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IN THE COMPETITION

Case No:1527/7/7/22

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Friday 14 June 2024

Before:

Ben Tidswell
The Honourable Lord Richardson
Derek Ridyard

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Class Representative

Alex Neill Class Representative Limited

V

Defendants

**Sony Interactive Entertainment Europe Limited and Sony
Interactive Entertainment Network Europe Limited**

-and-

Interveners

Competition Markets Authority

A P P E A R A N C E S

Robert Palmer KC, Fiona Banks & Antonia Fitzpatrick for Alex Neill Class Representative Limited (Instructed by Milberg London LLP)

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Friday, 14 June 2024

1 (10.35 am)

2 (CMC hearing)

3 **THE CHAIR:** Good morning, everybody. We have our usual live screen warning as
4 we are being live-streamed. An official recording is being made and an authorised
5 transcript will be produced, but it is strictly prohibited for anyone else to make an
6 unauthorised recording, either audio or visual, of the proceedings and a breach of that
7 provision is punishable as a contempt of court.

8 Thank you. Welcome, everybody.

9 Mr Palmer, I think we have a pretty clear agenda and we were planning to go straight
10 into the hot hub.

11 Just before we do that, is there anything else to add to the agenda; can we treat that
12 as being complete?

13 **MR PALMER:** I don't think so, I think there are some things that probably have been
14 agreed or can be minimised later on, but yes.

15 **THE CHAIR:** That's very helpful. Can I just say on timing, it would be useful if we
16 could finish at 4.15 pm. We don't want to take time away from you, I don't know
17 whether you feel we will need all that, but if by lunchtime you think we might need the
18 extra time, we would be happy to shorten the short adjournment and shave half an
19 hour off to give you some time back. So you might just bear in mind, when we get to
20 that point, whether you think you need it or not. If we don't, obviously we don't.

21 **MR PALMER:** We will see how we go with the hot tub.

22 **MR BEARD:** Yes, I think it's very unlikely because beyond the hot-tub I think we have
23 one or two issues. We have issues on the nature of expertise, we have one or two
24 issues -- we probably have issues in relation to timing and then we have some issues
25 in relation to disclosure, but they actually fall more into the timing category than the
26 substance category, I think. Therefore, I wouldn't envisage that we are going to need

1 all that time.

2 **THE CHAIR:** Let's see how we go and we can always review that at 1 pm.

3 With that we will jump straight to the hot-tub.

4
5 **Evidence of MR HARMAN and MR COLLEY**

6 **THE CHAIR:** Mr Harman, Mr Colley, welcome, thank you very much for joining us and
7 for the useful material you have produced so far. We are not going to administer an
8 oath to you and in that sense this is an informal discussion, but of course it's one in
9 which we expect you to fulfil your expert duties to the tribunal and I know you are both
10 very familiar with those.

11 I see you have some water. I think you were going to be given some bundles. I don't
12 know whether any of those are available, if you want to refer to them. Obviously, a
13 matter for you or indeed (inaudible) if we ask you to look at anything, but I want to
14 make sure you have your short reports and earlier reports if you need them.

15 I think it should have been clear from the correspondence, including some various
16 letters in the last couple of days, that this is about making sure that you, as experts,
17 are aligned on the key issues that need to be addressed by you and that your approach
18 to covering those issues has a sufficient degree of consistency to ensure the process
19 works efficiently.

20 There may have been some confusion about the word "alignment", it does not mean
21 we expect you to agree either on the answers or indeed necessarily on the
22 methodology. What we do want to make sure is that you are alive to and able to deal
23 with, in your primary reports, all of the issues not just the ones that you are -- that
24 emerge from your favoured approach, but that you are addressing each other's cases
25 or approach. So all know the key issues upfront. And as you will have picked up,
26 I expect we would at the moment favour a simultaneous exchange rather than

1 sequential exchange and we think that by making sure you are all on the same page
2 that it should be not only doable but also more efficient in terms of timetabling.

3 That's the point. Just to be absolutely clear, we are not intending to form any
4 conclusions about the best methodology to establish a point, or the correct answer to
5 any issue, or to give any indication to the parties about our thinking of either of those.
6 So if you are thinking we are doing that, we are not.

7 That is all entirely a matter for trial and that is the reason why we are not inviting
8 questions from counsel. Just with that preamble, any questions? I am sorry.

9 **MR PALMER:** There is an echo on your microphone which makes it slightly hard to
10 hear what you are saying. I wonder if it would help if you push the microphone slightly
11 further away from you.

12 **THE CHAIR:** Is that better?

13 **MR PALMER:** It is better.

14 **THE CHAIR:** I hope it didn't hurt anybody's ears too much. Have you any questions,
15 either of you, before we get going?

16 **MR COLLEY:** I haven't actually.

17 **THE CHAIR:** Good. Thank you very much. I will hand over to Mr Ridyard to lead the
18 discussion.

19 **Questioned by MR RIDYARD**

20 **MR RIDYARD:** You've had the list of questions and topics that we would like to cover
21 in the session. The plan will be for me to -- I will more or less alternate between you
22 as to who goes first, and I will give both of you a chance, obviously, to respond on
23 each of the topics.

24 Also, just a reminder, that although I am leading the questions, all three of us are
25 interested in the discussion and the answers and I am sure my colleagues will chip in
26 with supplementary questions or clarification points as we go through. I always say at

1 the beginning of these sessions it is important that you do realise you are
2 communicating to all three of us, not just to one member of the panel.

3 With that background, let us kick off. Our first topic was market definition. I think it
4 probably make sense, Mr Colley, if you go first on this first topic and that is really
5 a question about the SSNIP test framework.

6 Do you consider that that is the appropriate and useful framework to use when we
7 assess market definition in all its various guises in this case and, if not, of those
8 alternatives what alternatives are you going to propose?

9 **MR COLLEY:** Yes, sure. Perhaps I can begin on market definition by just going back
10 to something that came out in my first report. Just to be clear, I will be looking at
11 systems market, two-sidedness, I will also be looking at, if there is in evidence a
12 (inaudible) market, on a sort of Balkanised basis, each of the separate markets that
13 Mr Harman has suggested and all of the evidence that I pointed to in that report go to,
14 you know, allow me to assess each of those markets individually, so customer
15 substitution, et cetera.

16 I think in terms of market definition on the SSNIP test, I think actually both Mr Harman
17 and I -- I won't speak for you obviously -- I think you see from the joint -- the summary
18 of the joint meeting, you know, we agree that the SSNIP test is a useful framework,
19 but it's ultimately going to come down to quite a lot of, I think, judgment about the
20 factors that are at play. So obviously, we want to think about how customers would
21 respond to changes in price, that's the SSNIP framework, that's a mechanism by which
22 we assess substitution.

23 There are additional wrinkles here because of the indirect and direct network effects
24 associated with two-sidedness, I think getting a landing on the precise elasticities that
25 are at play there means going to, I think, descend us into a spurious accuracy.

26 I don't think are we going to be able to come up with a sort of critical cost analysis that

1 we can resolve to the second decimal place, I don't think we are going to be able to
2 do that, but we are going to use the SSNIP -- or I am going to use a SSNIP
3 framework -- (inaudible) take a view suddenly -- I am going to be using the SSNIP
4 framework and I think that's a sensible framework to apply.

5 **MR HARMAN:** Thankfully I agree with mostly what -- pretty much everything that has
6 been said. Obviously, there are issues to be considered in terms of systems markets
7 and two-sided markets, but I think the SSNIP test, hypothetical, the hypothetical test
8 is able to deal with those appropriately.

9 I agree on the degree of accuracy of a critical loss. I think it's widely recognised that
10 in abuse cases it's often difficult to determine the loss for changes in price,
11 econometrically because often there is just not the data to do that, but there is
12 a framework that is based on the SSNIP, an economic framework, that allows you to
13 think through on a quantitative and qualitative basis. You know, the things that need
14 to be considered in terms of demand side, supply side, geographical scope.

15 I think we are probably alive on many of those types of issues that you would think
16 about. You would think about observed relationships between prices and substitution
17 and sales. You would think about customer behaviour and what their preferences are.
18 You would think about differences across the market from a technical perspective or
19 what they offer. You would have regard to what Sony internally thinks about the
20 competition in the marketplace. You would think about analysts' reports and how they
21 see competition, and any stated views from customers.

22 So some of that is quantitative, some of it is qualitative, but I think in general the
23 approach is a preponderance of evidence type of approach that one has to bring that
24 together and ultimately there'll be a judgment as to which way that evidence is
25 pointing.

26 **MR RIDYARD:** Again, the point is you both signed up to the notion that the market is

1 something worth monopolising and then how you piece together the clues to try to get
2 to an answer to that question obviously will be something that will take up some time
3 and effort, but --

4 **MR COLLEY:** I want to come back, apart from spurious accuracy point, obviously
5 I think it's worth trying to push the quantitative analysis as far as you can within reason.
6 You mentioned econometrics there. I think econometrics will have a role to play here,
7 I was scratching my head slightly when I first heard the idea that I was involved in
8 an anti-trust litigation and people were questioning whether we should be using
9 econometrics. Absolutely that has a role to play. It allows you to control the various
10 factors in trying to isolate the customer responses that you are trying to get to.

11 So I think that's recognised I think you recognise that. I got the impression that you
12 were sort of suggesting that maybe there were too many things to control for and it
13 was beyond the wit of us to be able to control them econometrically, but I think I will
14 agree with. So I think econometrics will have a very significant role to play and we
15 then need to look at areas where it isn't answering all the questions, and that gets us
16 to, you know, the areas of judgment around these sort of factors.

17 **MR RIDYARD:** Just so I understand, are you talking about econometrics and
18 customer reaction, you are talking about critical loss analysis?

19 **MR COLLEY:** Yes, I think the SSNIP framework is going to inform the critical loss
20 analysis, that's right.

21 **MR RIDYARD:** What would you be modelling?

22 **MR COLLEY:** What econometrics allows you to do to try and control for various
23 factors and try and look at how customers are behaving in response to perhaps
24 particular events in the market. So that might be, for example, the release of a new
25 game on a rival system or at least, as I understand it, there are instances, I think this
26 happened on Grand Theft Auto -- it's not a game that I play very much -- there was

1 a release of certain elements of the game on one system, rival system -- maybe the
2 word "rival" is in dispute -- but that can allow us to test how customers on the Sony
3 system responded, you can look at how those responses varied across different types,
4 different cohort of customers and in particular if you can isolate customers who appear
5 to be multi-homers versus ones that aren't, you can look at what happens when
6 cross-progression or cross-commerce is introduced on particular games, and see how
7 customers respond.

8 All of that you would need to do econometrically because you need to control and you
9 want to compare across different customer groups, and that gives you insights into
10 general substitution and it may allow you to actually construct reasonable estimates
11 of how customers might respond to a hypothetical price change.

12 **MR RIDYARD:** Are you talking about -- obviously Sony will have some data about
13 that, particularly as fits their customer profile, are you talking about other data that you
14 can use for that, is there public source data for any of this?

15 **MR COLLEY:** Well, we are economists, we will try and use any and all data.
16 As I understand it -- and this is a sort of, you know, a very initial view, I haven't got my
17 hands dirty on Sony data yet at all -- but as I understand it, there is, you know,
18 potentially significant granularity around customers and customer usage and
19 potentially gaming as well as purchase. So I think that's potentially going to be a rich
20 source of data. And obviously we would look to supplement that with whatever public
21 data we can if possible.

22 **MR RIDYARD:** Any reactions to that?

23 **MR HARMAN:** No, not really. I think that if the data is available, obviously one will
24 consider using quantitative techniques. My experience tells me that it's often very
25 difficult, but I don't let that change the way in which I'm going to go about things.
26 Obviously I will look at the data and see to what extent one has some findings. It

1 doesn't have to be to the second decimal point, but if it's spurious, then we will have
2 to add that to the mix and say we have concerns about that and it will be for yourselves
3 obviously to consider what weight should be placed on it, but we are equipped to do
4 that analysis and to respond to that analysis.

5 **MR RIDYARD:** Okay. Then still on the market definition question at a fairly general
6 level. We had a query about the cellophane fallacy and its possible applicability here.
7 I don't think either of your short reports dealt with that explicitly.
8 Anyway, Mr Harman, do you have any thoughts on that and to what extent you will be
9 taking that into account and whether you have any thoughts on what the challenges
10 would be?

11 **MR HARMAN:** I think the cellophane fallacy becomes an issue with certain types of
12 analysis, and I think where the cellophane fallacy is probably more problematic is
13 when you are looking at things empirically because you are actually starting empirically
14 with prices that may well be at monopoly level or close to monopoly level or kind of
15 diverts from the normal assumption of the HMT that you are starting from a competitive
16 price.

17 So that's a general issue and one would need to factor into the quantitative analysis.
18 Liam will have some thoughts on that, but I'm sure it's complex as to how one gets
19 around that because in essence one is having to try and abstract away from prices
20 that one observes to potentially prices that are at a competitive level and that can --
21 I think other types of analysis that I explained or quantitative I think isn't necessarily
22 reflective or influenced by the cellophane fallacy to the same extent.

23 **MR RIDYARD:** You mean qualitative.

24 **MR HARMAN:** Qualitative, sorry. To the same extent and I think the third thing
25 I would say on this issue is, at the end of the day, I think that one has to be concerned.
26 I think it depends on how it impacts the analysis. It may turn out that there's agreement

1 between how the markets are defined irrespective of the cellophane fallacy. But
2 obviously we will have to shine a lens on results for this issue. It's an issue that's often
3 overlooked in analysis, in my experience. But given that there is a suggestion here in
4 this case that the prices may be above a competitive level, then clearly it's an issue
5 that needs to be considered.

6 **MR RIDYARD:** It would be fundamental to your case, isn't it?

7 **MR HARMAN:** Yes.

8 **MR RIDYARD:** Mr Colley, what are your thoughts on that?

9 **MR COLLEY:** I think we are all clear on the problem. It seems to me that -- and it
10 can be a problem -- it's flagging a potential circularity, but it also introduces another
11 circularity in trying to resolve for it. And so, you know, the way I would deal with it is
12 to -- it's a wood for the trees point. It's, you know, you need to take a step back and
13 look at the market in the round if you are ever in a position where you are trying to
14 hang your hat entirely on a critical loss analysis. We have already mentioned issues
15 around problems with doing that.

16 I would look at the history of the prices in the market and before we jump to
17 a conclusion that we can ignore any critical loss analysis that suggests a wider market
18 because that's exactly what we'd find for a monopolist, so this must be a monopolist.
19 I would challenge that and test that against well, how have prices evolved over time
20 including when, you know, Sony had a smaller market share, or what have you, and I
21 would look at prices of competitors. So, are we saying everybody is a monopolist if
22 they are charging similar prices?

23 So I think there are ways of stress testing the cellophane fallacy itself and we need to
24 do that, we need to do all of that and look at that in the round.

25 **MR RIDYARD:** I think that is probably as far as one can take that point. It may well
26 be something that causes some headaches further down the line.

1 The next question on market definition is much more generic, but I am very interested
2 to know how you are going to deal with this and that is clearly in the short reports
3 there's the notion of looking at the systems market, the whole thing in one go, and then
4 there's the argument of that breaking down the markets into the various component
5 parts, the various complements which go to make up a games system.

6 I think, Mr Harman, it may be sensible for you to go first on this one. Can you say
7 something about what you think -- how you think economic expertise can help us to
8 determine whether we should be looking at the whole thing as a holistic system market
9 or at what point do we decide that it's relevant to look at independent elements as
10 markets in themselves? How can economics help to inform that assessment?

11 **MR HARMAN:** I think the answer is it's partially in part because I think the factual
12 element will be important as to what consumer preferences are, how Sony prices
13 and so on and so forth.

14 But from an economic perspective, one of the central tests -- and when we are talking
15 about systems here I guess it's, you know, the alternate to that is an after-market type
16 framework and I think there are two elements to that. The first element is to what
17 extent do consumers, whole life cost and price -- how does -- when they are thinking
18 about both elements of consoles and games, to what extent do they take the whole
19 cost of that into account when making their decision, either upfront or if there was
20 a SSNIP, and what would they do, would they change?

21 I think that the economic framework thinking about that is -- can be broken down into
22 a number of components. The first component is the degree to which a consumer,
23 when purchasing a console, takes into account the level of games that it will buy in the
24 future and the download content associated with that. And I guess the issue there is
25 they would need to understand, for example, how many games and how much content
26 they are likely to need and over what period of time. So that will depend on the ease

1 of customers doing that, it will depend on whether customers actually do that, and
2 I think that that will be the first critical part of the analysis.

3 The second part, where economics may tell us something, is what are the relative
4 prices on -- in the system and you may get different outcomes depending whether the
5 prices in the after-market are high or low, as economics will tell us something about
6 that.

7 **MR RIDYARD:** The margins rather than prices. You can't really compare the price of
8 a console versus the price of a game, can you?

9 **MR HARMAN:** Yes, but if you are whole life -- if you are whole life costing, that's
10 effectively what you would have to do, you would have to think about the cost of the
11 purchase of the console and the cost of the games in aggregate and the question is,
12 I suspect, if the price was very low, then maybe you don't think about the costs of the
13 games, because it's not something that's significant by reference to the price of the
14 console. If they were very expensive, then you might say well, it would be -- it would
15 be sensible for them to do it because that's going to be the main element of the cost
16 of doing so.

17 **MR RIDYARD:** You are suggesting that your test here is whether consumers are
18 myopic or not. If it turns out the consumers don't have a clue about or don't think about
19 the games consequences of their console choice, then that will lead you towards
20 separate markets whereas if they go in with a fully costed spreadsheet every time they
21 turn up to buy a console, then you might be persuaded that it's a systems market.

22 **MR HARMAN:** Yes, I mean, I think that's the framework that I often see. The question
23 is that having bought the console are you suddenly going to wake up when you are
24 buying the games and think "oh, my God, I had no idea that I was going to be
25 overcharged for the games. I wish I hadn't done that". And if you are concerned about
26 that, then it's likely to be a systems market and you would have to think about that

1 together.

2 I think there's the second element, so the wholesale costing approach is a principal
3 part, but it's also, as your question determines, is there independent demand for the
4 services and that's a question that has to be asked. It's slightly more difficult in this
5 case because there isn't an alternative for consumers currently on the Sony
6 ecosystem, but the relevant question is if there was an alternative in digital distribution,
7 would they be able to or would they want to switch to that alternative?

8 And I think where we need to -- what we need to consider there is consumer
9 preferences, primarily around -- when they buy the console, what are they actually
10 thinking about? What are the elements of the system that are in their mind? Is it that
11 it is the console, is it the console and the software, is it because it's an integrated
12 system? And we will need to try and assess what the consumer is actually purchasing
13 and what is fundamentally important to them and ultimately what distinctive value
14 comes out of the Sony ecosystem that consumers find attractive and are willing to pay
15 for.

16 **MR RIDYARD:** Where do you think you are going to get this type of information from?
17 Is this consumer attitude surveys, do you think that will be the key input into that?

18 **MR HARMAN:** I think there's likely to be a number of areas that are going to be
19 informative. It's the type of analysis that I expect Sony will have performed because
20 that will inform how they go about pricing, how they go about thinking about the
21 markets.

22 I think that consumer survey analysis in its various forms may be helpful. I think that
23 there will be industry reports that go into what are the drivers of values. I think that
24 there can be a role for a technical expert in trying to identify what, within the Sony
25 ecosystem, is distinctive and could not replicated by others.

26 I think that there are probably some natural experiments, I can think of three. At a

1 point in time, Sony allowed a different operating system and that might tell you
2 something about whether people had independent demand in that case for software.
3 You could look at the physical market, obviously there are different stores that are
4 selling the physical disks historically and that might tell you something about people's
5 difference of preferences in terms of what is distribution. And we may also look
6 at alternative distribution systems where we see, for example in the PC market, that
7 there are different digital store fronts and therefore people may have a preference for
8 how content is delivered to them.
9 So I think there is a wealth of information that's likely to be informative.

10 **MR RIDYARD:** (Inaudible).

11 **MR COLLEY:** Thank you. So can I just start, Mr Ridyard, sir, your question, you are
12 focusing on economic expertise.

13 **MR RIDYARD:** Yes.

14 **MR COLLEY:** Is that to draw a distinction between, say, factual evidence within Sony,
15 the way it prices the consoles versus the games, so for example --

16 **MR RIDYARD:** Not necessarily, I was just curious as to -- it was this notion of
17 independent demand. I was curious as to what that means and whether, if it has
18 a meaning to an economist where we can use economic principles to distinguish
19 between what is independent and what isn't, I think was my specific motivation for that
20 part of the question.

21 **MR COLLEY:** Okay, got it. So it seems to me that -- I agree that key factor -- well,
22 independent demand is focusing on the demand side. I think we also need to look at
23 the supply side.

24 On the demand side, absolutely agree, we need to look at whole life costing. I think
25 there will probably be, I would have thought, you know, internal customer research
26 around that from Sony. That remains to be seen. But we could also look at evidence

1 in the market, you know, factual evidence around are there websites that allow
2 customers to whole life costs, for example. That would suggest that, you know, that
3 there are some customers who are doing that.

4 But I think part of your question is well -- and you put it very well -- which is well, if you
5 conclude that that doesn't happen a lot or enough and that consumers are myopic, is
6 that end of the market definition? Does that kill the systems market sort of approach.

7 I think we need to look at the supply side as well because, irrespective of the sort of
8 level of myopia, I think we want to look at whether there is pricing by Sony that takes
9 into account the margin it's going to generate from the games. And, you know,
10 whether any high margins associated with games are, I think, to use a phrase that
11 I have certainly heard you use and you may have coined, refunded in advance in the
12 primary market. And so I think all of that goes into the assessment of the systems
13 market.

14 Now, when we start to think about looking at this sort of Balkanised approach and
15 breaking it all up, I think the independent demand point, I think, bites most heavily on
16 is there a separate software point. I mean, clearly there is a demand for -- well, that
17 remains to be seen, I think that is where most of my concerns would be around this
18 independent demand point, that, you know, have we just created, by asserting there
19 might be a separate software market, the idea that there must be some kind of
20 independent demand? So I think it's worth looking at the example that Mr Harman
21 cites there.

22 But yes, I think that's -- there's a danger of that being very circular, I think.

23 **MR RIDYARD:** I think that is maybe what might have been partly behind the question.
24 Independent demand -- if a system is completely closed -- and I'm not talking
25 specifically about gaming system -- but in general, if it is completely closed, then there
26 won't be an independent industry selling components because the closed system has

1 closed that off. So one is assessing independent demand, one is assessing whether
2 if the system were broken up would people be interested in buying individual
3 components as opposed to buying a system?

4 I'm just not -- I'm just interested to know at what point do you say yes, there is
5 independent demand on or no, there isn't? I'm not sure that looking at the economics
6 of this is going to give you a good insight into the answer to that question, but if you
7 think it does, then I'd like to know --

8 **MR COLLEY:** I think I would say the economics has a role to play and there is another
9 wood for the trees point here, I think. If you look at the classic case of, you know,
10 Windows and Media Player, was there an independent demand for different media
11 players, then, you know, there's a sort of obvious judgment that people could quite
12 quickly reach, I think.

13 Is there an independent demand for a separate software on the Sony system, I think,
14 is a -- I would say is a wood for the trees assessment.

15 Is there an independent demand for -- your point is there's demand for alternative
16 distribution on the same platform. I think economics has a role to play, but perhaps,
17 I think, back to the Chair's starting point, I think we can all agree on the question, and
18 yes, you know, the answer will take some thinking about.

19 **MR RIDYARD:** Is there anything else to come back specifically on before we move
20 on. We are going to have to go to market more generally in a second.

21 **MR HARMAN:** Then I can pause.

