**IN THE COMPETITION APPEAL TRIBUNAL**

Case No: 1696/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

11th-12th December 2025

Before:

The Honourable Mr Justice Johnson
John Davies
Lesley Farrell
(Sitting as a Tribunal in England and Wales)

BETWEEN:

**DR MARIA LUISA STASI**

**Applicant**

v

**MICROSOFT CORPORATION AND OTHERS**

**Respondent**

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# A P P E A R AN C E S

Sarah Ford KC, Robert Marven KC and Ben Lewy (instructed by Scott+Scott UK LLP) on behalf of Dr Maria Luisa Stasi
Brian Kennelly KC and Aislinn Kelly-Lyth (instructed by Linklaters LLP) on behalf of the Microsoft Corporation and Others

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**Friday, 12th December 2025**

**(10.30 am)**

**Reply by RESPONDENTS (cont.)**

**MR JUSTICE ADAM JOHNSON:** Yes.

Mr Kennelly, good morning.

**MR KENNELLY:** Members of the Tribunal, I was dealing with the factual background still --

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** -- and I was addressing the popularity of Linux. As to that, I wanted to show you something in the CMA's Final Report dealing with the degree of usage of Linux in Azure, in the Microsoft cloud product.

If you could go, please, to the CMA's Final Report in the fourth volume, tab 27, page 2442. It is figure 7.2. You can see the dark blue line is Linux, the light blue line is Windows Server. It tracks between 2020 and 2023 the shares of VM usage by operating system. You can see that even for the Microsoft cloud product, the Azure product, for a significant part of that period the Linux operating system was more popular than Windows Server.

As to the Listed Providers, it is interesting to see the proportion of their customers that use Linux and use Windows Server. For that, I would like you to go to Professor Wickelgren's first report, tab 8, page 427. It is table 9, it is the share of developers on Listed Providers, that is Amazon, Google and Alibaba, using Windows as their OS 2019 to 2024. The share, as you can see, grows from about 31% to about 40%.

First, that tells you how many of their customers are using Linux. What is striking from this table, I submit, is that this is the segment from which Amazon and Google are said to be excluded, between 30 and 40% of their customers are using Windows Server.

The third and final area of factual background that I wanted to address was switching. The CMA, as you saw, said that there was not much switching, but it did find that the largest customers of VMs, the ones generating most revenue, often had multiple cloud providers, they multi-cloud. It is called multi-clouding. That suggests, we say, if one cloud provider was to increase its prices very significantly, it would prompt the customer to drive more of its new load to the cheaper provider, since it has multiple clouds available to it.

We see that multi-clouding again in the CMA's Final Report. It is back in volume 4, tab 27, page 2121, table 3.9.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** You can see the prevalence of multi-cloud weighted by revenue, which is obviously important from a competition perspective, and you see the percentages 37.6 in 2020 to 40.8 in 2023.

The prevalence by spend band is on the next page, figure 3.1. This shows how the degree to which multi-clouding happens is far less prevalent for the smaller spenders, but for the big spenders, the 20 million plus in the far right-hand, one sees over the period of 2020 to 2023 very significant multi-clouding, as you would expect, by big spenders, the ones, one would imagine, are most significant from a competition perspective.

That's the only factual background I wanted to show the Tribunal, just to ground us in reality as to how these markets are working in contrast to other exclusionary abuse cases that you have been shown.

Then to wrap up my summary of our case, what you are left is a methodology from the PCR which proposes to show, not that Amazon and Google are excluded wholly or partially from the cloud computing market, but that because the Linux cloud users are more profitable for them than the Windows Server cloud users, Amazon and Google

will focus their efforts on the more profitable segment. My learned friend was very frank that that was their theory of harm.

We say, simply, that will not do. The methodology needs to do more than show that Google and Amazon favour a more profitable segment instead of one which is still profitable, but less profitable than the Linux VM segment and less profitable because in the Windows Server segment they have to pay for Microsoft's IP.

The PCR needs to do more with its methodology, because it needs to show that competition in this market is not normal. You see that formulation of the legal test in the cases, but it is completely normal that Linux VMs are more profitable for Amazon and Google. The Linux VM segment is more profitable because Linux is open source. The bulk of the Linux input is free.

None of this is in dispute, whereas Windows Server is Microsoft's proprietary software, the fruit of its R&D, its intellectual property. It is completely normal for Microsoft to charge other companies to use its own proprietary software. It would be completely abnormal from a competition perspective for Microsoft to charge itself to use its own software. That would be an internal transfer price, which would be economically meaningless in any event, taking money from your left pocket and putting it in your right pocket.

But that is the PCR's case. That is the methodology. We see that most clearly in their pleading. Can I ask you to turn to that next, please, the Claim Form.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** Tab 3, page 9, paragraph 5. It is striking when one sees it here. Paragraph 5, subparagraph 1, this is the first Licensing Abuse. The practice which is said to be abusive is simply that Microsoft is charging wholesale prices for Windows Server, its proprietary product, that are higher than the prices for equivalent licences charged to users of Microsoft Azure. It is not that Microsoft is charging too much or

that Microsoft is charging so much that competition in a downstream market is being distorted. It is simply that Microsoft is charging more, just more, for the use of its Windows Server by its rivals than it is charging itself for Azure.

The question of whether this case is about pricing or not, which my learned friend returned to many times, is addressed at paragraph 8, over the page, page 10. This paragraph needs to be read carefully, because it goes to whether the case is really about pricing or whether Quality Abuses are also part of the claim.

"Whilst the proposed class representatives [says the PCR] will rely on the Quality Abuses as evidence of Microsoft's anti-competitive intent, the PCR does not, pending disclosure, seek to quantify the impact of these Quality Abuses."

We heard that already.

Then this:

"... or bring any claim in respect of them."

It was said by my learned friend that they have difficulty quantifying the Quality Abuses, but that's the extent to which Quality Abuses are put before you.

As the Tribunal knows very well, it is perfectly normal, especially in competition cases, for abuses to be pleaded but without any real quantification because it is very difficult to quantify, but the claims are made. Here the PCR has positively pleaded that no claim is brought in respect of the Quality Abuses. That's not simply about difficulty in quantification. They say they would seek to quantify the impact of the Quality Abuses after disclosure and bring a claim in respect of them. That is what is promised, but, as things currently stand, no claim is brought in respect of the Quality Abuses.

That's all I need to show you from the pleading.

I will turn now, if I may, to the law. My learned friend showed you the Google Shopping case in the General Court. I will begin with that, if I may, and then go on to the Court of Justice. Google Shopping in the General Court is in the fifth bundle of authorities,

tab 60.

I go to this first because you have just seen in the Claim Form that the PCR brings no claim in respect of the Quality Abuses. The only claim that is brought is in respect of the alleged pricing abuses. Although my learned friend relied heavily on Google Shopping in the General Court, I wish to show you one passage, only, you were not shown. That is at page 3925, paragraph 538.

Here the General Court is dealing with the argument that the Commission should have adopted a price-cost test, which one normally sees, and which we have obviously said ought to be part of the methodology offered by Professor Wickelgren.

Here the General Court says:

"As regards the arguments ... according to which the Commission failed to demonstrate that competing comparison shopping services that had experienced difficulties were as efficient as Google, when in fact they are not, the Commission is correct in maintaining that it was not required to prove this."

Why?

"The use of the as-efficient-competitor test is warranted in the case of pricing practices (predatory pricing or a margin squeeze, for example), in order, in essence, to assess whether a competitor that is as efficient as the dominant undertaking allegedly responsible for those pricing practices, and which, in order not to be driven immediately from the market, would charge its customers the same prices as those charged by that undertaking, would have to do so at a loss and accentuating that loss, causing it to leave the market in the longer term ... In the present case, [however] the practices at issue are not pricing practices."

We distinguish that the factual analysis sought to be drawn with Google Shopping, it is not a pricing case, whereas the case before you clearly is.

Next, I would like to show you the next stage in this Google Shopping case in the Court

of Justice. For that you need to go to the sixth volume of authorities, tab 64. It begins at page 4023. I would ask you to go, please, to page 4050.

I am taking the Tribunal to those authorities to make two broad points.

First, to make clear that competition law is not concerned with simply ensuring that every operator has the same costs and can offer similar prices, which is a statement of the obvious, but that competition law has no problem with less-efficient operators being driven from the market, if that's a result of normal competition, and, that, in order to find that kind of conduct in pricing cases, the normal approach is to use some form of price-cost test to see if an as-efficient competitor would be driven from the market.

Here at paragraph 164, you see the Court of Justice saying:

"It is not the purpose of Article 102 ... to prevent an undertaking from acquiring, on its own merits, a dominant position on a market, or to ensure that competitors less efficient than an undertaking in such a position should remain on the market. On the contrary, competition on the merits may, by definition, lead to the departure from the market or the marginalisation of competitors which are less efficient and so less attractive to consumers from the point of view of, among other things, price, choice, quality or innovation ..."

In paragraph 165, we see the two-part test, which is common ground. In order to find that the conduct is an abuse of a dominant position it is necessary to demonstrate.

The first part:

"... through the use of methods other than those which are part of competition on the merits ..."

The second part:

"... that that conduct has the actual or potential effect of restricting that competition by excluding equally efficient competing undertakings from the market or markets concerned, or by hindering their growth on those markets …"

Even in this Google Shopping case, which was not about pricing, it is interesting to see how they deal with competition on the merits. For that, could I ask the Tribunal to go to page 4053, paragraph 186. In paragraph 186, the Court of Justice says:

"It is important to add that it cannot be considered that, as a general rule, a dominant undertaking which treats its own products or services more favourably than it treats those of its competitors is engaging in conduct which departs from competition on the merits irrespective of the circumstances of the case."

187, we see why there was an abuse in Google Shopping. The General Court upheld the Commission, which established:

"... having regard to the characteristics of the upstream market and the specific circumstances identified, the conduct at issue, with its two components, namely the highlighted presentation of [Google's] own results and the demotion of those of competing operators, was discriminatory and did not fall within the scope of competition on the merits."

If you go to page 4062, we see the argument that the appellants said that the Commission didn't examine whether as-efficient competitors would be excluded.

If you go to see how the Court dealt with that, because in that case the Commission did not undertake an as-efficient competitor analysis, page 4064, paragraph 265, the Court says:

"The assessment of the capability of the conduct at issue to foreclose an as-efficient competitor ... appears, in particular, to be relevant, where the dominant undertaking submitted, during the administrative procedure, on the basis of supporting evidence, that its conduct was not capable of restricting competition and, in particular, of producing the alleged foreclosure effects. In such a case, the Commission is not only required to analyse the extent of the ... dominant position ... but it is also required to assess the possible existence of a strategy aiming to exclude competitors …"

This is important:

"... that are at least as important as the dominant undertaking ..."

266:

"... it must establish the existence of an abuse of a dominant position in the light of various criteria, by applying ... the as-efficient competitor test, where that test is relevant ..."

So, it should be applied where the test is relevant.

Then the Court goes on to explain why in Google Shopping the test was not possible, it was not practicable in that case. Paragraph 267, over the page, four lines down:

"... the Commission found, given that a comparison shopping service's ability to compete depended on traffic, that this discriminatory conduct on Google's part had had a significant impact on competition in that it had enabled Google to redirect, in favour of its own comparison shopping service, a large proportion of traffic previously existing between Google's general results pages and comparison shopping services belonging to its competitors, without the latter being able to compensate for that loss of traffic by using other sources of traffic, since increased investment in alternative sources was not an 'economically viable' solution.

"The General Court was ... right ... that it would not have been possible for the Commission to obtain objective and reliable results concerning the efficiency of Google's competitors in the light of the specific conditions of the market in question."

Next paragraph, for those reasons, the as-efficient competitor test wasn't mandatory, and it wasn't relevant in the context of this case.

In the particular context of Google, it wasn't practicable to do an as-efficient competitor test, which is why it wasn't done there.

It then tells you that even in non-pricing cases, the law is concerned with whether, in order to establish if it is competition on the merits or not, is an as-efficient competitor

being driven from the market, and that's in a non-pricing case.

Of course, in a pricing case that is done normally by applying a price-cost test. That's how you work out if an as-efficient competitor will be driven out or not.

The next case is one my learned friend showed you also, which is the Servizio Elettrico Nazionale case. She took you to the opinion of the Advocate General, which is also where would I like to go, if I may. It is also in volume 6 of the authorities, tab 63.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** Page 4000, please. Paragraph 68.

Here the Advocate General is dealing with the dividing line between things that are competition on the merits and things that are not normal competition.

At 68 he says:

"... it is necessary ... to assess, in the fifth place, the ability of competitors to imitate the conduct of the dominant undertaking. This assessment is relevant in order to determine whether the practice at issue comes within the scope of competition on the merits ..."

69:

"Indeed, the case-law of the Court ... confirms that exclusionary conduct of a dominant undertaking which can be replicated by equally efficient competitors does not represent, in principle, conduct that may lead to anticompetitive foreclosure and therefore comes within the scope of competition on the merits."

There you have our point. We say that if Amazon and Google can match or beat Microsoft's prices in the cloud computing market, then there is no problem from a competition perspective.

70:

"... in the context of price-related exclusionary conduct ... such a possibility of replication is assessed, as a general rule, but not necessarily, on the basis of the

so-called 'equally efficient competitor test' ... The particular modalities of that test vary depending on the type of practice in question, but the common factor consists in examining whether a pricing practice is economically viable for the competitor of a dominant undertaking, using as a point of reference, primarily and as a general rule, the dominant undertaking's price/cost ratio. In other words, that test consists in identifying whether that conduct can be replicated by an equally efficient competitor by placing the dominant undertaking in the place of the equally efficient competitor to ascertain whether the [dominant undertaking] would suffer exclusionary effects from the practice in question."

Then 71 we can skip, because it is about practices not relating to pricing.

Then 72:

"In the present case, the conduct ... in the main proceedings does not concern a pricing practice ...", but a non-pricing unlawful strategy.

Then this at 73:

"However, the underlying logic of the [equally efficient competitor] test -- which seeks, in essence, to estimate whether a dominant undertaking was in a position in which it was able to foresee, on the basis of data known to it, whether a competitor could, despite the conduct in question, have stayed competitive on the market operating in an economically viable way -- to my mind remains relevant."

That, members of the Tribunal, is the key to ascertaining whether this is abusive or not and this is the question Professor Wickelgren is failing to answer.

The next stage is to look at the Court of Justice in SEN. That's in the fifth volume of authorities, tab 62, page 3975, paragraph 76. The Court here is dealing, first, with examples of what is not competition on the merits.

76:

"... undertakings cannot make it more difficult for competitors which are as efficient to

enter or remain on the market in question by using means other than those which come within the scope of competition on the merits."

77, an example of that would be implementation of any practice which holds no economic interest for a dominant undertaking, except to eliminate competitors.

That's not competition on the merits.

Then 78:

"The same applies ... to a practice that a hypothetical competitor -- which, although it is as efficient, does not occupy a dominant position on the market in question -- is unable to adopt, because that practice relies on the use of resources or means inherent to the holding of such a position ..."

That part you have been shown, but over the page it is given a particular obligation in the context of pricing abuses, because that general question applies equally to pricing and non-pricing abuses, as we have seen in Google Shopping, but at paragraph 80 we see how it is applied in pricing:

"Regarding the first of these two categories of practices, [you can tell that is pricing from the paragraph immediately before it] which includes loyalty rebates, low-pricing practices ... margin-squeezing practices, it is clear from the case-law that those practices must be assessed, as a general rule, using the 'as-efficient competitor' test, which seeks specifically to assess whether such a competitor, considered *in abstracto*, is capable of reproducing the conduct of the undertaking in a dominant position ..."

The Court says that's one way of showing that an undertaking in this position uses means other than normal competition. You are not obliged always to apply that test.

Paragraph 82:

"Nonetheless, the fact remains that the significance generally given to that test, when it can be carried out, shows that the inability of a hypothetical as-efficient competitor to replicate the conduct of the [dominant] undertaking ... constitutes, in respect of

exclusionary practices, one of the criteria which make it possible to determine whether that conduct must be regarded as ..." something other than competition on the merits. What the Court is saying here is you have to ask whether the dominant undertaking is doing something which it can only do as a result of its dominant position in the market where the alleged abuse is taking place. Where the allegation is one of unlawful pricing practices, not limited to margin squeeze, the Court has been clear, they say including margin squeeze, for example, the right way to test the allegation is generally a price-cost test.

When the allegation is not one of pricing, a different test may need to be used, as we saw.

The PCR's case, as you heard, is that the concern is not pricing but some form of leveraging. The core question -- even if they are right about that, and we dispute it -- still is: is Microsoft doing something that its competitors Amazon and Google cannot do? What is it doing? What is allegedly driving Amazon and Google out of the market in part? It is charging less for Windows Server VMs than Google or Amazon.

So, the question needs to be: is Microsoft only able to charge those prices because it has resources on the leveraged operating systems market that are unavailable to Google or Amazon or could Google or Amazon, in fact, match or beat Microsoft's prices if they chose to?

That question can be answered by a price-cost test. Crucially, Professor Wickelgren has not proposed any alternative test for assessing that key question. It is not our case, has never been our case, that a price-cost test is always required. We can see from the cases there are situations when it is not appropriate. Our point is that it is plainly appropriate in this case.

