IN THE COMPETITION APPEAL TRIBUNAL

Case No: 1595/7/7/23 & 1644/7/7/24

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 2nd June 2026

Before:
Sir Peter Roth
Charles Bankes
Keith Derbyshire

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Robert Hammond & Professor Andreas Stephan

Class Representatives

V

Amazon.com, Inc. & Others

Defendants

A P P E A R AN C E S

Ben Rayment (Instructed by Charles Lyndon & Hagens Berman) on behalf of Robert Hammond

Tristan Jones KC (Instructed by Geradin Partners) on behalf of Professor Andreas Stephan

Conall Patton KC, Oscar Schonfeld, Daniel Piccinin KC and Kristina Lukacova (Instructed by Herbert Smith Freehills Kramer and Covington & Burling) on behalf of Amazon.com, Inc. & Others

James Bourke (Instructed by Stephenson Harwood) on behalf of The Association of Consumer Support Organisations Limited (ACSO)

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Tuesday, 2 June 2026

(10.30 am)

THE CHAIR: Good morning. We start, as always, with a warning.

These proceedings, like all proceedings in this Tribunal, are being live streamed. An official transcript of the proceedings is being made and an official recording. It's strictly forbidden for anyone to make any unauthorised recording or take any visual image of the proceedings, and to do so is a contempt of court and punishable as such. So, you have been warned.

Thank you to all the parties and indeed to those behind you, who we know do a lot of the background preparatory work, for the exchanges you've had, the measure of agreement that's been reached regarding the directions we're being asked to make. That, of course, has greatly simplified the task for today and shortened this hearing. We do appreciate that and the amount of preparation that has gone in.

If we can perhaps start at the end. We see that the directions for the opt-in application being made by Amazon in Professor Stephan's proceedings have been agreed between the parties. We've been asked to make, I think, those directions. They're not part of the form of order that has been prepared, because they only relate to the *Stephan* proceedings.

I think the dates that we've been given are set out at the end of the skeleton argument for Professor Stephan from Mr Jones: Professor Stephan's evidence in response by 4.00 pm, 3 July; Amazon evidence in reply, 4.00 pm, 31 July; skeleton arguments, 1 September 2026. I think you all agreed on those directions; is that right?

MR JONES: Yes, yes.

THE CHAIR: Yes, so we're content to make those directions. If you could draw up an order in those proceedings, and that would be done.

Then we've got -- which came yesterday -- I think a common form draft order for today with some things, of course, still in dispute. The first matter appears to be with regard to the list of other proceedings included in the recital with a view, then, to the operative part of the order in paragraph 1. Many of these are agreed. As regards (l), it doesn't really matter, Mr Jones, whether it's called an investigation or inquiry, does it?

Submissions by MR JONES

MR JONES: So can I break some good news, which is that we've had further engaging discussions overnight, and we've managed to iron out a few other wrinkles. I have another draft. The investigation/inquiry debate is one which me and Mr Piccinin enjoyed having, and in the end I agreed with him: we should call it an inquiry, not an investigation. But can I hand up just a slightly revised version, please? (Handed)

I should say, even since producing this, there are a few other changes which again shortcut a few of the debates, and so perhaps I could just tell you what they are briefly. There's three just to highlight.

In paragraph 1, the claims to privilege, the debate about the claim to privilege. The red text is agreed there. So I'll just say to make it clear that that claim to privilege will be a claim in respect of explanations which are given under (i) to (v) that follow. So it arises if there is a claim to privilege in respect of those sorts of explanations. That is why, as I understand, Amazon has been happy to agree to the red text. So that's been accepted.

Now, turning over -- just under (i), there was a debate in the next chunk of text about proportionality and relevance. I'm just highlighting this because, firstly, you'll see it's been agreed, but secondly, unfortunately there's a typographical mistake in this. We

need to delete, in the third line, from the word "unless", through to and including the opening parenthesis. Those need to be deleted, and then, sir, you'll see that that then makes sense as a proposal.

THE CHAIR: Down to, "to the extent proportionate to do so"; is that right?

MR JONES: So we delete the words "unless", "where and to the extent proportionate to do so", open brackets. Those will all be deleted.

THE CHAIR: In the fifth line of the subparagraph, it reads:

"a general description of the types and subject matter of documents produced by Amazon in each of the Other Proceedings [probably delete the full stop]. And;

"unless it is disproportionate to do so, in which case ..." [as read]

MR JONES: Yes, sir, let me read that piece out; what it should say:

"... unless it is disproportionate to do so (in which case Amazon will provide a detailed explanation of the reasons why it is said to be disproportionate), and unless the documents are in Amazon's opinion plainly irrelevant to the issues in these proceedings, in which case Amazon may state so and provide a detailed explanation as to why that is considered to be the case." [as read]

THE CHAIR: So, "in which case Amazon may state so". They have an option.

MR JONES: Of course I don't think it's intended that they would have an option if they think (audio distortion). Mr Piccinin is saying he meant that.

THE CHAIR: Yes, that's what (audio distortion). Yes.

MR JONES: But, sir, there is another point.

THE CHAIR: Oh, yes. Just like in the previous brackets, "will provide an explanation", "shall state so". Yes.

MR JONES: Having said all of that, Mr Piccinin has just whispered into my ear that it says “detailed explanation” here, which they did not actually agree to include “detailed”, where it says, "detailed explanation of the reasons why it is said to be

disproportionate". I'm afraid we'll make that small (audio distortion).

THE CHAIR: You can then argue what's detailed and what's not detailed. I mean, an explanation. If you can't understand the explanation and you think it's too vague, you write and ask them. If you still end up in dispute, we can come back, but I think we're not going to take up time on that. So we can delete, "detailed".

MR BANKES: Can I just check the word "and" at the end of the second line: are you intending that it should be a cumulative test, both disproportionate and irrelevant?

MR JONES: Oh, no, they're disjunctive. You could say "and/or".

MR BANKES: I think it should say "or".

MR JONES: Should say "or". Very well. (Pause)

The third one just to highlight is, broadly speaking, as you know, the way the order works is that paragraph 1 relates to documents and requires, among other things, Amazon to make a proposal as to future disclosure of documents falling within paragraph 1.

Paragraph 2 relates to algorithms, and there are issues still there which we're going to have to come back to. But paragraph 2 should include something requiring a proposal to be made for the disclosure of algorithms, and that had fallen through the net. So that has been added at the end of paragraph 2 in red. But again, further agreement has been reached because Mr Piccinin has said that they will agree to those words in red which say, "and stating which materials identified above the defendant has proposed to provide", as long as we add the words, "if any". We are happy to add the words "if any" to the (overspeaking) of that.

THE CHAIR: "... which materials, if any, ..."

MR JONES: Yes.