22 **MR RIDYARD:** I think my question -- my first question on after-markets was really
23 down to this question of consumer's approach and myopia because I just want -- if you
24 did -- if one was to do that analysis and we find that consumers are a bit myopic or
25 very myopic indeed, you would expect there to be consequences from that, you would
26 expect suppliers to -- in fact, you would expect suppliers to then compete harder in the

1 primary market because of the attraction of locking in these myopic consumers in the
2 after-market and therefore you could get this phenomenon where that's where you
3 would maybe expect to get this sort of water bed effect that, I think, Mr Colley, you
4 have mentioned in one -- in your report.

5 So let's say one was to find that there was -- consumers didn't think about the
6 consequences of their console choice, that would lead to maybe a certain expectation
7 about how prices get set in the market, but would it strengthen the case for looking
8 independently at the two elements or strengthen the case for looking at it as a system.

9 **MR COLLEY:** It kind of builds up the point we were just discussing that absolutely it
10 essentially, irrespective of degree of myopia, there is competition in the primary market
11 and that is, you know, sort of baking in, the expectation, the hope and expectation by
12 Sony of making money on the games into the console price. Then that would lead me
13 to conclude this is more of a systems market, and that any market power, if you look
14 narrowly and in a blinkered way at the after-market, is, once you zoom out, you see
15 that actually competition is working pretty well.

16 Now, I think there's probably a spectrum here of after-markets, aren't there, and the
17 one I was referring to earlier was the payment protection insurance situation where
18 the CMA concluded that you had vigorous competition on credit products and that
19 when it came to signing in blood for the credit agreement, the customer was sort of hit
20 over the head with an exorbitantly priced credit insurance product, they were sort of
21 ambushed. That's about as far away as you can get from customers sort of potentially
22 whole life costing and all the rest of it. And also, in that situation, they could always
23 choose not to take insurance product. Here the game is actually -- it is the product,
24 it's part of the product.

25 So I think it would have to be -- it would have to be a very, very high level myopia for
26 us to be concerned that this trumps the other analysis on the supply side that actually,

1 irrespective of that level of myopia, there is strong evidence that there is competition
2 for the customer in the first place and that any high profits in the after-market are being
3 competed away. So I think you need to look at the supply side and the demand side.

4 **MR RIDYARD:** Any thoughts on that? Because this notion there maybe there is a bit
5 of myopia or a lot of myopia even, does that strengthen the case for looking at the
6 systems market as a whole or the independent elements?

7 **MR HARMAN:** Without, you know, obviously treading too much on our economic
8 thinking on these things, I generally believe that if one is short sighted and you are not
9 whole life costing, then you tend to be in the world of an after-market and not a systems
10 market. I have recently done a case on this very issue. And the vast majority of
11 economic cases into it conclude that there are after-markets because of this myopia
12 in effect.

13 So I think that is going to be a fundamental issue as to whether there is a systems
14 market or not. The concern is obviously, once being locked in, if you are not thinking
15 about the prices, it opens the scope for a dominant undertaking to abuse the
16 marketplace because you are stuck in the system -- you are stuck in the after-market
17 context.

18 I think that one will have to look at the incentives of the pricing. I don't think that it
19 naturally follows that in an after-market setting the primary product is set at a loss. It
20 may be, but it also may not be. I think there's a different economic thinking when you
21 get to the two-sided market element where I think there a stronger potential --

22 **MR RIDYARD:** Let us not go there yet.

23 **MR HARMAN:** But we won't go there yet. But as part of the analysis, we have to
24 think about whether there is a cross-subsidy between the two. But irrespective of
25 whether the prices in the console market are lower so that you can capture customers
26 in the distribution end of the market, I think it opens up the competitive concern that

1 once you bought into the system, the after-market system, such that I shouldn't use
2 the word "system" in that, but once you are in the after-market you have very little
3 alternative, and that is where the concern about an abuse arises.

4 If you go in with your eyes wide open, then you are not going to be surprised in the
5 after-market because you've -- you know, you are able to determine with some degree
6 of certainty what those costs would be. So a case might be, for example, that if you
7 had one service in the primary market which was a contract for five years and in the
8 secondary market you also purchased in the secondary market for the same length of
9 time -- and I can give context to that, one of the cases I was working on is data centres
10 and connectivity markets -- and what we found in that case was that when a customer
11 entered the data centre, it contracted for connectivity over exactly the same period of
12 time. So they went in with their eyes wide open as to what the charges were, they had
13 choices going into the marketplace which is at least a constraint on both sides of their
14 primary and secondary market.

15 Had they gone in and not really considered what the connectivity prices were going to
16 be, then I think we end up in a different position, i.e. there is a chance that having gone
17 into the data centre market the telecom operator in that case could have increased
18 connectivity prices.

19 **MR RIDYARD:** You mentioned the subsidiary term and I notice that's quite prominent
20 in your short report and indeed in your previous reports. Can you just say a few words
21 about what you mean by "cross-subsidy" and how -- yes, when we need to determine
22 that cross-subsidy exists and doesn't exist.

23 **MR HARMAN:** Well, I think there's a variety of things that can be done to determine
24 that. The first is, I think --

25 **MR RIDYARD:** Sorry, I'm asking what is it, not how you measure it. What do you
26 mean by cross-subsidy?

1 **MR HARMAN:** Well, I think what we are talking about there is that you have priced
2 down in the primary market and priced up in the secondary market such that if they
3 were independent markets you may end up with a different price structure.

4 **MR RIDYARD:** The pricing is different than if they are a purely standalone operation.
5 So just a console manufacturer, for example, who just did consoles, then you would
6 get a different price than if you got a console manufacturer who has an interest in the
7 games market.

8 **MR HARMAN:** And I think the concern there is, you know, essentially that you have
9 decided to take a lower margin in the console market because you are going to make
10 it up in the after-market.

11 **MR RIDYARD:** Yes.

12 **MR HARMAN:** And the question is (a) is that what Sony actually does? Does it
13 actually think in those terms? Does it set the price of each independently or jointly,
14 bearing that in mind? Does it have an awareness of what it actually needs to have as
15 a return on both sides of the market? But also, as we get into my methodology, there
16 are bottom-up approaches that can be used to assess the degree to any
17 cross-subsidy. Is there evidence that it exists? And if it does exist, how material is it
18 and if it does exist, we will be able to factor that into the analysis.

19 **MR RIDYARD:** I mean, if one was to make losses in the sale of consoles and sell
20 them for less than it costs to make, fair enough, but how do you deal with situations
21 where, you know, it covers the cost of the console that might nevertheless be less
22 than -- price might nevertheless be less than it would have been had there been no
23 interest in the after-market, how do you assess that situation?

24 **MR HARMAN:** I think the approach that we take to consider excessive pricing more
25 generally is informative as to what level of costs would be expected to be recovered
26 in each of the marketplaces. So if we envisage that -- and this is just one line of

1 arguing -- if we believe that in a competitive market, consoles would need to adjust
2 prices, and if it's standalone then one can consider what are the economic costs of
3 that business and how do they compare to prices.

4 Under an assumption that in many competitive markets over time firms will earn
5 a return on some cost base measure, there is obviously issues that we will discuss
6 later about value and efficiencies and so on and so forth, but the general premise is
7 that in a competitive market there will be some correlation between cost and price. In
8 some markets.

9 But essentially, one will have regard to the price, for example, that a competitor could
10 enter into the marketplace and if those costs were higher than the monopoly provider,
11 then it could be argued that they could price at a cost that was equal to that entry cost,
12 for example.

13 There are other techniques that one can use, but in essence, that framework of
14 thinking about the economic cost of the business -- and by economic cost I mean the
15 reasonable rate of return, their rate of return, not in a perfect market but in markets
16 more generally -- is going to be informative as to whether there is a cross-subsidy and
17 I think it will be important to check that obviously.

18 **MR RIDYARD:** Sorry, I am still not there. A cross-subsidy exists where, when you
19 find what?

20 **MR HARMAN:** If you found out, just in very simple terms, that a price was lower than
21 economic cost, the difference between those two would be a benchmark for the level
22 of cross-subsidy.

23 **MR RIDYARD:** You are looking to see whether the price of console is less than the
24 economic cost of the console?

25 **MR HARMAN:** Correct. Put differently, we have framed it in that way where we are
26 thinking about profits in -- or the costs and pricing in two markets, but it's pretty much

1 the same as if you folded it into a system market and asked the question overall: are
2 the revenues Sony is receiving excessive by reference to a relevant benchmark?.

3 So we are split -- I split it down so that I can consider different components of the
4 business, but the alternative would be to think of the excessiveness as a whole at the
5 same time. I think you are likely to end up with the same type of result.

6 **MR COLLEY:** I think Mr Harman there accepted that if prices are different in each of
7 the markets to what they would be had they been priced independently, then we are
8 in a systems market, and that's why you need to look at the supply side as well as the
9 demand side.

10 I think your question on cross-subsidy is do we need to show a loss in, say, the console
11 market to conclude that there is a cross-subsidy and to conclude that there is
12 a difference to what price -- an independent console manufacturer, standalone
13 console manufacturer might price, and the answer clearly is no, it's a comparison to
14 the counterfactual of what that standalone console manufacturer would have
15 generated or what Sony as a standalone console manufacturer would have generated.

16 I think if you do show a loss, an economic loss, then you can unambiguously conclude
17 that this is different to what standalone console manufacturers would price and we are
18 unambiguously in a systems market. So those would be my main points.

19 I just wonder whether, instead of using the word "cross-subsidy", which I think
20 absolutely throws up the question of what do you mean by "cross-subsidy", the real
21 question here is: is there evidence of whole life pricing on the supply side? So is there
22 evidence of whole life costing on the demand side and is there evidence on whole life
23 pricing on the demand side, which would absolutely capture the question of are prices
24 ending up in a different place to where they would be if you had two separate firms
25 pricing independently?

26 **MR RIDYARD:** In light of that answer, Mr Harman, how do you deal with a situation

1 where we found that the price of the console was more than the economic cost but still
2 20% less than the price that, I think, a stand-alone console manufacturer might have
3 charged?

4 **MR HARMAN:** Yes, I mean, I think within our framework, my framework, one would
5 think about what costs -- what are the costs of a stand-alone console
6 manufacturer/firm, which would in effect relate to the cost of them developing, the
7 required concerns they would have for the risk that they have taken
8 and so on and so forth.

9 Sony's costs are likely to help us to understand what that benchmark might look like
10 and we will think about that (inaudible). But, of course, one of the issues that one
11 might have when thinking about the standalone cost of consoles is whether there are
12 any joint costs between consoles and the rest of the components in the system and
13 it's, therefore, quite possible to determine data confirming this, as to whether there
14 are economies of scope that are present within Sony's business and to the extent that
15 they aren't (inaudible) controlling that.

16 **THE CHAIR:** I think, as I understood it, Mr Ridyard was asking about this distinction.
17 I understand you are drilling into the question of how we might go about assessing the
18 position in the console market, and is it necessary for -- how do we approach
19 a situation or what significance do we attach to a situation in which our independent
20 console manufacturer is pricing a console at a level which is above the level, let's say
21 on this hypothesis, that Sony is pricing its consoles, but still the analysis leads one to
22 conclude Sony are making a profit on the console. It is that discrepancy, I think, that
23 I understood from Mr Ridyard's question. How does that fit in or how would you fit that
24 into your analysis? If I understood your answer, you were saying well, we need to
25 be -- or in your analysis you would go into the question of costs, et cetera, et cetera,
26 but it is that delta that Mr Ridyard's question was focused on.

1 **MR HARMAN:** I think what I'm arguing is that you may look at Sony's data and
2 position and buy an integrated system making (audio distortion) market. This is the
3 question: is there still any cross-subsidy? What I'm saying is that when you look at
4 your economic costs, have regard to standalone, what would Sony look like in these
5 standalone (audio distortion)? That may be higher than the position that we observe
6 people actually to share common costs, costs components, that was correct thinking
7 about (audio distortion) you should give credit for that. So you couldn't then be saying
8 that you are earning a profit, you would be saying prices would be higher than usual,
9 because your own console costs and subsidy are based on that so if the
10 prices -- Sony's prices were actually lower than the counterfactual console price (audio
11 distortion).

12 **MR RIDYARD:** Can I ask another question I had which was, just at the beginning of
13 Mr Colley's response, he said he understood you to be accepting -- and I just want to
14 confirm that you do accept this -- that's the -- if one is considering this question, as
15 I understand it, as to on the one hand we have a systems market or as alternative do
16 we have an after-market, those are the questions, do you accept that, as part of your
17 analysis to help us resolve that question, you need to consider the supply side issues
18 as well as the demand side issues?

19 **MR HARMAN:** I think (inaudible words) supply side issues.

20 **MR RIDYARD:** On that question: is it a systems market or an after-market.

21 **MR HARMAN:** I would -- what weight I would ultimately place I can't
22 say -- **(overspeaking)** -- I am not saying it's fundamentally
23 important -- **(overspeaking)** --

24 **MR RIDYARD:** Yes. But it would partly form part of the analysis. In a way this may
25 be another way of asking the same or a similar question. If you find that pricing in the
26 primary market is influenced by the aftermarket pay-off, as it were, or the attraction of

1 locking customers into your system, does that mean you always get, when you look at
2 profitability, you should look at profitability across system, or can it still nevertheless
3 be relevant to look at profitability of the after-market in isolation?

4 **MR HARMAN:** I think, as I have said, that I think that the approach that I put forward
5 to calculating a cross-subsidy -- and I agree that is probably not the best word to
6 use -- is likely to give a similar answer to profitability if you forward the system as
7 a whole, because it obviously would embed, once you consolidate both of them, the
8 cross-subsidy element obviously falls out of the equation, so it washes out.

9 I think that's right. I don't think that profitability informs whether it's an after-market.
10 The profitability element is something that is relevant to the question of abuse at the
11 end of the day.

12 **MR RIDYARD:** That is exactly why I am asking about the after-market. So that would
13 be -- if you looked at the after-market in isolation and found that prices were in excess
14 of cost, in a simple -- in another case you would say that's leading you towards
15 the -- the immateriality of excess pricing, but in this case would you have to say "Oh,
16 I can't look at that in isolation because of the effect that -- the lowering of price effect
17 that would have occurred in the primary market. So, would you always have to look
18 at the system as a whole, or would it still, nevertheless, be right to look at the
19 after-market profitability in and of itself?

20 **MR HARMAN:** As I said, I think, when you get to abuse stage, these two elements
21 consolidate to tell you the same answer.

22 **MR RIDYARD:** I don't understand that. If you are looking at the system, then the two
23 wash out and you take them both into account, but if you just look at the after-market,
24 then you are not considering the primary market.

25 **MR HARMAN:** My methodology isn't to not take account of what's been referred to
26 as the cross-subsidy. So whilst in the one it washes out, in the second we don't wash

1 it out and it's included in the analysis of the after-market's profitability. Is that clear?

2 I can try and re-explain that.

3 **LORD RICHARDSON:** Yes, try and re-explain it. Let's not --

4 **MR HARMAN:** Okay, so let's say that, in a very simple example, that in the console
5 market Sony decides that it's £10 short that needs to be recovered for whatever
6 reason, whether it's because of competitive restraints, whether it's because it wants to
7 have a structure that maximises profits in the after-market, I don't think that is
8 important. There is £10 that has to be recovered.

9 When we get to analysis of the after-market and, for example, we are considering limb
10 1 of the economic cost, part of the economic cost that would have to be recovered is
11 that £10 shortfall. So that's why I say that it kind of washes out in both approaches.
12 One approach is -- doesn't care about the cross-subsidy per se and to say so is
13 overall, I think, problematic.

14 The reason why I framed it in this way is because we think, in our provisional view, is
15 that distribution is an after-market and therefore I'm looking at the abuse in that
16 marketplace specifically. But as I've just accepted, you could do that analysis on
17 a consolidated basis.

18 **MR RIDYARD:** Mr Colley, do you have anything to add on that?

19 **MR COLLEY:** No.

20 **MR RIDYARD:** We need to take a break fairly soon, but let's make a start on the
21 two-sidedness of the market. Just looking at what you have both now said on
22 two-sided markets, I mean, I venture to suggest that there is an agreement, more or
23 less broad agreement, between you in terms of the framework. You are both accepting
24 you are looking at direct network effects and indirect network effects and it's pretty
25 obvious in principle what those effects might be.

26 Mr Harman, is that -- do you think you are on the same page in terms of things you

1 are looking for when you are trying to assess whether this is a two-sided market or
2 not?

3 **MR HARMAN:** Yes, I think that -- I think definitely the indirect network effects, the
4 cross group effects, are important in two sided markets. That's not to say that there
5 wouldn't be direct effects but obviously you have also direct effects in non -- or in
6 single-sided markets as well that you would want to consider overall.

7 The other consideration, I think, is one of whether the prices are set to optimise the
8 level of transactions, that's kind of a Tirole definition of a two-sided marketplace, and
9 the question there is if you were to change prices in the two-sided markets, if that didn't
10 lead to an aggregate level of increase or decrease in volumes, then it wouldn't be
11 a two-sided market because the pricing on either side isn't influencing the overall level
12 of commerce, trade, in transactions.

13 But I think that we are -- yes, I mean, I think the understanding of direct and indirect
14 effects are central to the consideration.

15 **MR COLLEY:** I would agree with that and I think the question then becomes how do
16 we test that empirically. I think we have covered some of this. Are there any internal
17 documents that, you know, Sony takes into account in terms of what it does. Its
18 negotiations with publishers. I think there are natural experiments in the marketplace
19 where -- there was an example, I think, of Microsoft paying a large sum of money to
20 avoid a games supplier going exclusive. I talked about the natural experiment analysis
21 we can do when there is quasi-exclusivity on one game (inaudible) and I have
22 responded to that.

23 So I think that can be tested for (audio distortion) counterfactual analysis.

24 **MR RIDYARD:** In all of this, what are you looking for and why? Are you looking to
25 see how two-sidedness affects the way in which prices are set in the Sony system?

26 **MR COLLEY:** It's relevant to the SSNIP analysis.

1 **MR RIDYARD:** Can you just expand on that a little bit as to why is it relevant and how
2 much attention do we need to pay to this?

3 **MR COLLEY:** I think that is an open question because it would depend on materiality
4 of the underlying effect and our ability to get at them with the data. So here today
5 I don't know. It is certainly, I think we are all agreed, that these are effects that could
6 be significant that will, you know, have a bearing on the competitive constraints that
7 Sony faces when it sets its prices on each side of the market. So naturally one would
8 want to try and take them into account in the SSNIP analysis.

9 **MR RIDYARD:** So can you give an example of how the two-sidedness would lead
10 Sony to charge a lower price to the consumer? Not example, just a story really of
11 how --

12 **MR COLLEY:** For example, negotiating with a publisher who wants a discount, if not
13 they will go somewhere else and not put their game on Sony's system, they will think
14 about what impact is that going to have on demand from existing customers and
15 attractiveness of my system to new customers who haven't yet bought the console.
16 And as I understand it, there is an example where Microsoft paid \$75 million to stop a
17 publisher going exclusive with Sony. So I think -- or something like that --
18 So that illustrates that in dealing with one side of the market Sony has an eye on what's
19 going on on the other side of the market. I mean, similarly, in pricing games to
20 consumers, Sony is going to think about the impact that has on the volume of
21 consumers it has and how attractive it is as a system to publishers.

22 **MR RIDYARD:** And that effectively would be something that could lead Sony to want
23 to charge lower prices to consumers --

24 **MR COLLEY:** Quite.

25 **MR RIDYARD:** -- to then say to publishers, "Look how many people have signed up
26 to this system, therefore you should write games for my system."

1 The other example you gave where the games system paid money to the publisher to
2 encourage them not to go exclusive with a rival, in that case, that would be --

3 **MR COLLEY:** Because of fear of losing consumers who were interested in having
4 that -- (**overspeaking**) --

5 **MR RIDYARD:** I can see why they would do it, I'm just thinking what influence would
6 that have on consumer pricing.

7 **MR COLLEY:** It would have an influence on publisher pricing. In effect (inaudible
8 words) discount so ...

9 **MR RIDYARD:** Okay. Mr Harman, any more comments on -- maybe we just have to
10 suck it and see and see what the evidence shows us. Given we have agreed on the
11 mechanisms here, but is there anything else you want to add at this point on the things
12 you think we will be looking at?

13 **MR HARMAN:** Not substantial. I mean, I think that in my experience these factors
14 need to be considered. It's often difficult to do it quantitatively. But you still get a sense
15 as to whether they are large, medium or small. I think there are important elements
16 that will go into questions such as dominance and, you know, from the market
17 definition perspective, I think the framework is relatively straightforward or clear in
18 terms of thinking about markets or defining markets on both sides. So publisher
19 console market, consumer console market, and then going through the SSNIP
20 framework for each of those businesses and size of the marketplace.

21 In some instances, there is likely to be a degree of correlation between the findings
22 because there will be factors that are common, but I think, as Mr Colley says, there
23 may be some factors that aren't, they may be relevant to publishers' options or
24 consumers' options at the end of the day.

25 But I think that you may spend a lot of time thinking about the two-sidedness of
26 markets. As Mr Tirole says, if you think hard enough, pretty much every market is

1 two-sided at the end of the day. Having determined that it's two-sided, then the
2 analysis follows the standard competition approach. And, you know, one of the
3 outcomes may be that of the two-sided market there may be some kind of pricing
4 optimisation between those two sides of the market that had to be taken into account
5 in a similar way we were just talking about in terms of after-market and what happens
6 if there was a cross-subsidy there.

7 I think the (inaudible) is --

8 **MR RIDYARD:** Do you think it's going to make -- I think maybe it is very premature
9 even to ask this question, but I'll ask anyway -- do you think it's going to make any
10 difference to the analysis that's done for the end in terms of how competitive the
11 market is and whether there is an abuse or not?

12 **MR HARMAN:** I'm sceptical that it will enhance the analysis, but I agree that we
13 should go through that analysis and see where it takes us at the end of the day.

14 In my first and second reports I set out what I think how the market works. It was
15 correctly raised that I hadn't thought about it explicitly in a two-sided market
16 perspective and in part because the analysis I had done suggested there wasn't going
17 to be a significant difference between the outcomes of those two markets, but I haven't
18 tested that formally and we will do and obviously if we are agreeing that this isn't a big
19 point of contention ultimately then maybe some efficiencies can be made but let's see
20 where we get to.

21 **MR RIDYARD:** Mr Colley, can you think of a scenario in which it matters?

22 **MR COLLEY:** I think that we just don't have -- I don't have enough data or facts to
23 make that assessment to say that this isn't going to matter here today.

24 **MR RIDYARD:** Yes.

25 **THE CHAIR:** You are not sworn, so you are free to speak to whoever you wish to
26 speak. You probably don't need to speak to. We will be back in ten minutes.

1 (11.46 am)

2 (A short break)

3 (11.56 am)

4 **MR RIDYARD:** Let's move on to the -- I think we have probably done as much as can
5 usefully be done on the two-sided point which is very useful, thank you very much, on
6 that.

7 Let's move on to the dominance issue. I think the first question we had on dominance,
8 I think, has largely been dealt with in the discussions that we had prior to the break
9 and unless you have a burning desire to say something on it. I would like to go into
10 just the assessment of -- kind of evidence we want -- you are going to be looking at
11 and making the dominance assessment.

12 I think, Mr Colley, this question probably is best addressed to you. Can you explain
13 how going to look at things like price and quality trends as a way of informing
14 dominance because you had some thoughts on that in your short report which were
15 quite interesting, but --

16 **MR COLLEY:** I think, as you say, it is a big overlap with market definition analysis.
17 Sorry, can I just clarify, sir, that the question refers to component parts consoles,
18 games, and then distribution?

19 **MR RIDYARD:** Yes.