With that in mind, one can distinguish quite easily, we say, Royal Mail v Ofcom, the case relied on by the PCR. I would ask you to go back to that in the first volume of

authorities behind tab 10.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** It is tab 13, in the Court of Appeal.

**MR JUSTICE ADAM JOHNSON:** Yes. Would you mind giving us a page reference?

**MR KENNELLY:** I am so sorry, page 806.

**MR JUSTICE ADAM JOHNSON:** Thank you.

**MR KENNELLY:** My learned friend showed you this, so you will be familiar with the background facts, just to recap them quickly.

Royal Mail had been a statutory monopolist, but after 2006, competition was permitted. A new entrant, Whistl, wanted to set up its own end-to-end bulk delivery service in competition with Royal Mail, but it could only enter the market gradually. So, it couldn't do end-to-end delivery all through the UK by itself, it still had to rely on Royal Mail for part of the country. It had to rely on Royal Mail's contractual terms.

If you go to page 808 of the Court of Appeal's judgment, paragraph 8. Faced with this new competitor, this new entrant, Royal Mail set out to devise a strategy that would limit direct delivery competition from Whistl, by deterring Whistl from expanding its own direct delivery operations. The mechanism which they employed for doing that was to introduce a price differential between NPP1, that was the plan for a company that would deliver throughout the whole country, and APP2, where it wasn't a fully national service. Whistl couldn't avoid purchasing a substantial proportion of its delivery needs from Royal Mail, because it could only practicably enter the market in a gradual way, and it was then placed in this invidious position. If it wished to roll out a competing delivery service at the national scale, it could only do it on NPP1, but there was a big risk for it in committing to a national profile, but if it used APP2, it would have to pay higher prices to Royal Mail to deliver mail for it everywhere else.

That was exactly Royal Mail's intention.

9, Royal Mail did not conduct any AEC test to see whether a competitor with its own costs could survive. What Royal Mail did was model Whistl's costs in order to work out a plan that would be most effective at curtailing Whistl's entry into the end-to-end market.

So, as you know, Whistl's backers took fright. Whistl withdrew, as Royal Mail had planned. So, the Court found it wasn't competition on the merits. The question really was about the second part of the test, about exclusion.

We see the Court's summary of the Tribunal's judgment at page 822, paragraph 49. The Tribunal concluded it was not necessary to conduct a AEC test in all cases, which is common ground.

Paragraph 50, the Tribunal concluded that the price differential in this particular case could not readily be put into any of the existing categories of pricing practice in which an AEC test had been considered to be an appropriate method for determining whether conduct was anti-competitive.

It was a novel case. The reason was that Royal Mail had many advantages as the designated provider of the universal postal service in the UK, built-in advantages that Royal Mail had that no new entrant could replicate. So Royal Mail's costs were a poor proxy for the costs of any competitor, even an efficient competitor.

The new entrant, as we saw, was necessarily less efficient than Royal Mail. For that reason, the AEC test would not help in identifying an abuse. No new entrant would be able to match Royal Mail on efficiency. The Court of Appeal upheld the Tribunal.

Page 824, paragraph 62, the Royal Mail said that an AEC test should have been undertaken. Here we receive the Court saying, four lines down. The Tribunal held:

"... it was not necessary to conduct an AEC test in all cases ... the present case could not readily be put into any of the categories in which [they] would be considered appropriate ... the concept of an AEC was highly problematic in this case ... the

Tribunal had major concerns about the AEC test relied on by Royal Mail ..."

There was no error of law.

The Court of Appeal did not deviate from the orthodox position, that in general there was no competition problem with excluding less efficient competitors, but an AEC approach in this case was not appropriate, because any new entrant was going to be less efficient than Royal Mail. Without these less efficient competitors, there would be no competition at all.

If you go to Lord Justice Males's judgment on page 828, paragraph 83, he summarises the cases. He says:

"... while an AEC test has been a useful tool for [demonstrating] whether there has been abusive conduct in some pricing cases ... [it] is not always relevant ... That will be the position in particular where the dominant undertaking holds a very large market share together with structural advantages which make the emergence of an 'as efficient competitor' practically impossible."

He sees no reason why that is the only situation where a test like this would not be used:

"Whether the test is relevant depends on whether and to what extent it provides useful information ... This is a matter of economic judgment ..."

Which is why we are taking this as a process methodology point.

What we take from this case -- we will see it also in Stopford -- is that it remains the law that Article 102 is not generally concerned to protect less-efficient competitors. So, absent any special reason, such as we see in Royal Mail, an abuse allegation needs to show that the operator which is being excluded is at least as efficient as the alleged wrongdoer. That's the general proposition, unless some reason can be shown for why it is not appropriate.

Of course, we are dealing only here with competition on the merits. In terms of

efficiency and being driven out, there is no suggestion that Google or Amazon are less efficient than Microsoft. It hasn't been suggested by Professor Wickelgren, obviously, that if Microsoft had to pay the SPLA, it would not be able to compete against itself. He has avoided addressing that entirely, because he knows that his case would fail if he actually answered that question.

In Stopford v Alphabet, which is the third volume of authorities -- this is the final authority I want to show you, because it is relied on by the PCR. Again, we see why in that case this price-cost test and as-efficient competitor analysis was inappropriate and how it is distinguished from our situation.

Tab 34, page 1968 it begins -- there is a similar issue here, as you have seen, Google was accused of abusing a dominant position in the search app and browser markets because it only allowed people to install the Google Play store on an Android mobile device if the Google search app and browser were also installed. There was a further problem, Google had agreed with Apple to have Google as the default browser on iPhones. So, new entrants were being blocked.

We see Google's argument at 1978, paragraph 21.

Google took this point as a strike-out point, and they tried to argue that there was a difference between the AEC principle and an AEC test.

The Tribunal rejected that.

22:

"... Google said that the AEC principle is mandatory in all cases and that 'it is no part of Article 102 TFEU to preserve on a market competitors that are less efficient than the dominant undertaking and thus less attractive from the point of view of ... price, choice, quality ... and that it is not, therefore, possible to ground a case of abuse on the basis of its alleged effect on such less efficient competitors; rather, whether exclusionary conduct is abusive depends on its capability to exclude as efficient

competitors.'"

Considering that the very same question had been addressed in Royal Mail, it is unsurprising that the following pages cite Royal Mail at length.

We come to the key finding at page 1988, paragraph 28.

Google sought to avoid engaging with Royal Mail, but the Tribunal found Royal Mail was important. About five lines down, a key decision is Post Danmark II, which makes the points: (1) an analysis in terms of an AEC does not work when the market structure prevents the emergence of an as-efficient competitor at all, and (2) less efficient competitors may have a beneficial effect on competition.

If you go to page 1989, paragraph 31:

"The Court in Post Danmark II was not saying that it is the object of Article 102 to (always) protect LECs ... We agree that behaviour likely to exclude LECs from the market without more will not make out a case of abuse of dominance since their lack of efficiency may itself lead to their exit. However, the PCR's case goes further ... and includes the assertion that it is not possible for an AEC to emerge, because of Google's behaviour in its dealings with Apple, in particular because that behaviour prevents potential competitors from achieving the scale of search that could enable them to be as efficient."

Royal Mail and Stopford are the two cases relied on principally by the PCR. One sees from the factual background, that you have seen, we are a million miles from the facts of these cases in our situation. It is beyond doubt that Amazon and Google can replicate Microsoft's conduct on the cloud computing market. They can charge the same price for Windows Server VMs. They don't need to make the same profit margin. The question is: are they able to offer the same price on the cloud computing market? Can they do that in order to compete? The question of whether the profit margin is too low is a question that can only be addressed by the price-cost test. That's the

thing that Professor Wickelgren is refusing to do.

Turning then to the methodology that's offered --

**MR JUSTICE ADAM JOHNSON:** Before we leave the authorities, could I ask a question?

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** Just going back for a moment to Royal Mail, page 828, and the judgment of Lord Justice Males, you referred us to paragraph 83 and the final sentence:

"This is a matter of economic judgment rather than law."

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** I think you made the point that that provides a platform for the submission, you are making at this stage, about the viability of Professor Wickelgren's methodology.

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** If we go, though, to Merricks, which is page 680 in the bundle, Merricks more generally seems to make the point that when it comes to certification we shouldn't be concerned with the merits of the underlying claim unless certain exceptions apply, including, for example, if there's a strike-out application or an application for reverse summary judgment, neither of which things have happened here.

We then seem to be left with the Microsoft test, set out here at paragraph 40, in the judgment in Merricks. I am curious about this. Just to read what it says, first of all:

"In my view, the expert methodology must be sufficiently credible or plausible to establish some basis in fact for the commonality requirement. This means that the methodology must offer a realistic prospect of establishing loss on a class-wide basis so that, if the overcharge is eventually established at the trial of the common issues,

there is a means by which to demonstrate that it is common to the class ..."

One, I would think natural way of reading that is that when it comes to undertaking an assessment of the expert methodology, and asserting whether there is enough in it to allow the matter to be certified, the emphasis is on whether it provides a sufficient degree of confidence that the loss being claimed is a loss common to the class, which makes the case one suitable for certification, as opposed to the sort of case where the loss is sustained on an individual basis, where an entirely different methodology would apply and where certification is not appropriate.

In light of all that, my question is: what is the basis for our authority or power at this stage, even if hypothetically one were to agree with everything you've said, for using it as a basis for denying certification?

**MR KENNELLY:** The reference to loss on a class-wide basis has to be read in the context of the blueprint to trial that would establish the loss. It is not enough for the PCR to say our methodology could be completely wrong. We may not even be asking the right questions, but if loss is established at the end of this case one way or the other, it will be loss across our common proposed class members. So, simply saying that there may be an appropriate methodology, and if there is one, it would establish loss on a class-wide basis, that's not good enough. They need to show their own positive blueprint to trial that would establish loss on a class-wide basis.

To be clear, they are not required to provide the answers to these questions. The legal test is common ground. They need to show -- to echo what the Court of Appeal said in Gutmann -- that they are asking the right questions, that they are asking the right questions which, if answered in the way they say at trial, would lead to the establishment of loss on a class-wide basis.

This formulation, at paragraph 40 of Merricks, does not absolve them of the responsibility to identify the appropriate questions to ask in order to establish loss on

a class-wide basis. That is the blueprint to trial.

**MR JUSTICE ADAM JOHNSON:** Doesn't Merricks also say somewhere that at the certification stage, the Tribunal should stay clear of merits questions, unless you fall within one of the identified exceptions, one of which is that, of course, if the defendant comes forward and brings an allegation for strike-out or summary judgment, then it is appropriate to engage with the merits.

How does one square that structure with the submission that, absent an application to strike out or enter summary judgment, there is nonetheless room within the certification process for the Court to produce the same result? Is there any authority or statement of principle anywhere which helps us address that question?

I hear entirely what you say about the Microsoft test, but we have to look at it in the context of the Merricks judgment as a whole, and other things said in Merricks seem to push against an interpretation of the Microsoft test along the lines that you have set out.

I understand the submission. I think what I am asking you is: is there anything else in Merricks or any of the other authorities that supports your way of using the Microsoft test in a way that opens up a merits enquiry?

**MR KENNELLY:** In terms of the authorities. I will begin with the material that's common ground. You have already been shown it by my learned friend, and that's the reference to a blueprint to trial. Let's look at that formula itself. To distinguish between a blueprint to trial and a debate on the merits, what I am not allowed to do and the Tribunal is not permitted to do, is decide whether or not Professor Wickelgren's proposals are likely to succeed or fail. Whether his ideas are good or bad is not the question for the Tribunal. What you need to be shown is a blueprint to trial, which at a minimum identifies the correct questions that the PCR will address in its expert and factual evidence which, if they are right, should lead them to success at the end of the

day. We are concerned only with whether they have asked themselves the right questions. That is the definition of a blueprint to trial.

That is not the same as asking if the proposed answers are right or wrong. That's not the debate for the present hearing. But the blueprint to trial has to mean something.

**MR JUSTICE ADAM JOHNSON:** Sometimes cases fail because the questions are wrong and you can still have a trial. The result of it may be a decision that the wrong questions have been asked.

Alternatively, the case may be so clear that the whole thing is susceptible to summary determination.

**MR KENNELLY:** May I show you in Gutmann --

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** I am not suggesting that this gives you a clear answer, but in the second volume of authorities at tab 18, this is the passage I had in mind. It is on page 1121, paragraph 56:

"Issues, not answers. At the certification stage the methodology must identify the issues, not the answers. The CAT is concerned to identify the issues and gauge whether the methodology proposed for determining those issues is workable at trial when the issues are tested and might lead to different answers, some in favour of defendants."

Again, you want to assess whether if we win on some issues, the methodology is capable of being adjusted so as to reflect only partial victory by the class.

The first point is the key, which is that the methodology has to identify the issues, the issues that are apt to answer the legal test.

The short point I am making, is that the legal test is common ground, something that is not competition on the merits and it is liable to exclude them from the downstream market. That is the legal test which is common ground.

The question is: have they identified the right issues for answering those legal questions?

My short point is that they have failed to do so. Professor Wickelgren has failed to identify the key issue, would a system answering those questions, which is a price-cost test or some variation of it, that would answer the question. By failing to identify that issue, that key issue, he has failed to give you an adequate blueprint to trial.

I am just seeing if there is anything else in Gutmann that could assist you.

Again, it is common ground that the blueprint is not fixed in stone. It can be changed. A level of generosity is given to the PCR in how you approach the methodology, but where Professor Wickelgren has set his face positively against a price-cost test, that tells you that you are in the danger zone.

**MR JUSTICE ADAM JOHNSON:** Might it not be said that that rather begs the question? The certification methodology must identify the issues. The issue here which is produced by an examination of Professor Wickelgren's evidence is whether, given the nature of the abuse alleged, which is said not to be limited to pricing factors but to comprise a number of other elements, including non-pricing factors, given the way in which the abuse is put, and bearing in mind, as was said yesterday, that the categories of relevant abuse are not closed, is a different sort of methodology applicable? That is the issue which needs to be examined.

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** The question is: how can we do that now? Should we do that now? There is an issue there, plainly, but is this the proper forum in which to ventilate it, bearing in mind what's said in Merricks?

**MR KENNELLY:** Our answer is --

**MR JUSTICE ADAM JOHNSON:** Yes. Your answer is Yes. No, I know.

**MR KENNELLY:** I fully accept that the bar for me is very high and the Court of Appeal

has been very clear in a succession of cases about how the Tribunal should approach the question of certification, which is why I am not arguing the merits of Professor Wickelgren's evidence. I am focusing on whether the right issues have been identified to answer the legal question, and, as to the pricing point, it is open to this Tribunal and, in fact, the Tribunal ought to determine whether on the pleaded case it is open to the PCR, now, to say that their claim includes an allegation of Quality Abuses, and for that reason, it is not appropriate to conduct a price-cost test, because whether a price-cost test should be an issue or not is a matter properly for you at certification stage. It would have been perfectly open for this Tribunal to say, on your currently pleaded case, it is a pricing abuse, if you amended it, that would be different, but as it is currently pleaded as a pricing abuse, you ought to go away now with Professor Wickelgren to consider if this were a pricing abuse case, which we find it to be as currently pleaded, what methodology would you adopt in that situation, and should you include in the methodology you are proposing to consider a price-cost test, as the CMA did. It is important. The CMA did not find a price-cost test to be determinative, but it did include it. So, that would be a perfectly legitimate route open to the Tribunal, notwithstanding the judgments in Merricks, Gutmann and McLaren. That is not to engage the merits. That is simply ensure that the right issues are identified by Professor Wickelgren for the purposes of answering what is common ground, the legal questions in the case.

I can see, sir, why the line between a merits assessment -- because to a lawyer coming to this from outside the world of collective proceedings, identifying the right issues looks like a merits question, a question that might be taken in a strike-out application, but in this context it is appropriate at the certification stage, when one is looking at a blueprint to trial, to ask: have the right issues been identified in order for this case to progress to trial? It doesn't mean they are right or wrong on them, but are

the questions the right ones?

**MR JUSTICE ADAM JOHNSON:** If the question is whether the right issue has been identified to proceed to trial, that is the same question that you were asked on a strike-out or summary judgment application, so how do I square that submission with what's said in Merricks?

**MR KENNELLY:** Because it is a question of economic judgment as to how to answer the legal questions. There is no obligation to use a price-cost test under the law, but Professor Wickelgren has to show you a methodology which explains how Amazon and Google are being excluded from a downstream market as a result of Microsoft's pricing policies. It would be open to him to say:

"A price-cost test would show X, but in any event, I will adjust the price-cost test in these various ways because the traditional price-cost test is not perfectly suited to this, but it can be adjusted to make it work."

He would be at least engaging; he would be identifying the right issue for answering the legal question. That he has failed to do. That's why we are taking the point in this way.

**MS FARRELL:** Just exploring that a bit more. I suppose the question is if you think the blueprint and methodology has asked the wrong questions, then the claim on the basis of those wrong questions cannot be made out, is that right?

