better for it to raise prices, output might well reduce but it would still be making the same or more revenue and that is not what has happened. That is another clue in the indisputable factual record which helps you decided whether we are right about constraints or Dr Kent.

That is our approach to these issues. We focus first on the substitution possibilities that are undeniable. Then we look for clues in the factual record to confirm that those substitution possibilities do in fact impose material constraints on Apple.

Dr Kent's approach is quite different. She compares Apple's commissions to the commissions that she says Apple would charge in a counterfactual world, in which Apple faced even more competition. That is having competing app stores on iOS itself and competing payment systems for in-app purchases. She advances, through Dr Singer, a hypothetical monopolist test. She concludes from the HMT that Apple is profitably sustaining a SSNIP in both the four alleged markets by comparison with the counterfactual competitive price that Dr Singer calculates. Because Apple can sustain that SSNIP,

it follows that Apple's market power is not constrained competitively, says Dr Singer.

You will have seen in the evidence that there are major flaws in that analysis, but more fundamentally, this is just the kind of circular reasoning that this Tribunal deprecated in the *Hydrocortisone* case. In the time available I cannot go back to that authority, but the Tribunal will have the general point. That is where the Tribunal said it is tempting, but wrong to look at a price and say, "That looks very high and because that looks like a very high price it can only have been imposed by a dominant undertaking. Then because we assume the undertaking is dominant, we have to assume the market definition is that which would provide for that dominance." That circular reasoning is inappropriate. It has the the potential to ignore, real world evidence about constraints that operate in fact.

THE CHAIRMAN: On that, obviously you have then got the cellophane fallacy, have you not, which is why I think they go down that path, as I understand it. In the cellophane fallacy you are actually doing something a bit different, are you not, you are actually starting with your proposition of your

market, the narrow market you think is the appropriate market, and then you ask yourself the question if, in those circumstances, it effectively looks like a monopoly, you need to be careful about the price that is being charged as the reference point for the SNNIP test. But *Hydrocortisone* does not say you should not do that.

MR KENNELLY: No of course not, and of course the problem the cellophane fallacy identifies was well understood and we understand entirely why one must watch out for that, but the focus then is on the comparator, if possible, the comparator that one chooses to avoid the trap that is identified by the cellophane fallacy.

THE CHAIRMAN: As I understand it, you do not really get into that debate. I think your position, as I understand it, is that is not the right starting point because I think you are saying if you are going to start anywhere, you should be starting no narrower than an all operating system transactions market. Is that right?

MR KENNELLY: The transactions market, indeed. We say that is the correct starting point because that is the one we see borne out in the facts. But if you are concerned about a cellophane fallacy, if you are

engaging with the cellophane fallacy concern that Dr Kent raises, then you have to look at the comparator that Dr Kent is using to say, "We cannot start with Apple's prices, we have got to start with somebody else's."

THE CHAIRMAN: Yes.

MR KENNELLY: There, we say, there is a fundamental flaw in the comparator they have chosen.

THE CHAIRMAN: I understand that point. I just want to be clear about the structure of your argument, I am more interested in that because it is plain what they are doing, and you have criticised it, you may be right who knows, we will find out. I think as I understand it, it comes out of a little bit of an exchange yesterday where I think possibly I might have confused you or not made myself clear about the question I asked, and I think the answer you gave me was probably something of a surprise to me. But on reflection, I think you probably meant something different and that is this question of the aftermarket.

MR KENNELLY: Yes I was discussing our response to Dr Kent's case, indeed.

THE CHAIRMAN: As I understand it, we have been talking about a two-sided market this morning, so there

clearly is a market of some sort which involves transactions.

MR KENNELLY: Yes.

THE CHAIRMAN: The question really is, in the context of the discussion we were having yesterday and now, forgive me, I am shifting back to devices again rather than transactions. But the question really there was how distinct from the devices market is that, so as to decide whether or not we should treat it for market definition purposes as a separate market.

MR KENNELLY: Yes.

THE CHAIRMAN: So you are not saying that it does not exist. You are just saying that, therefore, for the reasons we discussed yesterday, it should not be viewed as being separate. Is that right?

MR KENNELLY: It is a separate market, but it operates to exercise important constraints on the transactions markets that we identify as the relevant markets in the case.

THE CHAIRMAN: Yes, so the degree of substitution that comes through the devices market is sufficient to allow the market definition to encompass the broader -- I do not think you put it as a systems market though, do you?

MR KENNELLY: No, no, what Professor Hitt says is that what we see in reality is a combination. There are aspects of systems markets here because of the constraints that device markets operate, but also the dual markets that are the relevant markets for the purposes of the competition analysis. Just to be clear, I have now left my positive case and I am dealing with Dr Kent's case and responding to that. That is why I am engaging with the cellophane fallacy and I am drawing attention, if I may, to the flaw in the comparator that she has chosen.

Her starting point for the competitive price is a price charged by one or two, and the facts on this are very clear, much lower quality, much less successful app marketplaces on a different platform. She says that she can prove that Apple is a monopolist by showing that Apple charges a price that is more than 5 per cent above that benchmark, with no quality analysis at all. Of course, the comparator here is the Epic Games store. So she says that in the markets, that she calls her primary counterfactual, it would mean that no digital transaction platform could lawfully charge more than 5 per cent more than the Epic Games store, even though it is indisputable the Epic Games store has

been unprofitable since it launched in 2018, even since then, unprofitable, it is of lower quality than the other platforms and we say it offers nothing like the value that Apple provides. Her case implies that competition law must intervene any time that a supplier charges a price which is more than 5 per cent higher than the price charged by their lowest priced competitor. To do so, and this is critical in this case, without any regard to quality or product differentiation.

Just while we are dealing with the HMT argument that is raised by Dr Kent, I want to briefly address you on the CMA's position on the legal principles, very briefly. The CMA said in its written observations that the overarching test on market definition is whether there is a sufficient degree of interchangeability between the focal product and other products. They said a range, I am not going back to it in the time, they just said a range of evidence may be relevant, quite properly they said there is no exhaustive or mandatory list of factors that needs to be taken into account and they noted that an HMT is often used as a conceptual framework but it is not a necessary one.

So far so good. I refer to these because the

CMA's skeleton argument, that we saw last week, could be read, and I may be unfair here, but giving the impression that the HMT or the SSNIP is the beginning and end of the market definition exercise. And there is a suggestion, again no need to go to it but just to put down a marker, paragraphs 32 and 33, that it is the application of the HMT SSNIP test that determines the scope of the relevant product market. If that is what is said, we respectfully disagree, for the reasons set out in the CMA's own pleading.

There is also a short point on the law on dominance in the CMA's skeleton. I will touch on it very briefly. There is a reference to Apple's share of the relevant market. They say, if the market is as defined by Dr Kent, and it is persistently above 50 per cent, that would result in a presumption of dominance, where Apple would carry the burden of disproving dominance. We do not understand even Dr Kent to be saying that Apple bears that burden, and we would say that is wrong as a matter of law. But we will see, the CMA, I may have misunderstood and the CMA may clarify that when they come to make their submissions.

There is a final point I need to deal with on

this topic, and that is Dr Kent's contention that her two alleged product markets are distinct. She says, as we have been discussing, that the payments market is an aftermarket from the distribution market. We say, again, that makes no sense because developers know full well what commission applies to IAP transactions when they decide to publish an app on the App Store. They make a single decision as to what they want to charge, if anything, for downloads and in-app transactions. The in-app transactions and download prices are just two different ways for monetising an app. Unsurprisingly, for Dr Kent, Mr Holt has found that every store that offers in-app transactions charges the same price for them as they charge for paid downloads. Can we just see that? It is in Holt 3. Holt 3 is in {C2/10/142}, if you just look at the second and third columns. We see under "Commission for paid download", the commissions they have for the paid downloads, looking at the big ones, Steam, Epic, Microsoft, Nintendo and then we look at the commissions for in-app purchases, we see they are the same.

Since we are here, we also note what Mr Holt tells us about whether the in-app, what he calls aftermarket services are tied, tied on his approach.

We see that for Steam, Microsoft Store for games, which we know is the big money maker, Microsoft Store, X-Box games, PlayStation, Nintendo, they are all tied, even on his approach. No distinction is made. The big platforms also require developers to use the marketplace's payment system. So the idea of a separate market for in-app transactions is artificial, we say. It is not reflected in reality at all.

The next point that Dr Kent makes is that Apple is no longer match making users and developers once the app has been downloaded. They say that once the app has been downloaded, we are no longer match making developers and users, the so-called aftermarket becomes a one-sided market. Again, we say that completely mischaracterises what Apple is doing. The match making role obviously covers the initial download and the in-app transactions made possible by the download. The App Store encourages the latter, the in-app transactions, as much as the former, the download of the app as well. Because when, not least because when App Store consumers are browsing, the App Store tells them whether the apps offer in-app transactions and it tells them the prices of the particular in-app transactions. So

the user knows what they are getting before they download the app. That is required by the app guidelines, by the app review guidelines.

If there is any dispute about that -- in fact, I will show you, if I may, very briefly, just an example of it because it is {D2/99.1/1}. Here you see Good Food Recipe Finder, it used to be BBC Good Food. Five lines down, you see that the download is free but it offers in-app purchases. So the browser sees this and asks, "Well okay, but what will I be paying for the in-app purchases?" So they scroll down, which they can do before downloading the app. This is a preview. So page 3 please. On the bottom right-hand corner you see that the in-app purchases prices are listed there. IOS Device Users can even initiate an in-app purchase directly from the App Store where the developer has chosen to give them that option. I will just give you the reference for that, there is no need to go to it, {D1/1753/1}.

CHAIRMAN: Sorry Mr Kennelly, I do not want to take you out of course, but I am not sure I understand the point. Are you saying they can initiate the app purchase at the time they download, is that the point?

MR KENNELLY: No, sir, they are two different things. I

will slow down. Here I am making the point that when you are scrolling through the app to see will I buy the app or not, you can see that it offers in-app purchases and what it will cost you. There is a separate option. Can we pull up please {D1/1753}. Can we zoom in please? This is an option the developers are given, where directly in the App Store you can click on "In-app purchase". So it is possible to do it directly on the App Store. You do not have to download the app and then do it, you can do it immediately.

THE CHAIRMAN: So you can actually jump --

MR KENNELLY: Straight to the in-app purchase, yes.

THE CHAIRMAN: At the same time, so this is before you have downloaded the app?

MR KENNELLY: It is at the same time.

THE CHAIRMAN: So you are effectively consolidating step 1 and step 2?

MR KENNELLY: Yes, I will be corrected if that is not how it works.

THE CHAIRMAN: It would be helpful I think -- it is something we can ask.

MR KENNELLY: That is how I understand it.

THE CHAIRMAN: It may be that it will come out.

MR KENNELLY: Certainly the in-app purchase can be done

immediately, that is an option the developers are allowed to provide and it is provided extensively in the App Store.

So this distinction between matchmaking at the download stage and matchmaking at the in-app purchasing stage just does not reflect how the App Store works at all.

The next point Dr Kent makes about, and this is the final point, different business models. Dr Kent says there are different business models offered to developers and that shows that the distribution of iOS Apps is distinct from transactions within the iOS Apps. Of course we say, and you have this already by now, that that fact supports our market definition. My learned friend, Mr Hoskins, said what matters is not the genre of app but the manner in which it is distributed. Here we see the different ways in which app content is distributed and monetised because the availability of these business models, in-app purchases, monetisation through advertising and so forth means that transactions for apps and transactions for in-app content are substitutes for each other. A developer can choose the premium model and earn its revenues through IAP or advertising and developers can chop

and change, they can mix these transaction types to monetise their digital goods and services.

THE CHAIRMAN: Are you going to come and talk about Professor Hitt's analysis of games and videos, or have we done a bit of that?

MR KENNELLY: No, I think we will come back to that.

THE CHAIRMAN: Ms Demetriou explained that to us, but just on that point just so I am clear, that is all part of a piece, is it not? As I understand it, you are saying that if a developer is unhappy and wishes to switch, one of the substitutes open to them and you are saying one of the substitutes is to go to another platform.

MR KENNELLY: Yes.

THE CHAIRMAN: Obviously, Ms Demetriou explained how that might work and we have got when you get into video games and video distribution, as I understand it, you are advancing those as particular examples where there is greater latitude, if you like, to developers to substitute --

MR KENNELLY: Yes.

THE CHAIRMAN: -- because of the nature of the users' requirements.

MR KENNELLY: Yes.

THE CHAIRMAN: So for example in relation to games,

because they might multidevice, let alone multiplatform, but there are more options open as substitutes for just paying the Commission. Similarly here, you are saying it is a substitute for the just paying the Commission to decide to go off to somebody and get some ads, go to Google adtech and get some ads to pop on to their app.

MR KENNELLY: Indeed.

THE CHAIRMAN: That is another switching opportunity, if you like, away from paying the Commission. Is that right?

MR KENNELLY: Yes, for developers. These all operate as constraints on Apple, because Apple obviously is well aware of the fact that developers, and we are looking at developers here, can monetise in different ways and they will do so if Apple is not offering a competitive price.

MR FRAZER: Just on that point, do we have any data, just remind me, to show that these different business models are actually equivalent? For example, if we had a developer who wished to move away from in-app purchases or paid for apps or one of the premium, et cetera, they could entirely substitute the business model for an advertising model, that would, as it were, be a very reasonable substitute for them in

terms of the finances involved?

MR KENNELLY: Yes. In the time available, because I need to hand over to Ms Demetriou now, but there is data and evidence that goes to that point and we will give you the references in the course of the day. In fact, we see it playing out in realtime. There is strong evidence of the benefits of using advertising as a monetization strategy and that is done very successfully by many app developers on the App Store that pay almost nothing to Apple, and we also see, for example, developers taking advantage of in-app purchases. When in-app purchasing was introduced in 2009, lots of developers that were charging people to download stopped doing that and then switched to in-app purchasing as a different way of monetising their content.

MR FRAZER: It is just that when you showed us those very impressive figures about the very high concentration involved for developers in relation to the total commissions, the thought that occurred to me was whether that vast amount of money, as it were, of the monetisation, could be entirely substituted through advertising, or if there were some constraints in the advertising charges that would prevent that as a perfect substitute.

MR KENNELLY: We will show you that and, in fact, you will see the extent to which advertising is used by the most successful genre of app developers, which is the games developers.

At this stage, I think I need to hand over to Ms Demetriou.

Submissions by MS DEMETRIOU

MS DEMETRIOU: Thank you. I am moving on to the exclusive dealing allegation and as I foreshadowed at the outset we have four responses to Dr Kent's allegation. The first is that the restrictions of which she complains, so Apple's integrated and centralised system are how Apple competes on the merits and competition on the merits is not abusive.

The second point is that we are within the *Magill* line of cases because the counterfactual to the alleged abuse is that Apple would be required compulsorily to licence its technology. The exceptional circumstances in which competition law mandates this are not even pleaded by Dr Kent. She does not advance a case on that.

Thirdly, we say that Dr Kent has failed to show that in the counterfactual there would be appreciably more competition. Fourthly, we rely on objective justification.

Now, starting with competition on the merits, I am going to take that point first, it is common ground that in order to establish an abuse, a Class Representative must show that the conduct complained of was based on the use of means other than those which come within the scope of competition on the merits. We see that without turning it up in the Class Representative's skeleton argument at paragraph 91. Can we look very briefly at the *Ede & Ravenscroft* case which is in the bundle at {AB3/48} and if we go to page 26, please. Perhaps we can go to the previous page just to locate this passage.

This is a passage where the Tribunal is setting out some general principles and if we look at the bottom of this page, so subparagraph 5, and then go over the page, please. At (iii), so:

"Conduct that does not come within the concept of 'competition on the merits' is (without claiming to be exhaustive) generally characterised by the fact that it is not based on obvious economic or objective reasons. Where, therefore, there is no justification for the conduct other than to harm competitors, that conduct will necessarily not come within the scope of competition on the merits."

Then we see at (iv):

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

Then just to encapsulate our submission and picking up on the language of (iii) that I just took you to, Apple's requirements are based on an obvious economic or objective reason and that is because its product is an integrated tech product in which Apple competes on several markets, including devices markets and transaction markets, and the requirements which are the requirements of which Dr Kent complains are the reason why it is an integrated product. We say that customers, consumers, value the fact that it has been integrated and Mr Kennelly has developed some of the reasons why customers value that.

THE CHAIRMAN: Could I just ask you a quick question? You are not suggesting, are you, that because you have ticked the box in (iii) that is the end of it, are you? Because (iii) is all about indicia that it might not be competition on the merits, is it not?

MS DEMETRIOU: No.

THE CHAIRMAN: You are saying that, at least as far as that goes, we should not worry about that because

there is an objective justification but then of course you have to go on and deal with the broader point in (iv) as well?

MS DEMETRIOU: Well I think that's right, I do emphasise the words "generally characterised", so conduct that does not come within it, within the concept of competition on the merits, and again it says this is not exhaustive, but it is generally characterised by the fact it is not based on obvious economic or objective reasons, and we say that this is. So generally, you are looking at conduct which has no objective reason that relates to quality or price or any of those parameters.

THE CHAIRMAN: I do not think it is saying that, is it? Is it not saying that you can generally determine that something is not competition on the merits if you cannot find any obvious economic objective reason.

MS DEMETRIOU: Yes.

THE CHAIRMAN: That is quite different from saying if you have got an objective economic obvious reason it is likely to be competition.

MS DEMETRIOU: I think they are very closely related. So I am not saying that if there is an objective reason then in all cases it is generally competition on the

merits, but what we see here is they say without claiming to be exhaustive, generally speaking, what you are looking for when you are trying to identify conduct which is not competition on the merits, is conduct which does not have an objective reason because it is all about harming your competitors. So that is really the touchstone.

So what we say here is that the way in which Apple competes both on the devices market and the transactions market, so the way it marks itself out, is by offering an integrated platform which is valued by consumers, including for the better privacy and security and including because of its better performance and its streamlined nature. That is how it competes, and you saw the advertising and promotional material that Mr Kennelly took you to. So there is clearly an objective, an economic reason, for the requirements. The requirements are the means by which Apple achieves its competitive offering which is the way it distinguishes itself.

Now, pausing here, on Dr Kent's case, this is completely irrelevant. So on Dr Kent's case, she leaves no room in the way that she frames her case for this important issue to be taken into account and the important issue being that the very means by

which Apple distinguishes itself, the parameter, a key parameter, is accomplished through the requirements of which Dr Kent complains. She leaves no room for that in her analysis, because when we say the requirements are how Apple competes on the merits, Mr Hoskins' response, you heard the day before yesterday, was to say, "Ah well, no, that does not count because that is competition on the devices market, which is the wrong market to be looking at." That was his answer to our point. Our short answer to that submission is to say that it is both. Apple competes by offering an integrated platform through the requirements on both devices and transaction markets. Of course it is both. The device is an integrated product of which the store is a part. The privacy and security that Apple provides through its integrated approach makes the device more attractive but it also makes end users more willing to transact through the App Store, as compared with alternative platforms. But even if it were just the devices market, which it is not, that would be sufficient for our argument.

Now, Mr Hoskins then said, "Well, because it is the wrong market, this point needs to be dealt with under objective justification instead." So that was

his initial home for this argument. But when he got to objective justification, he said "Well, you cannot take account of the point there either because the market's been defined narrowly and because Apple has 100 per cent of that market. There cannot be any objective justification at all."

So on Dr Kent's approach, all questions of privacy and security and the integrated nature of the product which is, as I say, a key way in which Apple competes and differentiates itself from its competitors, are irrelevant. The upshot seems to be that an integrated approach is just inherently unlawful, no matter how much consumers benefit from it and no matter how many other approaches are available to them in the devices market or how many alternative means of transacting are available in the transactions market. We say that that position is entirely unreal.

My learned friend is asking the Tribunal to determine the allegation that Dr Kent makes, shutting its eyes to the critical point that the requirements she attacks are the means through which Apple produces a product which is differentiated from its competitors and which consumers value.

THE CHAIRMAN: Is that really just a function of the

outcome of the market definition exercise? Because you could say that once you have reached the conclusion about market definition and dominance, then actually that makes perfect sense because you really are then looking at the impact on a particular set of users and both sides of the market and the impact on them. So actually you have already decided that question. You have decided that is not the focus of the enquiry.

MS DEMETRIOU: Well, sir, we say that this argument succeeds even if we are wrong on market definition and dominance. So this is not dependent on our position on market definition and dominance, so even if Dr Kent is right on market definition and Apple is dominant on the narrow markets that she alleges, the fact remains that the requirements are not requirements -- the basis for them is not to harm consumers. There is an objective and economic reason. It is, they are the very means through which Apple differentiates itself, both on devices and transaction markets.

Really, one can contrast Apple's offering with that of Google's Android operating system, which is the most prevalent mobile operating system globally by a significant margin, because of course, as the

Tribunal has seen, unlike iOS, Android is licensed separately to run on devices manufactured by others and Google also permits third party app stores, which manufacturers like Samsung often pre-install on devices alongside the Google Play Store. Android devices also allow downloads from other sources too, such as developer websites. As we have pointed out in our skeleton argument, without turning it up, it is paragraph 17, Google itself acknowledges that its open system makes it more vulnerable, more susceptible to malicious attacks and that is because it has far less control over the quality of the apps on Android and even its own PlayStation applies less detailed and demanding app review than Apple.

But in striking the balance differently to Apple, Google's reward is to be the most prevalent operating system globally by a significant margin and the Google Play Store has about twice as many apps as the App Store. So these are choices that the manufacturers, that the two companies, make about how they are going to compete. Apple's one stop shop is, accordingly, a major part of how it competes and what marks it out and makes it different to other technology platforms such as Google's. As I say, the means through which it

achieves this is through the very restrictions complained about by Dr Kent. They are, accordingly, an economic choice, they do have an objective reason.

I would also add this. That this is not an unusual choice for an economic undertaking to make about the way it competes. It is precisely the same choice, thinking about a game developer, so an app developer of a successful game also faces a choice. Do they use their IP rights to reserve to themselves the commercial activities within the game, so selling weapons or different clothing and so on? Do they do that? Do they use their IP rights to reserve that activity? No doubt that would have benefits such as conserving the integrity of the game, its uniformity, its security and so on. Or, on the other hand, do they choose to allow third parties in to also offer commercial products on the game and charge them a commission for their activities in return for licensing their IP rights and allowing them on to their game? So it is a trade-off in each case. So you get the Commission, if you open it up, but then you lose other things in terms of the parameters of how you compete. Some game developers do things one way and others do it

the other way. There is a mix of different approaches.

THE CHAIRMAN: I am not sure I know enough about games to fully comprehend that. Are you suggesting that there are these commercial deals that monetise other interests?

MS DEMETRIOU: Absolutely. So for example, you have presumably heard of Minecraft, sir?

THE CHAIRMAN: I have observed my son playing it but that is about the extent of the expertise.

MS DEMETRIOU: Microsoft is the developer of Minecraft and then you have Roblox, which is another major app developer for games. What they do is that they have chosen to allow third parties in. So if you play on one of these games then there are commercial third parties that monetise the activity and they are charged a commission for doing that. Whereas there are other game developers that choose not to do that and they keep it all in-house. That is just a commercial choice.

You do not say, "Oh well the ones that decide to not licence their IP and keep the activity in-house, they are abusing their dominant position by exclusive dealing." It is really nonsensical. It is the same point. That is how they compete on

the merits.

You can actually see the same dilemma in the original decision that Apple made about allowing third party apps in the first place. Mr Kennelly yesterday, you might recall, took you to part of the launch event where that was discussed. As you know, in 2007, Apple did not allow third party native apps at all when it first launched the iPhone. That is obviously an even more tightly controlled approach. It is one we see in lots of electronic devices actually where the only applications that run on the device are ones that are preloaded by the manufacturer.

In 2008, Apple took a step in the direction of decentralisation by allowing third party apps but only through Apple's central distribution including app review, and in doing so it was striking that careful balance which goes to the very heart of how it competes.