20 **MR COLLEY:** So the distinction between games, I don't think that's -- unless we are
21 talking about add-on, you talked about games distribution, without a comma -- I
22 wanted to make sure I wasn't missing --

23 **MR RIDYARD:** No, take away the comma, if you would like. Everything prior to that.

24 **MR COLLEY:** Yes. I think, as I say, looking at price trends looking at, for example,
25 what was commissioned in the early days of Sony and how has that evolved over time,
26 were there periods where it's clear that they weren't dominant? That's going to be,

1 | you know, for example, a useful thing to look at when assessing dominance.

2 | I talked about some of the econometric analysis earlier and I think a lot of that flows
3 | also into the econometric analysis. I think I talked about the constraints that publishers
4 | might put on Sony and understanding that and whether that indicates that they are
5 | able to act to a significant degree independently, et cetera, et cetera.

6 | **MR RIDYARD:** Do you think, to be specific, do you think that evidence that the price
7 | hasn't -- that the price has stayed the same or has come down or the quality has
8 | improved over time, do you think that is disproving dominance?

9 | **MR COLLEY:** I think it's quite hard to find a silver bullet, but I think that, yes, it does,
10 | you know, fly in the face of the idea that a company has market -- when companies
11 | have market power, they tend to raise prices and reduce output. So if you see
12 | increases in output, you see increasing customers, you see increases in customer
13 | engagement and playing and you see increased diversity of games and, you know,
14 | quality and you see increased quality on the system, you know, higher specification,
15 | innovation, then all of those to me suggest that this is not a company that is acting
16 | independently of its customers and is under, you know, significant constraints to --

17 | **MR RIDYARD:** Just abstract it away from the current case and just think more in
18 | abstract terms. I mean, we have market power and I will raise prices to the monopoly
19 | level and I'll -- once I've done that, I'll keep it there. So maybe finding that my price
20 | level hasn't changed over the last ten years is not showing that I'm not dominant, it's
21 | just showing that I am dominant, I have exploited it and I am continuing to exploit it.

22 | Similarly, I'm just putting this as a test, and similarly, if it happens to be an industry
23 | where technological change is making things better over time come what may, then
24 | I might well improve the quality of the products over time just because, you know, it's
25 | just a matter of putting the latest chips in each year or each -- every three years and
26 | I'm still exploiting my monopoly power. So I wasn't sure that evidence that prices were

1 the same or that quality was improving was an effective way of disproving dominance.
2 Not to say that it shows there is dominance, but I am just not sure that it will be a good
3 counter to dominance.

4 **MR COLLEY:** There are two key components to your strawman.

5 **MR RIDYARD:** Right.

6 **MR COLLEY:** If I have got -- the first component is history of pricing and we will come
7 to technological changes in a moment. I would suggest that evidence of price is not
8 going up -- I think the example you gave is that prices were always high, but the
9 implication of us not being able to draw any meaningful inferences from that is that
10 you are suggesting that you have always been a monopolist. And I think -- I mean, it
11 remains to be seen what the analysis shows, but I think looking back and looking at
12 how this product has developed over time, I mean, this is not an inherited ex-state
13 owned monopoly we are talking about, this is something that has been, you know, the
14 result of innovation. You know, how much passing on of other people's innovations is
15 involved in that, we can come to. But I think it is worth looking in the rear-view mirror
16 and just seeing where we've come from, and if we can point to periods where, in the
17 earlier days, this was clearly not market power, I think you had lots of people
18 competing and you had to rely on your innovation and wit to get anywhere, then I think
19 it is right to draw inferences. And also to look at competitors who, by implication of
20 finding Sony dominant, may imply that they are not dominant. So I think that's all fair
21 game.

22 On the innovation front, you are quite right, the output point might be, you know,
23 demand curve sort of shifting out anyway such that, you know, you have
24 a monopoly -- I think there was a question about if you are dominant are you charging
25 monopoly price, put that to one side. So I think -- yes, I think you have to look at the
26 ways where the innovation comes from and what have Sony achieved. I find it, to use

1 Mr Harman's word, I'm a little sceptical of the idea that we have a monopolist who has
2 only got there by just cobbling together everybody else's great innovations. Well, if it
3 was that easy, why were you (inaudible) to it.

4 So I think, yes, as I say, none of this is definitive and you have to go through sort of
5 thoughts that we are going through as we are.

6 **MR RIDYARD:** Mr Harman, your thoughts on that.

7 **MR HARMAN:** I guess at some stage in the analysis one might have regard to price
8 and quality. I would question whether it's at the dominance stage rather than at the
9 abuse of dominance phase.

10 For reasons I think which you suggest, I mean, you may have a dominant undertaking,
11 that's increasing prices over time, you might observe that. You might observe
12 a dominant undertaking with static prices. They may be static because it's not abusing
13 its position. It may be static for other reasons, (inaudible) costs or things of that nature.
14 Prices could fall if you were predating in the marketplace. But there's lots of problems
15 with a trend at the dominant stage.

16 **MR RIDYARD:** If you're dominant and you have shareholders, why wouldn't you
17 abuse your dominance?

18 **MR HARMAN:** I think there are probably examples of dominant companies that have
19 not been found to have exploited their dominant position. Maybe they are concerned
20 about competition issues for those reasons.

21 But that's an assumption. What I think that I'm saying is that normally when one thinks
22 about dominance, one thinks about market shares. There is probably some correlation
23 between what's happening in the marketplace between market shares, using different
24 metrics which may be revenues, that when prices get included within that, obviously
25 we know that market shares are not determinative of dominance, so one looks at other
26 aspects, such as competitive constraints and barriers to entry, and that is the normal

1 question as to dominance.

2 Then once you get to the abuse stage, you consider whether price trends are indicative
3 of the company making an abuse of its dominant position. That is --

4 **MR RIDYARD:** Is the separation that takes in dominance itself, you are looking at
5 some ability to act in a way that you wouldn't be able to act if you were constrained by
6 effective competition? So wouldn't you need to look at pricing conduct in assessing
7 dominance?

8 **MR HARMAN:** Well, I think it introduces, like, a circularity in the analysis that if you
9 decided that you are dominant because you have abused your prices, once you get to
10 the market, the market abuse you have already got the conclusion. Because behind
11 any price you need to understand what the drivers of those price increases are, and
12 it's at that point in time that you determine whether it's for abusive purposes or not.
13 That's, you know, one of the things about *United Brands* test, limbs 1 and 2, I won't go
14 there --

15 **MR RIDYARD:** We have so many interesting questions on that I would hate to spoil
16 the punchline.

17 **MR HARMAN:** The point I am trying to make about that is that when you go through
18 that analysis, questions aside as to that analysis, it is explaining the price trend and
19 it's put in context to the price trend. So I'm not sure why, at the dominance stage, one
20 has to embed it there only to consider it in more detail at the next stage. I am not
21 saying that it's totally -- I'm saying that the price trend will be investigated.

22 **MR RIDYARD:** (Inaudible words) as long as it comes out and somebody saying
23 (inaudible words) as I understand it.

24 **MR HARMAN:** I just think that, you know, ordinarily, maybe that factors into the
25 dominance assessment, but I don't think that is where the maximum weight on the
26 price in question comes, it comes at the next stage having found dominance.

1 **MR RIDYARD:** In a nutshell, what is dominance then and how would you determine
2 whether it exists or not; market share?

3 **MR HARMAN:** As I said, I think the traditional way of looking at it is through market
4 shares, using different metrics, and those market shares may differ between different
5 parts of the marketplace, by looking at competitive restraints, by looking at barriers to
6 entry, they tend to be the normal building blocks of the dominance question.

7 I think, once you've determined that, that may provide insight as to a pricing trend,
8 might explain the pricing trend, but it seems the wrong order to include the pricing in
9 the dominance and then consider whether the pricing is an abuse of dominance. To
10 me, there should be a disconnect between them. Long story short, I think that pricing
11 trends do have to be considered and maybe it's where they are being considered is
12 a relevant question, does much turn on that? Maybe not. But potentially.

13 **MR RIDYARD:** And once you get into your various after-markets, do you think -- do
14 you think you have quite an easy job then on dominance because as soon as you get
15 into once I've bought my PlayStation and I'm in the Sony system then -- and I -- this is
16 more or less what you say in your short report that it's a 100 per cent market share,
17 tick the box, dominance is a bit of a tick-box exercise there, or is there more substance
18 to it?

19 **MR HARMAN:** I think that's exactly it. It is an after-market and not a systems market
20 and if consumers have no alternative once they are in the after-market, then clearly
21 Sony would be dominant. Now, there may be other explanations that we would have
22 to consider, but often that is the finding in after-markets.

23 **MR COLLEY:** A couple of points, sorry, a clarification. I thought I heard you say
24 earlier, if you are dominant and you have got shareholders, i.e., you should be profit
25 maximising, why wouldn't you abuse your dominance; is that ...

26 **MR RIDYARD:** I might have said that. Obviously what I intended to say why don't

1 | you charge a price well in excess of costs?

2 | **MR COLLEY:** Why wouldn't you price to the market? Or whether that price to the
3 | market is an excessive price (inaudible) and we are going to come to. I just wanted to
4 | clarify that I think --

5 | **MR RIDYARD:** I was being deliberately provocative.

6 | **MR COLLEY:** -- there is pricing to the market.

7 | And then on the after-market point, the tick-box, I mean, again it's a wood for the trees
8 | issue here which is the implication of if you haven't demonstrated a systems market,
9 | then in the after-market you are a 100 per cent monopolist. You know, if I design
10 | a game in my shed and I sign up one player to my console and sell them a game, am
11 | I a monopolist in the after-market, you know, with one subscriber.

12 | So I think, again, you would want to look at things in the round. If we have ended up
13 | in a position where we are not in a systems market, it seemed earlier that there was
14 | some debate over the weight that you attach to the demand side versus the supply
15 | side, but if there is evidence of system pricing, then clearly your pricing decisions in
16 | the after-market are going to be influenced by the impact that it might have in the
17 | console market.

18 | So unless you completely ruled that out, that would come into the dominance
19 | assessment as would the two-sidedness, so I don't think it is a tick-box.

20 | **MR RIDYARD:** Mr Harman, just to maybe sort of probe this same topic in a different
21 | way. If it's a tick-box for me once I've bought my PlayStation and I'm not in the
22 | after-market, would the analysis be any different if I happened to have bought an Xbox
23 | and then locked into the Xbox system? I mean, is there any difference, or is the overall
24 | story on alleged dominance in the systems market, does that somehow change the
25 | answer or the way you assess that situation?

26 | **MR HARMAN:** I can't argue from a legal perspective.

1 **MR RIDYARD:** I'm not asking you to do that, I'm asking --

2 **MR HARMAN:** But there is obviously potentially a legal aspect to that answer. The
3 after-market is in part important to the excessive pricing claim because it focuses on
4 whether they are dominant in the after-market and then it gives rise to an ability to
5 abuse a set of captured customers. I think that tying is a similar concept, but it's
6 a different form of abuse. It doesn't necessarily rest on the fact of whether there was
7 an excessive price, it focuses on what prices may have been available in a competitive
8 market than they have come -- or the ability of the tied market to -- the customers in
9 the tied market to have used different digital stores and distribution.

10 **MR RIDYARD:** I suppose the question is: is Sony any more dominant over its
11 after-market customers than Microsoft is over its Xbox in-store base or, indeed,
12 Mr Colley's example of signing up one user who then signs up to his system and then
13 can only use that system. Does the position in the primary market affect the way in
14 which you assess dominance in the after-markets?

15 **MR HARMAN:** I don't think that it does and I think that -- well, I reserve my position
16 on that, but often it does not. For the after-market context you do not need to be
17 dominant in the primary market if you are thinking about razors and razor blades, there
18 are multiple manufacturers of the razor handle and the question is what happens once
19 you have bought that in the after-market.

20 So I would need to give some more thought to that, but my initial reaction is that you
21 don't have to be dominant in the primary market, but there may be some tails to that
22 where we would need to consider whether it is meaningful.

23 **MR RIDYARD:** What about the profitability analysis? This -- Mr Colley, I'll ask you on
24 this -- because it seemed to me what you were saying in your short report was that
25 you didn't think profitability analysis was going to be particularly informative on the
26 dominance question and this -- and I'm conscious in asking this question -- is also

1 an area where we have the whole issue of whether Mr Bezant should be brought into
2 the proceedings to analyse this as well, but can you just say something about your
3 position on profitability analysis in assessing dominance?

4 **MR COLLEY:** Yes, so I don't think it's terribly helpful because I don't think that it
5 addresses the question of whether you are able to act independently and, you know,
6 how do you infer high levels of profitability, assuming you even find high level of
7 economic profitability, in a market where you have a lot of dynamic competition, and
8 you have even consoles being upgraded every sort of four or five years, where you
9 have to keep pace with that competition. So I think that profitability analysis, when
10 you look at dominance, can be quite circular.

11 And also you would need to do a profitability analysis of all the other potential rivals in
12 the broader market. I mean, what would you conclude if you found profitability of X for
13 Sony, how does that allow you to conclude that Sony is able to act independently of
14 Microsoft?

15 **MR RIDYARD:** I suppose if you -- if dominance is the ability to act independently of
16 competitors and customers, then the answer -- the simplistic answer would be the
17 dominant company would be one that could earn much, much higher returns than
18 everyone else in the marketplace because --

19 **MR COLLEY:** Everyone else requires you looking at their returns.

20 **MR RIDYARD:** Possibly, yes, or finding some other benchmark against which to
21 answer those tricky questions about dynamics, which there could be alternative
22 approaches to it. But it seems like -- I mean, profitability might be quite a useful way
23 of answering the question about ability to act differently from other people or
24 independently of competitive forces.

25 **MR COLLEY:** If you have the full picture. I mean, in a sense I think we might be
26 coming back to what's your share of the total economic profits instead of what's your

1 share of the revenue. I'm not sure that it's advancing the ball that much.

2 **MR RIDYARD:** Mr Harman, do you have any thoughts on that one?

3 **MR HARMAN:** I think that it's similar to my point on prices. I think profitability does
4 come into play in the assessment of whether a company has abused its dominant
5 position, and there are obvious ways in which you can do that. But you can also look
6 at returns of similar companies, if they are suitably comparable. That's an assumption
7 that will need to be tested --

8 **MR COLLEY:** Sorry, we are on dominance still, not abuse.

9 **MR HARMAN:** I'm explaining that profitability --

10 **MR RIDYARD:** I think what you were saying earlier, as I understood it, was that you
11 would rather keep your powder dry and look at the profitability when we are looking at
12 abuse rather than dominance. That was your view on pricing and is that also your
13 view on profitability?

14 **MR HARMAN:** I think that's similar because --

15 **MR RIDYARD:** If that makes sense.

16 **MR HARMAN:** -- one of the questions when you get to the abuse is that -- are there
17 indicators that you are earning profits that are too high. In essence. Because if you
18 start from -- you would abuse your monopoly position or dominant position to increase
19 your profit. If you were able to do that and you were able to act without constraint,
20 then your profits should be higher than whatever set of comparables that you have
21 regard to. I'm not saying they are determinative, but if you were to find that the profits
22 of the company under investigation were significantly higher than another and there
23 are no reasons that would facilitate or justify that higher profitability, then that would
24 be informative. Of course, there may be reasons why a company has higher profits
25 than its competitors.

26 **MR RIDYARD:** Understood, but all of this -- in your mind you are thinking this is

1 relevant mostly to the abuse question rather than the dominance question?

2 **MR HARMAN:** Yes.

3 **MR RIDYARD:** Let's -- we will come back to that when we get to that heading then.

4 The last one specifically on the dominance point is -- just going back to this two-sided
5 business -- is it necessary to think of dominance over -- over both sides of the market
6 or is the consumer side -- looking at the consumer side enough to get to where -- get
7 to conclusions on the issues that are relevant to us in this case. Mr Harman.

8 **MR HARMAN:** I think you would look at both sides to the extent that there were
9 differences. For example, an obvious thing might be that maybe publishers have more
10 countervailing power than consumers given their size, so that may or may not lead to
11 a different answer that you would get for consumers.

12 **MR RIDYARD:** What's the point of the exercise? If you found dominance over
13 consumers, what -- does it matter whether Sony's also dominant over publishers or
14 not?

15 **MR HARMAN:** Only to the extent that not being dominant on the publisher side of
16 the market doesn't have any consequences for the ability to abuse the market on the
17 other side. I think that's the only connection as what constraint does the publisher
18 place on the assessment of -- on the consumer side.

19 **MR RIDYARD:** Do you have any --

20 **MR COLLEY:** I think he's agreeing with you, that the focus is on consumer side, but
21 I think we are all agreed that you need to look at all of the sort of two-sidedness.

22 **MR RIDYARD:** No doubt we'll circle back to that later on in the proceedings.

23 The next topic was to look at whole exclusive dealing, tying, bundling, whatever you
24 want call it, the abuse of -- alleged abuse of conduct that's being analysed in this case.

25 The first question we have here is quite a general one and it may be that we are not
26 in any position to give an answer to that, but one thing that interests us is if one was

1 going to break open the closed system in some way or another, as I think is envisaged
2 by the complaint, do we have any clarity on what permissions the third party
3 distributor -- if there was such a thing -- what permissions they would need to get from
4 Sony. Mr Harman, do you have any?

5 **MR HARMAN:** I think at this stage, no. I think answers to that would be through
6 disclosure, but also to the use of a technical expert outside my understanding as a ...

7 **MR RIDYARD:** That's perfectly fair. But if there are permissions, whether it is an
8 intellectual property licence or, I don't know, I don't know what form that permission
9 could take, there's an economic consequence to that which is you might expect some
10 money to change hands to get the permission. So do you think, whichever way you
11 look at it, there's a kind of excess pricing question in all of this?

12 **MR HARMAN:** I think the word "excess pricing" is obviously a better word for subsidy
13 in some senses, or at least the excess price may well form part of subsidy, i.e., it is
14 a mechanism by which -- I mean, currently you might think of a distribution charge as
15 a -- including a charge for access from publishers to console, for example. But I think
16 there is a degree of access charging that needs to be considered and I think that we
17 are firmly in this area now that those issues need to be determined.

18 And I think a key question is whether these are unique aspects on the Sony platform
19 that could not be replicated in a competitive market and that's why a technical expert
20 would be needed to assess that.

21 **MR RIDYARD:** Could you just expand on why you think it's inherently related to
22 cross-subsidy?

23 **MR HARMAN:** Because I think that in a -- if you are in a two-sided marketplace, there
24 is obviously a question of charging both consumers and publishers to use the Sony
25 ecosystem. And the publisher doesn't pay for the console, so the pricing of the console
26 doesn't explicitly charge the publisher for access to the system, but obviously it pays

1 a commission to Sony on the sale of game and downstream content which, from
2 an economic point of view, could be characterised as the access price to Sony
3 placing -- PlayStation infrastructure.

4 So that's why I think there can be an overlap. Because it could have been feasible for
5 Sony to have adopted a different mechanism for charging the publisher directly more
6 at, I don't know, units, units sold or whatever -- which may have been easier to identify
7 as the cost that is charged to publishers for the use of the console and the rest of
8 the ecosystem, but I think -- yes.

9 **MR COLLEY:** So when you say including in the access price access to the console,
10 are you including access to Sony's customer base? That that's fair to ...

11 **MR HARMAN:** I think we are going to have to debate as to whose customers --

12 **MR COLLEY:** I think it's a great question because what it throws up is a lot of lack of
13 clarity here, not just on what the technical experts will be able to assist us with, but
14 also what is the counterfactual being envisaged. And if I could use an analogue
15 analogy, it seems to me, my understanding of the shorter counterfactual that is being
16 envisaged is a bit like a regulator requiring Tesco to devote, of its ten checkout tills,
17 two, three, four or maybe it needs to be more than six, to Aldi and Iceland and whoever
18 else wants to come in, retail their own, you know, provide their own retail services and
19 perhaps contract directly with Heinz and other people selling their products in Tesco.
20 What price Tesco would be allowed to charge Aldi for access to its proprietary stores
21 and to recover its costs of dealing with all the wholesale providers and transporting
22 staff around the country and putting it on the shelves and having security on the door
23 and all that sort of stuff is, I think, a sort of analogue version of what is being mooted
24 here. Because what is being mooted here is that, you know, customers should be free
25 to go and pick the products off the shelves and go by the Aldi checkout or indeed jump
26 on their smartphone and pay that way.

1 I think there are all sorts of permutations about what Tesco would be allowed to
2 recover in that environment, so I'm using that as a sort of analogy for what Sony should
3 be allowed to recover. As I say --

4 **MR RIDYARD:** Other analogies are available, I would say.

5 **MR COLLEY:** Other analogies are available.

6 **MR RIDYARD:** Carry on.

7 **MR COLLEY:** And so I'm sorry to add to the analogy list, but yes, and I think when
8 you move from the analogue world to the digital world, it's kind of harder to get your
9 head around what are the different component parts of the service. Obviously, the
10 cost of someone putting something on a shelf is more sort of concrete, and there's
11 a vast array of IP at play here in Sony's system.

12 So performing surgery on that to try and isolate some activities that go on this side of
13 the line versus ones, the sort of Aldi and Iceland equivalent, are going to be given
14 responsibility for, seems to me to be fiendishly difficult and is going to require not just
15 the technical expertise that has been put forward but, frankly, I need to be assisted by
16 an IP valuation expert who can -- who is better versed in understanding what the value
17 of some of these intellectual property assets are and what, you know, needs to be
18 recovered to ensure that there is a continuation of Sony's incentives to invest and
19 innovate in IP. Because if that is compromised, then, you know, consumers could well
20 lose out from all of this.

21 So I think -- sorry, that's a very long answer, forgive me, but hopefully it's thrown up
22 some of the reasons why I think we are very far in agreement in answer to the
23 question.

24 **MR RIDYARD:** I wasn't anticipating we would fix this problem at today's session, but,
25 Mr Harman, any comments on that?

26 **MR COLLEY:** No, I still think that the counterfactual will be informed by disclosure

1 and by a technical expert. I don't disagree that some of the issues that have been
2 raised are things that will need to be thought through ultimately.

3 **MR RIDYARD:** I know there's been reference to the circularity problem when we
4 come to the profitability analysis, which we will come to in a moment, but I mean
5 there's a sort of similar circularity problem potentially in the excess pricing question,
6 isn't there, because of the incumbent system on an access price that just compensates
7 them for what they are losing, then that might not be a very effective solution to
8 an abuse. I mean, that will be the way the argument would work through.

9 So if there was a way of assessing what the access price should be from a sort of
10 bottom up basis of what the intellectual property is worth, those are the kind of
11 questions one would need to grapple with.

12 **MR HARMAN:** Yes, I think there are techniques for working out what IP is worth and
13 I think those approaches are well understood. Some of those approaches might
14 embed a circularity and some of them may not at the end of the day.

15 **MR COLLEY:** Sir, to your earlier reference to Microsoft, I think it's very important that,
16 you know, a way of breaking that circularity is to compare to the value of the intellectual
17 property for nondominant comparators. So I would be greatly assisted by having
18 someone who could, for example, value the brand or reputation of Microsoft or the
19 Xbox to compare to those intellectual property assets that Sony has, similar ones, and
20 break that circularity.

21 **MR RIDYARD:** And on the question of efficiencies as well, because clearly there's
22 going to be an argument about inherent efficiency of the closed system, it is quite
23 possible anyway there will be an argument around that. Is that something that, as
24 economists, you can help us with, or is that something we are going to have to rely on
25 the technical experts or the technical arguments or facts to assess whether it's efficient
26 or inefficient to allow Aldi to come in and operate the checkouts at Tesco? Mr Harman.