**MR KENNELLY:** Yes. As things currently stand, yes, that would be the case. The case would fail, but a strike-out application would be inappropriate at this stage, because it would be open to them to say, even at this stage, "We intend to replead, Professor Wickelgren will revisit the methodology if that is what the Tribunal indicates". We are in the area of making sure we proceed to trial with the right questions, but it isn't a binary issue. A strike-out might be a pyrrhic victory, because we would be no further forward. All they would say is, we will amend and we will revisit this. We don't

agree, but at least we will ask ourselves the question and see where it gets us. It is really a process, that is, a methodology issue, not a strike-out issue.

**MR JUSTICE ADAM JOHNSON:** Thank you.

**MR KENNELLY:** But it is an important issue, because if you certify without addressing this question, we will all be worse off at the end, because we will be proceeding on the basis of the wrong issues and ultimately nobody will be well served by that. In a case of this magnitude, it is vital that the right issues are identified at the beginning, and the right questions are asked, as the Court of Appeal said in Gutmann.

It is easier to understand why the PCR is going wrong when one actually looks at the methodology they put forward. One can see in the abstract that it is a difficult issue, but when one zeroes in on what they are proposing to do, one sees why it just won't work as a blueprint to trial.

Let's look at the summary of the PCR's methodology in their skeleton argument. That's in the confidential bundle page 2O, the letter O. It is a short summary of it, paragraph 53.

Here is how Professor Wickelgren is proposing to show that Microsoft's pricing is not competition on the merits and that Amazon and Google are being foreclosed.

Let's look at the first four factors:

(i) the extent of Microsoft's dominance in the upstream market;

(ii) the conditions in the relevant market, such as economies of scale and so forth;

(iii) how much of the market for cloud computing services is affected by the conduct;

(iv) whether the practices influence user behaviour irrespective of the intrinsic qualities of the underlying product.

If you ask yourselves in respect of those four factors, legitimate competitive pricing could arise in any of the first four of those situations.

The fifth:

"... whether the discriminatory treatment raises rivals' costs or limits access to consumers."

That seems to assume that the pricing is not competition on the merits because it is discriminatory. The focus here seems to be exclusion, but again merely by showing that a rival's costs are increased or that market share is being won by Microsoft doesn't come close to showing anti-competitive foreclosure. The methodology is saying, "I am just going to look and ask if Microsoft's pricing is driving up rivals' costs in any way". It is just obvious that's that not sufficient.

Then we turn to the detail of PCR's methodology. We have the two reports of Professor Wickelgren. I need to go to both. I will start, if I may, with his first report, tab 8.

I see the time. Is this an appropriate time for a break?

**MR JUSTICE ADAM JOHNSON:** Yes. Would now be convenient?

**MR KENNELLY:** Yes, it would.

**MR JUSTICE ADAM JOHNSON:** Let's take a short break. Thank you.

(11.36 am)

**(Short break)**

(11.50 am)

**MR JUSTICE ADAM JOHNSON:** Thank you.

Mr Kennelly.

**MR KENNELLY:** Thank you, sir. Before I go to Professor Wickelgren's evidence, may I show you two extracts from the authorities in view of the discussion we had before the break.

**MR JUSTICE ADAM JOHNSON:** Certainly.

**MR KENNELLY:** The first is from the Gormsen judgment of the Tribunal. It is in the third volume of authorities, tab 28, page 1812.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** Again, this will be familiar to you, but just to recall what the Tribunal has said about its responsibility at this stage. We are looking at paragraph 40(2). We have already discussed that the merits aren't for review, but:

"The Tribunal bears a heavy responsibility as the gatekeeper in collective proceedings."

That reflects your management responsibilities in all cases that come before you, but in collective proceedings, the gatekeeper function is of particular importance.

Paragraph 38, if you go back to that, which is at page 1810, if you go back to sub-paragraph 3, there are three answers as to why the process test has to be undertaken. Over the page you see that it is an articulation of what the Tribunal should be doing in every case:

Collective proceedings, because of the specific need for the proceedings to be certified, have a specific stage devoted to these questions.

(2):

"Collective proceedings have the special requirement for certification because (i) there is less 'claimant control' and (ii) damages are or can be assessed at the level of the class rather than individually. These two reasons for certification constitute, in themselves, the reasons why the Pro-Sys test exists as a specific test in collective proceedings."

In normal cases, the claimant calls the shots. There is a high level of control from the claimant, and they wanted to minimise costs, costs exposure and maximise recovery:

"That implies a level of control of the litigation that will trend to the proportionate, and which will align to the claimant's interests in accessing justice to vindicate their rights. Of course, this is always subject to the court's control ... in collective proceedings, opt-in as well as opt-out (although the problem is starker in opt-out proceedings),

claimant control is far less, and the conduct of the litigation vests in the class representative. It is ... right and proper that the class representative's intentions as to the future conduct of the litigation ... receive a scrutiny that is higher than that facing the individual claimant."

And:

"Assessing damages at the class level involves a degree of uncertainty ..."

That isn't normally addressed in conventional pleadings.

The merits aren't in issue, so it is not appropriate to require the PCR to justify the likely quantum, but, again, it is right and proper that the Tribunal is satisfied that the PCR knows how it is proposed to make the claim good or what direction the Tribunal will immediately, or in due course, have to make to ensure an effective trial at some point in the future.

If you go ahead, please, to page 1814 in sub-paragraph (ii), it is the "not my problem" fallacy. This is of particular relevance to Professor Wickelgren's second report. If you skip down about ten lines, the Tribunal says:

"... where -- at the certification stage -- a proposed defendant makes clear that a certain point will be taken, then, whilst the proposed class representative does not have to have an answer to the point, it is incumbent on the proposed class representative to show how -- methodologically speaking -- the point can be addressed."

Here, it was certainly before Wickelgren 2, we raised the issue can Amazon and Google charge the same or less than Microsoft in the downstream market? That can be shown and should be shown by a price-cost test. How Professor Wickelgren engages with that is a matter for the Tribunal at the certification stage.

**MR JUSTICE ADAM JOHNSON:** What is the standard that we apply? Real prospect of success or what is the filter?

**MR KENNELLY:** Unfortunately, the courts don't give you a standard described in that way. You have to use your judgment to decide if -- bearing in mind, a forward-looking case management role, if you imagine that this case is going to be certified and proceeds, is there a major gap in the methodology that would have to be addressed and, if so, it needs to be addressed now. That's the question. If you imagine you are case managing this case to trial, is there something that's troubling you now that you think needs to be addressed? This is the opportunity to raise it and say:

"This is a question. You may be completely right in your answer, but you at least have to engage with the question. The way you have engaged with it so far is insufficient and so we would ask you to go away and deal with it".

I'm afraid I can't give you a specific test endorsed by the courts, but that's the approach.

In fact, some insight into that approach is given in a different case. This is in the second volume of authorities, tab 22. It is the McLaren case in the Court of Appeal. In this case, although the claim was certified, the Court of Appeal I think give you some insight, I think into the question you just raised with me.

**MR JUSTICE ADAM JOHNSON:** Thank you.

**MR KENNELLY:** On page 1472, paragraph 44, the Court refers to case management issues. Various criticisms were made by the defendants, and the Court of Appeal says these are not criticisms that go to certification, but they did find there was an error of law in the way the Tribunal understood the principles governing its gatekeeper responsibilities.

I rely on this because of course the gatekeeper responsibilities arise for you now also.

Page 1473, paragraph 50, the Tribunal had identified two completely divergent areas of dispute and did not address them at the certification stage. The Court said that's an error of approach. In that case, they had decided to grant certification, and the

Court said the CAT should have gone on to address the ramifications of the challenges to the methodology. That was the pivotal dispute. This is the paragraph that I submit is of relevance to your consideration now:

"If the CAT was of the view that it lacked sufficient information to perform this elucidatory role it could, exercising its broad case management powers, have directed the [PCR] to set out more fully its response ... as presented by the appellants. If [the Tribunal] considered that the appellants had not sufficiently particularised or evidenced their ... pricing case, it could have directed them to provide further detail and then directed the class representative to respond. Either approach would have enabled the CAT fully to exercise its gatekeeper role and at the outset lay down a more developed judicially approved trial preparation pathway."

The Tribunal erred in simply stopping in its tracks and saying "it is all for trial" hoping something will come up at trial.

Although this judgment is about post-certification assessment, I submit, it is of relevance to you because it is speaking to the Tribunal's gatekeeper role. In your gatekeeper role for the purposes of certification, it is equally valid to read paragraph 51, because if you are concerned about a gap in the methodology offered by the PCR, it is appropriate at this stage to ask them to elucidate it, and if there is a problem with our case in relation to that matter, again we can be directed to provide such elucidation as the Tribunal feels is necessary. That's part and parcel of the role you exercise at this stage.

Even if you are against me on all that and you decide to certify, the problems can't be dodged. It shouldn't just be left for trial. It needs urgent attention if the Tribunal takes the view that this is an issue that need to be resolved at an early stage.

**MR JUSTICE ADAM JOHNSON:** I suppose, I am just curious about the decision-making process that we have to undertake. If part of it is being a gatekeeper

with a view to assessing whether the case can proceed efficiently to trial, that sounds like you have to undertake some kind of merits assessment, but that's just what we are not supposed to be doing. See Merricks.

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** What is the framework that we are applying? Maybe you can't say any more than you have said already.

**MR KENNELLY:** No, this concern -- the Tribunal is very familiar with this exchange. This has happened in many other cases. All I can offer you by way of assistance is that passage in Gutmann where the Court of Appeal said that the thing the PCR does need to do is identify the right issues, but we are not interested in the answers. The answers are the merits. The issues are important for the certification stage. The questions haven't been the right questions.

If my learned friend says not even the questions are susceptible to scrutiny at this stage, then what is the point of the blueprint for trial test, what is left -- that is the other thing, it has to have some meaning, blueprint for trial, and we know it has important meaning, we see that in Gormsen. If you are not even able to ask if the questions are the right ones, then what is the point of the requirement to show a credible blueprint to trial.

**MR JUSTICE ADAM JOHNSON:** Very good.

**MR KENNELLY:** With that in mind, we go to Professor Wickelgren's first report. If you go, please, to page 400. Everything up to this point is market definition and dominance, which we can skip.

**MR JUSTICE ADAM JOHNSON:** Yes, thank you.

**MR KENNELLY:** At paragraph 272, he lists three points. This summarises what he's going to consider by way of Microsoft's allegedly exclusionary conduct, and I will take them in turn.

First, he will consider the evidence on whether Microsoft discriminates on the price -- he says quality -- but you have my submission about whether that's part of their case -- of software between Azure and Rival Clouds when selling Windows Server.

That is an allegation that Microsoft -- the question he is asking: is Microsoft preferencing itself over its competitors? We say, of itself, that question will not suffice. Preferencing yourself is not abnormal competition without more and it does not go to exclusion as formulated there.

Then the second question, he is going to look for evidence on whether the discrimination on price and quality raised the costs of Rival Cloud sellers and leveraged Microsoft's dominance in order to segment the market and weaken price competition.

Taking those in stages, first, simply raising the costs of your rivals by charging them for your own intellectual property, evidence of that is manifestly insufficient, and segmenting the market and weakening price competition again of itself, if it is the result of competition on the merits again, there is no breach, no even potential breach of Article 102.

Finally, the evidence of whether the Azure Hybrid Benefit amounts to a multi-product rebate that has exclusionary effects, I will come back to that.

On page 401, paragraph 275, we see the allegation as to how Microsoft has implemented the price discrimination:

"Offering Windows Server at a higher cost as a result of the SPLA licence required for use of these products on a Listed Provider ..."

The question is not whether Microsoft is overcharging or whether it is creating pricing pressure on Google or Amazon downstream. The question he asks is: is Microsoft charging more for the use of Windows Server by its rivals than it is charging itself for

the use of its own software?

Then for the second abuse, that is over the page. I will not read this again, because it's been read to you by my learned friend. Professor Wickelgren's point is merely that the AHB discount is only offered to on-premises Windows Server licence holders who are moving to Azure. If such a customer wishes to move to one of Microsoft's rivals, it does not receive the discount when using Microsoft's IP.

Again, the point is not the extent of the discount or that discount has an impact on their ability to compete downstream. It is simply the offering of a discount by Microsoft to customers who are using its software on its cloud server.

These pages that follow from page 403 -- I am not going to read them back to you again, my learned friend took you to them -- he alleges preferential treatment. Our short point is, where does he show a methodology that shows a lack of competition on the merits and a risk of exclusion?

We see an attempt on that at page 408, paragraph 298. We will just take that in turn. Here he says:

"Rivals were competitively disadvantaged by this pricing and quality discrimination."

He says in paragraph 298:

"I expect that the higher cost and lower quality user experience that Microsoft forced upon Rival Clouds ... is likely to have prevented [them] from competing effectively for new and existing cloud customers that rely upon Microsoft software. This is because there are a large set of customers with strong preferences for Windows Server ..."

Pausing there, that looks like the beginning of the right question, but then we go on to see what methodology he's offering to address it.

299:

"... some, but not all, of the Rival Clouds may have deep pockets and the ability to subsidise the higher costs themselves."

Pausing there, it is not a question of some, not all, of the Rival Clouds. We are only concerned on the pleaded case with the customers of the Listed Providers, the customers of Amazon, Google and Alibaba. There is no question, it is not being suggested by anyone, that they lack deep pockets and they lack the ability to subsidise higher costs if that's what they have to face.

Immediately above paragraph 299, at the very bottom of 298, you see the estimate that the element of the SPLA in the product that's offered by the Listed Providers is about 30%. So, 70% of the cost of the VM is not the SPLA fee. There is scope, obviously scope, for the Listed Providers to cut their prices to match or beat Microsoft if they are able to do so.

What does he say about that? Read the rest of paragraph 299. He says even though they have deep pockets, and they could have the ability to compete, to subsidise the higher costs and beat Microsoft downstream:

"... it would nevertheless be irrational for them to attempt to cross-subsidise to cover the costs and outbid Microsoft on discounts on software products that Microsoft produces and controls. Absent any restriction on its behaviour, Microsoft would in such circumstances be able to continue increasing the discrimination as far as it needs to in order to soften the competitive constraint from those rivals ... in order that even cross-subsidizing to match the discount does not enable the rival to compete effectively for these consumers. Anticipating Microsoft's ability to win that game, it would therefore be irrational for rivals to engage, even by offering a small cross-subsidy."

So, it is tolerably clear. He is saying it would be irrational for Amazon and Google to compete with Microsoft on price, despite being able to do so, because Microsoft would keep increasing the SPLA fee until it became impossible for them to compete on price and because of the risk of that happening, because that risk exists, it would be

irrational for them to compete at all.

Just take that in stages. Because Microsoft might increase the SPLA to a very high level, Amazon and Google will not bother to compete for these admittedly valuable and highly profitable customers, they won't even deploy a small cross-subsidy to compete. There is no methodology to prove that, he just offers no methodology to prove that. You are asked simply to assume that, and it cannot just be assumed to be right. That could be said of any vertical relationship where the upstream provider is in a dominant position. By definition, if you are in a dominant position upstream, you are not constrained in the price you charge. So, by definition, a dominant upstream provider can increase its prices. There is always the prospect of that happening.

It has never been suggested that that situation alone, the risk of that happening, means there is no effective competition downstream. A vertically integrated operator is not dominant downstream, by definition, there is competition, downstream. A fortiori here where downstream, the companies are massive companies like Amazon and Google, but it is an interesting piece of analysis because of course if, and it is a big if, Microsoft were to increase the SPLA to such a high extent that it would be impossible to compete downstream, that would be a margin squeeze. That's exactly the kind of analysis we say Professor Wickelgren should be undertaking, but he is not doing it because he knows currently there is no possibility of a margin squeeze and no evidence to show that Microsoft would act unlawfully in the future.

Of course, no methodology is offered in his report to prove any of that.

Page 410, please, paragraph 309, he says:

"... even if an equally efficient rival is able to compete for sales from Windows Server customers, they will not do so aggressively because that would require reducing their market-wide base compute prices which would mean sacrificing profits on those customers that do not use Windows Server."

This we struggle to follow. This is another area where if the Tribunal does not follow you, if the PCR can assist you, it is an area where they could be directed to elucidate their case. It is suggested that even if Amazon and Google could compete for Windows Server customers, they won't do it aggressively because it would mean sacrificing profits on customers that do not use Windows Server.

If it is being suggested that if they cut prices for Windows Server customers, they would be obliged to do so for Linux users, that makes no sense. Of course, it is open to them to target discounts at Windows Server customers in order to win that market share.

Then, the second alleged abuse at page 413, paragraph 320, this is the Azure Hybrid Benefit. He says in the heading 6.4:

"... Azure Hybrid Benefit amounts to a multi-product rebate that excludes Listed Providers."

At paragraph 320, he says that the AHB amounts to a multi-product rebate.

In the paragraphs that follow, he explains because it is a multi-product rebate, the four-part test in the EC draft guidelines is applicable and the price-cost test does not apply.

You see at paragraph 322, he says because the rebate is conditional, this means that the price-cost test does not apply and, instead, there is a four-part test to determine if the multi-product rebate is harmful.

In our submission, Professor Wickelgren just has this wrong. He has misread the draft guidelines. In fact, on his own analysis, he would and should have had to do a price-cost test.

Could you please turn up the EC draft guidelines? They are not in the authorities bundle, but in the hearing bundle, volume 2, tab 18 and it is page 1183.

