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IN THE COMPETITION
APPEAL
TRIBUNAL

CaseNo: 1745/5/7/25 (T)

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

23rd September 2025

Before:

Andrew Lykiardopoulos KC

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimants

**Roadget Business Pte. Ltd. and Shein Distribution
UK Limited**

V

Defendant

Whaleco UK Limited

A P P E A R A N C E S

MARIE DEMETRIOU KC & ALI AL-KARIM on behalf of Roadget Business Pte. Ltd. and
Shein Distribution UK Limited

JOSH HOLMES KC & NIKOLAUS GRUBECK on behalf of Whaleco UK Limited

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Tuesday, 23 September 2025

(10.30 am)

THE CHAIRMAN: Before we start, some of you are joining us via livestream on our website, so I must give the customary warning. An official recording is being made and an authorised transcript will be produced. It is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and a breach of that provision is punishable as a contempt of court.

Good morning.

Submissions by MR HOLMES

MR HOLMES: Good morning, sir. I appear with Mr Nik Grubeck for the counterclaimant, Whaleco UK, which is part of the Temu Group, and my learned friends Ms Demetriou KC and Mr Ali Al-Karim appear for the counterclaim defendants, Roadget Business Pte Ltd and Shein Distribution UK Limited, which form part of the Shein Group. I hope, sir, that you have four sets of bundles, a main CMC bundle consisting of three volumes, a supplemental bundle consisting of two volumes, one which should have reached you very recently, it was an overnight edition. Do you have that?

THE CHAIRMAN: Yes.

MR HOLMES: You do, and a one volume authorities bundle. There is an agreed draft agenda for today's hearing at tab 2 of the CMC bundle, with three issues on it: disclosure, trial structure and directions to trial 2, and the parties anticipate that disclosure may take most, if not all, of the morning and trial structure and directions to trial may be the business for the afternoon. If it pleases the Tribunal, we propose to take matters in the order of the agenda, starting with disclosure.

THE CHAIRMAN: That is fine. There was an issue that had arisen about the admissibility of the statement of Mr Parker, but I understand that Shein do not object

1 to the Tribunal referring to the evidence.

2 MR HOLMES: I think that's correct.

3 THE CHAIRMAN: Right. There was an issue that arose about a distinction that had
4 been made between expert adviser rather than expert witness. I have to admit I didn't
5 really understand that distinction.

6 MR HOLMES: I think it simply means that no testifying experts have yet been
7 instructed or approved for the purposes of the trial but the parties' expert advisers met,
8 in accordance with the direction of Mrs Justice Bacon, to discuss disclosure and so
9 it's, I think, a purely formal point from our perspective, it's simply that there is no
10 permission for expert witnesses to testify at trial yet. There simply have been
11 arrangements put in place for an expert led process at the disclosure stage. I don't
12 know whether Ms Demetriou agrees with that.

13 THE CHAIRMAN: All right. Well in light of the lack of objection, I think we can move
14 on, and it is admitted.

15 MR HOLMES: I'm grateful. You've seen the context, I hope, sir, from the parties'
16 skeleton arguments. The expert meeting which took place was effective in significantly
17 narrowing the areas of disagreement between the parties. There have been some
18 further adjustments and I'm pleased to say that there are now only a few points
19 outstanding.

20 THE CHAIRMAN: A further adjustment since the skeletons?

21 MR HOLMES: Since the skeleton arguments, yes.

22 THE CHAIRMAN: That's good.

23 MR HOLMES: I don't want to get your hopes up too much.

24 THE CHAIRMAN: Too late, you are raising them and dashing them in one fell swoop.

25 MR HOLMES: There are still some exciting matters to be canvassed but at least some
26 of them have been resolved by agreement between the parties.

1 THE CHAIRMAN: Well that's good.

2 MR HOLMES: So there is a composite disclosure review document. In fact, there are
3 several in the bundles but I think we might work, if it's convenient, from the original
4 one, which -- at the time of the skeleton arguments and we will update you on
5 progress, given we both worked from that, if that's convenient.

6 THE CHAIRMAN: I've been working from the one that was in core tab 40. Is that the
7 one?

8 MR HOLMES: That is exactly the one.

9 THE CHAIRMAN: That is what you meant by original, I was --

10 MR HOLMES: It may be helpful to have that up. For our part there are a handful of
11 remaining requests which fall in four buckets. The first is product market definition.
12 The second is geographic market definition. There are then some requests on the
13 effects of the impugned conduct on competition. This is the question of whether they
14 should be mutual or symmetrical or whether they should be confined to Temu. And
15 then fourth, there are a couple of requests relevant to the impact of the takedown
16 notices served by Shein. On Shein's side there are some disputed requests on
17 anticompetitive effects primarily, I think, and Whaleco's loss. If it pleases you, we will
18 probably just run through the document and each pick up the points that are raised
19 respectively by each of us.

20 THE CHAIRMAN: Yes, why don't we go issue by issue because otherwise it's harder
21 to keep up.

22 MR HOLMES: Yes, indeed.

23 THE CHAIRMAN: Particularly as they are quite sort of --

24 MR HOLMES: They are fairly detailed and fine grained points if I might put it like that.

25 MS DEMETRIOU: Sorry, just one suggestion, is there is a point of principle when it
26 comes to effects, as to whether Shein should be giving disclosure on the effects on

1 Temu's business at all and so I think that is an overarching point that's relevant to
2 several of the effects --

3 MR HOLMES: Yes, okay.

4 MS DEMETRIOU: -- issue, so it may be that we take that --

5 THE CHAIRMAN: I understand that, you are talking about the later ones where you
6 can put them together and the question is whether it's mutual disclosure or only from
7 one. I got that point.

8 MR HOLMES: And indeed, in the same vein, on the takedown notices and their
9 effects, there are two or three requests which straddle different issues in the same
10 way and it might be convenient to pick those up together.

11 THE CHAIRMAN: Let's see how we go. I think my main thing is I don't really want you
12 to address me on all of them in that way because I think that will be a rather difficult
13 way to proceed.

14 MR HOLMES: That's well understood.

15 THE CHAIRMAN: But if you want to break them up, do so in a way that you think is
16 practical.

17 MR HOLMES: I'm grateful. So I think the first point then is in relation to product market
18 definition. This is, of course, the first step in competition analysis which feeds into the
19 assessment of dominance and also frames the effects assessment. You will have
20 seen, sir, that there is a dispute on the pleadings as to the relevant product market.
21 Whaleco contends for an ultrafast fashion market involving the rapid release of a large
22 range of fashion items which are retailed online at very low prices, whereas Shein
23 contends for a wider market definition which includes at least other affordable fashion
24 products. And the practical upshot of that dispute is that a wider market could dilute
25 Shein's market share and could thereby reduce the prospects of a finding of
26 dominance.

1 Most of the requests relevant to this are agreed. On our side I think there are two
2 outstanding categories. The first is 1(b) (viii) in the middle column of page 758.

3 THE CHAIRMAN: Sorry, originally there was a dispute over the footnote. Has that
4 gone?

5 MR HOLMES: I'm pleased to say that has gone away. I think the parties are agreed
6 that we can simply refer to clothing, insofar as the definition is needed there and we
7 can dispense with any more specific definition than that. I'm sorry, I should pick up
8 the points that have gone as well. Similarly on page 758, you'll see in the claimants'
9 column --

10 THE CHAIRMAN: Sorry, before we leave 757, has datasetsbases gone?

11 MR HOLMES: Yes, it has, yes.

12 THE CHAIRMAN: In what way?

13 MR HOLMES: Temu is content to confine the requests at 1(b) to memoranda, reports,
14 presentations and analyses, subject to the specific request at 1(b)(viii) which is a
15 request for an extract from sales databases. But otherwise, and for the other
16 categories, we're content for the search to be done by reference to memoranda,
17 reports, presentations and analyses but excluding datasets.

18 THE CHAIRMAN: And 1(b)(vi) and (vii), that dispute has gone as well, has it?

19 MR HOLMES: That went in the skeletons, I think.

20 THE CHAIRMAN: I think one skeleton but not the other but okay.

21 MR HOLMES: Yes.

22 THE CHAIRMAN: I have to say I didn't see how it's phrased (vi) and (vii). It may be
23 a small point. Memoranda, reports, presentations, analyses. Should it say
24 "describing", consumers' perception, or?

25 MR HOLMES: Yes. I think that's it.

26 THE CHAIRMAN: And then (vii), should that be --

1 MS DEMETRIOU: Sir, I think the heading, the chapeau as it were, says "containing
2 information about", so that's the governing point, I think.

3 MR HOLMES: I think on this one though, there may not be -- (Overspeaking) --

4 MS DEMETRIOU: I think it's a drafting point.

5 MR HOLMES: It's a drafting point.

6 THE CHAIRMAN: It obviously doesn't matter, I didn't want it to matter later. And
7 likewise in (vii), I understand where it says "Shein and", that is no longer there but
8 I assume it will be something like "containing". I'm picking out the wordings that have
9 been used above.

10 MR HOLMES: Yes, I think it is now mutual, so both Shein and Temu.

11 THE CHAIRMAN: Oh, it's mutual, okay, sorry. The one left is 1(b)(viii).

12 MR HOLMES: Yes, it's the one under (b) that's left. You will see that that's a request
13 for an extract from sales databases providing aggregated information by product
14 categories for fashion products containing two types of information for each year of
15 the relevant period. And the first type of information, as you see at the top of page 759,
16 is "number of products in category." And the second is the price range and average
17 price. So a limited number of annual data points to be given, as we say, by both Shein
18 and Temu.

19 The explanation for the request on our side is provided on page 760 in the middle of
20 the final column on the page, under the heading "Defendants' request (b)(viii)." If
21 I could just ask you to refresh your memory of that, please, sir.

22 We say that the range and pricing of products are relevant characteristics for
23 determining whether Shein and Temu provide a differentiated offer. That is by
24 comparison with one another and potentially also by comparison with other types of
25 fashion retailer. These requests are aimed at determining whether there is a distinct
26 ultra-fast fashion market in which Temu and Shein compete to supply a large range of

1 products at very low prices, as Whaleco alleges, or whether there is a wider market
2 comprising other in-store retailers.

3 And we say that information about Temu's and Shein's pricing and product range
4 across time is relevant to those questions, so it will help to resolve the pleaded issue
5 between the parties on market definition.

6 As we understand Shein's position, it doesn't contend that this request is irrelevant to
7 product market definition but instead, its objection is on grounds of proportionality and
8 there are two prongs to this. The first is the evidence of Mr Democratis, a Shein
9 in-house lawyer, which says that disclosure of data would be burdensome. But his
10 evidence is generic in nature, relating to dataset disclosure on market definition
11 generally, whereas the present disclosure request requires information about only two
12 specific elements, price and number of products in categories on an annual basis, from
13 2022 to the present. Mr Democratis does not identify any specific challenges involved
14 in providing this particular disclosure, nor does he give any indication of the time or
15 cost likely to be required in order to provide it. For our part, we're happy to give the
16 disclosure in respect of the Temu side and we don't consider it would be particularly
17 onerous to provide, given the limited reference points require.

18 The second point that Shein makes is to say that the information can be readily
19 obtained from an inspection of Shein's website but first, we don't think this works for
20 time sensitive data of this kind. The range and pricing of the website is unlikely to be
21 the same from year-to-year. That is why annualised data from the business would be
22 helpful.

23 Moreover, if it were really the case that the information was as readily accessible as
24 Shein suggests, that would confirm that it would not be onerous to give and Shein
25 providing it as part of its disclosure will ensure the tribunal has before it an accurate
26 and comprehensive selection of the relevant material. So those are -- shall I hand the

1 floor to Ms Demetriou unless you have any questions.

2 Submissions by MS DEMETRIOU

3 MS DEMETRIOU: Sir, we make two points about this. The first relates to
4 Mr Democratis' evidence and if you could briefly, please, turn up page 1103. That's
5 tab 94, final tab of the bundle. Starting from page 1102, Mr Democratis explains the
6 practical implications of Whaleco's request for datasets in respect of the various topics.
7 Now my learned friend says: "oh this is generic evidence in respect of datasets under
8 product market" but of course, that's because before the concession that Whaleco
9 made in relation to the other datasets, we were facing multiple requests for datasets.
10 So it's true that he hasn't distinguished between each of the datasets. Nonetheless,
11 what he says at paragraph 14 at page 1103 applies to this dataset and I am instructed
12 because I asked for clarification on this, that there is no dataset that contains the
13 information that's sought. So there's no readily available dataset. It would have to be
14 put together and so for that reason, all of the practical objections that Mr Democratis
15 makes in the witness statement which are intended to apply to all of the dataset
16 requests under request 1, I can confirm apply to this dataset. So there is nothing that
17 can simply be pulled off the system, it would have to be generated and that's not
18 a straightforward matter. That's the first point, sir.

19 The second --

20 THE CHAIRMAN: Sorry, let me just understand that.

21 MS DEMETRIOU: Of course.

22 THE CHAIRMAN: I hadn't quite understood what is meant by "an extract."

23 MS DEMETRIOU: No, neither had we. And to some extent Mr Holmes has given
24 some clarification because we weren't sure what was meant but he's clarified that he
25 means there should be an annual, I think -- he said today in submissions just now, on
26 an annualised basis which doesn't appear from the request itself. But our point is that

1 | there is no such thing readily available as an extract from a database, showing all of
2 | these things.

3 | THE CHAIRMAN: So your clients don't have on an annual basis or on any other basis,
4 | as I understand it, information by product categories, showing the number of products
5 | in a category and the price range and average price?

6 | MS DEMETRIOU: No, so it would have to be generated -- there would have to be
7 | clarification as to what products we are talking about and the other parameters and
8 | then that would have to be somehow generated, so there is no readily available
9 | dataset or extract from a dataset.

10 | THE CHAIRMAN: How difficult is it to generate it? I mean is it pressing a few buttons?

11 | MS DEMETRIOU: No, and I'm told that -- what Mr Democratis says at paragraph 14
12 | applies to this as well, so:

13 | "The databases in which transaction level data is stored were not designed for the kind
14 | of request [...]"

15 | THE CHAIRMAN: Right.

16 | MS DEMETRIOU: They have been designed for other business purposes and it will
17 | be necessary to "comb through this data" and "reconcile different databases" in order
18 | to produce this information.

19 | And he says that would be a "resource-intensive process requiring not only technical
20 | input but also qualitative input from individuals within the business involved in
21 | designing the databases."

22 | So that's the practical proportionality objection, sir. And there is another point which
23 | is that if you go back, please, to tab 40, page 760, my learned friend said that the
24 | justification, he -- pointed you to the justification for this request. You can see that on
25 | page 760, he took you to it, in the final column in the middle.

26 | THE CHAIRMAN: Oh sorry, now I'm with you.

1 MS DEMETRIOU: In terms of Whaleco's justification to the request, Mr Holmes took
2 you to the final column. You can see there the heading and he said that the justification
3 is to enable a comparison between what Shein and Temu offer to their customers and
4 what other retailers and platforms offer. So that's said to be the justification.

5 When you then look at some of the other categories in respect of which it's been
6 agreed that disclosure will be provided -- and so if you go, for example, to -- if you go
7 to page 758, and we are looking at the middle column, so (iv). Do you have that, sir?

8 THE CHAIRMAN: Give me one moment --

9 MS DEMETRIOU: So if you look at (iv):

10 "Documents", I'm going to use that term broadly but you can see at the top what the
11 documents are, "containing information on the pricing of other fashion brands /
12 platforms ..."

13 Then (v):

14 "Benchmarking the disclosing party's pricing to that of other fashion brands /
15 platforms."

16 (vi) as well:

17 "Consumers' perception of the number of fashion products" on Shein and Temu
18 compared to other competitors' platforms.

19 Then at (vii):

20 "Shein and Temu's monitoring of, and/or benchmarking against, the number of fashion
21 products for sale through other UK online platforms."

22 And so you can see that in terms of what the justification is that's been put forward by
23 Temu which is precisely this sort of benchmarking of Shein's and Temu's prices to the
24 prices of comparator products on other platforms, there is already a rich seam of
25 disclosure that's going to be provided. And so it's unclear how the additional dataset
26 in (viii) is going to add to this information, just unclear how it's going to assist, given

1 that the parties will have disclosed all of the other information that you see and in
2 circumstances where it is onerous to provide, there is no readily available dataset, we
3 say that it's unnecessary and would be disproportionate to order.

4 THE CHAIRMAN: Madam, on your last submission, are you saying that from items
5 (iv), (v), (vi) and (vii), it would be possible for them to put together an aggregate
6 information if they so wished? Ie, the information will be there, it's just not put together
7 in a way that they request. Is that what you are saying?

8 MS DEMETRIOU: When one looks at the justification that they provide for the extract
9 they want from the sales database, the justification is all about comparing the offering
10 on Shein and Temu to the offering of other retailers and platforms, and we say that
11 that is what all of these other categories are about. If you need more, you can look at
12 Shein's website. There is publicly available data as to what they sell but it's not
13 apparent that they would need more in order to conduct that benchmarking analysis.
14 And so that's what we say. And we say in circumstances where we've provided
15 evidence that it would be onerous and that there is not a dataset which can readily be
16 provided, it's unnecessary and therefore disproportionate to order this category.

17 MR HOLMES: Sir, three very brief points. First of all, the request does refer to annual
18 data. You see the reference for each year at (viii).

19 THE CHAIRMAN: Yes, I suppose my question when I read this was it reads to me
20 like "an extract from each year", and I didn't know what an extract from each year
21 means.

22 MR HOLMES: The language could perhaps be improved. The information from sales
23 databases that illuminates the requested two criteria, namely the number of products
24 and category and the price range or average price. It's not suggested, nor could it
25 realistically be, that information about the number of products within particular product
26 categories or the price range or average price are not going to be recorded as part of

1 the ordinary business activities. They might require some processing to provide
2 an annual return, there might need to be some interrogation of the databases, but it's
3 standard in competition law matters for data disclosure to be given in circumstances
4 where such interrogation is required. And the other categories to which Ms Demetriou
5 refers are all qualitative or narrative, so they are dependent on there being memoranda
6 of the kind described.

7 This is the only quantitative request which is now maintained relating to data and we
8 do say that it will provide a helpful basis for assessing the particular range and pricing
9 to be observed on Shein's and Temu's websites over time, so that they can be
10 compared to one another and so that they can be compared to third party pricing in
11 general terms. The information about other fashion brands or platforms is all very well
12 in qualitative documents but we want quantitative information to understand what
13 Shein and Temu do, so that that can be considered by the experts in seeing whether
14 we are right in our identification of a relevant product market, a distinctive relevant
15 product market, which carries very large range of products at very low prices.

16 THE CHAIRMAN: But they said they don't have the databases in that form.

17 MR HOLMES: Well they have databases --

18 THE CHAIRMAN: They have the databases but not in that form.

19 MR HOLMES: What they say is the databases would need to be interrogated or
20 processed in order to generate specific annual data points. That's how I read what is
21 said at paragraph 14. There's a reference to a process required in order to generate
22 the particular data points.

23 THE CHAIRMAN: Yes. That process appears to be search queries and produce
24 datasets which would then need to be manually reviewed and although he says that it
25 will be extraordinarily resource intensive and he's talking, of course, about a broader
26 set of datasets then, I understand that they are still saying that it would be quite

1 a difficult task which would include both electronic and manual review, to put those
2 things together over quite a long period of time. This goes back to August 2022,
3 doesn't it?

4 MR HOLMES: I think the reason why we have proposed the request in the way that
5 we have is to meet an objection that very large volumes of material would need to be
6 disclosed for processing by Temu's experts. If Shein is content to give access to the
7 sales databases, I'm sure we would be happy to undertake the processing but
8 I apprehend from the reactions on the other side of the bar that that is not going to be
9 appealing to them.

10 THE CHAIRMAN: That's why I was interested in the extract because at the moment,
11 it reads to me that you want information aggregated in these categories for each year
12 back to 2022, August 2022, dealing with products in the category and price and
13 average price. If that was easy to obtain, that would be one thing but it does appear
14 to be -- what I understand is it's not easy to obtain and will need to -- and could be
15 quite a lot of data between doing annually for -- going back to that period.

16 MR HOLMES: The product will presumably be a fairly finite number of data points
17 because there are only two dimensions in respect of which data is sought but it might,
18 I agree, involve processing a large volume of data but you have my point that there's
19 nothing specific to indicate the cost or the difficulty of doing so and in relation to what
20 will be a key battleground at the trial, the scope of the relevant market which will inform
21 the assessment of dominance, we say that it is a proportionate request which confines
22 data disclosure to really this one category.

23 THE CHAIRMAN: Could you help me, price range and average price. That's two
24 different things, is it?

25 MR HOLMES: The price range is what is the top price of a product in the range, down
26 to what is the bottom price of a product in a given product category and the average

1 price is the price, on average, of items within the category.

2 THE CHAIRMAN: My final question and then we can stop, is just again, what is
3 an extract?

4 MR HOLMES: An extract is data points resulting from an interrogation of
5 the databases covering these matters.

6 THE CHAIRMAN: Okay. Thank you.

7 MR HOLMES: I'm grateful.

8 RULING (1)
9

10 THE CHAIRMAN: This is the first CMC in the Competition Appeal Tribunal after the
11 matter was transferred from the High Court. There are a number of matters to be
12 decided today. First are the remaining disputes on the DRD. The parties have
13 managed to reduce the number of disputes, for which I am grateful.

14 The first dispute concerns Request 1(b)(viii) of the DRD. It is a request by Whaleco
15 for disclosure of an extract from sales databases, providing aggregated information by
16 product categories for fashion products containing for each year of the relevant period
17 the number of products in each category and the price range and average price.

18 Mr Holmes KC for Whaleco says that the range and pricing of products are relevant
19 characteristics going to market definition. He says it is not possible (or at least it is not
20 clear that it is possible) to be able to get that information simply by interrogating the
21 websites themselves, primarily because of the temporal element.

22 Ms Demetriou KC, for Shein, objects on two grounds. First, she points out that this
23 may be covered by other disclosure requests that have now been agreed (in particular
24 Requests 1(b)(iv), (v), (vi), and (vii)). I am not persuaded that this is correct. There
25 may be overlap, but I am not persuaded that the issues that may arise under (iv), (v),
26 (vi) and (vii) entirely cover the request made in (viii).

1 Her next objection is proportionality. She says it would be burdensome and
2 disproportionate to undertake such a search as the documents cannot readily be
3 obtained from Shein's databases. For this, she points to the evidence of
4 Mr Democratis and in particular, his paragraph 14. This paragraph did not distinguish
5 between different databases or datasets and was written at a time of more general
6 requests for datasets. Accordingly, it does not address specifically the request now
7 being made. But on instruction, Ms Demetriou says that it would apply. It is said that
8 to comply would be an extraordinarily resource-intensive process. I can see that would
9 be so in respect of the original requests that were made. However, I am not persuaded
10 it would be so difficult for this much narrower request. I will allow this disclosure
11 request.

12
13 Submissions by MR HOLMES

14 MR HOLMES: The next request is Ms Demetriou's. I'm happy to say that this is all
15 by agreement which I --

16 MS DEMETRIOU: Sir, yes. This request relates to -- I am not sure it is the next one,
17 I think there is 1(c) --

18 MR HOLMES: I do apologise. 1(c) -- my learned friend's correct, there is one further
19 request on our part. This is --

20 THE CHAIRMAN: Could you point me where it is.

21 MR HOLMES: Yes, of course. It's on page 760 and you see that 1(c)(viii) and (xi) are
22 still disputed but (e) and (f) are not. These requests concern online and offline retailing
23 by the parties' groups. So the first seeks disclosure on the proportion of total sales
24 that are online and offline and any benchmarking of these proportions against other
25 fashion brands and platforms and the second seeks documents concerning the
26 strategic positioning of the offline channels and the rationale for the firm's presence in

1 either channel.

2 There's no dispute between the parties that the extent to which offline fashion retailing
3 falls within the relevant market is a key question that will need to be resolved. In other
4 words do H&M and Zara, for example, fall in the same relevant market as Shein's and
5 Temu's predominantly online offering.

6 Shein also recognises that it does have some offline presence, albeit it says that it is
7 not meaningful or is *de minimis*. You can see that from their skeleton argument. It
8 might help if we were to just turn that up. It's on page 7 of the internal numbering.