1 **MR HARMAN:** I think that's sensible to identify different types of efficiencies. The
2 question refers to both bundling and closed systems, but bundling can happen outside
3 of a closed system. As I alluded -- or it may be that Sony has economies of scope as
4 to efficiencies of being able to sell things, bundle, that accountants or economists can
5 help there with the assistance of technical expertise.

6 I think some of the things that have been referred to in terms of the closed system
7 reliability, compatibility and security, these are elements that will need technical
8 expertise and I think the question there, I think, is the degree to which these systems
9 could be replicated. A second question would be if they could be replicated, would
10 they offer the same value? And I think a third element to that general question
11 is -- there is a sensible one here -- I will come back to that in a second.

12 **MR RIDYARD:** Is there anything else we should be -- I mean, it's such -- obviously
13 it's a complex set of questions here on the whole how we deal with the closed system
14 and ways of opening it up, if indeed that was an appropriate thing to try to do. Is there
15 anything else on that which either of you would like to comment on at this point before
16 we move onto the next topic?

17 **MR HARMAN:** Maybe I should say it before we get it again.
18 Obviously introducing somebody within a closed system may lead to incremental costs
19 for facilitating the entry of another party and obviously those costs would need to be
20 reflected in the analysis.

21 **MR RIDYARD:** A cost would be imposed on the system so they would need to be
22 borne by the entrant.

23 **MR HARMAN:** Yes, which goes back to, you know, the approach of if you are thinking
24 about an entrant, what an entrance cost would be, then you would need to reflect
25 those additional costs into the pricing. Currently, Sony is able to avoid those costs
26 and that's an efficiency --

1 **MR RIDYARD:** Yes. That's fine. Okay.

2 Let's move onto the excessive price -- the approach to excessive pricing abuse. So
3 here we -- the correspondence has identified this potential circularity problem.

4 Mr Harman, I think, you know, you are clear enough on this. I mean, Mr Colley, what
5 do you think about that topic? Do you accept that there's this circularity problem and
6 do you have any readymade solutions to it, or thoughts on how we might be trying to
7 assess it?

8 **MR COLLEY:** Yes, absolutely. I think there is a circularity problem and that's been
9 recognised in many instances.

10 What I would say, first of all, is it's important not to throw the baby out with the bath
11 water here. So if you have a lot of the asset base in the digital world that is intangible
12 assets that might suffer from this circularity problem, then, you know, it becomes very
13 dangerous to sort of say well we either strip out those intangible assets or we value
14 them in a very different way.

15 Now, the main way that is being suggested by Mr Harman is a replacement cost
16 approach, okay. And I think that creates its own circularity because you -- we are
17 trying to replace assets that -- or does it really get round the circularity, maybe it is
18 better to put it that way. We are trying to replace assets that are clearly successful
19 and high performing and so are the result of a lot of risk taking.

20 So a replacement of cost approach, replacement, you know, it sort of does what it says
21 on the tin, so the clue is in the name, you are replacing something and therefore you
22 have a great risk of 20-20 hindsight that actually "oh, it's clear now how you replace
23 this, just mimic all of the steps that were taken to get to this asset" and I think that's
24 a bit like saying a replacement cost of this, you know, lottery winning ticket of
25 £5 million is £1.

26 So I think you get -- I'm very nervous about the replacement cost approach just ending

1 up with Mr Harman applying his own subjective view of how risky these bets were and
2 the costs of capital to attach to them, which is why I think you have to look at all three
3 approaches. I think you do look at the income approach and kind of ignore the
4 circularity because it gives you a handle on your type 1 error, or is it type 2, I'm not
5 sure. I suffer from type 3, which is to get those two the wrong way round, but anyway.
6 And so, you know -- but I do think a very important role here is the market approach
7 and to look at market comparators and that is what was behind my point about looking
8 at Xbox and the Xbox brand. Because if you are in a world where you've concluded
9 that Sony is dominant in the console market or in the system, then you are, by
10 implication, saying that Xbox isn't and so I think your circularity problem is removed.
11 So that's got to be a relevant comparator.

12 Now, I don't go around valuing brands and things like that, so I will need some
13 assistance there.

14 **MR RIDYARD:** Is there a neat solution to this lottery ticket problem?

15 **MR HARMAN:** I wouldn't characterise it quite like that. The question of replacement
16 costs goes further than a look at hindsight and says: "This is what it will cost to replace
17 your assets". There is more detail to that. One element of it is around tangible assets,
18 they are easily identified, I suspect.

19 There are methodologies that can value the risk that is taken in a business, so R&D
20 would be one of them. You don't know in hindsight how long or how successful the
21 R&D would be. You see that in patented pharma quite a lot, where R&D is successful.
22 And the general way in that context to assess the risk is by factoring in the probability
23 of failure into the analysis. On that example, the risk of failure is quite high. It is, in
24 essence, the approach that the CMA took in *Liothyronine* when it was having regard
25 to market authorisations, it did consider entrants into the market and based on the
26 evidence before it, it concluded that the risk of failure was a certain percentage.

1 Now, it will depend on the nature of the evidence that we see, but innovative firms will
2 have internal views as to how to value that and so there's disclosure on that. But as
3 a starting point to the analysis, it's obvious that having regard to a company that has
4 gone through innovating, probably failing in various contexts, that provides a starting
5 point to understand what a competitor would have to go through, bearing in mind that
6 there may be some other risk attached to -- that they wouldn't be able to do it as
7 efficiently as Sony.

8 So I think there is a methodology that allows you to take into account prior
9 investments, properly probability weighted for failure -- success and failure -- and
10 applying the right type of discount rate to the assessment.

11 Remembering that limb 1 is the first aspect of the two-limbed test, we are trying to get
12 an initial view as to whether there appears to be an excess, based on a reasonable
13 methodology that reflects the costs a firm would include, including risk, recovery of
14 innovation.

15 It's at the second stage that one considers whether there may be other reasons for
16 that excess. Is it due to efficiency or is it due to things such as distinctive value that
17 consumers are willing to pay.

18 And at that stage also, and in fact even at stage 1, one may look at the profitability of
19 similar firms to give a benchmark for what is expected in the industry. Now this was
20 a big debate in the CMA's pharma cases: Should you use a return on capital
21 employed in instances where it was difficult to estimate intangible assets; or should
22 you look at comparable firms and consider return on sales figures because that would
23 embed the annual type of return a business that was innovating would require. Kind
24 of does away, to a certain extent, the need to calculate capital employed.

25 In those circumstances it was difficult because of the specific context of the drugs in
26 question that made the comparables not so comparable for reasons of difference in

1 volumes, differences in input costs and so on and so forth.

2 So there's a two-pronged attack really. One is having a best attempt to calculate the
3 intangible assets. I think being conservative and doing sensitivity analysis around the
4 required rates of return, that can be informed, for example, by the returns that you
5 would expect to see in capital markets on innovative firms. Do they have higher costs
6 of capital as an empirical fact? And then cross-referencing your findings at the end of
7 the day, using the importance of limb 2, which assesses whether there are prices in
8 the market, profits in the market, other metrics in market, that you can use to
9 corroborate your understanding.

10 So your approach isn't this is just the cost and you can have no more. That's never
11 the test. The first step it says "could there be an issue here?" How much do you have
12 to flex your assumptions for there not to be an issue here in the (inaudible) term, the
13 cap, you know, traversed those types of issues in the witness hot-tub. You need to be
14 generous in the first place.

15 Once you got to that stage, then all of those other issues about IP, value, et cetera,
16 become important and we'll have to let the detail, the facts and the data, you know,
17 tell a story around that.

18 But for clarity, if one was to do a replacement cost analysis and one finds that there
19 isn't a price in excess of economic cost on that basis, then the excessive pricing aspect
20 of the claim would be more difficult to put forward and that's why it's an important first
21 step because it screams -- you could -- we can all go home on that particular issue if
22 one finds that on any reasonable basis price is not above economic cost, to
23 a significant account.

24 **MR RIDYARD:** Your position on that, as I understand it, is you would appreciate the
25 assistance from Mr Bezant to navigate you through some of those things.

26 **MR COLLEY:** Yes.

1 **MR RIDYARD:** Is there anything more to say on that particular topic?

2 **MR COLLEY:** On what Mr Harman says?

3 **MR RIDYARD:** Yes.

4 **MR COLLEY:** Yes, I am anxious to cover (inaudible).

5 I'm just conscious obviously the excess pricing analysis is trying to get at how does
6 the price compare to what the price would be absent the abuse, not absent dominance.

7 So you would agree with that. We need to factor in that, actually, prices might be
8 above costs because we have a dominant company that can price to the market.

9 **MR HARMAN:** I think that it's quite clear, I think, in *Hydrocortisone*, it's quite clear that
10 there can be instances of a dominant company pricing above costs, because there are
11 efficiencies and/or distinctive economic value that customers are willing to pay that
12 wouldn't exist in a competitive market.

13 **MR COLLEY:** A competitive market, there has to be an incentive to create those
14 distinctive differences which requires you to actually price above the (inaudible) level,
15 yes.

16 The false positives. Just to come back to the false positives, I think we need to be
17 a little bit careful about reading across from cases where some pharma drug has been
18 increased by -- the price has been increased by 900 per cent and, you know,
19 evaluating how that price compares to costs and how the cost varies depending on
20 how you treat what methodology you apply.

21 The difference here is that these prices are absolutely built in and need to generate
22 return (inaudible) scheme investments and so I think we just need to be really careful
23 that we are doing the best that we can.

24 **MR RIDYARD:** I think Mr Harman will probably say that is something -- Mr Bezant will
25 need to prove in due course.

26 Let me just probe on what I suppose is the limb 2 question. Mr Harman, what are the

1 | circumstances in which, in your view, a price can exceed and can be excessively high
2 | and yet not abusive? What are the things we are looking for there? I mean, assuming
3 | there is a set of -- there is something in that part of the Venn diagram, so the prices
4 | are above -- in excess of the competitive level, however judged, that's not unlawful.
5 | What do those look like or what are these things we are looking for there to justify the
6 | excess over costs?

7 | **MR HARMAN:** I think in general terms, the two obvious justifying factors for profits
8 | above -- prices above cost -- and I'm not saying they are the only two -- fall into
9 | efficiency related and also that you have distinctive value, that it could not be
10 | replicated.

11 | There's -- some of those demand side factors are obviously inserted into cases, so in
12 | *Port of Helsingborg* the location was found to be a demand side factor because absent
13 | that, to get to the nearest port you would have to travel and so therefore there was
14 | a demand for that additional value.

15 | There are similar examples of *Attheraces* and so on and so forth. In the pharma
16 | cases, the question again, which is a factual question to a degree, is: what is the firm
17 | doing that is adding value above a competitive level?

18 | In those cases, the CMA said actually what was happening was, you know, there
19 | wasn't added value, because these were drugs that had been off patent
20 | and so on and so forth and not to traverse all of those issues, but it was a factual
21 | description as to what might explain that increase, and then a preponderance of
22 | evidence around bringing lots of factors together in the case as to is that something
23 | that the consumers value, is that something that they should be forced to pay for, the
24 | willing -- willing to pay fallacy will come into it.

25 | **MR RIDYARD:** That's really the question, how? Because I mean, if they are prepared
26 | to pay for it, then in some sense there's some distinctive value because that's why

1 they are paying for it. But they also know that leads into the willingness to pay fallacy.
2 So what is the dividing line between the things which are in the fallacy and which
3 aren't?

4 **MR HARMAN:** Well, I think that -- I think there's -- on the one hand, I think limb 1 is
5 informative because it's trying to assess to the best that is possible, the cost that
6 an interim would require to replicate the assets.

7 **MR RIDYARD:** You've done all that.

8 **MR HARMAN:** You have done that, but if that was the case, if in a competitive market
9 there could be a PlayStation or a number of rivals in the marketplace, the question
10 becomes: would you, as a consumer, be willing to pay more for the Sony product
11 versus the other product? And the only reason that you would do that is if Sony was
12 able to provide you with something that could not be replicated in the marketplace.

13 Without seeing what those components might be, it's hard to prejudge exactly how you
14 would take them into account. Sometimes they are quite easy. Sometimes it might
15 be well, there is an intangible asset relating to our workforce. You might explain that
16 away by saying well we pay market rates for the labour force, so you are actually
17 capturing any labour intangible actually as a cost already. There might be some costs
18 like that, there may be some others that are distinctive and you have to think about
19 how you would value them.

20 **MR RIDYARD:** Mr Colley, do you have any?

21 **MR COLLEY:** Yes, slightly, I guess, getting into the next question around pass-on,
22 I think exactly the right question is we can't rely on a willingness to pay fallacy.
23 I think -- maybe I will get the right analogy this time, the old analogy was what happens
24 if you remove electricity price regulation, consumers are still going to pay for electricity
25 come what may sort of thing. So absolutely you can't rely on that.

26 But also I'm very concerned that everything that Mr Harman has said is, you know,

1 doesn't allow you to distinguish between a premium that a dominant company could
2 charge for its superior product versus what it could charge if it wasn't dominant. And
3 we are going to get into obviously at some point at the trial who is setting the retail
4 price here and who is being charged. So in a world where the publishers are setting
5 retail prices, then this 30% commission becomes -- okay --

6 **MR RIDYARD:** I am just conscious of the time. I have failed in my objective of
7 finishing the hot-tub before lunch. I think we are going to need another ten minutes
8 afterwards.

9 **MR COLLEY:** I could keep going.

10 **THE CHAIR:** You want to keep going. Okay.

11 **MR COLLEY:** I will be very brief because if we are in that world, the 30 is kind of the
12 price that is levied on the publishers, but that split is 30/70 which, you know, the
13 publishers are getting a lot of economic value. That's -- there's for willingness to pay
14 fallacy there, they are getting 70 instead of getting 30. That is a long way from the
15 *Attheraces* problem of the golden goose standard.

16 If we are in a world where we are looking at the price levied on consumers then,
17 you know, the question becomes: how do we isolate this premium above cost but also
18 premium above what a dominant company should be allowed to charge fairly? I think
19 the onus really, I think, is on Mr Harman to show that that premium is genuinely
20 abusive because customers are so over a barrel. You know, just come back to the
21 market analysis and the dominance analysis, customers are so over a barrel that you
22 could only rely on a willingness to pay fallacy to sort of get you off the hook. I don't
23 know whether that's helpful to bound the --

24 **MR RIDYARD:** I think what I say is I think the onus is going to be on both of you to
25 help us to navigate through this and we will need -- I'm sure we will need all the help
26 we can get if and when we get to that point.

1 **LORD RICHARDSON:** I hope you are not suggesting you are not planning to put
2 forward the positive reasons why the --

3 **MR COLLEY:** I will absolutely do the best I can.

4 **THE CHAIR:** Thank you.

5 **MR RIDYARD:** So let's finish off the last topic.

6 The way we set this up was, first of all, my impression is that we have, sort of,
7 an understanding from both sides as to what -- the sort of two models of ways of
8 looking at the market. One is that the pricing is set by -- the retail prices set by Sony
9 and it's essentially a profit share activity between Sony and the publisher. And on that
10 basis, this is a pass-on point, the way we understand the argument to work is that if
11 for some reason it was decreed that the 30% share it said it was getting was too much
12 and it should only be 10% or 12%, or whatever the number is, then that wouldn't affect
13 the consumer price because the consumer price that maximises the revenues or the
14 profits of the two parties would still be the same as it was before. And in that case,
15 the benefit of this intervention to reduce Sony's stake would go to the publisher rather
16 than to the consumer. That's the Sony side of the argument.

17 As I understand it, on the CR side, in a sense what -- the model you had in mind was
18 a sort of wholesaler/retailer kind of model where if the retail margin of 30% is deemed
19 to be excessive and some intervention happens, we compete the retail margin down
20 to 15 instead of 30, then that's not going to increase the wholesale price because why
21 would the retailer pay more to the manufacturer just because, you know, because the
22 retail margin had been -- profit problem in the retail margin had been solved and
23 resolved by reducing it to 15.

24 So those are the two sort of theoretical -- conceptual models expressed in a very crude
25 and simplistic way between you.

26 So it seems to us that the question on this pass-through point was which one of those

1 models best describes the way the market really works. Is that a useful way of
2 describing the problem, Mr Harman?

3 **MR HARMAN:** I think in a nutshell, yes. I think that what is needed is to understand
4 exactly how pricing does take place.

5 **MR RIDYARD:** Yes.

6 **MR COLLEY:** And at the moment there is a number of permutations.

7 **MR RIDYARD:** Absolutely. Sorry to interrupt, I think the question that both of you
8 raise in your short reports are, you know, being -- short, they are pretty sensible
9 questions and questions we would all like to know the answers to, I think, but in order
10 to differentiate between those two models and see which one --

11 **MR HARMAN:** You may have -- once you get into the factual detail as to exactly how
12 the prices are set, the degree of kind of anomalies around that, because maybe
13 different things happen with different publishers and so on and so forth, you may be
14 at one end or the other of the spectrum that you say, but I don't think it's binary in that
15 sense, that it's strictly here and strictly -- or strictly there.

16 **MR RIDYARD:** Understood.

17 **MR HARMAN:** There could be something in the middle that we then need to think
18 about what the economic consequence of that is and it may again fall in the middle of
19 those two outcomes, depending on the facts, but I think as economists we will be able
20 to look at the facts and provide an economic opinion as to the likely outcome in the
21 counterfactual.

22 **MR RIDYARD:** You.

23 **MR COLLEY:** I think I summarise the situation, it will turn on who is setting the retail
24 prices and what is the wholesale price, is it a dollar number or is it a percentage of the
25 retail price? That will determine the incentives everybody will face in the
26 counterfactual. So we need to get the facts straight.

1 **MR RIDYARD:** Looking at that, you agree that we need to look at the incentives of
2 individual publishers competing with one another because they may -- their incentive
3 to -- whereas Sony might be indifferent about whose game is sold on the system
4 because they get 30% whatever happens of whatever it is, the individual publishers
5 do care whether it's, you know, their game rather than their rival's game that gets sold
6 to the consumer. Do you think that is part of the assessment?

7 **MR COLLEY:** Possibly, but I think we would need to think about whether that is
8 changing as a result of counterfactual.

9 **THE CHAIR:** Yes.

10 **MR RIDYARD:** Is there anything else on the cost passthrough that isn't taken into
11 account by that brief exchange and discussion?

12 **MR HARMAN:** Not from mine. I mean, there is a question on how you go about
13 pass-on, but it depends on which world you find yourself in. So I think we've set out
14 the broad approaches to pass-on and depending on which factual reality lends itself
15 (inaudible) methodology.

16 **THE CHAIR:** Teams behind you, so thank you for your time and efforts with that. It
17 is appreciated. We will rise.

18 What time would you like us back? What is your current view of how long we are going
19 to need after lunch?

20 **MR BEARD:** As I say, we have these issues about whether you are admitting
21 a technical expert, where, I mean, to cut through you are not going to oppose, it is
22 obviously conditional on whether or not he has the right level of expertise, but we are
23 not going have argument about that. You have heard essential points in relation to
24 the valuation expert. I have one or two things on that.

25 Beyond those sorts of issues, I think we are then into much more a timing point
26 predominantly and I think there are some important timing points particularly that fall

1 on Sony, especially in relation to disclosure, but I don't think that's going to take up
2 vast amounts of time to go through. They are not hugely convoluted or complex. So
3 I would have thought if we start back at 1.00, we should be able to be done in a couple
4 of -- at 2.00, sorry, we should be able to get done in a couple of hours certainly.

5 **THE CHAIR:** That's certainly our impression and I think if it's helpful, in relation to
6 Mr Bezant, obviously we will hear Mr Palmer on this as well, but our provisional view
7 is this is much more about being clear about exactly what he is going to say rather
8 than whether he should --

9 **MR BEARD:** We don't have any issue with that because I think you heard from
10 Mr Colley already, Mr Bezant is not going to be disputing what Mr Colley does and
11 Mr Colley obviously can read the odd document with numbers in, so we are not having
12 some sort of parallel accountancy here so we can deal with that.

13 **THE CHAIR: (Overspeaking).** Let's deal with it at 2.00, but it sounds as if we can --

14 **MR BEARD:** Yes, and I think the other thing is that there is an issue about the reply
15 in relation to, if you admit Professor Pietzuch, we are not worried about that, it's all
16 about timing.

17 **THE CHAIR:** We got that as well. We have thoughts on that.

18 **MR BEARD:** We hear the tribunal on simultaneity of reports. Again, we don't mind.
19 We will explain why we suggest it's sequential, but it goes to timing issues again rather
20 than a necessarily precise order. When I say timing issues, I mean the gap between
21 initial reports, reply and the process thereafter. It's those sorts of issues that we need
22 to pick up.

23 But I think, actually, the CMA aren't here, I don't think there's an issue in relation to
24 them. I think pleadings issues, we have had a new pleading from the other side, we
25 need to have a look at it, we got it last night. I think the rejoinder is broadly dealt with.
26 So I think that's where we are, we are going to be focusing on timing.

1 **THE CHAIR:** It sounds like (inaudible) time, so we will rise and start again at 2.00 pm.

2 **(1.12 pm)**

3 **(The short adjournment)**

4 **(2.00 pm)**

5 **CMC**

6 **THE CHAIR:** Yes.

7 **MR PALMER:** Sir, I'm grateful. We have on the agenda a number of matters which
8 Mr Beard summarised earlier. They include the questions of expert evidence,
9 disclosure and timetable, and there is a degree of interrelationship between these
10 topics and overlap. And it has become clear from the stance taken by Sony in their
11 skeleton arguments and from this morning's valuable session as to what the experts
12 will need in order to progress their work and inform each side's case that there is a real
13 risk on the current approach of disclosure. There is a Gordian knot which needs to be
14 cut and it goes to the approach to all of those matters and it comes down to the
15 complaint made on behalf of Sony that the class representative has failed adequately
16 to particularise its counterfactual and its case and they can't particularise their
17 response until that is done. We say we can't do that any further than we have already
18 until we have further disclosure, further information.

19 So what I would like to do, sir, is just very, I hope, succinctly just take the tribunal to
20 what I see as the essence of the problem, but more importantly, and especially of the
21 solution. I won't hold back my punchline, which is this: that the answer will lie in the
22 approach to disclosure, rather than the approach sought by Sony, which is to conduct
23 its currently intended disclosure exercise and produce the product of it in six months'
24 time.

25 To have not formal staging, but an element of staging, low hanging fruit be provided
26 sooner rather than later. But crucially, that disclosure statements of the kind

recommended by this tribunal in other cases be provided, in particular where Sony are already saying that they are aware of any responsive documents and these documents, this disclosure, the early disclosure, the disclosure statements be provided simultaneously to both sets of experts to inform their work.

Can I just show you what I say it exemplifies.

THE CHAIR: Just before you do, I suppose in some ways I think we are already in the place you are in relation to seeing that there need to be some different ways of managing this in order to maximise, if you like, the efficiency of the process.

I suppose, starting from a slightly different place from where you are, but, for example, it was apparent to us that some form of rolling disclosure where, for example, the technical evidence was prioritised and had an earlier date rather than the later date might be a sensible place to go.

I suppose -- and I don't want to discourage you from laying out the other points as well -- I do think that -- what we have here is actually largely, as I understand it, an agreement about the big moving parts and this is really all about sequencing and timing.

MR PALMER: End content.

THE CHAIR: The end content. I absolutely take the point about it is a point here about the interface between further information and disclosure as well, isn't there? I have seen how it appears in the experts' schedule and obviously you have said something about it in your skeleton.

I just wonder whether it's helpful to clean out of the way -- and I appreciate it is a bit of chicken and egg here -- some of the decisions so we know where we are -- and I don't want to dissuade you from getting into the points you want to do, but I would quite like to tick off some things so we know where --

MR PALMER: If there are some low hanging fruit points you would like us to clear out

1 of the way, we are more than happy --

2 **THE CHAIR:** Also, in the course of that, crystallising, I hope, the sharp point of the
3 problem you are identifying so that we can then consider them in the round there and
4 we appreciate that it is probably not the way you were going to do it.