**MR JUSTICE ADAM JOHNSON:** Thank you. Yes.

**MR KENNELLY:** Here they begin. 1183. I would ask you to turn to page 1213. 1213 is paragraph 83 of the draft guidelines. This was the paragraph cited by Professor Wickelgren as the one applicable to multi-product rebates.

But if you go to the previous page, page 1212, we see just above paragraph 78, that, in fact, what is being addressed here is exclusive dealing, which is defined and you see how it is defined at paragraph 78:

"Exclusive dealing refers to various forms of obligation to purchase or sell all or most of a customer ... requirements from ... the dominant undertaking."

Do you see that, sir, at paragraph 78?

**MR JUSTICE ADAM JOHNSON:** Uh-huh.

**MR KENNELLY:** But there is no suggestion in the Claim Form that Microsoft demands that, to get the AHB, you need to take all or most of your cloud services on Azure. In fact, as you have seen, for the largest users they multi-cloud. There is no allegation that Microsoft says you only get the AHB if you take all or most of your services from us.

Conditional rebates and multi-product rebates, which is what Professor Wickelgren is describing, are addressed in a different part of the draft guidelines. We see that at page 1228, just to show you are in the right place, just the heading in the middle of page 1228. Do you see the heading at 4.3.1, in italics?

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** If we go to page 1229, paragraph 143, it says:

"To demonstrate that a conditional rebate scheme departs from competition on the merits, it may be appropriate to ... use ... a price-cost test ... In this regard, whether a price-cost test is appropriate and can be carried out will depend on the circumstances of the case."

Then, in paragraph 144:

"The use of a price-cost test is required to assess standardised volume-based incremental rebates."

Then (b):

"The use of price-cost test may not be appropriate in cases where ... the inducements offered by the dominant undertaking are not monetary ..."

That's plainly not our situation. Then, 145 over the page:

"To establish whether a conditional rebates scheme is capable of having exclusionary effects ..."

You have to analyse all the circumstances.

Then they are listed. I focus, in particular, over the page at (f), page 1231:

"The fact that even a hypothetical as-efficient competitor would be unable to compensate the loss of the rebates as demonstrated by means of a price-cost test, if such test is carried out to determine whether the rebate scheme departs from competition on the merits."

So, far from showing that price-cost tests are inappropriate here, the guidance suggests that is the default position."

Over the page, 1232, middle of the page you see the heading "Multi-product rebates", which is what Professor Wickelgren is describing in terms in his report. He distinguishes between the two types.

The first type, paragraph 154, if it is conditional on customers buying all or most of their requirements from the dominant undertaking, then you are back to 4.2.1, which is the exclusionary abuse part.

We say, obviously, not applicable. It is not in dispute that Microsoft does not make AHB conditional on getting all or most of your cloud services from Microsoft.

155, when the multi-product rebate is not conditional on buying all or most of your requirements from the dominant undertaking in order to work out if it is abusive, if such

conduct departs from competition on the merits and is capable of producing exclusionary effects, the guidance, skipping down, in section 431 can be relevant.

**MR JUSTICE ADAM JOHNSON:** Uh-huh.

**MR KENNELLY:** That's describing, where appropriate, the use of a price-cost test. That's how the liability methodology was addressed in Professor Wickelgren's first report.

I will pick up his last methodology when I come to his second report.

These significant gaps that I have outlined to you were pointed out in Professor Scott Morton's report and Professor Wickelgren responded in his second report.

We say that just compounded the problem, it made even clearer the gaps in his methodology, which we say the Tribunal ought to direct him to complete before this case can be certified.

I would ask you to go to his second report now, in the second volume, tab 12. Page 646, it begins. His theory of harm is at 656.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** Like my learned friend, I am going to take each of the three mechanisms of harm that Professor Wickelgren describes, and then go to the particular factors which are lifted from the EC draft guidelines and take them in turn.

**MR JUSTICE ADAM JOHNSON:** Thank you.

**MR KENNELLY:** He begins with the three aspects or mechanisms of harm. In paragraph 31, you see what he calls mechanism 1, "Foreclosure from the Windows Server segment".

Look at the first sentence:

"The first aspect of my theory of harm is that Microsoft's price and quality discrimination raises rivals' costs and limits their access to customers in ways that cannot be

matched, thereby denying those firms the ability to compete in the Windows Server segment of the market."

As in his first report, we say that looks like the beginning of the right question, but where is the methodology which will make that good, because, as I have said, now repeatedly, if the allegation is that their costs are being forced up such that they cannot match the prices of the vertically integrated operator, that is proven normally by a price-cost or some version of it, but he refuses to use such a test or any version of it.

We see that over the page, page 657, paragraph 33, he says:

"While rivals such as AWS or GCP could (in theory) offset the impact of the observed price discrimination ... by providing large subsidies to Windows products on their clouds, they would not do so in reality. If they were to do so, and demonstrate a willingness to provide such subsidies, I believe this would only encourage Microsoft to increase the magnitude of the discrimination ... [Skipping down] The credibility of this threat to escalate the discrimination could therefore not be matched ..."

That means they are unable to compete.

That's the same idea we saw in his first report, and it makes no sense, for the reasons I have submitted.

Mechanism 2, restricting smaller rivals' access to economies of scale.

Again, this is not a merits point. This is pointing out an issue which is irrelevant on the face of his own case, because he is saying that the conduct creates anti-competitive harm by raising the cost of smaller rivals, because the discriminatory conduct denies the smaller Rival Clouds the ability to increase scales and access economies of scale that would enable them to compete with the Listed Providers, but the alleged victims of this abuse are the customers of the Listed Providers.

Since the core argument is that the Listed Providers are being excluded from the

market, this mechanism undermines Professor Wickelgren's own case. He is saying smaller providers are being weakened vis-a-vis the Listed Providers. How is that consistent with an argument that says the Listed Providers are being driven out of the same market?

He goes on to say at paragraph 36, halfway down:

"The conduct may have already enabled the large Listed Providers to rapidly increase their size and obtain economies of scale that make them uncatchable as the market matures and the stock of new-to-cloud customers dwindles."

The economies of scale that are increased surely benefit the customers of the Listed Providers. No explanation is given by Professor Wickelgren as to how that's consistent with his theory of harm.

Then 37:

"I note however that this theory does not suggest that GCP and AWS have been foreclosed from the market as a whole. This fits with the observation that they have not been prevented from building comparable scale in the market as a whole, and hence efficiency in base compute, even if this has been largely (and increasingly) through the Paid Linux Server OS segment ..."

So, he is acknowledging there the marginal relevance of what he has just been looking at by reference to his main theory of harm. And for the new theory of harm, we come to mechanism 3, based on the fragmentation of the cloud market. This is the core of his theory and methodology which he offers up.

Paragraph 38:

"The third and in my view the most significant outcome of my theory of harm is that Microsoft's conduct makes Windows Server customers substantially less profitable for AWS and GCP than Paid Linux Server customers, and that this incentivises AWS and GCP to cede Windows Server customers to Microsoft and target Paid Linux Server

OS customers instead. This means AWS and GCP set base compute prices that attract and maximise the profit earned on customers who do not use Windows Server for their Cloud Computing Services."

The methodology which he is proposing for trial is to show that because Amazon and Google's profits in the Windows Server VM segment are reduced relative to the Linux VM segment, Amazon and Google are incentivised to focus on the VM segment. That's the case even if the Windows Server VM segment remains profitable, even highly profitable, to Amazon and Google. That's his methodology.

Even if they can continue, if they can continue to compete for these users, Professor Wickelgren will simply check -- this is a methodological issue -- because they have to pay for Windows Server, their margins in this segment are less than in the Linux VM segment. As a result, they will make more of an effort in the Linux VM segment where they don't have to pay for Windows Server.

It we skip down to paragraph 40:

"If, instead, Windows Server and other Microsoft software products were available to AWS and GCP customers on similar terms to those that they were available on Azure, then I would expect that the relatively homogeneous nature of base compute would result in more direct, head-to-head, competition between Azure and AWS/GCP, leading to lower base compute prices on Azure (and potentially on AWS and GCP)."

Again, pausing there, if Microsoft gave Amazon and Google its proprietary software at cost, there would be stronger competition, because Amazon and Google's costs of offering Windows Server VMs would be lower. That is it.

This Tribunal has seen the case law on what is required to show abnormal competition and the risk of foreclosure. The importance that competition law places is on not interfering with competition between as-efficient competitors. This methodology is completely untethered to the legal test that you have seen. It does not begin to

address the issues that need to be asked in a case where Microsoft is alleged to price in a way that reduces competition in a downstream market, meaning that Amazon and Google cannot compete effectively downstream.

To show that we are dealing here with a methodological issue and not just a pure merits issue, you test it this way. In any situation with a vertically integrated company supplying inputs to a downstream rival, unless the input is given away for free, the rivals' margins will always be lower than where they don't have to pay for the thing, all other things being equal. It has never been suggested in a situation like this that a vertically integrated company must supply the input for free or at cost to its downstream rivals simply to attract them away from a more lucrative, more profitable bit of the same market.

It is not suggested for a minute by Professor Wickelgren, because he can't, that Amazon and Google are unable to compete for Windows Server VM customers and Linux customers. They are all profitable customers, and Amazon and Google had the incentive to compete for them because they are profitable, and the ability to compete for them, because they have extraordinarily large resources. That is exactly what they do in practice, as you saw from the factual background material I showed you.

We are in a situation where what you are offered is so artificial, so unreal, that Professor Wickelgren has to be asked to go back and re-do his methodology. It is completely artificial to say that Microsoft must pay the same price for its own IP as Amazon and Google pay for it. Of course, since the input is Microsoft's own thing, it doesn't pay for this in any relevant sense. In fact, because Microsoft is using its own software, it is avoiding what you have seen in the papers described as double marginalisation, because it doesn't have to pay for it, because it is its own software. It avoids the cost that's involved in buying in an outside product, and that benefits consumers. It allows a vertically integrated company to reduce its costs and offer

lower prices downstream. That is a classic undeniable benefit of vertical integration. This is exactly the kind of economic principle which is so well recognised and raised by Professor Scott Morton that Professor Wickelgren should have addressed it in his second report. It is no answer to say, "We will deal with it at trial", this is exactly the kind of point he should have addressed. This is not complicated economics; this is blindingly obvious to anyone.

There are two other aspects of Professor Wickelgren's methodology here. Paragraph 38, in the third sentence, he says -- it is about halfway down paragraph 38, he says:

"If instead AWS and GCP were to set base compute prices to also compete for Windows Server customers ..."

So, if they were going to actually compete for Windows Server customers, which of course we know they do. Let's assume for a moment that he is right and they are not competing:

"... this would require these firms to make those lower prices available to both Windows Server and Linux Server customers."

That would reduce their profits, because they make lots of money on the Linux server customers.

That, in my respectful submission, makes no sense at all. If the Listed Providers wish to compete specifically for the Windows Server VM users, they can target them. They can cut prices for those customers specifically. There is no obligation as to why they must also cut their prices for the Linux users and there is no explanation given for why that would be the case here.

Then, paragraph 39 says this, second line:

"... Microsoft increases Azure sales and can set (higher) prices that maximise profits by focusing on the Windows Server customers."

Then, this:

"This steers customers in the Microsoft server segment of the market to Azure."

He is saying when Microsoft sets higher prices in relation to Azure, that steers customers to Azure.

**MR DAVIES:** Well, I mean at risk of sounding a bit Clintonian, it depends on what the meaning of the word "this" is, doesn't it. If "this" refers to the whole of the previous sentence, then the first bit of it, a reduction in competitive constraints, it isn't as it were fully compensated by the price increase ...

**MR KENNELLY:** All I am doing is reading what's before me.

The air of unreality that descends on the section is understandable, because it is on a piece, we say, with the theory of harm that's being advanced. That is completely untethered from the legal test, and reality, such that even the low threshold for this application on a process basis is engaged here. It cries out for rigorous engagement by the Tribunal, exercising your gatekeeper role. This is, as I said, Professor Wickelgren's key argument, and it is the reason why he says a price-cost test is inappropriate.

We see that if we go back to page 655, paragraph 26.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** He notes, as he has to:

"... that AWS and GCP are operated by two of the biggest companies in the world ... the ability of these firms to compete might be foreclosed, it is more likely, in my view ..."

That itself obviously we say is completely wrong, but we are not engaging with the merits, but this is the problem:

"... in my view, that any anti-competitive conduct would instead reduce their incentive to compete by reducing the profit from competing for Windows Server customers

relative to Paid Linux Server customers."

Even if Amazon and Google are in positive margins from competing for the Windows Server customers, which they are:

"... because those margins are much less than they earn from the Linux Server customers, they have a strong incentive to focus on the Paid Linux Server segment of the market."

That's the reason. You saw in the cases that the price-cost test is the normal approach, we all accept there may be reasons you don't use it. His reason for not using a price-cost test is this theory of harm. If the theory of harm makes no sense, his reason for refusing to engage with the price-cost analysis cannot stand.

While we are here, at paragraph 27, we see his attempt to show why the case isn't just about pricing. One can understand why the PCR wants to get away from the pricing cases, because they are so unhelpful for them. He says:

"... the conduct in this case is not purely pricing conduct ... the conduct is multifaceted ..."

How is it multi-faceted?

"... including discriminatory pricing."

That's pricing:

"A multi-product rebate contingent on buying Microsoft's product."

That rebate, the AHB, that's pricing:

"... and quality diminished Microsoft software products on Listed Providers' platforms."

That last bit, we say, is not pleaded as part of the claim.

That's a further reason why he says a margin squeeze analysis will ignore key aspects. Well, the margin squeeze analysis will ignore his ... quality diminished allegation. If that's not part of the claim, then again that part of his evidence doesn't assist you.

Of course, you have my point that even if Quality Abuses were properly raised, he offers no methodology, not even an outline, for how you evaluate or quantify the impact of those alleged abuses. My learned friend says it is very difficult to do that at this stage. The test is not a difficult one for the PCR to satisfy, but they have not tried to do so, even in outline.

**MR JUSTICE ADAM JOHNSON:** I am sorry. I am slightly lost.

The third element in paragraph 27, quality diminished Microsoft software products, you said that's not properly pleaded?

**MR KENNELLY:** Yes. It is not part of the claim.

I am so sorry, sir.

**MR JUSTICE ADAM JOHNSON:** You are referencing, here, paragraph 8 of the Claim Form?

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** I see. So, not part of the -- yes, not part of the claim, although, it is said that the Quality Abuses feed into the claim as part of the pattern of behaviour that gives rise to anti-competitive --

**MR KENNELLY:** That is as it seems, and the Tribunal will judge for yourselves.

**MR JUSTICE ADAM JOHNSON:** That's what is said in paragraph 8.

**MR KENNELLY:** It is raised; it's part of the intent, but it forms no part of the claim. I do rely on that, the pleadings are very important in this case, in all of these cases.

**MR JUSTICE ADAM JOHNSON:** I am looking at it.

**MR KENNELLY:** I am grateful that you are looking at it, but ultimately, I'm not taking a pure pleading point, the Tribunal will judge for yourselves whether this case is about pricing or Quality Abuses.

You have heard a lot of argument and been taken to a lot of evidence, and ... whatever verbal foundations can be employed. In my submission, it is obvious what we are

really concerned about in substance is a pricing exclusionary abuse.

**MR JUSTICE ADAM JOHNSON:** Just to be clear, when you say not pleaded, what you mean is not pleaded as part of the claim.

**MR KENNELLY:** Of course, yes.

**MR JUSTICE ADAM JOHNSON:** They are pleaded as part of going to intent.

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** Thank you.

**MR KENNELLY:** I have taken you through the three mechanisms of Professor Wickelgren's theory of harm.

Then he considers a selection of factors taken from the draft guidelines. Before I turn to that analysis, I would like to show you the guidelines again. They are in the hearing bundle, not the authorities bundle.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** Tab 18, page 1199, just to orient yourselves in what the law requires, the guidelines are an up-to-date summary of, certainly, the position as a matter of EU law.

Page 1199, paragraph 45, we have the two-part test, which is common ground. Need to show something which is not accomplished on the merits and whether it is capable of having exclusionary effects.

Then page 1201, please, paragraph 51:

"The concept of competition on the merits covers conduct within the scope of normal competition on the basis of the performance of economic operators and ... relates to a ... situation in which consumers benefit from lower prices, better quality ... does not preclude the departure from the market or the marginalisation, as a result of competition on the merits, of competitors that are less efficient ...

You have seen that already.

Then, paragraph 53, "Relevant factors to establish that conduct departs from competition on the merits":

"... conduct fulfilling the requirements of a specific legal test is deemed as falling outside the scope of competition on the merits."

You see exclusive dealing, tying, bundling, margin squeeze and so on.

Then, at page 1203, paragraph 56:

"In the case of certain pricing practices, namely predatory pricing ... and margin squeeze ... a price-cost test is required to establish whether conduct of a dominant undertaking departs from competition on the merits. Whenever a price-cost test is carried out to establish whether conduct departs from competition on the merits, the outcome of the test can also be relevant for the assessment of the capability of such conduct to produce exclusionary effects."

But it is not appropriate generally for non-pricing practices.

An example, as we have heard from my learned friend, where a price-cost test would not be appropriate is for self-preferencing.