So that is the way we put our first defence to the allegation, which takes me on to the second reason why Dr Kent's allegation of exclusive dealing is incorrect. That is because although she seeks to characterise this as an exclusive dealing case, it is not actually an exclusive dealing case, because

exclusive dealing is where you have a number of suppliers in a market and a dominant firm uses its market power in that market to prevent customers buying from other competing suppliers. The classic case is *Hoffmann-La Roche*, which we have in the bundle, and Mr Hoskins took you to for other purposes. If we look at it briefly at {AB4/2/46}. This is just the facts at the very beginning of the judgment. You can see at paragraph 2 at the top of the page, that the Commission had found Roche had a dominant position on the markets for particular vitamins and it had abused its dominant position by obliging or incentivising its purchasers to buy all or most of their requirements from it rather than from Roche's competitors. They would inevitably want to buy some from Roche given its dominance, and the exclusive dealing leveraged that dominance to create pressure for them to buy all or most of their requirements. We say that there is a critical distinction between *Hoffmann-La Roche* and the other exclusive dealing cases, on the one hand, and the present case on the other. Because in this case Apple is not using its alleged dominance in distribution to prevent developers from distributing their apps through competitor platforms. It is

using its IP to reserve the distribution activity to itself. I showed the Tribunal that when we looked at the DPLA.

Now, Dr Kent's case, and when I took you to the DPLA I showed you that Apple grants a limited licence to its technology, it does not licence developers to publish an app store, create an app store, run an app store or payment activities. It only licences its technology to developers to publish iOS Apps that are distributed through the App Store.

So Dr Kent's case is that Apple must licence its intellectual property rights for activities that it does not currently permit, and that really is a critical point in this case. We say that it is of the very essence of an intellectual property right that the owner of that right can decide whether or not to licence it. The very purpose of the intellectual property right is to permit the holder to reserve a particular activity to itself, or indeed to determine the extent to which others can use its IP right. That is why intellectual property rights are granted. They recognise, and this is trite and I know the Tribunal knows this, but they recognise the investment that has been dedicated by

the firm in question and they protect that investment so as to incentivise innovation, that is the deal.

For that reason, competition law will only intervene very exceptionally so as to require mandatory licensing of technology protected by intellectual property rights.

Now, sir, what I want to do is take the Tribunal back to the principal authorities that Mr Hoskins took you to, explain, and I am going to explain how we put our case in light of the case law, and I will respond to points Mr Hoskins made as I go along.

Can I start please with *Magill*. So {AB4/9/65} is the start of the judgment. You will recall the facts that *Magill* sought TV listings information from the main TV channels so that it could produce a combined TV listings magazine. The listings were protected by copyright.

Pausing here, can I just make this point. That obviously the intellectual property rights in *Magill*, copyright in their TV listings, was very far removed in terms of importance compared to the IP that we are considering in the present case, which protects swathes of innovative technology that Apple

has developed through very considerable investment. So both in terms of scope and investment, we are a much stronger case than *Magill*.

I want to look at paragraph 9 of the judgment. Looking at paragraph 9, you can see that the TV *stations*:

"Practiced the following policy with regard to the dissemination of programme listings. They provided their programme schedules free of charge, on request, to daily and periodical newspapers, accompanied by a licence for which no charge was made, setting out the conditions under which that information could be reproduced. Daily listings and, if the following day was a public holiday, the listings for two days, could thus be published in the press, subject to certain conditions relating to the format of the publication."

And they ensured strict compliance with these conditions.

Pausing here, you can see that the broadcasters did grant a licence to their programme listings, but it was a limited licence. So it did not allow *Magill* to do what *Magill* wanted to do, which was to publish a combined listing. We draw an immediate analogy with what Apple does in this case because

Apple also, as I showed you under the DPLA, grants a limited licence to its IP to developers. It is limited in scope and ambit, just as the licence to the TV stations was limited in scope and ambit.

Pausing here again, you will recall that Mr Hoskins' argument is that once an IP owner decides to licence its rights to any extent, it is game over for the *Magill* conditions. But we can see on the very facts of *Magill* that that is not so, because the TV stations did indeed grant a limited licence.

Now I just want to take you to a couple more points in the judgment. If we can go on to page 72, {AB4/9/72}. I just want to note that at paragraph 46 in passing, I am going to come back to this point, but the mere ownership, of course, of an intellectual property right cannot confer a dominant position, but we see from paragraph 47 that nonetheless the TV stations did have a dominant position in the markets for the provision of the TV listing information. You can see that they had a, by force of circumstance, they had a de facto monopoly.

Then if we go, please, to paragraph 48 over the page, the court said there that it is not the case

that the exercise of intellectual property rights could never be reviewed under competition law, but then 49 and taking it from the second sentence:

"... the exclusive right of reproduction forms part of the author's rights so that refusal to grant a licence, even if it is the act of an undertaking holding a dominant position, cannot in itself constitute abuse of a dominant position."

So that is the important starting point. Do not forget here, sorry to emphasise this again, but they are not talking about a refusal at all, because there was a limited licence. They are talking about a refusal of a licence of the scope and ambit that *Magill* wanted.

Then if we go to the next paragraph:

"However, it is also clear from that judgment that the exercise of an exclusive right by the proprietor may, in exceptional circumstances" -- we emphasise those words -- "involve abusive conduct."

The court then went on to outline what those circumstances were. The first point before you get to the conditions, and we have seen the first point, is that they have to be dominant on the relevant market for their IP rights, that was established. The second point we see at paragraph 53, if we could

scroll, please. That is the point about indispensability. You see that what the court is saying here is that access to the information on programme scheduling was indispensable for *Magill* to carry out the activity in question that it wanted to carry out. The position, pausing here, is that if the firm is dominant on markets where its products are protected by IP rights and access to those rights is indispensable to carry out an activity on a secondary market, then exceptionally, the firm may be compelled to licence its intellectual property rights if three conditions are met. So pausing there, if the conditions are satisfied, they would lead to the compulsory grant of a licence to conduct activities in a different market from the market for the product protected by the intellectual property rights so a secondary market.

The court then explained the three conditions. We see at paragraph 54 that the refusal to licence the intellectual property prevented the appearance of a new product. Paragraph 53 explains why because *Magill* wanted to compile a weekly television guide to all the channels, so back when there were just a few channels in that time. At that time, some of us might be able to remember, probably only a few of

us, you had to buy the Radio Times and the TV times and different magazine for each of the channels. So what they wanted to do was something that was new.

Then we see paragraph 55, there was no justification for the refusal of the licensing of the IP rights.

Then, at 56, the IPR holder reserved to itself the secondary market by excluding all competition on that market.

There are three conditions, but those three conditions only arise if you are dominant on relevant markets for the IP and if access to the IP is indispensable to carry on the business. Then if the three conditions are met, exceptionally a compulsory licence will be mandated by competition law. So that is *Magill*.

We see, I want to go back next to Bronner, which is at {AB4/3}, which was not an IP case and really, standing back, the difference is that the analysis is the same, except that where it is not an IP case you do not have the new product conditions. So there is one fewer conditions that have to be met. You will recall the facts. Media Print published several newspapers and had established a home delivery service. Oscar Bronner published a

rival national newspaper and the alleged abuse, we can see this from page 26, {AB4/3/26} paragraph 8, bottom of the page, was a refusal to allow Bronner access to Media Print's home delivery service. You see Bronner's argument at page 30, paragraph 24. So Bronner's argument, in short, was that Media Print was obliged under Article 102 to provide access to its delivery service. You see at paragraph 26 over the page, Media Print's argument. So Media Print said that:

"In principle undertakings in a dominant position are entitled to the freedom to arrange their own affairs", in that they are normally entitled to decide freely to whom they wish to offer their services and referred to *Magill*, the exceptional circumstances point.

Then the analysis of whether the conduct was abusive starts on page 33 {AB4/3/33} at paragraph 37. You see there that the court says:

"It would need to be determined whether the refusal by the owner of the only nationwide home-delivery scheme ... to allow the publisher of a rival daily newspaper access to it constitutes abuse of a dominant position ... on the ground that such refusal deprives that competitor of a means of

distribution judged essential for the sale of its newspaper."

So essential for the sale of its newspaper, not essential for selling a newspaper via a home delivery service, essential to the sale of the newspaper at all.

Then we see at paragraph 38 that the court refers to *Commercial Solvents*, saying that:

Although in *COMMERCIAL SOLVENTS v E.C. COMMISSION* the Court of Justice held that the refusal by an undertaking holding a dominant position in a given market ... to supply an undertaking with which it was in competition in a neighbouring market with raw materials and services, which were indispensable to carrying on the rival's business, to constitute an abuse, it should be noted, first, that the court did so to the extent that the conduct in question was likely to eliminate all competition on the part of that undertaking."

Then we see the court referring back to *Magill*, to the indispensability prior point before you get to the three conditions at all. You see at paragraph 41, at the bottom of the page, if we can go over the page, that it is necessary to show, "... not only that the refusal of the service be

likely to eliminate all competition in the daily newspaper market and that such refusal would be incapable of being objectively justified, but also that the service itself be indispensable to carrying on that person's business, in as much as there is no actual or potential substitute for the home delivery service."

In this case, before the court got on to the three conditions, the claim failed at the threshold indispensability criterion. In the next paragraphs the court made clear that this threshold condition is a difficult one to satisfy. You can see from paragraphs 42 to 44 that the criterion of indispensability was not satisfied here because even if there is only one home delivery service and Media Print was dominant, which were the facts, there were other means of distributing newspapers and no barriers to establishing Bronner establishing its own home delivery service.

You see if you look at paragraphs 43 to 46, the very high hurdles that you need to demonstrate, to establish this indispensability condition. So you can see at 45 that in order to demonstrate that the creation of an alternative system is not realistic, it is not enough to say that it is not economically

viable because we have got a small circulation. You have to do more than that you can see that from paragraph 46.

In the present case, just pausing here and explaining why I am going to this authority, licensing Apple's intellectual property rights, without the limitations that Dr Kent complains about, is not indispensable to carrying on the business of app development or for carrying on the business of an app distributor, because app developers and app distributors clearly do carry on business without the licence that Dr Kent says Apple should be compelled to grant them. They do so on other platforms. So just like Oscar Bronner, being told it would have to sell its newspaper through kiosk and regional distribution and could not sell a nationally home-delivered newspaper.

Before leaving Oscar Bronner, can I just take you to the Advocate General's position very briefly. That is in the same tab, page 22 {AB4/3/22}. It is paragraphs 62 and 63. I just want to take you to those because we can see, can you just read 62 to yourselves, please? That helps explain the rationale.

THE CHAIRMAN: Do you want us to go to 63?

MS DEMETRIOU: Yes, and 63, thank you.

MR HOSKINS: I would ask you to read down to 64 while you are at it, please. Thank you.

MS DEMETRIOU: So at 63 the Advocate General was explaining why *Magill* was an exceptional case, such that a compulsory licence was mandated. You can see some of the reasons for that, that the product was genuinely a new product that was being prevented by the refusal to licence. Also, the provision of copyright protection was difficult to justify. In other words, it was quite thin IP so the decision not to licence it was difficult to justify. Those were points which the Advocate General considered weighed heavily with the court and we would suggest the same.

Then just picking up on one point, please, in paragraph 64, we do emphasise the sentence in the middle:

"If it is so required" -- so if the *Magill* conditions are satisfied -- "the undertaking must however in my view be fully compensated by allowing it to allocate an ... an appropriate proportion of its investment costs", so an appropriate return on investment. So fully compensated.

The reason I am taking you to that is because

on Dr Kent's case, Dr Kent's case does not envisage any compensation at all for Apple for its IP rights. Nothing. Has not addressed that point.

I want to take you now to *IMS Health* at {AB4/12/30}. Can we start at page 30, paragraph 4. I just want to look at the facts. IMS provided data on regional sales of pharmaceutical products in Germany to laboratories, and they were formatted according to a particular specific brick structure, which is referred to as the 1,860 brick structure. You can see at paragraph 10, on the next page, that the brick structure was protected by copyright and IMS refused to authorise NDC to use it. Pausing here, while IMS refused to authorise NDC to use it, other undertakings did use -- IMS did authorise other undertakings to use the 1,860 brick structure. We can see this if we can quickly flip to the Commission decision, which is at tab 10.1, and the Commission, in its decision, initially required IMS to provide a licence to NDC and this was then annulled. If we go to {AB4/12/5} page 5 of the Commission decision and look at recitals 24 to 26, you can see that the 1,860 brick structure was also used by other companies without objection from IMS. If we can go on to page 14 {AB4/12/14} of the

Commission decision and look at recital 104, you can see that third-party software providers also delivered products in the 1,860 brick structure, and various software companies are named. So it is not the case that IMS refused to licence its brick structure at all. It did licence it to some operators, but not to NDC.

THE CHAIRMAN: That is presumably, am I right in thinking, because it is a pharma company, it did not want the competing pharma distribution arrangements.

MS DEMETRIOU: IMS is not a pharma company.

THE CHAIRMAN: Health data.

MS DEMETRIOU: Yes, a health data company.

THE CHAIRMAN: It did not want a competing service to the service it was providing but it is allowing other people who did not compete to use the same structure, is that right?

MS DEMETRIOU: I am not sure that is right, I am not sure we can get that from the facts. Let us assume for a moment that that's correct.

THE CHAIRMAN: That is how I had always understood the case that they were effectively using this data and monetising it through particular channels to doctors, clinics, and they did not want other people doing that in the same way.

MS DEMETRIOU: They certainly did not want NDC doing it. I do not know if as, a general proposition, they did not want anyone else doing it.

THE CHAIRMAN: There may have been other clinic organisations that were getting the benefit of it.

MS DEMETRIOU: That's right. What we can see from this is that a decision to licence a product for particular purposes does not then, as Mr Hoskins was seeking to suggest, take you out of the *Magill* case law. It is the same point, a similar point to the one that I sought to make on *Magill* paragraph 9, on the facts.

If we go back to the judgment, tab 12, page 36 {AB4/12/36}, we see that NDC argued that the refusal was a breach of Article 102. The court turned at paragraph 31 to the circumstances in which the refusal by an undertaking, in a dominant position, which owns a copyright of an indispensable product, that the circumstances in which it is mandated to grant a licence. You can see at paragraphs 34 to 35, if we can scroll, we see now the familiar law. So refusal to grant a licence by an undertaking in a dominant position not in itself an abuse; 35 exceptional circumstances. The court then refers back to *Magill* and if we go over the page and look

at paragraph 38, so 38:

"It is clear from that case law that, in order for the refusal by an undertaking which owns a copyright to give access to a product or service indispensable for carrying on a particular business to be treated as abusive, it is sufficient that three cumulative conditions be satisfied, namely that the refusal is preventing the emergence of a new product for which there is a potential consumer demand and that it is unjustified and such as to exclude any competition on a secondary market."

Again to reiterate, you have to show dominance in a market in which the IP rights are protected, then you have to show that access to the IP is indispensable for carrying out an activity on a secondary market, and then you have to show that these three conditions are satisfied.

On paragraph 39, you see the court turned to the first condition, and you see if we skip to paragraph 49, this relates to the new product requirement and what the court says here is that it is not a new product where the undertaking seeking the licence is essentially duplicating the goods or services already offered on the secondary market by the owner of the copyright.

You will remember what I showed you in the AG's opinion of *Bronner* where he said *Magill* was not such a case because it was genuinely a new product that was not being offered on the market. Then you see at paragraph 50 on the new product point:

"It is for the National Court to determine whether such is the case in the dispute in the main proceedings."

And of course it is referred back to the national court because it is a question of fact.

Then 51 you see the second condition, relating to whether the refusal was unjustified and then if we skip down you see the operative part of the judgment at page 40, and you see it is as I have just explained. So that is in the operative part.

I now want to take you to *Slovak Telekom*, which was the judgment relied on by my learned friend. That is at tab 26.1 of the same bundle.

THE CHAIRMAN: Is that a convenient point to take a break?

MS DEMETRIOU: It is.

THE CHAIRMAN: We will take ten minutes.

(11.46 am)

(Break)

(11.57 am)

MS DEMETRIOU: I want to take the Tribunal to Slovak Telekom, which is at {AB4/26.1/13} and I want to go to page 13. Can we put page 13 and 14 up side-by-side. Mr Hoskins took the Tribunal to paragraphs 49 and 50. Can I just ask you to read those to yourselves, remind yourselves what they say. Mr Hoskins' submission was that this is a paragraph 50 case, and we say that he is wrong about that, that the present case, in our submission, is a paragraph 49 case. *Slovak Telekom* is different to the present case because there was in *Slovak Telekom* no question about the scope or ambit of the access that *Slovak Telekom* should provide. We can see this if we look at page 15, please, paragraph 54. You can see from paragraph 54 that there was a regulatory decision that set out exactly how much access *Slovak Telekom* had to provide to its infrastructure, so that question was off the table. The issue was whether, having granted that amount of access, *Slovak Telekom* was acting abusively in charging excessive prices giving rise to a margin squeeze.

By contrast, the present case is about the scope or ambit of the access Apple is giving to its intellectual property. Take for example a

competitor app store, a competitor app store would need a licence from Apple to operate a competitor app store and Apple refuses to grant such licences. Apple has reserved that distribution activity to itself, as Mediaprint did, as IMS did. Take app developers, Apple has granted them a limited licence to its intellectual property. The scope of the licence is limited because it states that they can publish iOS Apps for distribution through the App Store and with any in-app transactions dealt with through IAP. That is a limitation on the ambit of the access granted by Apple.

So we say that the present case is just like *Magill* and *IMS*. In each of those cases the property owner did allow limited access to its property. The Class Representative in each of those cases said that those limitations should be lifted and the court held that this would be compelling a property owner to give access to its property in circumstances where it chose not to do so, and that competition law only imposes such a requirement under exceptional circumstances.

That is what we say about *Slovak Telekom*. We are a paragraph 49 case.

My learned friend also relied on the Advocate

General's opinion in *Android Auto* and can we pick that up at tab 34.1 {AB4/34.1}. I want to make a similar point in relation to this. If we go to page 6 {AB4/34.1/6}, paragraph 35 of the opinion, we can see that she, first of all, talks about the *Bronner* conditions and she says:

"By contrast those conditions are not intended to apply where the infrastructure concerned is open to other operators on the market, which according to the court can result from the application of regulatory obligations as was the case in the judgment in *Slovak Telekom*."

Arguably, that must be a fortiori in this case because it is deliberately developed to be used by third-party operators.

So I want to emphasise the words "open to other operators on the market". Now, Apple has never opened the use of its infrastructure to other undertakings in either of Dr Kent's alleged markets, not distribution nor payment. It has reserved to itself those markets, those activities, the infrastructure to carry out those activities.

Then if we go to page 7, paragraph 44 {AB4/34.1/7}, we see here that the Advocate General says:

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

So she is there recognising that if Google could establish that it was intending to reserve a particular activity to itself, *Magill* and *Bronner* would apply. She says she is recognising that that argument would be a well founded argument, and so she is recognising even though the Android Auto app was available freely to developers, as she said several times in the opinion, so even though the app, the car app, was intended, the very aim of it was to attract lots of developers to have lots of different apps on the platform, she said if Google could argue, in principle, that it wanted to reserve to itself the function of electric car charging apps. So that would be something that was open to Google, but she says that is not a persuasive argument on the facts, and she says it is not a persuasive argument on the facts and also Google has not even raised it, it is focused on other arguments.

So this is consistent with Apple's case.

Standing back, *Android Auto* is about whether or not an additional app should be allowed on to the platform in circumstances where Google had no intention of charging for access to the platform or for reserving the function carried out by this type of act to itself. Whereas Dr Kent's complaint is that Apple does not permit alternative app stores and payment processes at all, that is her very complaint. Her complaint is Apple reserved that to itself and it must stop reserving it to itself. That is squarely a *Magill* case.

The short point to make now is, I have explained why we say that Mr Hoskins' attempts to distinguish the *Magill* line of cases does not work. So it follows that for Dr Kent to succeed at all in her allegation, she would need to prove that this is a case in which competition law exceptionally steps in, so as to require Apple to licence its IPR on terms it does not choose, so to give licences where it chooses not to licence. But she has pleaded no such case.

We have seen Apple's defence. Let me take you to {A1/2/28}, paragraph 101(d).

THE CHAIRMAN: Just before you do that, I suggested to Mr Hoskins that *Google Shopping* might be useful. I

do not know whether you think it is useful. I had a quick look and I thought it was quite useful, but it may be you do not feel you need to deal with it now.

MS DEMETRIOU: Sir, we say that this is a different case to *Google Shopping*. Can I, in a nutshell, just because of time tell you what our submissions are?

THE CHAIRMAN: Yes.

MS DEMETRIOU: Obviously we now have the Court of Justice judgment and what the Court of Justice says in its judgment, it makes here -- the issue, as you will recall, is that Google applied various algorithms, such that a comparator shopping services were disadvantaged as compared to its own service on its results page. There was also in that case a question about access to the blue boxes, which only *Google Shopping* service had access to. The court in *Google Shopping* accepted that there was no question that Google would have to provide access to the blue boxes. That was off the table because that was its own technology. So that was not even part of the argument.

THE CHAIRMAN: So no question in the sense that --

MS DEMETRIOU: Did not have to. So the question then was, they had granted access to the general results page and the question was, was it abusive to

self-preference to have this algorithm which disadvantaged. Google sought to argue that is all about *Magill* and you have to show the exceptional circumstances, but that clearly is a *Slovak Telekom* case, because there was no question about ambit of the access. They were on, the licence was there. In fact, it was not an IP case, but the point remains the same. So they were on, they had access. No issue about ambit of the licence. The question was the conditions that were to be applied, so that's what we say about *Google Shopping*. We can explain that in more granular detail in our closing but that is in a nutshell the point.

THE CHAIRMAN: Thank you very much.

MS DEMETRIOU: Going to our pleading, just to remind you what we have pleaded, {A1/2/28}, so it is further up the page, paragraph 101(d). We put the point squarely in issue:

> "Save in limited circumstances ... not anticompetitive for a dominant undertaking to impose limits on the use of its intellectual property."

We have clearly stated the proposition there.

The Class Representative's reply to this paragraph is at {A1 /3/16} and you can see it is at the bottom of the page, "As to sub-paragraph (d)",

and if we look at this page and then over the page, can I just ask the Tribunal to read to yourself what they say. So it is effectively a bare denial. It is unclear why it is vague and unparticularised because we are just citing a proposition of law that is from well-known case law. So there is, accordingly, no pleaded case that the *Magill* requirements are met. Now, I do not mean any disrespect to him, but in a curious passage of his submissions just before lunch on the first day, Mr Hoskins in a few brief sentences sought to suggest that even if *Magill* applied, the conditions were met in this case. We say to that, it is not pleaded, that there is nothing in their skeleton argument about this, so we elaborated on this in our skeleton argument -- our skeleton argument post dated theirs to be fair, but there is nothing in their skeleton argument, they are clear about what the proposition is. And Dr Kent has not pleaded a case that the *Magill* conditions are fulfilled.

They have not sought permission to advance an alternative case that the conditions are met, nor could they. That is simply not open to Dr Kent. It is far too late because it depends upon a factual analysis and the parties would need an opportunity

to file factual and expert evidence on the issues arising.

Can I just explain why? It may be that this is a non-issue because Mr Hoskins was not pressing it, he did not apply for permission. But they would have to show, if you were going to advance a case like this, they would have to show that Apple is dominant in properly defined markets in which Apple's products are protected by its IPR. To take that issue, because obviously if they could not show that then Article 102 would not impose a condition to licence at all.

Now, it may be when Mr Hoskins said blithely "Oh, the conditions are met, and we can see that on the remaining facts in this case", it may be that he is assuming that since Dr Kent already alleges dominance in iOS App distribution and payment services markets that the analysis can just be carried across. But that would not be right. Because as the court held in *Magill*, mere ownership of an IPR, of an intellectual property right, does not confer a dominant position. Rather, as I took you to the position in *Magill* at paragraph 47, the court said by force of circumstance, RTE, and ITP as the agent of ITV, enjoy, along with the BBC, a de

facto monopoly over the information used to compile listings. So it was in the market for the supply of information to compile listings that the TV stations were dominant. In turn, *Magill* wanted to use that information to provide a comprehensive TV guide in a different market, what the courts have called in the case law a secondary market.

So here the markets in which dominance would need to be established are markets for the supply of the technology and software and services that help a developer to develop an app.

THE CHAIRMAN: So you are saying it is not, the right market is not the transaction market, which is -- you are saying that actually it is the supply of the tools, if you like?

MS DEMETRIOU: Exactly.