So I should say, those three points which I've just taken you to are points which I needed to show you, because they required some amendments on the document.

There are some other changes in here, compared to the one you've been looking at. They are, however, minor. They will become apparent, I think, as we go through, if they're of interest. They're things like the investigation/inquiry point, which we agreed we didn't really need to spend time on.

THE CHAIR: Now are we back to the question of whether these three identified earlier proceedings should be included in other proceedings?

MR JONES: That's right.

THE CHAIR: That's obviously something that concerns your client, but not Mr Rayment's client, not Mr Hammond, because they relate to the price parity.

MR JONES: That's correct, sir.

THE CHAIR: Yes.

MR JONES: Sir, on this issue, the idea, as you know, is to identify other proceedings where there are pre-existing caches of documents which can form a proportionate starting point for disclosure in this case. But none of those pre-existing caches will overlap perfectly with the issues in this case: they concern somewhat different abuses; they concern different time periods; they may concern different geographies.

But there have been, as you know, many investigations in other proceedings which touch in various ways on the issues in this case. The parties, in a broad sense, have agreed that those caches form a sensible starting point; Amazon then won't need to, as it were, re-invent the wheel. These three sets of proceedings do all concern abuse 5. I'll just remind you, if I may, of how that's put in the pleadings.

THE CHAIR: I think we're aware of abuse 5.

MR JONES: So can I show you how these three are pleaded in the pleadings, just to show you where they come into it.

THE CHAIR: Yes.

MR JONES: If we take up the core bundle in these proceedings, which is A. (Pause)

At 183, you have the anti-discounting practices described. At paragraph 159, you'll see that there's a reference back to certain express contractual requirements having been historically imposed by Amazon.

THE CHAIR: Yes.

MR JONES: Now, those historic clauses are said to pursue the same purpose, you'll see in paragraph 159, as the anti-discounting practices which are now followed.

Now, the other proceedings -- if you go back to page 150 -- were summarised at paragraph 87. So there's the OFT one at 87.1, the German one at 87.2 and the European Commission one at 87.3. I will take you briefly to the underlying documents to show you in a bit more detail what those three are about.

The OFT investigation, there is relatively little, as far as I'm aware, in the public domain, but my skeleton argument has quoted from the page which relates to this. So that is in bundle D at page 13.

THE CHAIR: Well, do we need to go beyond your skeleton argument? You've quoted it, haven't you?

MR JONES: Yes, exactly.

THE CHAIR: Yes, so we can just take it from that.

MR JONES: You can take it from that.

THE CHAIR: Yes.

MR JONES: You can take it from that, and the key points which come out of that are: it was an Article 101 --

THE CHAIR: We've read it, Mr Jones, (overspeaking).

MR JONES: -- investigation. Certainly, yes. I'll just do it very briefly, just to give the key points.

It's an Article 101 investigation, is one point. It was looking at the price parity conditions. It was closed in 2013.

The German investigation is in the bundle -- and, sir, it may also be that you don't need to go beyond my skeleton argument.

THE CHAIR: But you quote it in paragraph 18, yes.

MR JONES: It's all set out there. The Commission investigation is a 2017 decision in e-books, and that is in the bundle -- sir, I will just show you that briefly, if I may. It's in bundle E, from page 10.

THE CHAIR: Yes, it's a long decision, an Article 9 decision.

MR JONES: It's a long decision, and you'll see, if you go forwards to page 14, the subject matter of it. This was an Article 102 investigation. It's into e-books. It's concerned with what I called various price parity conditions which were in the contracts with e-books suppliers.

Forwards at page 19 -- this is referred to in my skeleton, but just to show you that from page 19, there is a detailed description of the various parity clauses. One of them, at recital 24, is called a "business model parity clause". You'll see that, in effect, it's a type of standard, most-favoured-nation clause, similar to what had previously been imposed in the marketplace and which was the subject of the UK and German investigations.

THE CHAIR: Slightly different relationship, though. (Audio distortion) it's the supplier.

MR JONES: Yes, it's the supplier and -- well, yes, so in fact the precise nature of that contractual relationship is redacted from some of this decision so it's not entirely clear precisely what the relationship is. It's sometimes described as a wholesale relationship; it's sometimes described as an agency relationship. I understand that historically, there were relationships where -- and these may be ongoing -- e-books are licensed to Amazon, and it then essentially acts as the retailer --

THE CHAIR: So there are various (inaudible) models. Different models, I think.

MR JONES: So there are various -- but it wouldn't be right to say that there's no model

which is the same as the marketplace. It's right to say it's a different market, and so they're not within scope directly; but it's not right to say that it's necessarily all about a different model contractually to what happens on the marketplace, because actually the details of that are redacted and we don't know exactly what the model was or what the models were.

Now, what Professor Stephan says about these various documents is that they show that over time and in various markets, Amazon has adopted these very similar sets of practices. They are all aimed at ensuring that prices on other comparison sites are not lower than, or not significantly lower than, prices on Amazon. Now, the old price parity clauses were ensuring that prices were not lower on other sites. The new policy, the anti-discounting policy, as you know, is framed as ensuring that prices are "not significantly lower on other sites".

One of the complaints which Professor Stephan makes is that actually that word significantly, which is never defined, is itself part of the abuse because people selling on Amazon don't know how to comply with that. That is why Professor Stephan says these are essentially the same kinds of provisions. You've moved from an express contractual term, price parity term, to a set of policies. Which are anti-discounting policies. But although you say there's a small difference because it's moving from not lower to not significantly lower, even that small difference doesn't really exist in practice because of the ambiguity around significance.

THE CHAIR: The question in this case is, what has Amazon been doing since about October 2015; isn't it?

MR JONES: So --

THE CHAIR: I mean, if they've done nothing since October 2015 on price comparison, abuse 5 falls away. The fact that they did it previously, 5, 10, 15 years before was irrelevant. Isn't that right? If you can't show that they have been doing it in the relevant

period, there is then no abuse.

MR JONES: Oh I see, absolutely right. In terms of showing what they've been doing, we have to show that they've been doing it in the relevant period.

THE CHAIR: Yes.

MR JONES: I accept that. So just for clarity, they --

THE CHAIR: And had they not been doing it in the relevant period, there is no abuse here.

MR JONES: I entirely accept that. Also, just for clarity, the relevant period goes back to 2017. That's the pleaded period from which they are dominant.

THE CHAIR: I thought it goes back to October 2015 in your case.

MR JONES: 2017 is how we've defined the relevant period. (Pause)

Oh, Mr Rayment is telling me on his case it's 2015.

THE CHAIR: Yes. Well, I'm looking at paragraph 128 of your amended particulars of claim. Have I got that wrong? (Pause)

MR JONES: Sorry, sir, I missed the paragraph.