5 **MR PALMER:** I'm very grateful.

6 **THE CHAIR:** The opposite. But I think we would find that slightly more helpful, similar
7 to the way we have been thinking about it.

8 Can I try and do that maybe just with the expert issues and just see if I can facilitate
9 that and obviously Mr Beard will tell me and you will tell me if I am going too fast or
10 missing something.

11 If one starts with the economic experts, Mr Harman, Mr Colley, obviously no question
12 as to permission, everybody agrees they are going to be giving evidence. It's clear in
13 relation to Mr Harman he is intending to do both economic and forensic accountancy,
14 if I can -- I think that probably is in some ways a slightly contentious expression, but
15 I'm going to use it anyway -- to explain the other bit of what he's doing.

16 There's a point about his position in the interchange fee proceedings, which I'm sure,
17 Mr Beard, if that still arises, ought to address. But it doesn't seem to us to be a point
18 that is going to take a lot of time.

19 In relation to Mr Colley, who is only intending to give economic expert evidence, there
20 is clearly going to be a dividing line between him and Mr Bezant on the assumption Mr
21 Bezant is in some way going to be allowed in. Is that so far --

22 **MR PALMER:** I think it's uncontroversial interchange points.

23 **THE CHAIR:** So we would give permission to Mr Harman and Mr Colley in those
24 terms, subject to anything that arises from the interchange fee proceedings.

25 When we get to Mr Bezant, it seems to us that it is a perfectly sensible and
26 uncontroversial basis for him to be introduced to give evidence as a forensic

1 accounting expert in relation to the material Mr Harman has already agreed and
2 acknowledged he is dealing with and he has set it out in detail.

3 **MR PALMER:** That is entirely sensible.

4 **THE CHAIR:** The question really in relation to Mr Bezant is whether there should be
5 any policing of the boundaries of that as there are clearly some controversial elements,
6 controversial in the sense --

7 **MR PALMER:** The application made was for him to give evidence as an intellectual
8 property and valuation expert, not as an accounting expert, fully recognised he can
9 give evidence as an accounting expert and there is no objection to that. But insofar
10 as there is an application that he be admitted as intellectual property expert and
11 valuation expert, we have no detail from him as to what he proposes to do, what his
12 methodology is.

13 **THE CHAIR:** I think that is the point. I don't think we find it terribly helpful to worry
14 too much about the labels and I appreciate they have evolved. As far as we are
15 concerned, I think we can see the need for somebody like Mr Bezant to do some of
16 the things that need to be done, but we would like to know what it is he is going to do
17 and it seemed to us that the most obvious way to do that would be to ask Mr Bezant
18 to produce a **short report along the lines of --**

19 **MR BEARD:** We were about to say, if it helps, he can just provide a short report
20 dealing with these things. There will obviously be a hole in the middle of it in the sense
21 that he doesn't know what the counterfactual is that he is grappling with. But we can,
22 in terms of him explaining how he would go about the IP valuation exercise and how
23 it fits with Mr Colley's work, that's fine, there's no issue there. So we can happily
24 provide that, that makes sense.

25 I'll come back to the Gordian knot and statements in a moment, but I think you wanted
26 to deal with experts first.

1 **THE CHAIR:** Part of the reason I don't want to have too much of an argument about
2 the Gordian knot is that I'm not sure that we are going to have to benefit from having
3 an argument about that -- **(overspeaking)** -- the question is what we do about it.

4 **MR PALMER:** No, that may well -- yes.

5 **THE CHAIR:** Just in terms of that, so that's on offer, Mr Palmer, and it seems to us
6 that it does need to deal with the ambit of his evidence and --

7 **MR PALMER:** Yes.

8 **THE CHAIR:** -- what he is doing as well as the way it fits in with --

9 **MR BEARD:** Sorry, that goes without saying. It will deal with in outline what he is
10 intending to -- how we would go about these things and then also indicate how he
11 currently understands it would fit with what Mr Colley refers to.

12 **THE CHAIR:** Well, it is a precursor of what he is going to do and how he is going to
13 go about them, because I am not completely sure about what it is he says he's going
14 to do. Because, as I put it, I mean this is a very uncontroversial way of putting it, but
15 there are things which are uncontroversial because Mr Harman says they need to be
16 done and presumably Mr Bezant says they need to be done.

17 So (inaudible) some things that Mr Bezant may be wanting to do which Mr Harman
18 doesn't necessarily agree with as an approach on methodology, and we just need to
19 know what they are and it's really for the same purpose as the discussion we had this
20 morning.

21 **MR BEARD:** No issue, I completely --

22 **THE CHAIR:** Because then Mr Harman will know exactly where Mr
23 Bezant -- **(overspeaking)** --

24 **MR BEARD:** No issue. All of those points will be taken down in the transcript. We
25 will produce something and Mr Bezant will produce something that will then be
26 considered and hopefully that will resolve this issue. If it doesn't, then of course we

1 will have to deal with it in due course, but ...

2 **LORD RICHARDSON:** Can I just ask you about Mr Harman and the business with
3 the interchange fee proceedings; is that something that you -- (**overspeaking**) --

4 **MR BEARD:** To some extent it doesn't lie with us because there are going to be
5 issues potentially for Mr Harman in relation to the fact that he appears in interchange
6 proceedings in respect of a party where Sony is also in those proceedings. And the
7 question will really arise in relation to acquiring material in parallel proceedings which
8 obviously are subject to the usual order that they can't be used or deployed in other
9 proceedings. Really it's a question of Mr Harman indicating how he's going to manage
10 that in due course.

11 I am not sure that we are at the point of there being some sort of car crash in relation
12 to it, but obviously if he's seeing different material in different proceedings then it can't
13 be cross-used effectively and equally we recognise that Mr Harman can't wipe from
14 his mind material that's seen in other proceedings. So it is how is that managed is
15 really the issue.

16 We are not putting this forward as a sort of objection to Mr Harman appearing in these
17 proceedings, I think we are clear about that.

18 **THE CHAIR:** No, quite. It seems to us that there are two things that one might -- I'm
19 not saying these are concerns -- but two areas that might be concerns that arise. One
20 is the collateral use of documents in other proceedings. Obviously, that is a matter for
21 that tribunal, not for this tribunal. And so anybody who does want to do that needs to
22 make the appropriate application to deal with it in that way so that may be you as much
23 as Mr Palmer --

24 **MR BEARD:** It may be, but I think in relation to the position of an expert there are
25 obviously issues that he will have to deal with if he's receiving material in proceedings.

26 **THE CHAIR:** That's the second point, I think. The second point is what he's got in his

1 head and how he uses it here, and he just obviously needs to be very clear about that
2 and that's a matter of transparency, isn't it, and I think it's relevant to note that he, as
3 I understand it, my involvement in the other proceedings, the evidence he's giving is
4 in relation to supplier pass-on. It may be that that doesn't make any difference
5 because he will still get material from Sony and so on.

6 But clearly, I think to state, what I hope is uncontroversial, Mr Harman is going to have
7 to give some thought to how he deals with information he's got from wherever else
8 and how, if at all, that is deployed in these proceedings and he needs to be completely
9 transparent about that and I don't imagine that is a controversial topic.

10 **MR BEARD:** No, I do not see it as necessarily controversial, but it's just not something
11 that's never been mentioned before by Mr Harman or by those on the other side, and
12 we realise through our clients that actually they were involved in those proceedings,
13 and they were referring to Mr Harman giving evidence in those proceedings, and so
14 we thought it was appropriate to raise it at this stage rather than any later. So that's
15 why we have done it.

16 **THE CHAIR:** It is not a confidentiality (inaudible) point.

17 **MR BEARD:** I don't think so -- **(overspeaking)** -- I mean, not at the moment.
18 Obviously not here. So that's why I'm saying I'm not trying to sort of catastrophise
19 about these things.

20 **THE CHAIR:** That's helpful.

21 **MR BEARD:** I think that is where we are in relation to that and so I completely
22 understand on the collateral use issue quite how that would be dealt with and on where
23 we are in these proceedings, where they are in those proceedings and so on, but leave
24 that for another day.

25 **THE CHAIR:** I think probably it all boils down to who wants what and --

26 **MR BEARD:** Who wants to rely on what. I'm not sure it's going to make necessarily

1 a huge amount of difference, but we just have to wait and see, but what we wanted to
2 do was highlight the fact that -- we didn't think it was fair if, later on down through the
3 process, we came forward saying "Aha, Mr Harman, you know, you should have been
4 doing the following things" we thought it was appropriate to raise it right at this stage
5 which is what we've done.

6 **THE CHAIR:** Yes, very helpful.

7 Mr Palmer, I don't know if anything I have said is controversial from the other
8 side -- **(overspeaking)** --

9 **MR PALMER:** We don't say it is controversial. There's proper and responsible ways
10 to handle such issues.

11 As it happens, I understand Mr Harman sees absolutely no conflict between the two
12 positions, that the disclosure he expects to receive in those proceedings relating to
13 Sony is going to be relatively short order and high level compared to the amount of
14 detail we are going to get into in these proceedings. It does seem unlikely it is going
15 to be a difficulty, but if there is, he knows how to handle it and what needs to be done
16 about it in the normal way.

17 Obviously, if there is relevant material to these proceedings which has a bearing on
18 the issues in the case which have been supplied to the economic experts, one will
19 expect it to be disclosed in these proceedings equally in any event. If there's any issue
20 beyond that which arises which means that that isn't the position, then of course there
21 are established ways of handling that.

22 **THE CHAIR:** Do we need to deal with Mr Bezant any further? Does what Mr Beard
23 said satisfy the concern there and we can then proceed on the assumption that he
24 has -- I think we were treated as being conditional permission on the basis that we
25 would like to see a short --

26 **MR PALMER:** We will have to hold open our position as to responsive evidence

1 because if he is going to propose a methodology which falls outside the expertise that
2 Mr Harman has, then we will have to think about responding to that and of course we
3 don't want necessarily to have to call another expert as well and incur that cost as well,
4 unless it is necessary and reasonably necessary to assist the tribunal and on that we
5 don't yet know.

6 **THE CHAIR:** Let's see what Mr Bezant has to say on the principle that he is going to
7 be an expert, the question is going to be about scope and assessment.

8 **MR BEARD:** Yes, no, no, it is all understood and we not trying to hold anyone to it.

9 **THE CHAIR:** Thank you.

10 Those are the economic and accounting experts and then we get to Professor
11 Pietzuch; is that how you pronounce it? That is how we are going to pronounce it.
12 Now, I think here we quite quickly get into the Gordian knot, don't we, because this is,
13 as I see it, there are two facets to this argument. One is how do we work out how the
14 class representative is in a position to state their case on the matters which the
15 defendant says hadn't been properly stated.

16 Then obviously how does that then find its way into a sensible sequence of expert
17 material and I appreciate we haven't dealt with the first point yet, but just assuming
18 that we are going to do that with Professor Pietzuch. As I understand it, there is no
19 objection to him in principle, the point you made before lunch, Mr Beard --

20 **MR BEARD:** There is not an objection in principle. The issue with Professor Pietzuch
21 is he is clearly, unlike the expert that was proffered the first time around, obviously he
22 does have a great deal of knowledge and expertise in relation to the broad field of
23 computer science. We are not suggesting otherwise.

24 We do have a question about whether or not his expertise is relevant to the particular
25 issues that are going to arise in this case because so far as we can see from his CV
26 and so on, he has not dealt with issues to do deal with the gaming industry, he does

1 not put himself forward as a specialist in cyber security, for example, whereas other
2 people indeed within his own department do.

3 Now, it's a matter for the class representative to decide whether or not they want to
4 put him forward in order to give evidence in relation to these matters and it remains
5 open to us to say "well, actually you don't have the relevant expertise here". But we
6 are not going to just object on that basis. But we do have the general problem which
7 is it's not good enough to say well you are a doctor in a case about heart surgery
8 turning up if you are an ear nose and throat specialist. It is not helpful.

9 **THE CHAIR:** You put your marker down and I think you are not pursuing it.

10 **MR BEARD:** No, I can't do more than that because I don't want to presume that just
11 because which don't see this stuff in his CV he isn't in a position to deal with some of
12 the issues that want to be raised.

13 It does seem to us, however, there is a lack of clarity about exactly how he is going to
14 go about this which is exacerbated by our concern about his expertise. So we received
15 lengthy requests now for disclosure very recently in relation to these things, we've
16 seen a list of points raised in the application saying that he's going to be commentating
17 on a whole range of what are called core issues, but he goes through all sorts of things
18 like market definition and so on and then ancillary matters as well.

19 I think one of the things we want to understand is how he is intending to actually
20 approach these issues because again, it would be useful, it seems to us, for him to
21 give a short statement about his methodology, how he's intending to deal with these
22 things in order that we can sensibly engage with a number of the requests that are
23 being given, but also making sure that the scope of what is being dealt with is sensibly
24 managed.

25 **THE CHAIR:** I think the difficulty with that is I think it's going to be said he doesn't
26 actually know because he doesn't know enough about your system yet and this is,

1 I think, the Gordian knot.

2 **MR BEARD:** I understand.

3 **THE CHAIR:** And I think it may well be that -- let me put it this way, all of these things
4 may have a time at which it may be easier and more appropriate to deal with unless
5 anything applies to the question of his expertise, because class representative now I
6 noticed you are taking the point if they choose to persist then obviously we will have
7 to make good on it at some stage and you can choose what stage you want to resume
8 chucking rocks at it.

9 In relation to what it is going to cover, I think it is difficult to say he has to produce a
10 short report when actually he is pretty much flying blind, as I understand it, in relation
11 to how all of this works and I do think that there may be a point in time later where
12 there's some validity about bedding him down, but I'm not sure it is yet.

13 **MR BEARD:** There are two obviously two levels to that, aren't there? There is one
14 level which is the issues that are being raised in relation to his approach which is set
15 out in the application, talk about issues to do with, for instance, cyber-security and
16 whether or not it is possible to have alternative systems.

17 We don't understand how he is going to approach those issues, but he seems
18 confident that he can deal with these things. To the extent that the class representative
19 and the professor are saying "well, I'm confident I can deal with these things" it's a little
20 surprising that they can't explain that level of detail for the tribunal.

21 I do understand that the point is then made "well, in relation to what would actually be
22 being replicated, you don't know that until you have more technical information. And
23 I can see that that is undoubtedly a second stage. But in order for someone to put
24 forward an expert and say that they are reasonably required, I mean just applying
25 standard process tests that if this had been raised previously we would be applying,
26 explaining the methodology that is expected to be applied by the expert would be the

1 sort of thing that this tribunal would ask for at a basic level and we don't actually have
2 that --

3 **THE CHAIR:** I'm not sure that -- I don't think that there's a requirement to produce
4 a methodology --

5 **MR BEARD:** It's not absolute, I quite accept.

6 **THE CHAIR:** -- from an expert like this (inaudible) proceedings order stage, and that
7 is not actually what the methodology rules are about. I don't think I accept that.
8 Putting that aside for one minute, at some stage we have to -- this is really where we
9 enter the Gordian knot, isn't it, and I don't think we are going to cut it here. And if your
10 complaint is -- and I completely understand if it is -- that you don't want to be exposed
11 to a wide-ranging disclosure request that have no obvious rationale for the work he's
12 going to do, then we should deal with that as a matter of disclosure and we will come
13 onto that in a minute.

14 What I would like to see and I think what we would like to see is that that issue is
15 progressed so that we are all clearer about from the basis of your client's disclosure
16 and then the pleadings that come after that, then we know what this is all about. And
17 that's the stage it may well be right to press for more details from Professor Pietzuch.
18 At that stage, of course, we are expecting to be quite quickly into the factual evidence
19 that will apply.

20 **MR BEARD:** This is one of issues and also, insofar as we are talking about technical
21 evidence -- and this is obviously something we will need to come onto in relation to
22 disclosure timing -- actually working out precisely what sort of technical evidence is
23 being requested and the process of getting it is difficult. It is one of the areas where
24 things are much more complicated in relation to the Sony system and how these things
25 are operated and have been developed over time. You are dealing with a company
26 where actually a lot of this material is likely to be held in Tokyo rather than in the US

1 or in Europe.

2 So we do have a number of the issues that will arise here being complex and involving
3 highly secretive material about which there's going to be real concern that we have
4 proper confidentiality considerations and indeed I have made some enquiries and
5 apparently there are obviously going to be risks that some of this material is going to
6 need to be translated because it may not have been written in English and I am
7 assuming that Professor Pietzuch is going to need to see that material.

8 **THE CHAIR:** I think we will just have to deal with all that, won't we?

9 **MR BEARD:** No, I completely understand that. We are not resisting that, we are
10 trying to keep it focused. That is the -- the difficulty we have at the moment is we have
11 got quite a wide-ranging --

12 **THE CHAIR:** If I may say so, the way to cut through this, I think, is the control of the
13 process as it evolves. Certainly, the way we are thinking about this is that the
14 disclosure process needs to be controlled obviously so it's proportionate and it has
15 some proper reference to issues in the case.

16 Now that may be more difficult in the space because of the lack of understanding of
17 the class representative and of how the system works. That is just something that we
18 will have to deal with in the disclosure process. Certainly, the way we are looking at it
19 is that a successful outcome in that space will drive benefits through the rest of the
20 chain and so in a way I don't think it is necessary a Gordian knot at all.

21 **MR BEARD:** No, I should say in terms of Gordian knots, the suggestion that there
22 might be stages in disclosure, I should say we are not going to object to that sort
23 of -- a staged process, our concern is about the timing of those stages and what we
24 are being required to do. Because we are in a slightly difficult position at the moment.
25 We've obviously provided a table -- I know we are jumping ahead slightly here, but it
26 does go to what we are dealing with in relation to this expert. We have obviously

1 provided a table dealing with the issues that the class representative has raised and
2 we've provided our responses in broad terms.

3 **THE CHAIR:** The experts in the case, generated from the experts, as I understand it.

4 **MR BEARD:** I think those were mainly from the economic experts, so there's
5 a separate issue in relation to Professor Pietzuch because those have only just come
6 in and that's actually an additional issue.

7 In relation to the economic experts, yes, because we had understood, perfectly
8 understandably, that the tribunal wants that disclosure process to be expert driven to
9 a great extent. So we've been engaging with that, we've been trying to identify relevant
10 custodians, we have date ranges and so on, but that is really the -- that's, I think, the
11 claimants want to turn into a Redfern process. We don't care what form the tables
12 come in, that's not the issue.

13 **THE CHAIR:** But put that aside for the moment, let's come back to that. Just sticking
14 with the technical stuff, because I think the point here is that our suggestion is that we
15 try and prioritise to some extent the provision of the technical material so that it can
16 be -- as it can be, the sooner that that gets to Professor Pietzuch the sooner he can
17 assist the class representative with a pleading that sets out to your satisfaction exactly
18 what we are talking about here, and at that stage we will all be in a better position.

19 **MR BEARD:** That I don't -- again, I understand why the tribunal's approaching it in
20 that way and I completely see that. I think the difficulty we have is that I do need to
21 take proper instructions about how long it will take us properly to answer the sorts of
22 requests that are being made.

23 **THE CHAIR:** Of course, and we are not dealing with it today and we will come and
24 talk a little bit about how the disclosure process might unfold. In a way -- if we start
25 with level of principle, I think it seems to me it is pretty much the only way to do this,
26 and that's what we should be doing and that is trying to get the technical information

1 out as sensibly quickly as you can so that they can get on with providing a pleading
2 that will satisfy you that everybody knows for the purposes of the next phase which is
3 the factual evidence and the technical expert evidence. Now, that seems to me to be
4 pretty obviously the way to deal with this.

5 I completely understand that that's not -- you are uncomfortable about being opened
6 up to the demands of that and we need to discuss that and make sure that they are
7 done properly and proportionately.

8 So just taking that as read -- and we will come back to that in a minute -- but I think
9 just in terms of the process here and I think your suggestion that we push
10 Professor Pietzuch further up the moment, I don't think we are inclined to do that
11 because we would really like to get disclosure out, get the case properly pleaded and
12 then by all means let's have a discussion about whether Professor Pietzuch goes off
13 on a jolly or should be brought back.

14 **MR BEARD:** Yes, look, as long as the tribunal is recognising that that discussion
15 needs to be had, we are content with it not being had today. The second point about
16 the technical disclosure, again, I understand why the tribunal is trying to deal with it in
17 that way so that there is a process by which we can both ensure that the pleading is
18 properly put forward. Because that, as we have emphasised, is something that is
19 important for us, we do think it needs to be dealt with.

20 Equally, the practical issue of actually us being able to inform the tribunal, even if we
21 took the sort of listed disclosure requests that have been just served, provided in
22 relation to Professor Pietzuch's issues, and how long that's likely to take us, we are
23 going to encounter that quite quickly in relation to these issues --

24 **THE CHAIR:** We are back to disclosure again. Maybe we should just say a few words
25 about that and what we are thinking about that and what we are thinking is that it
26 should be done by way of a Redfern-type process.

1 **MR BEARD:** Fine.

2 **THE CHAIR:** I don't particularly care what it is.

3 **MR BEARD:** No, we don't.

4 **THE CHAIR:** But what we would like is clarity around what Professor Pietzuch says
5 he needs and obviously should be driven by him because that's, of course, the point
6 of the exercise. And then we need to know what you say about whether you can do
7 it, how easy it is to do it and when, and any issues that arise from that.

8 Then I think what we need to do is, rather than having another CMC in September,
9 I think we need a running process of hearings in relation to the Redfern schedule
10 which will be proper CMCs, but they will be short and sharp and I will sit alone and
11 make decisions about what is and isn't to be ordered at what date. So that is the way
12 I would like to do it.

13 So it is going to be quite closely case managed, there will absolutely be ample
14 opportunity for you to be saying "this is too difficult, it's too much" or whatever it is. We
15 will come out of that with clarity about what's coming when and I am certainly able to
16 in the most of the next couple of months give some attention to that and make sure it
17 happens on a regular basis.

18 Now, we can work out the details of that later, but it is just to give you some comfort
19 that the present view is that we should have some (inaudible) oversight of this process
20 to precisely manage the points you raise.

21 **MR BEARD:** Well, look, that is obviously of comfort to my client because it's that sort
22 of case management that is of concern. I think in terms of going through a Redfern
23 schedule process in relation to this, as I say, no objection to that at all, it's a useful way
24 of just presenting the material and presenting the concerns in relation to these issues.
25 The one thing that I do need to check is how quickly, if we are going to embark on that
26 as a Redfern schedule process in relation to, say, the 25 disclosure requests that are

1 set out in the letter of the 4 June, I think it is -- yes, 4 June, how long that's actually
2 going to take us to come up with sensible responses. Not just in relation to whether
3 or not the subject is relevant, but actually where we hold this material and how it can
4 be relevantly gathered. Because that's going to be -- it's going to be that sort of
5 proportionality and timing issue that's actually going to be critical here.

6 **THE CHAIR:** Roughly how long do you think? You may not be able to say, but just
7 at a guess.

8 **MR BEARD:** I genuinely don't have an idea because anticipating some of these
9 questions from the correspondence, I made initial enquiries about the sorts of
10 disclosure periods that will be required. People have already started obviously, in the
11 light of the material that we received on 4 June and the application, started making
12 enquiries about where this material might well be found. You don't have any witness
13 evidence in relation to that, but my understanding is that a lot of this material would be
14 Japan-based, that material that related to these technical issues will go back over quite
15 a long period because of course what you are talking about is --

16 **THE CHAIR:** Forgive me for interrupting again. I understand you are going to have
17 all these things to say and I really don't want to spend too much time --

18 **MR BEARD:** No, no, understood.