Let's see how that is described in the guidelines. 1233, paragraph 156, under the heading "Self-preferencing". That's defined as:

"... dominant undertaking actively giving preferential treatment to its own product compared to those of competitors [and this I rely on] mainly by means of non-pricing behaviour."

Obviously, a price-cost test is not going to be helpful when you are assessing non-pricing conduct.

With that in mind, I turn to the factors that are selected by Professor Wickelgren. I go back to his second report. Volume 2, tab 12, page 659. They are listed at paragraph 46.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** I will try and be brief, because, of course, you have been through these already, but this is the methodology which he is putting forward to show a lack of competition on the merits and the prospect of foreclosures ...

(a) the extent of Microsoft's dominance.

(b) the conditions in the relevant market, such as switching costs.

(c) the extent of the allegedly abusive conduct and whether and for how long a large share of the Windows Server segment is affected by the conduct.

Each of these factors, as we can see, go to whether the conduct is capable of having exclusionary effects. This is what you look at to see could this -- these could contribute to exclusion, but they are not sufficient to show whether the conduct would exclude Amazon or Google. That question is not being asked, and they don't address the prior question of whether the pricing is competition on the merits or not.

Then (d):

"Whether the dominant undertaking's conduct consists of, or enables ... discriminatory treatment that favours itself over its competitors."

Again, by that is meant is Microsoft charging its competitors to use Windows Server when it is not doing that for itself? That's not controversial. We say that's not sufficient, that question, however it is answered, is not going to get you home on the question of a lack of competition on the merits. That's not enough, however it is answered, to show abnormal competition.

Then (e):

"Whether the preferential treatment takes place in a leveraging market that constitutes an important source of business for competitors ..."

Downstream that they can't replace.

Again, it is not in dispute that an input is being supplied by the vertically integrated operator that is needed to compete for Windows Server customers downstream, but,

again, however that question is answered, it is not sufficient for the purposes of exclusion.

Then (f):

"Whether a hypothetical competitor as efficient ... would be unable to adopt the same conduct ... because that conduct relies on the use of resources or means inherent to the holding of the dominant position ..."

That's lifted, as we have seen, from the SEN judgment that we saw earlier. They asked if rivals cannot replicate conduct, then that conduct might be a departure from the merits. But here, as I have said repeatedly, the alleged conduct -- the exclusionary conduct -- is charging lower prices for Windows Server VMs. The question is: can Google or Amazon match or beat those prices?

Professor Wickelgren does not engage with whether Google and Amazon are able or unable to do that. He avoids asking that question, which the Court was addressing in SEN, because, of course, that would draw him into a price-cost test that he doesn't want to do.

He focuses on the part of the conduct that asks whether the undertaking uses resources that the purchasers don't have, and of course it is not in dispute that Microsoft has the Windows Server and Google and Amazon don't, but that's the situation in any vertically integrated relationship. However, whilst that's addressed, it doesn't help you on the competition on the merits or exclusion points.

(g):

"Whether the preferential treatment is likely to influence the behaviour of users, irrespective of the intrinsic qualities of the leveraged product."

This asks whether users react to any price differential caused by a difference in costs. Again, that's not in dispute as a matter of principle that users will react to lower prices driven by lower costs, but that could be said for competition on the merits also, but

that question, that issue, doesn't help you in resolving the legal questions that you will ultimately have at trial.

Then at (h):

"Whether the discriminatory treatment raises rivals' costs or limits access to consumers."

This, we have the beginning of the exclusion question, but, as I have said already, it only asks if rivals' costs are being increased or if market share is being won by the dominant undertaking. It doesn't ask by how much. It doesn't look at the extent of the increasing costs. Simply increasing your rivals' costs can equally happen where there is competition on the merits. It is only when the costs are increased such that they can't be downstream, that one has a competition law problem.

Of course, what's described at (g) does not show exclusion. Not every increase in costs or loss of market share drives you from the market in any sense that the case law has described.

Page 665 -- those are the factors, that's it -- those are the factors up to (g). The rest we can see in the text of the report itself.

If we go to 665, paragraph 76. I am focusing on this because this is the key bit: does the discriminatory treatment limit access to consumers? We look to see: is there anything new here? He repeats his point that even if Amazon and Google are well able to match Microsoft's prices downstream, despite paying the SPLA fee, because the margins reduce, they will focus on Linux where they don't have to pay for Windows Server, and they will earn bigger margins.

You have my point that this is not anti-competitive exclusion in the meaning of the case law. It doesn't even follow from this that there's a lack -- sorry. Even from this, if you felt that Amazon and Google were favouring Linux users over Microsoft's Windows Server -- sorry -- over Windows Server users, because there are fatter profits

for the Linux servers, even that does not show you a lack of effective competition for the Windows Server VM users.

I mean, first of all, if Amazon and Google weren't competing for the Windows Server users, this class wouldn't exist. This is the class of Windows Server users who have chosen to take their cloud services from Amazon and Google. We know that 30%, 40% of their cloud business is coming from Windows Server VM users. It is completely unreal to imagine them being driven from the market. As you would expect, Amazon and Google are not lightly driven from any market.

The key point: even if they are competing harder for fatter margins in the Linux segment, that does not mean there is a lack of effective competition for the Windows Server users.

You have the point from our skeleton that multi-product suppliers will often make different margins for different products. Unilever, companies like that, will have big margins for one type of product and smaller margins for another type of product. The products could be in the same market or in segments of the market. The fact the margins are different does not mean there is not effective competition in the market with the lower margins. In fact, that can often show more intense competition.

You have the point in our skeleton that if a shop is selling oranges and apples, and the margins are higher on apples than on oranges, that doesn't mean it is not competing effectively with a lower margin. That is the entirety of this analysis, what you are seeing here. I am not leaving anything else out. That is the theory of harm. So even if rivals can get higher margins from Linux VM users than on Windows VM users, that is a million miles from signifying abusive conduct.

The key question is whether the profit margins are being reduced in a way that risks exclusion and that's why we say in this case on these facts a proper methodology has to include a price-cost test.

If we look at the rest of the factors here, (i) -- now we are in the body of the report. Bottom of 665:

"Evidence of exclusionary intent."

**MR JUSTICE ADAM JOHNSON:** Sorry. Before we move on --

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** -- in 77 -- in 76, which you have taken us through, he describes his analysis, so far, based on publicly available information, based on which he draws various inferences, but 77 then goes on to describe what might happen in the future if the case is certified. Is that also part of -- to be regarded for present purposes as part of his methodology?

**MR KENNELLY:** Yes, yes. You are entitled and should consider what he is proposing to do, what he is proposing to consider doing in the future. The Tribunal takes a generous approach to the methodology. So, where he is saying, "I will look at these things in the future", that is part of the methodology that's put before you. In paragraph 77, he is very careful to describe what he will do. He says he will seek third party disclosure of the evidence provided to the CMA, and he will compare the relative profits of Listed Providers in the Paid Linux Server OS work flows to the profits they would achieve by having to absorb costs in order to include Microsoft in the Windows Server workflows.

So, all he is doing there, all he is promising to do, is to show that the Listed Providers earn bigger profits in the Linux VM segment than they do in the Windows Server VM segment, because, surprise, surprise, in the Windows Server VM segment they have to pay for Microsoft's proprietary software.

He is not proposing, and he is very careful not to propose, to carry that forward to an actual price-cost test and ask by reference to Amazon and Google's costs if there is going to be a margin squeeze.

**MR DAVIES:** But am I right in thinking -- maybe you said it -- the CMA did conduct a price-cost test, even though it said it didn't have to? Is that right?

**MR KENNELLY:** Yes, yes.

**MR DAVIES:** Presumably the price-cost test failed, but the CMA nonetheless found an AEC?

**MR KENNELLY:** Yes.

**MR DAVIES:** So, if he reviews the CMA's and, potentially, the evidence it reviewed, then he will presumably within that also review the CMA's price-cost test. So, he will take account of one, even if it's one that doesn't necessarily (inaudible).

**MR KENNELLY:** With respect to Wickelgren, that is a stretch as to what he is proposing to do. He says he will look at the CMA's investigation, and he will look at their Final Report. In two lengthy reports, he is very careful not to say, "And I will consider adopting, although it is not decisive, a price-cost test of the type run by the CMA". He does not say that. It is not enough for him to say, "I will look at what the CMA did" and infer from that, he will take into account a price-cost analysis in his own work.

On the contrary, sir, he says in clear terms the price-cost test is of no assistance, which is not the CMA's position. He says -- and you saw it in his report -- "I will not do this. It is not relevant. It does not assist you" for the reasons he gives, because we have seen what he says. Price-cost test is inappropriate.

The CMA -- I will show you this -- the CMA said a price -- the CMA approaching a different legal standard, of course, not an abuse of dominance case, the CMA said, "We will look at the price-cost test and we will look at the margins downstream, but it is not decisive to our final conclusions".

If Professor Wickelgren had adopted the CMA approach, my submissions may have to be adjusted, but that's not what he is doing, though. He is adopting a different

approach. That's something -- my learned friend said in general terms they are just doing what the CMA did. That is not correct. The CMA did, 44 paragraphs -- sorry – 44, either paragraphs or pages where the CMA does a price-cost analysis and looks at the margins of Google and Amazon. We disagree with the analysis. We disagree with their comparators, and if Professor Wickelgren had advanced a price-cost methodology, we would have (inaudible), but on his methodology that will not be before you. He will not attempt such a thing.

So, I'm afraid I don't think we can read that paragraph to say that he will or he is contemplating adopting a price-cost analysis as part of his work in the future. He said that's what he won't do.

Then (j). Sorry. 5.10, over the page, just rounding off these factors, at page 666, "Whether discriminatory treatment is likely to be contrary to the underlying business rationale of the dominant undertaking's activities".

Here, unreality again. Sure, where a dominant undertaking does something that doesn't seem to be consistent with its own underlying rationale, that suggests something abnormal, but the complaint is that Microsoft is making its rivals pay for the use of its own proprietary software. That's the first alleged abuse. The second abuse is that Microsoft is not extending a discount to its rivals' customers which it gives to its own customers.

Now, whatever else, that makes commercial sense. There is nothing abnormal or contrary to Microsoft's underlying interests for it to operate in that way.

Finally, the combined effect of 5.11 from paragraph 83 and following. Here, he refers to three methodologies. If you go, please, to paragraph 86 on page 667, his methodology, 86, halfway down:

"I intend to net off any elimination of double marginalisation (if there is any) and any Azure specific efficiencies ... If there is still a difference in the pricing of Windows

Server on Azure and the Listed Providers, then this would distinguish the combined effect of Microsoft's conduct from pro-competitive vertical integration."

At the top of 86, I should have read this first:

"... I plan to benchmark between the pricing of Windows Server licensing costs on the Listed Providers and that of Azure."

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** That's the first methodology.

Microsoft is charging for Windows Server, and it is not charging itself. You have my point that the idea of charging itself does not make any sense economically.

That's his first methodology.

The second methodology, paragraph 88.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** "The second methodology, which was not available to me when I wrote my first report, is to look at the changes that have occurred since Microsoft settled with CISPE in July 2025 ... This creates a natural experiment that would allow me to view the effect on sales in a counterfactual absent the conduct concerned."

I will take this slowly, because this ties in with Professor Wickelgren's methodology on loss.

**MR JUSTICE ADAM JOHNSON:** Before you move on, I see it is 1 o'clock.

**MR KENNELLY:** I am so sorry.

**MR JUSTICE ADAM JOHNSON:** We should probably break.

How are you doing overall in terms of your submissions?

**MR KENNELLY:** I am doing well. Even with the opt-in, out-out submissions and funding, I think half an hour after lunch.

**MR JUSTICE ADAM JOHNSON:** Very good.

Then let's break until 2.00 pm.

**(1.01 pm)**

**(Lunch break)**

**(2.00 pm)**

**MR JUSTICE ADAM JOHNSON:** Yes. Thank you, Mr Kennelly.

**MR KENNELLY:** Sir, I was dealing with the conclusion in Professor Wickelgren's second report.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** There were three methodologies that he referred to in his conclusionary section. I dealt with the first.

The second is his reference to the settlement, CISPE, where he says that shows in the counterfactual that if Microsoft were told that they had to equalise the price they offer Amazon and Google with the price that they charged themselves, they would give, says Professor Wickelgren, Windows Server to Amazon and Google at cost and they would give the AHB to customers who want to go to Amazon or Google. They would give them a discount.

He ignores the fact that whatever happened with the small provider settlement, Microsoft would never rationally -- no operator in Microsoft's position would ever rationally - behave in that way, because if the law required Microsoft to equalise the price that it gives Windows Server to Amazon or Google with the price that it charges itself, the only rational thing to do would be to increase the price of Azure to charge itself the SPLA and to increase the price of Azure, rather than give up the SPLA profits that it earns from Amazon and Google. That would be the only rational thing to do, because the competitive effect would be the very same. The competitive effect as between giving Windows Server at cost to Amazon and Google would be the same as increasing the Azure price by the level of the SPLA fee.

**MR DAVIES:** That would be a demand effect?

**MR KENNELLY:** It would be a demand effect, but the demand effect would be the same -- look at what Professor Wickelgren says. The demand effect would be the same depending on whether Microsoft increased the price of Azure or gave the Windows Server at nothing or cost to Amazon or Google.

Professor Wickelgren deals this in page 681 of his report.

Rather than dealing -- to take up Mr Davies' point about doing a proper analysis of the demand effect, he simply says at paragraph 145:

"The claim that Microsoft would just increase its Windows Server price on Azure to match its price on Listed Providers does not make any economic sense. Given that Microsoft is already capturing the large majority of Windows Server workloads due to its conduct, it could not profitably increase the price to the large majority of the market by a significant amount."

At 146, he says:

"This shows that if Microsoft were to increase the price of Windows Server to Azure customers to match what it charges on Listed Providers, it would be greatly increasing prices over the level it has determined maximises profits. This would, in turn, lead to what would likely be very large profit sacrifices, making such a response implausible."

Just again stepping back and asking the basic question, he says:

"Microsoft cannot charge more in this market."

But his whole case is that Amazon and Google are charging more than Microsoft for Windows Server VMs, and you have seen the market share they have. Why can't Microsoft charge more than its current price if that is what it has to do because in the counterfactual the law compels it to do so, and if the customers are captive Windows Server users, as Professor Wickelgren says, where is the sacrifice? Where will they switch to? They are not going to switch to Linux, as he claims. That's not his case -- He says they would go to Amazon and Google. They are just as likely to switch to

them if they are giving Windows Server to them at cost as if they are equalising the final price between Azure and the current prices of Google and Amazon's product when they pay the SPLA (inaudible).

Mr Davies is looking sceptical. I am only dealing with the argument before me. Professor Wickelgren says it makes no economic sense for Microsoft to increase its price of Azure to any significant extent. We say --

**MR DAVIES:** I don't want to make a big thing of it, but there is always a right price, which is maximising price, prices less than that are less profitable and prices more than that are less profitable. That's true, for example, even for a monopolist. If you go higher than the market price, you will lose profits. That does seem to be what he is saying there. That their pricing at the moment is the level it is determined maximised profits, so if it increases from that, then its profits will fall, because demand curves ultimately slope down even for monopolised products.

**MR KENNELLY:** That is the theory. Here, on Professor Wickelgren's own case, the prices for Amazon and Google are higher, suggesting that there is appetite for higher prices and Microsoft could increase its prices ... the current Microsoft Azure customers would go, on his case, they would be going to Amazon and Google. So, we ask competitively what is the difference between the two?

We say what he is offering as the counterfactual does not make any sense. He has to accept from the counterfactual, even if it is possible that Microsoft might be constrained as Mr Davies suggests, the idea that in the counterfactual Microsoft will not increase the Azure prices, but instead will give Windows Server away for nothing or at cost to Amazon and Google, that we say is unreal.

Similarly, for the AHB. The idea that in the counterfactual, if Microsoft is told "you cannot give preference to yourself for the AHB, you cannot give a discount for people switching just to you", Microsoft will obviously just abolish the AHB. Why would they

give that discount to people switching to their rivals? That's not complicated economic theory. That's just common sense. In the counterfactual, if they were told they could not favour themselves, they would not offer the AHB to anybody.

Professor Wickelgren again does not engage with that point which Professor Scott Morton made in her report.

The final point that Professor Wickelgren makes, and it was made by my learned friend, is to contend that the CMA -- this is a point we touched on before the break -- also denied the relevance of a price-cost test. That is not quite right, as we discussed. Although the CMA did say the price-cost test was not determinative, it did consider it informative and it did undertake a price-cost analysis.

As I said before the break, in the report -- I am not going to go through it -- there are 44 paragraphs in 40 pages of price-cost analysis by the CMA. They took it into account, along with the other factors, in its ultimate assessment but, as my friend rightly acknowledged, there's a limit of how much reliance we can place on the CMA, because of the different test it had to apply in the market investigation compared to the test before this Tribunal in a Competition Act case.

We see that most clearly in the Final Report. My learned friend showed this to you, but I would like to go back to it because it is very important in view of the reliance placed on the CMA Final Report by the PCR and by Professor Wickelgren.

It is in the Final Report, tab 27 page 2480. It is footnote 2440 that I would like to go back to.