THE CHAIRMAN: Because that is the IP that is protected.

MS DEMETRIOU: Exactly so, so that would open up a whole different sphere in the case. You can see the point, if we go back, you can see it easily if you go back to my example of the game developer so Minecraft and so on. So the developers, take a developer that is seeking to exercise the point I put to the Tribunal earlier, exercise its IP rights to reserve for itself the market for selling weapons

in a game. Somebody comes along and says, "Well Article 102 requires you to licence us to sell weapons in the game." Obviously, Article 102 would require no such thing because the relevant question is not whether the developer is dominant in distribution of products for its game, the question is whether it is dominant in relevant markets in which it holds its IPR, such as markets for supplying games. So you can see the point perhaps more vividly when you just change the facts slightly.

The second point we make, and again it may be that these points are theoretical because as I say we are not facing a pleading, but the next point is that the *Magill* condition relating to preventing a new product on the market, now Mr Hoskins briefly in his submissions indicated that this requirement would be satisfied merely if he could establish that it was likely that another app distributor would enter the market and provide services on Apple's platform. But as I have shown you in the case law, to satisfy the requirement the other distributor would have to be doing something new and different, not simply replicating the distribution services that Apple provides. If this had been pleaded, it

is a factual point, you can see that it was sent back to the national court.

The third point I wish to highlight, this is not an exhaustive list of points, but the third point is that of course one of the *Magill* conditions is that the refusal to licence is not justified by objective considerations. Mr Hoskins, in his submissions, sought to conflate this with the question of objective justification that arises if the *Magill* line of cases does not apply, so the point Mr Kennelly is going to come on to. But it is a different question, with respect, because here Dr Kent would have to persuade the Tribunal that Apple's refusal to licence its intellectual property rights was not justified. In order to address that point, Apple would want to consider adducing evidence on its intellectual property rights, the scope of interference with those rights, the underlying investments and the chilling effect on investment if Apple were required to licence it compulsorily. Again this would be a highly fact intensive exercise and it is not in the evidence because it has not been pleaded by Dr Kent.

So we say that Dr Kent's case must stand or fall on her argument that we are outside the *Magill*

line of cases, and for the reasons I have given she is wrong about that.

Just briefly, before I turn on to the next line of defence, you will recall that Mr Hoskins said on Monday that we have not pleaded the argument in relation to unfair pricing or the payment allegation. Of course, in relation to unfair pricing, the point does not arise, so we are not running this point in relation to unfair pricing. But we do take the point in relation to the payment restriction, it is precisely the same argument, and our skeleton argument deals with both together.

The short response to Mr Hoskins' point --

MR HOSKINS: I am sorry to interrupt, but there is an issue in relation to this in the sense that after I opened the case on Monday, we were sent a proposed re-amended defence.

MS DEMETRIOU: I am going to deal with that.

MR HOSKINS: Thank you.

MS DEMETRIOU: So the short response to Mr Hoskins is that there is no deficiency in our pleading. The facts necessary to make the legal argument that Apple has IP rights in the software necessary to provide payment processing is pleaded and is common ground, it is relied on positively by Dr Kent. We

have stated clearly the contention of law on which we rely. I took you to that, the last sentence of paragraph 101(d). So Mr Hoskins' argument is you have got it there but you have not replicated the contention of law further down in the pleading, and as he says --

MR HOSKINS: I am sorry --

MS DEMETRIOU: Sorry, can I finish?

MR HOSKINS: No, because this is not fair. Because we were sent the draft re-amendment. We were asked to give an indication by 1 o'clock today whether we consented or not. I can take away the suspense, we will not be consenting to it. This is precisely the sort of submissions and argument the Tribunal is going to have to hear as to whether to allow that to happen or not. It is really not fair and it is not efficient to take it this way now, where it is just we plough forward as if Apple does not have to make the application.

THE CHAIRMAN: So Ms Demetriou, just so I know where we are, the position seems to be that whether you need to or not, which you may argue about, you want to clarify the pleading in relation to payment restrictions. Are you applying to amend?

MS DEMETRIOU: Well, our position is that -- I am

slightly scared that I am going to say something and Mr Hoskins will jump up again, but if he will let me just finish a couple of sentences.

Our primary position and we made this clear in the letter, is that it is not necessary to amend and I can develop that, but it may be that we should take this off the table and deal with it later.

THE CHAIRMAN: So I am not going to give you, we are not going to give you an indication as to whether that is fine or not. You are going to have to make a decision about whether you are going to apply or not and if you decide not to, you take the risk that Mr Hoskins is going to say, as he has said, "You have not pleaded it and therefore you cannot run it", and just like you, said, he has not pleaded *Magill*. So I think you just need to land on that. I do not think we are very interested in the permutations until you have decided which way you want to go, in which case you can obviously explain it.

MS DEMETRIOU: Sir, let me come back to that after the short adjournment, but can I just state our position, which is that there is no parallel between -- so if permission were needed which, as I say, I do not think it is, but if it were needed,

there is no parallel between this amendment and the type of amendment which Dr Kent has not made, because it is not a factual question. There is no prejudice to Dr Kent.

THE CHAIRMAN: I am not suggesting the answer. I am just saying the only similarity is that if it is not on the pleading and you want to run it, then you need to get it amended. I am not suggesting that I do not know whether it should be treated the same or differently. At the moment, I do not understand there is an amendment application in relation to it.

MS DEMETRIOU: Sir, let me come back to that after lunch. I just have to discuss it with my team and I will come back after lunch.

THE CHAIRMAN: Just one point on that. I mean, you said it does not arise in relation to the excessive -- unfair pricing argument and obviously there is a difference, but there was a counterfactual in that. I just want to be clear that there was a counterfactual on that and you have considered that possibility because the counterfactual, as I understand it, implies that there has been competition on the merits, as argued by the Class Representative. I may have that wrong, it seems to me that is implicit in the counterfactual, is it

not?

MS DEMETRIOU: Sir, all we are not running from unfair pricing is the particular compulsory licensing *Magill* argument. That is the only point we are not running on unfair --

THE CHAIRMAN: I understand that but to the extent that a counterfactual price -- I am just responding on the hoof here so tell me if I am all over the place, but it seems to me that to the extent that the counterfactual price implies what is said to be competition on the merits, that may also imply that there has been the ability for competition which would require the access to an alternative app store. So to the extent that that chain of logic is part of the counterfactual, you do not need to deal with *Magill* and their contents.

MS DEMETRIOU: No, so there is certainly no dispute about that. What we are saying is that one of the problems with the unfair pricing case that is run by Dr Kent is that Mr Holt, for example, uses -- the competitive benchmark that Mr Holt puts forward does not account for any compensation that would be paid to Apple for its IP rights. So we do absolutely make that point. That is a separate point.

THE CHAIRMAN: I understand. Let me try and put it a

different way, which is that it would be unfortunate if later on it becomes apparent that you are arguing that the counterfactual, which does not on its face disclose a requirement to licence, amounts to that because it is implied by the sort of comparator, for example, or by a non-infringing price. I just do not want to find that you have made this decision and that you are not going to address that without having thought that. It is up to you.

MS DEMETRIOU: Can I take that away?

THE CHAIRMAN: I am highlighting it as a further point which may or may not be taken by anyone but it would be awkward not to deal with it all at once.

MS DEMETRIOU: No, thank you very much.

THE CHAIRMAN: I am not suggesting that you are wrong at all. All I am saying is if there is a point there let us make sure we deal with that right now rather than later.

MS DEMETRIOU: Sir, I am very grateful. So let me, if I can bundle that up with the pleading point and discuss that over lunch and come back after the short adjournment.

THE CHAIRMAN: Just before you move on, I am thinking a little bit about timing. I do not know how you have -- we have taken you out of your way a bit.

MS DEMETRIOU: So I am going to be very brief now on our third thing, which is no appreciable effects which Mr Kennelly is going to, I am going to pass the baton. Also a little bit on this and then objective justification and then after lunch I will deal with unfair pricing.

THE CHAIRMAN: I am just very conscious we have got to fit the CMA in, and I think it would be fair to the CMA, Mr Gregory, I do not know if he is going to be in the room or online, but I think it would be necessary for him to start after the mid-afternoon break.

MS DEMETRIOU: That is the assumption.

THE CHAIRMAN: Effectively around about 3.30 to give him an hour.

I am conscious that you have also got to deal, I assume you are going to deal with Hitt 4 in there?

MS DEMETRIOU: Sir, yes.

THE CHAIRMAN: Just having had a little look at some of that, I anticipate that might take a little bit of time. I am just wondering how that fits into the timetable.

MS DEMETRIOU: Sir, we were absolutely intending to hand over to Mr Gregory, who I understand is going to be here in the afternoon after the shorthand

adjournment, so at say 3.30. I do not think, with the best will in the world, we have had an hour less than my learned friends, I do not think we are going to be able to deal with Hitt 4.

THE CHAIRMAN: That is what I am anticipating, so the question is, do you want to shorten the short adjournment, so we would be happy to start at half-past 1. I would prefer to do that than to run over at the end, particularly, if it involves you sitting down and Mr Gregory getting up and then you standing up again. Albeit that we could deal with Hitt 4 as sort of an isolated point but it probably is more convenient to deal with it in your submissions.

MS DEMETRIOU: That would work well for us if the Tribunal would grant us that indulgence.

THE CHAIRMAN: I think it is probably looking like it is probably the best way to get that done.

MS DEMETRIOU: Okay, thank you very much.

THE CHAIRMAN: Let us plan on that basis, I mean if you think anything different, let us know.

MS DEMETRIOU: Thank you.

Sir, on no appreciable foreclosure effects, this is the third reason why Dr Kent's allegation of an exclusive dealing abuse is wrong. Can I just

remind the Tribunal of *Streetmap*, the relevant part of *Streetmap*, so {AB3/22/24}.

Can I just remind the Tribunal of paragraphs 88 to 90. Really the key point is that a mere possibility of anticompetitive foreclosure is insufficient, and we also rely on the points at 89 and 90. We have developed those points in our skeleton argument. I am just going to give you the cross reference, at paragraph 111. It is {A1/5/39}.

The second point we make is that the real world evidence suggests that there would not be appreciably more competition in the counterfactual and we have good real world evidence in the form of the Google Play Store. What that does is it provides an example of an app transaction platform that does not contain the restrictions that Dr Kent complains about and yet, as Professor Sweeting points out in his first report, and I will just give you the reference, it is paragraph 345, reference {C3/3/163}. Despite not having the restrictions that Dr Kent complains about, over 90 per cent of all app downloads on Android devices occur through Google Play and it is common ground that Google Play charges a 30 per cent commission for downloads and in-app purchases. So the real world evidence

suggests that the restrictions that Dr Kent complains about do not give rise to any appreciable restriction of competition.

Now, Dr Singer conducts two analyses seeking to establish what Apple would charge in the counterfactual, as you know. So the first looks to comparators and the second uses theoretical models. Those will be explored in the evidence. But I just want to make two points about his evidence now so that the Tribunal is clear about what our case is.

The first is a point about the start of the counterfactual, so the temporal point that my learned friend addressed.

THE CHAIRMAN: Yes.

MS DEMETRIOU: Mr Hoskins took the Tribunal to some authorities on that. The effect of those authorities is that the counterfactual must be realistic and stripped of unlawful conduct. That is the effect of the authorities. But let us think about what that means here. So the realistic counterfactual on the facts is obviously one in which the requirements were present because they were in fact present. So Dr Kent needs to show that they should be stripped from the counterfactual prior to the claim period because they were

unlawful. But she has no pleaded case that they were unlawful before the start of the claim period.

Thinking about 2008, when the App Store was launched, Apple had a tiny share of devices markets. We say it is crystal clear that it was not dominant, even on the market as defined by Dr Kent, because of all the constraints that Dr Kent acknowledges exist would have operated with even more force at that time. Now there is no evidence before the Tribunal on the market conditions at that time or any time before the start of the claim period, and it is simply impermissible to say "Well, these requirements in the counterfactual, you have got to strip them out because they are unlawful." In circumstances where Dr Kent would struggle very hard to show that Apple was dominant in that period. So that is really the point we want to make there.

The second point in fact we have already --

DR BISHOP: Ms Demetriou, I am a little bit lost. What time period are you referring to there?

MS DEMETRIOU: So Dr Singer's primary counterfactual is that the restrictions would not have been in place from the date that the App Store was launched and his delayed counterfactual is that the restrictions are lifted at the date of the start of the claim

period in 2015.

DR BISHOP: Yes.

MS DEMETRIOU: So we are taking issue with his primary counterfactual, because that would involve -- so in order to get to the point where you are removing the restrictions from that pre-claim period time, you are having to show, and this was really Mr Hoskins' point, he was saying, "Ah well, if we can show that they are unlawful now in the claim period, then obviously they are unlawful then, so you strip them out." But we say that is not so because, because apart from anything else, of the dominance point.

DR BISHOP: Yes.

MS DEMETRIOU: They would have had to have pleaded that and that would have opened up -- this trial would have probably been a week or so longer because that would have opened up further evidence and analysis, no doubt from the experts.

DR BISHOP: Thank you.

MS DEMETRIOU: I am now going to hand back to Mr Kennelly, thank you.

Submissions by MR KENNELLY

MR KENNELLY: Thank you, so I will deal with tying and then move on to the outstanding points on the counterfactual and then objective justification.

On tying, it is common ground on the legal test that to establish whether alleged tying constitutes an abuse requires the fulfilment of four conditions, ones outlined by my learned friends. The firm must be dominant in the tying market, the tying product and tied product must be distinct. The separate demand and customers who want the tying product must be required to purchase the tied product, and finally that the tie has to lead to substantial foreclosure.

We say none of those four conditions is satisfied. Obviously our starting point is that Apple is not dominant in the market for iOS App Distribution Services, but since we are at the stage of abuse we can assume that issue has been determined. So I will move on to the second condition.

In asking whether what Dr Kent calls an iOS In-App Aftermarket Services is a separate product from what she calls the iOS App Distribution Services, the key question is consumer demand. Developers, we say, want to get their app into the hands of end users and they want to receive payment in exchange for that.

On that basis, IAP is not a separate product

from distribution from the perspective of developers, it is a continuation of a single service, which is finding a paying customer for the developer's digital content. If we think about that for a developer who wants to sell, once again a game to end users, obviously the developer first needs to make the game for which it uses Apple's tools and technologies as Ms Demetriou outlined. Next the developer needs to present the game to end users, somewhere where they can find it, and that is what Apple provides in the App Store. The discoverability and marketing functions built into that to help consumers find the games they want and provides information, as we have seen, to customers, like screenshots, descriptions, reviews.

A developer could choose to charge the customer at that point, as we saw, in which case the customer would pay £10 say for the download. Dr Kent characterises the Commission for that as payment for the distribution service. That is all the discoverability and marketing functions that we have been talking about. But a developer could, as we have seen, choose a slightly longer path to payment. It could choose to allow the end user to download the game for free but require the end user to pay

£10 if the end user wants to get further than the first level of the game or emotes or gems, or whatever it is.

In that case, Dr Kent characterises the Commission charged as something, charged for something completely different. The in-app aftermarket service, she says, is nothing more than taking payment and sorting out taxes and receipts. She characterises the Commission as payment for a narrower service than the service of allowing the app to be downloaded. We say that makes no sense. In both cases the developer has sold the game to the user for £10. In fact, the only difference in the second example is that Apple has provided something more involved. In addition to all the services we have discussed, it is effectively allowing the developer to allow the end user to try the game for free, to try before you buy, before spending money on the in-app purchase. It is an extended version of distribution and has obvious practical advantages from the perspective of developers and end users. It is not, we say, a separate product.

THE CHAIRMAN: So evidence of how the technical aspects of how this works and about the APIs and the routes to payment, does that make any difference to your

argument? Is that contested that evidence and does it make any difference to your argument?

MR KENNELLY: No, it is not contested that there were different APIs in play. We say it makes no difference to the question of substance, which is, are these separate markets or a single market, an extended version of distribution.

What does Dr Kent say? First, she says that there are stand-alone providers of the tied product waiting in the wings to step in and provide it. That is to confuse, we say, demand with supply. Paddle is the example given by Dr Kent. Paddle is not a developer. Paddle is someone who would like to free ride on what Dr Kent calls Apple's distribution service. What it wants to do is to swoop in, right at the end of the process, of the developer selling digital content and take Paddle's 10 per cent commission after Apple has done all of the hard work of finding a paying customer for the developer's app. Dr Kent's idea, to be clear, is that Apple should get paid nothing for that work and that developers would prefer this arrangement because paying Paddle 10 per cent for the tiny piece of work at the end of the process is better than paying Apple 30 per cent for the whole job.

The fact that Paddle would like to do this is not evidence of consumer demand, it is evidence that somebody may be willing to supply on those terms. Even if Dr Kent found developers who would like that arrangement, that is not evidence of consumer demand either. What it really is, if there was such evidence, would be evidence or demand for circumventing the mechanism through which Apple gets paid.

Just to look at it another way, as Ms Demetriou has explained, in the counterfactual we say even if there were third-party app marketplaces on iOS, and third-party app payments as well, Apple would still charge for its tools and technology and for the distribution service. So even if Paddle could swoop in and replace Apple for the IAP stage, Apple would still require developers, who use the App Store and then take up Paddle's services, it would still require them to pay for the tools and technology they have used and for the use of the App Store.

So the real question is where is the demand from developers for a proposition in which they pay Apple for using Apple's tools and technology and also pay Apple for having their app distributed through the App Store. Then they have to pay

someone like Paddle for the in-app transaction service on top of that?

Dr Kent has not identified any demand at all for that proposition. The reality is there is no pent up demand for different approaches to processing in-app payments. There are some developers, like Epic, who would like to avoid paying for the services they receive from Apple and there are providers, like Paddle, who would like to help them do that. Dr Kent says these are concrete examples, Epic and Microsoft, that do allow third-party payment providers to swoop in at the end of the process and deprive Epic and Microsoft of their commission. It is true that on the Epic Games store developers can have their games downloaded for free and then have someone like Paddle come in at the end to process the payment.

But, as you will hear in the evidence, Epic's evidence is that it did that for two reasons. First, because its own in-game payment processing service was very poor; and secondly, maybe more importantly, Epic wanted to encourage Apple and others to take the same approach so that Epic, as a developer, could avoid paying Apple for Apple's distribution services. In any event, there has been

almost no take up of Epic's of what seems to be a very genuine offer.

For Microsoft there is no evidence at all about the extent of take-up, and for games accounts, Microsoft did not allow this approach.

Turning then to the third condition, we say on no view are developers coerced in any way to use Apple's payment system. To show this condition is satisfied Dr Kent would need to show that developers are forced to incorporate Apple's IAP service into their apps. Like Hilti, you will recall from the case, forced its customers to take its nails whenever they purchased Hilti cartridge strips.

My learned friend Mr Hoskins cited the *Microsoft* case, where the tied product was the Windows Media Player which, as the Tribunal will recall, the PC OEMs were required to take with the Windows operating system. The product was a piece of software which the OEMs had to install into the PC whether they liked it or not.

We say this case is completely different because IAP is a service. It is not a nail cartridge or a piece of software, which the user has to take whether they want to use it or not, because it is a service developers and users do not need to

take it at all. Developers are free to use the App Store, and all of what Dr Kent calls Apple's iOS distribution services, without having anything at all to do with what Dr Kent calls Apple's in-app aftermarket services.

They can monetise their content in ways which do not depend on in-app purchases and, in fact, the vast majority choose to avoid IAP and monetise their content in other ways. You will see that when the evidence is more developed.

Developers can obtain these so-called distribution services without having to obtain the so-called in-app aftermarket services from Apple. For that reason alone, the coercion condition is not satisfied. This is not just theory, this is exactly what we have been discussing, for example, in relation to in-app purchasing. Developers are free to, as a matter of form and substance, take the alleged tying product without the alleged tied product, and the vast majority do so.

Just to come back to the point I was discussing with Mr Frazer earlier on this question of the utility of in-app advertising. If I may just give you two references. It will be developed at greater length in the evidence as to the use of ads by top

spending genre developers, {C3/8/142}; and more broadly, the significance of ad revenue to developers, {D1/1149/3}.

Dr Singer calls the monetisation, options other than IAP, a degraded or penalty option. We disagree with that but for the purpose of tying, it is irrelevant. As a matter of law, we saw in *Hilti* and *Microsoft* that the dominant undertaking was required to offer a version of the tying product that did not contain the tied product at all. Apple does that. If you want Apple distribute an app with no in-app transaction option at all, Apple will do that for you happily.

So we say for those reasons, in summary, this is not a tying case.

If I may move on, then, to objective justification, and the evidence on safety, security and privacy, some of which I foreshadowed in my opening yesterday. Before I turn to objective justification, relying in particular on safety, security and privacy, I would like to recall how the evidence on those issues demonstrates there is no exclusionary abuse in the first place. It arises in three ways.

First, the evidence on safety, security and

privacy, demonstrates how Apple competes on the merits. Just to echo what Ms Demetriou said earlier, there is no doubt that rivals in the device markets strike that balance between openness and safety and security in different ways. Apple and Google, in particular, have adopted very different structures reflecting the different way they have struck that balance. They have adopted fundamentally different models based on the way they have decided to strike that balance. The real question for the Tribunal is, is Apple's differentiation a legitimate way to compete? Because Apple's different approach, the balance it struck, is based fairly and squarely on the restrictions which are challenged in this case. We say it is obviously legitimate in an increasingly complex and dangerous online world for Apple to differentiate itself in this way. To be blunt, Dr Kent wishes to force Apple to be more like Android, and to remove that crucial differentiating factor which is so important for fostering competition, not least in device markets.

The second way in which safety, security and privacy is important is in relation to the counterfactual. Finally, thirdly, objective

justification.

I will take up the counterfactual, if I may, next. Professor Lee's evidence for Dr Kent is that if third-party app marketplaces and direct distribution by developers were allowed on the App Store, they would have the ability and incentive to offer the same or better levels of safety, security and privacy and quality as Apple offers currently. Dr Kent's case is that third-party app marketplaces and developers distributing directly have the ability and incentive, willing and able to achieve what Apple has achieved.

Just in case the Tribunal finds that surprising I would like to show you where Professor Lee says it in terms and that is in {C2/13/16}. It is paragraph 31 first. If I could ask the Tribunal just to skip to the bottom of that page 16, and the very last sentence on paragraph 31. Professor Lee says:

"In my opinion, alternative app stores/developers using direct distribution provide" -- he says in the present tense -- "the same standard of app review, including human review, as the App Store in the actual world, and would be able to provide this same standard in the counterfactual."

If you skip ahead, please, to page 25, paragraph 37 the actual world comparators and his counterfactual analysis, "show that alternative app stores and developers using direct distribution or side loading are providing ... and would be able to provide ... a comparable standard of app review to Apple through its App Store including incorporating aspects of human review."

If you go please to paragraph 84, which is on page 50 of the same report, paragraph 84 second bullet. He is not aware of any evidence that a third-party app store has deliberately adopted lower security and privacy standards than Apple, and he disagrees that other operating systems are less secure than iOS.

This, we say, is an extraordinary claim. It flies in the face of all of the evidence before the Tribunal. The Tribunal will recall what the United Kingdom's national cybersecurity centre said about third-party app marketplaces yesterday, I am not going to go back to it, regarding the fact that third-party app stores typically are characterised by their focus on user and developer freedom as opposed to the safety and privacy of users. That tells you, as I have said, the balance they have

struck. And you will recall from the report prepared for the Government, for DCMS, dealing with the extent of malware in apps on the Google Play Store and third-party app marketplaces. The Google Play Store is important because of course Google does its own app review and has no lack of resources, but still falls very far short of Apple. That, we say, is because of the balance that Google has chosen to strike between safety, privacy and security and openness and ease for development. Of course the Google Play Store is one of the stores that Dr Kent says should be allowed on to iOS.

For third-party app marketplaces, of course it is open to them to review apps before publishing them. We saw their record, very much worse than that of the Google Play Store.

To be clear, these third-party app marketplaces which Dr Kent wants to let loose on iOS, it is clear that they would have let in significantly more malware than Apple and allowed significantly more social engineering attacks, driven, we say, by their own incentives as the national cybersecurity centre said for GCHQ. Even the Google Play Store, no lack of ability, what do we infer about its incentives, because we have seen far more malware than the Apple

App Store and far less privacy protection consistently through the claim period. That is driven by commercial rational determinations driven by the striking of the balance that Google has made. So the Tribunal should be highly sceptical of Dr Kent's claim that in the counterfactual, where the requirements that challenge restrictions are removed, that third-party app marketplaces and even the Google Play Store would suddenly raise their standards to Apple's current level on safety, security and privacy.