THE CHAIR: Maybe that's not the relevant period. (Pause)

Well, that's when you say dominance, I see. Yes, that's when you say they've been dominant, but the relevant period is six years before the claim form.

MR JONES: Yes.

THE CHAIR: Yes, so that would be --

MR BANKES: June 2018.

THE CHAIR: June 2018, Mr Bankes is pointing out.

MR JONES: Yes, I see, so relevant period -- yes, sir.

THE CHAIR: Yes.

MR JONES: Dominance 2017, yes.

THE CHAIR: Yes, but the claim, the relevant period for abuse is June 2018. So you've

got to show, and we're not concerned with the Hammond claim period because they're not alleging this abuse, that from June 2018 onwards there was this price parity policy or significant price parity, whatever.

MR JONES: Yes, exactly.

THE CHAIR: Yes.

MR JONES: So that I accept and we're on the same page about that. What we say is it is going to be helpful to look back at the earlier material to inform our analysis of effects.

THE CHAIR: But why is it necessary?

MR JONES: Well, it'll be relevant because, as we say --

THE CHAIR: Sorry to interrupt you, but the criteria for disclosure are relevance and necessity.

MR JONES: Well, we're --

THE CHAIR: It's not just relevance.

MR JONES: Well, at this stage we are simply asking what documents were produced in those other proceedings. The way that we see the claim, and it's been pleaded, is a continuous type of conduct which started with express clauses and then moved into these policies, which effectively dealt with the precise concern that the regulators had put to Amazon, but found another way of achieving the same end.

Now, when you then ask, what's the effect of this conduct? What we are concerned to know is why did Amazon introduce it in the first place? And when you look at those documents, it will be interesting to see, for example, what were their concerns about comparison sites? Other sites, I'm saying comparison sites, I simply mean other competitor sites. What were the concerns which were being raised? Why was it felt necessary to introduce these sorts of parity or anti-discounting provisions?

THE CHAIR: I'm not sure you need a lot of information -- anyone operating a site like

this, one can see why they will find it useful to have a price parity clause. You don't need lots of disclosure.

MR JONES: But there may be evidence about what the effect was of not having the price parity clause, so there may be something -- you would expect them to be looking at the effect of competition in the absence of a price parity clause. That tends to (overspeaking) --

THE CHAIR: You're trying to help to prove your case that it had an effect.

MR JONES: Precisely, precisely. There will be documents in there which go to effect, because --

THE CHAIR: But that would be effect in 2012.

MR JONES: Yes, but if since 2012, there's been a consistent pattern of conduct, that will be the only clean thing that one can look back to. What was going on before then, and what is the evidence that Amazon looked at, at the outset of this conduct, to make the business decision that it made? What were the strategy documents? What was the analysis that Amazon had done? What was the evidence that it had gathered, which made it concerned about the absence of price parity or anti-discounting provisions? Because otherwise, when we come to look at effects, we'll only be able to speculate about a counterfactual and about the reasons for adopting this in the first place. So those are the reasons why we think --

THE CHAIR: You're going to have to -- the counterfactual, you don't have to speculate, do you, about the counterfactual on this one? The counterfactual is very clear; there would be no such policy, and merchants would know that the price they charge elsewhere is irrelevant to what Amazon might do. So that's the counterfactual. What you would want to see is, well, what would that have done to prices in a period which is quite different from the period that one is concerned with, if you're looking at the outset, the introduction of this policy that did exist.

MR JONES: It would be different, but it would nonetheless have relevant material which would throw light on this. The questions which arise would be, firstly, how would merchants have behaved in that counterfactual? And there may be evidence about that in this cache of documents, because there may be evidence about, as I say, what motivated Amazon to adopt the policy, which may well have included them looking at how merchants were pricing on other sites. One assumes that's what would have motivated the policy, and therefore there would be evidence.

We'd be able to look and say, we can see before this course of conduct was adopted, we can see what merchants were doing because Amazon itself has documents, and they would have been gathered and disclosed in these other proceedings.

THE CHAIR: Why won't your clients have such documents? Your clients are the merchants.

MR JONES: Well, so those are members of the class; that's right.

THE CHAIR: Yes. If you want evidence on how merchants would behave.

MR JONES: We are going to be considering, I think, at the next CMC, possible disclosure from the merchants. But as you will know, there are many, many limitations to that exercise. One of them, and it's a crucial problem, is how would you go about getting any sort of disclosure which is representative; because over a large variety of merchants, as we have in this claim, there's going to be very, very different behaviours, experiences and evidence.

So in circumstances where we think Amazon already has or may well already have this kind of evidence, and it's already gathered in these caches for these other investigations which have been carried out, it would be very useful and much more targeted and proportionate to have access to those.

THE CHAIR: So this is going to the quantum claim, right? You're looking at the effect of, how would merchants have behaved if there was no such policy? That's the

relevance, you see.

MR JONES: Yes. I mean, it comes in at the effects stage as well, but I accept that effects will be a more straightforward bar for us to meet. But yes, it's relevant to effects and to quantum because on both of those questions we will want to know how merchants behave so that you can then work out what the effects have been on Amazon.

THE CHAIR: And it's not relevant to the question of, did Amazon have such a policy in --

MR JONES: It's not relevant to that bit.

THE CHAIR: No.

MR JONES: The existence of its current policy is not in question; that the existing policy that we rely on, which we say is abusive, is accepted. There are, I think, debates around the edges about exactly how that policy is enforced and exactly what the meaning of significant is, and so on. But the core policy that we call the anti-discounting policy is just a written policy that Amazon accepts applies to the claims which are within the scope.

THE CHAIR: Yes, but Amazon says it's very different, the earlier policy --

MR JONES: They do say that.

THE CHAIR: -- and that therefore, the question of what actually the current practice, or practice over the relevant period, I should say, of Amazon has been - is very much in issue.

MR JONES: Yes, well, it's in issue in the sense that they say it's very different, but that's a pleaded issue.

THE CHAIR: Yes.

MR JONES: Of course, we won't know if it's different or not unless we can compare and contrast it with the earlier conduct.

THE CHAIR: But the first -- we're not concerned with compare and contrast, we want to know: what is Amazon doing in the claim period?

MR JONES: Sir, I accept that. I don't want to take us down rabbit holes. But my point is, my whole case is the earlier period, the data and evidence that was gathered for those earlier investigations will be helpful and relevant, because that earlier conduct is very similar to the ongoing current conduct. So I accept, as part of what I'm saying, the Tribunal would at trial -- not now but at trial -- need to engage with the question of whether it's right to say that that earlier conduct is similar to the current conduct, because if it's not then I accept one isn't going to be able to draw very much from those earlier materials.