19 **THE CHAIR:** -- because we are not going to be able to get to the bottom of it.
20 Certainly, what I suspect is the right answer is to fix a time which will probably be at
21 the back end of second week in July, because of my availability, and we can just have
22 this discussion then and if at that position then you say "we are not in a position to tell
23 you" that is where we will be. So I think that's the sort of next step I would think.

24 **MR BEARD:** You would be envisaging, sir, the idea that we try to pull together
25 a Redfern schedule response, so the other side will provide a Redfern schedule
26 formalising either the request in their 4 June letter plus anything else or subtracting

1 from -- on reflection from their 4 June letter, we live in hope not expectation, and we
2 would have a look at that.

3 Now, that process I just need to make enquiries about how quickly we can do that,
4 how sensibly --

5 **THE CHAIR:** Well, in a way I don't think you do need to do that. I think if we set
6 a date, then you will come and tell us.

7 **MR BEARD:** What we've been able to do.

8 **THE CHAIR:** Well, we will ask you in advance of that date to fill in the schedule and
9 tell us where you are. If the answer is we have made these enquiries and are still
10 waiting to hear, that will be the answer. I might press you a bit on that, but obviously
11 we would expect there to be some haste behind this and your client will understand
12 the importance of getting it done.

13 I don't think -- I'm not saying that at this first hearing I'm going to make an order that
14 you do things by a particular date. The point of this process is to make sure that we
15 are moving forward as quickly as possible; is that helpful?

16 **MR BEARD:** That is helpful. And obviously all I can do is take instructions in relation
17 to it, but obviously the indication that you give that we can use our best endeavours in
18 the meantime to answer a schedule that comes to us and if we are genuinely struggling
19 to actually identify how we will identify the material that is being requested, we will
20 make that clear to the tribunal.

21 That's just in relation to the sorts of issues I'm talking about, restructurings, locations
22 outside the UK and timing.

23 **THE CHAIR:** I understand. That's very helpful. Just while we are ranging across the
24 topics and I have -- (**overspeaking**) -- the other area which I apprehend -- and
25 Mr Palmer has hinted at but I haven't given him chance to expand on it -- is this
26 question of information as opposed to documents. Because of course what is being

1 said is that (inaudible) documents you say we haven't got any, they say well in that
2 case could you be more helpful and tell us about things.

3 Now, it seems to me that the answer to that is pretty straightforward, that those should
4 be formulated as requests for information and we should put them in the same
5 process, and if you say they are unreasonable or unhelpful, then obviously we manage
6 that and if you say, yes, we can do that, then we work out when you can do them and
7 we end up, therefore, with, if you like, a rolling programme of RFIs and responses as
8 well.

9 **MR BEARD:** I can't really say anything. Anyone can make an RFI request during the
10 course of proceedings at any point, so of course those can be made.

11 I think one needs to be a little bit careful about this notion of information statements.
12 It was something that was useful in the context particularly of the *Trucks* cases where
13 effectively it wasn't lack of disclosure, it was actually a surfeit of disclosure, particularly
14 in relation to pricing practices, where there would have been thousands and thousands
15 of documents that would have to have been digested. It was said -- and actually it
16 was volunteered by some of the *Trucks* manufacturers, we would rather just give you
17 a statement and then if you are not happy with our statement about how we do pricing,
18 then we can revisit.

19 In other cases, of course, it has been used where there wasn't documentary material,
20 but if we go back to, say, the *National Grid* litigation where this was considered by
21 Mr Justice Roth, there you had an initial set of RFIs being asked while disclosure was
22 rolling on. This was all in a follow-on case. The court initially said "No, you are not
23 going to get RFIs because you are going to get disclosure and we will see where we
24 get to in relation to that".

25 The other issue that matters here is also effectively those statements being pressured
26 to give early witness statements and so we can't for a moment prevent RFIs. Yes, we

1 can deal with them on a rolling basis. That's fine. We may not be able to answer them
2 at this stage depending on what they are.

3 **THE CHAIR:** That's entirely clear, Mr Beard, and I understand all of that. I think every
4 case has its different circumstances. Here the particular problem we have is that they
5 need to plead a case for which they don't have enough information at the moment and
6 they need some information from your client about it. If that is not contained in
7 documentary material, for whatever reason, then actually it might be sensible and
8 helpful to you, as well as to them, for them to understand at least what the basic factual
9 position is for a particular point so they can plead to it.

10 **MR BEARD:** Yeah, I understand.

11 **THE CHAIR:** Clearly there will be plenty of room for argument about the boundaries --

12 **MR BEARD:** Yeah, yeah, of course, and I'm saving that for -- (**overspeaking**) --

13 **THE CHAIR:** In a way, what I would quite like to do is to put it into the same process
14 because it seems to me that in a way what is most important about this, I think, is that
15 we are not divorcing the RFI process from the disclosure process because your points,
16 I think, will have a lot of force if you come along and ask for information in relation to
17 something which you say we are about to give you some disclosure.

18 Whereas if you are saying "look, we are a vacant lot on that", and they are saying "can
19 you tell us a bit more about how it does work, albeit we know it is going to be in your
20 witness statements, but just in outline", then that would seem to make some sense.

21 **MR BEARD:** Again, it does just depend on the circumstances. I've outlined how it's
22 being used in a couple of cases in completely different directions. We accept it exists
23 as a power for the tribunal up to a point because obviously, without one wanting to
24 sound like a broken record, it does remain with the class representative obviously to
25 prove their case in relation to these matters. There isn't a boxing in, that is
26 fundamental. But yes, of course we will provide relevant disclosure, information in lieu

1 of disclosure if that is the better way of dealing with these things, subject to proper
2 argument about what the scope of that will be.

3 **THE CHAIR:** I don't see that as being a wide-ranging set of information, it's not
4 a substitute for -- an early substitute for witness statements.

5 **MR BEARD:** No, I took, sir, your references to those matters as recognising that there
6 will be, if necessary, there could be discussion about it.

7 All of these are options that are open to the tribunal, we are not suggesting otherwise.
8 It's how these are sensibly dealt with in dealing with these disclosure issues over time.
9 But -- and as I say, we can't stop the class representative throwing out all sorts of
10 RFIs, but they do need to sensibly think about whether an RFI is appropriate when we
11 are looking to see whether we have disclosure.

12 **THE CHAIR:** My suggestion is that the mechanism for that should be through the
13 same sort of process as the disclosure which is effectively a Redfern-type approach
14 and which I'm going to arbitrate whether or not they get it, and therefore how long you
15 should have to reply to it.

16 **MR BEARD:** We are not going to quibble about whether it is in the form of a table or
17 a letter or anything like that --

18 **THE CHAIR:** Exactly. But that process, if you like, of aligning the two different streams
19 of work and then applying the same -- effectively the same set of considerations, is it
20 proportionate, is it necessary in order to allow them to plead out properly? Is it expert
21 driven in a sensible way and actually is there a feasible and sensible way for you to
22 do it in a more (inaudible) timeframe.

23 **MR BEARD:** We are not going to stand here cavilling against a more efficient way of
24 dealing with these problems, we completely understand that. All I have to do at this
25 stage, I think, is recognise that some of these questions and some of these issues
26 they are not straightforward, this assumption that Sony simply knows all of the sorts

1 of things that they are asking for can disclose it and even can provide the narrative in
2 relation to it because if anyone has ever had to deal with the process of identifying
3 what intangible property lies in sophisticated technology systems, whether IP or
4 otherwise, it turns out to be a lot less straightforward often than people assume. There
5 isn't just a single patent sitting there --

6 **THE CHAIR:** There is a caution for the person who is going to have to decide the
7 answer for the Redfern schedule and I take that -- (**overspeaking**) --

8 Can I see whether -- that's been very helpful, thank you, I think we may have made
9 a bit of progress.

10 Mr Palmer, I rather suspect --

11 **MR PALMER:** We are entirely content with the process which you, sir, have outlined
12 in terms of short-term CMCs, progressing requests for information alongside requests
13 for disclosure.

14 I just want to put down a couple of markers about what Mr Beard has told you about
15 that so there is absolutely no surprise on his side.

16 This problem, what I called the Gordian knot, whether that is apt or not, arises because
17 of the defence that Sony has pleaded and, in particular, by way of objective
18 justification. I can take you to them, but by way of objective justification, they have
19 said: "we are entitled to refuse to provide such IP rights as you may need, we don't
20 know yet what you need. We are concerned that your counterfactual of allowing
21 alternative app stores or downloads from websites are going to run acceptably, subvert
22 the security systems that we have in place, the anti-piracy measures that we have in
23 place. We are concerned that you will not have an adequate cryptography because
24 we have a system of private keys that we do not want to share with you, it is all very
25 confidential and it can't be done."

26 And they take all this to the point of saying what we are proposing is, their word,

1 impossible.

2 Now, fine, that is their defence. The tribunal will hear it in due course. They have
3 an evidential burden in respect of that defence, and that is one which, when it's met,
4 obviously then falls for us to overcome it and say "No, no, that's not an adequate
5 answer to our case and that burden lies on us," that arises in response to an evidential
6 burden being discharged by the defendants. That's --

7 **THE CHAIR:** That may well be right, firstly I'm not sure it's terribly helpful to solve the
8 problem, but also I am not sure it is right in terms of the big picture because you are
9 putting forward a counterfactual. The counterfactual can't just barely assert that
10 someone is going to come and commit to it, you have to explain how, don't you?

11 **MR PALMER:** We have to explain how, but we have to explain how in such a way
12 that overcomes their defence of objective justification because you can't
13 divorce -- **(overspeaking)** --

14 **THE CHAIR:** Well, I think before you put the defence in, I think that they might
15 reasonably say you need to explain exactly what you mean by that, and what the
16 technical solution is.

17 **MR PALMER:** Not when their defence -- and I can take you to the pleadings and the
18 way they put it -- **(overspeaking)** --

19 **THE CHAIR:** I don't think it's a pleadings point, Mr Palmer. I think you are starting off
20 by saying in the counterfactual there would be a set of circumstances pertaining by
21 which third parties could come and connect to the system. That's right, isn't it? And
22 it seems to me that it is not unreasonable to expect you to flesh that out by explaining
23 what that actually means as a technical thing.

24 Now, it may well be they are going to say you haven't dealt with these points and the
25 evidential burden shifts, but at the end of the day, I am not sure that debate helps us
26 very much -- **(overspeaking)** -- we are not going to be deciding this as a matter of

evidence -- (**overspeaking**) --

MR PALMER: No, of course not.

THE CHAIR: So really, what you are really talking about is a different sort of problem, I think, which is that we understand why you haven't set out in the particulars of claim and the claim form exactly what's going to happen, I don't think it has anything to do with evidential burden, it is just that you don't have the information.

MR PALMER: That's exactly right. That's the point because Mr Beard's original position on all this, you, the class representative has to plead this now -- (**overspeaking**) --

THE CHAIR: We are certainly familiar with the -- (**overspeaking**) --

MR PALMER: Beyond that you have to combine that point with the point to which the tribunal is well alive which is the point of information asymmetry of the fact it is their system, they need to explain to us how it works.

Can I take you to the letter which Mr Beard referred to, it is the letter of 4 June?

THE CHAIR: This is (inaudible).

MR PALMER: Yes, it is exactly that. You may well have had the opportunity to look at it. It is helpful to look at it again in light of what the tribunal has proposed and what Mr Beard has said about it so far. It's at tab 78 in core bundle 2.

THE CHAIR: Can you give us a page number, please?

MR PALMER: Yes, it's page 939 onwards.

THE CHAIR: Yes.

MR PALMER: You will recall from the CR's expert application that there were six categories of technical information which were going to be asked for, and what this letter does in relation to each category, if you go to page 940 first for category 1, you see that the first category, repeating from the expert application at paragraph 3:

"Technical descriptions of the process of distribution of PS games software and

1 updates to consoles including details regarding any quality assurance, certification and
2 testing performed by Sony both during distribution and beforehand during
3 development."

4 So that was the ask. And with Professor Pietzuch's help, we have formulated what it
5 is that we say would be needed to be required. You can see (a) relates to documents,
6 it is precise technical documentation, so that can be the subject obviously of
7 a disclosure request in the normal way.

8 Then (b) a detailed step-by-step breakdown of the process by which gaming software
9 is distributed, including the nature of the involvement of gaming publishers.

10 Now, it might be that there exists a document somewhere which does provide exactly
11 that. It might be that such a document doesn't exist. It makes no odds for our
12 purposes, we need that information to understand it. So this is requests for information
13 in that sense to be -- which can conveniently be provided by disclosure statements or
14 in some document if it exists. And then:

15 "Details of cryptographic mechanisms, protection measures, which are used to protect
16 game, binary, establish ownership and validate custody of games. A description of
17 how Sony accepts games software for distribution and all details pertaining to quality
18 assurance process."

19 So this isn't simply a sort of search some email boxes, see what you come up with and
20 we will try and piece it together from there. It tells us how this works and it's focused
21 not at something random or unmanageable, but at precisely the sorts of points which
22 have been raised by Sony in their pleadings as being relevant and they say fatal to
23 our case. So we say well, we want to understand that, that's what we are going to
24 need.

25 So your suggestion, if I may respectfully say, sir, is entirely right that the appropriate
26 response to all of this is to manage disclosure requests and information requests

1 alongside each other and that's why we support it. What we don't accept from
2 Mr Beard is that this can be boiled down into "Oh, you can make RFIs any time you
3 like." We made an RFI about precisely these points. We got back a very general,
4 high level description saying "we can't give you further details until we know more of
5 what your counterfactual is".

6 This is why I say it's a Gordian knot because we need to progress this sort of
7 information, this sort of disclosure and then, we entirely accept, it is for us then to set
8 out what our counterfactual is and how we say we can overcome what's been said on
9 the other side.

10 **THE CHAIR:** I understand all that. I think it's interesting just looking at 4(b) and (d).
11 You might take the view that 4(d) was actually very straightforward and very much
12 what you'd expect Professor Pietzuch to ask for. It's not entirely obvious to me that
13 what you are trying to get -- but you are not trying to get evidence in 4(b) and I am not
14 saying that is the case, obviously we will argue all that when we get there. I think the
15 point is it would be very helpful if you could put this into the Redfern process as -- the
16 schedule -- (**overspeaking**) --

17 I think when you are doing that, I think it would be really helpful also if you could have
18 another conversation with Professor Pietzuch and just bearing in mind this discussion
19 try and make these as forensic as possible, justifiable as possible, because I really
20 don't want to be having a discussion about, if you like, the woolliness or otherwise of
21 any particular request. I would like to understand really clearly, when we next meet
22 on this, what something's required for and why you think it can be done in a sensible
23 and proportionate way without finding something in the witness statement. So if there
24 is going to be a boundary there, you are going to need to bump against and stay within.
25 Just a marker for you, if I may, on that.

26 **MR PALMER:** Thank you. That is well understood. That is extremely helpful. That

1 was precisely our proposal to take this into Redfern schedule and particularise it as
2 necessary, so we will do that. It's helpful to have the indication that we can simply get
3 on with it and (inaudible).

4 **THE CHAIR:** Just in terms of timing, I don't have a diary with me and we can come
5 back and fix a date, but I think the idea would be that we would set aside an
6 hour and a half, maybe two hours, depending on what is on the schedule and how
7 much there is to discuss. We will do it virtually, so no need for in person.

8 We will not treat it like the informal case management conferences because I
9 appreciate we will be making orders at the end of them, but I would encourage, you
10 know, the smallest cast that you think is necessary in order to -- the smallest, most
11 efficient cast, if I can put it that way. I don't want hundreds of people on these calls
12 because they are meant to be very functional and I just want to get some business
13 done and decided. I don't want big set piece discussions at these hearings, I would
14 like to make them very business-like, but the reality is that I think the output is going
15 to involve orders which require compliance, so clearly you will want to take them
16 seriously and engage in the process.

17 **MR BEARD:** It's fine. This is a discussion being postponed effectively in relation
18 to this. But just to echo the indication or caveat place, Mr Chairman, by you in relation
19 to this, a number of these are transparently requests for witness evidence early.
20 A number of them are evidential demands prior to proper disclosure issues being dealt
21 with. That's fine. We can deal with that in the schedule. But it is more sensible if the
22 class representative focuses on an orthodox disclosure approach and a focused RFI
23 approach. They should not be assuming that wide-ranging statements are the way
24 forward here in relation to these matters because --

25 **MR PALMER:** That's where we disagree.

26 **THE CHAIR:** I'm sure we can start when we actually get some examples in front of

1 us. I think the line between what is evidence and what's information is a little bit hard
2 to form.

3 **MR BEARD:** Of course, that's right.

4 **THE CHAIR:** What I would like to think is we can always come back for the purpose
5 of the exercise not just to enable the class representative to produce a sensible
6 pleading and so in a way that ought to be the best justification for whether something
7 should or should not be provided. I appreciate that that doesn't answer the question.

8 **MR BEARD:** No, and it's an up to a point issue --

9 **THE CHAIR:** It's an up to a point issue, I understand that.

10 **MR BEARD:** -- because, you know, the role of the respondent in these proceedings
11 is not to enable a class representative to keep fishing and fishing and fishing for
12 material in order to essentially fortify a claim that it hasn't properly particularised.
13 There can be asymmetric issues, we accept.

14 **THE CHAIR:** Well, quite, and in a way I don't want to cut you short because the point
15 you are making is unarguable in its own right, but we are in slightly uncharted territory
16 and also this is not going to be decided by the statement of principle really, it's going
17 to be decided by pragmatism based on what is proportionate and sensible.

18 **MR BEARD:** There will be issues of principle as well as pragmatism.

19 **THE CHAIR:** They will inform the pragmatism. I understand that, but in a way let's --

20 **MR BEARD:** -- **(overspeaking)** -- I think in a sense let's park it, and I think it's
21 important that the idea that you can turn an early disclosure process, because that's
22 essentially what we are talking about, an early disclosure process into some kind of
23 super early witness statement process is not right.

24 **THE CHAIR:** You absolutely made your point on that. I understand that. I think what
25 might happen -- and I'm hopeful what might happen -- is that once we have done a few
26 of these -- **(overspeaking)** -- where the line is being, I don't know where it is yet.

1 **MR BEARD:** Also, I don't rule out the fact that, you know, Sony may well come along
2 say "No, no, no, we are perfectly happy giving you this sort of outline" because, as per
3 *Trucks*, it's easier than dealing with disclosure issues, and it may be that there have
4 to be multiple iterations. We understand that, we are alive to these things, but I do
5 think we need to be careful. This tribunal is exemplary, as is said in terms of its case
6 management innovation, but we shouldn't get away from the fact that we're dealing
7 with basic tort litigation.

8 **THE CHAIR:** I hope you don't mind --

9 **MR PALMER:** I'm going to push back briefly. It can be left for a different day,
10 I appreciate that also. I just want to make absolutely clear, my learned friend's
11 submissions as to the role of disclosure statements versus witness evidence are well
12 out of date and do not give true effect to what this tribunal has explained in the *Trucks*
13 litigation. It wasn't restricted to voluntary disclosures.

14 **THE CHAIR:** As I say, I don't think we are being helped really by a discussion about
15 principles. I think we are going to have to work things out in this case with the
16 objections you have in mind. I am sure that when we start doing that, it will sort itself
17 out.

18 Where do we go next? I appreciate we have cantered across a number of subjects
19 and I have taken you well out of course. Is there anything -- one thing we haven't dealt
20 with is the timetabling, the sequencing in relation to the expert technical evidence and
21 technical witnesses.

22 **MR PALMER:** Can I address you on that?

23 **THE CHAIR:** In relation to Professor Pietzuch, otherwise I think we have dealt with
24 him, haven't we?

25 **MR PALMER:** Yes. Can I take you to the timetables that are in the supplementary
26 bundle.

1 **THE CHAIR:** We have them loose. I don't know if that's helpful.

2 **MR PALMER:** If you have them loose --

3 **THE CHAIR:** Which one do you want to look at? Do you want to look at the one that
4 arrived last night which has the CMA Wright(?) case. I think that's the one that we
5 have loose.

6 **MR PALMER:** We have one for the -- let's make sure we are looking at the same one.
7 It is supplementary bundle, page 181.

8 **THE CHAIR:** Yes, that's the one we have here.

9 **MR PALMER:** Even these dates may need to change in light of the indication that the
10 tribunal has given us as to how it wishes to proceed. Some of this is already out of
11 date.

12 You can see that, just dealing with the broad brush points to start with, the main
13 difference between this alternative 1 and the alternative 2, at 185, apart from the
14 ultimate trial date, in terms of early case preparation on the road to that trial, the main
15 difference between the class representative and Green proposals is simply the amount
16 of time given in respect of pleading after close of disclosure. So we just want to pursue
17 this obviously expeditiously, but to end up at a place where we have that disclosure,
18 we have that information and then we plead our case. We are not under ridiculous
19 time pressure with a computer dump of documents, now you have three and a half
20 weeks to get on top of it all and work out what it all means.

21 Beyond that, that key principle we say there's a proper timetable to trial here.

22 **THE CHAIR:** Do you mind -- I would like -- I would like to focus on this timetable a
23 little bit in relation to the sequencing, if you like, in relation to the technical expertise.

24 Can we come back and talk about the timetable more generally at the end because
25 I think that might be helpful after we have knocked everything off. I am not quite sure
26 if there are one or two other things we need touch on, but just on that, we have -- it

1 pops up on around about March and actually I think we do have some views, so let
2 me try this on you.

3 It seemed to us that it would be sensible for there to be witness statements of fact first
4 in relation to technical matters. That shouldn't include Professor Pietzuch to the extent
5 that he is effectively putting a factual basis in. It would be helpful to have his factual
6 foundation at the same time as the factual witnesses that come from Sony as the
7 foundation. And then it seems to us that it would logically follow straight after that,
8 obviously evidence as well and then technical experts and it does seem to us that it
9 would be helpful, if not necessary, by that stage to, if not little bit earlier than that, to
10 understand whether Sony is doing this expert or doing it in-house. So in a way we are
11 going to, I think, ask you to commit yourself at some stage earlier than this, probably
12 after the pleadings have closed.

13 **MR BEARD:** I was going say that there is an issue here and it is precisely that.
14 Because we are not quite clear what it is -- or how Professor Pietzuch is intending to
15 deal with things, we don't know whether or probably to what extent we might need
16 an external expert apart from Sony witnesses of fact, we completely see that that
17 needs to be called out earlier than these dates. We don't just want to be --

18 **THE CHAIR:** I don't think you can wait until you see what Professor Pietzuch's case
19 is.

20 **MR BEARD:** No, but if we have a better idea through the process of disclosure and
21 so on and the pleading process --

22 **THE CHAIR:** I would have thought once you have the pleading on 20 January, you
23 should have a pretty good idea about where it's --

24 **MR BEARD:** Well, whatever date it may be -- yes, I think that's right.

25 **UNIDENTIFIED SPEAKER:** I am sorry to interrupt --

26 **MR BEARD:** But that said (inaudible) disputed point. That is black, so as I understood

1 it, you agree about that, don't you?

2 **MR PALMER:** There is a footnote on that.

3 **MR BEARD:** I think what we need to ensure is what -- Mr Palmer, I quite understand
4 from a somewhat class representative solipsistic view, has said well the only concern
5 about the timetable is about how long we get to deal with the documents.

6 I think we need to be clear. In relation to a timetable through to a February start date,
7 we have not taken issue with that being a relevant step. The difficulty we have is in
8 relation to the disclosure process primarily. Both the process of getting to a point
9 where we know what we are doing in terms of disclosure and then the process of
10 actually doing the disclosure, and that is the essential difference, I think, in the early
11 stages between what are referred to as the February timetable and the May timetable.
12 So, Lord Richardson, you are absolutely right, of course, that in the February timetable
13 we don't take issue with 20 January, but we have placed a caveat on this because we
14 don't think that the disclosure process that we are talking about is sensibly going to be
15 completed before the December date. That's the issue here.