9 For completeness, you see a footnote at the foot of the page, footnote 6:

10 "Shein has at times operated "pop up" stores as a marketing exercise, but sales from
11 such exercises account for a *de minimis* proportion of Shein's UK sales."

12 THE CHAIRMAN: Where are you?

13 MR HOLMES: The footnote at the foot of the page. Do you see it? Shein does have
14 an offline presence, albeit it says it's *de minimis*. There's no suggestion it would be
15 onerous to put the scale of that presence beyond doubt by indicating what proportion
16 it represents of Shein's overall operations.

17 As regards the strategy papers concerning the offline channel, these would shed light
18 on why Temu and Shein focus on the channels that they do. Insofar as they focus
19 predominantly on online, one can see that such strategy papers, to the extent that they
20 exist, would illuminate what is specific about the online channel. So their reasons for
21 not expanding in the offline channel are likely to be informative of whether it sits in the
22 same or a different market from online, ultrafast fashion. You will have well in mind,
23 sir, that this is Model C disclosure and all that is required is reasonable enquiries of
24 the business to see whether such papers exist and where they are to be found. And
25 we say that again, that is proportionate and reasonable, given the issue which is
26 recognised to exist between the parties as to whether offline are within the same

1 market.

2 THE CHAIRMAN: So you are requesting on (viii) a proportion of total sales that are
3 online and offline.

4 MR HOLMES: Yes.

5 THE CHAIRMAN: Do you not accept then that those are almost all online, other than
6 some pop-up stores?

7 MR HOLMES: We see what they say. They say that the sales offline are *de minimis*,
8 and we see that they say that they do -- paragraph 20, on page 6:

9 "Neither party alleges that it generates meaningful sales through bricks and mortar."

10 These are quite nebulous terms and we think that the Tribunal would be assisted by
11 a quantification of that, so that it understands, really, whether the offline is something
12 that needs to be borne in mind for the purposes of market definition.

13 THE CHAIRMAN: Then the second which is number (ix), that is requesting external
14 market research, memoranda, report analyses, showing strategic positioning on the
15 online and offline channels and rationale for the firm's presence in either.

16 If one was assuming that it's correct that they don't generate meaningful sales through
17 brick and mortar stores, other than perhaps some *de minimis* pop-up, are strategic
18 positioning papers going to be of any use?

19 MR HOLMES: They could very well be, sir.

20 THE CHAIRMAN: And why is that?

21 MR HOLMES: Because they can show why they have chosen to keep their presence
22 in offline to these negligible pop-up stores and they have not pursued a wider entry
23 and that could show what is different about being a supplier of online, ultrafast fashion
24 and why it's not the same as or well suited to any substantial offline presence.

25 So those documents, we say, could be highly illuminating. We accept, of course, that
26 it depends on whether those qualitative documents do exist but to the extent they do,

1 they are relevant and we say they have to be disclosed.

2 THE CHAIRMAN: (Inaudible), or they haven't said they do either, so it's not a question
3 where I have evidence where I don't think that they say they don't exist.

4 MR HOLMES: Yes. That's (inaudible), sir.

5 THE CHAIRMAN: Yes, and again, just help me here, and sorry if this is (inaudible),
6 but why is it -- you are both, effectively, online sellers, and why is it that it's relevant to
7 be investigating why you are both -- or why they, in this one, are online sellers and
8 why it's not suited to offline? What does that go to?

9 MR HOLMES: Because the question of the scope of the relevant market will depend
10 not only on the activities of Shein and Temu specifically but other suppliers who may
11 act as a relevant competitive constraint on Shein's and Temu's activities. So the fact
12 that Shein and Temu have chosen to focus predominantly on online isn't conclusive,
13 although we say it's highly informative, of whether offline are in a separate market or
14 constrain the activities of the online sellers. For example, if there were a memo which
15 said: we update our range much more often than these offline sellers, because this is
16 ultrafast, it's got to be up to the minute, we carry a much larger range, this is much
17 less suitable for offline retailing, we can't really offer a proper experience of ultrafast
18 fashion retailing in offline premises, that would be confirmatory of the market definition
19 which we are advancing. If, on the other hand, the evidence suggested -- the
20 disclosed documents suggested that Shein had seriously considered entering
21 and hadn't seen any serious obstacles, that might cut in the other direction. Either
22 way, strategy documents of that kind show what the parties understand to be their
23 activity and the means by which it can be provided. Which --

24 THE CHAIRMAN: Experts in the court or the Tribunal will be assisted by having
25 internal documents. I mean some of what you have just said there, I would expect
26 an expert might give evidence about difficulties on differences between online market

1 and bricks-and-mortar market and I can see that being something that, I suspect,
2 might be in the preserve of the expert witnesses at the trial. Is anyone really helped
3 by what the parties might have said internally?

4 MR HOLMES: In my submission the strongest and best evidence of the competitive
5 constraints on a party is their own internal documents shedding light on what they
6 perceive those competitive constraints to be.

7 THE CHAIRMAN: It's not just a bit of prejudice.

8 MR HOLMES: Really, sir, this is not a category that -- you see from the immediately
9 prior category which was included at the request of Shein which concerns the
10 differences, similarities and/or interaction between online and offline, that this is
11 recognised as an aspect of the enquiry.

12 THE CHAIRMAN: I saw that, you said that in your skeleton and I take that point, that
13 there was some discussion in their skeleton about how this is all about online, so offline
14 has got nothing to do with it and as you pointed out, that doesn't fit with agreeing either
15 category (vii). I have that point. Thank you.

16 Submissions by MS DEMETRIOU

17 MS DEMETRIOU: We say this is a wild goose chase, if ever there was one. The way
18 that it fits -- so we accept that the Tribunal will have to be looking at competitive
19 constraints from offline channels as part of the market definition exercise and pursuant
20 to request 1(c), the parties have already agreed to disclose internal analyses on
21 a number of issues relevant to market definition, including market research, their own
22 market research on competitors and products. And you can see that from the other
23 agreed categories of disclosure under (c). If you go to page 759, this captures a lot of
24 the internal analysis of the parties as to who is competing with them, who is competing
25 with Shein and Temu. So you can see at (v), for example:

26 analysis as to "fashion brands / platforms that consumers consider to be alternatives

1 to shopping at the disclosing party's UK website."

2 (vi):

3 "Fashion brands / platforms to which consumers switch" following some "significant
4 event affecting the disclosing party's UK website".

5 So this is going to capture -- then you have more general information at (i), (ii) and (iii)
6 in relation to consumer behaviour, so that is going to capture wide-ranging documents
7 from the disclosure from Shein and Temu in terms of their own internal analysis of who
8 are their competitors. So does Shein compete with Zara's bricks and mortar store, for
9 example.

10 The reason why (viii) and (ix) are a wild goose chase are that both Shein and Temu
11 have taken the commercial choice to be online only retailers and we have explained
12 that Shein's offline stores are pop-up stores lasting about a week, limited to one or two
13 per year, per jurisdiction. And in terms of when we say *de minimis*, it really is
14 *de minimis*. To say that the revenue from those stores is even as much as a millionth
15 of a per cent of revenue would be putting it too high. In those circumstances it simply
16 is disproportionate and unnecessary to ask Shein to search for documents relating to
17 the positioning of its on and offline channels, given that the offline channel is simply
18 not meaningful. This is going to capture all sorts of documents about why they have
19 these pop-up stores for marketing events which simply don't go to the issues in
20 dispute. So for that reason, we say that this is unnecessary and, indeed, irrelevant
21 and would be disproportionate.

22 THE CHAIRMAN: Do you have evidence of disproportionality on that?

23 MS DEMETRIOU: No, we don't have direct evidence on disproportionality but we do
24 say it's irrelevant and that even just looking at the request is going to result in a chain
25 of enquiry about documents relating to the positioning of these offline pop-up stores
26 that last a week in various jurisdictions across the world which are essentially

1 | meaningless.

2 | THE CHAIRMAN: Presumably on (viii), it's not going to be very difficult to give the
3 | proportion of total sales that are online and offline. I mean you say there are almost
4 | no sales.

5 | MS DEMETRIOU: Yes

6 | THE CHAIRMAN: So that would not be difficult. That could be done not by
7 | memoranda and that could be done by a suitably signed statement, couldn't it?

8 | MS DEMETRIOU: Yes, I mean I think that in terms of -- just looking back at the
9 | requests, so proportion of total sales, so that point you mean, sir?

10 | THE CHAIRMAN: I'm just looking at what the request is and I can see -- and frankly,
11 | subject to anything I hear again with you, that having to give memoranda, reports,
12 | presentations, analyses, i.e. a large amount of disclosure on the proportion of total
13 | sales that are offline, when you had said in your skeleton and I accept, that they are
14 | either *de minimis* or not really very meaningful, that at the moment seems to me to be
15 | sledgehammer and nut territory. What I can see is supporting that statement that it is
16 | *de minimis* and I'm looking at both of you here as to whether this is the way through,
17 | that would seem to me to be something that would be very easy to do and so you can
18 | provide the information in that way.

19 | MS DEMETRIOU: Can I just take brief instructions?

20 | THE CHAIRMAN: Of course. (Pause).

21 | MS DEMETRIOU: Yes, we can provide an estimate of the proportion of total sales
22 | that are online and offline, so it may not be the precise figures because they are
23 | recorded separately but it's very *de minimis* and we can provide a statement which
24 | confirms that.

25 | THE CHAIRMAN: Let's just stop there. Just before you go on, would that, Mr Holmes,
26 | satisfy your clients? Sorry, I didn't mean to cut you off there.

1 MS DEMETRIOU: Not at all.

2 MR HOLMES: I'm so sorry, sir, we would be content with your suggestion as a way
3 through.

4 THE CHAIRMAN: That appears to be that part of it.

5 And then we have benchmarking of these proportions against other fashion brands'
6 platforms. I should ask, what do you understand that means?

7 MR HOLMES: It may be that I can cut through this. We are content for the entire
8 request to be dealt with on the basis of what's suggested.

9 THE CHAIRMAN: That's request (viii). You are still pressing for request (ix) or not?

10 MR HOLMES: Sorry, may I just take instructions. (Pause).

11 We do maintain request (ix) on the basis that even if there is a negligible presence,
12 insofar as there are strategy papers explaining why that is the case, that, we say, will
13 be potentially informative for the purposes of market definition.

14 MS DEMETRIOU: Sir, on that, we say it's at the very margins of what could potentially
15 be relevant. Were it the case that Shein had a mixed presence and was considering
16 the balance of online and offline, then one can see that potentially that might be
17 relevant but given that they've taken a commercial choice, as has Temu, to operate
18 as purely an online seller, then in those circumstances, searching for strategy
19 documents, if they exist, is simply not a proportionate thing to order Shein to do, in
20 light particularly, of all of the other information on this. So there are analyses that have
21 already been agreed between the parties, including in relation to consumers'
22 perception. You can see at (vi), (vii):

23 "Shein and Temu's monitoring of and benchmarking against the number of fashion
24 products for sale through other UK online platforms."

25 That's really the point. The point is to what extent is Shein in fact competing with other
26 platforms, be they online or offline, and that's all covered by these other information

1 requests. So to require Shein, in circumstances where it has deliberately chosen to
2 be an online seller, to search for this category of strategy documents, is simply nothing
3 to the point. So it's barely relevant and it would be disproportionate.

4 MR HOLMES: I don't have anything to add, sir.

5
6 RULING (2)
7

8 THE CHAIRMAN: I now have to decide a dispute in relation to DRD section 1(c)(viii)
9 and (ix). In (viii) Whaleco request disclosure of documents relating to the proportion
10 of total sales online and offline and benchmarking of those proportions against other
11 fashion brands and platforms. This was opposed by Shein. Ms Demetriou points to
12 her skeleton argument where it is said that neither side alleges that they generate
13 meaningful sales through brick and mortar stores and that Shein at no time has
14 operated in such stores, other than perhaps pop-up stores as a marketing exercise
15 but sales from those would be *de minimis*.

16 At the hearing I suggested that this request could be determined by a signed statement
17 from a relevant authorised person within Shein, who can give an estimate of the
18 proportion of online and offline sales in order to support what was said in Shein's
19 skeleton argument.

20 The parties agreed. That disposes of the dispute on (viii). This statement shall be given
21 at the same time as the rest of disclosure.

22 In relation to (ix), Mr Holmes continued to press for strategic positioning documents
23 for the online and offline channels and rationale for the firm's presence in either
24 channel. Ms Demetriou says that that this would be on the very margins of what could
25 be considered to be relevant and I agree. It would not be a useful or proportionate
26 exercise. To the extent the experts want to comment on online and offline sales, they

1 will be able to do so without the need for internal disclosure from the parties. I will not
2 order the disclosure sought by Whaleco in 1(b)(ix).

3
4
5
6 Submissions by MS DEMETRIOU

7 MS DEMETRIOU: Thank you, sir. I think next are 1(d) and I think, happily, the parties
8 have reached agreement on this. 1(d) is --

9 THE CHAIRMAN: Is that the keyword bidding data?

10 MS DEMETRIOU: Exactly. So Whaleco has proposed providing Google analytics
11 reports. We assume, obviously having made that proposal, that they do have such
12 reports. I'm sure they do. If they don't, we may need to come back to seek
13 supplemental disclosure but on the basis that they do, the parties have agreed that
14 Temu will search for automatically generated Google auction insight reports regarding
15 keyword bids, demonstrating the keywords against which the disclosing party
16 advertises online in the UK and the other brands/platforms that bid on them. So we've
17 agreed that that's appropriate.

18 THE CHAIRMAN: Can I just check. This is request 1?

19 MS DEMETRIOU: 1(d).

20 THE CHAIRMAN: Okay, I don't want to unpick any agreement that's been done.
21 I hadn't quite understood the purpose of the bidding data but if the parties have agreed
22 it, I'm not going to unpick it. I couldn't write down everything you just said there as to
23 what you've agreed but I'm sure you will send me that and I can look at it.

24 MS DEMETRIOU: We can send it to you. Thank you, sir.

25 THE CHAIRMAN: No, I'm not going to unpick what the parties have agreed.

26 MS DEMETRIOU: Then I think we move on to 1(e) and 1(f) which I think have similarly

1 | fallen away. 1(e) and (f), these are supplier on-boarding and evaluation documents.
2 | This issue has moved on since the parties filed the DRD and Shein is content to
3 | provide disclosure of these categories of documents. In other words, on-boarding
4 | documents and internal documents setting out Shein's policies for evaluating new and
5 | existing suppliers, subject to the request clarifying that the policies to be disclosed are
6 | general in nature and not supplier-specific. Which I think is implicit in any event in the
7 | requests which talk about policies for evaluating suppliers. So what we are keen to
8 | avoid is a trawl through every document relating to individual suppliers because I don't
9 | think it's how the request is phrased anyway but, subject to that, we are content to
10 | provide this.

11 | THE CHAIRMAN: I understand you are confirming that, so --

12 | MS DEMETRIOU: So I think we are then --

13 | THE CHAIRMAN: 1(e) is agreed.

14 | MS DEMETRIOU: And similarly, 1(f). I think we are next on to geographic markets.

15 | THE CHAIRMAN: We are.

16 | Submissions by MR HOLMES

17 | MR HOLMES: This is Issue 2. And the three disputed categories here are on
18 | page 763. Here too I'm pleased to say that there has been movement. So the issues
19 | at (iv) and (v) have both gone. In relation to (v) --

20 | THE CHAIRMAN: When you say gone, you mean they've been agreed or?

21 | MR HOLMES: The parties have reached agreement.

22 | THE CHAIRMAN: To have that or not have it?

23 | MR HOLMES: In the case of (v), Shein has proposed some compromise text. The
24 | disclosure will cover the disclosing party's product offerings in other regions where
25 | those memoranda, reports, presentations, analyses, datasets are prepared in the
26 | context of or for the purposes of the UK market.

1 THE CHAIRMAN: So similar to what was put out in the skeletons?

2 MR HOLMES: Yes.

3 THE CHAIRMAN: In exactly the same wording that --

4 MR HOLMES: Exactly, sir. And then issue (iv), we saw what Shein had to say about

5 this and we are content to leave that to be dealt with based on publicly available

6 sources rather than disclosure of internal --

7 THE CHAIRMAN: That sounds sensible to me.

8 MR HOLMES: Yes, I am grateful. So that leaves only (iii), the geographic location of

9 suppliers by country and region and the proportion by number and revenues for each

10 country and region. As to this request --

11 THE CHAIRMAN: Could that not be done by a statement? Does it require all these

12 documents?

13 MR HOLMES: Sir, that seems sensible to me but let me just -- if I may take

14 instructions.

15 THE CHAIRMAN: Obviously subject to what Ms Demetriou says but at the moment,

16 when I read that, I don't know why that would require all these memoranda,

17 documents, et cetera, et cetera.

18 MR HOLMES: We are content with that, sir. With respect, that sounds like a sensible

19 solution.

20 MS DEMETRIOU: May I just take instructions?

21 THE CHAIRMAN: Of course, of course. (Pause).

22 MS DEMETRIOU: Just looking at the request, going back to the request. So the

23 geographic location of suppliers by country and region and the proportion by number

24 and revenue. I think what we could do is a statement with the geographic location of

25 suppliers by country and region and the number of suppliers in each country or region

26 but we don't understand what they mean by revenues, proportion by revenues.

1 THE CHAIRMAN: Maybe you could help.

2 MR HOLMES: Yes, of course. Sir, it's simply indication of what proportion of
3 the revenues generated by Shein is attributable to suppliers from each of the relevant
4 countries and regions. So it's a weighting, if you like, it shows how much money they
5 make. The sheer number of suppliers may not be informative of where the bulk of the
6 commerce is done.

7 THE CHAIRMAN: Right. So you say they could have 80 suppliers in one country and
8 one in the other but the one in the other dwarfs the 80?

9 MR HOLMES: Exactly so, sir.

10 MS DEMETRIOU: So that is just simply not tracked, so that would be extremely
11 difficult to do.

12 THE CHAIRMAN: Right.

13 MS DEMETRIOU: And just sort of going back to basics and rewinding as to why this
14 is said to be necessary, it's said to be necessary to the issue of the geographic market.
15 Can we just look at the pleading. So we are in the same bundle at tab 5. It's the first
16 bundle, page 57. So you can see the heading, "The relevant market." Do you have
17 that?

18 THE CHAIRMAN: Yes.

19 MS DEMETRIOU: Then if you look at 38.1, you see that this is -- so this is Temu's
20 pleading:

21 "The relevant product market is the ultrafast fashion market which has the following
22 properties."

23 Then if you go to 38.2:

24 "The relevant geographic market is at least as wide as the UK, given that typically ..."

25 Then you see the factors, the pleaded factors on which they rely:

26 "Purchases can be delivered only to addresses in the region where the customer's

1 account is registered. The design of UFF retailers' online storefront is region-specific.
2 Customer preferences differ by region. And products and promotions differ by region."
3 So just pausing here, what you see is that these factors are all about the
4 consumer-facing side of the market. So it's how is the website designed? Is it specific
5 as regards consumers? What are consumer preferences by region? And that's what
6 you would expect, given that the market definition is the ultrafast fashion market. You
7 would expect there to be and that is what is pleaded, you would expect there to be
8 factors relating to the consumer-facing side of the market. And the question that
9 the Tribunal will have to decide is whether non-UK retailers imposed a competitive
10 constraint, ie because a consumer in the UK, instead of buying off a UK website, goes
11 to buy off a website in another country.

12 THE CHAIRMAN: Yes.

13 MS DEMETRIOU: Now there is no pleaded case here that the supply side of the
14 market affects geographic scope of the market. There is simply not a pleaded case
15 on that point. And so there is no justification on the pleading for Temu seeking
16 disclosure on any of these points at all on the geographic location of suppliers by
17 country, and region, and the proportion by number and revenues for each country and
18 region. That has nothing to do with their pleaded case on the geographic state of the
19 market. Their pleaded case is all about where consumers prefer to buy. Nothing to
20 do at all with where the suppliers are located, so there is no pleaded relevance of that
21 point to market definition.

22 And Mr Parker offers no explanation at all in his report for why this disclosure is
23 relevant, why it's necessary to determine where the suppliers are located. So they are
24 wrong to say that this disclosure is therefore necessary.

25 THE CHAIRMAN: Can you just show me that in Mr Parker.

26 MS DEMETRIOU: Yes. If you go to the second bundle, tab 37, and if we go to

1 | page 708. Start on page 707, so you see there he says that:

2 | "Each of these requests is likely to produce material relevant to inform the experts'
3 | assessment and the Tribunal's assessment."

4 | And then over the page, request 2(a)(iii):

5 | "Includes documents that identify the location of the party's suppliers by region and
6 | country."

7 | And he says that:

8 | "This is essential for the definition of geographic scope of the relevant market because
9 | the suppliers used are likely to affect the products that the parties are able to offer to
10 | consumers."

11 | But it's not at all clear why that's so and indeed, it's just not there on the pleading. So
12 | there is no proper pleaded basis -- there is no pleaded reference for these points at
13 | all, it's simply something that Mr Parker's saying in his report at this stage. And in
14 | circumstances where the pleading sets out the factors that are relevant to geographic
15 | definition of the market and they are all consumer-facing factors, we say that if indeed
16 | the case is -- if Whaleco's case is indeed, as Mr Parker seems to say, well it's essential
17 | now to look at suppliers, it really was incumbent on them to amend the pleading of
18 | their case, so that we could debate whether or not that was indeed a relevant point.
19 | They haven't done that.

20 | So going back to the request. We are content, in order to try and compromise and not
21 | be too difficult, to provide a statement that identifies where suppliers are located and
22 | the number per region, but what we cannot do because the information is not tracked,
23 | is any revenue-based assessment and we shouldn't have to do that in circumstances
24 | where there just is no pleaded case about the supplier side of the market.

25 | MR HOLMES: Sir, I can be very brief on this because I think I have a way of cutting
26 | through. You will have noted, sir, that market definition is, as is usually the case,

1 subject to factual and expert evidence. That's an express reservation on the pleading,
2 it's the way that competition claims are generally pleaded on market definition. They
3 are at a high level, pending disclosure and factual and expert evidence. And
4 Mr Parker does, we say, explain why the location of the party's suppliers is relevant to
5 the retail -- competition on the retail facing side of the market. If one reads on in the
6 paragraph that Ms Demetriou showed you. But we are content as a first stage to have
7 the offer that Ms Demetriou has suggested. That's to say just the number of suppliers
8 in different regions. And if it looks as though that is uninformative or there is some -- it's
9 finely weighed between different locations such that it's relevant to consider in more
10 detail, we can come back at that point to ask for further information about the particular
11 weighting of suppliers' supplies. But for now, I think we are content to take what
12 Ms Demetriou has offered by way of witness evidence.

13 THE CHAIRMAN: Okay, well that's very helpful.

14
15 RULING (3)
16

17 THE CHAIRMAN: The next dispute concerns Requests 2(iii), (iv) and (v). In the event,
18 Whaleco withdrew its request (iv). As regards (v), I was told that the parties have
19 agreed wording and I will not interfere with that agreement.

20 That leaves Request (iii). Here, Whaleco ask for documents going to the geographic
21 location of suppliers by country and region and proportion by number of revenues for
22 each country and region.

23 I suggested a compromise whereby Shein will give a statement signed by a relevant
24 person as to the geographic location of their suppliers by country and region and the
25 proportion by number for each country and region. This was acceptable to both
26 parties.

1 Originally, Mr Holmes' clients had also sought information on revenues.
2 Ms Demetriou's position was that it is not possible, at least not easily possible, to give
3 revenues and she points out that on the present pleading at paragraph 38.2 of the
4 Re-Re Re-Amended Defence and Counterclaim, the particulars given are
5 consumer-facing, not relating to suppliers. For today, Mr Holmes does not push the
6 request for revenue information but reserves the position to come back and request
7 more information, particularly about revenues, at a later date. At present, in my view,
8 Ms Demetriou's complaint had force but since that has now been compromised, I need
9 to say no more about that.

10 Accordingly, I direct that Shein provides a statement signed by a relevant person as
11 to the geographic location of their suppliers by country and region and the proportion
12 by number for each country and region. This should be provided at the same time as
13 the rest of disclosure.

14
15
16 MR HOLMES: That brings us, I think, to the third bucket of requests on our side.

17 THE CHAIRMAN: Before we go for the third bucket, it may be before we enter any
18 new buckets, we should break and have a slight five minute rest.