But our case is it's essentially a continuous type of conduct. I've shown you how that's been pleaded. I've told you the key point which Amazon relies on is they say the new policy is about prices which are significantly lower, and that is why I say that there is a clear case for it being continuous and a clear case for that earlier material being relevant for questions of effects and quantum.

THE CHAIR: Yes.

MR BANKES: Just to go back to what you said earlier, I think your pleaded case is the dominance arose only in 2017; is that right?

MR JONES: Yes.

MR BANKES: So an investigation into circumstances before 2013 will have very little to say about the consequences of dominance.

MR JONES: Sir, that is a fair point. That's why I highlighted that those earlier -- I didn't want to dodge this -- investigations were Article 101 investigations. So the price parity provisions were not looked at through the lens of abuse of dominance. They were looked at through the lens of anti-competitive agreements. So I entirely accept that point. But what I say is they were nonetheless analysed for their anti-competitive

effects. So once you've established that there is a price parity provision, the effects analysis -- whether you're looking at it through article 101 agreements or article 102 abuse -- is the same. Or if it's not the same, it's pretty much the same in both contexts. That's why we think we will get valuable information, including about why it was introduced originally.

MR BANKES: I see that. Although, of course, if it was a market in which there was not a dominant player, the economic way in which the effects would have played out would be very different.

MR JONES: They might be different. So I accept that there may be differences there. And I accept that these are points which the economists, if they have access to this material, will need to factor into their analysis. But they're the kinds of points which economists are very skilled at factoring into their analysis.

THE CHAIR: Yes.

MR JONES: I'll just make one additional point on this. Amazon made a further point in a letter which was sent yesterday -- which I'll just mention -- which is essentially they make the point that it would be particularly costly, they say, to look at these particular investigations.

THE CHAIR: This is not a letter we've seen; is it?

MR JONES: Well, it's in the bundles. Sir, you've not been taken to it. It may be that you need to look at it. I don't need to show it to you. I just want to make this headline point which is, since that point was made, we have agreed to the text which you've looked at and amended about proportionality and relevance under (i). So it obviously is no part of either of the class representatives' case that we want to force Amazon to do things which are disproportionate at this stage because the whole idea is to have a proportionate first step. So we have accepted that wording on proportionality and I'll see if Mr Piccinin says anything further about expense and so on, but that's intended

to deal with those sorts of problems.

Before going on to other issues, shall I pause there? I don't know whether Mr Rayment -- well, he won't have any. My learned friend won't have any --

THE CHAIR: Mr Rayment is not concerned with this at all. Yes. Could you pause a moment, please? (Pause)

THE CHAIR: Yes, thank you, Mr Jones. We are against you on that point. We do emphasise that there is considerable concern about the costs of disclosure in these collective proceedings, often, I may say, voiced by those who act or fund class representatives. It is important to bear in mind that the criteria for disclosure is not simply what may be relevant but also what is necessary for fair resolution of the case. We think these are historical matters and, certainly for the moment, we do not see that this disclosure inquiry -- and I appreciate you are seeking only descriptions of what sort of documents were there -- is necessary. So that is refused.

We do, however, wish to raise one other set of proceedings not pursued at the moment, it seems, by Professor Stephan. But you will all bear in mind that the Tribunal has power under the rules itself to direct disclosure, whether requested by a party or not. That is the proceedings that are current, and therefore not historic, brought by the Canadian Competition Bureau into Amazon's price parity policies. So they are dealing with how Amazon has been pricing recently.

There is agreement that Amazon will provide details of the description of the documents in the FTC case, which is concerning price parity allegations in the United States. The Canadian Competition Bureau's investigation is obviously dealing with price parity policies in Canada. It seems to us of just as much relevance as the US and we think that there is considerable value in having this description of the documents disclosed -- and it is only a description at the moment -- regarding the Canadian investigation which, certainly in its intensity has started, I think, some time

ago but it has been more focused since July 2025. So we are minded to include those proceedings, subject obviously to hearing from Mr Piccinin.

MR PICCININ: On that one, could I take instructions over the short adjournment and get back to you?

THE CHAIR: Yes, that sounds very sensible. Thank you.

The next aspect of disclosure following the helpful agreement is, I think, about -- that's the privilege, that's been agreed. Is it paragraph 2 --

MR JONES: Yes.

THE CHAIR: -- about how the algorithms are to be dealt with. Is that the next point?

MR JONES: Yes. You will see that there is agreement on (i) to (iii) that Amazon will provide some information about the algorithms which have been produced in the other proceedings. That includes confirmation of whether codes have been produced, whether any explanations have been produced and, at (iii), the format. So those are relatively focused explanations which will marginally progress discussions about algorithms.

There are two disagreements. One is in the opening words of (2) where you will see in blue, Amazon does not want to have to provide full answers but only answers on the basis of its external lawyers' recollection. So they're proposing they will consult their external lawyers in the other proceedings and if those external -- and only if those external -- lawyers remember the answers to these questions, will they answer them. That's the first disagreement.

The second one is at (iv). This is in red because this is Professor Stephan's proposed text, which Amazon does not agree with. You'll see that Professor Stephan says Amazon should also provide any explanations which it gave to regulators, parties, et cetera, in the other proceedings concerning the nature of the algorithms and how they were used. Amazon's stance on that, in summary, is that it's out of sequence.

I think this is a fair summary of their position. They say this first step should only be telling you, broadly speaking, what we disclosed and then, if you want any actual material such as explanations which we gave to other regulators, you'll have to come back for that at the second stage. That is essentially Amazon's position. So that's the scope of the disagreement.

You will know that the algorithms are central to these proceedings and the class representative's economic analysis will not be able to progress significantly until our economists have access to the key algorithms. In other words the key code which shows you how the rankings on Amazon are decided, how the buy box is decided; those sorts of things. So it is crucial to make, we say, as much progress as possible on this front. That is why limiting this to the memories of external lawyers is, I say, frankly an extraordinary suggestion. We don't know even whether those external lawyers are still in place, let alone how good their memories are.

THE CHAIR: Yes. On this second point, just so I can understand it: in (ii), Amazon is asked to confirm, subject to this external audit point, whether any detailed explanations of the operations of the algorithms were produced in other proceedings. Is (iv) basically saying, "Well, if the answer to (ii) is yes, then you should produce those explanations"; is that essentially what it is?

MR JONES: That's precisely it. So if (ii) is in there then it's hard to see why there's any extra work or at least much extra work in (iv). So the point about (iv) is, yes, it's out of sequence compared to the rest of what's been agreed, but we don't need to be handcuffed to a particular sequence. It's an obvious step to take at this stage because --

THE CHAIR: No, I understand. But really, if you get (iv), (ii) falls away.