It is telling, we say, that Dr Kent has failed to engage with the specific standards which Apple has applied, which have secured the current levels of safety, security and privacy. Particularly safety, which of course is broader than protection from malware, although as you will see in the evidence unsafe content like pornography is particularly attractive to providers of malware. Dr Kent's case is that standards of user safety will also not have deteriorated in the counterfactual.

THE CHAIRMAN: Mr Kennelly, can I just make sure I can locate this in the hierarchy of the arguments. I think you started talking about this in relation to competition on the merits, which the first point

that Ms Demetriou made, you were supplementing that.

MR KENNELLY: Yes.

THE CHAIRMAN: Are you into objective justification now?

MR KENNELLY: No, I said there were three ways this evidence works.

THE CHAIRMAN: I am a bit lost.

MR KENNELLY: I am sorry. The middle one is the counterfactual. When Ms Demetriou discussed with you the counterfactual, she was doing that in order to show whether, among other things, whether there had been an abuse in the exclusionary abuse case. In determining whether there has been an abuse, it is common ground that you need to look at what services and prices would be available in the counterfactual and this is material also to the question of quality adjusted prices.

THE CHAIRMAN: But this is the competition on the merits point, is it not? Is it not that the same point?

MR KENNELLY: Yes, they are very closely linked, yes.

THE CHAIRMAN: I had understood them, it is my fault, I am sure.

MS DEMETRIOU: I was delineating three points. There is competition on the merits, then there is *Magill* which is separate, then there is no appreciable restriction of competition, which is different from

competition on the merits.

THE CHAIRMAN: Why does privacy and security go to appreciable competition. Other than obviously, I understand the point about connection to device market.

MR KENNELLY: It is because, among other things, if in the counterfactual, privacy and security, and other considerations like that, have collapsed, then you ask what impact will that have on the extent to which you see competition in the counterfactual. Ultimately, in fact, Android is a good example of that, where notwithstanding the more open system, 90 per cent of the market share is still held by the Play Store. So there are implications for competition when one factors in these other considerations in determining how they effect competition and pricing in the counterfactual.

THE CHAIRMAN: I have not quite located that in an assessment of competition, but I am sure it will come out.

MR KENNELLY: It is in the evidence. That is how it relates to competition in a narrow sense, but we also say that in asking whether there are appreciable effects on competition, it is material to ask what kind of competition will you be seeing.

Professor Lee's evidence is there presumably to explain that the competition that would take place would have no negative impact on privacy and security.

THE CHAIRMAN: I had understood that evidence to be going to the question of benefits which obviously you are coming on to, but you are saying something different.

MR KENNELLY: I am because it is important to understand that this evidence is relevant even before you get to objective justification.

THE CHAIRMAN: I can see it is relevant in some ways, but I am not sure I can see it is relevant in the way you are saying. No doubt, that will become clear.

MR KENNELLY: Among other things, at the very least it is material to look at what has happened in Android and the extent to which, how much competition do you see and in the counterfactual what kind of competition is that and what other quality adjusted prices you would see--

THE CHAIRMAN: I can absolutely see the point about how will it change the market. I can see that. I am not sure I see beyond that, though. I do not want to distract you. I am sure it will become clear.

MR KENNELLY: The evidence I am describing to you now, of

course, is also the evidence for objective justification.

THE CHAIRMAN: I am not trying to push back on that. I understand that. I am not sure I am completely seeing it the way you are seeing it. It will come out, I am sure.

MR KENNELLY: I will develop the evidence and you will maybe get a clearer picture after we have finished with Professor Lee.

THE CHAIRMAN: Yes, I am sure.

MR KENNELLY: The important point I am making here, and as I say it is relevant for objective justification, is that the standards which Apple imposes, which have secured these levels of privacy and security are set out in its app review guidelines. I am not going to take you to those now, there is not time. They are extremely detailed and demanding. There is no suggestion that any other app marketplace has adopted standards like them. The standards are not much use unless they are enforced, and again, in the counterfactual the Tribunal needs to ask whether third-party app marketplaces and developers distributing directly have the incentive or ability to enforce standards as Apple does.

In terms of enforcement, you will hear evidence

from Mr Kosmynka. This is very important evidence because it amplifies what Mr Federighi says in his statement, about the security challenges which Apple faces, the complexity and sophistication of bad actors and what Apple has done about it. You will see in his evidence the fact that Apple has at least 500 experts devoted to app review, reviewing apps in 81 languages, split into multiple teams with detailed training in escalation, using bespoke tools for static and dynamic review and to assist in human review. In relation to the critical role of human review, Mr Kosmynka will speak to the amount of time that will be spent and hours can be spent on difficult apps even if the average is a smaller period. It is just not plausible that third-party app marketplaces have the ability to do anything like that even if they have the incentive to do it which they definitely do not. Even Google Play, with its resources, only adopted human review in 2015 and even then does not subject it to -- does not apply it to all apps.

Dr Kent's fallback, again as expressed by Professor Lee, is that even if malicious apps and social engineering attacks increase in his counterfactual, users -- users will be able to

distinguish the bad apps from the good. We say that is pure wishful thinking and it is contradicted by the evidence that we will explore with him.

Dr Kent's ultimate fallback, this is Dr Lee's alternative case, is that Apple in the counterfactual can be allowed to review and approve all the apps which are offered on iOS whether by third-party app stores or developers directly, and that Apple's own standards would be applied. So that Apple would effectively do it all, but for third-party app stores and developers distributing directly.

Here, perhaps we come to the answer to your question, sir, which is what effect would that have on competition? If Apple was doing all of that and presumably being paid for it, what effect would that have on competition in the counterfactual? You have my point that even in a more open system like Android, Google Play still has 90 per cent of the market share. But in this fallback position there would be no impact on competition, no material impact at all. Sorry and, even then, there would be worse outcomes for users because Apple would not have its full complement of tools to ensure that its current levels of security and privacy are

maintained, not at least because it would not have the information that it gets instantly through its centralised distribution network and payment network to alert it to malicious apps.

So I am going to move on then to objective justification. I will be relatively brief on this but I will carry on till --

THE CHAIRMAN: Keep going till 1 and then we will resume again at 1.30.

MR KENNELLY: This is the third way in which the security and privacy evidence is material and of course Apple bears the burden of proof. I will show you the *Google Shopping* case, I know you have been anxious to see it. I will be showing it to you for a different purpose now, but at least it will be up {AB4/27/12} page 12, paragraph 57. Paragraph 57 is just the abuse, I think the Tribunal knows what the abuse was in that case. Page 108 {AB4/27/108}, please and objective justification, just to understand what counts for objective justification. Paragraph 544, first of all, this is what Google was maintaining. It said it was demonstrating that the quality of the service that it offered had improved. Could we skip please to paragraph 547, Google made the argument that for technical reasons it could not

show results from other shopping services without damaging the quality of its search results, just to give you a flavour of what Google was arguing.

Then paragraph 551 please, we have the test:

"It is open to a dominant undertaking to provide justification ... by establishing either that its conduct is objectively necessary from a technical or commercial point of view, or that the exclusionary effect produced may be counterbalanced or outweighed by advantages in terms of efficiency that also benefit consumers."

First, we see at 552 what is included in the objective necessity test, and this is, we say, contrary to the suggestion in the claimant's skeleton that only factors external to the dominant undertaking may be taken into account, because the court said that:

"It may stem from legitimate commercial considerations, to protect against unfair competition, to take account of negotiations with customers and equally technical" -- I rely on this obviously -- "justifications linked to maintaining product or service performance or to improving performance."

Pausing there, before I move on from objective

1 necessity to efficiency gains, there is no
2 suggestion here that for objective necessity the
3 dominant undertaking must show no elimination of
4 competition. We say, of course, that competition
5 has not been eliminated, that constraints are still
6 there even if you are against me on market
7 definition, abuse and foreclosure, there are still
8 constraints which are not eliminated. Just to be
9 clear, because the point was raised by Mr Hoskins,
10 that no elimination competition is part of the
11 objective necessity test, we do not accept that.
12 THE CHAIRMAN: That is partly I think because he was
13 asking for a read across from Article 101. Is that
14 right?
15 MR KENNELLY: He was, he was relying in particular on the
16 *European Superleague* case.
17 THE CHAIRMAN: You do not accept that?
18 MR KENNELLY: No, he would have to do a bit more in
19 closing to land that point, and we do not accept
20 that that is the part of the test for objective
21 necessity. It may not matter because we do not
22 accept that competition has been eliminated. At
23 553, where there is no elimination of competition
24 test, we say we satisfy this also:
25 "As regards efficiency gains, it is for the

dominant undertaking to show that the efficiency gains are likely to counteract any likely negative effects ... and that those gains have been brought about as a result of the conduct and it is necessary for the achievement of the efficiency and does not eliminate defective competition by removing all or most existing sources."

For that second route to objective justification, it is necessary to show no elimination of competition.

That is all I want to say about the case law and it may be an appropriate point to stop.

THE CHAIRMAN: We will resume again at half-past 1.

(1.01 pm)

(Break for lunch)

(1.31 pm)

THE CHAIRMAN: Mr Kennelly?

MR KENNELLY: I am sorry, I cannot resist going back to the point you raised with me just before we finished. It is always a bit distressing when, having made my submissions, I get that look from the Tribunal.

THE CHAIRMAN: I am sure it was my fault.

MR KENNELLY: No, it does not really matter if it is your fault or not. If it has not happened, it is my

fault. The point sir, really, I will give you three highlights, really you were asking how does all this safety and privacy stuff fit, when we say that in the counterfactual there would be no appreciable effect on competition.

THE CHAIRMAN: Yes.

MR KENNELLY: I will give you three highlights and it is not limited to these. The first is closely linked to the point I was making about competition on the merits, which is if Apple is forced to be more like Android, we will be robbed of a really important differentiating factor, which is important for competition in the device markets and we also say in the transaction markets.

The second is Dr Kent says in the counterfactual there will be more competition on price, but we say where is your work on quality adjusted prices because the quality will collapse and that has not been done.

THE CHAIRMAN: That is a competition on the merits point too because that is one of the three or four focuses, is it not?

MR KENNELLY: Exactly, which is again another link. The third, these are all just safety and privacy, Ms Demetriou has got different points, but I am

talking about where the safety and privacy fit in. Then finally, if in that final counterfactual, Apple has to do app review for everybody, then who is going to pay for that and how much? Again, Dr Kent has done none of that work.

THE CHAIRMAN: That is very helpful and that does make perfect sense, thank you.

MR KENNELLY: Coming back to objective justification and focusing on objective necessity first, our case is that maintaining the highest levels of security, safety and privacy, according to Apple's guidelines, is a legitimate objective in an increasingly complex and dangerous online world where malware, and this is not disputed, and social engineering show growing sophistication and reach. It is a legitimate objective to offer a particularly secure app store. In an online world where interactions have become ever more hostile and where personal and physical dignity are often given scant regard, it is a legitimate objective to offer an app store that prioritises safety and safety according to Apple's strict values. In an online world where threats to users' privacy have also become more complex and pervasive, it is a legitimate objective to offer an app store that imposes the strictest privacy

protections for its users.

This is not to take the law into our own hands as is deprecated in *Hilti* and *Tetra Pak*. This is about offering an app store that goes beyond the bare legal and regulatory requirements. The evidence demonstrates that the challenged requirements are necessary to secure those legitimate objectives. It is difficult enough, as you will hear from Mr Kosmynka, to do so even with Apple's strict standards and policing. To dilute or remove them would leave the legitimate objective unsecured.

As regard to efficiencies, our case is that the benefits produced by the challenged requirements outweigh any harm to competition. I will not go to the figures, they are confidential, but you will have seen the average alleged annual loss per class member. That is on, just to give Mr Holt's analysis, and you will see it in -- the figures are given in Sweeting 2, footnote 331, no need to turn it up, {C3/7/88}. But looking at those figures, we say, to outweigh this alleged overcharge the challenged requirements need only provide a small fraction of the benefits that users enjoy. Professor Sweeting speaks to the value of those

benefits, again no need to turn it up, you will hear that when he gives evidence.

What does Dr Kent say in response? She says, first of all, that none of this matters and Mr Hoskins could not have been clearer, because the effect of the restrictions is to eliminate competition for the distribution of native iOS Apps or the provision of what she calls her in-app aftermarket services. But even if, we say, even if the competitive constraints that we identify, the point I made just before we broke, are insufficient to rebut Dr Kent's case on market definition, on dominance and on foreclosure, they have not been eliminated and for that I rely on the submissions in the evidence that I outlined earlier. Those constraints operate even if you are not with me on the prior steps.

This argument about elimination also illustrates the absurd consequences of Dr Kent's market definitions. Those markets are defined so narrowly that competition has been eliminated in its entirety and that means the Tribunal is compelled to ignore the enormous efficiencies, benefits and procompetitive effects that these challenged requirements have created. To be absolutely clear

about this, when Professor Bishop raised with my learned friend Mr Hoskins, "Well where does the (I think the word was compensation) for consumers fit in?" Mr Hoskins says, "Oh do not worry, it will come in objective justification, that's where it has its role." But not so, when we got to that stage Mr Hoskins said, "Actually, because competition is eliminated entirely on these very narrow markets, all of that evidence about safety, privacy and security is irrelevant, it has no home." On his argument, competition law compels you to allow open season on iOS without regard for privacy, security and safety, because those considerations cannot serve to justify any restrictions at all because competition is eliminated in those markets.

Now, the second point Dr Kent makes about objective necessity is that there should be a requirement that the impugned conduct is essential to the survival of the main operation of the dominant undertaking. That begs the question as to what is Apple's main operation for which its integrated and centralised approach is necessary? For that, can I ask you to turn up the *CEAHR* case that we relied on in our skeleton. Mr Hoskins, my learned friends skipped over this rather quickly,

{AB4/23/1}. Now just to summarise, this was a complaint to the European Commission which was rejected and the rejection was appealed. It is the Article 101 findings on objective necessity which are of interest, and if you go please to paragraph 60, which is on page 18, {AB4/23/18}. You will see what the Commission said dealing with objective justification. Just to be clear that the restriction was that prestigious Swiss watch manufacturers restricted the ability of watch repairers to get spare parts to allow them to repair the luxury watches and the question was, was that a restriction -- restrictions on competition, could it be justified? At paragraph 60, you will see the Commission's argument:

"Those systems, those restrictions were justified by the objectives put forward by the Swiss watch manufacturers, namely, the need to take account of the increased complexity of the watch models, the preservation of brand image, the maintenance" -- and I rely on this -- "of high and uniform quality repair services and the prevention of counterfeiting."

If you go to paragraph 65, you will see the court rejected the idea that preserving brand image

alone would do, but then we see the critical paragraph 66 on page 19:

"It ... follows that ... although preserving a brand image cannot justify a restriction of competition by the establishment of a selective repair system, the objective of preserving the quality of products and ensuring their proper use may, in itself, justify ... a restriction."

This is dealing with objective necessity, so the Swiss watch brands could justify their refusal to supply spare parts to these independent repairers on grounds that they sought to preserve the high quality of their products and ensure their proper use.

THE CHAIRMAN: So this is not a *Metro* case.

MR KENNELLY: Sorry?

THE CHAIRMAN: This is not a *Metro* case?

MR KENNELLY: No.

THE CHAIRMAN: It is not because it is a distribution arrangement. I mean, there is a reference to *Pierre Fabre*, is there not?

MR KENNELLY: *Pierre Fabre*, yes, selective distribution cases.

THE CHAIRMAN: Yes, so the question, I think is, is this an application of objective justification, or is it

actually just the application of that line of authority. I think you are telling me it is the latter, are you?

MR KENNELLY: Sorry, if you go back to paragraph 53 on page 17. There you see the reference to *Metro*, which is the authority that these distribution networks, which are restrictive, can be justified where they are necessary to preserve the quality and ensure the proper use.

THE CHAIRMAN: Yes.

MR KENNELLY: But the basis for this lies not in Article 101(3), but in justification for the prior stage --

THE CHAIRMAN: I understand, yes.

MR KENNELLY: Which is what is analogous to objective necessity in Article 102.

THE CHAIRMAN: You are taking the justification that comes from the *Metro* line and saying that it is helpful in understanding how it works here.

MR KENNELLY: Precisely, because this question of main operation. So the question of what is Apple's main operation, what is Apple's main operation, that is the question that Dr Kent tells us we have to ask. We do not accept that, but if we have to ask that question, we say, by analogy with these watch manufacturers, it is the design, manufacture and

sale of integrated devices, the operating system and the App Store, not just any device manufacturing business. Because if main operation meant any device manufacturing business, then the court here in this judgment would have said "Well, you can only justify your restrictions if they are necessary or essential to operate all watch manufacturing businesses", but there was a particular recognition given to the fact these were of a particular quality for which restrictions were needed.

So if we have to look at what is the main operation, Apple's entire business model is that it is an integrated and centralised model and that is what ensures the high quality of its ecosystem. The challenged requirements are a core element of that product, its design and its competitive offering.

In the counterfactual, Apple would have to change that centralised approach in a fundamental way. It would have to develop an operation which is by definition fundamentally different from its main operation. Just before I move on to my final point on *Hilti* and *Tetra Pak*, there may be an echo here of what main operation means in the interchange cases. My learned friend, Mr Hoskins took you to this when he showed you the Sainsbury's case in the Court of

Appeal, when Visa and Mastercard argued about objective necessity there, and the Court said, "Well these restrictions are not necessary for the survival of your main operation", the main operation being a four party payment scheme. But of course, Amex, in that case, was not treated as having the same main operation as Visa and Mastercard, it was a three party scheme, was fundamentally different from a four party scheme, but it did offer card services to merchants and users. From a user and from a merchant facing perspective, there were strong similarities, but there was a fundamental difference in the model that they had adopted.

Similarly here, between Android and Apple there was a fundamental difference in what we would classify is, if you need to look at main operation, in the main operation of how these businesses operate.

THE CHAIRMAN: Just so I am clear about what you are saying here. So you are saying that when you are thinking about what the main operation is we effectively have to think about an operation of the sort which is integrated and has the features that you have been explaining to us about, whatever it happens to be, security, privacy, centralised. You

are saying that is the standard we should be looking at for whether it is necessary for that, rather than just whether Apple can maintain a manufacturing platform.

MR KENNELLY: Exactly, exactly. It may be said that is rather circular, you are saying the thing that you are seeking to defend is the main operation, but you do have to look at the difference between Android and Apple quite closely. If one sees the differences, they are fundamental and that fundamental difference is what is Apple's main operation for these purposes.

THE CHAIRMAN: Quite a lot of things seem to be quite circular in this case, as far as I can tell.

MR KENNELLY: The arguments, often evidence is being recycled for different arguments but the point is a very important one, and what distinguishes Apple should not be lightly thrown away as Dr Kent would have us do.

Finally, *Hilti* and *Tetra Pak*. In those cases, upon which Dr Kent places reliance, the dominant undertaking sought to justify restrictions on the grounds that the excluded products threatened public health and, in fact, even legal requirements. The court said, "Although in principle public health and

safety and other public interests can be a basis for exclusionary behaviour, the law cannot be taken into the dominant undertaking's hands, and they should be expected to have recourse to regulators if they have a public health or safety concern."

Just two points about *Hilti* and *Tetra Pak*. Even on their face, they are reasoned on the basis of an assumption that it was possible for laws and regulations to ensure effectively that consumers could be kept safe from dangerous products. That is why when you look at those cases, there is real scepticism about the claims of the dominant undertakings in the *Hilti* and *Tetra Pak* when they could very easily have complained to regulators who could have taken action.

Our context is far more complicated. It is simply implausible that a catalogue of criminal offences or possible regulatory requirements during the claim period could ever have produced a sufficient deterrent to protect UK consumers from malicious online actors worldwide. As a second and final difference I want to draw to your attention, Apple's concern, as you have seen in the evidence, is not simply that a user on his/her device will be harmed by a particular malware that he or she has

1 downloaded, or social engineering. It is the risk
2 that in a decentralised app distribution system,
3 users come to harm because of bad apps downloaded by
4 other people, and that the harm spreads so widely
5 and silently that calling a public authority, and
6 who would one call, is just unrealistic. So the
7 analogy with *Hilti* and *Tetra Pak*, we say, is
8 misplaced.
9 I will hand over, if I may, at that point to
10 Ms Demetriou.
11 Submissions by MS DEMETRIOU
12 MS DEMETRIOU: Thank you, sir. I am going to now address
13 the unfair pricing allegation. We say that
14 Dr Kent's case on unfair pricing is flawed for two
15 overarching reasons. I will summarise the two
16 reasons first and then take the Tribunal briefly
17 back to some of the key authorities and then develop
18 our submissions in so far as I have time. I am
19 hoping to convey the gist of our case in opening and
20 obviously you will hear evidence on it too.
21 The first overarching submission is that a cost
22 base analysis is unsuitable as a methodology for
23 determining whether Apple's commission is abusive,
24 yet the bedrock of Dr Kent's case is the
25 profitability analysis conducted by Mr Dudney which

is then adopted by Mr Holt. The reason that it is unsuitable is that for some products, including this one, the costs of producing them are uninformative as to their value. The value of the product to the purchaser may far exceed the amount it cost to produce it.

Just thinking about, for example, taking an analogy, so last year, Magritte's painting "L'empire des lumieres" was sold in New York, it was the highest selling painting last year and it was sold at auction by Christie's for over $121 million. Now it is obviously meaningless when thinking about whether that price is fair or unfair to be enquiring about the cost of oil paints and the costs of the canvas or the costs of Magritte's labour back in 1954 when he painted it. The same is true of intangible and innovative products like Apple's.

There is a further point here too. For intangible products, like transactions on the app store the distribution of apps, the product can be replicated infinite number of times without any material increase in costs. So if a costs based approach were appropriate, it would mean that a particular percentage commission might be fair if the product were not very successful, but would then

become unfair if it were hugely successful, benefitting developers who were thereby able to realise enormous value. We say that that is obviously nonsensical.

The true position is that the innovator is entitled to be paid fair value for each and every use of its intangible product or service and that means that the more the product or service is used, the greater the profit that the innovator earns. For an intangible product that is extremely popular the revenues can end up leaving costs very far behind. We say that there is nothing wrong with that. The aggregate value created for customers may be even greater still. As we will see in the case law, competition law understands this and the courts have warned against carrying out this kind of profitability exercise in relation to intangible products.

So we say that it is surprising that Dr Kent should have embarked on this exercise for the App Store as though it were no different from a manufacturer of generic medicines, for example. To be clear, we are not saying that Mr Dudney's profitability analysis is inadmissible. Of course we are not saying that. But if you are, contrary to

what I have just said, going to, as a Class Representative, start with an unfair pricing assessment for this kind of product by looking at costs and doing what Mr Dudney has done, then we say it is absolutely essential that a proper assessment of economic value to the purchaser is then carried out.

The short point that we make here is that Dr Kent has simply not sought to address this to any meaningful extent. The only part of Mr Holt's evidence, of his analysis, which even attempts to assess demand side value, is his comparators analysis, that is the only thing we have. The problem with that is that it fails to do so adequately because the premise for it, as he says himself, so this is not disputed, is that the value he accounts for is only the value in the narrow distribution and payment processing services. That was the proposition one I started with yesterday.

Now, Mr Armitage made the surprising submission that it is an abuse of process for us to argue at this trial that a cost based analysis is inappropriate to establish unfair pricing on the facts of this case. We say it is, with respect, not only surprising, but a hopeless submission. It is

telling, we say, that it was Dr Kent's first argument. In its judgment -- in the Tribunal's judgment refusing Apple's strike-out application, the Tribunal did not find that Apple was wrong to say that economic value needed to be accounted for. On the contrary, it held that economic value does need to be accounted for, but declined to strike-out Dr Kent's case or grant reverse summary judgment in favour of Apple, because the Tribunal took the view that Mr Holt could address economic value in his evidence for this trial. That is what the judgment of the Tribunal did, with respect.