19 (11.50 am)

20 (A short break)

21 (11.55 am)

22 THE CHAIRMAN: Mr Holmes.

23 Submissions by MR HOLMES

24 MR HOLMES: We come now to Issue 36 which begins on page 778 and this issue
25 concerns the effect of the allegedly infringing conduct on the ability of actual or
26 potential competitors, including Temu, to compete with Shein on the merits.

1 The Tribunal will have in mind that capability to affect competition is one of the criteria
2 which must be met to find a competition law infringement under Chapter II.

3 The relevant issue -- you see that the documents contain -- various types of business
4 metric are then identified under this head, so at (i), the number of users and the level
5 of sales and revenue over time, (iii), the number of sellers or suppliers over time, and
6 at (iv), the volume of sales by year, aggregated as total sales value, average sales
7 value, per supplier, in total and for each quartile.

8 So these draw on standard business reporting data and it's agreed that Whaleco
9 should give disclosure of them in relation to the Temu UK platform and the question is
10 whether Shein should also give such disclosure and we say that it should. You've
11 seen that the case against Shein alleges foreclosure of competitors and in particular,
12 Temu, by depriving them of an essential input, namely access to the suppliers of
13 ultrafast fashion items.

14 In order to assess the effects of such conduct, we say it is relevant to consider how
15 the putatively dominant firm has fared by comparison with its competitors. If the
16 dominant firm has grown more strongly than competitors such as Temu in terms of
17 number of suppliers and volumes of sales, that may be powerful evidence that
18 competition has been adversely affected and it also provides relevant data when
19 assessing how other firms might have fared, absent the infringing conduct by which
20 the dominant firm itself was unaffected.

21 And that is the view of Whaleco's economist, Mr Parker. He deals with the point in his
22 report at tab 37, at page 709, by reference specifically to request 36(a)(iv). If I could
23 ask you to refresh your memories of paragraphs 21 to 23, please.

24 THE CHAIRMAN: Yes. I've read them. These, it seems to me, one might say to be
25 going more to quantum. Which, obviously, we have to come on to discuss but
26 obviously your clients would like a split trial, a measure of total level of sales and the

1 | like, that sounds to me more like quantum rather than --

2 | MR HOLMES: Indeed, sir, I see your point. In this case, of course, the allegation is
3 | of targeted conduct against Temu. And in consequence, the distinction between the
4 | effect on competition and the effect that is specific to Temu/Whaleco, is therefore more
5 | attenuated than it might be in some cases. But in any event, the Tribunal will need to
6 | address matters in a quantified way as to the effects on Whaleco and Temu, in
7 | determining whether loss has been suffered at all and eventually, as you say, for the
8 | purposes of quantifying loss.

9 | THE CHAIRMAN: But in terms of whether there has been an effect, and whether there
10 | has been foreclosure, does it really help to see what has happened on the claimants' --

11 | MR HOLMES: The predominant firm -- we say it is relevant because it sheds light
12 | on -- if the dominant firm grows much faster or grows while others shrink, that may
13 | indicate a successful foreclosure strategy.

14 | THE CHAIRMAN: Right. It may but it may also open up an entire can of worms as to
15 | reasons for that and whether that has anything to do with your client's --

16 | MR HOLMES: Indeed, one does need to consider other confounding variables but
17 | that's a regular feature of competition law enquiry, certainly at the damages stage.

18 | THE CHAIRMAN: Yes, I see the damages stage. I understand that, that is why I saw
19 | it as a -- my understanding is your clients are pushing for a split trial --

20 | MR HOLMES: We ask --

21 | THE CHAIRMAN: -- and therefore, I haven't made a decision on that yet, I'm going to
22 | come to it. I'm not, at the moment, going to order disclosure which might go to
23 | quantum, we can revert to that once we know what we are going to do about a split
24 | trial because it makes no sense to order disclosure that might go to quantum and then
25 | later on -- I mean that would -- doesn't make any sense in my mind.

26 | MR HOLMES: Yes.

1 THE CHAIRMAN: At the moment I'm struggling to see how this is going to be a useful
2 exercise. It seems to me to be quite a significant exercise in terms of the liability side.

3 MR HOLMES: Well, sir, we --

4 THE CHAIRMAN: Your evidence doesn't help me. Your evidence, as I say, it seems
5 to me to be more focused on quantum than on liability.

6 MR HOLMES: I agree, sir, that there is undoubtedly a consideration of the
7 counterfactual sales that Whaleco would have generated and that is a factor that
8 would be relevant to quantum. But Mr Parker does observe in paragraph 21 that the
9 relevant data will be relevant for assessing the effect of Shein's alleged infringing
10 conduct more generally, the effect we say on competition, as measured by its impact
11 on Whaleco as a specific competitor. So in other words, the disclosure, while it may
12 be relevant to quantum, is also, we say, illuminating as to the effect on competitors in
13 the market by seeing how Shein's performance compares with others in the market.
14 We say that type of data is material which is taken into account when assessing
15 harmful effects.

16 We put some materials in the supplemental bundle to address the suggestion in my
17 learned friend's skeleton argument that this is an unorthodox exercise and it might
18 perhaps assist to just look briefly at some of those. Just to show you briefly a couple
19 of examples, if I may. The first is a judgment in the Microsoft case of the General Court
20 of the European Union which shows information about the metrics in the market,
21 business metrics in the market.

22 THE CHAIRMAN: Could you tell me where I'm going.

23 MR HOLMES: Of course, sorry. It's in supplemental volume 2 at tab 17.

24 THE CHAIRMAN: Ah, this is -- actually, when I said to you this morning I had the
25 supplemental bundle, I didn't actually know there were two volumes to it. And that's
26 what you were asking this morning. I thought I had the supplemental bundle. I don't

1 have a second volume of it.

2 MR HOLMES: It's described as a further supplemental bundle volume 1.

3 THE CHAIRMAN: That's the misunderstanding this morning.

4 MR HOLMES: Yes. These are only intended as examples, to show that it isn't
5 unorthodox to consider the trends in the market when assessing whether there has
6 been foreclosure. This is the Microsoft case.

7 THE CHAIRMAN: Right. Which tab are you in?

8 MR HOLMES: So it's tab 17.

9 THE CHAIRMAN: 17, right.

10 MR HOLMES: You see it's a 2007 judgment of the General Court of the European
11 Union.

12 THE CHAIRMAN: Okay.

13 MR HOLMES: And the abuse included a finding of foreclosure in the market for Media
14 Player software on the Windows platform. If we could just look at the extract briefly at
15 page 142, just to show you how the Commission relied on data on market
16 performance. If you look at 1078, it's recorded there that:

17 "In the third stage of its reasoning the Commission examines the evolution of
18 the market in the light of market surveys carried out by Media Metrics, Synovate and
19 Nielsen/NetRatings and concludes that the data in these surveys consistently point to
20 a trend in favour of usage of Windows Media Player and Windows Media formats, to
21 the detriment of the main competing media players and media player technologies."

22 And the court then finds that conclusion to be correct, considering the evidence.

23 And at 1080 it notes that:

24 "Windows Media Player began well behind the market leader but its usage increased
25 dramatically and at a faster rate than the competition."

26 So the short point here is that the court considered whether there was an adverse

1 effect on competitors by reference to the performance of the dominant firm,
2 benchmarked again the performance of its competitors. And this, of course, was in
3 relation to liability rather than quantum which wouldn't arise in an appeal against the
4 Commission decision.

5 Just one other very brief example if I may. At tab 19, you see a much more recent
6 Commission decision in the Google Android case from 2018. If you look for a moment
7 at the -- this found exclusionary abuse, amongst other things, in relation to mobile web
8 browsers and the relevant -- if you look for a moment at the contents table at page 168,
9 you see that section 11.4 addresses the tying of Google Chrome, that is Google's web
10 browser, with two other apps. And looking over the page, you see that 11.4.4
11 addresses the resulting restriction of competition as found by the Commission, and if
12 we then see how that's developed. If you turn on, please, to page 173, to the extract
13 that we've included, you see towards the foot of the page:

14 "The European Commission relies, as part of its analysis, on the market performance
15 of Google by comparison with its competitors."

16 THE CHAIRMAN: I think I'm lost at the moment. 173. Which of the paragraphs?

17 MR HOLMES: So if you look towards the foot of the page there's a heading, (iv):

18 "Google's competitive advantage resulting from the tying and the inability of competing
19 non-OS specific mobile web browsers to off-set that advantage is consistent with the
20 evolution of market shares."

21 And at recital 947, the Commission records that:

22 "Google's competitive advantage resulting from the tying and the inability of
23 developers of non-OS specific mobile web browsers to off-set that advantage, are
24 consistent with the evolution of Google's general share queries."

25 And at recital 948, Google's usage share on mobile web browsers is considered, and
26 on page 174, it's increased both in Europe and worldwide between August 2012 and

1 March 2017 and figure 21 records that visually and similarly, you see figure 22 on
2 page 175.

3 So an analysis of data regarding the dominant firm's performance to show an adverse
4 effect on competition, again at the liability stage. We say data of this kind relating to
5 the dominant firm's performance in a foreclosure case is a relevant matter to have
6 regard to when assessing whether there is a capability to affect competition. Has there
7 been an actual adverse effect indicated potentially in the data.

8 Now, we understand the point that is made against us, that the data will need to be
9 considered alongside other factors which might affect performance. That's true in
10 relation both to liability and in so far as it's relied upon there, and quantum. But we
11 say that that is a matter that the experts can deal with.

12 And as regards proportionality, there's no suggestion that the data would be difficult to
13 provide, Mr Democratis' evidence for Shein addresses data disclosure relating to
14 issue 1(b) but is notably silent on the requests in relation to Issue 36 and Whaleco, for
15 its part, hasn't objected to the disclosure on proportionality grounds. So in the
16 circumstances we do say that this material is likely relevant to assessing effects on
17 competition, and that data should be given by Shein, as well as by Temu, for that
18 purpose.

19 Subject to any questions, those are our submissions on these mutuality requests.

20 Submissions by MS DEMETRIOU

21 MS DEMETRIOU: Sir, what you have before you -- there's a general point of principle
22 that arises here in relation to issue 36 but also some of the other requests on effects
23 and the point of principle is should Shein have to give disclosure in relation to those
24 points, when what we are looking at is effects on Temu. Can I take you back to the
25 pleading so we can situate this debate, how it arises.

26 If we go to the first bundle, tab 5, and turn to page 65, please. I want to show you how

1 Temu's effects case is pleaded. You have earlier in the -- it's useful to see this, sir, as
2 well because we are going to come on to this this afternoon but in terms of the trial
3 structure point and whether or not there's overlap between effects and quantum, on
4 that point I agree with the submission Mr Holmes just made which is that issue 36
5 which is relevant to effects, is also relevant to quantum and that is because of the
6 overlap. But looking at the pleading, the infringing conduct starts from page 59.
7 Perhaps we go back to that, just to see how this fits together. This is, of course,
8 Temu's pleading. And the infringing conduct, you see from paragraph 42, it's said that:
9 "Shein's forced suppliers to enter into adhesion agreements with suppliers that
10 effectively create exclusive relationships."
11 Then you see at 43 on page 60, Shein has sent tens of thousands of baseless notices
12 of copyright infringement to Temu and so that's another aspect, it's alleged, of the
13 infringing conduct.
14 Then over the page you see 45, some or all exclusive dealing agreements between
15 Shein and its suppliers and enforcement of those agreements are targeted specifically
16 at Temu.
17 Then 46, Shein has required at least some suppliers to sign confidential loyalty oaths,
18 saying they won't do business with Temu. 47, it's alleged that Shein has placed further
19 or other pressure on suppliers not to deal with Temu. And then you see some
20 particulars of that. And then if you go over the page to page 64, 47C, it's alleged that
21 Shein issued Penalty Notices on certain suppliers who deal with Temu. Then you see
22 at 47D on page 65, at least some of the suppliers who received Penalty Notices
23 subsequently delisted products from the Temu platform and at 48, it's said that the
24 cumulative effect of all of these allegations operates by way of disincentive and
25 restriction and prohibition of suppliers from doing business with Temu.
26 That's the way that the case is put.

1 And then we see the heading, "Objects and effects of the infringing conduct." This is
2 where Temu explains why this alleged conduct, if made out, is anti-competitive, has
3 the effect of restricting competition. And we see that at paragraph 50. Can I just ask
4 you just to read paragraph 50 to yourself. Including the subparagraphs (Pause).

5 THE CHAIRMAN: Yes.

6 MS DEMETRIOU: Then you see at 52:

7 "Further or alternatively, the copyright notices have forced the removal of thousands
8 of lawful product listings."

9 That is said to interfere with Temu's ability to sell the relevant products.

10 Now Shein's responsive pleading you can see behind the next tab and if we go to
11 page -- so paragraph 44(a). Let me just find the page number. Page 111. You can
12 see there that Shein denies that the notices served on -- sorry, that's as regards
13 paragraph 52:

14 "... denied that the notices served on the defendant were unwarranted or that the
15 product listings were lawful."

16 And:

17 "...denied that compliance with the notices required the defendant to remove product
18 listings from the defendant's website."

19 And generally, you see that there's a denial of paragraphs 49 to 51. You see that in
20 paragraph 43.

21 So just taking stock and pausing here, the issues that the Tribunal will have to decide
22 on effects, they are essentially whether this infringing conduct -- first of all, was the
23 infringing conduct made out? That is on liability. But secondly, if it was, did that have
24 the effect of foreclosing competition, of restricting Temu's business? And just standing
25 back, in terms of the overall lack of plausibility of the case, and I don't make this as
26 a sort of forensic point but the position is that Temu has some 15 million suppliers,

1 that is a matter of public record, and Shein's suppliers are around 7,000 in number,
2 and so what Temu is going to have to show at trial is despite the fact, as a matter of
3 public record it has 15 million sellers on its platform and its business is increasing
4 exponentially year-on-year, this conduct which relates to a very small number of
5 suppliers, so the particularised conduct is a fraction of the 32 suppliers that have been
6 identified so far, that has had the effect of foreclosing the market.

7 On that issue, so on the question of market foreclosure, the Tribunal is going to have
8 to look at a number of questions. So was Temu required to take down the product
9 listings or was it only required to take down the photos? That's one question. Because
10 if it was only required to take down the photos that were said to be infringing, then it
11 won't succeed on its effects case because it wasn't actually required to take down the
12 products. The products still could have been sold with different photos. But assuming
13 that Temu was required to take down the actual product listings, then Temu's going to
14 have to show that it's going to have to prove that these suppliers stopped doing
15 business with it. So are there suppliers that stopped doing business with it as a result
16 of the allegedly infringing conduct? But even if that's right, so even if it can identify,
17 say, 20 suppliers that didn't do business with it any more, it's going to need to show
18 that it was unable to sell substitutable products, either from the same suppliers, for
19 non-infringing products, or from different suppliers, one of the other 15 million suppliers
20 that it has on its platforms. Sellers that is has on its platform. We have given the
21 example in our skeleton argument we call the white T-shirt example. So say one of
22 these photos or product listings was a white T-shirt and they had to take that down.
23 Well it's going to have lots of other white T-shirts on its platform, so it's going to need
24 to show that -- it lost consumers as a result of that white T-shirt being removed in
25 circumstances (a) where there were other sellers on its platforms selling white T-shirts
26 that could have provided the relevant sale, and (b) there are other suppliers out there

1 that could provide white T-shirts. So that's the sort of thing that is going to need to be
2 investigated.

3 And the thing about that -- so the Tribunal's going to need to look at whether or not
4 Temu in fact sold substitutable products. So it's going to need to look at what the
5 effect was on Temu's business of this alleged infringement. So it's all about Temu's
6 business.

7 So that's really to locate these requests. That's why we say it raises the question
8 whether Shein should be giving disclosure on the effects and market foreclosure issue
9 at all and we say plainly not.

10 Now Mr Holmes has pointed to a couple of Commission decisions saying: oh well,
11 look, here, in these abuse cases -- which by the way were very different to the present
12 case, they concerned bundling and tying - the investigatory authorities, the
13 Commission, did look at generic market data, including in relation to the dominant
14 undertaking. Well two points on that. First of all, of course, what the Commission
15 looks at and has access to in the context of a Commission investigation, does not at
16 all mirror to what it's appropriate for the courts or the Tribunal to require by way of
17 disclosure in a claim like this. And it is illuminating, we say, that Mr Holmes has not
18 been able to point to a single case in this jurisdiction in which the Tribunal has ordered
19 the defendant to a competition claim to provide disclosure in relation to its own
20 business, in order to enable the claimant to prove that its business has been affected.
21 And we say that is highly, highly unorthodox.

22 Now, turning to the request itself, starting with Issue 36. That's in the second bundle
23 behind tab 40. You looked at that a moment ago with Mr Holmes. Starting at the
24 bottom of page 778 ...

25 THE CHAIRMAN: One moment. (Pause). Where am I?

26 MS DEMETRIOU: We're at tab 40 of the second volume, sir.

1 THE CHAIRMAN: Are you second (inaudible) or are you second --

2 MS DEMETRIOU: No, this is the core, yes.

3 THE CHAIRMAN: Which document are you going to?

4 MS DEMETRIOU: This is the DRD that we've been --

5 THE CHAIRMAN: Right, sorry. The reason is I have it out, so I forget that it was in
6 tab 40 originally. It's now just the DRD for me, so -- okay.

7 MS DEMETRIOU: It's page 778. At the very bottom you have issue 36.

8 THE CHAIRMAN: Yes.

9 MS DEMETRIOU: The issue is what's the effect of the infringing conduct on the ability
10 of Temu to compete? That's the issue. And then what you have, and Temu has
11 agreed to provide, are appropriate disclosure requests, in order to elucidate whether
12 there was any effect on Temu's business. And what Temu are saying is that Shein
13 should provide equivalent disclosure in relation to its own business.

14 Mr Holmes said: oh well, we haven't made any proportionality objection in
15 Mr Democratis' evidence but of course, we say that it's self-evident that requiring
16 Shein to search for all of these documents, in circumstances where they are simply
17 not relevant to the effects on Temu's business, would be disproportionate. We didn't
18 include that in Mr Democratis' statement. We say there is a point of principle that
19 arises here in relation to whether Shein should be giving disclosure at all on those
20 points because we say it self-evidently shouldn't be doing that.

21 THE CHAIRMAN: Although normally with proportionality, one doesn't rely on self
22 evidence, does one, one normally has evidence.

23 MS DEMETRIOU: Yes, and there is an increasing tendency, I accept, to start
24 adducing expert reports and solicitor witness statement in the Tribunal but good old
25 submissions about proportionality are not excluded and we do say when one looks at
26 the nature of these, so memoranda, reports, presentations, analysis, one doesn't need

1 Mr Democratis to tell you that this is going to be a lot of work. Now, true Temu is doing
2 the work but that's because it's advancing a case that its ability to compete has been
3 affected and, of course, on the infringement side, on the whether or not the infringing
4 conduct's taken place side, the burden is on Shein, not on Temu to provide the
5 disclosure in relation to that and we had a big debate about that the last CMC.

6 THE CHAIRMAN: Presumably you would say -- I mean -- I've had the Commission
7 approach in the Google Android case and the Microsoft case --

8 MS DEMETRIOU: Yes.

9 THE CHAIRMAN: -- and I've seen only snippets, really, of those. But it did strike me
10 that what -- you can see it in the Google case -- what they are looking at there is if you
11 like -- I put it this way, macro (inaudible) data, and we are looking at usage shares,
12 shares in the market which seems to me to be rather different to what is being
13 requested that you do which is, I would say, more micro.

14 MS DEMETRIOU: Absolutely.

15 THE CHAIRMAN: And so you are being asked to go through really quite a lot of
16 reviews of quite -- to my mind, quite detailed which -- obviously, I'll hear again what
17 Mr Holmes says but it doesn't seem to me to be of the same nature as to what was
18 considered in the Google and Microsoft cases.

19 MS DEMETRIOU: Sir, I completely agree with that and would add two points. The
20 first is that in those cases, of course the Commission was scrutinising the behaviour
21 of Microsoft and Google and so there the question was, had they unlawfully bundled
22 their own product? So here, of course, the allegation of anticompetitive effect is
23 this -- this part of the allegation is that Temu's ability to compete has been impeded so
24 focus is very much on Temu in the way that the case is put.

25 Now the other point --

26 THE CHAIRMAN: He says well yes, but if you are going like a storm and you have

1 increased enormously, they may be able to say: well we can at least know that and
2 particularly if it's in areas which correspond to the allegations. So if you have
3 say -- I can't remember what it was but 37 or whatever it was suppliers and if they
4 supply you with white T-shirts and then -- sorry, them with white T-shirts and then your
5 sales go through the roof on white T-shirts, that might give them some information.
6 I think that's the point as I understand it.

7 MS DEMETRIOU: Yes. Let me take you to what Mr Parker says. Because Mr Holmes
8 relies on Mr Parker for this. So that's at tab 37 of the core volume.

9 THE CHAIRMAN: I'm there.

10 MS DEMETRIOU: Mr Holmes took you to paragraphs 21 to 23.

11 THE CHAIRMAN: Yes.

12 MS DEMETRIOU: This is, with respect, really the thinnest of gruel really, it's extremely
13 high-level stuff. There's no explanation here from Mr Parker as to the analysis that
14 he's proposing to take, to carry out. He talks vaguely about the counterfactual
15 analysis. He's not explaining how he is going to go about doing that and why the
16 information from Shein is essential to that. On the contrary, he doesn't say it is
17 essential. If you look at paragraph 22, he says it's useful.

18 That is really is damning with faint praise because we all know that lots and lots of
19 data are useful to economists. They would like to get as much data as they possibly
20 can but the question is whether or not it is proportionate to order it.

21 So how essential is it? And as we say in our skeleton argument, there are two obvious
22 problems with using information about Shein sales to conduct a counterfactual
23 analysis. And the problem is that Mr Parker doesn't even alert the Tribunal to these
24 problems, let alone explain how he would address them. The first is that Shein's
25 success on the market and its profits will be driven through all sorts of factors, including
26 its own marketing, advertising and business strategies and its supplier base will be

1 different to that of Temu, it's operating a different business model. So one simply can't
2 look across at Shein and say: oh well, its business has been expanding rapidly, and
3 say: we can draw from that, that it must have inflicted this anticompetitive damage on
4 Temu. As Mr Holmes accepted, there are all sort of confounding factors, as he put it.
5 Really the concerning point here is that Mr Parker doesn't even alert the Tribunal to
6 those, let alone say how he would deal with them and whether he could address them.
7 The second point is that Shein's data can shed no light whatsoever on the steps that
8 Temu took or could have taken in response to the alleged conduct. So to take the
9 white T-shirt example we've referred to and I've again explained, suppose for
10 argument's sake that Shein did compel a supplier to stop selling a Shein branded white
11 T-shirt on the Temu platform. The question for effects is not whether the product was
12 taken down or whether Temu lost that sale, it's whether customers were able to
13 purchase a substitutable product on the Temu platform or whether it globally lost sales.
14 That is really the question and no information from Shein will enable that point to be
15 elucidated. And again, this is a point that Mr Parker does not even refer to, and that's
16 why I say this is the thinnest of gruels. Certainly no basis on which to order disclosure
17 of this wide-ranging information from Shein.

18 Sir, there's a final point that I would wish to make, and the final point is this, that this
19 is essentially an attempt by Temu to undercut a ruling that has already been made by
20 Mrs Justice Bacon at the last CMC. And let me explain why I say that. At the last
21 CMC we had an argument about what was then issue 49 and Temu lost that argument.

22 And what issue 49 said was this, it said:

23 "What effect has the infringing conduct had on Shein's sale volumes, operations and
24 revenue?"

25 You can see that is essentially the same information as is being sought now under this
26 issue 36. And if you could go back, please, to the first volume of the core bundle,

1 behind tab 31 we have the transcript of that CMC.

2 THE CHAIRMAN: Behind which tab?

3 MS DEMETRIOU: Behind tab 31 and if you turn, please, to page 619, you can see -- if
4 you start on the top right, so page 181. So page 619 of the bundle behind tab 31.
5 Then the top right-hand rectangle, you can see -- this is -- here we are talking about
6 Issue 49, you can see that. The next one, you see the bottom of that, Mr Holmes is
7 saying the next one concerns issue 49. And then what Whaleco proposes is an issue
8 concerning the effect of the alleged conduct on Shein's performance in the market.
9 Now Shein's objection is this is not a pleaded issue.