MR JONES: Yes, I mean, (ii) would fall away because --

THE CHAIR: You would just say, "Any explanations provided should be -- "

MR JONES: That's right. Then if we don't --

THE CHAIR: I was just trying to understand.

MR JONES: I'd say yes.

THE CHAIR: It's a sort of alternative in a sense.

MR JONES: That's right.

THE CHAIR: And one goes further. Yes.

MR JONES: Of course, in these other proceedings -- or at least in some of them -- they must have been providing algorithms, because the same issue would have arisen in those other proceedings and they must have been central to some of them. Now, what is said in response is, "Well, it's complicated. We can't trawl through everything to find every piece of code that may have been provided and, of course, "algorithm" could mean even some small piece of code which is performing a very discrete function". The problem with that stance, I would respectfully submit, is it is letting the perfect be the enemy of the good.

Amazon have known for months that we need to progress algorithms. They've known for years that they were going to need to be provided in these proceedings and that they're really going to be at the heart of the analysis. Amazon could have come today saying, "Well, we've taken advantage of the last couple of years, or at least the last few months, to speak to our external lawyers and to have a quick look at the documents in those other cases. We can tell you there were the following key algorithms which were disclosed". And they might say, "Well, we can't guarantee that there were no other small bits of code but why don't we, as a first step, give you these key algorithms?" They could have come saying that. The problem we now have is they're not saying that. They seem to have done nothing. Instead, they are offering now to do the bare minimum and, for all we know, it might turn up nothing at all. I mean, they could consistently, with their draft order, come back next time and say,

"Our external lawyers don't remember" or, "They don't remember very much", and we will then be back here in six months.

THE CHAIR: No, I understand the point. We've got your point. Yes.

MR JONES: Sir, I will just make this one final point. Which is, I do accept that it might be too much to, as it were, require them to turn every single page of all these documents looking for little scraps of code which could be described as algorithms. I accept that. We would not have any objection to them answering this requirement (ii) in the way that one tends to answer disclosure requests by providing an explanation of what they've actually done to discharge the obligations on them.

If, in the course of that explanation, they say, "Well, we didn't actually page turn every single document. We instead ran the following searches and spoke to the following people and looked in the following places and, you know, that was the way in which we discharged it". Then so be it. But that is very different to saying that they should simply be allowed to do what they're suggesting and rely on the memories of external lawyers.

THE CHAIR: Yes. Thank you.

Well, should we hear from Mr Piccinin?

MR JONES: Mr Rayment may have something to answer, if I ...

THE CHAIR: (Inaudible), are you ...?

Submissions by MR RAYMENT

MR RAYMENT: Sir, I don't really have very much to add. We totally support what Mr Jones has said on behalf of Professor Stephan. It just seems to us -- being very practical about this, which is the approach one should take, we say -- it just seems very likely that, in terms of explaining to the relevant regulators and competition authorities how the relevant algorithms they were investigating work, those

explanations are likely to be found in certain key documents provided in response to requests by those competition authorities and regulators.

So I just make what I think is a practical point simply to support Mr Jones's point, which is that we are not talking about looking for a needle in a haystack, which is how, at times, Amazon's description of the exercise involved is made to sound like. We want the key explanations in relation to the key algorithms which have been the subject of the proceedings you're well aware of. That seems a reasonable and manageable exercise.

I mean, it's quite possible that there were all sorts of bits of code here and there and that, you know, additional clarifications here and there were provided which, it's possible, might be disproportionate to provide at this stage. But, as we say, we think there ought to be a core set of explanations that would be hugely valuable in moving these claims forward as fast as possible.

As for the recollections point, well, I'd be worried if it was my recollection that was being relied on.

THE CHAIR: Yes, Mr Piccinin.

Submissions by MR PICCININ

MR PICCININ: I'd like to begin with just four contextual points here; I think it's important to bear in mind when we're looking at this wording.

The first point is that it's not true that we've been sitting on our hands doing nothing. That is not a fair characterisation. Obviously, I can't break privilege over what has been done, but work has been done. We can see that this is something that we need to get on top of, and we have begun to scope out what there is in these proceedings and what resources we're going to have available to us to answer these questions.

In doing that exercise, it's also important to understand where this fits into the overall

disclosure piece and what Amazon's incentives are. Because of course Amazon is conscious of its obligations under rule 4 of the Tribunal Rules to co-operate, and Amazon always complies with those. But in addition, the point of this exercise in paragraphs 1 and 2 is to scope out and provide information to the Tribunal and to the Class Representatives about what is available, which then provides the basis for us to explain why our proposals that we make for disclosure from this set of information and from the set of documents are reasonable. It's obviously in our interests to provide as much information as we reasonably can within the bounds of proportionality in order to explain why providing documents from these repositories is going to be more efficient than some granular bottom-up exercise.

So we're certainly not in the business here of trying to provide the minimum information possible. That's not going to help us when we come back at the next CMC, because all of a sudden what we would find is that the Class Representatives say, "Well, in that case, we need the whole world; these aren't enough."

But it is also important to bear in mind the scale of this task that we're being asked to do. There are nine proceedings that we have been asked about by the Class Representatives, other than the three that have been excluded, and then the Tribunal has just added a potential tenth. They're in various places around the world. They're also various types of proceedings.

Some of them are litigation, and of course, the Tribunal will have a reasonable understanding of how litigation works in terms of the production of documents and the provision of information.

Some of them are regulatory proceedings, which all work in very different ways, depending on who the regulator is and how those particular proceedings are conducted. You don't usually have disclosure exercises of the same kind. Instead, you have ad hoc provision of information, you have ad hoc responses to RFIs or

provisions of documents with submissions.

Additionally, across these nine proceedings -- in fact, even just in the FTC proceedings -- there are millions of documents that have been produced. So if you were trying to give an exhaustive account of anything that had been provided, that would be an incredibly onerous task.

The final point of context is that when thinking about -- I'm really talking about the wording in the chapeau here, to paragraph 2 -- how we should go about providing the information that's been requested, it's important to understand that it's not just the provision of the algorithmic code that we're being asked about -- that's (i) -- but it's also (ii), which is confirmation of whether any detailed explanation of the operation of any code has been provided. We don't object to that. We can understand why they ask for that. It's a sensible thing to ask us to provide them with information about. But you can immediately see that there are lots of ways that there could have been explanations provided in these various proceedings about the various algorithms that are in play. Trying to work out which ones have been explained -- or the subject of a detailed explanation, is what we're asked about is -- is a task that if you were trying to do it exhaustively would be impossible to do without doing work that is equivalent to a disclosure exercise.

THE CHAIR: Amazon presumably has an in-house counsel department.

MR PICCININ: Amazon has in-house lawyers, and it also has external lawyers, yes.

THE CHAIR: Yes, but it will have an in-house legal department.