Now, we are not, as I say, seeking to argue Mr Dudney's profitability analysis is inadmissible in any way. We are seeking to establish that it is inappropriate and uninformative on the facts of this case. The very premise of the Tribunal's judgment on the strike-out application was to leave the question of whether Dr Kent's analysis is appropriate on the facts, to this trial. So the idea that we are now precluded from saying, well, a cost based analysis is uninformative, is simply nonsense.

The second overarching submission is that the profitability analysis that Mr Dudney and then

Mr Holt have carried out is uninformative, and that is for a number of reasons which I am going to come to in due course, but I want to go briefly back to the case law. Could we go back to *Flynn* in the Court of Appeal, please. So that is {AB3/37}. I am just going to go back to a few paragraphs in this but before I do so, again I want to emphasise that this case was about a generic pharmaceutical product, *Phenytoin*, that had been developed in the 1930s and was without any patent protection, and where the CMA had found that there was no innovation. So really the opposite end of the spectrum to the kind of product we have in the present case, and the kind of case where it plainly was meaningful to look at the cost of production.

Mr Armitage took you to the court's analysis of *United Brands* and I just want to emphasise a few key points. If we go to page 19, please, paragraph 62 at the bottom of the page. What the Court of Appeal is saying there is that Cost-Plus is only one method of determining whether a price is excessive. So it is not mandatory, it is one method. If the Cost-Plus methodology is going to be used, then it is necessary to go on to examine whether the price is also unfair in itself or by reference to

competing products. So in other words, the two-limb test applies if the Cost-Plus approach is being used. But then if we go over the page to paragraph 63, at the top of the next page, the court there explains that there are other economic ways of deciding whether a price is unfair. Our essential submission is that what way is appropriate will depend significantly on the type of product, as I have said. You then have the court surveying some of the key cases. These cases, or some of them, establish that the facts of a particular case may mean that it is inappropriate to conduct a cost based analysis. If we look at page 24, I just ask you to note what the court says at paragraph 78, when looking at the *Latvian Copyright* case. So it is a few lines down:

"This was not a case involving a Cost-Plus analysis since in cases involving intangible property, such as copyright, it is recognised that such an analysis might be artificial."

I will come back to that.

Then going on, please, to page 31, we have paragraph 97. Mr Armitage took you to this, but we see at (iii) and (iv), really the point I was just endeavouring to make, being made by the Court of

Appeal quite clearly that there are different methods that can be used and which is appropriate depends on the facts and circumstances of the case.

Now, I want to take you next to the Court of Appeal's judgment in *Attheraces*, and you are familiar with it because Apple did take you to it in the strike-out case. I will take it quite shortly. But it is at, this is the same authorities bundle, tab 9, {AB3/9}, and the Tribunal will recall, I think, the essential facts of the case, which concern the provision of pre-race data owned by the British Horse Racing Board provisioned to *Attheraces* (ATR).

We can take it, I think, for present purposes, from the top of page 27, {AB3/9/27}, and you can see that the analysis begins at that point. We read, you can read paragraph 152 to yourselves. Here as well what the Tribunal is looking at is the relationship between price and economic value of the product supplied. We then have a summary of what Etherton J (as he then was) had found in the trial below. He had, Etherton J said that he accepted that it was necessary to consider the economic value of the pre-race data, but if we actually look at 155-156, what we see is that he did not consider the

demand side value. Instead, he took the view that the value of the product was reflected in what he called the competitive price, which he established by reference to the cost of compiling the database plus a reasonable rate of return. Pausing there, implicitly, what he seems to have had in mind when he called that a competitive price is a counterfactual market in which multiple competitors were free to spend £5 million building their own database containing the information about BHB's horse races, and the idea is that if multiple firms were free to create the same dataset and sell it on the market, the price would come down to a reasonable return on the cost of producing it.

As the Tribunal will see during the evidence in this trial, this is essentially the view that Mr Holt has taken as to the nature of the correct enquiry.

Then if we go to page 32, please we see the court considering economic value, and you have at the top of the page the BHB's submission at paragraph 186 and Mr Roth for the BHB argued that the judge below had not given any separate analysis of economic value other than the competitive price defined in terms of the supply side. So he had not

looked at the demand side. Then at 189 you can see an elaboration of the BHB's argument which is analogous to our argument in the present case, that economic value is a different concept from cost as it reflects revenue earning potential to the person who acquires it. That is really what we say, that one needs to look at the revenue earning potential in the hands of the developers, of the enormous value that Apple confers on developers.

Then if we go to page 33 at 191:

"The BHB", and this is still their argument, "says that even on a competitive price approach it would be wrong to find it was cost-plus."

Then the court's conclusions start at the bottom of page 34 and if we can take it from paragraph 203, we can see that the court agreed with the BHB's submissions and could we go over the page, please. Could I just ask the Tribunal to read to yourselves paragraphs 204-206.

Then in 207 we see in the third sentence particularly that the Court of Appeal here reaches the same -- obviously before the Court of Appeal in *Flynn*, but reaches the same conclusion, that it is not necessary to adopt a cost-based approach.

Then if we look at page 36, please. Paragraph

212, you see the court there reflecting the BHB's central contention that there is no reason why the economic value of the product should not be its value to the purchaser rather than Cost-Plus.

Then 213, the court notes the Commission's decisions in *Scandlines*, which we also rely on. I am not going to have time to take you back to it, but I think you will recall the basic facts, and was endorsing the Commission's approach in that case.

Then if we look at paragraph 214:

"Economic theory recognises the relevance of externalities to price. The judge rejected BHB's argument that the benefit of the system to overseas bookmakers was a relevant externality. But it was incontestable that the overseas bookmakers were paying ATR, in a competitive market, amounts which afforded it a handsome profit which it wanted, so far as possible, to keep. The facts found by the judge do not suggest that anybody is going to go out of business as a result of the alleged abuse of dominant position. Despite its elaborate legal and economic arguments and the high levels of moral indignation, the case is about who is going to get their hands on ATR's revenues from overseas bookmakers. There is no need to classify the

benefit derived by the bookmakers from the deployment of part of BHB's products as a 'positive externality' in order to recognise that it has a bearing on whether their pricing is excessive."

Then can we just go on to the next page and looking at the first part of 215:

"This said, we accept that there is moral force in ATR's position. ATR adds value (in the form of pictures of the races) to the pre-race data and has the task of collecting overseas bookmakers, payments. It is taking all the risks and as the judge found will have to absorb most or all of the costs while BHB seeks to take half of what they make."

Pausing there, in that case, all that the BHB provided was data, nothing else, and these were data that the BHB had to produce for its own purposes anyway. It was not doing anything additional for ATR. There were no IP rights, that is a point we get from earlier in the judgment, in the data in any event. So all the real work in ATR's venture including all the commercial risk, was borne by *Attheraces*, yet the court concluded that a fifty-fifty split was not unfair.

The present case, our case, is stronger than

this because it is not the case that developers take all the risk. As I have submitted, and as the Tribunal will see during the course of the trial, the developments of apps for iOS is in the nature of a joint enterprise between Apple and app developers.

Just looking at the last sentence of this paragraph, there is little, if any, evidence that competition in the market is being distorted by the demands made by BHB upon ATR. We say the same here. No evidence that competition between developers is being distorted in any way as a result of Apple's commission.

Then looking at 216, or can I just ask the Tribunal to read to yourselves paragraph 216, please. This is an interesting paragraph because Mr Hollander's submission, which was rejected by the Court of Appeal, was essentially the point being made by my learned friends in this case. So by referring to, by putting forward a profitability analysis, they seem to be saying whatever the demand side value, so be it if developers are earning millions, and being sold for billions as a result of having access to Apple's tools and technology, it does not matter. Apple is constrained in what it can charge and the rest of the profits lie with the

developers. That seems to be the implications of their case. But the court rejected that and accepted Mr Roth's (as he then was) submission for the BHB. In other words, if the value of the product was a high one, then the supplier could raise his prices to reflect it. We see the last sentence of 217 makes the same point. The conclusion at 218:

"In holding that the economic value of the pre-race data was the cost of compilation plus a reasonable return, the judge took a too narrow a view in Article 82. In particular he was wrong to reject BHB's contention on the relevance of the value of the pre-race data to ATR in determining the economic value of the pre-race data and whether the charges specified by BHB were excessive and unfair."

That is, so we do rely on what the Court of Appeal says in this case, and we say that the reasoning applies with particular force in the present case. I am not going to take you to *Scandlines* because you will recall it and just in view of the time.

The other cases, of course, the Tribunal will also recall, and I am not going to take you to these cases in view of the time either, but we have

addressed them in our skeleton. The Collecting Society cases, including the *Latvian Copyright* case, and in those cases a Cost-Plus methodology was not applied at all because it was unsuitable given the nature of the product. Pausing here, the reason why nobody does a Cost-Plus analysis in these copyright cases is not because it is impossible to estimate the costs of producing the music, of course it is possible and we know that the costs are trivial, musical instruments, studio recording time and the time of the musicians. The costs of producing many famous songs would have been really trivial. But the reason you do not carry out a Cost-Plus analysis is that the real value of music is intangible and impossible to measure other than by reference to what people are prepared to pay for it. The same is true with software.

The value of Apple's code does not depend on how long it takes to write. The value is in what the code can do and what it enables others, like developers, to do. A brilliant idea can create huge amounts of value even if it takes a moment's flash of inspiration.

If you just bear with me for a moment because I am trying to shorten what I was going to say. Just

coming back, just to make one further point in relation to *Attheraces* and *Scandlines*. They are significant because, aside from the reasons I have given, also because they show in this way that the approach taken by Mr Holt and Dr Kent is wrong, so you do not assess a fair price for pre-race data by imagining a world in which there are multiple suppliers able to supply reliable pre-race data, that was the approach of Etherton J. Equally, in *Scandlines* you do not assess a fair price for access to a port by imagining a world in which there are multiple similar ports sitting right next to each other in the same desirable location. Instead you look at the value that customers actually derive from the product or service they are purchasing, and ask whether that is consonant with what they are paying.

Drawing together my submissions so far, we say that as in the copyright cases and *Attheraces*, the product in this case is an intangible product, and we are a much stronger case than *Attheraces* for the reasons I have given, it is an innovative product protected by extensive intellectual property rights. What that means is that a comparison of the price of the product with the cost of producing it is an

unsuitable method by which to test the fairness of the price just like with the Magritte painting. It does not tell you anything really about the value of the product. It has a value to the user that bears no relation to the cost of producing it. It is really disconnected from it.

The further point on this, I think we can see from Professor Hitt's second report, if we go to {C3/4/219} at paragraph 395. Can I just ask you to read paragraph 395, please, this is the point about the fixed costs that I summarised a few moments ago.

THE CHAIRMAN: And over the page?

MS DEMETRIOU: If we go over the page as well what he says at 396 is also important, because this feature of the App Store that value increases with further use without much corresponding increase in cost is actually also true of apps. If you look at the confidential figures, you can see that just the top three developers, you can see what they have brought in just on the App Store just in the UK. Their global revenues of course from the App Store are obviously much higher, and again higher when you take into account in-app advertising revenues that the developers earn. So their billings obviously bear no relation at all to the cost of developing

their apps. Again, that would be a meaningless comparison. The reason why that is important to our case, thinking about Apple, is because it is an even more acute version of the issue that I showed you that was discussed by the Court of Appeal in *Attheraces*, where the court said somebody is going to be earning these revenues that bear no relation to cost, so why is it okay for developers to earn the revenues that bear no relation to costs, but not okay for Apple?

Really, this comes back to the point about the supermarket where the Court of Appeal rejected Mr Hollander's submission, where he said no matter what the vast earnings as a result of this data, the supplier is just limited to some fee that bears a relation to cost, but then the supermarket can charge what it wants.

DR BISHOP: Ms Demetriou, a tiny point. I am looking at paragraph 396 but I have forgotten whose report this is.

MS DEMETRIOU: This is Professor Hitt's second report, Sir.

THE CHAIRMAN: Can I ask you, you do not unless I have missed something, you are not saying what you think economic value is. You do not set out to carry out

that exercise. Obviously we have some information, like the one you have just indicated here, that you say suggests the economic value to developers is very large, and there are no doubt some bits of evidence that suggests it is substantial for the consumers. There is no criticism. Just to be absolutely clear, you are not in that business. You are not intending to suggest to us that the economic value can be dealt with in a particular way, or should be analysed in a particular way?

MS DEMETRIOU: Sir, we are saying that it is essential, in order to establish an unfair pricing case, it is essential to addressed demand side value and it has not been.

THE CHAIRMAN: That is a burden point.

MS DEMETRIOU: That is a burden point, but it is an important point, but it is an important one.

THE CHAIRMAN: I just want to be clear that is where we are.

MS DEMETRIOU: It is not the case that Apple has adduced no evidence of economic value because we can see in Professor Hitt's report, and there are further details about this in his evidence, he gives figures as to the revenues that developers have earned from the App Store, so that has been put in evidence by

us.

THE CHAIRMAN: I have seen that, but that is a little bit different from -- well I do not even think you set out a methodology by which one would do it. Again, no criticism I just want to be clear that that is not your case. You are not suggesting that is there a way you could do it, let alone what the answer would be.

MS DEMETRIOU: We are saying the methodology of course of Dr Kent is inapposite. What we are saying, standing back, if you are asking me how would a Class Representative go about establishing unfair pricing.

THE CHAIRMAN: I am not doing that. I just want to be clear about where your case is and my understanding that you are not embarking on any positive case in relation to this.

MS DEMETRIOU: We are to the extent we have put in evidence... data as to the value on the demand side so that needs to be addressed.

THE CHAIRMAN: I understand that.

MS DEMETRIOU: We are not saying this is the figure.

THE CHAIRMAN: You are not even necessarily saying how you go about doing it.

MS DEMETRIOU: That's right, sir, but standing back we say the Class Representative has come nowhere near

establishing a case of unfair pricing. Can I just take you to some headline figures of why we say that is.

THE CHAIRMAN: I am happy for you to do that, but I want to stick with this for just a minute. I do understand you to say that there is no reason to suggest that 30 per cent is not a competitive price, but as I understand it, you are not saying that there is any science behind the 30 per cent that provides, if you like, a justification for the benefit, because, as I understand it, it was set fairly arbitrarily in 2009 and so much has changed and it would be quite difficult I think to make that connection.

MS DEMETRIOU: Sir, you are quite right to say that we are not seeking to identify the price above which a commission would be unfair. So we are not doing that, but what we are doing is saying we are establishing that Apple's commission, the 30 per cent commission, is fair. So we do have evidence to establish that.

THE CHAIRMAN: Because you say there is plenty of evidence of very significant consumer value.

MS DEMETRIOU: Amongst other things because also 30 per cent is less than other people charge.

THE CHAIRMAN: The comparators as well.

MS DEMETRIOU: Exactly.

THE CHAIRMAN: There is also this business of the aggregation of the different services and the comparisons as well.

MS DEMETRIOU: Exactly.

THE CHAIRMAN: There is a complicating factor in this case in the 30 per cent, which was set without reference to anything in particular, which was being charged on a small number of developers and paid by a small number of users, you are being paid for a whole lot of different things, some of which go back to 2008 and involve innovation, and so on, and some which are today the costs of actually just running an app store. So it is quite a difficult landscape to get your head around, is it not?

MS DEMETRIOU: Can I just pick up one point, where you say set without any particular reference to anything in 2008, can I show you some of Mr Schiller's evidence in the Australian trial when he was cross-examined. I think it might be useful just to show you that briefly.

THE CHAIRMAN: I do not want to take you out of your way. I am conscious of the time, if that is going to come out at some point.

MS DEMETRIOU: It is a convenient time. If we can go to {G2/18/82}. It is really, I am not going to read it out. Could you just look at, read to yourselves from line 25.

MR WARD: Sir, sorry to interrupt. There is obviously some concern that Mr Schiller's cross-examination in Australia is essentially being relied on by Ms Demetriou as primary evidence. He has given a 230-odd paragraph statement in this case. The transcripts are in the bundle. No question. We are not saying I think they are somehow inadmissible, but hope it is not going to be said that anything Mr Schiller said in Australia that is not challenged in these proceedings is somehow therefore accepted or something of the kind.

THE CHAIRMAN: I think Ms Demetriou is responding to a question I asked.

MR WARD: She referred to this yesterday as well, I noticed, unsolicited.

THE CHAIRMAN: As I understand the exercise we are going through at the moment, I have asked Ms Demetriou a question, which I have put a proposition which she say she does not think is right. She has given me an indication of that. I rather suspect that is something Mr Schiller is going to be cross-examined

on.

MR WARD: He will certainly be cross-examined on his witness statement in these proceedings.

THE CHAIRMAN: In which he does, I think, talk about the setting of the Commission in 2008.

MR WARD: He does indeed. I put a marker down now that if it is going to be Apple's case in closing that we failed to challenge something he said in Australia rather than what is in his proof in these proceedings, they really need to say so. We can fight that out.

THE CHAIRMAN: It is a marker.

MS DEMETRIOU: I think we should pick this up at a different point because I do think that if this is something that Mr Ward wants to dispute, he ought to put to it Mr Schiller, because there are no contemporaneous documents and this is what he said in the Australian Proceedings. I am not trawling through the transcript.

MR WARD: That is a separate point.

MS DEMETRIOU: We can deal with it separately.

THE CHAIRMAN: I think let us park it for now. We DO NOT need to go down this rabbit hole. Maybe there is a rabbit hole we need to go down, but I do not want to go down it now.

MS DEMETRIOU: So you have any point about the gap in Dr Kent's case. It is the same gap that we identified at our strike-out application and we say that she has failed to fix it. Now, Dr Kent fails to engage at all with the enormous revenues made by developers through the App Store, and I have shown the Tribunal some of the figures in Professor Hitt's second report. Most of these revenues are not subject to commission at all, yet they are obtained through using Apple's tools and technology and the iOS ecosystem. So you have our key point.

Now what is Dr Kent's response to this? You heard my learned friend's submissions yesterday. Aside from trying to argue that it is somehow an abuse of process for Apple to make these submissions, my learned friends made two main points. The first was to invoke the willingness to pay fallacy, which you may have noticed is something of a mantra for Dr Kent. All this is saying is that the court should not necessarily assume that the price developers pay Apple corresponds to what the product is worth. But that proposition, it cannot always be the case that what developers are willing to pay does not correspond to what the product is worth because if that were right, then every

dominant undertaking would be charging an unfair price.

The argument is entirely negative. So it is saying, "Be cautious, Tribunal, not to equate what is being paid with economic value", but it is not actually grappling positively with the economic value issue.

The second point that my learned friends made was to say that it is for Apple and not Dr Kent to justify the price it charges on the basis that it accords with demand side value. You will recall that Mr Armitage sought to argue that the evidential burden shifts to Apple because the evidence is in its possession. Again this is, with respect, nonsense. The burden of proof lies squarely on Dr Kent to show that there is no reasonable proportion between the Commission and the economic value of Apple's product. In all of the many excessive pricing authorities that my learned friend, Mr Armitage, took you to, not one establishes the proposition that he is seeking to persuade the Tribunal to accept.

What he did do was try to draw an analogy with pass-on and he referred the Tribunal to Sainsbury's in the Supreme Court. But that analogy is

inapposite. In that case the Supreme Court had already found that an overcharge would prima facie establish loss on the part of the claimants. The card schemes then sought to rebut this with the defence of pass-on. The Supreme Court held that as the evidence was exclusively in the hands of the merchant claimants and concerned the recovery of their costs through their own businesses, within their own businesses, they had a heavy evidential burden. So they had to produce the evidence.

Contrast the position here. It is not the case here that this evidence is exclusively in the hands of Apple. We are talking about demand side value, i.e. value to developers. That is not in Apple's hands because it is information pertaining to developers. It was open to Dr Kent to seek disclosure from developers in order to make a case on this, but she has just ignored the issue.

We go further than that because we say even where one is in a case concerning pass-on or mitigation of loss, so not this case, the idea of a heavy evidential burden has limits. Can I just show you the Court of Appeal in *Stellantis*, so {AB3/46/16}. In fact, it is the next page. Can I ask you to read paragraph 53 from the sentence, "The

reference to the heavy 'evidential' burden)".

So it is a description of the burden that disclosure would impose, were it to be ordered, but it is not an indication that the legal burden of proof shifts once the Defendants has raised a point. There has been no suggestion in this case that Apple has failed at all to give disclosure on the question of economic value, so it is not the case that Dr Kent has sought disclosure from Apple and then said, "Apple has failed to discharge its evidential burden." Of course, lack of proportion with economic value is at the heart of the alleged infringements. So it is obviously not right that a Class Representative can simply assert unfair pricing and then say, "The burden now shifts to the Defendants to disprove it."

So that is the first overarching submission. I will be much quicker with the second one, which relates to profitability because this really will be tested in more detail in the evidence, but we say there are major flaws with the profitability analysis. Can I just identify some key ones, so that the Tribunal has them mind. The first point I wish to make is this. If we can turn to Mr Holt's third report, {C2/10/63} and could you look at

paragraph 145. This is in the profitability section of Mr Holt's report, so we are looking at Limb 1. He is looking here at comparing a firm's ROCE with its WACC, and he says that:

"In a market characterised by effective competition, any excess returns above the WACC would be expected to be eroded over time."

That is really the premise for Dr Kent using the profitability analysis to establish excessive pricing. However, what Mr Holt then accepts as a result of his comparator analysis, as Mr Ward said in his submissions, is that a commission in the range of 10-20 per cent with 15 per cent as the central estimate is a competitive commission. Now if Apple charged a 15 per cent commission, which is what Mr Holt says would be a competitive commission, Mr Dudney says that Apple's ROCE would still have been 257 per cent, which is obviously many times larger than Apple's WACC.

MR WARD: Are these figures now non-confidential? I was careful not to read any yesterday.

MS DEMETRIOU: They are not marked confidential in the report. I have been quite careful about that but if Mr Ward thinks I am saying anything that is marked confidential --

MR WARD: It is your confidentiality.

MS DEMETRIOU: It is not marked confidential.

Now Mr Dudney says that Apple's WACC is around 10 per cent. So he says, taking the 15 per cent central estimate, Mr Dudney says that Apple's ROCE would have been 257 per cent. If Apple charged 20 per cent, still in Mr Holt's competitive range, then its ROCE would have been even higher and essentially indistinguishable from its actual levels. What this means is that whatever the position may be for other markets like generic pharmaceuticals, Mr Holt accepts for this market, that a competitive price can produce a ROCE that is very, very far in excess of WACC. That was a point indeed that Mr Ward sought to pray in aid during his opening submissions. He says that Mr Holt recognises that it is legitimate for Apple to earn many multiples of its WACC. But the problem with that position is that it acknowledges a complete disconnect between the profitability analysis and the question that the Tribunal has to answer, is the Commission unfair? Because if a ROCE of 200 or 300 per cent is okay, why is a ROCE of 400 per cent abusive? It is completely untethered from the question of costs.

Where this all leads to is that Mr Holt's conclusion rests in reality on his comparator analysis, which is deficient for the reasons I have already given, because it does not take account properly of economic value.

The second point that I just wish to flag at this stage is that the profitability analysis depends on allocating costs to the App Store, which you have the gist of our submissions on that, we say that that is a meaningless exercise because the product is an integrated one. That will no doubt be explored in the evidence. The third point I wish to make is that Mr Dudney seeks to allocate cost to the App Store in proportion to the revenues achieved by the App Store, but it is a particularly unsuitable approach in this context because Mr Dudney does not include in the revenues for the App Store any of the vast revenues that are achieved by apps which are free and which are monetised through advertising. That includes the vast majority of activity on the App Store and some very large developers such as Meta, Facebook and Instagram and Google. So the consequence of this approach is that Mr Dudney does not allocate any costs or assets to the App Store in respect to the vast majority of the activity on it.

Further, because of the revenues that Apple collects on the App Store are so modest, reflecting only a small fraction of the value that Apple creates, a revenue approach only allocates a very small percentage of Apple's OPEX to the App Store, and that small allocation gives a false impression of the profitability of the App Store. It exaggerates it.

A further problem with Mr Dudney's work on profitability is that in the balance sheet that he constructs for the App Store, he omits the most valuable assets that Apple has and it uses, and by that I mean its intangible assets like its intellectual property and its brand. As I say, these and other flaws in Mr Dudney's analysis will be explored during the course of the trial, but they only go to underline the inappropriateness of seeking to demonstrate, in this case, a pricing abuse by comparing revenues to cost.