10 What we say is that in the context of a foreclosure case, when considering actual or
11 potential effects on competition, it's relevant to consider not only how rivals have fared
12 but also the market position of the dominant undertaking. That hopefully resonates
13 with Mr Holmes' submissions today in relation to issue 36. It is exactly what he is
14 saying now and he says:

15 "This is all the more so when the counterfactual would need to model how Temu would
16 have fared, unencumbered by an impugned conduct."

17 Again, that is Mr Parker's point.

18 And then we see what the judge made of that, and if we go over the page to internal
19 page 185, so top right:

20 "I'm not going to order this issue, it's not a pleaded point. The pleaded point relates to
21 Temu's performance and not that of Shein."

22 And so we say that this is a question that was traversed at the last CMC, we had
23 debate about it, Temu lost it and it's now seeking through the back door to try and get
24 this very granular disclosure, when it's simply not relevant in principle.

25 So sir, those are our submissions on that.

26 We make similar submissions, it has to be said, in relation to the other issues on which

1 Temu seeks disclosure from Shein. I can make them very shortly or we can hear what
2 Mr Holmes says about them but they're in the same vein, it won't take me long.

3 THE CHAIRMAN: Alright (inaudible).

4 MR HOLMES: Only, sir, that there are specific points in relation to those from our
5 perspective.

6 THE CHAIRMAN: Okay, well let's take them.

7 MR HOLMES: If you want to hear me after Ms Demetriou --

8 THE CHAIRMAN: No, no.

9 MR HOLMES: That's fine.

10 Submissions by MR HOLMES

11 MR HOLMES: So these relate specifically to the impact of the takedown notice and
12 they are the issues --

13 THE CHAIRMAN: Why don't we deal now with the point just -- if you reply on the point
14 just done and then move on to the takedown notice point.

15 MR HOLMES: This is the suggestion that this has been determined already --

16 THE CHAIRMAN: Oh, okay.

17 MR HOLMES: Sorry, is that the point you were asking me to address?

18 THE CHAIRMAN: I don't know, I'm lost -- you have jumped up and I --

19 MR HOLMES: I'm so sorry, I had understood that Ms Demetriou was about to turn to
20 address the remaining outstanding requests --

21 THE CHAIRMAN: And you wish to reply on Mrs Justice Bacon's judgment and the
22 transcript.

23 MR HOLMES: I simply want to be most useful to you. The question is whether you --

24 THE CHAIRMAN: You're on your feet, do it.

25 MR HOLMES: -- hear us both now on these additional requests or not.

26 On what Ms Demetriou says, she made some general points of disparagement about

1 Temu's case which obviously aren't accepted. She referred to the 15 million suppliers
2 of Temu's. You will be conscious, sir, that Temu is active in many different markets.
3 Those 15 million suppliers aren't all ultrafast fashion suppliers. It's not comparing
4 apples with pears. She made the point that Mr Parker only said that these data would
5 be useful. We say, sir, that is sufficient, particularly in circumstances where there's no
6 specific evidence on proportionality. Ms Demetriou says it's fine to proceed by way of
7 submission but this is in the context of a situation in which Shein has itself provided
8 evidence from an in-house lawyer, actually on the question of proportionality relating
9 to other requests. But he has been silent on the categories which are sought under
10 issue 36. And where evidence is brought forward it should address the proportionality
11 of those requests in relation to which proportionality objections are raised.

12 And on the question of whether this question was addressed by the ruling in relation
13 to issue 49, we say that it was not. It was specifically reserved for this hearing, what
14 disclosure was to be given under the effects heads, including who was to give
15 disclosure. So it's a matter on which I think it's legitimate for me to address you today.
16 And you have my submissions on why we say this is relevant. We say that it is relied
17 on in other proceedings and you put it well, sir, if I may say so, when you said that if
18 the evidence showed that Shein was going great guns, while Temu's performance was
19 significantly impaired, that would be a relevant consideration. To say that there is no
20 scope to adjust for other factors at the outset is, we say, a counsel of despair and it
21 shouldn't be a basis for pre-empting disclosure now, at this stage, of relevant material
22 in relation to not the substantial number of business reporting points for Shein as for
23 Temu.

24 Those are my submissions on what you have heard so far.

25 THE CHAIRMAN: May I just ask you about the last hearing before Mrs Justice Bacon.

26 MR HOLMES: Of course.

1 THE CHAIRMAN: Again, one has to be careful just taking bits from transcripts, sort
2 of island hopping around but it does appear that a similar issue was being put forward
3 by your clients for disclosure and the issue concerning the effect of the conduct and
4 then looking at how Shein -- how it would affect Shein's performance on the market.
5 And it does appear that the judge was not convinced and said that was not relevant
6 because the focus of the pleading was on Temu and not on Shein. It does, just reading
7 it, appear to be pertinent to what we are talking about today, is it not? It seems to me
8 the same thing.

9 MR HOLMES: Well, sir, I have to admit that I haven't -- I think you said you were going
10 to reserve judgment anyway on the points that you thought might go to quantum --

11 THE CHAIRMAN: I wasn't going to order anything now that might go to quantum, I will
12 revert to that. So on quantum, if I think things were going to quantum I'm not going to
13 make either party give disclosure on quantum before we've decided whether or not
14 the Tribunal is split or not, that would make no sense and would mean unpicking orders
15 as we went along. So I'm not going to do that until we've decided what to do on that,
16 or I've decided.

17 This a bit of a different point. This a question on liability. And the issue arose before,
18 as I see it, Mrs Justice Bacon as to whether disclosure should be given on how the
19 conduct may have affected Shein. And she said that is not a relevant issue. And my
20 question to you is that although a party is never foreclosed from coming back and
21 asking for more disclosure, and disclosure as we all know moves on through
22 proceedings, where there's -- you haven't pointed to anything changed, or any
23 difference, that must be something that's relevant for me to take into account given
24 that Mrs Justice Bacon when this came before her in July said no.

25 MR HOLMES: We think the point on whether this was open goes a little further than
26 that. The order that Mrs Justice Bacon made following the hearing contained

1 an express reservation. Insofar as it's suggested that this point was determined
2 there --

3 THE CHAIRMAN: I don't think Ms Demetriou is saying that and my own view is that
4 disclosure requests are rarely determined in the sense that one isn't able to come
5 back, it's not an estoppel or anything like that. What does arise though is that
6 the Tribunal when looking at the same or extremely similar disclosure requests again
7 would normally wish to see some reason why it should depart from the ruling or
8 decision of the Tribunal or Court before it, particularly when this was only July this
9 year. And that was really my question. It's not that it's not open you to, but it's --

10 MR HOLMES: Indeed, sir.

11 THE CHAIRMAN: I'm giving you an opportunity to help me really as to why I should
12 say: well, Mrs Justice Bacon hadn't seen all the relevant factors.

13 MR HOLMES: You saw that she decided it by reference to a pleading point.

14 THE CHAIRMAN: Yes.

15 MR HOLMES: You have before you today the evidence of Mr David Parker on why
16 this material is in his view useful for the issues which are agreed to arise before
17 the Tribunal as to the effect of the conduct. And that I think would be the distinguishing
18 feature that I would rely upon.

19 THE CHAIRMAN: Thank you.

20 MR HOLMES: On the other requests we do say they are somewhat different. These
21 are the requests that Ms Demetriou was just about to turn to and I would wish to
22 address you on them. They are 36(a)(xiv), 42(b)(iv) and 45(b), all of which relates
23 specifically to the impact of the takedown notices and we don't accept that those are
24 entirely covered by what's been traversed so far. I'm in your hands, sir, whether you
25 would rather deal with those issues that you have already heard me and Ms Demetriou
26 on including me in reply, or whether you would like me to develop my points first in

1 relation to those requests.

2 THE CHAIRMAN: I think what I will do is I will consider whether -- is there overlap
3 between the later issues?

4 MR HOLMES: They are requests for disclosure in relation to Shein but they are
5 specific to the takedown products and we say they are particularly informative for the
6 purposes of the takedown products.

7 THE CHAIRMAN: Right. I think I will make a decision now on issues 36, 37, 38, 40,
8 42 and 45 on the question of whether or not it should be mutual disclosure or just
9 disclosure from your client. Have I got the right requests? So the parts we've just
10 been debating.

11 MR HOLMES: Yes. The part that I've so debated but I haven't yet come to 36(a)(xiv),
12 42(b)(iv) and 45(b) so I would like to address you on those.

13 THE CHAIRMAN: We've debated 36(a) ...

14 MR HOLMES: Except for the request -- I didn't go so far -- I'm sorry, I should have
15 made this clearer, sir. There remains a request which I hadn't yet canvassed with you,
16 36(a)(xiv).

17 THE CHAIRMAN: Right. That's the takedown notice point.

18 MR HOLMES: Takedown notice. And that connects with the points that are then
19 developed in 42 where you see -- 36(a)(xiv) is on the prices of the products that are
20 affected by takedown notices. 42(b)(iv) on page 789 is the historical sales data,
21 including gross merchandise value and number of sales for the affected products
22 before their removal. And 45 is more generally memoranda reports, presentations or
23 datasets including the historical number of items sold and gross merchandise value of
24 removed products listings. And those are all sought from Shein.

25 MS DEMETRIOU: One point of clarification. I think Mr Holmes has referred to three
26 points and the first two of those as points I have addressed. I was intending to

1 address those requests so my answer to them is the same, that effectively the --
2 The point on issue 45, which is on 791, the issue here is: what effect have Shein's
3 takedown notices had on Temu's product listings? And so, what they are seeking from
4 Shein are memoranda that talk about the effect on Temu. This is not Shein's data;
5 that's in a different category. And I was going to address you on those requests
6 because they are a bit different.

7 We also say they are even further removed because whatever Shein thought the effect
8 of its conduct on Temu is, is hugely removed from what its actual effect was. I can
9 address you on those separately but it is in a different category.

10 THE CHAIRMAN: It seems to me that the better way to approach it is I will now make
11 a decision on request 36(a)(i) to (xiii), and unless anyone tells me that isn't what we
12 have just been discussing, and my understanding is that that is what you both made
13 submissions on, I understand that Mr Holmes says that (xiv) is in a different position
14 potentially because it specifically relates to takedown notices and that then takes us
15 through to the later issues. And just to try to keep them clear in my head, I think I will
16 now address therefore request 36(a)(i) to (xiii).

17
18 RULING (4)
19

20 THE CHAIRMAN: This dispute concerns Issue 36 and whether the disclosure sought
21 should be given only by Whaleco or whether it should also be given by Shein.

22 The request is broad: it is all memoranda, reports, presentations, analyses, datasets
23 that demonstrate and/or detail a large number of matters, such as numbers of users
24 and monthly or daily levels of sales, business performance, brand recognition, growth,
25 suppliers, fashion products, volume of sales and the like.

26 Whaleco says that this disclosure by Shein is relevant to see how the dominant or

1 putatively dominant firm may have grown and that this may be powerful evidence of
2 a competitive effect.

3 The same (or very similar) issue came before Mrs Justice Bacon at the CMC in July.
4 At that hearing Shein pointed out that Whaleco's pleading relates to Temu's
5 performance and not that of Shein and so documents from Shein are not likely to be
6 relevant to that pleaded issue. Bacon J agreed and did not make the order.
7 Ms Demetriou relies on that today.

8 I do not suggest that Mr Holmes' clients are shut out from making the disclosure
9 request either today or later on, based on the decision of Bacon J, but I would expect
10 there to be some reason for a different decision to be made today. Mr Holmes pointed
11 to paragraphs 21 to 23 of the Statement of Mr Parker. It seems to me that that
12 evidence would go more towards quantum than liability and I do not wish to order
13 anything going to quantum before deciding on whether to split the trial. Ms Demetriou
14 describes this evidence as "the thinnest of gruels". I would not go that far but I do take
15 her point that it is quite high level, and not said in the strongest terms. Experts often
16 say that having more data would be useful, but that does not mean that it is sensible
17 or proportionate to order it. Moreover, this does not deal with the pleading point.

18 Mr Holmes also relied on two cases from the Commission, *Microsoft v Commission* T-
19 201/04 and *Google Android* (Case AT.40099) to show that it is not unheard of for the
20 Commission to review or consider the effect on the defendant, and he particularly
21 pointed out some usage share graphs showing the Commission looking at what had
22 happened to Google Chrome's usage share in those cases.

23 I am reluctant to place too much emphasis on individual past cases, particularly when
24 I have not been shown the entirety of those cases and only have short extracts.
25 Further, as Ms Demetriou points out, what the Commission looks at is not necessarily
26 the same as this Tribunal. It is telling that Mr Holmes could not show me a single case

1 in which this Tribunal or a court has ordered a defendant to give disclosure of its own
2 business to show how the claimant's business has been affected.

3 Finally, Ms Demetriou says it would be disproportionate and a great deal of work.
4 Mr Holmes fairly points out that I do not have any evidence from her clients that
5 specifically relates to that even though they have given such evidence on other issues.
6 However, I accept that they were taking a point of principle on this particular issue.
7 I also accept that I can take a view as to the sort of level and granularity of detail that
8 is being requested.

9 Overall, what concerns me about this is the extent of the request when the returns are
10 unlikely to be very informative. It is a request for Shein to give potentially a very large
11 number of documents over a large number of years. In my judgment that is not
12 proportionate to the likely assistance that such documents might provide. I am not
13 closing out Mr Holmes from coming back or looking at this again, with perhaps a more
14 limited request, but the request that is before me today, in my view, is too broad for
15 the reason it is being deployed and therefore I refuse it.

16
17 MR HOLMES: Thank you, sir. I'm conscious of the time. It might make sense also
18 for us to take stock in the light of that ruling over the lunch adjournment.

19 We touched base briefly, Ms Demetriou and I, I think we are doing alright for time
20 because the other business, besides disclosure, we hope might go more rapidly. So
21 while we had hoped to have finished before lunch we think we are still fair set in terms
22 of time.

23 THE CHAIRMAN: Yes. We haven't managed to finish before lunch but it does seem
24 we are on good time. I have asked for some sort of breakdown on the trial timetable
25 from you, you may have agreed it, I don't know, just so I can understand the ...

26 MR HOLMES: We have prepared such a thing and we showed it to Ms Demetriou

1 very briefly before court and I think it's broadly along the lines that she might be happy
2 with as well.

3 MS DEMETRIOU: Sir, I think the point of difference between us, having looked at it,
4 is that it goes to the point on overlap between effects and quantum because of course
5 we say that there is very heavy overlap. So my learned friend has separated out
6 quantum experts, no doubt because that assists his argument on splitting the trial, so
7 we don't accept that. But we do overall accept the broad parameters of the length of
8 the trial. And it's quite hard to be more specific because nobody has identified
9 numbers of witnesses and so on so we are take a relatively broadbrush view.

10 THE CHAIRMAN: Yes. I suppose what I'm interested, we will look at it later on, is it's
11 one thing having a broadbrush view but it seems to me quite long, the trial suggestion.
12 And the other point that I would like you to think about over lunch is, I haven't yet got
13 my head round why both parties seem agreed this trial could not be heard next year
14 at all. I know that it was perhaps said in the previous hearing but I haven't yet
15 understood actually why this would be a 2027 trial, which seems a long way off.
16 (Overspeaking) --

17 So maybe you need to just explain that. At the moment both of you seem to just accept
18 it and I didn't really understand why.

19 MR HOLMES: Very good. Would it be -- (overspeaking) --

20 THE CHAIRMAN: Yes, please, because I wanted to have a look at it over lunch.
21 I think we will break until 2.00.

22 (1.00 pm)

23 (The short adjournment)

24 (2.00 pm)

25 THE CHAIRMAN: Yes.

26 MR HOLMES: Sir, we reflected over the short adjournment in the light of your ruling

1 and we think that the requests relating to the takedown notices are primarily relevant
2 to quantum, rather than to effects. So on that basis, given your indication in relation
3 to the split trial, we suggest they are parked for the moment and we can come back to
4 them as needed, in the light of your ruling about that. So I think that only leaves
5 Shein's requests, remaining requests under 36 and subsequent issues.

6 THE CHAIRMAN: If you can point me to which page we are in in the DRD.

7 MS DEMETRIOU: Yes.

8 THE CHAIRMAN: Are we now 7 --

9 Submissions by MS DEMETRIOU

10 MS DEMETRIOU: We are on request 36(a)(xii) to (xviii). You are ahead of me in
11 terms of finding it. These are our requests of Temu and you can see them in red. Do
12 you have that, sir?

13 THE CHAIRMAN: Yes.

14 MS DEMETRIOU: So 780 and 781 and you can see the explanation in the DRD
15 document itself is, I think, on 783, in the right-hand column. Sorry, that's the
16 defendants' response, just bear with me for a second. You have actually on page 780,
17 starting on 779, the bottom of the page -- we see in the right-hand column request
18 (a)(xii) to (xviii). This is a refinement and I think narrowing of requests that had
19 previously been made and as we say there, it's necessary to address the connection
20 between the delistings and actually what happened on the Temu platform. And so
21 they are essential, in order for the Tribunal to address the question of whether the
22 infringing conduct, if proved, affected the number of volume of sales made through the
23 Temu platform.

24 And that's why we've asked for this disclosure. And we say that the disclosure that
25 the defendant has agreed to provide doesn't address, for example, the likely level of
26 sales of delisted products in the counterfactual which is a critical point and you will

1 remember the white T-shirt example. So if 10 white T-shirts were delisted, is that
2 a loss of the sale of 10 white T-shirts or did those consumers go on to buy 10 similar
3 T-shirts on the same platform, in which case there was no loss as compared with the
4 counterfactual, or did four of the consumers go on to buy different white T-shirts, in
5 which case the loss would have been six white T-shirts. So it's that point that's critical
6 that these requests address and if these requests are not granted, there is no way of
7 getting at that counterfactual question and that's why we say that it's central to the
8 analysis of the alleged effects of the infringing conduct.

9 Because what one can't do is say these products were delisted, therefore that
10 translates into a loss of 10 white T-shirts, you have to look at what happens. So were
11 those sales in fact replaced by similar sales. That's really what these questions get
12 at.

13 THE CHAIRMAN: Excuse me for interrupting, are they all limited to the takedown
14 notices?

15 MS DEMETRIOU: Yes. If you look at --

16 THE CHAIRMAN: I can see that (xii) is. (xiii) just says "following the removal of
17 products" and then (xiv) says "following the removal."

18 MS DEMETRIOU: Yes.

19 THE CHAIRMAN: I just wasn't sure -- because that seems broader to me.

20 MS DEMETRIOU: Yes. Sir, what we've said in our skeleton, if you turn to our -- do
21 you have our skeleton there?

22 THE CHAIRMAN: Yes, I do.

23 MS DEMETRIOU: If you turn to -- we start addressing this at paragraph 50 on
24 page 13, bottom of page 13. And we've explained what the nature of the information
25 is. This covers not just the issues I've taken you to but also 45 and 61. The dispute
26 on 61 is very minor and we have explained the relevance of this information and we

1 say it's not surprising that Mr Parker doesn't object to the relevance of the documents.
2 So really the concern is a proportionality concern. We say that at paragraph 53 and
3 you've seen Mr Shao's witness statement.

4 THE CHAIRMAN: My question really is are the requests -- all the requests restricted
5 to where products have been removed, as a result of the takedown notices?

6 MS DEMETRIOU: Yes, that's the intention. If you look at 56, we say:

7 "The requests asked Temu to provide the analytics and analyses conducted by Temu
8 in respect of these products."

9 Those are the products that have been taken down so it's not any wider than that.

10 THE CHAIRMAN: It's taken down because -- it just seems to me that some of it might
11 just be removed for all sorts of reasons but you are focusing on all the takedowns.

12 MS DEMETRIOU: Yes, because that's the case that's made against us.

13 THE CHAIRMAN: It was more the drafting, I think --

14 MS DEMETRIOU: No, no, so the drafting I agree could be improved but it is meant to
15 just be connected to the products taken down as a consequence.

16 THE CHAIRMAN: Understood.

17 MS DEMETRIOU: And then what we say at 56, just in response to proportionality:

18 "This need not mean necessarily individuated analysis of each product but rather,
19 more general analysis of the overall impact of the takedown notices or relevant
20 ordinary course analysis which speaks to the importance of individual products and
21 whether removing a different product results in customers switching to other products
22 on its platform or leaving it entirely."

23 As you can see, we are not saying you have to do it by reference to lots of data in
24 relation to each of the products but we are saying this is something that has to be
25 addressed and in relation to which we have to have disclosure. So if there are more
26 generalised analyses that get at the same thing, then that would be acceptable but at

1 the moment, we are just facing a refusal, so there really is no request that goes to this
2 important point.

3 Now just taking it from the skeletons, I think it's more efficient to do it this way, if you
4 look at paragraph 57, you see that Mr Shao intimates that Temu doesn't hold the
5 relevant analyses or data on the products it took down. And we've set out what he
6 says there. He says:

7 "In practice, the efforts required to provide the disclosure would be significant and
8 would likely first require the identification of products that were removed following
9 Shein's takedown notice, followed by searches for and the collation and processing of
10 historical sales data and summaries of customer feedback for those removed
11 products."

12 Now that's, we say, very surprising evidence because the whole premise for Temu's
13 claim is that taking down these products was disastrous and created
14 an anti-competitive or foreclosing effect in the market. So if the evidence is: well we
15 didn't much care about it so we didn't even log it in our internal documents, we say it's
16 very surprising and difficult to understand the basis on which they could be bringing
17 such a claim at all. Must be something that they have internally that touches on this
18 question.

19 THE CHAIRMAN: You are not asking them to undertake that analysis, you are saying
20 if they have the analysis, they should hand it over. Is that right?

21 MS DEMETRIOU: We are making the request that we make in the DRD and then in
22 response to the proportionality objection, we are saying if it's too onerous to look at
23 every single one of the documents, tell us how else you could do it. If you have
24 a generalised analysis, then provide us with the generalised analysis. If they don't,
25 then I think they are going to have to look at each of the products that was taken down
26 following the takedown notice because their whole case is: delisting these products

1 caused our loss. That's their whole case. And so it's not enough to simply point to the
2 products and say: these 10 white T-shirts, we had to remove the listings for these 10
3 white T-shirts because that doesn't translate into loss represented by the loss of sale
4 of 10 white T-shirts. Because the overwhelming likelihood is that a customer that has
5 gone on to the site trying to find a white T-shirt would buy one of the other available
6 white T-shirts. They wouldn't come off the site and go somewhere else simply
7 because a Shein branded white T-shirt was not there.

8 That's really critical to the effects case and that is why we are seeking this information.
9 We don't really understand the basis -- as I say, they are not saying it's irrelevant, they
10 have to accept it's relevant. But if they are not going to provide this information, there's
11 simply no way of the Tribunal getting at that essential issue and that really is the issue
12 on the effects case.

13 So that's 36, those paragraphs of 36. I can take -- because they are similar, 45. If we
14 go to 45. That's at page 791. You can see the issue:

15 "What effect has Shein's takedown notices had on Temu's product listings, operations
16 and revenue."

17 And I think the area of debate between us is what you see in red. So reports,
18 presentations, analyses, which show the extent to which products similar to those sold
19 by other fashion brands are promoted for sale on the Temu UK website. So that's
20 a request which goes to a similar area of dispute, same area of dispute.

21 THE CHAIRMAN: Does it not look a bit like quantum?

22 MS DEMETRIOU: Sir, I'm going to come on to -- can I just say in a nutshell what my
23 argument's going to be on the overlap between effects and quantum? Because we
24 say that they are almost entirely overlapping. And that's because when one looks
25 at -- these are issues which are all framed in terms of effects. You will see that. Going
26 back to issue 36 which you observed when you first looked at it looked like a quantum

1 | issue, is actually -- that's on page 778:

2 | "What is the effect of the infringing conduct on the ability of actual or potential
3 | competitors."

4 | So that is looking at anticompetitive effect which is liability. Your observation, sir, was:
5 | well lots of this looks like it's relevant to quantum and I agree with that. So lots of it is
6 | relevant to quantum. But it really does demonstrate the overlap between effects and
7 | quantum. That's really because of the nature -- I'm going to elaborate these
8 | submissions. I don't want to make them all now because I'm going to elaborate on
9 | them when we come to the trial structure point.

10 | THE CHAIRMAN: I see an overlap, the question is how great that overlap is. But that
11 | we can come on to. I was just looking here, where we have -- you have a request for
12 | them to provide documents relevant to the number of website user searches that
13 | would otherwise have returned. And that seems to me to -- I'm looking at, for instance,
14 | (c)(iii).