Because Microsoft offered estimates as to what it would earn if it were charged SPLA prices to show an as-efficient competitor test. Microsoft, as you have seen, said if it was paying the SPLA in view of the fact that people buy these VMs with other cloud services, it would earn a profit margin of between 50% and 60%:

"We note that use of an as-efficient competitor test, which focuses on whether

an as-efficient competitor earns a negative margin, is not provided for in our guidance and we do not consider that an application of an as-efficient competitor test is necessary or determinative for the statutory questions we must answer in the context of this market investigation. To the extent an as-efficient competitor test focuses on whether a rival is loss-making or not, it does not account for a rival being materially disadvantaged even while continuing to earn a positive margin."

That's what the CMA looks for in market investigations:

"We note that this type of analysis can be used as a tool when assessing potential infringements of competition law but as noted above, we are not investigating whether the conduct in question infringes [the Competition Act 1998]."

**MR JUSTICE ADAM JOHNSON:** Does that account for a rival being materially disadvantaged even while continuing to earn a positive margin?

Isn't that what's being said here, actually?

**MR KENNELLY:** By the PCR? Absolutely.

**MR JUSTICE ADAM JOHNSON:** Let me get this right, so the CMA conducts a cost-price analysis, it comes out with a negative result.

**MR KENNELLY:** That is not entirely right. Sorry, sir. I interrupted your question.

**MR JUSTICE ADAM JOHNSON:** No, can you show me some summary of what the output of a cost-price analysis was?

**MR KENNELLY:** Yes, I can. If you go to CMA's Final Report, page 2422, just to put it in context.

**MS FARRELL:** 2422?

**MR KENNELLY:** 2422, yes.

I want to start with this minimum bundle issue, because a key area of debate in the price-cost analysis is what are you actually looking at as the comparator, because it is common ground at that no-one buys the VMs by themselves. They buy them with

a bundle of other products, and those products and other products are more profitable for anybody than the VMs. Microsoft has submitted that a broad range of services have to be taken into account, and the CMA found a smaller range should be taken into account. You see that on page 2424:

"Our assessment."

7.353:

"We agree with Microsoft that it is reasonable to include at least some allocation of customer spend on storage and networking within the comparator. This means that the minimum appropriate level of spend against which to compare the Microsoft software input costs is broader than spend on Windows Server VMs only …"

You have to look at the margins for that broader minimum package, not just the server VMs.

Then if you go, please, to page 2487, this is the conclusion on the margin squeeze analysis, the price-cost analysis. They say at 7.657:

"Despite the uncertainty around demand aggregation ... it is clear that the appropriate set of services to use in the estimations is narrower than customers' total spend on cloud services and wider than an individual product or service ..."

So, wider than the minimum bundle for most customers:

"... the margins fall somewhere between the two extremes.

"Although we lack a clear benchmark to compare against, we consider that margin levels in this industry (i.e. not only for Microsoft workloads) are generally high, reflecting that cloud services are characterised by low variable costs and high fixed costs."

Pausing there, that shows you that even if Google and Amazon's margins are being reduced to pay for Windows Server, once they win a Windows Server customer, they can sell other cloud services that are even more profitable.

Then (c) these margins, the broad cloud services products' profits, their margins are:

"... significantly above Microsoft's calculations of mark-ups and our own calculations of Google's actual margins for Windows Server and SQL workloads ..."

They are all above Microsoft's estimates of margins it would make if it were subject to SPLA costs based on total cloud spend.

Just pausing there, Microsoft's estimate was that if it had to pay the SPLA costs based on the total spend that customers were making on cloud, it would make a margin, even if it paid the SPLA, of 50% to 60%. That's the upper band they say in the list of calculations, and they are significantly above the margins based on the minimum set of services regardless of whether we consider Microsoft's estimates or Google's:

"Our estimates for Google's actual margins are [less than 15%] for Windows Server."

Pausing there, that's obviously a positive margin for Windows Server, but it is still the lowest possible margin, because the CMA is looking only at Windows Server. The CMA has said, above, that the proper comparator would be wider than the individual product or service and when you pull in the other cloud services that people typically buy with the VM, the margins will increase.

For certain additions of SQL, the margins are negative:

"The estimated margins Microsoft would earn if it paid SPLA licensing costs range from [20-30]% according to Microsoft's analysis to [10-20]% in Google's estimates."

"For customers eligible for AHB they range between [20-30]% and [-10 to -5]%, depending on whether we consider Microsoft's or Google's estimates ..."

Pausing there, you will see no reference to Amazon, because Amazon did not submit figures for this purpose, for reasons best known to itself.

**MR JUSTICE ADAM JOHNSON:** Uh-huh.

**MR KENNELLY:** 7.658:

"... the level of these estimated mark-ups and margins is consistent with partial

foreclosure."

**MR JUSTICE ADAM JOHNSON:** Uh-huh.

**MR KENNELLY:** If Professor Wickelgren adopted a price-cost test and attempted a similar exercise, we would respond by challenging, depending on what he said, the particular aggregation that he assumes for the purpose of the comparators and we would examine the exact margins that are actually in issue here.

The CMA has reached its view. There's no point challenging this because no remedies were sought to be imposed. The CMA has left this now for a different part of the CMA to consider whether to take action or not under the Digital Markets Act -- sorry, under the DMCCA, the Digital Markets, Competition and Consumers Act, so that remains to be seen. This has been parked, but if the PCR and Professor Wickelgren decide to adopt a similar approach, we will have an opportunity to debate it.

Our concern is that he is not putting forward anything like this. This is the debate we should be having. It is not the issue that Professor Wickelgren has put before you. It's not good enough for him to say he will look at the CMA report at some point, because he has said in terms that he does not believe the price-cost test is appropriate. So, we can only infer from that that he doesn't intend to --

**MR JUSTICE ADAM JOHNSON:** Can I just try and summarise my own understanding in layman's terms? Forgive me. Just to capture the essence of what is being said here. The cost-price analysis has been carried out. It has limitations and has returned results which are inconclusive, notwithstanding which the finding expressed at 7.658 is in effect that there is some kind of adverse effect on the market.

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** That's been caused by something. One plausible explanation for it is that there's been some form of distortion of competition.

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** The fact that the CMA -- I am just putting this point to you to gauge your reaction -- the fact that the CMA have been able to express that conclusion, albeit applying a different test and looking at this through a different lens on the basis of an indeterminate price-cost analysis, might be said to lend support to the theory that you can make good an assertion of this type without a cost-price analysis.

**MR KENNELLY:** Sir, in response we would say that the contrary is in fact demonstrated by (c), because although this was not determinative of the CMA's finding, the CMA took the view that it was informative and did the work to do this analysis.

Professor Wickelgren is not saying this analysis is useful and I don't need to replicate it because I will simply rely on what the CMA is saying. Professor Wickelgren is saying, in effect, "They shouldn't have done this work at all because a price-cost test is not informative", which is why he is not proposing to do even this work. That's the omission. If he was advancing a price-cost test, I would struggle, because the Tribunal would say to me, "How can you say his price-cost test is inadequate given when they have done one and it is a matter for trial as to whether his price-cost test is good enough or not". But he has set his face against a price-cost test. He has not said that he will do something like the CMA's work. The fact the CMA thought this was useful and important and went to the trouble of getting the information and doing this analysis tells you that it is a useful exercise.

As it happens, we disagree with the CMA's conclusions. If Professor Wickelgren does a price-cost test, which he ought to do, we will have an opportunity to engage with him in front of a court, a tribunal, in a way that is -- in a proper trial, not by way of judicial review against a decision, which was ultimately parked.

**MR JUSTICE ADAM JOHNSON:** I follow, yes.

**MR KENNELLY:** On the contrary, this tells you --

**MS FARRELL:** Just moving on, unless we want to stay on the price-cost test, and we have covered that.

**MR JUSTICE ADAM JOHNSON:** No.

**MS FARRELL:** How do you think we should take account of the CMA's conclusion at the end of the market investigation that the licensing practices of Microsoft had had an adverse effect on competition of cloud services in the UK? What relevance does that have for our decision.

**MR KENNELLY:** It is not our case that it is irrelevant such that it would be irrational for you to take into account at all. We can't do that, because they are looking at similar issues, but my learned friend took you to the very same footnote I took you to. It is the weight that one gives to the analysis, which cannot be very great, because the question they are asking is a different one. They are not concerned with abuse of dominance. They are not bound by any of the case law that I showed you. They are asking a different question. The question is easier to satisfy. It is easier to show adverse effect on competition. That is why the market investigation was invented. It was because it would fill a gap. It caught conduct that wouldn't otherwise be caught by the anti-trust laws, like (inaudible) the one that is relied on by the PCR.

So, the test is different, and the standard is different. For that reason, while some of the analysis can be relied on -- we don't say it is irrelevant -- ultimately you can only place very little weight on their conclusions.

Just to be clear about the price-cost test being inconclusive, I have just been reminded that the CMA found that an equally efficient competitor, an “as-efficient competitor” would have made a profit. Except for these small exceptions, and we can come back to the materiality of those, these equally efficient competitors, Google and we can infer Amazon, since its scale is even greater, are plainly profitable even on the as-efficient

competitor test.

You may say the margins, 15%, 10%, are not as fat as the margins for the Linux VM users, but the question is: are they profitable and are they profitable in a sustainable way? The answer is definitely yes, even on the CMA's approach.

That's not the question I am being asked. The question is: what relevance can you place on this? The answer is very little, because the standard is different, the test is different.

In fact, if you are to place relevance on it, it is relevance that favours not certifying the PCR in its current form, because they have chosen to avoid doing an analysis like the one conducted by the CMA, which we say is exactly the focus they should be having in a case that turns on pricing abuses.

That is also the case -- even if there are Quality Abuses in ... even if you are not with us on the pleading point, the majority of their case is plainly focused on a pricing abuse. In that context we would expect to include price-cost analysis in their methodology. Without it, they do not have a blueprint to trial.

I will quickly check those are my submissions on ...

I am not going to take you to it, but just for your note, unless you are going to give an extempore judgment --

**MR JUSTICE ADAM JOHNSON:** It is unlikely.

**MR KENNELLY:** Section 5.3 of Professor Scott Morton's report is where the profit maximising price is fully explained. This goes really to Mr Davies's questions. I got the impression you may not want to engage in a detailed debate about this question and its importance may not be central, but if you do have an opportunity to look at what Professor Scott Morton says, pages 51 to 54 in the confidential bundle, that is where she deals with this change to prop up the maximising price. She explained it in economic terms. I tried to show you how even at the merits standard it doesn't suffice,

but she gives the economic explanation as to why Professor Wickelgren is wrong to say that Microsoft is charging a profit-maximising price, such that it could not increase its price of Azure in the counterfactual.

Unless I can be of any further assistance on process, those are my submissions on the methodological issues.

**MR JUSTICE ADAM JOHNSON:** Thank you very much.

**MR KENNELLY:** Moving on to into opt-in, opt-out, we say if the claim is to proceed at all, the appropriate course would be to have an opt-in class. I am not submitting that the whole case should be opt-in. This is a case that cries out for an opt-in class and an opt-out class. The opt-in class containing those larger companies who are well able to decide for themselves if they want to take part in the litigation and who do not need the assistance of the collective proceeding regime.

For that, could I ask you to turn to the PCR's reply? It is in the pleading bundle, tab 5. First volume, tab 5, page 184.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** You have the rule at paragraph 134, that in deciding whether to -- something should be opt-in or opt-out you ask:

"... is it practicable for the proceedings to be brought as opt-in collective proceedings?"

At 135, the PCR says there are certain features that are important. They refer to the large and diverse size of the class, 59,000 members.

First of all, that is actually not a very large number of claimants, even across both classes when one compares it to classes in many group litigation cases proceeding in the High Court. The claim value is £29,000 pounds on average. Again, a substantial sum. The comparison with Hammond & Stephan v Amazon is not straightforward for the PCR. If you look at footnote 84, the class in that case was not 59,000, it was 211,000 businesses, and the average loss was less than half of the average loss here.

It was £13,000 in the Amazon case. But, like Amazon, all of the class members here are organisations, they are not consumers.

The key point, though, is the largest class members have claims in the millions and even the medium size class members have claims in the hundreds of thousands and there is no reason at all why they need opt-out proceedings. Can I show you the CMA report again, just to make that good. Page 1983. So, we are back in volume 4, tab 27, page 1983. Top of the page:

"Large companies are the major customers for cloud providers ... a small number of high-spend customers account for a significant proportion of providers' revenues ... AWS, Microsoft and Google, the top [10-20]% of customers account for a very large majority of revenues and the top [0-5]% account for over half of revenues."

Those revenues themselves are very large indeed, you see those at Table 2.1 further down that same page, in the billions.

**MR DAVIES:** It may be the same question I asked when Ms Ford was speaking yesterday, but do we have any information on how spend on Microsoft Server licence fees is distributed? I mean, is that going to be proportional to that?

**MR KENNELLY:** The answer is we don't have any information to put before you. There is not a direct correlation, because users will have different packages of Windows Server cloud providers products from both Azure and from Amazon and Google. So, the mix will vary from customer to customer. So, we don't have a direct correlation, but plainly --

**MR DAVIES:** Does it roughly scale, because you pay per product, or is it more like a fixed cost?

**MR KENNELLY:** No, it scales, it is a metered charge. What that tells you, along with the information we have seen, is that the very largest customers will have large claims and in respect of the particular allegations in this case.

You saw the figures from Azure, which is all we can give you, in Kristin Chester's witness statement, as a model of what that might be truly for Amazon and Google. There is no need to go back, but you have seen the figures. A small number of customers are spending tens of millions annually. Even the medium-sized customers are spending hundreds of thousands annually and over the whole claim period from 2018 that amounts to a large sum, a large claim value, and critically a claim value belonging to companies that are sophisticated and well able to indicate their own legal advice without the assistance of the opt-out procedure.

The next point that was made against us was that claimants may not opt-in because they are in fear of retaliation from Microsoft and, therefore, should not be expected to positively opt-in. That, in our submission, is a hopeless allegation. Can I bring you back to the PCR's reply? It is in the first volume, tab 5, page 186, where we see it set out.

This is what they plead to show that customers might be afraid to opt-in because of retaliation. Top of page 186, sub-paragraph 1, the CMA noted in the working paper. Let's look at who made the allegation: a cloud provider and CISPE.

Pausing there. The cloud provider could be Google or Amazon and CISPE is the association of small cloud providers. It was the cloud providers, Microsoft's competitors, who submitted that customers are unwilling to speak openly about the issues they face in relation to Microsoft's licensing practices, because they fear retaliation from Microsoft through onerous audits and so forth.

As the Tribunal well knows, customers may make anonymous complaints to the CMA, it happens all the time. It happens in competition cases and merger cases. It is telling there is no such anonymous complaint here. The allegation is coming from cloud providers and should be taken with a large pinch of salt.

Sub-paragraph (2) goes on to say:

"The CMA therefore considered a remedy to 'include rules-based provisions relating to the auditing of unlicensed use of Microsoft's software products.'"

That word "therefore" is quite misleading in this context, because the CMA did not consider the remedy because of a retaliation concern from Microsoft. That was not why the CMA was discussing rules-based provisions relating to the auditing unlicensed use of Microsoft software product. The risk they were concerned about was that Microsoft could use those processes to preference its own client services by getting commercially sensitive information or making audits overly frequent. The CMA made no link between that concern and a retaliation risk.

Then at (3), they say the concern wasn't limited to the possibility of audits. In deciding that the remedies available under the Enterprise Act were inadequate to contain Microsoft, the CMA said, I paraphrase, that there were circumvention risks because Microsoft operates in a complex way and has, according to the CMA, significant market power.

So, the remedies may not work because of circumvention concern. There was no link by the CMA anywhere to that circumvention concern and the possibility of Microsoft retaliating against customers who have concerns about its pricing practices.

So, although this is positioned in a particular way to make it look as if there is some support for a retaliation concern, it is just not there and it is not in the CMA Final Report.

Microsoft is hardly likely to retaliate against a customer bringing it significant revenue. If you, for example, have an opt-out class for customers who spent £100,000 or less on cloud services, you would ensure companies spending less than that figure who may be smaller -- this is a rough-and-ready approach -- would have the opt-out procedure, but if a company is spending more than £100,000 a year on cloud services, they ought to know what they are doing. They ought to be able to opt-in if they think

it is in their commercial interests.

To be clear even in a opt-in case, they still get the benefit of aggregate damages and all the efficiencies that collective proceedings bring.

The idea that Microsoft would retaliate against those kinds of customers is, again, slightly unreal, where these are customers which on our own evidence are bringing Microsoft millions of pounds in revenue over the years and for which Microsoft is competing against Amazon and Google.

The question then as to the risks that are involved in splitting opt-in and opt-out cases, it was said that there might be a case management problem. That might have been a theoretical problem before we actually saw how this works in practice, but in the CICC cases where, my learned friend is quite right, the PCRs agreed to have a separate opt-out class and an opt-in class. They were being case managed together in a perfectly sensible, legitimate and efficient way, as you expect in a tribunal. And, in fact, may be case managed with the Umbrella Interchange Proceedings which are coming before the Tribunal in January for the CMC. There is no reason at all why they can't be case managed in parallel, and no problems have arisen in that case in that way.