Before finally handing back to Mr Kennelly, there is one issue that I would like to pick up. You will recall that Mr Ward took you to annex C of the CMA's market study, where the CMA reported the conclusions of an analysis it had carried out in relation to the profitability of Apple's business as

a whole, Apple Inc, and Mr Ward sought to rely on it. The point I just want to flag is that neither Mr Dudney nor Mr Holt carry out such an analysis in their expert reports and it is hard to see where it goes because Dr Kent accepts that Apple is not dominant in any devices market. So it follows that whatever ROCE Apple is earning is being earned in conditions of workable competition. Even if Dr Kent did not accept that, you have just seen from Mr Holt's evidence that Dr Kent accepts that a competitive price in the App Store can be consistent with ROCE as high as 300 per cent. Nobody has put forward any evidence on what a competitive ROCE in the devices market would be, if not the actual ROCE that Apple earns from competing. So we are unable to challenge the conclusions of the CMA.

Can I just ask the Tribunal to contrast the position that would arise had the CMA taken a CA-98 decision and reached the same conclusion, and then Apple appealed to this Tribunal. The CMA would have had to have called an economist as a witness at the appeal before the Tribunal who could have been cross-examined on the analysis, and the analysis itself would have been before the Tribunal. It would have been tested through cross-examination.

The reason I raise this point is that it is illustrative of the more general point I made yesterday. We have thousands of pages of expert evidence from the actual experts in these proceedings and it cannot be right that Dr Kent can just import the conclusions reached by regulators on other issues that nobody has investigated and then ask us to disprove them at this trial. It was open to Dr Kent to plead a case on Apple's profitability in the devices market and then instruct her experts to consider that issue for themselves and if they wanted to, to replicate the work the CMA did on that topic and then we could have cross-examined them at this trial. But it is not open to it to point to conclusions of the CMA and say to the Tribunal, "The Tribunal must adopt them unless we somehow disprove them." The reason I raise it is because it is illustrative of the more general point I made yesterday about the use that should and should not be made of these materials.

That is all from me on unfair pricing. Mr Kennelly is going to address you on incidence.

Submissions by Mr Kennelly.

MR KENNELLY: So at this stage of the saga Dr Kent needs to have shown that developers would have paid less

on a quality adjusted basis in the counterfactual. We say that she never reaches that stage for the reasons that both myself and Ms Demetriou have developed. But even then Dr Kent has failed to show that developers would have passed on those savings to consumers.

As a matter of law, and from my learned friends it appears to be common ground that the burden lies on Dr Kent to show some pass-on of those savings, to show that some pass-on would have taken place and to show that on the balance of probabilities. It is also common ground that once Dr Kent has shown that the extent of any pass-on will be determined by the Tribunal as best it can using the broad axe as appropriate.

As you saw when my learned friend Mr Armitage took you to the *Guttman* case in the Court of Appeal, the extent to which the Tribunal needs to use the broad axe will depend upon the quality of the evidence that you get from the trial. In this case, we say you are faced with a clear choice in terms of the quality of the evidence before you on this question of incidence. Because from Apple there is, contrary to my learned friend's submission, empirical evidence, real empirical evidence

including regression analysis on actual transaction data, showing that developers did not, in fact, pass on commission reductions which took place during the claim period and which strongly suggests that that they would not have passed on Dr Kent's claim savings to iOS devices either. From Dr Kent, we say you are offered theory, economic theory which is untethered from the facts of these markets.

Just to summarise the first of those and what Apple is offering you through Professor Hitt. There were four times when Apple's commission rates have decreased and Professor Hitt considers each of them. Could I show you please {C3/4/233}. You see in Exhibit 35 the four examples, the "Small Business Program", the "Auto-Renewing Subscription Policy", the "Video Partner Program" and the "News Partner Program". For each of these, we know that there were commission reductions. For the Small Business Program there was a 15 per cent, the Commission was dropped to 15 per cent for developers with less than a million dollars in revenue. For Auto-Renewing it dropped to 15 per cent after the first year. News Partner Program, the Commission was 15 per cent if the developer provided content to Apple news and the Video Partner Program again dropped to 15 per cent

if the content was integrated into Apple TV.

THE CHAIRMAN: Mr Kennelly, do you accept that these figures deal with the first point, which is that on the balance of probability there has been some pass-on, is that contested in light of these figures?

MR KENNELLY: Yes, we accept and -- sorry, we contest that these figures confirm that there has been some pass-on. We contest that.

THE CHAIRMAN: Right, so Professor Hitt is telling us that he has done some regression analysis that shows there has been, in the case of the Small Business Program, in respect of the Video Partner Program.

MR KENNELLY: No, no, on the contrary. Sorry, if you just allow me to take you through this, he is showing that there have been reductions in the Commission under each of these headings, and then he looks to see what impact these reductions on the Commission had in the developers who benefitted from them.

THE CHAIRMAN: Does this not show that some of them did smaller numbers in that case?

DR BISHOP: 68 per cent did not --

MR KENNELLY: No, no, I am afraid you have to bear with me because he actually looks to see who reduced

prices and who raised prices after this and his conclusion is that the figures do not show that they reduced prices, or even where they reduced prices, that they did that because of the reduction in commission.

Again just to slow down for a second, the analysis which Professor Hitt undertook here was to undertake a simple examination of what proportion of developers reduced their prices after entering the programme and compare that with the proportion that increased their prices, what kept them steady.

That is what you see if you go to page 235. 235, Exhibit 36, again we are looking here at the -- because he does what he can with each of those instances in which commission was reduced and here we are looking at the Small Business Program, and you see his conclusion:

"For the vast majority of products, app developers that enrolled in the SBP did not reduce prices in response to reduced commission rates."

Because he notes their reduction in commission rates, commission rates charged by Apple, and then he sees the percentage of developers that reduced their prices and you see that in the second column. The developers that made no change in prices and the

developers that increased their prices in the period after the change in commission rates. He notes that the percentage --

THE CHAIRMAN: Sorry, Mr Kennelly, I did not mean to interrupt you. I mean, maybe I am missing something but does the second column not illustrate that, is that not the remainder, so not the vast majority. The figures are confidential, are they not?

MR KENNELLY: No, these percentages are not confidential.

THE CHAIRMAN: So the 13 per cent is the opposite of the vast majority, it is those people who, according to this table, are app developers that did reduce their prices in response to reduced commission rates. Is that not pass-on? Am I missing something?

MR KENNELLY: No, the question is why, why do they reduce their price?

THE CHAIRMAN: He says in response to reduced commission rates. That is what he says in his table, in his exhibit.

MR KENNELLY: No. He is saying that -- no doubt he can be tested on this in cross-examination. There may be some verbal infelicity.

THE CHAIRMAN: Maybe I should stop bothering you. We will let him deal with it. I just had misunderstood completely, I think, what was going on.

MR KENNELLY: Because in fact when you come to look at the report and he will be tested on this, what he infers from this, in fact, is that because the percentage of developers who increased their prices is actually greater than the percentage that reduced them and in view of the percentage that made no change, he suggests that even for those who decreased their prices, the 13 per cent that decreased them, that was probably not because of the reduction in commission. That was not passing on the Commission reduction. That is a coincidence, they happened to decrease their prices in the period after entering into the programme, but he says you cannot infer -- this is why it is important just to bear with Professor Hitt. Simply because some small minority, in fact, reduced prices when the Commission dropped does not mean they did it because the Commission dropped. One has to look at what the other developers did, increased their prices or keep them the same.

THE CHAIRMAN: I think I am sure it will all come out. I have to say I thought it was being presented to us as econometric analysis that demonstrated the linkage between the change in commission and the change in prices. That is not the case, I am sorry.

MR KENNELLY: That is definitely not the case. Definitely not the case. Professor Hitt is offering you the percentages and he says, in terms, that because more increased rather than decreased and because a substantial proportion did not change, he then asks what he can infer in relation to those that did decrease and he says, "One cannot then attribute that to the reduction in commission, there must be other reasons for that." To the extent that his own text below the heading is unclear, well I am sure that will be explored with him and he can clarify that himself in evidence in the hot tub.

THE CHAIRMAN: Yes.

MR KENNELLY: That was not the only analysis that was done. He went on to explain at paragraph 437, if you go on in the report to page 239. There is no need to take you through this in detail but this is the second stage. He did a formal difference in differences regression analysis which enabled him to measure the causal impact of the reduction in commission on price, again looking only at the Small Business Program using some control groups and again he found that the reduction in commission did not cause developers to reduce their prices.

He does the same kind of analysis for the

Auto-Renewing Subscription Program and he gets the same results. There is admittedly less data for the News Partner Program and the Video Partner Program, but he still conducts a simple analysis of the data and finds that most did not reduce prices after entering the programme. He draws the same inference from that. That is not him saying that those that did reduce prices did so because of the programme that is the opposite of the finding that he reaches.

We say, taken together, based upon his analysis of the empirical evidence, this is strong empirical evidence that if Apple had charged lower commissions in the counterfactual, developers would not have charged lower prices to any material extent.

Dr Kent challenges that empirical evidence in various ways and that will be explored in evidence, but the only empirical evidence that Dr Kent offers us is the effects of a 2015 EU decision that had the effect of increasing VAT on App Store transactions in the UK by 5 percentage points. Apple increased its App Store price tiers as a result of that change. But this is not an example of developer pass-on because the increase was a decision by Apple in respect of its price tiers. That tells you nothing about the developers' decisions regarding

their own prices. Just to recall, you will see this again with Mr Owens and Mr Burelli, the way that Apple's price tiers work is that a developer can choose a single price tier for, usually the country with which the developer is most familiar, and then Apple will automatically charge the price corresponding to that price tier in every other country in which the developer wants to offer its app, it is a very valuable service that Apple offers. The idea is to set the price tiers to equalise those prices in rough terms on a pre-tax basis. So when there are large changes in foreign exchange or local taxes in a particular country, Apple adjusts the tiers. That means the developer does not need to do that manually, does not need to worry about that.

We say that Apple's process of automatically adjusting local prices for tax and *FX* tells us nothing about the decision developers would make if Apple cut its commission.

That is it on the empirical analysis that Dr Kent offers us. So what do we get instead from her? She uses, through her experts, what the European Commission refers to as a simulation method, to estimate the rate of incidence. This is

why we say it is pure economic theory. The first simulation model involves linear demand and as we heard from my learned friends, they say that economic theory tells us that whenever firms face linear demand, in any market, they pass on costs at a rate of 50 per cent. Some of this will be, will have a horrible Pavlovian reaction in the Chairman.

His second simulation model involves a different demand system called logit. He says that economic theory tells us that whenever firms face logit demand in any market, they pass on costs at a rate equal to 1 minus market share, which we were told calculates to be roughly 90 per cent across the App Store.

Without attempting to estimate any relationship between price and cost at all, Dr Singer can tell us with sufficient confidence to persuade the Tribunal to award potentially hundreds of millions of pounds in damages, that the answer is either 50 per cent or 90 per cent. How is the Tribunal supposed to even choose between 50 per cent and 90 per cent.

By reference to the shudder that the Chairman and I shared, if it was as simple as this, then why did we need the pass-on trial in interchange? If all that was needed was to decide, for every

industry in the country, they face roughly linear demand and say the answer is 50 per cent, or say every industry in the country faces roughly logit demand and therefore it is 1 minus market share. There would be no need to look at the relationship between price and costs whether by sector or sector or Class Representative by Class Representative. We say that which is obvious, that this is not an acceptable approach.

Even if in some situations one relies on a pure theory where there is an absence of data, Dr Kent does not have that excuse. Here there is an embarrassment of data. The Class Representative has had access to an extraordinarily rich transaction level data set for several years and, of course, if Dr Kent did not like our natural experiments based on facts, it was open to them to try other empirical methods to tease out a pass-on rate, like we often see in competition damages cases. But that is not what that they did. Obviously, in cross-examination we will explore the extent to which Dr Singer's theoretical analysis is also flawed on its own terms, but that is for another day.

Finally, my learned friend Mr Ward relied on some Commission conclusions from the *Spotify*

decision. In something which may become a theme throughout this trial, those conclusions were relied on without any exploration of whatever analysis underpinned them and that will have to be put to Professor Hitt if he wishes to make any reliance on it. We do not accept that the Commission's analysis establishes pass-on.

In any event, two points about *Spotify*. The Tribunal has the point that *Spotify* has not accepted transactions on iOS since 2016. So it makes it virtually none of the commerce and as you know now, music streaming apps have very different characteristics from other apps, and even collectively they account for a small fraction of the commerce. We say, you cannot rely, as the Class Representative appears to do, to rely on a Commission decision for one tiny subset of quite distinctive developers and say, "Now that is all we need to show."

So we say, as far as incidence is concerned, Dr Kent has failed to prove her case and she has given you nothing with which you can quantify loss, even if she had established any. We say, on the contrary, the empirical evidence points the other way.

So unless I have missed something or I can be of any further assistance those are the submissions on incidence.

Forgive me, of course we have the Hitt issue.

THE CHAIRMAN: And indeed Dr Singer 4. So shall we do that now? I am conscious the transcriber has not had a break but if he is happy to go through to a quarter past that would be quite helpful. Sorry about, I hope that is acceptable. We have got both of these reports to deal with. I think we will start with Dr Singer and just work out what the objection is and whether there is. As I indicated yesterday, I do not accept there is any necessary linkage between Dr Singer and Professor Hitt, maybe the other way around because of responsiveness but as far as Dr Singer is concerned, either he gets it on the basis of the discussion that took place at the PTR or he does not. He was given, I think, a fairly open goal to respond to the points that were raised by Mr Ward.

It may be, Mr Ward, unless you want to say anything that we should just see what it is.

MR WARD: Yes. I mean, I explained yesterday why the report was adduced. I explained yesterday that Apple made clear it would object if there was

something irrelevant or disproportionate, and I explained yesterday it did not object at all until Saturday when it sought a horse trade, and as you know we do not accept the horse trade because we think Professor Hitt's fourth report is inadmissible. But I am happy to deal with it in whatever way is most convenient, sir.

THE CHAIRMAN: Mr Piccinin, yes?

Submissions by MR PICCININ

MR PICCININ: Sir, if I may, I would just like to start by taking us back through the chronology of this and I will deal with Dr Singer first and Professor Hitt second.

THE CHAIRMAN: You need to be quick because we need to be done by quarter past. I think we are fairly familiar with the chronology but by all means if you need to do that, but do not dally.

MR PICCININ: I do not think it is going to be possible to do it in five minutes, sir.

THE CHAIRMAN: I am not asking you to do it in five minutes. We need to be finished by quarter past.

MR PICCININ: Okay. If we could start with the joint statement which is at {C4/7/6}. You can see the date there, this was filed on 25 October 2024. Let us look at the specific points that Dr Singer said

he actually needed to address. If we could just go to page 20 {C4/7/20} quickly. You can see that in the proposition 44, at the bottom, what Dr Singer says he needs to respond to is the specific new analysis that is included in the appendix to his report that you saw yesterday. I just point over to the right-hand column. You can see what that was. It was just a short point that there was no change in the trends of iOS downloads of Netflix as between 15 months before and after Netflix stopped using IAP. But importantly, that was not something entirely new that Professor Hitt just introduced into the case spontaneously. This was his first opportunity to make that point in response to what Dr Singer had said in his reply report. Because of course we have had simultaneous exchange reports.

That is the first point. If we go on to page 35, you have proposition 88 at the bottom, and the issue is the one that you are familiar with, which is whether the logit model that Dr Singer uses satisfies the IIA properly which it needs to do.

Over the page, you can see looking at the right-hand side, second paragraph, that this question of whether it satisfies the IIA properly or not was not a new issue in the case. In fact,

Dr Singer had said in Singer 1, in his very first report, that he was going to test for it in his substantive report and he just had not done that.

Then in the third paragraph under there on the right-hand side of the page, you can see that Professor Hitt cites to some of his pre-existing analysis on that issue, but he also introduced a new piece of analysis, which is a formal statistical test. You can see that it is that, on the left-hand side at the top of the page that we can see right now, it is that that Dr Singer said he needed to address in a further report.

Now, you might wonder why Professor Hitt conducted a new analysis on this issue instead of just leaving the reports where they stood at that point. Dr Singer somewhat gives the impression here that he was ambushed with this new test and he does likewise in Singer 4, and that is a further issue of some concern to us. If I can just show you what Professor Hitt has said about that. If we could go to {C3/9/18}.

CHAIRMAN: This the fourth report?

MR PICCININ: This is the fourth report. There is not going to be anything substantive in there that you are going to need to get afterwards. If you just

read 19(a).

THE CHAIRMAN: Does any of this really matter, Mr Piccinin? We got to the position in November where it seems that the obvious thing to do was to allow Dr Singer to deal with it.

MR PICCININ: I am actually going to show you what he has done now because he has done far, far more than just respond to those points. We have no objection to him responding to those points as long as we are able to deal with it fairly, but what he has done in Singer 4 goes far, far beyond that. That is what I was going to show you next. This was 25 October, as we have just said, then we had the full PTR, a full three weeks later than that, at which we still did not have a draft of Singer 4. All we were told by Mr Ward was that there was going to be a Singer 4 coming, that was going to deal with a couple of pages, not even, of text that you have already seen in the joint expert statement. That is what we were expecting. The report actually came on 21 November, so that is a full four weeks after the joint expert statement. All he was responding to was a couple of pages, and he has produced a 12-page report over the course of four weeks and just before Thanksgiving as well.

If we can look at it now and I will show you what it covers and what does and what does not relate to the proper issues. If we go to {C2/17/2}, so pages 2 to 4 deal with the Netflix issue, and you can see this is dealt with at a much greater length than Professor Hitt was able to do in the joint statement. If you go to page 4, the key point that Dr Singer makes is that he wants to extend the analysis back not just 15 months but back to two years before Netflix's change. That is what he says about incidence.

THE CHAIRMAN: Is there a problem with any of that? Because, as I understand it, Professor Hitt has said here is my analysis --

MR PICCININ: Sir, if I can just cut it short there is no problem with any of that.

THE CHAIRMAN: You do not object to it?

MR PICCININ: We do not object to it although we do say Professor Hitt should be given an opportunity to respond to it.

THE CHAIRMAN: We can come back to that.

MR PICCININ: We can come back to that.

THE CHAIRMAN: But in terms of their position that is fine.

MR PICCININ: That's right. Then from page 4 to 13

Dr Singer embarks on an extended discussion of issues related, broadly speaking, to incidence. But this ranges far, far more widely than the issue of the IIA property, let alone the tests in his model. If I can show you some examples, sir.

THE CHAIRMAN: Yes.

MR PICCININ: On page 5, paragraph 7 he discusses what he calls the direct test of incidence in relation to the passing on of VAT, which my learned friend Mr Kennelly just addressed you on. That has nothing to do with his logit model at all, let alone the IIA property. Still in paragraph 7, five lines down, Dr Singer also gives evidence that economic theory posits that in the long run incidence would be between 50-100 per cent, and again that has nothing to do with his logit model at all.

THE CHAIRMAN: Again he is just summarising the evidence. None of this is terribly exciting, is it?

MR PICCININ: That is an additional proposition, that economic theory has a general range to pass-on which is between 50 to 100 per cent, which we absolutely do not accept. So sir, you can see that this is going beyond what is in, what is responsive to the two points --

THE CHAIRMAN: What would be helpful, we can argue about

things that may or may go beyond, but it is about things that matter, it is about things where you think that -- it does not really matter that he has put in a sentence whether this is between 50 and 100 per cent. He is setting out the background before he gets into it, is he not? If you really object to that, then fine let us think about whether it stays in or not. I do not want to argue about the nuance here. I want to know what you really object to and I would like to do it as quickly as possible.

MR PICCININ: Sir, our position is not that anything should be kept out. Our position is that we need an opportunity to respond to this that is all.

THE CHAIRMAN: As I said to you, this is not an exercise in conditionality. Either you accept this goes in or it does not and if you accept it does not, it is justified, and then we will deal with that. But the reason for doing that is that you have not raised this issue at any point before Saturday, and I think you have foregone the opportunity to try and argue that somehow there is some nuance that needs to be dealt with here. We have got to deal with this in series, so this goes in or it does not. I am open to submission that you say there are things in here that are definitely not within the original ambit

that Mr Ward sought permission for, and if you want to make those arguments fine let us have them. That is that exercise and it is compartmentalised with an expert.

MR PICCININ: It is just my submissions on the next issue are fundamentally the same because what I need to do is show you what is said in Singer 4 and then show you how they relate to what is said in Hitt 4.

THE CHAIRMAN: Fine but just to cut the chase, if what you are saying here is that you are not objecting to this going in, on the basis that I am not allowing you to attach a condition to it, the question is on its merits does it go in or not?

MR PICCININ: Can I just take instructions for a moment? Sir, it has just been pointed out to me that we always reserved our position on the acceptance of this report.

THE CHAIRMAN: You did, but you saw the report on 21 November and did not think fit to raise an issue with it until 10 or 11 January. That is the problem, Mr Piccinin. If this was all happening on 28 November, I think you would be in a much different position. I just do not think you can do this now. If you wanted to say something about this, we had skeletons exchanged and we read all

this stuff and you have not said anything about it and we all assumed that you were not objecting to it. I am not shutting the door to -- if you have a legitimate objection, let us have it and it stays out. But as I understand it, you are not advancing one, so there is really no point in arguing about whether you can condition this with -- connect this with Hitt going in. There are different things because they have got a very different temporal circumstance.

MR PICCININ: Yes, sir, sorry. Sir, yes, I have instructions, we do not oppose the admission of the report. It is still helpful, I think, for me to take you --

THE CHAIRMAN: It is, but we have to give some time for Mr Ward to deal with this as well and we are running short of time. If that is what you want it in --

MR PICCININ: We do in order to be helpful, sir, yes.

THE CHAIRMAN: This has been in the bundle, so we have read it. It has been there obviously pro tem because we did reserve the position, but we rather assumed this was in for the reasons we have discussed. I have looked at it before, I do not think the other panel members have had the opportunity to do that, but I do have a sense of

what is in there. In a way you can cut quite quickly to Hitt 4. That needs to be your ...

MR PICCININ: Let us do that. Fundamentally, my submission is that the material that is in Singer 4 is material that is useful for Professor Hitt to comment on, and this is an appropriate way to do that, so it does not ambush anybody when it comes out in the box.

THE CHAIRMAN: What about the bits in Hitt 4 that are not in response.

MR PICCININ: There is only one part that is not in response, which is the *Spotify* decision. If I can just explain how that came about, Sir. You will recall in the run up to the PTR Dr Kent asked for us to disclose new materials in relation to the *Spotify* investigation. So we could immediately see when we looked at what they were that they were relevant to the issue of incidence, to that broad topic, and so we thought again because those were materials that Professor Hitt had not seen, and had not had an opportunity to comment on, it was appropriate to draw them to his attention so that he could consider them, and if he had anything to say about them, again do it in an orderly way, that would enable the Tribunal and our opponents to understand what he has

to say. He has done that.

THE CHAIRMAN: So why is it that nobody said anything about this until 10 January? That is immediately apparent, why have we waited two months and why are we now in a position where we are having to deal with this in the middle of the trial?

MR PICCININ: I understand that concern, sir. The issue is, as I said before, Singer 4 only arrived on 21 November, which was a considerable time after the joint statement, and in a period where we were all busy preparing our written submissions for trial, and the amount of time that has passed since there is seven weeks between that date and when we provided the report.

THE CHAIRMAN: It is not just a question of it being seven weeks, it is seven weeks leading up to a trial, so why are we having it on the day before the trial? I can understand there is lots going on, but on the other hand it does rather smack of tactical behaviour.

MR PICCININ: It certainly is not that, sir.

THE CHAIRMAN: It looks very like that, Mr Piccinin, and documents that Professor Hitt turning up with what is not just a critique of what Dr Singer says in Singer 4, but also turning up with some new

analysis. So there are two bits in Hitt 4 where he has performed new analysis, he has done a new Chow test and he has done some more analysis that in relation to --

MR PICCININ: Perhaps we should look at those because they are wholly responsive to what is new in Singer 4.

THE CHAIRMAN: They may be responsive but it is new analysis, is it not? If it is new analysis Dr Singer is going to say, "I need to look at it."