15 | MS DEMETRIOU: Sorry, which page are you on?

16 | THE CHAIRMAN: I'm on page 762. Is that where I was meant to be? Issue 45?

17 | MS DEMETRIOU: Issue 45.

18 | THE CHAIRMAN: You were addressing me on issue 45, then you moved back and
19 | then it was the red in (c) and what caught my eye, that you want documents relating
20 | to the number of website user searches and that didn't strike me immediately as
21 | a liability.

22 | MS DEMETRIOU: Do you mean in black?

23 | THE CHAIRMAN: I mean in red 3.

24 | MS DEMETRIOU: Oh, in red 3.

25 | THE CHAIRMAN: On page 762.

26 | MS DEMETRIOU: Do you mean 792? Oh yes, sorry, 792.

1 THE CHAIRMAN: 792, sorry, it is a strange angle.

2 MS DEMETRIOU: Yes, I know, it is a strange angle.

3 THE CHAIRMAN: I'm trying to negotiate around this document which is not exactly

4 user-friendly but that's not your fault.

5 MS DEMETRIOU: No, it's not at all user-friendly and I'm struggling too. So yes, the

6 reason why we say that it doesn't go to quantum is that -- you can put it this way. So

7 I want go back to the white T-shirt example because it's just a useful way of illustrating

8 the point that arises. They say: all right, you've made us delist these 10 Shein branded

9 white T-shirts from our site. And they say: well that shows that we've suffered loss.

10 And we say: no, no, it doesn't because what you have to do is examine whether or not

11 the consumer who would have bought that Shein branded white T-shirt searched for

12 other white T-shirts on the site because as we've said, they have millions of sellers on

13 the Temu site. And so for a generic product like a white T-shirt, somebody goes on

14 thinking: I want a Shein branded white T-shirt, they don't find it, so it's there one day,

15 gone the next. Do they say: oh well, that's it, I'm going to abandon my search on Temu

16 for a white T-shirt or do they say: there are actually 2,000 other white T-shirt listings,

17 and these look good enough to me, so I will buy a white T-shirt anyway that's not Shein

18 branded. So that is really the point.

19 So how do you get at that? It's a tricky question but it's a really critical question

20 because if the answer, sir -- and this is why it doesn't just go to quantum -- if the answer

21 is all 10 of those -- say you have 10 people that wanted to buy a Shein branded white

22 T-shirt. If the answer is all 10 of those people bought another white T-shirt instead, so

23 Temu made the sale, then there is no loss at all. So there's no effect. It's not just

24 a quantum point, there is simply no effect and that is why the issues are so tightly

25 bound up together.

26 They are not going to be able to show an effect on competition unless they prove that

1 the lost sales were not substituted by other sales. That is really the point and that
2 really goes to effect, not only to quantum.

3 The quantum point, if you like, is: well we sold six rather than 10, so we lost four.

4 THE CHAIRMAN: My caution here is what you're asking for. I'm just trying to get my
5 head around what it is that you are actually -- documents that -- let's take this one:

6 "Reference to number of website user searches that would otherwise have returned
7 those fashion products as part of the search results."

8 What are the documents you are thinking about that would be able to show that?

9 MS DEMETRIOU: So let me just check to make sure that I --

10 Exactly. So it's the searches for the white T-shirt. So if 10,000 people were searching
11 for a white T-shirt, then that's (iii). So if you look at (c)(iii):

12 "The number of website user searches that would otherwise have returned those
13 fashion products as part of the search results."

14 So if 10,000 people are doing a search for a white T-shirt on Temu, that is what we
15 want to know. So how many people were searching for that type of product.

16 Then of those 10,000, how many bought something else. You can see that in (iv).

17 THE CHAIRMAN: So what you have to trace through -- who is searching for what in
18 relation to all the products and then you have to try and trace whether those people
19 bought something else.

20 MS DEMETRIOU: Yes, exactly, but that is critical because if you don't do that, if you
21 stop at saying: oh, well look, we had this Shein white T-shirt which we had to take
22 down, then how do you judge whether that caused -- how can the Tribunal assess
23 whether that caused Temu any loss at all? Not just a quantum question but whether
24 it affected its ability to compete in the market, in circumstances where these sites are
25 selling so many different versions and have millions of sellers selling similar generic
26 products?

1 So that is the analysis that has to be done in order to make good an effects case.
2 Otherwise, the very simple answer to their effects case is: so what? So what? You
3 had to take down a thousand products over how many years, so you had to take down
4 some products but so what? That doesn't mean that the market was foreclosed or
5 that you couldn't compete. Because these consumers would have bought something
6 else. And so that's why it's a necessary part of this case which as I say, we say is
7 an implausible case but it's a necessary part of it, that that analysis has to be done
8 and unless these requests are responded to, there will not be the material to do it.
9 I think I showed you the pleading, sir, that explained the effects. So Temu's case on
10 the pleading -- I showed you the effects case -- what they then go on to say is that in
11 terms of loss, their losses are depression of sales and so you can't get at whether
12 there's been a depression of sales without this type of analysis, otherwise, as I say,
13 there is a very simple answer to it and it's their case to prove.
14 That's what we say about 45. The remaining one is 61 which is on page 799. The
15 only point of dispute here is the reference to platform service fees. There is also
16 a slightly more complex issue that's arisen because Temu has very recently amended
17 its case on loss or part of its case on loss and is seeking to make some amendments
18 to the DRD to reflect that. I think that's probably a point for Mr Holmes to take first
19 because it's him that's seeking to backtrack on the DRD and some of the agreed
20 disclosure categories, as a result of this very late proposed amendment which we
21 haven't yet had a chance properly to consider. But these are our submissions on the
22 remaining categories in which we seek disclosure from Temu.
23 As I say, we have addressed in our skeleton the so called proportionality concerns but
24 what Mr Shao and what Temu don't actually grapple with is how the Tribunal -- what
25 is the material that they are going to provide that will allow the Tribunal to determine
26 these points.

1 THE CHAIRMAN: And whereabouts in your skeleton do you refer to your request for
2 platform service fees. I just want to remind myself.

3 MS DEMETRIOU: I think we haven't done that. That's a fair point. I don't know if
4 Mr Holmes is proposing to deal with the points that he wants to make on the
5 amendments to the DRD following --

6 MR HOLMES: We will certainly be dealing with the platform service fees point.
7 I appreciate that Ms Demetriou says she hasn't had time to consider the other
8 suggested tweaks which are really very minor, so I was proposing to focus on the
9 platform service fees point for today.

10 MS DEMETRIOU: I can make my point about --

11 THE CHAIRMAN: If you make your point about the platform service fees. I hadn't
12 seen it in your skeleton, it looks like it's not there and so I just want to understand what
13 you are saying about it. Because I hadn't realised it was a particular issue.

14 MS DEMETRIOU: I think, actually, in the circumstances -- because this amendment
15 came in after the skeleton, so because the skeleton argument -- the reason the
16 skeleton didn't deal with it is because the amendment came in afterwards, so it may
17 be helpful to hear from Mr Holmes. We are not quite clear on what his -- the effect of
18 his amended case on loss, so it might be better --

19 THE CHAIRMAN: Again, mine wasn't a criticism, it was merely because I haven't
20 seen what you'd said at all and I was thinking: I'm not sure I have seen anything.

21 MS DEMETRIOU: It would be more helpful to hear what Mr Holmes say first but you
22 have my points on the substance of the white T-shirt request, as it were, if I can use
23 that as a shorthand. Issue 36 and 45.

24 THE CHAIRMAN: Yes.

25 Submissions by MR HOLMES

26 MR HOLMES: Sir, first of all, the requests under issue 36, and 45. First point, it seems

1 to us that these points go very clearly to quantum and not to effect on competition.
2 Ms Demetriou, when she was describing what she calls the white T-shirt point, said
3 that it went to assessing whether there was any loss compared with the counterfactual.
4 She said that it concerned an enquiry into whether the delisting of products caused us
5 loss. These points, as we see it, are quintessentially quantum related points. For the
6 purposes of assessing effects on competition, the question in law is whether the
7 conduct was capable of affecting competition in the market. If the takedown notices
8 were wrongly served and were, as we say, part of a pattern of targeted conduct, their
9 lawfulness, as a matter of liability, would not depend upon our showing that we had
10 definitively suffered any particular level of loss in consequence.

11 So we do see these points as going very much to quantum.

12 We also say, sir, that these are intractable questions, questions that are hugely difficult
13 and very unlikely to be capable of producing a meaningful response. Starting with
14 request -- just working through a little bit more slowly and carefully, the requests under
15 issue 36. The first disputed request at (xii) asks for:

16 "Disclosure of memoranda, reports, presentations, analyses or datasets,
17 demonstrating and/or detailing in respect of any product that was listed and
18 subsequently removed, as a direct result of takedown notices, data on the number of
19 impressions, the click through rate and the number of purchases for each product prior
20 to removal."

21 We have already agreed under other headings to give number of purchases or sales,
22 the same thing. Number of impressions – well, that relates, as we understand the
23 point, to the number of times that the taken down products, of which there were around
24 9,500, were included in the search results provided in response to searches
25 undertaken on the Temu site but without the user choosing to click through to make
26 any purchase. It also seeks click through rates. That is to say data about customers

1 who did view the product by clicking through but then decided not to buy it prior to
2 takedown.

3 So this is, therefore, data in relation to customers who were not interested in the taken
4 down products, and they did not buy the taken down products. The focus for damages
5 assessment is on how many customers would have purchased, and extrapolations,
6 we say, can be made about that from how many did purchase on Temu's site and on
7 Shein's site but it's very difficult to see how it helps to analyse the population of users
8 who did not purchase the product and may not even have chosen to view it from
9 a wider list of search results. There is no evidence before you to explain why this
10 tortured request is needed to assess the harm to Whaleco.

11 (xiii) is the next request. The specifics of the request appears on page 781, as we
12 understand it, in the fourth line down:

13 "Specifically analytics showing how often users who would have viewed the removed
14 product go on to click through, or purchase another product, leave the website without
15 purchasing or leave but subsequently return to purchase another product at a later
16 date."

17 Now this appears to be targeting documents concerning a highly involved and
18 speculative counterfactual enquiry. Documents which try to identify users who did not
19 in fact view the removed product but would or might have done so if it was still
20 displayed. And as Whaleco's factual witness, Mr Murphy Shao, has confirmed, there
21 is no data about this because it relates to a counterfactual which did not transpire.

22 The next category is at (xiv) and it consists of:

23 "Documents assessing the impact on aggregate impressions, click through rates
24 and/or purchases for generic search queries or fashion product categories after
25 a product has been taken down which would have been triggered by the search query
26 or product category."

1 So this is again a tortuous request. It's also misconceived. It's hard to see how the
2 number of impressions generated, apparently in relation to the takedown of any
3 product, not as a result of a Temu takedown notice, a Shein takedown notice, could
4 shed light on what volumes the taken down product would have sold in. And the same
5 is true of the number of click throughs. And as regards the purchases made, given
6 the constantly changing array of styles available on the website as suppliers update
7 their offerings and the constantly evolving algorithms used to surface results, it's very
8 hard to see how one can draw any conclusions as to whether sales made
9 post-takedown are in fact substitutions for the sales lost. It's worth bearing in mind
10 here, we are talking not necessarily about white T-shirts, but take the example of
11 Hawaiian print shirts. Somebody who would have seen the taken down product buys
12 one, two, three Hawaiian print shirts from the website. How is one to know whether
13 that is a substitution from a purchase that they would otherwise have made? It's
14 an intractable enquiry. One simply can't know what the consumer's preferences would
15 have been, had the product which has been taken down still been visible as a result
16 of this extremely involved request.

17 The next category is (xv). It seeks documents on in-store recapture rates, when
18 a product or category is not available. Again, not by reference to Shein takedown
19 notices. This appears to be a request for generic analyses prepared in the ordinary
20 course of business, assessing substitution where products or categories are
21 unavailable.

22 Mr Shao's evidence is that in-store recapture is terminology used for physical retail
23 and the business does not track customers' substitute purchasing behaviour where
24 products are removed from the Temu UK platform. That is in Shao 7 at
25 paragraph 16E. This is, therefore, another vain category.

26 Category (xvi) is similarly general. It asks for documents assessing product

1 cannibalisation, i.e. the proportion of revenues that a new product will cannibalise from
2 others already sold on the site. Mr Shao's evidence is, again, that Temu does not
3 conduct any such analysis.

4 The final disputed Shein category under (xvi) is at (xvii), and it is for:

5 "Documents summarising feedback, complaints or survey results from users or sellers
6 that address the removal or unavailability of certain types or categories of fashion
7 products and the observed or reported effects on customer purchasing decisions or
8 site abandonment."

9 We say again, this is a highly tenuous question. It would require trawling through
10 feedback and complaints records to identify complaints relating to a product removal
11 or unavailability for any reason apparently, reasons that may bear no relationship to
12 the conduct at issue, in the hope that they may shed light on how customers in those
13 cases may have responded, and the chance that such tangential narrative material
14 could assist in damages quantification is extremely slender. The diffuse nature of
15 the request renders the material inherently difficult and burdensome to identify and
16 collect. That also is not a proportionate request.

17 In relation to all of these categories, given the strange and difficult framing of them, we
18 say that to come before you and ask for disclosure without any evidence to explain
19 why this material would be helpful or useful, we say is not the right approach. If this
20 material is required, it needs to be explained in terms that show what exactly Shein
21 has in mind and how it could realistically be used. We say that's wholly lacking.

22 THE CHAIRMAN: Just a couple of questions from that. One of the points I'm still
23 struggling with a little bit and I think is the main point really made against you here, is
24 this is your claim. In relation to the question that the Tribunal is going to have to look
25 at as to whether the alleged conduct had an effect and if so, what, is something that
26 is said these document goes towards. Now you say they don't, they go to quantum.

1 I'm not sure about that because, actually, there is a difference between assessing
2 whether there is an effect and then quantifying that effect.

3 On the question of assessing whether there is an effect, am I understanding you to
4 say that your case will not involve looking at whether there has actually been any
5 effect, it will be placed only on whether it is capable of effecting. So you are not going
6 to run a case that there has actually been any effect?

7 MR HOLMES: I don't go that far. I didn't mean to go that far.

8 THE CHAIRMAN: How are you going to --

9 MR HOLMES: There will certainly -- the point is that for a finding of infringement, it is
10 not necessary to show actual effects. Obviously for loss, one does need to show effect
11 when one comes to quantum. But for the purposes of -- so if it is the case that Whaleco
12 were required to take down large numbers of listings on a basis that was incorrect and
13 that formed part of a wider set of anti-competitive conducts, we say that that would be
14 in itself sufficient to establish liability because it would clearly have the capability of
15 effecting competition if large numbers of products were being removed from
16 a competitor site on grounds that were unjustified and unsupported.

17 When one comes then to consider effects, the obvious starting place, in my
18 submission, will be to look at what Temu was selling before of the product, and what
19 Shein continued to sell in relation to the product and how, therefore, sales were lost.
20 It would be very, very far from the obvious starting point to try to reconstruct
21 an analysis to determine what purchases users would otherwise have made on the
22 website, in circumstances where the array of products being displayed is constantly
23 shifting. That is a very intractable question and I don't accept that that is required in
24 order to make good a case on loss.

25 THE CHAIRMAN: Right. I still am not very clear on how you are going to show at
26 trial, and you will have to help me, how you plan to show at trial that there has

1 | been -- although you say you don't need to, that any of this alleged behaviour has had
2 | an effect. You are saying because there is -- I'm with you that a lot of the drafting here
3 | is -- I think your phrase was "a bit contorted" or -- and I'm with you that it's quite
4 | a complex array of questions, and issues. And I'm with you that some of it looks, to
5 | my mind anyway, difficult to assess how a search would be done to find the documents
6 | and you've said and you have put evidence in that you don't have some of this, so
7 | I understand all that.

8 | What I'm left with though is a submission from you that you are not going to give any
9 | of this, in which case I'm then left with thinking how are you going to prove effect. And
10 | I'm not interested in quantifying the effect, I am just looking at the effect. But it has
11 | had an effect and as I understand it, are you saying simply you're going to be arguing
12 | capable of affecting?

13 | MR HOLMES: By evidence to show -- for example, expert evidence to show that one
14 | of the factors affecting the appeal of a website, a platform in this sort of field, is that
15 | the quality and range of the products that are available -- so that if the number of
16 | products is reduced, that is likely to reduce the appeal of the store, and it's likely to
17 | reduce the extent to which users will visit the site and will make purchases on it. What
18 | I don't think I need to show in each individual case is that a user who would have been
19 | shown one of the removed products did not make any other purchases on the site or
20 | that those purchases -- still more torturous -- those purchases were not in -- such
21 | purchases as were made were not in substitution for the removed product. Because
22 | you can immediately see that those are imponderable questions.

23 | THE CHAIRMAN: Has your client done any assessment?

24 | MR HOLMES: I should also say I'm grateful to Mr Grubeck. This is wholly unpleaded.

25 | THE CHAIRMAN: I was going come to the pleading in a moment but just -- my
26 | question was, has your client done any assessment on whether this has caused any

1 effect?

2 MR HOLMES: In bringing the case, certainly my client has assessed effects by
3 reference to the products that were removed. Insofar as that falls within these
4 categories, my understanding is that these categories are -- they seem impossible and
5 you see what Mr Shao says about how one could possibly go about the types of
6 analysis as described.

7 THE CHAIRMAN: I think where I'm digging to is perhaps the way this is drafted is too
8 broad but I'm concerned about a situation where disclosure is not given now and then
9 later on witness evidence pops up and then we have a fight about the disclosure that's
10 behind that witness evidence. That is what is concerning me. And I am struggling at
11 the moment with the suggestion that you brought the claim without having done
12 an assessment as to whether there was actually any effect. It was all just done on
13 potential expert evidence on capabilities of effects. That seems at the moment to me
14 rather unlikely and if you do have documents, underlying data from which you can
15 assess there was an effect, I'm struggling to see why you wouldn't want to give it.

16 MR HOLMES: I hear --

17 THE CHAIRMAN: It would be in your interests to give it.

18 MR HOLMES: Obviously, the types of analysis that are done in preparing for litigation
19 will likely be privileged.

20 THE CHAIRMAN: That may be right. Not the underlying data.

21 MR HOLMES: Yes. Yes.

22 THE CHAIRMAN: I mean the data about the analysis I'm not asking -- of course I am
23 not asking for any suggestion of breaching privilege or anything of that nature but I am
24 just struggling at the moment -- I have the evidence from Mr Shao that this data
25 doesn't exist, and I can understand that, with some of the way the requests have been
26 written. What I'm struggling with is that the underlying question that, as I understand,

1 Ms Demetriou has put to the Tribunal, is well, we need to know this and the Tribunal
2 needs to know in order to consider effect. And I'm just thinking surely you want us to
3 have that and you must have that, otherwise you wouldn't have known about whether
4 there's effect, unless it's a claim you just don't know if there is effect and you have to
5 talk to an expert and that is what I'm struggling with.

6 MR HOLMES: (Inaudible) are the lost volumes in relation to the taken down articles,
7 so for items that were taken down, there were sales that were not made -- there were
8 sales that were being made before, which cease.

9 THE CHAIRMAN: Just basically, it is just on the fact that ... There were lost sales
10 based on the takedown notices without an assessment and your clients haven't done
11 an assessment as to whether or not those people purchased something else or what
12 those people did, it's just that there were lost sales.

13 MR HOLMES: It's very difficult to see how you would go about assessing whether
14 users purchased a product in substitution for a removed product. I think you have my
15 submission about that. Because these are generally differentiated articles. And often
16 multiple purchases will be made by a single user on the website, and saying whether
17 a user would have purchased the items that were purchased if the product had not
18 been taken down as a result of a putatively illegitimately served takedown notice, is
19 the kind of complex counterfactual enquiry that is just not feasible and that is not what
20 broad axe assessment requires.

21 THE CHAIRMAN: Finally, sorry -- my questions. In (xvii), in Roman 17, appeared to
22 me to be of a slightly different nature. This is on page 782.

23 MR HOLMES: Yes. The feedback -- I'm not sure it was one that was addressed by
24 Ms Demetriou.

25 THE CHAIRMAN: When you went to it, you were saying it was very similar -- to me
26 it's slightly different, in that that seems to be fairly concrete documents or survey

1 results that you may or may not have but that does seem to -- that doesn't seem to be
2 difficult to provide if you have them and may be relevant.

3 MR HOLMES: If you give me one moment, sir.

4 THE CHAIRMAN: Yes. (Pause).

5 MR HOLMES: I'm not sure what there is to give under this category but I do see your
6 point, that this is a different order of requests.

7 Insofar as the request is for the underlying complaints, then I think that that would be
8 very onerous because obviously -- summarising yes, indeed. I think in the light of
9 Ms Demetriou helpfully pointing out -- Ms Demetriou has helpfully pointed out these
10 documents are only summaries of feedback, complaints or survey results. We would
11 be content to give what we have under that category.

12 THE CHAIRMAN: And again, what about (xvi)?

13 MR HOLMES: (xvi)?

14 THE CHAIRMAN: Again, the reason that focuses my mind -- I'm looking at it, is it's
15 specific documents that are being requested if you have them, rather than having to
16 create through various different databases. What struck me, reading this, is that some
17 of the requests and I mean no disrespect to the other side, but some of the requests
18 seem difficult, in my mind, to see how one can search. But some seem a bit more
19 specific to types of documents.

20 MS DEMETRIOU: May I try and assist?

21 THE CHAIRMAN: Always welcome.

22 MS DEMETRIOU: I can see the point that you are making and so looking, for example,
23 at comparing -- looking at the ones that you've just identified, I think if we look at -- take
24 this whole request, and if we look at -- starting on page 780, so request (xii) is granular
25 because it relates to all of the products that were subject to delisting. But then (xiii)
26 down to (xvii) are all categories of documents or analysis which if they exist, would

1 assist in providing material to get to the bottom of whether there's been an effect. If
2 these were provided, then I think that would mean that we wouldn't necessarily have
3 to pursue 45 or (xii) of this request. Which are more granular. So the options seem
4 to be either -- I suppose what I'm saying is that if it's too onerous to produce detail
5 relating to each of the products that was delisted, then at least these categories of
6 documents -- of analyses more generally would help us to extrapolate from the general
7 position to what was likely to have happened in this case.

8 THE CHAIRMAN: That's helpful. My initial reaction is that Mr Shao has said they
9 don't have any documents, as I understand it, under (xiii) and (xv) and possibly (xiv).
10 If I understand it, this would be a situation of them having to go through all their data
11 and trying to generate.

12 MS DEMETRIOU: Yes.

13 THE CHAIRMAN: And, frankly, at the moment, I'm not minded to make them do that
14 but I haven't made -- not a final decision yet because I would like to see the pleading
15 as well, before you sit down but I'm trying again to cut through this a bit --

16 MR HOLMES: We are very grateful for those efforts. We are similarly trying to be
17 helpful and co-operative to the extent we can. We wonder if an offer which consisted
18 of (xv), (xvi) and (xvii) would satisfy Shein.

19 MS DEMETRIOU: I will just take instructions on that point.

20 THE CHAIRMAN: I would also say that, where we get to, you are going to have to
21 take instructions and take stock as to how you plan to prove your case going forward
22 and I won't have a situation where you've said that: we don't have the documents or
23 it's too difficult to do and then we have a witness turning up who starts giving evidence
24 about click through rates and losses and the like because that would then open up
25 disclosure all over again but would also open up a question as to how did you do it.
26 And I say this -- a shot across the bows if you like but it's a warning that I can't have

1 a party stand here today and say "We can't do it", and then later on decide they will.
2 And I'm sure you are aware of that but I thought I should get that out on the transcript.
3 MR HOLMES: No, I appreciate that. We have it well in mind, sir.
4 MS DEMETRIOU: While I'm taking instructions on that offer, may I just make a short
5 point by way of reply on the pleading by way of reply to Mr Holmes' submission.
6 Because he -- if you could go to their pleading which is tab 5 of the first core bundle,
7 page 65, Mr Holmes said: "well we don't have to show any actual effects, it's all
8 enough to show potential effects" and indeed, that was very concerning to us because
9 that deviates from their pleaded case. But also he said in response to your question,
10 sir, which is how are you going to show an effect, he said: "oh, by expert evidence
11 showing that factors that contribute to the appeal of a website include quality and
12 range of products" which is highly generic.
13 If one's looking at their pleaded case, you can see at paragraph 49 that they plead
14 a case that the conduct had the object of restricting competition. But they don't stop
15 there. It was open to them to stop there but no doubt they thought that was precarious
16 so they've also pleaded a case on effect and you see that at 50. And just reading 50.
17 So the effect of the infringing conduct has been to impede competition in the relevant
18 market by limiting the ability of actual or potential competitors, particularly Temu, to
19 compete on the merits, including bias. So let's be very clear. This is not a potential
20 effects case, this is an actual effects case that has been pleaded. That is the pleaded
21 case we are meeting.
22 Then when you look at the subparagraphs, you see what the particularisation is of
23 impeding competition on the market. It's obviously not enough to say, as Mr Holmes
24 said orally, that once you issue takedown notices, that's an effect by itself. No, it's not
25 an effect on competition, you can see the particularisation of the effect of competition
26 and they include at 50.6:"

1 "Suppressing Temu's sales volumes and/or growth."