The real benefit of having an opt-in class is that we would have the possibility of getting disclosure from large users of cloud services. In this case, if this does proceed to trial, disclosure from them will be critical, because we will need to know -- the Tribunal will need to know how these customers procure their cloud services. What is the minimum viable bundle of services that these customers procure? That's vital for the price-cost test that we say ought to be deployed. The extent of multi-cloud use, how they choose cloud providers and operating systems and even ultimately for pass-on questions, disclosure from the customers will be really important, and without opt-in companies, it is going to be very difficult to get disclosure from customers. Third party disclosure

will be required. It is a much more complex and difficult process, whereas if you have opt-in companies, especially big ones, that will be extremely useful disclosure if this case proceeds to trial.

So, there is a huge benefit in having an opt-in class for the larger users and no repercussions to anyone if it is split that that way.

Those are my submissions on opt-in and opt-out. I move on to funding now, if I may.

**MR JUSTICE ADAM JOHNSON:** Can I just ask, do you have an estimate of how large the opt-in class might be. The impression I have is that it is likely to be a small number of large --

**MR KENNELLY:** It really depends. I am afraid all I can do is point you to the Chester evidence, the Azure.

**MR JUSTICE ADAM JOHNSON:** By way of parallel.

**MR KENNELLY:** The table at the end, which is confidential, so I can't read the numbers, but the customer --

**MR JUSTICE ADAM JOHNSON:** Could you just give me the page reference.

**MR KENNELLY:** It is page 1809 in the confidential bundle.

1807, Ms Kelly-Lyth tells me.

**MR JUSTICE ADAM JOHNSON:** Thank you.

**MR KENNELLY:** If we draw the line at customer spending -- in that table we don't have a £100,000 line. So, you have to -- I can hand you up a more granular table, may I do that?

**MR JUSTICE ADAM JOHNSON:** Is it something that Ms Ford has already?

**MR KENNELLY:** No, no, no (inaudible).

I am happy to --

**MR JUSTICE ADAM JOHNSON:** Is it a more detailed version?

**MR KENNELLY:** It is a more granular version of what you have.

**MS FORD:** I have some concern in the second day of the hearing being handed a new piece of evidence.

**MR JUSTICE ADAM JOHNSON:** I think we need to treat it with some caution. What would you like me to do? Ignore it?

**MR KENNELLY:** I only produce it to assist, if my learned friend objects to it, I can happily put it away.

**MR JUSTICE ADAM JOHNSON:** We may be able to address my question I think by reference to annex 1.

**MR KENNELLY:** I am happy to do it that way.

**MS FORD:** This is the sort of information we asked for months ago, and it only gets provided now.

**MR JUSTICE ADAM JOHNSON:** Do you want to keep it or ...

**MS FORD:** I am not in any position to address it.

**MR KENNELLY:** I take no point against my learned friend. If she objects to the numbers, that is entirely her right.

**MR JUSTICE ADAM JOHNSON:** Let me ask the question in a more hypothetical way. If it is right that the make-up of this market is that there are a small number of customers with a large spend, and if it is right that having disclosure from them would be useful at trial, nonetheless even if one has an opt-in -- sorry -- even if one has an opt-out class, if the number of customers falling within that group are limited in number and readily identifiable by some means, then there would be a method for getting disclosure out of them, if that was relevant to the trial analysis, and that would make rather more neutral the benefit of having an opt-in class for the purposes of producing disclosure. That's all that was in my mind.

**MS FORD:** There is a submission I would like to make on this, but I am conscious Mr Kennelly is addressing you at the moment. I think we do object to the production

of further apparently evidence, although not contained within a witness statement.

**MR JUSTICE ADAM JOHNSON:** I don't think we need to go there. Shall we give it back to you? Let's take it back to avoid any --

**MR KENNELLY:** The basic point is the one that I am making anyway.

**MR JUSTICE ADAM JOHNSON:** Yes, I follow.

**MR KENNELLY:** We are not particularly fixated on the £100,000 line either, which is why ultimately nothing turns on the extra evidence --

**MR JUSTICE ADAM JOHNSON:** I am more interested in the question of principle.

**MR KENNELLY:** Yes. To that, looking at annex 1, one can see that there's a small number of larger users, and even if one had a number of thousands of larger users, that is still a small number for the purposes of an opt-in case. We know from the FX litigation that my friend showed you that the case has momentum. So, if the larger companies opt in, that generates momentum in its own right and makes an opt-in action more viable and more attractive for smaller users, as in relatively smaller users. They are still spending hundreds of thousands on cloud per year. The key thing is getting the largest companies to opt in. In practical terms that's the key thing to make a workable usable opt-in option. Where the line is drawn, I am happy to have my learned friend address you on that and we can address that separately. I suggested £100,000 as a rough-and-ready line. The principle of the thing seems to us to be obvious, which is it is undeniable that disclosure and something of customers is critically important in this case. The best way to get it is have them in the case for large users with very large claims and no evidence of retaliation there is no downside to them opting in for the purposes of benefiting from this option of the CMA -- in the same way as the CMA Final Report has been used against me, it is positively advertising the possibility of an opt-in claim to larger users who are spending hundreds of thousands or millions on cloud services, they must be aware.

**MR JUSTICE ADAM JOHNSON:** Should we assume that the larger users are identifiable by some appropriate means?

**MR KENNELLY:** Yes, because Professor Wickelgren himself says it would be possible to engage with Amazon and Google, to understand who their largest users are. It is likely to be obvious in any event (inaudible) who are the greatest users of that (inaudible). It is industry knowledge the greatest users have procurement competitions (inaudible).

**MR JUSTICE ADAM JOHNSON:** All right.

**MR KENNELLY:** That's it.

**MR JUSTICE ADAM JOHNSON:** Very good. Funding.

**MR KENNELLY:** Funding is (inaudible), we wrote to the PCR's solicitors to ask if they construed the clause 17.1 litigation funding agreement as had been suggested. We have had no response, so we will be interested to heard what my friend says about that.

I will say no more about it, except we also are looking at it, so it could be read to mean that the question of economic viability of the claim could well be from the funder's perspective and not from the class and that I think was the concern which the Tribunal was raising.

As regards the viability of LCM, may I show you the letter at that we sent in October --

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** It is in the fifth hearing bundle, tab 61, page 2823. In October of this year, two months ago, we wrote raising our concerns and you see them at paragraph 3.

At paragraph 4, we wrote regarding the parent company's 2025 results, which reported -- what is reported you have seen yesterday. That is what was publicly reported in October 2025 regarding the very concerning position of LCML. Our

concerns have not been properly addressed in the reply.

You asked yesterday if any further public announcements had been made after that report in October. You were told no, but what was reported is in this letter, paragraph 5.

Following the very concerning report of LCML:

"... on 1 October LCML reported another loss in a case in which it had invested £9.9 million of its own capital ..."

That wasn't accounted for, it appeared to us, in the 2025 results. That investment was held to a fair value in June 2025 at 26.5 million.

Then paragraph 6, on 6 October 2025, there was another loss reported by LCML in an arbitration. The investments held the value of £1.4 million.

These are further erosions into the capital of LCML and LCM which happened after that very concerning document was published in October 2025.

As you have seen, Mr Moloney filed a witness statement --

**MR JUSTICE ADAM JOHNSON:** I am sorry. LCML is the AIM-listed entity?

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** LCM is the contracting party here?

**MR KENNELLY:** Yes.

**MR JUSTICE ADAM JOHNSON:** It is LCM which has 41 million represented on its balance sheet, is that right, not LCML?

**MR KENNELLY:** That's correct, yes.

**MR JUSTICE ADAM JOHNSON:** Thank you.

**MR KENNELLY:** 41 million. There could be concern at that number. It has obviously been eroded by these further losses -- sorry. There's a background problem which is LCML's position ... we are told to trust them.

In relation to LCM itself, it is funding other cases. This was the point you picked up

and said, "It is all very well saying 41 million will cover this case". After Guttman was certified, that is another case added to LCM's commitment. They are also funding the Amazon Buy Box litigation, Apple cloud storage litigation, Performing Rights Society and Govia Thameslink.

We set all this out in our response. So, the more cases that LCM funds, the greater the risk that it will not be able to provide adequate funding for all of them. That's why the fact that the Tribunal in Gutmann were satisfied does not give us complete assurance. There is an increasing number of cases that are calling on that money.

The answer we are given is, "Don't worry. If LCM were to go, another funder would step in to cover off that 38 million figure". Mr Hain-Cole -- it is a very short point; I am nearly finished on this.

**MR JUSTICE ADAM JOHNSON:** Right.

**MR KENNELLY:** Mr Hain-Cole addressed in his statement. May I show you that? It is page 2915.

He says on page 2918 -- my learned friend showed you this:

"Don't worry, because even if we lose LCM, we will easily get another funder to step in."

Given they advised Dr Stasi on the funding arrangements for these proceedings:

"I discussed the matter with John Astill of Exton Advisors, his view, based on current conditions of the litigation funding market, was that should the claim be certified and LCM subsequently cease to be in a position to fund, alternative funding would in principle be available, though a period of time would be required to permit a thorough due diligence process to be completed by any prospective substitute funder."

He said the opportunity to fund a certified claim would likely be viewed favourably by the market.

But that evidence needs to be read with what happened in relation to the selection of

LCM as the funder for this case, albeit pre-certification, because the reality is that LCM was the only funder which Exton, the same consultancy, could find which was willing to fund the claim.

Can I show you that? It is in the fifth bundle, tab 43. Fifth bundle, tab 43 is a letter, February 2025 from Scott & Scott to Linklaters.

**MR JUSTICE ADAM JOHNSON:** Would you mind giving us a page number?

**MR KENNELLY:** The page I would like you to go to is 2761.

**MR JUSTICE ADAM JOHNSON:** Yes. Thank you.

**MR KENNELLY:** This is in relation to how the funding arrangement were made, how did LCM come to be chosen. If you go to 5.16(a), Scott & Scott, the PCR's solicitors, say:

"Exton Advisors is an independent advisory firm with extensive experience ... Following some initial discussions with the funding market conducted by Scott & Scott, Exton was approached by Scott & Scott to assist with arranging suitable funding. Exton approached ten funders in the London market and terms were ultimately offered by LCM."

Then this, which concerns us:

"The other funders [the other nine] declined to offer terms."

So, we are not reassured by the statement by Exton, the hearsay evidence in Mr Hain-Cole's statement, that simply because this case has been certified that now it would be straightforward to get funding in the market when nine out of the ten funders declined to do so. The Tribunal has well in mind the standard certification of this Tribunal, which I have been struggling with it myself. The threshold is not so great, and it is odd that nine out of ten should decline pre-certification, but after certification suddenly there is nothing to worry about it.

But we are worried and that's why we continue to take this point before you

notwithstanding the judgment in Gutmann. Of course, in Gutmann, although it is not a massive point, 75% of the funding was third party funding. Here it is not as much as that, 62%.

And the Northleaf issue remains concerning. We are told that there are arrangements between Northleaf and LCM which means that Northleaf will step in, but the arrangements between Northleaf and LCM are confidential as between them. Even the PCR does not know precisely what arrangements are made between Northleaf and LCM. So, we are in a state of some darkness when it comes to understanding how the arrangements are made.

Ms Kelly-Lyth has a good point for me. The £41 million figure read out yesterday is from LCM's accounts from June 2024. In view of the changes and difficulties that we see, that figure also should be considered to be quite (inaudible).

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR KENNELLY:** Those are all my submissions, unless the Tribunal has any questions.

**MR JUSTICE ADAM JOHNSON:** Very good. Thank you very much.

Ms Ford. Thank you. Over to you.

**Reply by APPLICANT**

**MS FORD:** In my submission, the Tribunal was asking the right questions and applying the correct test in the exchanges between the Tribunal and my learned friend. It is emphatically not a merits test, and the question is: can the Tribunal see a way of trying this claim? It has become very clear, in my submission, that the objections to the class representative's proposed methodology really boil down to one key issue. That is that Microsoft thinks one should apply a price-cost test, and Professor Wickelgren does not agree.

It is common ground, both as a matter of EU law and domestic law, that there is not an obligation to apply a price-cost test, even in relation to purely pricing conduct. In the course of his submissions Mr Kennelly showed you at least two passages that made that clear.

One was paragraph 81 in the judgment in Servizio that he went to, which was, for the Tribunal's note, authorities bundle tab 62, page 3976.

The second was paragraph 83 of the judgment of Lord Justice Males in Royal Mail, authorities bundle, tab 13, at page 828.

Mr Kennelly drew attention, in particular, to Lord Justice Males' comment that essentially whether one applies a price-cost test or not is a matter of economic judgment and he relied own that to make the submission that that was why Microsoft was taking this as a process point, a methodology point.

In my submission, this Tribunal cannot decide now whether Professor Wickelgren's economic judgment is right or wrong in taking the view that the price-cost test is not the appropriate test. That is axiomatically a matter for trial. It is not in our submission a matter on which the basis of which one can either grant or refuse certification.

The submission was also made that if the Tribunal did not grasp the nettle now and require Professor Wickelgren to conduct a price-cost test, then we will all be worse off in the end, is the submission that was made.

In an exchange with the Tribunal, it was suggested that, unlike the CMA, Professor Wickelgren was not proposing to look at a price-cost test at all.

What the CMA did in essence was to look at the price-cost test which had been put before it on behalf of Microsoft by way of advancing Microsoft's case, and Professor Wickelgren has indicated that he is prepared to do the same. He has set that out in his second report, which is D12, page 677 --

**MR JUSTICE ADAM JOHNSON:** Yes.

**MS FORD:** -- paragraph 125. So, he is not moving from his position that he considers a price-cost test to be inappropriate, but what he says is:

"Insofar as Professor Scott Morton maintains her position that a price-cost test is appropriate, I can assess the robustness of that test and/or propose an appropriate means of conducting such a test."

So, insofar as it is being suggested that because of Professor Wickelgren's expression of economic judgment somehow there is going to be a huge hole in material before the Tribunal that cannot be filled, that, in my submission, is not the case.

Insofar as Microsoft consider that the price-cost test is the correct one, they can put it forward and Professor Wickelgren will actually engage with it.

Finally, on the blueprint to trial issue, the Tribunal had a question about the weight to be accorded to what the CMA has said in its Final Report. The submission was made in that context that what the CMA is doing by exercising its statutory powers under market investigations is addressing matters that aren't capable of falling within the scope of conventional competition law. That, in my submission, is not quite right and we can see what the CMA understands by its market investigation powers in tab 27, page 1972. I am focusing, in particular, on paragraphs 1.5 and 1.6 of the Final Report, which we did touch upon previously.

The CMA is explaining here that the benefit of the market investigation is it allows the CMA the opportunity to assess whether competition in the market is working effectively with the focus on the functioning of the market as a whole rather than on a single aspect of it or the conduct of a particular firm within it.

Then 1.6, the CMA can examine whether any relevant feature of each relevant market prevents, restricts or distorts competition:

"These powers enable the CMA to determine whether there are market-wide features, or a combination of features, that have an adverse effect on competition."

Entirely consistently with that, what the CMA has looked at is a market-wide review of all matters that feed into the dynamics of the cloud services market, but within that assessment one of the factors that it has chosen to focus on is Microsoft's licensing practices. In the context of that it has made the finding that those practices gave rise to an adverse effect on competition.

In our submission, there is nothing about the market investigation powers that suggests that that is a matter which is not capable of falling within conventional competition law. On the contrary, we would say that it is a very short step from a finding of an adverse effect on competition to a finding of abuse of a dominant position, in our submission.

In response to the Tribunal's enquiry, in our submission, the findings of the CMA should be accorded very great weight in assessing the allegations that the class representative is putting forward.

Turning to address briefly the opt-in/opt-out question, the suggestion has been made for the first time this afternoon that the line should be drawn such that there should be an opt-out class for customers who spend £100,000 a year on cloud services and opt-in for customers who spend above that amount. That is the first time that that or indeed any boundary has been proposed. Mr Kennelly described it as "a rough-and-ready approach". in our submission, it is an arbitrary approach, and it is an approach which has nothing to recommend it in terms of positive benefits.

The supposed benefit -- which has again been articulated for the first time this afternoon -- is a benefit in terms of disclosure. That was a submission that was made in the McLaren case when this tactic was tried by another proposed defendant, and the Tribunal addressed that in page 1079 of the authorities bundle.

The Tribunal will see at paragraph 168, the Tribunal in McLaren recorded:

"The key benefit that the respondents rely on as achievable through opt-in proceedings

relates to disclosure. In our view this is not a good reason to accede to the respondents' proposal, and any genuine issue that arises in relation to disclosure should be capable of being dealt with in another way."

**MR JUSTICE ADAM JOHNSON:** Sorry, where are you reading from?

**MS FORD:** I am sorry. I am reading from paragraph 168, page 1079. The reasoning is in 169. It points out:

"The Tribunal has power under rule 89(1)(c) to order disclosure by any represented person, defined in rule 73(2) to include class members who have not opted out of opt-out proceedings as well as those who have opted in to opt-in proceedings. No distinction is drawn between those who participate on an opt-in or opt-out basis. Rather, the Tribunal has a broad discretion. It may well be that disclosure would not ordinarily be ordered from members of an opt-out class, but nothing precludes it. If an order for disclosure against certain class members was determined to be reasonably necessary and proportionate [they are citing there the standard test in the CAT for disclosure], then we would expect that a way could and would be found to achieve that so as to ensure that the proceedings can be disposed of fairly. Examples might include some form of costs protection so that the burden is not shouldered unfairly as between class members, potentially giving the relevant class members the option of being excluded from the claim by removing them ... if the opportunity to opt-out would otherwise have expired."