MR PICCININ: Yes, probably ...

THE CHAIR: Yes, probably (overspeaking).

MR PICCININ: Well, I was hesitating as to whether it's only one, or more than one, or how you want to describe it, but yes.

THE CHAIR: Being one of the world's largest companies, quite a sophisticated one,

I'm sure.

MR PICCININ: I don't know about that. The Tribunal can take that as read--

THE CHAIR: They will keep a careful watch and control over the proceedings which Amazon is involved with. So if Amazon through its in-house counsel will know about these things, why should it be limited to only the external lawyers?

MR PICCININ: Oh, I see. Sir, you're asking me whether if we expanded the wording in the chapeau to include the knowledge of the relevant in-house; is that what --

THE CHAIR: Well, the knowledge of Amazon.

MR PICCININ: To the extent that Amazon knows without conducting further searches; is that the ...?

THE CHAIR: Well, I'm saying that -- it suggests here that you only provide these various bits of information on the basis of external lawyers' recollection.

MR PICCININ: Yes, but --

THE CHAIR: I can't understand that. If Amazon's counsel knows these things but the external lawyers can't remember, why should Amazon not provide it?

MR PICCININ: Yes. I think what we're really trying to avoid, though -- and I should say, I think there's an extent to which everyone is agreed about what we should be doing and shouldn't be doing, and the difficulty comes in trying to legislate for -- to find the form of words that describes the exercise that we should be doing. I think what we're really trying to avoid here is a situation where we have to go and conduct searches or actually review documents in order to work out whether, you know, buried in there somewhere there is something that meets the description of an explanation of the algorithm or the (overspeaking).

THE CHAIR: The other thing is, the algorithms, I would have thought, are very confidential, aren't they?

MR PICCININ: Well, yes, sir. Of course.

THE CHAIR: Yes, and therefore disclosure of or explanation of the algorithms is something that Amazon through its in-house counsel would keep a very careful eye upon. It's not something they just hand out readily in regulatory proceedings. So they would be aware, one would expect, of what code has been given. We're talking about, as made clear by both Mr Rayment and Mr Jones: it's not sort of any minor qualification or variation of the code; it's the key codes through which the business in relevant respects was conducted.

MR PICCININ: It's actually not limited, sir, at all as to which algorithms.

THE CHAIR: Well, relevant to the conduct in the proceedings. In these proceedings.

MR PICCININ: Yes, that's right.

THE CHAIR: Yes, so it's limited to that.

MR PICCININ: Yes, that's true.

THE CHAIR: It won't concern the e-books, for example, and the Commission investigation, so ...

MR PICCININ: No, (overspeaking). Sir, can I just take instructions on one point? (Pause)

Sir, what I can say is we don't need to limit it to the external lawyers. We understand the Tribunal's concern about Amazon itself already being aware of. What we want to avoid is an exhaustive search exercise.

THE CHAIR: Well, you've got to do some searching, because some of these may have been a little while ago. It may be that people have moved on and the people who were involved are no longer there. But in general, any disclosure exercise, what the parties are expected to do is to take reasonable and proportionate steps. That may involve going into the file of the Commission investigation which closed some years ago because the lawyer who ran it from within Amazon has left the company, and having a look.

But provided it's limited to Amazon taking reasonable and proportionate steps, which will include sometimes going to its external lawyers where necessary, sometimes not, Amazon will know how to do it. It seems to me it's an obligation on Amazon, and the defendant shall take reasonable and proportionate steps to provide to the Class Representatives. That's all it should say. That will include Amazon internally, it will include Amazon consulting external lawyers if it thinks that's most efficient.

MR PICCININ: That's fine.

THE CHAIR: Yes.

MR PICCININ: We don't object to that.

THE CHAIR: Yes. Just pausing there.

Mr Jones, I think that meets your primary point --

MR JONES: Yes, yes.

THE CHAIR: Yes, so that deals with the chapeau.

MR PICCININ: But in relation to (iv), though --

THE CHAIR: So then we're down to (iv).

MR PICCININ: Yes. But (iv) is a different point, sir, because here what they're asking for is us actually to provide to them all of the explanations of the relevant algorithms that have been provided in all of these different proceedings. So they'll get a German one, they'll get a Canadian one and several American ones, all with slightly different forms of words, perhaps, or not. To do that, we would not merely need to work out roughly what has been provided, but we would actually need to go out and find all of them and then produce them.

THE CHAIR: Can you pause a moment? (Pause)

We're with you to some extent, Mr Piccinin. Two points, really, before we get to (iv).

MR PICCININ: Yes.

THE CHAIR: First of all, (ii). It says, "any detail of the operation of any algorithm

code". Then (iv) says, "nature, purpose, operational functioning of any algorithm". We think the broader language is more appropriate and that (ii) should say, "whether any detailed explanation of the nature, purpose, operation or functioning", instead of just "operation".

We also think it would be appropriate to say: if so, for which of the algorithms identified in answer to (i), and in which of the other proceedings. Because otherwise, you could just say, "Yes, explanations have been produced in the other proceedings or some of the other proceedings", but I think it would be helpful to know which.

MR PICCININ: I thought that was effectively covered by (iii). But I'm sure we could clarify (overspeaking).

THE CHAIR: Means(?) ...

MR PICCININ: In the course of answering (iii), (overspeaking).

THE CHAIR: Yes. Well, either (ii) or (iii), that you identify for -- because some explanations of a particular code might have been provided in five of these proceedings.

MR PICCININ: Yes. I mean, there is the wording at the bottom -- I'm not sure what the opposite of a chapeau is -- that in each case, it's giving a separate answer.

THE CHAIR: Oh, I see, in relation to each of the answers. Yes, okay. Well, that might -- sorry, that does cover it.

MR PICCININ: Yes.

THE CHAIR: On that basis we can see some merit in leaving (iv), and then for example, there might be two key algorithmic codes, and there have been explanations provided in seven proceedings, in which case subsequently, it may be that one can suggest that you give disclosure of two of them, but you don't have to give all seven, and some might not be in English --

MR PICCININ: That's the point.

THE CHAIR: -- and so on. It doesn't have to be an exhaustive provision of explanations, and it will enable the Class Representatives to come back with a much clearer picture and say, right, we'd like the following five. I think in due course, you can expect that the Tribunal will order you to disclose some of these explanations because clearly it makes sense. But we can see that taking it in those stages is of assistance, and if we do it that way, and this is to be done by the end of August, then we would hope if the Class Representatives then write and say, please, can you disclose these, Amazon will look on that request sensibly and not say, no, we've got to wait till the next CMC and an order from the Tribunal, because you can anticipate that all sensible orders will be made, and you should therefore start the process of responding to such requests.