2 That's their case. Then 50.7:

3 "Foreclosing access to suppliers needed to compete in the market".

4 Not just any old supplier but suppliers that you need in order to compete in the market.

5 Suppliers that you can't substitute with other suppliers.

6 So this is their pleaded case. And so it simply isn't enough for Mr Holmes to say it's

7 all about the attractiveness of the website and whether we can have -- instead

8 of -- I think a search for Hawaiian shirts has just revealed a thousand entries. Instead

9 of 1,000, have 1,003. That won't do, and it won't do to say, as Mr Holmes intimated:

10 well our sales volumes have decreased if we can show that we lost the sale

11 represented by the delisted product. That's obviously an incoherent submission.

12 Because if the sale was made anyway, because a different white T-shirt was

13 substitutable, then that is not a lost sale and it's not a reduction in volume. So it really

14 is central to their case on effects, that is why it's important.

15 Then if you look at loss, just to complete the picture, so that's on page 70, this

16 illustrates the difference between -- there's a huge overlap, but the actual difference

17 between effect and loss you can see by comparing paragraph 50 with 69.1. So the

18 losses, the difference between the profits it would have made, absent the claimants'

19 unlawful conduct. Alternatively, the profits it lost the chance to make and the profits

20 that it in fact made. That's the quantification exercise. Building on -- but you first have

21 to show the effects. So we don't accept that this is all about quantification. This point

22 about substitution and whether in fact there were any lost sales, looked at overall, in

23 light of substitutable products, is actually central to their pleaded case.

24 Now if Mr Holmes is going to say: we strike through this actual effects case and instead

25 we are going to just put forward a pleading on potential effects, then frankly we would

26 be delighted because that would be a very weak claim but they haven't done that. So

1 the claim we are facing is a claim of actual effects and it really is focusing on
2 foreclosing access to suppliers needed to compete in the market and suppressing
3 Temu's sales volumes and that is why this material was central. I take your point, sir,
4 that some of the categories could be more happily drafted or could be narrowed, so I
5 take that point but what we can't do is be in a position where -- we don't have any
6 material to test these points.

7 THE CHAIRMAN: What do you say about the fact that Mr Shao says that they don't
8 have the material, for instance, I think, that's in your (xiii), (xv) and I think also (xiv)
9 actually, I think -- this is on page 781. And I think his evidence was that they don't
10 have this material. And I take the point you say in your skeleton and I have already
11 put that or asked that to Mr Holmes, that seems surprising. But I can't really go behind
12 that if they don't have it.

13 MS DEMETRIOU: No, but I think that the solution may be to take what they are
14 offering now but to order them to provide a witness statement explaining what material
15 they do have that will enable us to interrogate these points. Because they are saying
16 this is disproportionate, disproportionate to look at the delisted products, we don't have
17 this, we don't have that but that is highly unsatisfactory. What we don't have is any
18 indication at all of what they could provide in order for these points to be interrogated
19 and as I have shown you on the pleading, they are central points.

20 So a bit of constructive co-operation rather than just putting up the red flag and telling
21 us to go away would be welcome.

22 THE CHAIRMAN: Sure. Mr Holmes, I don't want to go on and on, we are going back
23 and forth, back and forth. I don't want to play ping pong. This pleading point has
24 arisen and I was going to ask, and your pleading says -- pleads actual effect and the
25 actual effect being at 50.6 and 50.7 in the way that you have seen there, "suppressing
26 sales volumes and growth and foreclosing access to suppliers." What is your answer

1 to that in respect of disclosure going to those results?

2 MR HOLMES: Sir, the access to suppliers' points seems slightly separate. As regards
3 the suppression of volumes, we say that there must be ways of testing that that do not
4 involve intractable questions about how users would have responded if they had
5 a different range of products available to them. Which, in relation to differentiated
6 products, on a constantly shifting array of differentiated products, seems extremely
7 challenging and if that really were the bar which had to be met, it's very difficult to see
8 how one could ever show loss.

9 We do hear what Ms Demetriou says about the categories and understanding what
10 categories are available. We think -- if I might make a suggestion, why don't we give
11 what we can under (xv) to (xvii), and then there will be opportunities to take stock in
12 relation to this category, not least given that it is certainly, on any view, relevant to
13 quantum as well as to effect.

14 THE CHAIRMAN: Okay, thank you.

15
16 RULING (5)
17

18 THE CHAIRMAN: The next dispute concerns issue 36 and in particular requests made
19 by Shein under subparagraphs (a) (xii) to (xvii). Ms Demetriou explained that these
20 are all focused on the effect (if any) of the takedown notices and says this disclosure
21 is necessary both for her clients and for the Tribunal in due course to understand what
22 effect, if any, these takedown notices may have had.

23 I have great sympathy with that. Against that, for Whaleco, Mr Holmes points to the
24 evidence of Mr Shao, who says that they do not have documents in this format, at
25 least in relation to (xiii) and (xiv) and also says that the documents go to quantum
26 rather than liability. In any event, he says his client does not have to show an actual

1 effect for liability but can run their case on the fact that the conduct was capable of
2 affecting competition. I do not accept that these documents only go to quantum. I
3 accept that they potentially cover relevant aspects of the case. I also have difficulty
4 with the submission that all that is advanced is a case that the alleged conduct is
5 “capable of affecting”, particularly in light of Whaleco’s pleading at paragraph 50 which
6 alleges an actual effect. I therefore agree with Ms Demetriou that these appear to me
7 potentially to have relevance or at least to cover potentially relevant material.

8 The problem is with the way the requests have been drafted which is extremely broad
9 and also quite nebulous. It is difficult to know how one might search for such
10 documents and how one would then go about ensuring that the disclosure
11 requirements and obligations have been met. Accordingly, I am not going to order (xii)
12 to (xiv).

13 At present, it is unclear to me how Whaleco plan to prove their case at trial if they have
14 no documents going to effects. I make it clear now that if what is said today is correct
15 (that there are no such documents as requested by Shein under categories 36(a)(xv)
16 & (xvi), and his clients have not done any such analysis and cannot do any such
17 analysis), then the Tribunal will not expect to see any evidence submitted later which
18 seeks to rely on such analysis.

19 To my mind Requests (xv), (xvi) and (xvii) are in a different category because they are
20 relating to specific documents, analyses and reports that may exist and the scope of
21 the requests is clear. My understanding is Mr Shao has said that some may not exist,
22 and if that is right, then it will be a nil return. However, I order that the categories in
23 Issue 36, Requests (xv), (xvi) and (xvii) should be disclosed.

24
25
26 Submissions by MR HOLMES

1 MR HOLMES: As we see it, (iii), (iv) and (v) are really of a piece with the requests
2 under 37. They cover very closely overlapping territory. I think that is how
3 Ms Demetriou presented them as well so I don't know if they are separately pursued.
4 Insofar as they are, they raise, I think, similar issues of formulation.

5 They are very broad and it's very unclear how one would go about answering them.

6 THE CHAIRMAN: Yes. Okay. Which one is that? That is (i), (ii) and (iii), so all of
7 them (inaudible) as well.

8 MR HOLMES: Sorry, that was (iii) to (v).

9 THE CHAIRMAN: And (iii) to (v).

10 MR HOLMES: On (i) and (ii) this really goes to the platform service fees point. We
11 have given, I think, already, disclosure in relation to what the prices were of the
12 products removed from the website. The platform service fees we say are not relevant.
13 That's the issue under issue 61 which we -- Ms Demetriou briefly -- I think she parked,
14 so that I could explain our position on that. So I can address you now on platform
15 service fees but it might be --

16 THE CHAIRMAN: I think what I will do is I will hear Ms Demetriou on (iii), (iv) and (v)
17 and in my mind the platform service fees is a slightly different point.

18 MR HOLMES: Yes, indeed.

19 Submissions by MS DEMETRIOU

20 MS DEMETRIOU: Sir, in my submission, these don't suffer from the issue that you
21 referred to in relation to the other requests, in that they are not difficult to understand
22 or nebulous. They are seeking precise information in relation to the particular products
23 that were taken down as a result of the takedown notices. And so it really goes to the
24 same point of principle. Temu haven't said that they can't do this and really, if they
25 are saying they can't do it, then I think we are hitting a brick wall unless they can
26 explain to us what it is they can do that gets at this issue which is why I have suggested

1 they provide a witness statement explaining what analysis they do have and what
2 might be feasible because it's plainly a really important issue in the case.

3 So I would urge you, sir, to order these categories and if they have a difficulty in
4 complying with them, then they can come back and negotiate with us to seek some
5 different -- or variation on these categories that meets the same objective. But I fear
6 that if this request were to be refused too, we are left with almost nothing on an issue
7 that's central to the litigation.

8 THE CHAIRMAN: Thank you. Do you have anything further to add.

9 Submissions by MR HOLMES

10 MR HOLMES: Only to note, sir, how is one to assess what a substitutable fashion
11 product is for the purposes of this enquiry? So again, it's this complex counterfactual
12 enquiry as to how users behaved and would have behaved, based on whether they
13 substituted from one product to another, and it's unclear how one would go about
14 analysing that question for the purposes of this. But it falls within the same broad
15 category of counterfactual enquiry which Mr Shao has addressed and was my
16 objection to categories on which you haven't ordered disclosure.

17 THE CHAIRMAN: (Inaudible) evidence on this request.

18 MR HOLMES: Yes, of course. Sir, page 718, tab 38. You see his evidence at 15
19 that:

20 "The datasets appear to be extremely broad, encompassing a large volume of
21 information but it would be extremely time intensive and costly to identify, harvest,
22 collate, process, review and then, where relevant, disclose relevant information in
23 relation to a large number of products which have been subject to takedown requests."
24 And it does appear to apply to the entirety of the cohort of products that were taken
25 down, of which there are approximately 9,500.

26 THE CHAIRMAN: I can see (iii), on that I can understand your point. That again has

1 | been drafted, to my mind, in quite a difficult way. It's searching for documents of
2 | website user searches that would otherwise have returned those fashion products as
3 | part of the search results. But (iv), that's searches that customers on each occasion
4 | purchased a substitutional fashion product through the Temu UK platform.

5 | Your point there "What is a substitutional fashion product." That seems to me to be,
6 | again, something that I would be quite surprised if your clients couldn't do. Are you
7 | saying that's one that would not be able to know or --

8 | MR HOLMES: (iv) and (v) build on (iii), sir, as we read it. So (iii) identifies the website
9 | user searches that would otherwise have returned fashion products as part of the
10 | search results and then (iv) and (v) interrogate whether the customers purchased
11 | something which is assumed to be in substitution for a purchase that they would
12 | otherwise have made. In fact, it goes -- it's even less -- it's even more nebulous than
13 | that, in that (iii) is simply users whose searches would have triggered a return for
14 | a taken down fashion product, not users who -- so one doesn't know whether those
15 | users would in fact have purchased the taken down products. And one then ascertains
16 | whether they purchased a product which is to be assessed ex-post as substitutable
17 | for the original products. So one has to imagine would the user or some of them whose
18 | searches would have triggered the product, have purchased the product and have
19 | they purchased another product which is substitutable for the product they would have
20 | purchased. It just seem terribly difficult --

21 | THE CHAIRMAN: I have the point, I think. What about finally -- because we should
22 | move on, we are going to run out of time -- what about the suggestion of a statement
23 | saying what you do have that supports your pleading at paragraph 50?

24 | MR HOLMES: Sir, another way of proceeding would perhaps be by way of further
25 | particularisation of our case on loss by way of a --

26 | THE CHAIRMAN: I'm just interested -- you have a pleading at paragraph 50. It must

1 have had some support underneath it. When it was pleaded there must have been
2 some documents -- I'm not talking about privileged documents, underlying data --

3 MR HOLMES: Yes. So it's the type of data which informed the assessment. Is that
4 the --

5 THE CHAIRMAN: At the moment, the problem I have as the Tribunal, is that I have
6 some sympathy with you that I think that the requests are quite difficult to know how
7 to search. And I can understand it. If I received that request, it might be quite difficult
8 to know what I'm searching for. I also have evidence from your Mr Shao that firstly, it
9 would be extremely time intensive and costly and also that in fact, with many of them,
10 you don't have it and you therefore would have to try to create and that is something
11 that has not been done. So I understand that.

12 I also take on board what Ms Demetriou says which is this is central to your case and
13 needs to be interrogated. We can't have a situation where she and her clients can't
14 interrogate that case and neither can the Tribunal. So I'm left with perhaps a DRD,
15 where I'm not very comfortable with how it's been written. But I'm also not going to
16 have, I don't think, your client just walk out, saying: "we are not going to give any
17 disclosure". So the question is how to work through this. I could say all go away and
18 rewrite the DRD but I am keen to get this, for the moment, done on the CMC, so there
19 must be documents and if in fact you have no documents to support paragraph 50, I'm
20 sure Ms Demetriou would be quite interested to know that. If there are no underlying
21 documents, then fine. If you have none, if you have none, then fine.

22 MR HOLMES: The data that were used as the basis for pleading --

23 THE CHAIRMAN: Paragraph 50.

24 MR HOLMES: Yes.

25 THE CHAIRMAN: I'm not -- I stress there's no suggestion of asking you to breach
26 privilege obviously.

1 MR HOLMES: No, no, of course not.

2 THE CHAIRMAN: It's purely --

3 MR HOLMES: It's underlying data (inaudible).

4 THE CHAIRMAN: If you have none or there is none that you could use, then obviously

5 you must tell Ms Demetriou.

6 MS DEMETRIOU: Sir, I wonder if the way through -- I think it would be helpful to know

7 what data underpinned their claim but we also want to know what's available. When

8 you look at Mr Shao's statement, he is not saying things aren't available, he is raising

9 various objections as to why they can't be produced. But I would suggest that either

10 these categories are just ordered and then they can come back if there's some

11 problem with them, the issue 45 categories, or -- so I can see you are not attracted to

12 that.

13 THE CHAIRMAN: I'm not attracted because of the search requirements that go with

14 it. So it's easy for me to sit here now and say I order that but then of course the

15 searching has to be done. I don't want this to come into just a big chat. I'm not

16 attracted to that.

17 MS DEMETRIOU: No. Well then, sir, we would like -- either I think the way to go is

18 for them to produce a witness statement telling us what they could do, to enable

19 us -- what they could produce, what they do have to enable us to interrogate this part

20 of their case, which is not an unusual thing in competition cases, where one side is

21 saying "We can't do this, we can't do that." The Tribunal quite frequently says "Well

22 tell us what you could do." Because we are really stabbing in the dark.

23 The alternative is to ask him to give Model D disclosure on those points so that they

24 identify -- no no, seriously. So they identify the categories -- Mr Holmes laughs but

25 otherwise we are stuck in a position where we simply can't make progress. So those

26 to me seem to be the alternatives. That's my submission.

1 MR HOLMES: Sir, if I can briefly address you on that. So custodial disclosure is not
2 going to assist requests that are too vague to be formulated for the purposes of Model
3 C disclosure. We would be content to give, sir -- we hear what you say -- we would
4 be content to give a witness statement setting out the material available to prove our
5 case on effect. I apologise.

6 THE CHAIRMAN: Thank you. I think I will bring this to a close now. I heard what you
7 say, Ms Demetriou, about Model D disclosure. I'm not going to order or change the
8 category of disclosure.

9 RULING (6)

10
11 THE CHAIRMAN: The next issue concerns Shein's requests at Issue 45(c). As I have
12 explained during the course of debate, I am not happy with the drafting of Shein's
13 requests in Issue 36, Requests (a) (xii)-(xiv) and those concerns also apply to these
14 requests and so I will not order them.

15 But as I have said, it is very unsatisfactory that we end up with a pleading in
16 paragraph 50 from Whaleco to which no disclosure is being given. I will therefore
17 require in the next 21 days a witness statement from a suitably authorised person
18 within the Temu undertaking explaining the documents (if any) that underlie the case
19 on effect that is pleaded in paragraph 50 of the Re-Re-Re-Amended Defence and
20 Counterclaim and then in due course, those documents will be disclosed, at the time
21 of the rest of the disclosure. If there is a nil return, then that is something that
22 Ms Demetriou and her clients have a right to know.

23 At the moment I will keep it within the confines of the pleaded case. That was relied
24 on by Ms Demetriou and I think also it is fair for today.

25
26 Submissions MR HOLMES

1 MR HOLMES: Sir, I'm grateful. I have been asked to request 21 days, if that were
2 possible, given that the client is outside the jurisdiction.

3 THE CHAIRMAN: I see. That makes no difference.

4 MR HOLMES: I'm grateful for that. I think that just leaves the platform service fee
5 request. You see that this arises firstly at issue 45(c) in (i) and (ii), where a request is
6 made for "description, unique identifier, the platform service fees and retail prices
7 associated with taken down products." And then again:

8 "The terms, rules and policies which determine and/or restrict the platform service fees
9 and retail prices associated with those fashion products."

10 Then issue 61 on page 799, you see again a request at (a) for "memoranda, reports,
11 presentations and analysis demonstrated in respect of any product removed, the
12 platform service fees and retail prices associated with those products."

13 The short point on this is that platform service fees do not constitute any part of
14 Whaleco's loss, so it's difficult to see how they are of relevance for the purposes of
15 this case. The platform service fee is the fee that is payable by suppliers to the Temu
16 Group for the distribution of products, for the products sold on the Temu website. It's
17 commission. That is not the basis on which Whaleco suffers loss. That was set out
18 in and understood by Shein, as is apparent from the pleadings. So if one looks at
19 volume 1 of the CMC bundle, you see first at 5, the Defence and Counterclaim and
20 the loss is described at page 71 in 69A. And you see that two categories are pleaded
21 there. First of all, "reduced takings in the UK", and secondly, "a reduced distribution
22 of revenue within Temu, the amount of such distribution depending in material part on
23 the value of sales generated through Temu's UK sub-page."

24 As regards 69A.2, that is a reference not to platform service fees, but service fees paid
25 to Whaleco by other entities in the Temu Group for the performance of corporate
26 services in the UK. And the remuneration is on a cost plus basis, so there is

1 a percentage mark-up at the costs incurred by Whaleco which are in turn, very heavily
2 influenced by the volume of sales which are made on the Temu UK sub-page. So if
3 there are fewer sales on the Temu UK sub-page, that affects the service fees available
4 to Whaleco from other Temu entities. And that is the mechanism of loss.

5 Now the takings category was one -- I accept it's very general, and it's one that clearly
6 caused some confusion but you see from the Reply and Defence to Counterclaim that
7 it was well understood by Shein that this was not and could not encompass the
8 platform service fees payable within the Temu Group. So if you turn at tab 6 to
9 page 116, where Shein pleads back to 69A in its Defence to Counterclaim, you see
10 that the alleged unlawful conduct is denied at (a). Then at (b):

11 "The defendant has submitted a witness statement from Mr Shao."

12 Shao 3. And there's also reference to the RFI response and:

13 "Those admit that the platform service fees received are ..."

14 Then you see what is described as happening to those service fees. They are not
15 retained by platform service fees, they are not retained by Whaleco. And then at (c):

16 "Accordingly, it is denied, contrary to 69A.1, that the defendant has suffered a loss in
17 the form of receiving reduced takings in the UK. Such reduced takings which are not
18 defined, even if proven, would not constitute a loss."

19 And so on.

20 So there is an understanding by Shein that platform service fees were not part of the
21 loss suffered by Whaleco, but there was uncertainty, clearly, about the meaning of
22 reduced takings. That was the subject of a request for further information over the
23 course of the summer in August which we responded to by way of a pleading
24 amendment shortly before skeleton arguments were served. That's in the further
25 supplemental bundle at tab 12. It's the first supplemental bundle at tab 12. And if you
26 turn to page 165, the word which has created the difficulty, "takings", has been

1 removed. Takings in the UK. And in its place the allegation related instead and
2 clearly, to the interest generated from the sales proceeds received from customers on
3 Temu's UK sub-page. So that is interest payable on the sales made on the webpage
4 which are held for a time by the defendant before they are paid on to other entities in
5 the Temu Group.

6 So what this amendment makes clear is that "takings" indeed doesn't refer to platform
7 service fees, as it's clear that Shein had already appreciated that they were not
8 retained. As a consequence, the reference to platform service fees, which you saw in
9 the DRD, is not understood. They are not, as we see it, relevant. Neither party
10 considers that they are relevant. Shein pleads that they are not relevant to Whaleco's
11 loss and we don't understand why disclosure is sought in relation to the platform
12 service fees under either issue 45 or issue 61.

13 THE CHAIRMAN: What's the amendment going to? Sorry, the reduced retained
14 interest, as opposed to reduced distribution of revenue?

15 MR HOLMES: I'm so sorry, I missed the question.

16 THE CHAIRMAN: What is the purpose of the amendment?

17 MR HOLMES: The purpose of the amendment is to make clear that besides the
18 service fees under the corporate service contract, which Whaleco receives -- not the
19 platform service fees --

20 THE CHAIRMAN: Right.

21 MR HOLMES: -- but the service fees that are -- there is also another element of
22 income that Whaleco receives which is interest on the balances from sales on the UK
23 website which are retained within the UK for a time before they are remitted. So that
24 simply clarifies what the takings -- we accept that it was perhaps not the clearest
25 pleading -- what the other category of loss besides the corporate service fees payable
26 to Whaleco is. Neither of those categories relates to platform service fees, as Shein

1 apprehended and pleaded in its Defence to Counterclaim. On that basis we resist
2 disclosure of the platform service fees, on the basis that they are not relevant to
3 assessing the impact of the conduct on Whaleco on the defendant in these
4 proceedings. And so there's no basis, therefore, why they needs to be disclosed.

5 Submissions by MS DEMETRIOU

6 MS DEMETRIOU: Sir, our response is that they are relevant -- so it's 69A.2 of the
7 pleading which hasn't been amended. That says that:

8 "The defendant [ie Whaleco] received a reduced distribution of revenue within Temu.
9 The amount of such distribution depending in material part on the value of sales
10 generated through Temu's UK sub-page."

11 If you go in the -- the short point, sir, is that -- and we pressed for a long time to get
12 clarity on why it's said that Whaleco has suffered loss because Whaleco essentially,
13 when it sells on the UK site, the way it works, apparently, is that it receives money
14 from consumers, it pays the sellers on the site, that money minus a platform fee. That
15 platform fee is then passed on to other Temu entities, so we were thinking where's the
16 loss of Whaleco? And we were told that there's a complicated mechanism by which
17 Whaleco gets money back. You can see that in Mr Shao's third witness statement.
18 That's in the further supplemental bundle behind tab 1 at page 7. What I've just said
19 is really set out -- so paragraph 13, you see:

20 "Whaleco first repays the merchant the purchase price less the platform service fee
21 it's liable for. This amount is typically paid to the merchant via an agent. The remaining
22 balance of the purchase money, i.e. the platform service fee, is also transferred from
23 Whaleco, in order to allow Temu to collect moneys in respect of all products sold
24 across Temu globally. Temu then makes a periodic --"

25 THE CHAIRMAN: I've lost where you are.

26 MS DEMETRIOU: Sorry, I'm in paragraph 13 of Mr Shao.

1 THE CHAIRMAN: I didn't hear you.

2 MS DEMETRIOU: No. Can I just ask you to read 13 maybe to yourself. (Pause).

3 THE CHAIRMAN: Yes.

4 MS DEMETRIOU: You can see what happens. The money comes from the
5 consumers who are buying the products. That money is then paid to the merchant,
6 minus a commission which is effectively the platform service fee, which Temu then
7 passes on to another Temu entity -- sorry, Whaleco passes on to another entity in the
8 Temu Group. So you might be thinking: well, where's Whaleco's loss? But then what
9 Mr Shao explains is that Temu then makes periodic distributions to Whaleco back.
10 And those -- it's quite opaque how those distributions are calculated. This is what we
11 want to get to the bottom of in the disclosure but it's clear that they are based on the
12 platform service fees that have been going back to the other Temu entities.