16 **LORD RICHARDSON:** But equally you would completely understand, I'm sure, that
17 the tribunal might take the view that the perfect shouldn't be the enemy of the good
18 and from that point of view the fact that we can't work out every possibility at this stage
19 or even some realistic -- you might anticipate issues arise for disclosure. Nonetheless,
20 the tribunal could take the view that we have fixed dates and if it transpires that those
21 dates need to moved because issues arise, then those can be dealt with at that point.

22 **MR BEARD:** We do understand that. There is a salient problem with doing it that way
23 round and the problem with it is this, that effectively you have to be booking people
24 out throughout the relevant period and in particular the trial period in the run-up. And
25 it is not fair on anyone concerned that you book out effectively prep time and trial time
26 for two alternatives. And the difficulty is that it's fine to be saying out "oh well, we could

1 move this and that", but we are at a stage where we are encountering long lists of
2 technical disclosure, we don't even have yet agreed search terms even in relation to
3 the custodians, we have to go through those sorts of processes. Then you do
4 the sampling as to what those custodians would throw up to see whether or not it's
5 proportionate. Then, when you actually disclose that material, it's got to be digested
6 by everybody, and on that we completely understand Mr Palmer's point, he needs time
7 to be able to deal with that. What we are saying is we don't think that the February
8 timetable is actually realistic, there is going to be slippage, that is the real danger with
9 it. That's the only caveat I place on the blackness of 20 January.

10 **LORD RICHARDSON:** We are a long way from that if we are not working and we are
11 talking about the timetable here. So I think you are accepting in principle you would
12 be comfortable with a suggestion that I've just made about the way the technical
13 evidence should come out. So effectively, including factual
14 from -- (**overspeaking**) -- and committing you at some stage around about 20 January
15 to whether you are putting an expert up or not.

16 **MR BEARD:** That's fine. That's absolutely fine. We don't have any issue with that
17 because that's obviously a sensible way of proceeding.

18 **LORD RICHARDSON:** Then we would anticipate a simultaneous exchange. You
19 know, you have some --

20 **MR BEARD:** Yes, yes, absolutely, that's fine. Because if we are putting forward
21 a technical expert, we don't anticipate our technical expert will be putting forward any
22 factual material, and therefore it will just be an exchange of reports on that process.

23 **LORD RICHARDSON:** Mr Palmer, we didn't get your views on
24 this -- (**overspeaking**) --

25 **MR PALMER:** We don't support that proposal and I want to explain why.

26 Professor Pietzuch's report needs to be, in the first instance, for the reasons we have

1 already discussed, informed by how the Sony system works. You have heard the
2 debate between us as to what is going to go into narrative disclosure statements
3 potentially and what is properly only the matter of factual witness evidence from
4 a Sony witness.

5 To the extent that what he needs to do, his job is in fact contained either in documents
6 or disclosure statements which are produced in advance of that stage, then fine, he
7 can do his work on that. But to the extent that requests that he has made, the answer
8 comes back to well that is a matter of witness evidence, well he's going need to see
9 that factual witness evidence to inform his report -- **(overspeaking)** --

10 **THE CHAIR:** He is going to see it, he is going see it before he has to put his report
11 in.

12 **MR PALMER:** I may have misunderstood. I think you said at the same time.

13 **LORD RICHARDSON:** No, no, just insofar as he is purporting to give factual evidence
14 only. To be clear -- **(overspeaking)** --

15 **MR PALMER:** That exercise can be best served once he's received Sony's facts.

16 **LORD RICHARDSON:** Hang on a minute. I think what we are talking about here is if
17 he's going to bring to the party here facts which he has accumulated elsewhere, then
18 they ought to be on the table with everybody else's facts if that is what he is doing.
19 They may not do that. I'm not talking about the information which is gleaned from the
20 Sony disclosure, I'm saying -- if he's going to turn up and say, effectively like
21 an industry expert, this is how -- this is what happens, this is how these things
22 work -- **(overspeaking)** --

23 **LORD RICHARDSON:** What we are talking about is ensuring that there is,
24 recognising Professor Pietzuch in his comment, that this tribunal and other courts
25 where you have an expert who will deal both with factual matters but also matters of
26 opinion, recognising the point that's made by the defendants that there should be

1 clarity as to what is opinion evidence, is factual evidence, insofar as
2 Professor Pietzuch -- (**overspeaking**) --

3 **MR PALMER:** That is a difficult distinction to draw on technical matters. What is a far
4 easier distinction to draw is that which I heard a moment ago from the Chairman,
5 which is if he is going to come up with factual evidence of his own from some other
6 source as to how he says the PlayStation system works, well then, he needs to
7 produce that in advance so that their expert, if they choose to call one, or their witnesses
8 can respond to that. I have no difficulty with that proposition.

9 I have more difficulty with the proposition that he might not have relevant facts at
10 a later stage to inform his expert opinion drawn from his analysis of what Sony have
11 said in their factual evidence because Sony may say this is how we operate --

12 **MR BEARD:** No, no, it might help, because we put it forward -- we anticipate precisely
13 the point, sir, you are making which is at the moment the asymmetry is remarkable.
14 We'll be doing all the disclosure it appears we are the people putting in the factual
15 evidence in relation to these matters. If they are going to have a technical expert
16 coming along talking about factual issues as well, we want to smoke that out early and
17 it needs to be part of the factual process. And it's not just in relation to Sony systems,
18 it's in relation to anything else he wants to rely upon. We need to know that's only fair,
19 that's all we were doing here, we are not trying to do anything cleverer than that.

20 **THE CHAIR:** If he is bringing the factual material into the pot that is already in there
21 then obviously --

22 **MR PALMER:** Drawn from some other source than Sony, yes.

23 **THE CHAIR:** Yes, from wherever and it's relevant to the expert report (inaudible), it's
24 only fair that the opposing expert, if there is one, has that in the same time and the
25 same way as the other factual material. That is the simple point that is being made.

26 **MR PALMER:** If that's the scope of it, I have no difficulty. What I'm keen to protect

1 against is some sort of later objection that when what he does is, in the light of what
2 Sony has explained in their factual witness statements, which I have now seen and
3 I therefore have a fuller understanding of how the Sony PlayStation system works,
4 here is my explanation as to how the class representatives' counterfactual propositions
5 has by this stage pleaded, could be made to work consistently with what Sony has
6 said.

7 **THE CHAIR:** That definition cannot be fact because he is relying on somebody else's
8 facts, isn't he -- **(overspeaking)** --

9 **MR PALMER:** If that much is clear, then there is no difficulty.

10 **MR BEARD:** No, no, we are not trying to stop him pontificating on our facts later.

11 **LORD RICHARDSON:** Shall we worry about that and dealing with it at the point at
12 which it does or does not arise?

13 **THE CHAIR:** To clarify, to the extent that he is doing what we've talked about in
14 relation to facts, he puts that in the pot with the factual evidence from Sony, and then
15 there's a simultaneous exchange of technical, and then there would be a reply round,
16 and then there will be a simultaneous exchange of technical experts after that.

17 **LORD RICHARDSON:** I wonder if, therefore, there's a slight variation in that currently
18 the reply factual statements come in after the technical reports are in, and I wonder
19 if --

20 **MR PALMER:** It would be more sensible to have all the factual first and
21 then -- **(overspeaking)** --

22 **LORD RICHARDSON:** All the factual material dealt with and then the experts.

23 **MR PALMER:** I agree. I accept that.

24 **MR BEARD:** That's obviously right.

25 **MR PALMER:** I think our joint proposal is that economic expert evidence comes after
26 that.

1 **THE CHAIR:** Because it feeds into --

2 **MR PALMER:** So it can be -- that's our joint --

3 **MR BEARD:** No, no, we completely agree with that.

4 **MR PALMER:** And we have expressed a preference for simultaneous economic
5 experts exchange, I don't know, Mr Beard, if you can push back on that.

6 **MR BEARD:** Well, just to explain why we said sequential. It goes back to the position
7 we need to understand what it is that Mr Harman is going to be saying about -- just
8 take, for example, what he says the royalty arrangements would be in his
9 counterfactual world, if that's one of his counterfactuals. We need to understand that.

10 Now, we thought the sensible thing, therefore, was that he presented his report, we
11 dealt with what he came forward with as the counterfactual and that's the way you get
12 the most sensible engagement. Because there are two big issues, what he's going to
13 say is the counterfactual and how it works and also history in relation to passing on.

14 Now, if you don't have that sequential process and you have the two sets of experts
15 dealing with the issues simultaneously, well obviously what you are risking is that
16 Mr Colley is dealing with -- not able properly to deal with what the counterfactual story
17 is and what the pass-on story is that's being put forward by the class representative
18 which is important.

19 Now, I completely understand that that can then be picked up in reply reports, but
20 that's a much, much bigger step then and you are essentially just missing out on that
21 exchange. So that was the thinking behind the sequential process here because of
22 these big uncertainties in the way in which the class representative were actually
23 putting their case on an economic basis and how the tribunal gets the best interaction
24 here.

25 **LORD RICHARDSON:** Well, I'm not sure we agree that there are uncertainties as to
26 how the economic cases have been put. The counterfactual uncertainties are largely

1 about technical issues, and certainly I think we felt that the session this morning was
2 very helpful in indicating that there's a very good understanding by the respective
3 experts of the other's approach.

4 Now, it may well be that they don't have the detail of what is the royalty going to be,
5 but I think we would quite like to see what they both think the royalty is going to be
6 because they both know they need to do it rather than one respond to the other.

7 So certainly our preference, having gone to the trouble of making sure that they are
8 well aware of each other's cases, is to have them provide simultaneous reports.

9 **MR BEARD:** As I say, I was just explaining why it was -- and with respect to this
10 morning's session, one of things we don't know, for example, is how
11 Mr Harman -- whether Mr Harman is going to be saying, yes, the royalty rate is entirely
12 fine for any putative alternate stores that they are going to be on and how I think that
13 should be set. We just don't understand.

14 **LORD RICHARDSON:** That's partly a function of the introduction of Mr Bezant,
15 though, isn't it? It may well be that is something that Bezant will deal with.

16 **MR BEARD:** Mr Bezant will deal with some of the issues that arise in relation to that.
17 The reason why we had anticipated that sequential might be useful is because I'm not
18 suggesting that the two experts don't understand in very broad terms where they are
19 heading with these stories, but there is an extent to which that question about, for
20 instance, what Mr Harman is saying -- and I'm just taking one example -- that he's
21 saying "well, you have an alternative store, but I recognise that the store may have to
22 pay a royalty in these circumstances." Now, what the level of that royalty is that he is
23 asserting should or should not be payable or no royalty at all --

24 **LORD RICHARDSON:** I understand the point, but I think I am saying to you we would
25 actually prefer if both Mr Harman and Mr Colley worked that out and gave us the
26 answer. We would find it particularly helpful because that will give us two points of

1 reference rather than an argument which is undoubtedly going to maximise the
2 difference between them.

3 **MR BEARD:** Again, we have to be a little bit cautious about what we are asking
4 Mr Colley to deal with because we need to understand -- Mr Colley will need to
5 understand what the story is that he's not responding to effectively.

6 **LORD RICHARDSON:** I think he understands that, Mr Beard, and in a way it is really
7 actually Mr Colley's argument that there should be a royalty and I understand that is
8 a better -- an argument he puts forward on a positive --

9 **MR BEARD:** I think it's rather different from that, it's essentially saying that if you are
10 putting this forward as the alternative and saying that actually this would have a benefit
11 for consumers in your hypothetical world, you need to explain why that's the case,
12 including taking into account royalties, but that's a discussion for another day.

13 I understand what the tribunal wants and I'm not going to fight further about it. You
14 see the point we are making. The consequence, however, will be in relation to the
15 timetable, whichever one we are dealing with, there will need to be a much more
16 substantial gap between principal reports and reply reports. Because at the moment
17 you only have a month in there and that just is not feasible given that what comes out
18 in these preliminary reports could be very, very substantial.

19 **THE CHAIR:** I think we will proceed on simultaneous, Mr Beard, we hear what you
20 say. I think, Mr Palmer, your --

21 **MR BEARD:** I think Mr Palmer was simultaneity -- **(overspeaking)** --

22 **MR PALMER:** Simultaneous, and for the reasons that you indicate, if I need to
23 persuade you, let me know, but if you are minded -- **(overspeaking)** -- then nothing
24 further to say.

25 **THE CHAIR:** I think that deals with all the expert issues; am I right?

26 **MR BEARD:** Yes, so we are effectively postponing the decisions in relation to

1 Professor Pietzuch. He is admitted for present purposes as an expert; is that how we
2 are dealing with these things?

3 **THE CHAIR:** I don't think we are postponing anything in relation to him, we have given
4 permission for him.

5 **MR BEARD:** It is the scope of his evidence.

6 **THE CHAIR:** And we have given you permission as well to be firmed up by whatever
7 date it is you receive or shortly afterwards --

8 **MR BEARD:** Yes, I think we will need a couple of weeks afterwards, but yes.

9 **THE CHAIR:** You will need a couple of weeks. Indeed, there may be (inaudible)
10 issues tied to your defence or -- (**overspeaking**) -- amended --

11 **MR BEARD:** Yes, I think that will be the sensible way of doing things.
12 I should say that both of these timetables need to include a period for the rejoinder
13 because there is not an amended rejoinder. But that is a separate issue.

14 **THE CHAIR:** We will come back to that, but then as far as experts are concerned, I
15 want to make sure we have dealt with everything.

16 **MR BEARD:** I think so. We just have left our position in relation to the scope of what
17 Professor Pietzuch --

18 **THE CHAIR:** You've obviously got the entitlement to object if it goes beyond, but the
19 difficulty is -- (**overspeaking**) -- rather depends on what is in the pleading ultimately?

20 **MR BEARD:** That's the issue I'm just conserving here in relation to --

21 **THE CHAIR:** I understand. I do not think you -- you haven't -- the stable door is not
22 shut on that. You are entitled -- as I understand it, you have reserved your position as
23 to whether he's a proper expert in relation to all the material he might choose to give
24 evidence on. You are also concerned about whether there is actually an overreach in
25 scope in terms of the things that might or might not be an issue.

26 **MR BEARD:** As long as my marks are clear, I have -- (**overspeaking**) --

1 **THE CHAIR:** Your marks are clear. **(Pause)**

2 A little bit of black-sliding from us. I think what we might do is give you conditional

3 permission on the basis that we would like to firm it up once you've seen the amended

4 pleading. The reason for that is just simply it doesn't seem quite appropriate for us to

5 be giving permission for an expert in circumstances where we all acknowledge we are

6 not entirely sure what the scope of his opinion is going to be.

7 Now, I don't think you should read into that any reluctance from us to have him giving

8 evidence, but I just think it is probably helpful to have a mechanism which ties into

9 your amended pleading which is then the basis on which he has permission, so we

10 are all clear about what it is he's actually doing before he gets formally sent off to the

11 races. Is that --

12 **MR PALMER:** No real difficulty with that. Again, it's a matter of scope of evidence at

13 the appropriate time which is exactly what we seek in respect to Mr Bezant.

14 **THE CHAIR:** In a way, if we don't do that, I am sure that Mr Beard will still be opening

15 the issue up on that basis, so it is probably a matter of --

16 **MR PALMER:** The need for such technical evidence is obvious to the tribunal as it is

17 to everyone else.

18 **THE CHAIR:** I think it's absolutely clear that we are going to have -- and no doubt you

19 are putting forward Professor Pietzuch, so it's fine.

20 Just conscious of the time. Just before we take a break, I think we might take

21 a ten-minute break then come back to deal with the timetable. Before I do that I will

22 just check to see what else is outstanding.

23 We talked about --

24 **MR PALMER:** There are very brief issues on the pleadings, I think, but there is no

25 issue about --

26 **THE CHAIR:** Just on disclosure, have we done everything on disclosure we need to.

1 We have basically agreed it is going to be a Redfern schedule, we are going to have
2 some regular hearings, the first one to be fixed. We have talked about trying to achieve
3 some rolling disclosure and some earlier dates for, at least provisional, some of the
4 technical material going to be managed, subject of course to that.

5 **MR PALMER:** We would say again it can be for July, but there is also low hanging
6 fruit on the economists' side as well. There are some readily identified documents
7 referred to in the schedule, so although the priority is to fast-track technical evidence,
8 where it's easy to get, for example, pricing statements -- relevant information as to
9 pricing approaches, how prices are set, that sort of thing, the earlier that sort of thing
10 is produced the better.

11 **LORD RICHARDSON:** Obviously matters for discussion.

12 **MR BEARD:** I gave the indication we are amenable to thinking about staged
13 disclosure. It may be that that category is actually harder than, say, data of some sort,
14 but let's leave it for another day. In principle, I'm not objecting. The devil comes in
15 what is actually being treated as low hanging or high hanging fruit.

16 **THE CHAIR:** In that case that is good. The only other thing I want to say about
17 disclosure is that I have picked up a sense of some degree of satellite dispute and
18 I think you mentioned search terms and there is clearly some -- these procedural
19 difficulties -- I don't want to dig into it, I just really wanted to read the riot act which is
20 to make it plain to everybody who is listening that when we get these Redfern
21 schedules in front of the tribunal for discussion, I will not be at all amused by these
22 satellite disputes. I want people to concentrate on the issues and be proactive and
23 constructive in trying to resolve them.

24 Just to be absolutely clear, I will be less than impressed if I see any of that sort of
25 behaviour.

26 **MR BEARD:** No, no. I think in relation to that I think the issue is less some sort of

1 | trying to cast shade one side to the other in relation to it. It's just a recognition that
2 | actually the process through to getting to the EDQ and the disclosure report actually
3 | involves a number of stages before you move to final disclosure.

4 | And discussing the Redfern schedules and so on is obviously sensible, but if one
5 | thinks about it just in relation to a category of disclosure where, say, you only have
6 | four custodians, it's been agreed, I'm not going to presume on the other side they
7 | agree, but four custodians are the relevant people, you are covering a long period in
8 | relation to these individuals. You have a discussion about what the search terms
9 | should be, there might be a lot of those search terms, they need then to be tested
10 | because you might find that you get tens of thousands of documents out of those
11 | search terms.

12 | **THE CHAIR:** -- (overspeaking) --

13 | **MR BEARD:** Probably -- I'm not trying to create terrible flashbacks for you,
14 | Mr Chairman -- (overspeaking) -- It's the logistics of that, so it's not about a fight at
15 | this stage. I'm just talking about how we deal with this.

16 | **THE CHAIR:** May I make a slightly different point, which is certainly I have picked up
17 | from the correspondence that there was -- and we see it again with talking about
18 | pleadings and we see it again with the future claims points, where there seems to be
19 | some blockage because somebody is saying it's someone else's responsibility to do
20 | something and they are saying "no, you go first, you go first." And there's a bit too
21 | much of that in this case for my liking and if I will see it I will call it out. So if people
22 | can bear that in mind. That is the point I was making.

23 | **MR BEARD:** Yes, understood.

24 | **THE CHAIR:** I think we should take a break because otherwise we will end up not
25 | taking it. In terms of the pleading, shall we deal with that when come back and then
26 | we will deal with the timetable. I think that is probably the sensible course.

1 We will rise for ten minutes and come back at 3.30.

2 **(3.18 pm)**

3 **(A short break)**

4 **(3.28 pm)**

5 **THE CHAIR:** Mr Palmer.

6 **MR PALMER:** Sir, there were a number of pleading points on the agenda. I'm not
7 sure that any of them need detain the tribunal now. There was the rejoinder, which
8 has been consented to, there are no unresolved issues on the RFIs.

9 The future claims point, we have provided a draft order and yesterday a draft pleading
10 just indicating exactly how we propose to deal with that in due course. Essentially, the
11 proposal was to deal with that application at the PTR, essentially updating the claim
12 period up to that date. The proposal as to how that would be publicised for the
13 purposes of what (inaudible) was used and so forth.

14 We hope to check that there was not an allergic reaction from the tribunal at this point,
15 we are not asking for a determination, but that is why we have explained what we
16 propose to do having flagged it in a similar way, so that intention was flagged in
17 *Spottiswoode* litigation as I understand it.

18 **THE CHAIR:** That is consistent with another --

19 **MR PALMER:** That's what we hoped, but I'm not asking for any -- there's no formal
20 application before the tribunal as of today for the very good reason that you want to
21 leave it to the PTR.

22 **THE CHAIR:** -- **(overspeaking)** -- that is agreed to, this is an approach, you may --

23 **MR BEARD:** I don't think we -- we got -- apparently there's a minor change to the
24 pleading that's been sent. I'm not anticipating that's going to do anything, we need to
25 check on it.

26 I think there's going to be an updated notice draft provided to us. Again, I don't

1 anticipate there is going to be anything very exciting about that. We'll look at. I think
2 at the moment we don't have anything in relation to any of these issues, so no.

3 I suppose at some point we should pick up the fact that somewhere in these
4 proceedings there may well still be an extant appeal in relation to funding issues
5 because obviously it was stayed -- the appeal permission was granted, but then
6 obviously stayed on the basis it was going to be legislation. That legislation didn't get
7 passed.

8 The Court of Appeal isn't imminently about to deal with these things, but I think we do
9 have to recognise that it will come on at some point during the next six/nine months
10 possibly, unless there were to be legislation. But I imagine that assuming there might
11 be a new administration, it may be that they have other legislative priorities and
12 therefore I don't think we can work on the basis that we were perhaps working on
13 before, but I just put that down, that's not really a pleading issue, but I mention it.

14 **THE CHAIR:** That is certainly something that occurred to me as well. I am not sure
15 we can do anything about it.

16 **MR BEARD:** No, I do not think, if we are looking at the timetables into 2026, I am not
17 sure that it makes a great deal of difference, but I just thought I would mention it in
18 passing because it is a change since last time.

19 **THE CHAIR:** That's helpful. Thank you.

20 Should we talk about timetable?

21 **MR PALMER:** Yes, otherwise I think it's just timetable.

22 **THE CHAIR:** Yes, good.

23 Now, we have some views on that. The first view was that I distinctly recall asking to
24 be provided with an addenda timetable and unless I missed something, I haven't seen
25 one. I appreciate or anticipate that you are both going so say that February is quite
26 difficult. Is there a November timetable? I don't think there is one in the bundle, is

1 there?

2 **MR PALMER:** There were in early drafts. Neither of us could make it work, even
3 slightly.

4 **THE CHAIR:** Well, I think it would have been helpful to even see one that didn't work.
5 So maybe there is correspondence that shows it. I don't think there is any point turning
6 it up, no need to -- I just make the point I have asked specifically for it.

7 **MR BEARD:** I think, to be fair to the class representative, they did pull one together.
8 There were exchanges about it. Whether or not it is (inaudible) in correspondence
9 and I think we indicated in our skeleton argument that we had tried to develop
10 a November timetable, but it just was not feasible.

11 I have already put down an initial marker in relation to February. I apologise that we
12 didn't go through the exercise of putting it in a spreadsheet, but it's just -- it wasn't
13 something that was ignored. It was taken into account and, to be fair to the class
14 representative, they did try to pull together an initial version. You have experienced
15 litigation teams on both sides who are trying to make this work and it simply was not
16 going to be feasible.

17 **THE CHAIR:** We will move on from there because we don't have one and I think
18 certainly, Mr Beard, your position is that February looks difficult. I don't know,
19 Mr Palmer, whether you are disagreeing with that. I get the impression you think the
20 same thing.