MR WARD: Sir, he already has of course.

THE CHAIRMAN: That is the problem, is it not, Mr Piccinin? That is the problem with it arriving the night before the trial starts, because we have got a moving feast. This case has been managed, I think, very well by all the parties and I hope by the Tribunal because we have had everything in the right place at the right time, and this is not -- and it creates a problem and it is not something that I am keen to encourage, either in this case or any case. It is not the way this litigation should be run.

MR PICCININ: Sir, I think what I can say about that is if you look at it in perspective, Dr Singer took four weeks to respond to two pages of material from

the joint statement. Professor Hitt was then given the period between then and trial.

THE CHAIRMAN: It is not even about, that is not what it is about either because Mr Ward was telling us on 15 November that there was a problem and he wanted to deal with it. We have had no indication of that from your side.

MR PICCININ: I accept that, Sir, but at the same time it is true that there is still a month to go before Professor Hitt actually needs to be cross-examined by Mr Ward.

THE CHAIRMAN: That is not really the point, though, is it? Because for a start, who knows what relevance this might have to factual evidence, I do not know. You know, I do not know. Secondly, everybody is busy doing cross-examination and a lot of your witnesses need to be cross-examined by this side of the court, that is where the bulk of the effort is. Apart from the preparation for the cross-examination, you are putting a burden, creating a prejudice. That is because it has arrived so late without any warning that is the problem here.

MR PICCININ: Sir, I do not accept that it could have been done materially quicker than it was done.

THE CHAIRMAN: It could have been indicated at least, could it not?

MR PICCININ: That would not have made the burden any easier.

THE CHAIRMAN: It might have done.

MR PICCININ: They would not have seen the material until it arrived and it arrived when it was ready to arrive.

THE CHAIRMAN: Let us see what the position is from the Class Representative before we get into the details. I would like to identify where the differences are and you need to justify some bits, and we know what is in dispute and then come back and ask you to deal with it. A lot of this, I think, is really about the ability of the Class Representative and Dr Singer to deal with this sensibly. So if we may, I might leave you here for the minute and come back to you.

MR PICCININ: Sir, the one other very brief point is that of course all of this can be dealt with in cross-examination as well. So whether the material is in or out, it can all come out in writing.

THE CHAIRMAN: That is why I make the point about the new analysis because I do not think you are going to find it that easy to cross-examine Dr Singer on the

new analysis, are you? The new Chow analysis, how are you going to put that to Dr Singer?

MR PICCININ: On that I would like to show you a new authority, if I may, which is one my learned friends gave us before lunch, which is ^ *BGL*.

THE CHAIRMAN: Just before you do that, let us find out what Mr Ward says then come back to you.

Submissions by MR WARD

MR WARD: Sir, the problem is the timing of all of this, as you say. We have had an orderly process, it was ordered I think in 2023, it slipped slightly but we are all on course for trial. The joint expert process was completed in October. Then we had the written openings, the Tribunal has done its reading in and then this pops out unheralded on Saturday. In my respectful submission, it embodies a basic flaw in Apple's thinking, which is that the experts are entitled to carry on working up new analysis all the way into the trial, rather than having an expert process that crystallises the issues.

What I would like to do is just page turn this document a little bit more closely. Would you mind, please, turning up.

THE CHAIRMAN: Mr Ward, just so I am clear, are you objecting to all of this?

MR WARD: Yes, I object to it in its entirety. I say it is fundamentally wrong to serve a report like this on the Saturday before trial begins. I can do that by just itemising what is in it.

There is probably some material that is anodyne, but the stuff that matters I object to.

THE CHAIRMAN: Why do you not pull those out as quickly as you can.

MR WARD: Can I please take you towards the back of the report first which is {C3/9/43}. It just gives you an indication of the scale of this piece of work. This is the documents relied on and it goes to the next page as well if we could turn it. It is a total of 60 items. It is 13 academic articles, three books or articles, a data set, the existing expert reports, four documents, nine public materials and 14 web pages. That is not a short rejoinder.

If we go to the actual content, we have firstly pages 7 to 9, we have got the Netflix analysis. But this is not just disagreeing with what Dr Singer said. As you say, there is a new statistical test that of course he will want to reply to.

Then on incidence there is remarkable material where Dr Singer essentially accepts he is doing some

new analysis here -- Professor Hitt I am sorry. Professor Hitt is doing analysis on Singer 2, where he talks about at paragraph 11, I am sorry I do not have the page numbers, page 14 I think. If we could go to that. Paragraph 11. If you look on the last four lines:

"Upon further investigation, it has come to light that Dr Singer did not even run a correct logit regression."

So he is talking about Singer 2. So the time for replying to that was in the reply evidence of 15 September. Then if he had, of course, Dr Singer could have had time to think about it, he could have responded in an orderly way in the joint experts statement. As you can see at a glance, at least to the lay people, if you look at the next page it is not simple stuff by any means. And the page after, even if some of it is buried in a forensic footnote, it is still complex analysis.

Then we get on to the IIA assumption where there is an argument about one of the tests that Professor Hitt -- sorry this is page 17, this is one of the tests that Professor Hitt introduced during the joint expert process, which by the way was already too late for new material. The joint expert

process is often called "agree/disagree". It is crystallising the existing issues, not pursuing something new. But here doggedly and onward we go, page 19 at (c), please, what we see is:

"Given Dr Singer has now said he is concerned about the Stata warning, I have now implemented another standard statistical test", which of course is another thing that Dr Singer would obviously have to consider.

Then we get to *Spotify*, please if we turn to page 27, where there are some very generous confidentiality redactions so I am going to be careful. Sorry I have given the wrong page, 21. So this is a section on the *Spotify* report. Now, there is a very important thing to know by way of context here. Dr Singer referred to *Spotify* in his May report, 14 May 2024. Professor Hitt, in his reply report, completely ignored it for the purposes of his incidence analysis. Here he is having a second bite at the cherry. Now I know it is said that part of the reason for this is further disclosure, but the *Spotify* decision was well in play by May. Then the parts that are redacted I will describe without reading out, are an attempt by Professor Hitt to adopt the views of an entirely separate set of

experts. I think I can be allowed to say what those experts were doing without talking about the content of them. If you look in footnote 74 you can see their identity, it is quite a familiar name there, at least the first one. If you look at footnote 74, you can see who this is. I am sure you know the first name if not the second.

THE CHAIRMAN: So what are you saying?

MR WARD: This is expert material, I am going to go slowly in case someone jumps up, adduced by Apple in the investigation.

THE CHAIRMAN: These are experts in the *Spotify*?

MR WARD: Yes.

THE CHAIRMAN: Was this the disclosure that came at the end of --

MR WARD: Yes, but it was Apple's disclosure. Apple have had this since whenever they commissioned this work. What we have here is Professor Hitt seeking to adopt work by other experts not instructed, not here, that we cannot cross-examine or ask any questions of and we do not even know if those experts were acting as independent experts or consultants, as is often the case in these kind of investigations. You hire consultants, so they are not bound by the sorts of duties to the court that are supposedly important in

these kind of proceedings. But it is obviously not acceptable on the Saturday before trial to say, "Look there is this expert report by someone else that is in the disclosure and I would like to rely on it too." That is putting a completely unreasonable burden upon us. Those particular experts are not in front of us and again the opportunity to comment on the *Spotify* decision was when Dr Singer raised it in his second report, Professor Hitt put in his reply report in September on an orderly basis, and if he disagreed with what Dr Singer had said, rather than ignoring it completely, which is what happened, he could have said so then and they could have discussed it in the joint expert process.

Sir, that is the substance of this report and that is why we invite you to reject it in its entirety.

THE CHAIRMAN: Mr Piccinin, how do you want to deal with this because we are going to take a break now and we are going to start the CMA at 3.30. We obviously need to deal with this, and I want you to have proper time to deal with it. We are not going to do that now.

I do not know whether it is helpful. We can

try and start again at 4.30 when Mr Gregory has finished, but I do not think that is fair on anybody. We can start early tomorrow morning.

MR PICCININ: That is fine by me.

THE CHAIRMAN: It would be helpful I think whether you think there is anything in this report you do not wish to pursue. I think you need to be clear about what you want to get, what you have to get clear and make a case for it. I leave that entirely to you. I do not know whether that results in anything or something. But I think probably we are going to have to put it off until tomorrow, given where we are and timing in fairness to Mr Gregory. I do not want Mr Gregory to have to come back tomorrow.

MR PICCININ: I do not want that either.

MR WARD: Sir, is there any way we could try and resolve this today? I am so sorry to do a special pleading. If is there a way to do it today, this has obviously taken up a lot of time. I confess it has taken a lot of energy on our side dealing with this already. Of course if it leads into tomorrow, it takes another iteration of time. I do not want to place an unreasonable burden on anyone else involved including the Tribunal.

THE CHAIRMAN: We cannot sit past half-past 4 today. I

1 am afraid I think the earliest we can address this
2 is tomorrow morning. The question really is how
3 long you need for that because what I do not want to
4 find is that this is messing up the timetable for
5 the rest of the week. It is obviously very
6 important for logistics, particularly for the video
7 evidence.
8 MR PICCININ: Absolutely sir, this is far from the most
9 important point in the case but if we started at 10
10 o'clock I am sure that would give us plenty of time
11 to finish before 10.30.
12 THE CHAIRMAN: That gives you time to get through and
13 tell us what you think say what you want to say
14 about it and anything else Mr Ward wants to say.
15 MR PICCININ: Yes.
16 THE CHAIRMAN: Let us do that. Mr Hoskins?
17 MR HOSKINS: If Apple wants to apply to re-amend its
18 defence, we need to deal with that before the
19 evidence starts as well. Since you are thinking
20 about housekeeping, I just wanted to put that on the
21 menu.
22 MS DEMETRIOU: We were waiting for a response from
23 Dr Kent so we are assuming she is going to explain
24 why she is not consenting, because it is a -- if
25 permission to amend is needed, then it is obviously

just a legal argument that causes nobody any prejudice at all. So we would like to understand what the nature of the objection is, but in any event.

THE CHAIRMAN: So do you know it is not consented to?

MS DEMETRIOU: All I know is what Mr Hoskins said before lunch where he said, "I can tell you we are not going to consent", but we have not had an answer to our letter. I am expecting we will get an answer to the letter. I think the position is, subject to considering what Dr Kent tells us in response to our letter, that our primary position is that we do not need to amend but that I will in the alternative make an application to amend.

THE CHAIRMAN: How long do you think that will take? I know you do not know what the objection is.

MS DEMETRIOU: It is a very short point. I mean it rather depends on what the nature of the objection is, which is difficult to understand, but assuming there is nothing that I --

THE CHAIRMAN: Can I maybe suggest that at least you can see whether you can make some progress over this break we are going to take and give us some indication.

MS DEMETRIOU: A time estimate, I will.

THE CHAIRMAN: We have got various options, we can either begin a little bit earlier, but I do not really want to be starting any earlier because I know it inconveniences people. We can have a shorter lunch break but, of course, the problem with that is that it is coming after the evidence has started.

MS DEMETRIOU: Let me speak to Mr Hoskins.

THE CHAIRMAN: If you could come up with a solution for tomorrow that both of you support, that would be quite helpful.

MR HOSKINS: Of course, absolutely.

(3.24 pm)

(Break)

(3.33 pm)

THE CHAIRMAN: Mr Gregory?

MR GREGORY: Sir, can I just check you are happy for me to remain sitting?

THE CHAIRMAN: Yes. I hope you are feeling better, at least well enough to be here.

Submissions by MR GREGORY

MR GREGORY: I am dosed up with various things that will hopefully keep me going for an hour.

The CMA is grateful for the opportunity to make submissions today and also for the opportunity to put in its skeleton. I will start with a few

introductory words about the CMA's intervention and will then address you on the issues on which the CMA has intervened, predominantly based on our skeleton, though I will also pick up a few points which have been raised in openings.

The CMA has a right to intervene and make written submissions in private damages actions in the Tribunal under CAT rule 52. As noted at paragraph 593 of the CAT guide, that provision was introduced to mirror the requirements under regulation 1 of 2003, that the Commission and National Competition Authorities should be able to submit written observations to national courts relating to the application of Articles 101 and 102. Recital 21 of that regulation explained that the purpose of that provision was to promote consistency in the application of the competition rules as between courts and national regulators.

To date, the CMA has intervened in nine private damages actions, as well as these proceedings the other cases include *Le Patourel* and *Coll*. In broad terms, there are two types of case where the CMA intervenes. The first is where the CMA has considered or is considering the same or similar issues in its own investigations. Second, where

cases raise issues of wider significance to the competition law regime generally, such as questions of law or issues of high level approach, including because the Tribunal's findings may well influence how the CMA has to apply the competition rules in future cases.

This case is a bit of both. The CMA has some experience of applying the competition provisions to app stores, including Apple's App Store. You have already been taken to the CMA's mobile ecosystems market study reports based on an investigation carried out between June 2021 and June 2022. You will perhaps not be surprised to learn that the CMA considers that its decisions and reports should be admissible in private damages actions such as these, with it being a matter for the Tribunal of how much weight to place on the CMA's findings. That is in line with the guidance provided by the Court of Appeal in the *FX* judgment, to which you were taken on day one.

In terms of the process followed by the CMA in that report, I will just show you one passage from it. It is at bundle {AB6/25/5}. I would be grateful if you could just read paragraph 1.6 starting at the bottom of the page and then over the

page and look at figure 1.1.

THE CHAIRMAN: Yes.

MR GREGORY: No doubt throughout the trial the parties will discuss specific pieces of evidence that were relied upon by the CMA for the purpose of making specific findings. The only point that I am making now is that in general terms it was a fairly detailed exercise.

I am not going to take you to any more passages in the report. I thought I would just provide you with some references for the transcript in case you wish to familiarise yourself with the CMA's key findings through summary of materials. There is a 20 page overall summary at bundle {AB6/41}. The main report that I just took you to is at {AB6/25}. Each of the chapters has a one page summary at the front. The most relevant chapters are chapters 4, 6 and 8. Chapter 4 sets out the CMA's findings on the limited competitive constraints faced by Apple and Google in relation to their app stores. You have already been shown the one page summary of that chapter by Mr Hoskins. It is at page 82 of the report.

Chapter 6 discussed the various conducts of Apple and Google relating to their app stores,

including that they require certain in-app payments to be made using their respective payment systems. The one page summary is at page 181 and the findings relating to App Store payment systems are at pages 215-221.

Chapter 8 outlines potential market interventions identified by the CMA. The one page summary is at page 279, and appendix H specifically considered Apple and Google's in-app purchase rules and that sits at bundle {AB6/33}.

Overall, the report concluded that there was a strong case for interventions across a number of different areas, but that many of these were more suited to being considered further and the CMA's Digital Markets Act powers, again for your notes that point is made at {AB6/25/350}. However, the CMA has also initiated two Competition Act investigations into Apple's App Store and Google's Play Store.

First, in March 2021, before the mobile ecosystems study, the CMA initiated a Competition Act investigation into Apple's App Stores terms and conditions. Among other things, that investigation considered complaints by developers that Apple only allowed them to distribute apps to iPhones and iPads

via the App Store, but certain payments had to be made using Apple's payment system and relating to Apple's commissions of up to 30 per cent.

In August 2024, that investigation was closed on administrative priority grounds. Among other things, the CMA considered that a more holistic consideration of Apple's rules on in-app payments, alongside the wider commercial terms in its App Store, would be more effective under the provisions in part 1 of the Digital Markets Competition and Consumers Act, the DMCCA. The CMA's case closure notice stated that this step did not imply that the CMA considered that the concerns it was investigating were unfounded or had ceased to exist.

Second, in June 2022, the CMA launched an investigation under chapter 2, in particular into Google's Play Store rules that obliged app developers to use Google Play's own billing system for in-app purchases. In April 2023, the CMA published a notice of intention to accept commitments offered by Google, which involved giving developers the option of using alternative billing systems for in-app transactions. However, 40 out of 43 people who responded to the consultation opposed the commitments, including on the basis that the

reduction in fees proposed by Google would not be sufficient to cover the costs of using an alternative billing system.

On 21 August 2024, the CMA therefore decided not to accept the offered commitments and on the same day it decided to close the investigation on administrative priority grounds, again noting the possibility that the relevant conduct might be better addressed in an investigation under the Digital Markets Act and that the case closure did not mean that the CMA had concluded that the relevant concerns were unfounded or had ceased to exist.

A few days ago, on 7 January, the CMA announced that it expected to initiate two investigations this month into two areas of digital activity under the DMCCA. Yesterday, it announced that the first of those investigations would assess whether Google has strategic market status in respect of search and advertising services and whether those services are delivering good outcomes. The CMA has not yet announced the subject of the second investigation but has said that it expects to do so before the end of January. If the subject matter of that second investigation overlaps at all with these

proceedings, the CMA will write to the Tribunal and the parties to inform them.

THE CHAIRMAN: Yes, thank you.

MR GREGORY: In opening, Apple submitted that given the bespoke digital markets powers that now exist at both the EU and UK levels, it was not appropriate to apply the chapter 2 prohibition to the issues raised by these proceedings. We emphasise that the CMA's decision to close its Competition Act investigations were taken on the basis of administrative priorities, not because it concluded that the existence of the digital markets powers constituted a legal bar to it applying the Competition Act provisions to the conduct. If a regulator has concurrent powers under the Competition Act and sectoral regulation, as many regulators do, they will generally have a discretion as to which of the tools in the tool box they reach for.

The proposition, if this is what is being advanced, that the CMA or this Tribunal is now precluded from applying the Competition Act provisions to digital activities, such as those in issue in these proceedings, because of the existence of the Digital Markets Act powers is contrary to binding authority. One example is the General

Court's 2010 judgment in the *AstraZeneca* case which concerned an alleged abuse of dominance by a pharmaceutical company in an area that was governed by patent litigation. It was one of the few competition law judgments that was not already in the bundles so we asked for it to be added. It is at {AB4/14.01}. I would be grateful if you could turn to page 139 and read paragraph 366 to yourselves.

So as a matter of law, the existence of sector-specific digital markets legislation does not render the competition rules inapplicable to conduct in these markets. There was also the practical point that the CMA's digital market powers do not include the ability for it to require companies to compensate those who may have suffered losses as a result of historical conduct, one of the main purposes of the collective proceedings regime. Consequently, and irrespective of the CMA's preference for considering particular issues under sectoral legislation as a matter of administrative priority, all of Apple's arguments can and should in these proceedings be considered within the Competition Act's legal framework in relation to market definition, dominance, abuse and so on.

As it does not have any ongoing App Store investigations under the Competition Act, the CMA's interest in these proceedings is now predominantly based on the fact that they raised three points of law or high level approach that were of wider relevance to the competition law regime. In respect of these three issues, it is therefore seeking to play a traditional amicus curiae role with a view to promoting the consistent enforcement of the competition provisions. Those three high level issues were identified in the CMA's written observations, which summarised the main legal principles and authorities relevant to each area. The first of those high level issues relates to unfair pricing. As has already been noted, the cup of unfair pricing authorities currently runneth over. As you are not short of authorities in this area and you have already been addressed on them at some length I am not planning to say anything about them. The main principles and authorities are summarised at pages 17 to 25 of the CMA's written observations. They include the Court of Appeal judgment in *Phenytoin*, the main domestic authority, and since we submitted those written observations, the Tribunal has handed down its judgment in Le

Patourel. As already mentioned, the CMA intervened in *Le Patourel* and submitted observations on the correct approach to unfair pricing. The CMA does not express any view about the Tribunal's application of the law to the facts, but in broad terms it considered that in the judgment the Tribunal applied the correct legal framework.

The second issue on which the CMA has intervened and the main focus of its skeleton concerns market definition. Shortly, I will briefly comment on a few market definition points raised during openings and in questions from the Tribunal including in relation to assistance markets and aftermarkets, however I will deal first with the market definition points covered in our skeleton, primarily by reference to the skeleton itself. That is in the bundles, bundle {A3/4}. First, however, just to address a point made by Mr Kennelly this morning on our skeleton, we are not saying that the hypothetical monopoly test is mandatory in all cases for market definition. What we are saying is two things.

First, if you are going to apply the hypothetical monopoly test, there is a standard framework for applying it. So if you were going to

apply it, you should apply it properly.

Second, it is a commonly used technique and in general you would expect to apply it in one form or another unless there is a good reason not to, for example because of insuperable cellophane fallacy issues, which I shall come on to. I say in one form or another because as we noted in our skeleton, it is often not possible to apply the test empirically due to data limitations, so it is often used simply as a conceptual tool for the purpose of identifying close substitutes.

While I am in responsive mode Mr Kennelly also questioned the proposition at paragraph 36 of our skeleton, which is at page 11. I would be grateful if we could go to that. Page 11 of the document, paragraph 36. I will give the full reference again, the documents reference is bundle {A3/4/11}. I would be grateful if you could just read paragraph 36.

THE CHAIRMAN: Yes.

MR GREGORY: Footnote 23 refers to paragraph 60 of the well-known *AKZO* judgment. I would be grateful if we could go to that. It is at bundle {AB4/5/15} and go to page 15. I would be grateful if you could read paragraph 60 of that judgment.

THE CHAIRMAN: Yes.

MR GREGORY: You will be familiar with the distinction between the legal burden and the evidential burden. The Class Representative or regulator always bears the legal burden of proving dominance. However, for any issue, once a party that bears the legal burden has adduced a sufficient amount of evidence, it is possible that the evidential burden may then shift on to the other side to rebut the conclusion that appears to follow. The CMA's position is that where an undertaking has had a market share over 50 per cent for a sustained period of time, that will ordinarily be sufficient to prove dominance, absent evidence to the contrary, and therefore to shift the evidential burden. That proposition is consistent with paragraph 212 of the CMA's guidelines on the assessment of market power (OFT415). That guideline is not in the bundle but we can ask for it to be added.

THE CHAIRMAN: Yes, thank you.

MR GREGORY: Returning to market definition, as you will have seen, our concern is that the market definition framework should be applied properly. We are not making submissions as to the end point that you should reach on market definition. Rather, we are

highlighting aspects of the standard approach to defining markets and suggesting what that might mean for your starting point and for where in the framework various arguments should be considered.

Paragraphs 6 and 7 of our skeleton identify two reasons why it is important for the market definition framework to be applied correctly and consistently, in particular in high profile cases such as this. You are a very experienced panel and I imagine have collectively provided a great deal of competition law advice to clients. Such advice often turns on questions of market definition, for example, because it is determinative of whether the company in question is dominant or whether the block exemption applies. If the market definition framework is applied unpredictably by courts and regulators, to which clients and their advisers look for guidance, legal certainty would be undermined and if a misapplication of the framework results in a position of dominance being missed, the effective enforcement of the chapter 2 prohibition will be undermined, to the detriment of competitors, customers and ultimately consumers.

Paragraph 10 of our skeleton summarises the basic steps in market definition by reference to the

UK market definition guidelines. I do not think those basic steps are contentious. There is a standard framework and it is important that it is consistently applied, but the conclusions must be sensitive to the facts of the case. Applying that framework to the facts almost inevitably requires the exercise of judgment in places, it is not a mathematical formula. When you are making those judgments the touchstone that we say you should come back to, is that the purpose of the market definition exercise is to shed light on the competitive constraints on the relevant supplier in respect of the conduct in issue in the relevant proceedings. Stage one in that assessment is market definition, often carried out by reference to the market power of a hypothetical monopolist, and stage two is the assessment of dominance. In its submissions yesterday afternoon, Apple sought to conflate those two stages but they are distinct and it is important that they are kept distinct because the analysis is different at each stage.

At the market definition stage, you are concerned exclusively with close substitutes. The fact that some other product or service imposes some level of competitive constraint is not enough, but

when assessing dominance, all competitive constraints, strong or weak, can be taken into account. At that second stage, it is possible that the evidential burden of proof may have shifted on to the undertaking in question, in particular if its market share is above 50 per cent, as I have just discussed.

Starting with stage 1, market definition, the first step in the standard in that framework is the identification of the focal product. As we note in the skeleton, there is typically less discussion of the process behind identifying the focal products than there is of the next step, the application of the hypothetical monopolist or SSNIP test, but it can be critical to ensuring that the defined market is appropriate for the particular facts of the case. Identifying the focal product is a fork in the road. If you start with the wrong focal product, your subsequent steps may take you in the wrong direction.