13 THE CHAIRMAN: Right.

14 MS DEMETRIOU: So that's why the platform service fee is relevant. It's the first stage
15 in the calculation of loss. That's what Mr Shao himself explained.

16 THE CHAIRMAN: Yes. This does seem to be a calculation of loss, a quantification
17 issue, doesn't it?

18 MS DEMETRIOU: Yes.

19 THE CHAIRMAN: Anything further you want to say?

20 Submissions by MR HOLMES

21 MR HOLMES: Only that the platform service fee isn't the basis on which distributions
22 are made to Whaleco. That is the service fees under the corporate contract, as has
23 been explained subsequently. But I apprehend, sir, you may be wanting to park this,
24 pending the -- do you want me to show you the discussion of service fees and where
25 they are explained, the corporate service fees?

26 THE CHAIRMAN: What I would at the moment just like to understand is Ms Demetriou

1 has pointed out your 69A.2 and also pointed out paragraph 13 of Mr Shao and it's not
2 entirely clear to me at the moment where it is that it's clear that you are -- the service
3 fees play no part in the quantification of loss. Because it would seem from Mr Shao
4 they might, mightn't they? How big they are, how great they are.

5 MR HOLMES: No, no, I understand. It's explained in a subsequent response to a
6 request for information which is in --

7 THE CHAIRMAN: If you show me that, then we had better take a break.

8 MR HOLMES: It's in core bundle 2, tab 22. Page 445. Do you have that, sir?

9 THE CHAIRMAN: Yes.

10 MR HOLMES: You see that this is a request for further information in relation to
11 responses previously given which you see on page 444. It's a request for further
12 information under the terms of the contract, so those are the contracts between
13 Whaleco and other Temu Group entities:

14 "The defendant is entitled to be compensated for services in accordance with a cost
15 plus transfer pricing methodology, pursuant to which the defendant is paid for the cost
16 of performing the services, plus a mark-up. The contract states that the service fees
17 referred to in article 4 of this agreement shall be the sum of the service costs plus a
18 mark-up element. The mark-up element should be calculated as the mark-up
19 percentage multiplied by service costs."

20 So you see there that the contracts pursuant to which Whaleco is remunerated, have
21 been disclosed.

22 Turning over to page 445, you see a request for confirmation that the service fees,
23 those are the corporate service fees received by Whaleco from the entities there
24 stated, "are determined in accordance with the following calculation." Service costs,
25 that's the costs of providing various services in the UK, in particular the payment
26 processing services:

1 "Multiplied by 1, plus a mark-up percentage, equal to the service fee."

2 So in other words there's a percentage mark-up on the costs of providing services in
3 the UK to run the Temu UK website. Nothing to do with the platform service fee. You
4 see the response to request 1:

5 "As to request 1(a), as stated in response 1 to the previous response, the company
6 there named makes periodic distributions, i.e. makes payments towards the service
7 fee to the defendant. The service fee that is due from that company to the defendant
8 is determined in accordance with the calculation set out in request 1A, namely service
9 costs, the costs of running the UK website which are dependent on the scale of the
10 services provided, times one plus mark-up percentage, equals the service fee."

11 So nothing in that calculation has anything to do with the platform service fee payable
12 to Temu by the suppliers.

13 THE CHAIRMAN: What was Mr Shao talking about in paragraph 13?

14 MS DEMETRIOU: Indeed, 14, just while you are on the page. So Mr Shao 14 (audible
15 words).

16 MR HOLMES: So he is talking there about what happens, money comes into Whaleco
17 and it's then distributed. Some of it's distributed to the suppliers who made the sale,
18 and some of it in respect of the platform service fee is transmitted from Whaleco to
19 other entities in the Temu Group. The way in which Whaleco is remunerated is not
20 part of that equation. It receives a distribution of revenue under the corporate
21 contracts. And that does not vary dependent upon the level of the platform service
22 fee. So the platform service fee just isn't relevant to that. I don't think 13 or 14 suggest
23 that Whaleco's distribution, the amount of revenue distributed to Whaleco, is
24 calculated by reference to the platform service fees.

25 THE CHAIRMAN: "The remaining balance to purchase money, the platform service
26 fee is transferred from Whaleco to allow Temu to collect monies in respect of all

1 products or across Temu globally."

2 MR HOLMES: Yes. Do you see that is -- the transfer from Whaleco up within the
3 Temu Group, it's not the money that Whaleco gets which is the basis for the loss, and
4 that's described in 14 and the contracts pursuant to which the distributions are made
5 have been disclosed. The methodology has been described, whereby the corporate
6 service fee is calculated, as a mark-up on the costs incurred by Whaleco. In particular,
7 the payment processing costs and the marketing costs which are a function of
8 the scale of sales made but none of that relates to the platform service fee. There's
9 just no connection between the platform service fee and the loss which is alleged and
10 that is understood by Shein, as was clear from the pleading in the Defence to
11 Counterclaim which I showed to you.

12 THE CHAIRMAN: Thank you.

13 MS DEMETRIOU: Just a short point on that is Mr Holmes says it's all calculated by
14 reference to the scale of the services provided but as far as we understand it, the scale
15 of the services provided by Whaleco is measured by the service platform fee.

16 MR HOLMES: No, no, that's not correct. It's the costs that are incurred. It is variant
17 depending on the sales made in the UK because a lot of the costs are payment
18 processing fees and you pay more if you are processing more payments from
19 consumers buying products. So that's why the service fee is variant, depending upon
20 the volume that's done. It has nothing to do with the platform service fee and I don't
21 know the basis on which Ms Demetriou has gained that impression.

22 THE CHAIRMAN: All right. I think maybe one of the problems might be the proposed
23 amendment to the pleading which may have caused issues as to how clear it is. As
24 this debate has gone on, it's become pretty clear to me that this is a question of loss
25 and quantum and both of you accept that and as I said earlier, I would prefer to debate
26 that or decide on that once we've decided what we are doing. I am not going to go

1 back over the debate, so I will make a decision on this once I know whether quantum
2 is in or out. But for the moment, I think we take a break and is that the end then, of
3 the disclosure issues?

4 MR HOLMES: It is. So there are some very minor consequential amendments
5 dependent on the pleading (inaudible). I suggest that we park those, given that
6 Ms Demetriou hasn't had an opportunity to consider them.

7 MS DEMETRIOU: Sir, there's one point which is that Temu are purporting to delete
8 a category that they have already agreed to provide, contingent on their pleading, and
9 we don't accept that it's no longer relevant as a result of the pleading amendment.

10 THE CHAIRMAN: In that case, I think we had better do that after the break because
11 otherwise it's not fair on the transcript writers, otherwise we will be powering for
12 another -- it sounds like it might take longer than a minute.

13 MS DEMETRIOU: Yes.

14 THE CHAIRMAN: In that case, why don't we break for five minutes and then -- we
15 don't have -- we are running out of time. We were doing terribly well before lunch and
16 we have slowed down. And so I still would like this all to be wrapped up today, as I'm
17 sure you would, so please keep that in mind with your submissions.

18 (3.44 pm)

19 (A short break)

20 (3.50 pm)

21 MS DEMETRIOU: I will take this point quite briskly. I think it's the last point on
22 disclosure.

23 THE CHAIRMAN: Good to hear.

24 MS DEMETRIOU: If we go back to the amended -- it's a different part of the proposed
25 amendment, so it's in supplemental bundle tab 12, page 160. We've looked at the
26 effects case. It's paragraph 50.

1 THE CHAIRMAN: Sorry, which page?

2 MS DEMETRIOU: 160 of the supplemental bundle. We have looked at paragraph 50.

3 We see the proposed deletion in paragraph 50.5, so now they are not running a case
4 that Temu's costs have been increased. So what they say is that -- if you can go back,
5 please, to the DRD in core bundle tab 40, page 788, issue 41. It's in grey. It's in grey
6 because it was agreed and you can see that Temu had agreed -- you can see what
7 they'd agreed to provide, "reports, presentations", et cetera:

8 "...outlining or examining the reasons for any deviation between Temu's costs over
9 time, assessing the relationship or connections, if any, between value and volume of
10 sales and Temu's costs, and assessing the relationship or connections, if any,
11 between the number of sellers that sell fashion products through the Temu UK platform
12 and Temu's costs."

13 Now, the short point is that Temu now say: "oh well, we have got rid of the costs bit of
14 our effects case, therefore we don't have to provide this disclosure anymore". But our
15 submission is that this disclosure continues to be relevant to the effects case and let
16 me explain why briefly. And this is, of course, against a backdrop which I'm not going
17 to repeat my submissions but you have well in mind, sir, that we are very concerned
18 that we are getting very little disclosure on effects. That is the backdrop. And the key
19 reason why it's relevant is that if in fact -- if Temu are right to say that the delisting of
20 these products foreclosed access to suppliers, that they needed to compete or
21 suppress their sales volumes, then you would expect to see some reaction to that, in
22 terms of -- that then resulted in an increase in costs. And so that's why costs data is
23 relevant for assessing foreclosing effects. So we've, in the time available, had
24 a discussion with our expert economist about this point and they consider that this
25 disclosure which has already been agreed to be given, is relevant to assessing
26 whether or not there's been these other effects, market foreclosing effects or effects

1 on sales. And really, the short point is that if Temu were effectively being foreclosed,
2 then it would need to respond to that foreclosure by spending and investing more to
3 acquire customers and suppliers. So if it were foreclosed through a restriction in the
4 number and quality of suppliers, then it may incur higher costs, identifying and working
5 with alternative suitable suppliers.

6 On the flipside, if there was no change or a decrease in cost, then it would be difficult,
7 in our respectful submission, for Temu to argue that there's been any meaningful
8 foreclosure or marginalisation or at least Temu would need to explain why it didn't
9 react to this alleged market foreclosing effect. And so, sir, that is our submission. We
10 say against a backdrop where, as I say, we are being given very little by Temu allowing
11 us to interrogate its case on effects, this information which it's already agreed to
12 provide, would be relevant to an interrogation of their effects case, even though they
13 propose to delete this part of their claim. So that is, in a nutshell, our submission on
14 this.

15 THE CHAIRMAN: Can I just say, can you just show me your pleading when you
16 responded to paragraph -- what is your pleading on costs -- on these costs or
17 otherwise.

18 MS DEMETRIOU: Our pleading is a flat denial, so we haven't articulated or we haven't
19 articulated a point to point. We have denied and put them to proof because we need
20 to see the basis on which they say that there has been an effect.

21 THE CHAIRMAN: Right. So the situation is that they said that one of the effects of
22 the alleged infringement conduct was increasing their costs. You denied that it would
23 have increased their costs. They now are no longer alleging it did increase their costs,
24 but you want disclosure anyway.

25 MS DEMETRIOU: Yes, because we say that the disclosure is relevant to whether or
26 not there was a foreclosing. The other foreclosing effects as pleaded is -- so, for

1 example, depriving -- the first one, "depriving Temu of an equal opportunity to compete
2 in the relevant market", how do we interrogate that? If they were in fact being deprived
3 of an equal opportunity to compete in the market, one would expect them to react to
4 that by investing in, for example, efforts to acquire more suppliers.

5 THE CHAIRMAN: I understand.

6 MS DEMETRIOU: That's the point.

7 Submissions by MR HOLMES

8 MR HOLMES: Sir, I think I can probably cut through this quite quickly. We are content
9 for this to remain in the DRD for now. We obviously have heard what Ms Demetriou
10 says today, which is helpful to understand. We hadn't heard it before; that's no
11 criticism of her or her expert economist, it's just it's new to us and we'd like to discuss
12 it with our expert and then if there is an issue we can raise that with Shein in the first
13 instance.

14 THE CHAIRMAN: Okay.

15 MR HOLMES: But we would like to understand the basis on which the costs connect
16 to other heads of alleged --

17 THE CHAIRMAN: Ms Demetriou has explained that and you've heard that.

18 MR HOLMES: Yes, I have.

19 THE CHAIRMAN: If it's in then it's in. Just while you are on your feet, can I just check,
20 and it's partly my fault, the status of the amendment, the amended pleading, is that
21 something that you're asking to be made today?

22 MR HOLMES: No.

23 THE CHAIRMAN: Okay, that's fine.

24 MR HOLMES: I don't think they've had an opportunity yet to consider their position on
25 it.

26 THE CHAIRMAN: Because I was about to say that seems a bit premature. We're all

1 looking at it but I wasn't sure when it was going to -- okay, that's fine.

2 MR HOLMES: We'll liaise and hopefully it can be resolved by agreement.

3 THE CHAIRMAN: Right. That finishes, does it, the disclosure issues?

4 MS DEMETRIOU: Yes.

5 MR HOLMES: Yes.

6 Submissions by MR HOLMES

7 MR HOLMES: I think next issue is the trial split and the question of whether the
8 competition quantum should be heard together with the IP quantum.

9 This is obviously not a question of whether there is to be a split trial but rather which
10 issues should be heard in which trial, the proceedings having already been split across
11 three trials. In essence, we say that it makes sense to deal with all of the quantum
12 issues in the proceedings together in trial 3.

13 So just by way of procedural background first, Shein notes that Mrs Justice Bacon
14 initially ordered a two-trial split pursuant to which all the competition issues would be
15 heard together, and that is correct, that was in the order following the first CMC on
16 7 November 2024. But it's not how matters have remained. The last CMC, the most
17 recent CMC before transfer, the judge was invited by Shein to revisit that structure and
18 instead adopt a three-trial split and it made that request just before the CMC,
19 specifically asking that trial 3 should deal with quantum in the IP claim. You can see
20 that from their supplemental skeleton argument for CMC 3.

21 THE CHAIRMAN: I don't think that's in dispute.

22 MR HOLMES: No, indeed. I was just going to show you how they put the point. They
23 say now that it was just about jurisdiction but in fact they identify efficiencies as well
24 on the basis that if the IP claim were decided against Shein there would be no need
25 to go on to consider quantum and we say that that's same logic applies equally to the
26 competition claim, so that same efficiency argument weighs also in relation to where

1 the competition quantum should be located.

2 Whaleco at the CMC reserved its position on whether trial 3 should also include
3 quantum in the competition claim and the judge ruled that that should be decided at
4 this CMC. So it's not a matter which has been ruled upon, there's no question that at
5 any point the court decided that competition quantum should not be moved to trial 3
6 once trial 3 was first decided upon.

7 The legal principles, I don't think I need to spend any real time on those. You saw in
8 our skeleton argument we referred to the Daimler case, which sets out factors:

9 "The overall test is to ensure that proceedings are dealt with justly and at proportionate
10 cost. Deciding whether and how to split a trial involves a pragmatic balancing exercise
11 which weighs up the anticipated costs and benefits of such a case management
12 approach."

13 There is just one point on the law which is worth flagging. That is that there is no
14 jurisdictional impediment to splitting the issues as Whaleco now proposes. That is
15 because the Tribunal can sit with the President or Chair in a dual capacity and thus
16 determine any mix of issues. The authority for this, if authority were needed, is the
17 Sportradar case. That is in the authorities bundle tab 7, page 197. In that case you
18 see that Mr Justice Roth described the arrangement just below D, he says:

19 "Standalone competition proceedings under section 47A will often raise legal issues
20 outside pure competition law. I consider it most unlikely that this would serve as a
21 good ground of transfer out of the CAT, as noted in Sainsbury's. The Tribunal hearing
22 such a case can be chaired by a High Court Judge and if, say, the defence to
23 a competition claim raised questions of intellectual property law the judge hearing the
24 case may be no different from the judge who would hear the case in the Chancery
25 Division if it were transferred. The fact that he or she would be hearing the case in the
26 CAT along with two other members having expertise relevant to other aspects of the

1 case is hardly a good reason for transfer out."

2 And that is exactly what happened in Sportradar. If you turn on to the next tab at tab --

3 THE CHAIRMAN: At the moment I think I will accept the Sportradar, subject to
4 anything Ms Demetriou says.

5 MR HOLMES: Yes, very good, that's helpful. We say that Shein is incorrect to suggest
6 in paragraph 71 of its skeleton argument that trial 3 on IP quantum had to be ordered
7 for jurisdictional rather than case management reasons.

8 As regards where competition quantum should fit, the starting point is that there will
9 be a separate trial that deals with quantum in the IP case in any event and there are,
10 we say, at least three good reasons, four good reasons why it's sensible for
11 competition quantum to be heard alongside IP quantum. First and foremost the split
12 will allow quantum to be assessed on the basis of the actual liability findings made by
13 the court and the Tribunal. As is apparent from the discussions today, there may be
14 nuanced multi-faceted findings on liability and it would be much easier and more
15 efficient if the determination of quantum can proceed on the concrete basis of liability
16 findings across all issues in the case rather than having to take into account multiple
17 potential variations. The court will obviously strive to avoid a situation in which factual
18 witnesses and experts have to grapple with multiple hypotheticals as to how liability
19 might be resolved.

20 The second point is that a split is efficient, it's efficient to split off competition quantum,
21 and that is for two reasons. First, it may be conducive to settlement, if, once liability
22 is decided, the parties have an opportunity to take stock; and if there is a settlement,
23 there will be no need to incur the costs and court time required to address quantum at
24 all; and if the competition claim fails, there will be no need to consider competition
25 quantum, and again that will be a saving. And that factor weighed with the judge and
26 was prayed in aid by Shein when the decision was made to break quantum off in

1 relation to IP.

2 My third consideration is speed. Given the ongoing nature of the infringing conduct
3 there is real urgency, we say, in ensuring the competition claim is determined as
4 quickly as possible and the priority is to determine liability and any consequent
5 injunctive relief. Damages of course are also relevant but less time critical than
6 injunctive relief and delay is capable of being factored into a damages award,
7 separating off the complex evidence and submissions dealing specifically with
8 quantum means that there's likely to be a notably shorter trial and a faster timetable
9 up to that trial.

10 Then finally we say that there is potentially very significant cost and time saving. Once
11 there are two final judgments on liability there must be a real prospect that the case
12 can be resolved. So the extensive cost and Tribunal time. Sorry, I think that was
13 repetitious of an earlier point but in any event those are our reasons for favouring
14 a split.

15 Just to deal briefly with the points that are made against a split. Shein first says that
16 there is substantial overlap between liability and quantum issues in the competition
17 counterclaim. Inevitably there is some overlap and we don't shy away from that fact.
18 As in any other tort claim, Whaleco has to show some loss in order to establish liability.
19 But that is the case in every competition claim and there are many examples of split
20 trials in competition proceedings where that's convenient. Just for your note, one
21 example in the authorities bundle is Up and Running at authorities bundle tab 11
22 page 361 where at paragraphs 34 the Tribunal ordered a split trial.

23 Showing some loss and quantifying the amount of the total loss are two very different
24 tasks and they require different evidence, differently focused submissions. For
25 example, expert accountancy evidence is unlikely to be necessary at a liability trial but
26 will likely be required at a quantum trial.

1 The second point Shein raises is the likely overlapping disclosure as well as factual
2 and expert evidence. But that ignores, as we see it, two important points. On the one
3 hand, to the extent evidence and/or disclosure for trial 2 deals with issues relevant to
4 trial 3, the exercise does not need to be repeated. The material will be ready and
5 available to the parties and the Tribunal in trial 3. And on the other hand, there will
6 equally be significant overlap in the evidence and disclosure required for the IP loss
7 claim and the competition loss claim and it makes more sense to prepare that together
8 as part of a holistic approach to the quantification of damages.

9 Third, Shein suggest that it would be disproportionate to have a separate quantum trial
10 given the limited quantum of the case: in the region of £4 million. That's not advanced
11 with any great detail, and that's unsurprising, there's no basis for such a submission
12 in circumstances where an IP quantum trial is happening in any event at Shein's
13 instigation and the quantum in the IP proceedings is likely to be lower than in the
14 competition claim and, if anything, this means that combining the IP and competition
15 quantum issues makes trial 3 more proportionate. Moreover, relatively low quantum
16 should be an indicator that a quantum trial is more likely to be capable of settlement
17 following decisions on liability.

18 The fourth point raised by Shein is to suggest that dealing with competition quantum
19 as part of trial 3 will seriously disrupt the well-established procedure for IP quantum
20 trials. It's unclear why the steps involved for the IP quantum trial would not also be
21 suitable for dealing with quantum in the competition claim. In practice it should not
22 pose any particular difficulty for a single trial to address both the IP and competition
23 issues arising in relation to the overall award of the damages to be made.

24 Finally, Shein says that a global quantum trial would deprive the parties of the benefit
25 of the economist expertise in the Tribunal. But that, we say, is incorrect. As I showed
26 you in the Sportradar decision, the way to avoid this is for the Tribunal President to sit

1 in a dual capacity. That, we say, would cause no practical difficulties and would leave
2 trial 3 to deal with all quantum issues in the round. So we say that here, where there
3 is already to be a trial 3, the factors weigh really decisively in favour of dealing with all
4 the quantum issues in the round, both IP and competition.

5 Subject to any questions, those are my submissions.

6 THE CHAIRMAN: Thank you.

7
8 Submissions by MS DEMETRIOU

9 MS DEMETRIOU: Sir, this is a case where there's very large overlap between liability
10 and quantum, it's an effects case. I don't need to traverse the pleadings again but
11 you've seen that the effects case essentially pleads the same point as the case on
12 loss and the pleading, I took you to paragraph 50 and then paragraph 69.1, that the
13 question for the Tribunal is going to be whether there was an effect on competition,
14 whether the alleged infringement affected competition, by, for example, reducing
15 volumes and sales on Temu's platform and the loss is calculated by reference to the
16 profits foregone as a result of those lost sales. So there is almost an entire overlap
17 between the liability and quantum case.

18 So what that means, and you can see this, not only in the pleading but in the disclosure
19 issues and, sir, you pointed out this morning that Issue 36, which is an issue on effects,
20 you said: well, that looks quite a lot like quantum to me; and that really does illustrate
21 the very big overlap between the points. What that means in practice is that we are
22 going to have expert evidence from economists which deal with effects, which are
23 going to be central to the case on quantum. Central. And witness evidence on effects,
24 factual evidence on effects, is also going to be central to quantum. And it would result,
25 in our submission, in enormous wasted costs to have the economists come back for
26 a separate trial in circumstances where they've already given evidence once on effects

1 and that's essentially determining the quantum point save for some calculations as to
2 lost profits.

3 So we say that the substantial overlap and duplication of evidence makes the case
4 against splitting the trial clear and add to that fact that the quantum claimed by Temu
5 is just £4 million, we say that makes the case against a split trial pretty overwhelming,
6 it's plainly disproportionate.

7 Now, Mr Holmes says: oh well, don't worry about that because there's going to be
8 an IP quantum trial in any event. Two things. One is that he has made no attempt
9 to -- he doesn't even try to persuade you that the issues in IP quantum are connected
10 to the issues in competition quantum. They really are separate. But, secondly, he's
11 assuming that there is going to be an IP quantum trial and of course one of the bases
12 you have heard on which it was deemed efficient to hive off IP quantum was that it
13 may not be necessary depending on the result of the IP liability trial. So there may not
14 be an IP quantum trial, one can't assume that.

15 What then one is left with is quantum hanging over in circumstances where the
16 quantum claimed is very minor and really the expert evidence going to establishing
17 quantum is going to be pretty much the same as the expert evidence that goes to the
18 effects case. That is really the issue.

19 Sir, you will know that the economic evidence in these cases is generally very
20 substantial and very expensive. It's expensive to have economic experts giving
21 evidence twice in two separate trials on closely related and overlapping issues. So for
22 that reason we say it would be disproportionate to hive off quantum.

23 Of course, Mr Holmes is quite entitled to raise the point again but it was actually a point
24 that was debated at length in the first CMC where Mrs Justice Bacon, following
25 submissions, decided it wouldn't be appropriate to separate competition liability and
26 quantum precisely because of the overlap.