MR PICCININ: Yes, (inaudible). It might depend on --

THE CHAIR: If, in early December, when we're all back here, Mr Jones says, "Well, we wrote on 15 September and asked for disclosure of the explanations in these proceedings and Amazon just fobbed us off", we will not be very impressed.

MR JONES: Sorry, can I just raise one small point which follows on, which is, I think sir, it was implicit in your account of the process a moment ago that when these codes are provided, Amazon will also give a brief description of what the code is and what it was doing. And I just flag that because we had envisaged that within (iv) in the drafting of this provision, it doesn't actually say anywhere else that they will tell us what the codes are, and obviously, unless we know what they are, they could just theoretically answer point one by saying "Yes, some codes were produced" and two, by saying "Yes, some explanations were given" and three by telling us the format.

So I think it's implicit in the discussion you just had with my learned friend that when they answer (i), it's just implicit in that that they will tell us what the code actually is, and if it's a description of what it is, what it was doing. I just want to clarify that

Mr Piccinin may agree with (overspeaking).

THE CHAIR: (Overspeaking) that they won't just say --

MR PICCININ: We won't just say yes.

THE CHAIR: -- "Yes, we provided algorithmic codes".

MR PICCININ: No, exactly. We'll say "Yes, we provided these algorithmic codes".

THE CHAIR: And if you can say these -- because you're not actually disclosing the codes, what those codes relate to.

MR PICCININ: Yes.

THE CHAIR: Yes.

MR PICCININ: Again, it comes back to what I said at the start, we're not trying to minimise the information that we provide here. That's not the --

THE CHAIR: So, whether that means any --

MR PICCININ: I think that deals with --

THE CHAIR: I mean, it says, "giving separate answer, stating which ..." Well, perhaps it should say, "whether any and if so, which algorithmic codes were produced in the other proceedings and how they are relevant to these proceedings".

MR PICCININ: That might be obvious.

THE CHAIR: It might be obvious, but if it's not then they can be added. So "confirmation of whether any and if so, which algorithms relevant to the alleged conduct were or have been produced in the other proceedings and how they are relevant to these proceedings". Yes.

MR PICCININ: Yes.

THE CHAIR: Then you've got in each case separate answer, which they propose to provide.

MR JONES: Yes.

THE CHAIR: Then that will include, therefore, a proposal to provide some of the

explanations under (ii).

MR PICCININ: Yes, we already have that wording up there.

THE CHAIR: Good.

That takes us then to the question, potentially, of the disclosure report; is that right?

MR PICCININ: Which I should say is one for Mr Patton to (inaudible).

THE CHAIR: Yes, but before we do that, we wanted to actually raise something else which is ventilated in the skeletons, and that is the scope of the trial.

MR PICCININ: Yes.

THE CHAIR: This arises in two respects. First, we are very concerned that there will be no trial on what's been currently put forward until the autumn of 2028. It seems to us, given when these proceedings started, very, very distant and extended. Secondly, we see great merit, from the Tribunal's perspective and potentially the parties', in a split trial in this case. The two somewhat go together because if there is a split trial, it doesn't cover everything, but it's obviously not as long and, in our view, should be able to be heard earlier.

The split we have in mind would be to cover market definition and dominance, and what you would call liability/infringement. In other words, are the alleged abuses and if so, which, made out over what period; but not causation and damage. The great merit of that, also, is if some of the abuses are made out, and not others, then obviously one doesn't spend a huge amount of time including costly expert evidence working out the effect of an abuse that's not been established.

Secondly, we think it actually assists the experts insofar as abuses are established when it's been determined more clearly, what is the nature and operation of the abuse? You know, if there was use of non-public seller data, how was it being used and what was happening? It makes that task much easier.

So that is the split that we have in mind, and we would have thought that on that basis,

irrespective of whether ACSO is included or not, such a trial should not take more than six to eight weeks as opposed to the 12 weeks proposed for everything, and could be heard, we would have thought in early 2028; February or March 2028. But reduced the scope of the expert evidence, it would have reduced the scope of disclosure, not involve pass-through and so on. So that is what we have in mind.

We need to take a break in any event. What I'm proposing is that we will rise now and give you slightly longer because it's obviously an important question, say 15 minutes to consider that with those behind you, then you can address us when we return. But we are very keen, and this is -- albeit that you've not been pushing for a split trial -- in the interests of the class or classes, that a case is heard earlier than the autumn of 2028. We all know that resolving certain issues, very important issues, can service those discussions that may or may not take place as a result. I don't think we're in great time constraints today, we'll give you until 12.00.

(11.41 am)

(A short break)

(12.01 pm)

THE CHAIR: Yes, Mr Piccinin.

MR PICCININ: Yes, sir. Just in relation to Canada, which was all I wanted to say, which is that we've got no objection to including them on the same basis as all of the other ones, so subject to proportionality and relevance and so on.

THE CHAIR: Yes. Thank you very much, that's very helpful.

MR PICCININ: I'm grateful.

THE CHAIR: Yes, Mr Jones.

Submissions by MR JONES

MR JONES: Should I pick up on the split trial proposal?

THE CHAIR: Yes.

MR JONES: I have a high level point and a granular point, if I take them in that order. The high level point is that we see the advantage, sir, in what you have suggested. Our concern is to move as promptly as possible to a result or results in these proceedings. It, however, gives rise to a concern about timing, which is just this. So what you proposed was that the first trial would be February, maybe March 2028; that does make sense to us, and we think that would be a good way to proceed. We also think it would be sensible to set a time, if possible, for the second instalment, and we would be concerned if that were pushed back too much further.

We had, as you know, suggested a unitary trial of late 2028. I see that if the first trial is early 2028, then perhaps that second one would go into the first part of 2029, I don't know. But we would want to make sure that that doesn't fall too far back.

The other related point is, I haven't heard what Amazon's position on this, but I anticipate they may say early 2028 is too early. If they do say that we would very much object to a split trial with a later first trial than you have suggested, sir, because that would start pushing the whole timetable until we get a final decision on damages back too far.

There's a related point about cost, which is one can look at these proceedings and say, well, a split trial might save costs and in some ways shouldn't lead to higher costs because after all, it's the same issues just over two trials. But in reality, what happens is the work does tend to expand to fill the time available, and so if the second trial is pushed back too far from what we've suggested, we could start to run into cost problems as well, and of course, the funding which has been provided has been on the basis of a single trial. So at a headline level, at a high level, as I say, those are my points. We think it's a good suggestion, so long as it doesn't slip into something later than has been proposed.

There's a granular point which I wanted to flag as well, which is, so you outlined the broad split, dominance, market definition, liability; and then the second one, I think you said would be causation and quantum. Broadly we think that is sensible. However, sir, can I suggest that if that is the route that's gone down, we might revisit the precise delineation at a future hearing.