A number of key quotations from the market definition guidelines and textbooks are set out at paragraph 14 of our skeleton. The critical point is that the focal product should ordinarily be the products that are the subject of the conduct alleged

to be unlawful in that particular case. As the authors of Bellamy & Child note in the passage quoted at subparagraph (c), that leads to a counter intuitive result, namely that markets for the same products or services can be defined differently in different cases. For the purpose of competition law, the boundaries of markets are not like the boundaries of countries, immutable lines that should be drawn in the same place on every occasion.

If you turn over the page to page 6 of our skeleton and look at paragraph 15. In its *Spotify* decision, which you have already been taken to, the Commission started with a focal product of a distribution services offered by Apple to developers of music streaming apps. As you can see from the quoted recitals, the Commission did not start with the services offered to a subset of developers because it considered that competitive conditions varied materially as between music streaming apps and other types of app. It started with the services offered to developers of the music streaming apps because it was the imposition of antisteering terms, specifically on that category of developers that was the subject of the complaint by *Spotify* in that case.

If you turn to bundle {AB6/45/252}, you will see the operative part of the decision. If you just read Article 1 at the top of the page. The central finding of abuse in *Spotify* was the imposition of antisteering provisions on music streaming service providers. Unlike in these proceedings, the Commission was not asked to find and did not find that Apple had committed an abuse through the imposition of terms on all developers wishing to distribute apps through the App Store. That is why we say, in these proceedings, because the abusive conduct is said to be applied to all developers, the natural focal product is the provision of services to all developers rather than to a subset of developers such as, for example, the developers of gaming apps. That is the case even if, as Apple says, developers and consumers of gaming apps have more substitution possibilities available to them than developers and consumers of other types of apps. Those points can and should be taken into account in the process when considering the profitability of a SSNIP and when assessing dominance. But in the CMA's view, the mere fact that certain categories of customer, amongst the many subject to the allegedly abusive conduct, may

have more substitution possibilities available to them, would not ordinarily justify undertaking a separate market definition exercise based on a distinct focal product, specifically in respect of that group. That is because of the ultimate purpose of the market definition exercise, to shed light on the competitive constraints of the supplier in respect of the conduct in issue in the particular proceedings.

As we are still at stage 1, market definition, the focus is on the position of the hypothetical monopolist, rather than on the position of Apple within that market. The question is whether the hypothetical monopolist could profitably introduce the SSNIP across the products and customers that are the subject of the allegedly abusive conduct. The fact that the hypothetical monopolist might not be able profitably to introduce a SSNIP only on a particular subset of those products and customers is not determinative of that question. Imagine this very simplified scenario. It is no doubt inaccurate, not least because the CMA is not in the Confidentiality Ring, so I have not seen the relevant figures. It is purely intended to be illustrative at the high level points of principle.

Imagine that all categories of app generate the same margin for Apple. Gaming apps constitute half of all apps for example by value. If fewer than 4 per cent of developers switch away in response to a SSNIP, the SSNIP is profitable and the market should not be expanded further. If more than 4 per cent switch away, it is unprofitable and the market should be expanded.

In response to a SSNIP, 5 per cent of gaming app developers would switch away, 1 per cent of other app developers would switch away and overall 3 per cent of all app developers would switch away. So if you were considering whether the hypothetical monopolist could profitably impose a SSNIP only on the developers of gaming apps, the answer would be that it could not. So you would expand the market, for example to include gaming products distributed through other platforms such as on PCs. But in circumstances where you were considering whether an undertaking has position of dominance, in respect of conduct imposed on all developers, the relevant question at stage 1, the market definition stage, is whether the hypothetical monopolist could profitably impose a SSNIP on all developers.

These illustrative numbers would indicate that

could not, so the market should not be expanded further so as to include, for example, distribution of gaming products by PCs. It is purely illustrative but it highlights why the correct identification of the correct focal product really matters, in order to ensure that the market definition that you finish up with is actually appropriate for assessing the conduct that you are concerned with in the particular facts of the case.

THE CHAIRMAN: So the point is the linkage between the focal products and the abuse, effectively?

MR GREGORY: Yes. So that is the focal product. You then apply a SSNIP to a market comprised of the focal product and consider whether it would be profitable in the light of switching away. The SSNIP should be imposed on the competitive price. The cellophane fallacy notes that, in particular if the incumbent has market power, the current price might be above the competitive level. Dr Singer, the Class Representative's expert, says that comparators suggest that a competitive commission rate would be around half of Apple's actual commission rate and the fact that Apple has been able to charge double the Commission rate indicates that a SSNIP would be profitable. In its skeleton,

and again this morning, Apple said that is circular because it assumes that the current price is excessive, which is one of the main questions for the unfair pricing analysis. We think that objection is fair, while noting that Apple does not propose any solution.

A few comments in terms of how you might be able to square that circle. The cellophane fallacy is a well recognised potential problem, for the purpose of market definition, and it is important that it should be taken into account and addressed so far as possible. Problems with potential circularity of reasoning do not mean that you can simply assume the problem away. If the low hanging fruit is if the hypothetical monopolist could profitably raise prices even from current price levels, you can be confident that the market is no wider. That point is made at paragraph 209 of the *Le Patourel* judgment. If that is not the case, then although there is a logical order for the different steps in the analysis, market definition then dominance then abuse, and so on, in practice the Tribunal will be determining all of those issues in parallel for the purpose of writing a judgment. You would therefore be able to approach the various

issues iteratively or holistically, taking into account different strands of evidence relevant both to market definition and unfair pricing. In particular, as well as considering comparator prices, you will have evidence about profitability levels. That evidence may be relevant to whether Apple's commission charges are unfair, but also to whether or not Apple's current charges are above the competitive level.

If you conclude that the profitability analysis suggests that Apple's current commission rates are above competitive levels, you can take that into account when considering it if there is a risk of the cellophane fallacy applying for the purposes of market definition.

I am now going to turn to systems markets, and aftermarkets, on which there have been a few exchanges during opening, in particular involving Dr Bishop. The CMA summarised its view on this issue in its written observations, I would be grateful if you could turn to bundle {A3/1/10}. I would be grateful, it is a minute or so of reading, if you could just read paragraphs 29 to 36 to yourselves.

THE CHAIRMAN: Yes.

MR GREGORY: Footnote 48 refers to the Commission's analysis of these issues at recitals 415-465 of the *Spotify* decision. I am not going to take you to those recitals but if you could turn back to a passage you looked at on day 1. That is the *Spotify* decision at bundle {AB6/45/100}. At recital 337, the Commission summarises its approach to defining system markets and aftermarkets. The considerations listed there will be familiar from the CMA's written observations that you have just looked at.

Dr Bishop asked about the footnote references to authorities. There is one additional authority that I want to flag, that is the 2010 judgment of the general court in the *CEAHR* case, more easily referred to as The *Luxury Watches* case. That is at bundle {AB4/14.1}. The background was that the applicant complained that luxury watch manufacturers had committed an abuse by refusing to continue to supply spare parts to independent watch repairers. The Commission rejected the complaint in part on the basis that there was a systems market that included the market for luxury watches in which the relevant companies were not dominant. The General Court found that the Commission had made legal errors in its assessment. The relevant passage is at page 29

I would be grateful if you could read paragraphs 79 and 80.

CHAIRMAN: Yes.

MR GREGORY: You start by applying a SSNIP in the secondary markets, there spare parts, here the provision of service through app developers and you ask whether that SSNIP will be profitable, including in the light of any resulting switching away that would take place in the primary markets, there luxury watches, here smartphones and other devices. I should be grateful if you could turn ahead to page 33 and read paragraphs 94 and 95.

So when applying the SSNIP test in this way and considering whether customers would respond to a SSNIP in the secondary market by switching in the primary market, you should take into account the respective values of the products in the two markets.

Unless you have any questions on market definition, I was proposing to turn to the counterfactual issue addressed in the final few paragraphs in our skeleton.

DR BISHOP: Just the observation of the last two sentences:

"Furthermore, the price of the spare parts is

normally included in that cost, and thus represents an even lower percentage of the purchase price of the new watch. Accordingly, it is evident that a moderate price increase for spare parts remains a negligible sum in comparison to the price of a new luxury/prestige watch."

What conclusion did they draw from that. It was not system competition or it is system competition?

MR GREGORY: Yes, the General Court concluded that the Commission had erred in finding that there was a systems market.

DR BISHOP: Thank you very much.

MR GREGORY: So the counterfactual issues are discussed at our skeleton to paragraphs 37-43. In its skeleton, Apple suggested in the counterfactual that it should be assumed that the allegedly abusive conduct would have been in place right up to the start of the claim period. There are two reasons to have the counterfactual, and while you might ultimately end up using the same counterfactual for both. It is important to keep the different purposes in mind.

First, you must have a counterfactual for the purposes of estimating aggregate damages. That is

an issue for Dr Kent and Mr Hoskins made submissions about that.

Second, it may be helpful to consider a counterfactual for the purposes of identifying the effects of the relevant conduct to help you determine whether it is abusive. The CMA often uses counterfactuals for that purpose. The legal position, is as set out by the Court of Appeal in *National Grid*, in the passages set out at paragraph 42 of our skeleton. There is no legal requirement to use a counterfactual to prove an abuse and if you are going to use one, the appropriate form of the counterfactual is a matter of judgment and assessment for the decision-maker.

Our point is very simple. Namely, that for the purpose of identifying the effects of the conduct in question, it makes no sense to compare the actual world with the counterfactual in which some of those effects are still present, as might be the case, if you assume that the allegedly abusive conduct was in place right up to the start of the infringement period, for example because the market would still be adapting once that conduct had been removed.

Yes, you might want to consider what a realistic alternative counterfactual should be, but

simply assuming that the unlawful conduct remained in place right up to the start of the infringement period seems to us to be wrong in principle.

Unless you had any questions, those are my substantive submissions for today.

THE CHAIRMAN: Just on that last point, I think you are saying it is effectively a matter of judgment for us as to how we deal with the transition between the two worlds, and the timing point and that, no doubt, is fact-specific and depends on the way the real world operates. But ultimately we are trying to get to a point for the purposes of the counterfactual concerning abuse, to something which gives us a clear picture of the likely effect?

MR GREGORY: Yes, but for the purpose of estimating aggregate damages, you have this question about you know what the delta is between the actual world and the counterfactual and whether there is a glide path and that is all affected by whether you assume the abusive conduct is simply removed in its entirety or is in place. The CMA is not making submissions about that.

THE CHAIRMAN: That is why I am very focused on the side of assessing the abuse and the effect of it.

MR GREGORY: The counterfactual is a tool to assist your

assessment of whether or not the conduct is abusive, and to understand the effects normally, it would be better to compare the effects in the actual world with the counterfactual world in which the abusive conduct and the effects of that conduct have been removed in their entirety.

THE CHAIRMAN: Yes, I understand. That is helpful, thank you.

MR GREGORY: Finally, just on a procedural point, I wanted to raise the possibility of the CMA making some sort of submissions in closing. First, if the Tribunal would find it helpful for us to set out our position on any issues in closings, we would obviously be happy to do so. Second, we would like to be able to review the written closings and consider whether there are any issues on which we could usefully make further submissions, whether in writing or orally. We appreciate we would need the Tribunal's permission to do that, and so if we would like to make further submissions, we will write to the Tribunal and seek permission.

There is only one practical point arising from that, which is that the timetable at the end of the trial is quite tight and to allow us to do that in a timely manner, in particular in time for the parties

to make any responsive points they might want to make, it would be very helpful if we could receive non-confidential versions of the written closings at the same time that they are served on the Tribunal.

THE CHAIRMAN: Just so I understand, is the position, obviously your observations are as of right as you indicated at the beginning. Does that remain the position for closings as to the point about supplying of the skeletons, the closing submissions I mean. In other words, if you wanted to turn up, do we need the views of the parties or are you just saying if you want to turn up, you could?

MR GREGORY: Yes, I think if we want to make submissions at closing whether written or oral we will obviously write to the Tribunal and seek your permission to do that.

THE CHAIRMAN: So as the rules say you do now have permission to do, to turn up at all. I cannot quite remember how it works, yes, that is helpful.

MR GREGORY: Yes, the rules allow us to make written observations, which you have obviously done in the original.

THE CHAIRMAN: It's their effect and everything after that. That is helpful, thank you.

Mr Hoskins, Mr Kennelly, is somebody going to

tell me whether there are any views on that?

MR HOSKINS: I am going to be taking instructions is probably what will be happening.

MR KENNEDY: I have a housekeeping matter, sir. I am mindful the Tribunal has a hard stop at 4.30 but there is one housekeeping point which happily is not contentious.

THE CHAIRMAN: Well just before you get on to that --

MR KENNEDY: Of course, I can come back to that.

THE CHAIRMAN: Fine. I just wanted to finalise this point about the CMA's position. Do you have a position on that?

MR HOSKINS: Let me just take instructions on that.

THE CHAIRMAN: Yes.

MR HOSKINS: Sir, we are happy for the CMA to come if that would be helpful. Just on the timing, we will get them a non-confidential version as quickly as we can but it might not be at exactly the same time for obvious reasons.

THE CHAIRMAN: I think we are due to get it at the happy time of 10 pm.

MR HOSKINS: I do not know whose idea that was, it was not my idea I promise, on the 19th which is a Wednesday.

THE CHAIRMAN: I am not anticipating that they are going

to be full of confidential material, presumably.

MR HOSKINS: If it is possible, you know, they will get it at the same time.

THE CHAIRMAN: I imagine Mr Gregory is not going to be waiting up for them but it would be quite helpful if they were available during the day on the 20th. Would that be sensible?

MR HOSKINS: We can liaise with Mr Gregory. If it looks like there is a delay we can obviously let him -- he can phone me up and I will tell him where we are at. Perfectly happy to do that.

MR KENNELLY: I am afraid we cannot commit now to producing a non-confidential version by that time. It is highly compressed and so we will have to reflect overnight on whether that can be done by the 20th. There is also a question about and again it is not for the Tribunal to decide it now, the CMA will have to ask, for timing for them to make submissions orally if they choose to because the timeframe for closings is highly compressed at the end of the trial.

THE CHAIRMAN: Well you have got five days for it. It is not in my view highly compressed.

MR KENNELLY: Well actually in a trial of this magnitude with the amount of evidence it is actually

unfortunately compressed. As you have said yourself, sir, already the timetable is tight and there is a huge amount of evidence to get through.

THE CHAIRMAN: Mr Kennelly, I understand obviously lots is going on, all these things are quite difficult and somebody has got to work hard for it, but the reality is you are going to be writing these things, you have probably started writing them already and as they progress, somebody having an eye to what is confidential or what is not is not unreasonable, to say within 24 hours you have got to produce a non-confidential version, is it? Why do not you go away and think about it?

MR KENNELLY: We will have a think about it but genuinely --

THE CHAIRMAN: That is what I am inclining towards so I would need some quite good reason not to. Given, as I say, you will be working on them as we go and you have got quite a lot of time. We are not talking about a huge amount of material, I would imagine, we are talking about numbers and so on. The alternative would be to put Mr Gregory into the ring. If you would rather do that. I do not know, Mr Gregory whether you would be prepared to do that. You may prefer not to.

MR KENNELLY: Shall we just take it in stages, sir. All I am saying is the cross-examination of the experts finishes on the 14th, the timeframe for the production of the document itself is very compressed and although obviously we can begin it earlier and of course we will, as you know, sir, the critical crunch point for the production of the written closing is at the very end, when the output of the expert cross-examination is revealed. So it is a very compressed timetable. All I am saying, sir, is give us a bit of time, please do not bounce us into saying something now that turns out to be impossible or impractical. Let us reflect on it.

THE CHAIRMAN: That is fine and you are not objecting in principle.

MR KENNELLY: We are not objecting in principle to it but it cannot prejudice our preparation for closings.

THE CHAIRMAN: As to the CMA for closing submissions, you again are not objecting in principle it just needs to work practically?

MR KENNELLY: In oral closings?

THE CHAIRMAN: Yes.

MR KENNELLY: Again, I am not saying never now, but we would need a very frank discussion with them about what they envisage because we do think that the

timetable for oral closings is compressed and so we need to discuss with them what they envisage in terms of time.

THE CHAIRMAN: Do you have any sense, I suppose you do not have any sense of how much time you might need Mr Gregory, are we talking the order of an hour two hours?

MR GREGORY: It is difficult to say but, I mean, if we had an hour again I think that results in 12 hours each for all closings for the parties.

THE CHAIRMAN: Mr Kennelly, I think I am going to bounce you on that. I mean as far as we are concerned we would find it very helpful to have, we found the submissions, the written observations in the skeleton as very helpful and I am grateful for the time and effort the CMA has put into it and we would find it helpful to have further written submissions and attendance in the closings. So we are going to order that that should happen. That is in the expectation that it is going to be in the order of an hour to two hours and we can find time for it on the timetable, I am sure we can manage it.

MR KENNELLY: An hour, certainly, sir, we could see how that could work. The CMA will not be attending on the evidence so one imagines their submissions will

be in relation to the law.

THE CHAIRMAN: One assumes they are going to follow the same path as Mr Gregory has described, which is they are here to keep us on the straight and narrow in relation to the points of principle they think important. I do not imagine it goes beyond that.

So I think that is our decision in relation to the attendance. As to the timing, I think I can say that the expectation is that some time on the 20th we would expect a non-confidential version to arrive. I am not going to order that but if you want to reflect on that and think there might be a better way of doing it like putting Mr Gregory in the ring or doing something different, then we can have that conversation. That is where it is going.

MR KENNELLY: I am obliged. That is a clear steer just let us think about it. Obviously, we seek to be as helpful as possible but we do not want to be prejudiced and of course it is important that we have time to reflect on what Mr Gregory says. The position is not quite as neutral as it appeared in their written observations. The skeleton and their oral submissions gave it a rather different slant and so we need the opportunity to respond to that.

THE CHAIRMAN: It is inevitable, is it not, that if they

are making observations on points that they think are important, sometimes they are going to favour one party and sometimes they are going to favour another. That rather depends on where the parties are and how it falls out.

MR KENNELLY: There is a rather different degree of favour. I think there was one, you know, little gift that we were thrown.

THE CHAIRMAN: Perhaps it might keep everybody honest, Mr Kennelly.

MR KENNELLY: Let us see, sir. The last point I had was that, just for the Tribunal's timetable, some good news. Mr Kosmynka, if you recall we had asked that we have an early start to accommodate him on Friday. He was due to start at 9.30. He is now able to start at 10.30.

THE CHAIRMAN: So that means we do not start early on the 17th.

MR KENNELLY: So it is possible that we can now start with Mr Kosmynka on Friday at 10.30.

THE CHAIRMAN: That is very helpful, thank you. So just before we finish then. Mr Gregory, is there anything else? Are you happy with that outcome? Obviously, if there are any issues about how that all works in practice then you can write to us.

MR GREGORY: I think if we get the submissions the following day, that would allow us to review them. They are going to be lengthy documents so it will take some time to review them let alone produce something in writing, if that is what we are going to do.

THE CHAIRMAN: I think it would be useful to have something in writing just for obvious reasons, but how and when that happens we can work out a bit later perhaps. Perhaps you might think about some timings for that, suggest some, so we all know what is coming when, that would be helpful. Thank you very much for your assistance.

Who was next? I think Mr Kennedy?

MR KENNEDY: I think it is me, sir. Sir, you will hear Mr Kosmynka's evidence now at 10.30 on Friday. We are mindful the proceedings should be in open as far as possible but Mr Kennelly and I have had a couple of conversations and we think that in the circumstances it would be better if Mr Kosmynka's evidence was heard in private. I can show you the statement.

THE CHAIRMAN: I have read the statement.

MR KENNEDY: You will have seen that there is a significant amount of confidential marking.

THE CHAIRMAN: Yes there is. Just to be clear there is all sorts of confidentiality littered through this. I understand that. The approach I would like you to take is to consider, is there any of your questioning which you think you could safely do in open court even if it is only five or ten minutes. I would like to start with that if it is possible and if it is not possible then obviously we will start in closed session. What I do not want to do is just to default to being in closed session because there is going to be some material that is difficult. I appreciate it puts an extra burden on you in terms of organising your cross-examination. I am sorry if that is not how it looks at the moment but it is a very important principle.

MR KENNEDY: Of course, sir, and that is why we raise it now to get that indication.

THE CHAIRMAN: Or I do not mind doing it the other way round, if you want to do the more sensitive material first. It is probably easier to think about the other way, what can you do that does not require us -- and in that I am assuming that there will be bits where you are going to be confidential and are not. It does not make any sense to me to be open and coming backwards and forwards, so I am not

suggesting you do it by question, divide it by question. I think by topic really is the point, there are topics that you can do that you are confident are clean, then let us do those in open, then the moment you run out of that, then let us go to closed.

MR KENNEDY: Sir, we will continue to reflect on it. Part of the concern is that it has not so far been necessarily possible to identify topics which we are confident are clean and are confi.

THE CHAIRMAN: If that is the conclusion you get to, then we have to start and finish and close.

MR KENNEDY: It is partly out of fairness to Mr Kosmynka, because whereas I might be confident my question does not involve any confidential material, he might want to answer by reference to matters which are confidential to Apple.

THE CHAIRMAN: That is a bit more problematic and I think, you know, you could take that view with pretty much anything, really. You need to do your best to try and work out what is safe and what is not. If you reach the conclusion that there is not anything that is safe, then that is fine. If you are in doubt then obviously you can discuss it with Mr Kennelly. If during the course of events it

becomes apparent there is straying, or Mr Kosmynka looks like he is in difficulty, then I will certainly be alert to that as well. Then we will need to park that question.

MR KENNEDY: Of course, sir. I was going to indicate that to Mr Kosmynka as I start, that he should indicate to you or his advisers if he feels uncomfortable that he is straying into matters.

THE CHAIRMAN: It is not ideal, I appreciate it makes it difficult for you, but on the other hand, what I do not want to do is find we are defaulting to closed session all the time and then finding there is quite a lot in there that could have been dealt with in open.

MR KENNEDY: If it turns out it is all closed, I will indicate that first thing on Friday morning but I wanted it raised it now just to get that indication.

THE CHAIRMAN: Thank you, Ms Demetriou?

MS DEMETRIOU: Sir, yes, just on the amendment application. I spoke to Mr Hoskins and we think that between us it will probably take about 20 minutes.

THE CHAIRMAN: So should we try and do that at 10 o'clock instead, then? Start at 10 with that and then which means that we will find some time for Professor

Hitt, either over lunchtime or depending on how the witnesses go. We know we will not be getting Mr Parekh until 2 o'clock, is that right?

MS DEMETRIOU: That's correct, sir.

THE CHAIRMAN: So I do not know if you still think you are going to be the morning with Mr Owens.

MS DEMETRIOU: That is Mr Kennelly. I think the assumption is you are going to be the morning.

MR KENNELLY: Yes, Mr Owens.

THE CHAIRMAN: If you do not mind, Mr Piccinin, we might just see if we can fit it in somewhere but being mindful it needs to be said, I think obviously Mr Ward has impressed on us the need to know where he is.

MR WARD: Yes, sir. If I can just explain I would not otherwise be attending the Tribunal tomorrow morning for Mr Kosmynka's cross-examination -- I am so sorry, Mr Owens' cross-examination. I do intend to attend in the afternoon for Mr Parekh. So if it could be dealt with after Mr Parekh tomorrow. Mr Parekh goes into Friday as well, I think. Sorry, I do not have the timetable in front of me.

THE CHAIRMAN: Or we could do the half-past 1, if that is convenient?

MR WARD: Yes of course, if that would be -- I do not

mean to impose my own convenience on the Tribunal.

THE CHAIRMAN: It has got to happen somewhere and on the assumption Mr Kennelly is going to keep us busy until 1 o'clock, then it probably is the obvious answer. I would much rather do it over a shorter -- unless people object to that I think it is a much better thing to do than prolong the day.

MR WARD: It confines the argument. Thank you, sir, I am personally grateful for that proposal.

THE CHAIRMAN: We will sit at 10 o'clock. We will do the amendment and then we will deal with Professor Hitt, Hitt 4 at 1.30. Anything else?

Very good, thank you very much. We will see you at 10 o'clock.

(4.34 pm)

(Adjourned till 10 o'clock tomorrow morning)

I N D E X