1 What are the points made by my learned friend in terms of efficiencies? He says -- his
2 first argument was that hiving off quantum means that there's then a concrete basis
3 for the calculations to take place. But really that would be a reason for hiving off
4 quantum in every single case. And in this case, in this case, there aren't going to be
5 all sorts of variables which need to be taken into account. There will be evidence,
6 factual and economic evidence, going to whether there was an effect and, if so, the
7 extent of that effect and that will be the evidence as used by the accountants to
8 determine whether or not there have been lost profits.

9 So that, in our respectful submission, is not an efficiency.

10 The second point made by my learned friend is that determining all the competition
11 issues together is liable to delay resolution of the infringement claims. We say there
12 no substance to that at all given the overlap and given that the quantification aspects,
13 so the calculation aspect, is really quite minor in the scheme of things once one has
14 debated effects. So the economists, the experts and the factual witnesses who are
15 here giving evidence on effects, will be giving evidence on the extent of those effects,
16 not just on whether there was any effect but the extent of those effects. And then it's
17 a reasonably straightforward matter to translate that into a monetary amount, which is
18 where the forensic accountants come in.

19 So what you are deferring, or what you would be deferring, is actually a minor part of
20 the trial. The disadvantage, as I say, is that one then has duplication, heavy
21 duplication of evidence at the second trial and one leaves hanging whether or not there
22 really is a plausible quantum claim in this case. We've been very concerned about the
23 plausibility of Temu's quantum claim and it would be -- we are concerned with any
24 suggestion that that is deferred and we think that the deferral, the -- any delay in our
25 ability to test that case is likely to make settlement less likely rather than more likely.

26 So we think it should be all in the mix, we should be able to test the plausibility of the

1 | loss claim and that is going to make settlement more rather than less likely.

2 | One moment please. (Pause).

3 | Yes. So Mr Al-Karim makes a good point that it's not -- my learned friend's submission
4 | that we are having an IP quantum trial anyway, so this is not really disproportionate,
5 | ignores the fact that there are separate legal teams and separate experts for the
6 | competition claim and for the IP claim. So all of the competition solicitors and
7 | barristers that appear at the liability trial will have to come back again to the quantum
8 | trial. It's not the same teams doing both cases.

9 | I think it's late in the day, I'm being fed points that I'm forgetting. Again, another very
10 | good point that I've forgotten is we accept the Sportradar point that there is flexibility.
11 | However, on my learned friend's suggestion, what's going to happen is that at the final
12 | trial of quantum there will be simply a Chair and no economist member and one of
13 | the key reasons for transferring these proceedings to this Tribunal is to have the
14 | economist member. So the suggestion made by my learned friend is: "oh, it's alright
15 | because the Chair of the Tribunal can then go and sit in the Chancery Division at the
16 | IP quantum trial to hear both IP and competition quantum". That has to be in the
17 | Chancery Division because the CAT has no jurisdiction to determine the IP quantum
18 | trial here.

19 | So my learned friend's skeleton argument says: "oh don't worry because the Chair of
20 | the Tribunal hearing competition liability can be the Chancery High Court Judge
21 | dealing with both". But that ignores the fact that we then wouldn't have the benefit of
22 | the other two members, including the expert economist.

23 | THE CHAIRMAN: Would you not be on the competition side? I thought the point was
24 | that the Tribunal as a whole can hear both but it's actually the High Court Judge that
25 | can hear the High Court element, if I put it that way. That doesn't mean that when the
26 | competition quantum issues are being considered that you don't also have the other

1 two members. I thought that's how it works. Forgive me if I'm wrong.

2 MS DEMETRIOU: Possibly in theory, but then the spectre that that creates is we then
3 have a hearing which is supposed to be -- the efficiencies then disappear because you
4 then have a hearing of IP quantum and competition quantum together, where only the
5 Chair is dealing with the arguments on IP quantum, and then suddenly the other two
6 wing members join at that stage to hear competition quantum.

7 THE CHAIRMAN: Yes.

8 MS DEMETRIOU: So there would be effectively sequential trials between the IP and
9 the competition quantum trials. That is in effect four trials, not three trials. So any
10 efficiency that you might have we say there's none in combining. My learned friend
11 says: "oh, great to have quantum, all the quantum together", but let's not beat around
12 the bush, there would be consecutive trials with different trials.

13 THE CHAIRMAN: Is that right? I'm just looking at Sportradar, what Mr Justice Roth
14 said at page 197, paragraph 43, where the issue that arose, as I understand it, about
15 potential intellectual property issues as well as competition law issues.

16 MS DEMETRIOU: I think what he's saying there is that the judge that hears the case
17 in the Chancery Division that the CAT has no jurisdiction over could be the same as
18 the Chair of the Tribunal. But he's not saying that the economists -- what can't happen
19 is that the wing members, including the economist, determine the IP quantum claims,
20 there's just no jurisdiction for that to happen.

21 THE CHAIRMAN: That's right. He says:

22 "The fact that he or she would be hearing the case in the CAT, along with two other
23 members having expertise relevant to the other aspects of the case is hardly a good
24 reason for transfer."

25 So is he not saying that the judge would consider the IP aspects, yes, of course there
26 would be two other members there who are there for the other aspects but the fact

1 that that arises is not a good reason to be concerned, in this case transfer.

2 MS DEMETRIOU: No, of course. So it's not a bar but these arrangements are of
3 course very uncommon. And what one has to ask oneself when looking at the
4 efficiency of this is: well, how efficient is it actually going to be? Is it going to be efficient
5 asking the full panel of the Tribunal to attend the whole of trial 3? Answer no. That's
6 really wasteful of judicial resources, asking the entire CAT panel, the two wing
7 members, to sit to hear the IP quantum case when they can't have anything to do with
8 that case.

9 So then one is left with the idea of having effectively with two sequential trials of IP
10 quantum and competition quantum. Otherwise you have Tribunal Members sitting
11 there listening to the IP quantum claim twiddling their thumbs when they could be
12 doing something else.

13 THE CHAIRMAN: Is this not what happened in Sportradar? If we look at paragraph
14 3 of Mr Justice Marcus Smith's ruling in the next tab he said:

15 "The October actions are what may be called a hybrid. They contain claims which are
16 going to be within the jurisdiction of a Tribunal and a panel constituted for that purpose,
17 whereas certain other claims are in the Chancery Division and will be determined by
18 me independently of the two ordinary members as a justice of the High Court."

19 MS DEMETRIOU: Yes, sir, precisely so. So what would happen -- so there they've
20 split off two aspects of the case. But here the proposal is that the aspects of the case
21 which calls for different jurisdictions would be heard together. So not at separate times
22 but together.

23 So Mr Holmes say it's very efficient to have all quantum decided together. What
24 Sportradar doesn't allow, nobody allows, because it comes back to the jurisdiction of
25 the respective courts and Tribunals, is that wing members of the CAT to decide the IP
26 quantum case. So you are going to have on any view -- the options then are that the

1 two wing members are going to be sort of sitting there when they don't have to be
2 listening to IP quantum; or, in effect, you have two sequential trials. It's in effect two
3 sequential trials, trial 3, because of the different composition of the Tribunal. And once
4 you appreciate that that does really eliminate any of the so-called efficiencies in hiving
5 quantum off.

6 Those are my submissions.

7 MR HOLMES: Sir, I have really addressed Ms Demetriou's submissions already. Just
8 two brief points: first of all, the issue in relation to counsel attending can just be handled
9 by sensible case management. The fact that there would be IP and competition
10 lawyers there, not all of whom have to be present for everything, that's how it's worked
11 at the CMCs and that's how it could work at the combined trial.

12 Secondly, we respectfully agree that the way it would work is that the Chair, who is
13 a High Court Judge, would hear the IP elements and the full panel would hear the
14 competition elements but there would still be efficiencies for all the reasons which I've
15 developed.

16 RULING (7)

17
18 THE CHAIRMAN: I now have to decide whether to split this trial between liability and
19 quantum. By an order dated 7 November 2024 Mrs Justice Bacon ordered two trials,
20 trial 1 for the IP claim and trial 2 for this competition claim, and at the third CMC Shein
21 proposed a new trial structure so the quantum of the IP claim would be considered in
22 a trial 3. As I understand it, both parties agree that liability and quantum will be split
23 for the IP claim.

24 In response, Whaleco indicated at the third CMC that they wished to consider also
25 splitting off quantum in the competition counterclaim and Mrs Justice Bacon directed
26 this issue should be determined today.

1 I was referred to the guidance of Mr Justice Hildyard in *Electrical Waste Recycling v*
2 *Philips* [2012] EWHC 38 as synthesised by Mr Justice Bryan in *Daimler AG v*
3 *Walleniusrderierna Aktibolag & others* [2020] EWHC 525 at [27]. These cases set out
4 the factors to consider when ordering a split trial. The courts have emphasised the
5 approach is to do justice, to consider costs and that the decision is essentially
6 a pragmatic one, with the factors listed in *Daimler* being relevant to the making of that
7 decision.

8 The request is to have the quantum issues on the competition claim heard in trial 3
9 together with the quantum issues on the IP claim. Although at one point it appeared
10 that Shein might be taking a point on whether there is jurisdiction to order such an
11 outcome, Shein did not press this. Ms Demetriou accepted that there is jurisdiction in
12 light of *Sportradar AG v Football Dataco* [2021] Bus LR 294. The trial could be heard
13 by Mrs Justice Bacon sitting as a High Court Judge for the IP issues, and then the
14 competition quantum can be determined by her in her capacity as President of the
15 Competition Appeal Tribunal together with the other members of that Tribunal.

16
17 Overall, in my decision this is a case that makes sense to split out the quantum issues
18 from trial 2, which will hear issues of market, dominance, liability and causation. That
19 is not to say it is appropriate to do in other competition cases. It is a decision based
20 on the facts of this particular case. This is an unusual case in that the parties are
21 agreed that there will be a quantum trial on the IP issues that will be likely to be heard
22 by Mrs Justice Bacon. In those circumstances, it makes procedural sense for all issues
23 of quantum between the parties to be determined at trial 3, with Mrs Justice Bacon
24 sitting both as a High Court Judge and as President of the Competition Appeal
25 Tribunal, with the other members of the Tribunal present for the competition aspects.

26 In this case, a split trial means that the competition liability issues could well be

1 determined sooner (and in a shorter trial), a matter I will discuss next with the parties.
2 This will remove potential delay for any other relief that may flow and have the capacity
3 to save costs. Further, it might mean that no quantum trial is needed, or may assist
4 settlement prior to any such trial needing to take place. Whaleco suggest that
5 removing quantum would reduce the liability trial by a week. In my view, having seen
6 the evidence in this case, it seems likely to reduce it by more than that. Of course, I
7 accept Ms Demetriou's point that there is some overlap between disclosure and
8 evidence going to effect and quantum but I do not consider the degree of overlap in
9 this case outweighs the considerable benefits of a split trial in this case. There remains
10 a distinction between an assessment of whether there is an effect and the
11 quantification of that effect. Finally, I reject the notion that a claim of £4 million is too
12 small a claim to make it proportionate to have a quantum trial, particularly when the
13 parties agree the IP element should be split by liability and quantum. Any issues over
14 different legal teams can be sorted out between the parties to ensure there is not
15 excessive duplication or increasing costs.

16 Overall, for those reasons I will order the split trial requested by Mr Holmes' clients.
17

18 MR HOLMES: That takes us I think to length of trial and timetable to trial. We hear
19 what you say, sir.

20 THE CHAIRMAN: Yes. I've looked at the directions and I think this is really to both of
21 you. As I understand it, Ms Demetriou, you set out in an annex 1 to your skeleton and
22 you are requesting an extension for disclosure from 28 November this year through to
23 February 2026; is that right?

24 MS DEMETRIOU: Yes. There's no actual extension to the estimate of time it's going
25 to take, it's just that we've taken longer than we'd first anticipated to get the DRD sorted
26 out.

1 THE CHAIRMAN: Yes. But it's still an awfully long time, isn't it, to February?

2 MS DEMETRIOU: That's the time on instructions I'm told it's going to take. It's
3 certainly not something we are trying to delay on but my solicitors have spoken to
4 Shein, there is an awful lot of disclosure to give, we have only looked at part of it today,
5 and it's time-consuming. There's evidence for the Tribunal as to all the different
6 businesses that Shein operates and why it's necessary to interrogate lots of different
7 sources of disclosure and information and I'm told that that is the time it's going to take.
8 So I'm not trying to incur any delay and it's not unusual in a case of this size, this
9 magnitude.

10 THE CHAIRMAN: It seems to me the disclosure should be given this year. I don't
11 think it should go through into next year. I can tell you where my mind is going is that
12 both parties seem to say that the trial of this doesn't need to take place until some time
13 in April/May 2027. That seems to me to be excessive and it seems to me the trial
14 should be taking place towards the end of November/December 2026. We are now in
15 September 2025, this case has already been proceeding for some time and it doesn't
16 seem right to me that whatever the parties may say that it should just roll over as late
17 as being suggested. I will hear Mr Holmes on it but that at the moment is my
18 provisional view, that we need to speed this up.

19 Therefore, the idea then of not doing disclosure until February, as you might imagine,
20 doesn't fit, and we are running out of time now but I may request brief submissions
21 now and then we might do it in writing. But to my mind one should be looking at having
22 November/December, or maybe late November for disclosure, and then a December
23 CMC, and then having witness statements, fact evidence in March and April and
24 looking at the expert evidence in June/July with an aim to getting a trial on in
25 November/December next year. And at the moment I can't see how that is
26 unreasonable to either of you.

1 MS DEMETRIOU: Sir, I can see why 2027 looks a long way away and I think we can
2 see what we can do to trim some of the stages. But just in terms of the first step and
3 disclosure being given in November, and just to recall that at the last CMC -- Shein
4 will need to make a significant number of Model C requests to the business, so it's
5 going to take time to identify the relevant platforms and the persons for each of those
6 requests, to make the requests and then to collate and review.

7 Shein also needs to provide Model D disclosure for the relevant suppliers on 14 issues
8 which again involves identifying, processing and reviewing significant amounts of data.
9 And that process is -- and we still haven't identified or agreed the custodians and the
10 search terms and any of that. So the idea that the disclosure is going to be provided
11 in November, I just don't think that's possible. I think that we can do what we can to
12 trim the timetable but disclosure is really the most onerous stage for us and it
13 involves -- there are also going to be translation issues that one has to factor in.

14 I don't know if you want me to show you Mr Democratis' evidence in witness
15 statements in previous CMCs but he's given some quite detailed evidence about the
16 storage, the way that there are five Shein business functions that potentially hold
17 documents and what's involved in making the requests and essentially finding the
18 documents and reviewing them.

19 I certainly can see why, sir, you want to get the trial on sooner and we are very
20 sympathetic to that but I can't commit to a November deadline for disclosure which is
21 what I'm told is just not possible.

22 THE CHAIRMAN: Let me hear, if I may, from Mr Holmes on the trial date because
23 things flow back from a trial date. What do you say about having it earlier?

24 MR HOLMES: We want it heard as soon as possible. We think it can be done in the
25 course of next year but in order for it to be done during the course of the next year
26 disclosure does need to fall within the course of this year. So we would respectfully

1 agree with your preliminary observations in that regard. We are surprised to hear
2 custodians haven't yet been identified.

3 MS DEMETRIOU: Agreed.

4 MR HOLMES: Agreed. But they have presumably therefore been identified. It's a little
5 bit difficult because no evidence has been provided by Shein for the substantial delay
6 and the reasons are very vague that have been provided so far in support of the
7 substantial delay. We were going to suggest, as a compromise, a date at the end of
8 term, so in mid-December or somewhere thereabouts. We think if disclosure were
9 done by then it would be possible to get to a trial at the end of next year and the parties
10 could liaise once a date had been provisionally specified by the Tribunal to agree
11 a timetable to propose working back from there with the Tribunal resolving any
12 disputes on the papers if that were convenient. But that seems to us a workable way
13 of dealing with this now, given the hour.

14 THE CHAIRMAN: Yes, given the hour.

15 Ms Demetriou, I think -- I'm just looking at the date of the pleading when the
16 counterclaim was raised, it was October 2023, and I am not happy for the trial to go
17 over beyond 2026. I think the trial needs to be in a window or fixed, I'm not going to
18 give a date now, but November or December 2026.

19 Looking at the time I think the parties then are going to have to work together to go
20 back from that. In my view, I'm not going to make a ruling now because what I would
21 like you to do is to produce a new timetable and send it to me, that it should be possible
22 to do disclosure by the end of this year. I don't think it's reasonable to say it can't be
23 done by the end of December. And I think particularly we are now on 23 September
24 it is enough time to give disclosure in my view and I'm not convinced of the fact that
25 it's not possible.

26 I also think not doing it by the end of this year will make it very hard to fit in all the

1 matters that need to be done to get to a trial in November/December but to me this
2 trial should be happening next year, not into 2027.

3 MS DEMETRIOU: Sir, we hear that loud and clear. What I'm being told is that we
4 think it's much more feasible to move the date of the others to compress the dates of
5 the other step. Don't forget that now, given the split trial, the overwhelming burden of
6 disclosure is on Shein rather than Temu. So it's all very well for my learned friend to
7 say: "it can all be done by December".

8 But the parties -- and of course the parties' agreement is not set in stone, but the
9 parties had actually agreed what was necessary for disclosure about 23 weeks from
10 the finalisation of the DRD and the provision of disclosure; that had been agreed by
11 the parties. That is really what we are asking for.

12 So we understand, we hear you loud and clear about the date, we will make it work
13 but I can't promise because I am being told it's not possible that disclosure can be
14 compressed.

15 THE CHAIRMAN: I am not going to push it now because I was trying to get some
16 information about this yesterday and I have no criticism but you got it at lunch, it's not
17 fair to throw it at you without you having proper consideration with your clients.

18 You heard what I say about the trial date. I would like then for you to work together to
19 get a timetable that works to get to that date because it doesn't seem to me acceptable
20 for the trial to slip over, and it wasn't even slipping over, it was going to April/May 2027.

21 MS DEMETRIOU: Yes.

22 THE CHAIRMAN: In relation to the trial timetable, again I would like you to think a bit
23 more closely about this and again I'm happy for you to write to the Tribunal with your
24 thoughts and submissions. But at the moment it seems to me it is far too long. On
25 excluding competition issues my view is it only requires two days of opening
26 submissions. I think five days of factual witnesses seems enough, unless any party

1 has a specific issue why seven days would be needed. And at the moment two days
2 of expert evidence would seem, from what I've seen of the papers, to be sufficient.
3 I think there should be two days for preparing closing submissions and the two days
4 of closing. So a far more restricted trial. I know it's not what necessarily you are used
5 to in competition cases but in my view once one starts getting up to four/five/six
6 weeks -- on what I have seen of this case there's no need for that in this case.

7 MS DEMETRIOU: Did you say two days for expert evidence?

8 THE CHAIRMAN: I'm prepared to push that to three but no further. And I stand by
9 five for fact witnesses. That may get less because I don't what fact witnesses you
10 have, you haven't come here with any understanding of what you have on fact
11 witnesses.

12 MS DEMETRIOU: Sir, that's a fair point. One question is that we also haven't yet got
13 to the point where we are asking for permission for expert evidence and I think it may
14 not just be expert economists but potentially experts on Chinese law because the
15 supply agreements are governed by Chinese law.

16 THE CHAIRMAN: Fair point. Although the cross-examination of foreign experts on
17 the whole is not extensive normally, even for Chinese law. I take your point. This is
18 what I was trying to get my head round as to what is it -- I'm not prepared to put a trial
19 in that is just six weeks because we are guessing.

20 MR HOLMES: We were mindful, sir, just to explain on the factual evidence, the fact
21 that a number of our witnesses are likely to be non-native speakers and some of them
22 require translation facilities which will slow matters down inevitably, but we can put our
23 heads together.

24 THE CHAIRMAN: I think I would like you to put your heads together. We are not
25 going to make a decision now because I only got this at lunch and it's not fair on you
26 on that. But equally, you've heard my view which is, you are going to have to be much

1 more specific as to why you need the time because to me that is also one of
2 the benefits of the split trial, that we can streamline it and get this on in 2026 in
3 a reasonable timeframe.

4 MS DEMETRIOU: Sir, one clarificatory question on your ruling as to the splitting of
5 quantum. I am assuming, but please tell me if I'm wrong, that causation remains with
6 liability because that really is bound up.

7 THE CHAIRMAN: Yes.

8 MS DEMETRIOU: Thank you.

9 THE CHAIRMAN: What I suggest is that within the next seven days you could provide
10 information about a proposed timetable. If you can agree it that would be obviously
11 preferred; if you can't agree it then set out the areas of disagreement, and likewise on
12 a timetable. I do see there's only so far can you go when you don't actually know the
13 witness and we haven't got down to the -- equally at the moment, no offence, but it's
14 about as generic as one could possibly get, and I struggle to see how one would need
15 more than four or five -- well, a whole week of evidence, both facts and witness, or -- it
16 may just tread over but I certainly don't think you would have what you have here, so
17 I think we are going to have to --

18 MR HOLMES: Can I ask one very brief question just to get a sense of your reaction
19 to it. You would be envisaging perhaps a November CMC? It occurs to me that active
20 case management is likely to be required to get this through to trial by December. You
21 may not be in a position to say one way or the other but is that something the Tribunal
22 might be prepared to entertain?

23 THE CHAIRMAN: Yes. Again, in your timetable I had hoped for a CMC towards the
24 end of this year after disclosure. If in fact it's not possible to do the disclosure by the
25 end of this year, and I hear what Ms Demetriou's clients have said, then I think we will
26 need a CMC. Whether we need one before the end of this year depends on what's

1 | happened because there may not be -- if anything happened.

2 | Certainly after the disclosure has been given I am anticipating there will require
3 | a CMC. I'm also very understanding and alive to the fact that with a tighter timetable,
4 | although in my mind over a year is not that tight a timetable, but with a tighter timetable
5 | requires greater case management, and again we can put some CMCs in. I ask you
6 | to put a new timetable basically.

7 | MR HOLMES: I am grateful. It may be the parties could give some thought to rolling
8 | disclosure as well as a way to ensure that --

9 | THE CHAIRMAN: Let's see. Don't bite off more than we can chew at the moment.

10 | MS DEMETRIOU: There is just one classificatory question -- sorry, I see the time --

11 | THE CHAIRMAN: I know, we have to stop.

12 | MS DEMETRIOU: -- on Shein's disclosure, and just because this is going to feed into
13 | the timing of it, I think I recall from earlier that on the effects disclosure there were
14 | some narrow categories that Shein has to provide, although you rejected most of them,
15 | but you said that insofar as they apply to Shein they really go to quantum. So can
16 | I take it that those don't have to be provided early, given that quantum's been split off,
17 | because I think that would assist.

18 | THE CHAIRMAN: I will have to review which bits you are talking about before I do
19 | that. My understanding is anything I ordered was because I decided it didn't go to
20 | quantum. I was trying to be careful not to order things -- I'm not sure I agree with you
21 | in what you just said.

22 | MS DEMETRIOU: Okay.

23 | THE CHAIRMAN: Is there anything else for today?

24 | MR HOLMES: No, thank you --

25 | THE CHAIRMAN: If you get that to me as soon as you can, and then I think there are
26 | some other things that you have to do in 21 days or whatever statement and the like,

1 and then we can see where we go after that.

2 Thank you very much.

3
4 **RULING (8)**
5

6 The parties suggested that the trial in this action should take place at the end of
7 April/May 2027. I have no idea why it is thought that this trial should take so long to
8 come on. I direct that the liability trial of this competition claim will be heard in
9 November/December 2026. A benefit of the split trial is that it permits a considerable
10 streamlining both in the timetable to trial and for the trial itself.

11 Within the next 7 days the parties shall submit to the Tribunal proposals (or if possible
12 an agreed proposal) for the directions to trial, in order to achieve a trial from November
13 2026. This should include provision for further CMCs for active case management.
14 Further, the parties should at the same time propose a trial timetable.

15 My provisional view is that the trial will require 4 days' pre-reading, 2 days of oral
16 opening submissions, 5 days of fact evidence, 3 days of expert evidence (taking
17 account of the potential need for experts in Chinese law and simultaneous translation),
18 2 days for preparing closing submissions, 2 days to read the closing submissions and
19 then 2 days for oral closing. Excluding pre-reading, that would lead to a trial of 12
20 hearing days (i.e. excluding time for writing and reading closing submissions). There
21 will be a strict page limit on expert reports of 100 pages and page limits on written
22 submissions which can be discussed at later CMCs.

23
24 **{4.50pm}**

25 **The 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?