21 **MR PALMER:** What we do want is a trial date and we would rather have one that
22 didn't move rather than one that did move. So we think it's possible to get to February.
23 It wasn't possible to get any earlier. Once you had the additional round of pleadings
24 in, that's what made the difference.

25 **LORD RICHARDSON:** Certainly our take on this -- and it is very helpful to have it set
26 out in the way you've done that -- is that we can see no reason whatsoever why

1 February is not a viable trial date, and in particular, just picking up key points on that,
2 I understand what you say, Mr Beard, and what your client says on the footnote about
3 meeting extended deadline. But on the other hand these proceedings have been
4 around for a very long time, one would hope and assume that your client has some
5 idea of the documents that it needs to produce, and that some work has been done,
6 at least on the standing document population. Seven months does seem to us for the
7 exercise is quite sufficient, and it also seems to us that there is a potential for some
8 extra time in the timetable, should there be any slippage on that or part of the
9 disclosure for that.

10 Let me just lay down the points and then I will let you come back on them.

11 We also think that there is every expectation that you can fit in everything from there
12 until the current scheduled target of 29 September 2025 for the expert reply report,
13 seems to us the timetable broadly does work from that point on; and at that stage we
14 have three/four months before the end of the year, and another month in January in
15 which no doubt you will be preparing but there is still another month before trial. That
16 seems to us quite difficult to accept that a timetable that on its face looks sensible and
17 allows four months before the beginning of the trial after the expert reports and reply
18 have been served is not a viable timetable.

19 **MR PALMER:** We agree with that. Our only concern has been if there is slippage
20 early on which starts pushing that back.

21 In terms of the adequacy of that length of time as an interval, I entirely agree with what
22 you said, sir.

23 **THE CHAIR:** And we have given the clear indication that we intend to case manage
24 the disclosure particularly and very carefully, make sure it's proportionate and
25 therefore more likely to be delivered. But certainly our view, and it is a firm view,
26 obviously for you to push back on, but our firm view is that this case should be listed

1 for trial in February 2026.

2 **MR BEARD:** Let me push back on that then just for a moment. The duration which
3 these proceedings have been on foot doesn't tell you about the extent of the difficulties
4 in relation to the disclosure process because it's the disclosure process that is going
5 to be important here. Now of course in terms of holds and so on when you are faced
6 with litigation then companies put in place responsible holds.

7 **THE CHAIR:** Are you telling me that the defendant has done nothing by way of
8 preparing for disclosure up to this point in time?

9 **MR BEARD:** I'm not saying it's done nothing, I think as I indicated prior to the short
10 break we had, not only has the defendant been engaging specifically with the process
11 of expert-led disclosure issue identification through the process of identifying not only
12 where the cohorts, the documents would be, but the custodians. I think it's perhaps
13 worth turning up tab 81 in the core bundle where we have the expert disclosure
14 requests and the responses to them.

15 **THE CHAIR:** What page is that?

16 **MR BEARD:** Page 959. So with respect, sir, it's plain that the defendant hasn't been
17 simply ignoring this disclosure process, it --

18 **THE CHAIR:** I don't think it has. I mean I wasn't really seriously suggesting it has,
19 Mr Beard, but really my point is that it won't have done and it should no doubt have
20 made some progress. We are not starting from a standing start --

21 **MR BEARD:** We are absolutely not starting from a standing start and that's why the
22 concerns are so salient here, because if we just take it in stages, running through to
23 the disclosure report and EDQ before there is actual disclosure that's being made, we
24 have a process where we need to deal with the issues in this schedule and the
25 proportionality of the disclosure of documents within this schedule.

26 Now what you see in the schedule are detailed responses that are being given in

1 relation to the expert disclosure issues, including specific identification of individuals,
2 when they were in post, what the posts were that are relevant here; and broadly,
3 therefore, the cohort of documents in relation to key custodians that will be searched
4 for. As I mentioned, that is the first part of the process. The class representative is
5 saying: well, could there be other custodians that are relevant? We will go back and
6 we will explain to the class representative why these custodians are the right people,
7 and why going after wider ranges of people is not the appropriate thing to be doing.
8 We will explain that in answer to the questions they've posed.
9 We then need to go through and identify with the class representative what they are
10 saying they think are the relevant search terms. Obviously we will come up with search
11 terms as well. Those then need to be tested against samples in order to see what sort
12 of volumes of documents we are generating. As you indicated, Mr Chairman, you are
13 familiar with this sort of process. That then needs to feed back into what it is that we
14 are actually going to then carry out as the disclosure exercise that forms the basis of
15 the disclosure report and the EDQ. That process is not going to be instantaneous. It
16 also needs to be done in relation to the Pietzuch material. That is going to take us into
17 the summer. That is a process that will take us into the summer. It just doesn't happen
18 immediately in relation to any of these situations.
19 Once we have clarity, with the assistance of the tribunal case managing the Redfern
20 schedule that we generated from this table and from Professor Pietzuch's requests,
21 once we have that we will then be in the process of providing disclosure. As I've
22 already indicated, we think disclosure can be dealt with on a staged basis. What we
23 are trying to do is identify cohorts, particularly of data that can be provided to the
24 experts on the other side sooner rather than later in order that they can start whatever
25 exercise they want to carry out in relation to it.
26 In relation to the technical documentation that you are talking about, let's not lose sight

1 of the fact that the application for a technical expert on the other side is something that
2 has only come forward in recent months.

3 Now, we have been saying that there are serious issues with claimant's case in relation
4 to these matters previously. We recognised of course that there would be a need for
5 disclosure in relation to these sorts of issues in due course, but to suggest all of these
6 issues were crystallised as to what was going to be required and how we would need
7 to go about it just wouldn't be reasonable in these circumstances. We have
8 nonetheless, in the light of material that we've seen in the application for
9 Professor Pietzuch, and indeed the letter to which we are referring on the 4 June, last
10 week's letter, we have already been making enquiries about how we might be able to
11 obtain that material. But we immediately encounter the complexities that I was
12 highlighting earlier: the fact that we are based in three locations in the US, Europe and
13 Japan, and in relation to technical material we think much of it will in fact be in Japan.
14 That in addition to that there have been multiple restructurings in relation to the way in
15 which Sony operates which makes this exercise more difficult.

16 And the other thing is of course we are talking about, as I said earlier, going back to
17 a period probably to 2012, prior to the advent of PS4 and how PS4 was brought into
18 the market, both in relation to economic materials but also in relation to technical
19 materials, and of course then we are dealing with changes of systems across the past
20 decade, as occur in many companies, and in particular in tech companies, about
21 where this material is stored, whether we need to go to archives and how long that will
22 take, our initial assessment of that means the December, as a date by which that
23 disclosure exercise can be completed, and that's assuming that this tribunal does
24 engage in close case management and doesn't allow disproportionate requests, that
25 will still be something that it will be extremely difficult to hit. We think there will be
26 slippage. If you have slippage in relation to that it does have knock-on all the way

1 through. We do think in those circumstances it is more sensible to build more slippage
2 time into this timetable because we do not think that the disclosure process will be
3 completed by the end of December.

4 And in those circumstances, as Mr Palmer rightly said and I indicated earlier, it is
5 better to have a fixed date, which is less likely to slip, than it is to have one that risks
6 slippage. And I hear the tribunal saying: well, there's a gap between the close of
7 expert reports and the final trial. But you do need in fact a substantial gap in that
8 period in order to prepare. You don't want all of that to disappear in slippage that is a
9 knock-on from earlier disclosure issues. And here we think that in circumstances
10 where this is a case that goes to the fundamental nature of Sony's business, in
11 circumstances where the burden is highly asymmetric on Sony, and that even at
12 a stage where we are only able to provide you with an outline of what the issues are
13 in relation to disclosure, it would not be wise to set that February date. We should
14 allow ourselves at least a couple months more slippage, we think the May timetable
15 deals with that. If the tribunal wants to tighten up timetable points within the May
16 timetable so that effectively it gives some broader gaps later on that can be
17 compressed but make sure we don't lose the May date, that is the more sensible way
18 of dealing with these things. The three months between February and May, they are
19 better kept in these circumstances.

20 **LORD RICHARDSON:** So there is other capacity in the timetable too, isn't there? So
21 the whole pleading process takes from January through till March and actually
22 provided we can prioritise the technical material then actually there is no reason why
23 disclosure couldn't be occurring during that period. Not necessary for the CR to have
24 the disclosure in order to (inaudible) in relation to that point.

25 So there is actually room -- as long as you get prioritisation right, that rolling disclosure
26 right, there is room for slippage past December. And it just seems to us that with that,

1 and with four months -- I take what you say about time for preparation -- but
2 four months is an unduly long time for preparation, there is capacity in this timetable
3 to absorb some slippage and I will certainly be doing my best to make sure that there
4 isn't slippage past December, at least not that it affects the timetable.

5 I mean I hear what you say, Mr Beard, but this is a case that needs to get to trial more
6 quickly than May. We want to get on with it and we see no reason why it can't be done
7 within that timeframe, given the timetable that actually we think leads quite comfortably
8 to a February trial.

9 **MR BEARD:** You have heard my submission. If what the tribunal is thinking is that
10 actually there can be slippage in relation to disclosure and continuation of the pleading
11 process, I mean there is a concern that obviously what comes out of disclosure might
12 well feed back into further iterations in relation to pleading and the orthodox process
13 would be making sure that you closed disclosure. The concern that will arise is if you
14 allow slippage in relation to disclosure, which we think is going to be necessary, you
15 have a difficulty in relation to the factual witness date on 13 February, because
16 obviously all disclosure has to be completed well in advance of the factual witnesses.

17 **LORD RICHARDSON:** It's just an indication of service of the statements; the
18 statements aren't served until March.

19 **MR BEARD:** Agreed, that's true. But you are going to want to take that into account
20 and then --

21 **THE CHAIR:** Look, we are not talking about -- I hope we are not talking about by
22 February a substantial deficit in your client's disclosure. I mean really if we are talking
23 about things that are not done by December then one would hope they are the least
24 important things and there's not so much of it. And if that's not the case then it really
25 does make me wonder how long you think you do need for disclosure.

26 **MR BEARD:** I think one of the things we can do is obviously we will -- as we are going

1 through the Redfern process we will be identifying more closely where difficulties might
2 arise in relation to the timing of the disclosure process overall.

3 **THE CHAIR:** There is an opportunity there for you as well to shortcut some of that
4 because if it is more efficient and you would prefer to do it, then you can provide
5 information in a different way from just providing a lot of disclosure.

6 **MR BEARD:** Of course we hear that as well and -- **(overspeaking)** --

7 **THE CHAIR:** And we don't really know what that looks like, do we, yet, and --

8 **MR BEARD:** No, no, we don't and this is part of the problem with it: because we don't
9 know exactly what it's going to look like because of these technical issues being raised
10 as they have been relatively recently then those are issues in respect of which there
11 is a degree of uncertainty. I'm not decrying that. But we do have a situation where
12 we need to close disclosure, make sure we are identifying the relevant factual
13 witnesses. Of course it's not that we won't be identifying factual witnesses before the
14 close of disclosure, but in order to declare them finally we want that disclosure closed.
15 And actually preparing witnesses, I know that the Practice Direction is of course saying
16 don't trail your witness through a commentary on documents, but you do need to have
17 the disclosure available to them in order to do these things. And March, frankly, is still
18 going to be tight for those witnesses. That is the truth of these matters.

19 **LORD RICHARDSON:** I'm just looking at the alternative timetable which I think is in
20 the supplementary bundle, I think it's at page --

21 **MR BEARD:** 185.

22 **LORD RICHARDSON:** -- 185, thank you. And just looking at that on that timetable
23 disclosure is concluded on 28 February 2025.

24 **MR BEARD:** Yes.

25 **LORD RICHARDSON:** And the final date in terms of the final exchange of expert
26 reports comes I think on 19 December 2025.

1 **MR BEARD:** Yes.

2 **LORD RICHARDSON:** Now, I think in a nutshell the difficulty which the tribunal has
3 is from 19 December until the date of the trial on 2 February we are struggling to
4 understand why it is -- even on this, which is a more pessimistic view of how long
5 things might take -- why it isn't possible to consider the parties might be in a position
6 to proceed with the trial on 2 February 2026. Because it's interesting, isn't it, that
7 two months follow through, doesn't it, from end of December through to end of
8 February and likewise from end of September until December in relation to the expert
9 reports.

10 **MR BEARD:** I take your point, Lord Richardson. In relation to this latter timetable
11 what it does -- and there are a couple of things that I just wanted to pick up in relation
12 to it if I could. First of all, if we look at that timetable, where it talks about the expert
13 reports being filed, the reply expert reports being filed on 19 December, I think this
14 timetable could move all the simultaneous reports back to the middle of October to
15 ensure that you had simultaneous reports being provided and then two months for
16 reply which would deal with the issue that I highlighted earlier.

17 **LORD RICHARDSON:** There is argument that that should be the case and the
18 February timetable that you could move the simultaneous experts at least to the date
19 suggested by the CR which is 11 August and it is possible that you might do the replies
20 before the end of September as well.

21 **MR BEARD:** That's true. But you are also dealing with humans here, and setting
22 those deadlines through August and into September is dealing with a situation where
23 essentially during summer months you are effectively requiring people to deal with
24 intensive preparation of expert reports. This timetable, the second timetable doesn't
25 do that sort of thing. It does involve a degree of humanity to those who are actually
26 dealing with this process, though I do completely take the point that it concludes in

1 December and then doesn't list a trial until May. And if the tribunal was to say: well
2 actually, perhaps we should be moving more towards this second timetable but
3 because it effectively accommodates more flexibility right the way through it we don't
4 need to have as long through to the final trial, so that we would be, for instance, looking
5 at a March/April type trial, perhaps April splitting the difference between the two. You
6 then have three and a half months between the conclusion of the process and through
7 to a fixed trial. You would in those circumstances be obviating the risk or mitigating
8 them very substantially of any slippage and you will be dealing with the process
9 through disclosure entirely adequately.

10 If we are in the territory of discussing those two months, it seems to us that it is much
11 more sensible to adopt, broadly speaking, the second trial timetable, perhaps bring
12 the May date forward, but nonetheless make sure that the stages along the way do
13 not require, on the face of it, undue pressure covering holiday periods, that they do
14 allow for potential slippage without it all having to move everything else along the way
15 and in those circumstances accommodate both positions, and give us greater
16 certainty. Because on that, Mr Palmer and I are absolutely ad idem, we want to have
17 an absolutely clear date on which this trial is going to start.

18 **LORD RICHARDSON:** (Inaudible).

19 **MR PALMER:** Sir, I have one concern only really, which is that when we are called
20 upon to do our amended Claim Form we have enough time for disclosure. So with the
21 staged disclosure that really should be possible and with your assistance, sir, as you
22 indicated, we are about to get relevant disclosures in time so that we are not
23 ridiculously pressed to understand what we are being told taking expert advice to plead
24 a proper case. If we clear that bar then really sympathetic to what the tribunal has
25 said about the amount of time following the end of expert report and getting to trial.

26 If you want to build in some extra slack, just have to be between February, May, March

1 might do, if that's what it takes. These are illustrative timetables. I think that is our
2 only concern. We do want a workable trial date which won't have to be postponed and
3 then goodness knows when next the tribunal will be available, counsel will be
4 available; that's the worst of all worlds. We want a trial date we can count on, sufficient
5 time to plead our case, sufficient time to consider it, sufficient time for skeleton
6 arguments following reply, exchange, reports. We think that can be done in
7 February/March but honestly I am more concerned to have a date which the tribunal
8 thinks is achievable and we can depend upon than arguing the toss over one month
9 here, one month there.

10 **MR BEARD:** Can I just check -- there's just one issue that I wanted to check. There
11 was, as I understand it, at the informal CMC that Ms Thomas led for Sony on,
12 a discussion about applications potentially from the class representative in relation to
13 third party disclosure. I don't know whether or not those are still being contemplated
14 and if so whether or not we need to accommodate that at all.

15 **MR PALMER:** Part of the disclosure process, the difficulty is, in advance of receiving
16 disclosure from Sony, we simply don't know what we would need to ask third parties
17 for. There are some things which -- obviously -- the approach of third party disclosure
18 is generally quite restrictive and kept to what is necessary for obvious good reasons.
19 So we are keen not to make scattergun applications for third party disclosure, however
20 much we would like to get hold of all sorts of publishers' data and so forth, but to target
21 any applications, again with the staged procedure just makes that a much more
22 realistic and credible way to proceed, if I may respectfully say so.

23 **LORD RICHARDSON:** The problem of availability of counsel, is that driving you?

24 **MR PALMER:** Not on our side.

25 **MR BEARD:** In terms of either dates, I don't believe that there is. If there was any
26 drift in relation to it, such that being shifted, then obviously as Mr Palmer said that

1 quickly creates a problem -- (**overspeaking**) --

2 **LORD RICHARDSON:** -- at the moment it's not a problem.

3 **MR BEARD:** No. At the moment we don't have specific problems, we both made sure
4 that we are available in order to do this.

5 **LORD RICHARDSON:** In February and May?

6 **MR BEARD:** Yes, we have. We have given the indication to the tribunal, we have
7 ensured that that is the position, but that isn't the consideration in these circumstances.
8 (**Pause**).

9 **THE CHAIR:** Yes. I think we are partly persuaded, Mr Beard, but not completely.
10 We think the March is the right date to aim for, we want to pin that down. So the first
11 available date in March, first sitting day in March. And inevitably that means if we are
12 looking at -- I think the estimate is eight weeks; is that right?

13 **MR BEARD:** I think that's the current -- yes.

14 **THE CHAIR:** We are then inevitably going to fall over Easter, which is on 5 April. But
15 that may be no bad thing in terms of giving people a bit of time to gather themselves.
16 Of course February wouldn't have that problem but I understand the points you make.
17 So what we will do is we will fix the trial for the first available date in March 2026.
18 I think we'll leave it to you to go away and come back --

19 **MR BEARD:** With a timetable.

20 **THE CHAIR:** -- with a timetable. There are quite a few things that have moved a little
21 bit today --

22 **MR BEARD:** Yes, I think that's the change we are rather working through now, yes.

23 **THE CHAIR:** And I would expect to see that that would give you a little bit of extra
24 time for disclosure, Mr Palmer hopefully a bit of time to make sure he's comfortable
25 he's got time to deal with the pleadings and then --

26 **MR PALMER:** We will work on that basis. Could I just emphasise, the matter which

1 needs to be dealt with today in terms of getting us -- perhaps you are coming to
2 this -- from here to July first CMC, mini-CMC that you have contemplated. What that
3 does say to us is it underscores the need to get the Redfern process underway swiftly.
4 We proposed in the timetable that we file and serve our Redfern schedule by 21 June,
5 so that's only a week's time, and we need a response on that from Sony. We have
6 suggested 5 July, giving them two weeks to do that. I appreciate there may be some
7 categories for which their answer is: we can't do that yet. But if there's going to be
8 a meaningful CMC in July, second week I think of July, there is going to need to be
9 some boxes ticked so we can make some progress. That's what we would be keen
10 by way directions coming out of today.

11 **THE CHAIR:** You should clearly be getting on and serving it as soon as you can, in
12 any event by the 21st, if you can do that.

13 Mr Beard, I mean, on the basis that we know you are only going to be telling us what
14 you can tell us, and the answer, it would be helpful to have a -- (**overspeaking**) --

15 **MR BEARD:** Look, given the tribunal's indication that you want to have a hearing
16 second week in July, I think that there isn't an option. We need to tell you what we
17 can at that point and, you know, it will be a developing story, as they euphemistically
18 do on the rolling news. That we completely understand and I think we have to deal
19 with that.

20 The one thing that I'm not sure about is how -- look, it's frankly up to the class
21 representative if they want to provide a statement of common ground and list of issues.
22 I don't want to at this stage be agreeing the idea that we should be responding to that
23 by 5 July if we are going to have a --

24 **THE CHAIR:** I don't think you are being asked to, are you?

25 **MR BEARD:** On their green code we are.

26 **THE CHAIR:** Oh, I see.

1 **MR BEARD:** I think it might be more sensible --

2 **THE CHAIR:** I see, that's all right, yes.

3 **MR BEARD:** -- if that's picked up as something that is dealt with at the CMC, rather
4 than trying to do these two things in parallel. If the class representative wants to serve
5 it then that's great, and then we have it available and we can consider it. But I don't
6 want to be pinned down to responding to that whilst we are trying to deal with these
7 issues in relation to disclosure and Redfern in the run-up to that CMC.

8 **THE CHAIR:** Why don't we -- I don't think that's likely to make a difference to the CMC
9 so I don't imagine it's a necessary input. Why don't we talk about the timetable again
10 at the CMC and -- I mean, we can see what you've given us and I will have a chance
11 to consult with the rest of the tribunal.

12 **MR BEARD:** We can also then come back with what we think are workable times for
13 the service of the disclosure report and EDQ as part of the overall timetable.

14 **LORD RICHARDSON:** (Inaudible).

15 **MR BEARD:** The first one being a rejoinder and then -- that is effectively agreed so
16 we will get that sorted. But yes -- that's a much better way of capturing what I was --

17 **LORD RICHARDSON:** And the rest of that page will then be for discussion, including
18 the last item will be -- you know, we are expecting, and then it's going to be -- in the
19 March timetable no doubt you are going to squeeze a bit of extra time and hopefully
20 not too much. But that's something we are clearly going to be talking about in a way
21 that actually is going to be eclipsed by what we decide on the Redfern process anyway.

22 **MR BEARD:** Yes. The two things are going to interrelate because how you are
23 thinking of managing that process subsequently will depend on what the scheduling
24 for hearings thereafter will be.

25 **MR PALMER:** Just thinking on my feet rather than on this, but on the draft statement
26 of common ground list of issues it may be that that is something which should be

1 postponed for the moment in any event to be thought about because the logical place
2 for that actually would be at the close of pleadings.

3 **LORD RICHARDSON:** As I understood it -- you are putting forward, as I understood
4 it, and I thought the point of it was to help us with the disclosure discussions, I think it
5 would be quite helpful when we **(overspeaking)** --

6 **MR PALMER:** The statement of common ground --

7 **LORD RICHARDSON:** It could just be a draft, couldn't it?

8 **MR PALMER:** Might be a "travelling draft" -- **(overspeaking)** --

9 **LORD RICHARDSON:** I wonder if that might be --

10 **MR PALMER:** Treated as a "travelling draft".

11 **LORD RICHARDSON:** If you could produce that I think it would be helpful, and then
12 if you are able to comment when you --

13 **MR BEARD:** We will do what we can -- I didn't want to be held to a kind of formal
14 response prior to the CMC.

15 **LORD RICHARDSON:** If we have it on an iterative working basis that would be
16 helpful.

17 **MR BEARD:** Yes, that fine. No objection, we'll obviously do that. We can't stop them
18 sending us stuff.

19 **THE CHAIR:** Is there anything else?

20 **MR PALMER:** I have one other matter, unrelated, just to -- just going back to the
21 conditional approval for Professor Pietzuch, the application hasn't yet been made for
22 his admission to the confidentiality ring but I take it it's not the tribunal's intention that
23 the conditional nature of the permission should affect our ability to make that
24 application, just to get the point clear.

25 **THE CHAIR:** That's absolutely right.

26 **MR PALMER:** I am very grateful.

1 **MR BEARD:** I'm going to take it that that's the same for Mr Bezant.

2 **LORD RICHARDSON:** Yes.

3 **THE CHAIR:** Well that's it, I think, isn't it?

4 **LORD RICHARDSON:** We finished five minutes early.

5 **THE CHAIR:** We're done in record time. Thank you very much. That's been
6 extremely helpful.

7 The next thing is we will get back to you with a date for the CMC and we will put
8 everything else up there. But thank you very much for your help, we are making good
9 progress. Thank you.

10 **(4.07 pm)**

11 **(The hearing concluded)**