The Tribunal's view, when this was run previously, was it is an illusive benefit to suggest that one needs an opt-in class in order to manage issues of disclosure.

The submission that was made this afternoon was that having an opt-in class might be the best way to obtain disclosure.

In my submission, in fact, the best way might be if Microsoft were to put forward a customer list, in the way that Amazon offered to do in the context of the opt-in/opt-out

debate in the Amazon case. No offer has been made to that effect from Microsoft and, indeed, what we have seen this afternoon is that Microsoft have provided information which was sought many months ago for the first time this afternoon, notwithstanding that it has been repeatedly requested to be provided.

In my submission, the Tribunal can have no confidence that information to facilitate the operation of an opt-in class would be forthcoming from Microsoft.

In those circumstances, in my submission, it lies ill in their mouths to suggest that the best way of obtaining information or disclosure would be to have an opt-in class.

Sir, unless I can assist further, those are my submissions.

**MR JUSTICE ADAM JOHNSON:** Could I just ask one question? It goes back to this point about the relevance of any kind of merits assessment at this stage. I am back in Merricks in the Supreme Court, where we were told that generally it is a no-go area but there are two exceptions. One is where there's an application for strike-out or summary judgment. The other, though, is under the relevant provision.

**MS FORD:** This is the opt-in, opt-out?

**MR JUSTICE ADAM JOHNSON:** Yes, the opt-in, opt-out question. I wonder if I can just find the reference. You may get there before me. I think what the statute says is that in determining whether opt-in or opt-out is the best way to jump, one can have regard to the strength of the claims.

**MS FORD:** Sir, yes, that's right.

**MR JUSTICE ADAM JOHNSON:** What is that driving at?

**MS FORD:** So, the first point is it is a separate assessment to whether or not to certify. So, the Tribunal first decides, "Is this a claim I am going to certify?" Then it comes on to consider, "If I'm going to certify it, do I certify it on the basis of an opt-in or an opt-out class?"

In considering that second question, the rules identify two further factors that in

addition to all the usual factors the Tribunal may take into account; the merits of the claims is one such factor and the practicability of optin is the second factor.

Under the merits of the claims, the Tribunal has my submissions from yesterday that the merits are strong. We rely primarily on the matters set out in the CMA Final Report together with the various other regulatory authorities and complaints that have been going on around the globe which indicate that this conduct is at least potentially problematic. So, in our submission, taking into account the merits at that stage points very strongly in favour of an opt-out class rather than opt-in class.

**MR JUSTICE ADAM JOHNSON:** Uh-huh, and the logic of the point is what, that the stronger the claim, the further you are along that spectrum, the more appropriate it is to certify opt-out, all other things being equal?

**MS FORD:** Yes, all other things being equal, because -- this is the reasoning as to why the Tribunal below in the FX case, which is the case I showed the Tribunal, which is currently pending before the Supreme Court, (inaudible). In that case the Tribunal had taken the view the claims before it were extremely weak and that that pointed towards opt-in, essentially, because it perceived the risk that one can use the benefits of an opt-out claim in circumstances where the actual merits of the underlying claims don't warrant it.

**MR JUSTICE ADAM JOHNSON:** I follow. Thank you very much, Ms Ford. Very good.

Mr Marven, thank you.

**MR MARVEN:** A short reply on funding. Can I begin with what was suggested to be the tension between there only being one funder willing to offer terms at the outset and the relative optimism that Mr Hain-Cole expressed having discussed the matter with external advisers if the worst came to the worst for the present funder.

The answer to that is that there is no tension at all. The explanation is also at

page 2918, a little further down, paragraph 9 of Mr Hain-Cole's statement, which I hope the Tribunal now has electronically as well as in hard copy, but in any event --

**MR JUSTICE ADAM JOHNSON:** Could you just give us a page number?

**MR MARVEN:** It is page 2918.

**MR JUSTICE ADAM JOHNSON:** We do. Thank you.

**MR MARVEN:** It is really the second half of paragraph 9, a little below halfway down, beginning:

"Mr Astill considered that the opportunity to fund a certified claim would likely be viewed favourably by the market relative to the usual pre-certification volume applications insofar as certain risks associated with the certification process could be viewed is as having been mitigated."

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR MARVEN:** So, that is the answer. From a funder's perspective the upside is greater, and the risk is less once they know that the certification is in the past. So, there is no discrepancy and there is no tension between those two positions in my submission.

But let me emphasise this. That is looking at things on the very worst case scenario. I don't have anything more to say or more information to give in respect of the position of the present funder than I said yesterday, but I do say that the suggestion that the funder will cease to fund is unrealistic, or at least not sufficiently realistic that it is an impediment to certification.

Although my learned friend says it is different material from Gutmann, I do say that Microsoft commits the error of principle that was discussed in Gutmann, of saying that you have to look at this on the position of a worst case scenario, and, as the Tribunal said in Gutmann, and I don't propose to turn it up again unless you invite me to, that's not the right approach at the certification stage for two reasons in particular. One is,

it's asking the wrong question and, two, that it completely overlooks that the Tribunal has an ongoing supervisory jurisdiction. I made my points yesterday about if there was a material change, the defendant as well as the class representative and therefore the Tribunal would know about it as soon as that was announced.

That's all I really have to say on the funder as such, subject to any points the Tribunal want to raise with me.

**MR JUSTICE ADAM JOHNSON:** I am just curious about the inter-relationship between LCML and LCM. Forgive me. I can't remember. LCML, the AIM listed company, has a number of subsidiaries, does it, or just one?

**MR MARVEN:** I don't think that's in evidence. It would be my assumption that they do because they fund in different jurisdictions through different subsidiaries, but I'm making that assumption. I am not sure that's actually in evidence.

**MR JUSTICE ADAM JOHNSON:** I am just trying to piece the bits of the jigsaw puzzle together. The Linklaters letter that we were shown, paragraph 9, refers to LCML. It is page 2824.

**MR MARVEN:** Yes. LCML.

**MR JUSTICE ADAM JOHNSON:** LCML reporting write-downs on assets held on its balance sheet at the fair values that are given there.

I mean, I am just wondering whether those same events required some form of write-down at the LCM level. If the -- I mean, it all depends on what the accounting arrangements are between them.

**MR MARVEN:** That was not suggested. There is no evidence on that point.

**MR JUSTICE ADAM JOHNSON:** No, I know. I think that's just my point. I am just trying to get the best picture at least just to understand what the evidence is that we have, but maybe the upshot is it is unclear.

**MR MARVEN:** Can I just have a moment?

**MR JUSTICE ADAM JOHNSON:** Yes, yes.

**MR MARVEN:** There is no more information. That's not a suggestion that was put to us or something that was asked. So, there's nothing there.

**MR JUSTICE ADAM JOHNSON:** Nothing more to say.

**MR MARVEN:** This funder, I do stress it is an on-shore company. That is another point in my favour. A lot of these funders are off-shore. This is a UK, England and Wales company.

**MR JUSTICE ADAM JOHNSON:** I follow.

**MR MARVEN:** But, again, this is all I do say -- I understand why the Tribunal press on this. All this is looking at things really from a worst-case scenario perspective. I have endeavoured to give comfort not only about the funder's position but also if anything does change for the worse, that is something that the Tribunal will be able to look at at the time and it is not an impediment in my submission to certification.

Unless there is anything else, sir, that's perhaps as much help as I can give on that.

**MR JUSTICE ADAM JOHNSON:** Thank you.

**MR MARVEN:** I did just want to return to the provisions, the two points the Tribunal raised with me yesterday.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR MARVEN:** First of all was 17.1, that you have on page 2690.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR MARVEN:** I was, in fact, going to show the Tribunal the letter, but you said this was the only one you wanted help on. A very different reason from my learned friend's reason, which as simply to emphasise that the funding agreement even as it stands is one that the Tribunal could be satisfied as being tested in the market.

I also just wanted to make two further points about clause 17.1. The first is that I made the submission, and I am not resiling from it, but one would look at economic viability

from the class's perspective. I didn't think that would be controversial, given it was the class's claim, but to be clear what I didn't say, and wouldn't want to be understood to have meant is, that there is some kind of sharp distinction to be drawn when you look at the meaning of economically viable between the funder's perspective and class's perspective.

One obvious reason for that, and let me be very clear about this, is that the class's perspective must obviously take into account the liability that has been incurred for the funder's fee. So, if there was any suggestion that I was meaning that that was simply to be disregarded when looking at economic viability, I certainly didn't intend that.

To be clear, although, as I said yesterday, I don't speak for the funder, I would submit it is obvious that no funder is going to accept an arrangement whereby they don't have a right to terminate if the likely recovery seems to be such that it wouldn't be possible to pay the funder's fee, but that's not very difficult from the class's perspective. If everything is going to be eaten up by the funder's fee, it is not economically viable from the class's perspective either. So, I just wanted to say that so that there was no misunderstanding about what I said yesterday.

As to how this clause might be revised, I don't have a draft revised agreement. The Court will appreciate this was -- of course, I make no complaint. The court raises this. That's an appropriate thing for the Court to do, but it is not something the defendants have raised before, this particular clause.

**MR JUSTICE ADAM JOHNSON:** No, I follow.

**MR MARVEN:** The parent is in Australia and there are other interested parties. So, it is not possible to come back with a revised clause.

I mean, one possibility, and I just wanted to show, which I didn't have at my fingertips yesterday, that similar clauses, albeit slightly rather more beefed up in terms of the reference to advice, have found favour with the Tribunal before. I wanted to show you

two examples in the authorities bundle.

The first is at page 2242. It starts at 2241. This is part of the Stephan v Amazon judgment.

**MR JUSTICE ADAM JOHNSON:** Yes. Sorry. I am in the wrong bundle.

**MR MARVEN:** You will see there, it deals with "satisfies the merits" at 24.3.1. The term there actually is --

**MR JUSTICE ADAM JOHNSON:** Sorry. Which?

**MR MARVEN:** 2243. So sorry. Forgive me. I am getting the numbers wrong. 24.3.1 is the merits. 24.3.3, the term used there is "commercially viable" rather than "economically viable".

**MR JUSTICE ADAM JOHNSON:** I am still slightly lost. Page 2243 of the authorities?

**MR DAVIES:** I am lost as well.

**MR MARVEN:** I am sorry. It is page 2241. I am sorry if I got that wrong. It is the bottom of that page.

**MR JUSTICE ADAM JOHNSON:** All right. There we have -- is this in the quotation?

**MR MARVEN:** Yes. That is the term. The wording that relates directly to the wording that the Tribunal was raising yesterday is the wording at the top of page 2242. It is clause 24.3.3. It uses the term "commercially viable" rather than "economically viable". I am sure better economists in the room than me might be able to say there is a difference between economically and commercially viable. For present purposes, I would suggest at the risk of straying into construction again that the two are synonymous really.

There is a stronger provision in respect of advice:

"... such a view to be reached based on independent legal and, where appropriate, expert advice ..."

That is more specific wording than one finds in 17.1, which simply says:

"Based on independent advice."

The Tribunal there, subject to that point, found that wording acceptable.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR MARVEN:** The second example I wanted to give is in the Merricks case that you have seen before. It is at tab 14, page 841. It is paragraphs 26 and 27. It is the bottom of page 840 and top of page 841. This is not quite so similar, because there is a specific figure mentioned there, but it is 12.1(ii).

**MR JUSTICE ADAM JOHNSON:** Yes.

**MR MARVEN:** What the Tribunal wanted added to that, one sees at paragraph 27, is:

"'such a view", i.e. the funder's view, "to be reached based on independent legal and expert advice that has been provided to the funder'."

One could add something -- I say one could. I'm not speaking for the funder. One might be able to add something like that, but with that beefed up requirement for expert as well as legal advice. Very similar clauses to this one have been accepted by the Tribunal in the past. Of course, there is also -- and I made this point yesterday -- the KC dispute resolution clause, which I think was also a feature of those agreements.

That's all I wanted to say, subject to anything the Tribunal wanted to say to me, about clause 17.1.

The other point -- unless there is anything else the Tribunal wanted to come back to me on, the other --

**MR JUSTICE ADAM JOHNSON:** How shall we leave it? Just going back to page --

**MR MARVEN:** That's a very good question.

**MR JUSTICE ADAM JOHNSON:** -- 2242, for example, the first of the sets of wording that you took us to at 24.3.3 of that agreement, I mean, it is very clear, I think, based on that language as a whole what is being talked about is the viability of the action --

**MR MARVEN:** Yes.

**MR JUSTICE ADAM JOHNSON:** -- because in order to assess whether it's viable or not you need legal advice and expert advice. So, the assessment is: is it economically viable to continue with this claim?

**MR MARVEN:** We will certainly invite the funder to consider that.

**MR JUSTICE ADAM JOHNSON:** I think so, because there is a bit more ambiguity about 17.1.

**MR MARVEN:** I see that the provision for advice in the clauses I have taken you to are more specific.

**MR JUSTICE ADAM JOHNSON:** Yes. Well, if you are able to invite the funder to think about that. I mean, there ought to be little objection to it, because if your view of it is correct, then all we are doing is clarifying the meaning the wording has already, but it would be beneficial I think to put it beyond doubt, and it seems consistent with the approach in other cases.

**MR MARVEN:** We can invite the funder to consider that, and we will write to the Tribunal as soon as we are in a position to do so on that.

The other point, now that we are back in the Stephan v Amazon case that you raised with me, can I just go back a few pages to page 2239? My learned friend Mr Kennelly did not make anything of this, but I am conscious the Tribunal asked about an independent costs review. I just wanted to show at paragraph 46 of this authority the arrangement that found favour with the funder there.

Leading counsel for the proposed class representative indicated that the class representative was prepared to:

"... instruct specialist cost lawyers and that this could be accommodated within his existing budget."

I paraphrase the rest of it. They would do monthly oversight reports and where

appropriate, identify queries, etc, etc.

As I understand, we think provisionally that it would be possible to do that within the existing budget, and if that would find favour with the Tribunal, I accept that my instructing solicitors could in fairly short order write a letter confirming that we will make an equivalent arrangement.

**MR JUSTICE ADAM JOHNSON:** Yes. Thank you. If you are able to consider that and respond in due course, that would be very helpful.

**MR MARVEN:** Certainly. Unless there is anything else I can assist with, those are my submissions.

**MR JUSTICE ADAM JOHNSON:** No. Well, thank you all very much for your assistance. Anything else?

**MR KENNELLY:** Just to avoid the Tribunal labouring under a misapprehension. It relates to opt-in, opt-out. Microsoft does not have a list of the customers of the Listed Providers. There's a special arrangement for them. So, we don't have a list -- to the extent this informs your thinking at all about what to do, Microsoft does not have a list of the names of the customers of the Listed Providers. I could get into what we did and did not provide, but not now.

**MR JUSTICE ADAM JOHNSON:** Yes.

**MS FORD:** Sir, there is a document in the bundle which goes to this. I believe it is tab 25, page 1941.

**MR JUSTICE ADAM JOHNSON:** 1941.

**MR KENNELLY:** These are the public terms. That's why I said special arrangement for Listed Providers. The general terms and conditions require providers to give Microsoft information of the Listed Providers. The CISPE agreement of course was to give them the benefit of the Google and Amazon terms on anonymity. They said we simply want the same thing. (Inaudible). We have dealt with that. We don't have the

names of the Listed Providers' customers. That's why we can't give information about the names.

**MS FORD:** Sir, the Tribunal will appreciate that we are somewhat at a disadvantage because this is information which has been provided which is not in evidence. What we rely on is page 1949, "Monthly use reporting" where it says:

"The monthly use report must include the total number of licences required for each product that you made available during the preceding calendar month. If the end user generated more than USD1000 per month in revenue to Microsoft, you must include the user's name and address."

**MR KENNELLY:** That's the general terms and conditions which Google and Amazon have special arrangements for.

**MR DAVIES:** But are now being changed even for the other ones as a result.

**MR KENNELLY:** But we are not in a position to deal with that (inaudible).

**MR JUSTICE ADAM JOHNSON:** Right. Okay. Well, there it is.

Thank you all very much for your assistance. We are going to reserve judgment. I hope that doesn't come as a surprise to anyone. We will be in touch through the usual channels in due course. Very good. Thank you all very much.

**(3.29 pm)**

**(Hearing concluded)**

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**Key to punctuation used in transcript**

| | |
|---|---|
| -- | Double dashes are used at the end of a line to indicate that the person's speech was cut off by someone else speaking |
| … | Ellipsis is used at the end of a line to indicate that the person tailed off their speech and did not finish the sentence. |
| - xx xx xx - | A pair of single dashes is used to separate strong interruptions from the rest of the sentence e.g. An honest politician - if such a creature exists - would never agree to such a plan. These are unlike commas, which only separate off a weak interruption. |
| - | Single dashes are used when the strong interruption comes at the end of the sentence, e.g. There was no other way - or was there? |