The reason I say that is not because I want to juggle any big topics between the two trials, but it's only that there are points which will need to be addressed, for example, by the economists in relation to effects, which might be very, very similar to things which they need to investigate for the purposes of quantum, and it just might be sensible to shuffle some of those points into the first trial, rather than having to go over the same ground again in the second trial.

So there might be discrete issues that it's just more proportionate and sensible to break out and have as part of the first trial. So I'm only floating that, and I'm aware -- you may have noticed I've been parachuted in for this hearing -- so I'm somewhat aware of the extent of my ignorance in this case. I've of course read the expert reports and spoken to the economists, and one thing I do know is that there are very complicated economic analyses to be done with lots of overlapping, interconnected points.

So that granular point is no more than me saying, it seems to me that it would be sensible to revisit at the next hearing whether it might be sensible to juggle some points around for proportionality purposes, but if you press me to give precise examples, I'm not going to be able to.

THE CHAIR: Yes. We don't want to bring in too much of that sort of analysis because then that (a) extends the length of the trial which goes to your point of not delaying it, and also the cost benefit can slightly change. I can see there may be, as it were, at a more conceptual level, questions of effect as opposed to actually seeking to quantify the effect, which is a very different exercise. It is in your clients' claim form where they

list common issues, paragraph 41, there's quite a helpful indication of the issues in the case. But I understand that perhaps the precise formulation is something we can leave the parties to go and consider, but it should be determined pretty soon.

MR JONES: Yes.

THE CHAIR: But not until the next CMC. But it might be helpful if one looked at your paragraph 41, which is in the pleadings at tab 5, page 128.

As set out there -- and I'm not saying that articulation is cast in stone -- but one sees 41.5 as saying "whether any abuse ... has caused [any effects]", but it doesn't -- and then that is distinct from 41.6, which looks at the value of those effects. It's the value of those effects we certainly don't want to go into in trial 1, because that's a massive (audio distortion) exercise. (Audio distortion) it had effects of a certain kind (audio distortion).

MR JONES: Yes, precisely.

THE CHAIR: Effects might go to whether it's an abuse at all, but depending how one thinks of the law (audio distortion). Yes, thank you.

Mr Rayment.

Submissions by MR RAYMENT

MR RAYMENT: Happily, sir, members of the Tribunal, I can say at once that our position is essentially similar to that of Professor Stephan. We see the merits of the proposal as long as, you know, it leads to an earlier hearing and determination of the issues you've been outlining, because there's always swings and roundabouts with splitting trials. Mr Jones has touched on that. You know, they can involve efficiencies and savings but they can sometimes have the opposite effect. So it's important the way that it's managed and I know the Tribunal will be extremely careful about that. I do very much want to reinforce what Mr Jones said about the sense of allowing, at

least, a period in order to just consult with the experts and refine the exact parameters of what this split would involve. Subject to that, we're grateful for your indication.

THE CHAIR: Okay.

Mr Piccinin? Oh, sorry. Yes.

Submissions by MR PATTON

MR PATTON: I'm sorry to say that we, on the other hand, have a number of concerns about the proposal. I hope I may identify what those are. May I just unpick, as it were, a number of strands to the Tribunal's thinking as we understand it.

The first strand is that there is a clean split here between what you have called liability on the one hand and questions of causation, pass-on and quantum on the other hand. So that's the first strand.

The second strand is that, on the assumption that that split can cleanly be drawn, doing so would bring forward the earliest date on which the trial could sensibly be listed to a date in March 2028, whether that would be realistic. So that's the second strand.

The third strand is that such a trial would be significantly shorter than the 12 weeks estimate that both of the Class Representatives have put forward to date.

So, if I may, I was proposing to deal with each of those in turn. So far as the viability of the split that you've identified: both of my learned friends have reserved their right to go away and look at that. One can understand that because, as you know, that has not been the subject of any dialogue between the parties hitherto. It's not been the subject of any analysis by reference to the pleaded issues and it's not something that's been raised, for example, with the experts to see how it would impact upon their work. It's obviously fundamental to the viability of this whole proposal that that split should be clean and achievable. The immediate concern that it raises for us is that although

one can label the issues for your first trial, "liability" -- and it's a point that, Sir Peter, you've just made, I think. That liability, in this case, depending on an abuse that involves consideration of what is the effect on competition: either an actual effect or a potential effect. In a number of cases, particularly in the Stephan proceedings, the alleged abuse that's alleged here is essentially said to involve leveraging a dominant position in one market so as to achieve effects in an adjacent market. Therefore, for that reason it would be necessary for the Class Representatives to go further and to demonstrate appreciable effects on competition. Or, at least, that would be our position.

Now, the determination of effects in this case is not a straightforward exercise and we submit that the way in which both experts have analysed it to date shows that they are treating it as a very closely related exercise to the exercise of establishing what the loss is, if any, to the class.

To take a couple of examples, one of the things that the experts seek to do is to rerun the algorithm without the elements of the algorithm that they say are offensive to competition. That's a very complex exercise but it's an exercise that would be necessary on their case, both to establish the effects but also to prove that there was damage to the class members.

It's going to take a considerable amount of time, which is something I'm going to come back to in relation to timings. But the exercise in question is an exercise that would be relevant not only to the question of an effect, but also to the question of causation of harm. Because the issue in both instances will be the same: what is the relevant counterfactual and how would things have happened differently in that counterfactual? So that's a point that cuts across the question of an effect but also the question of damages causing loss.

As you will also know, one of the other ways in which the effects case is put is that

effects have arisen indirectly because of an impact on the logistics market of the alleged abuses. So, in very broad terms, it's said that there was reduced competition in the logistics market and that has led to higher logistics costs or higher marketplace fees. In, for example, Mr Hammond's case, he says that those are passed on to consumers in the form of higher landed prices paid by them. One can immediately see that that is not only a complex exercise, but it's a quantitative exercise. It's an exercise that will involve an intensive analysis of the quantitative data to establish whether such an effect existed and, if so, whether it was something that was transmitted to the class members. It's not an exercise that could be conducted at a purely conceptual level, or at least that wouldn't be sufficient for the purposes of the trial.

Then looking briefly at the ACSO claim: now that's a claim, as you know, which hasn't yet been certified and the question of whether it should be certified will be before you in October. But, in the ACSO claim, you may recall that the question of pass on -- which you have proposed would be left to the second trial -- is actually dealt with as part of the effects analysis by ACSO's expert, Dr Bagci. I've got some references for that if you'd like me to take you to that. But essentially it's contended that the Boik and Corts model would incorporate not just the question of the effects but also the question of pass on and would directly estimate what the impact was on retail prices. So it's not possible to draw a clean split in that case -- if that claim were to be satisfied and that expert methodology were to be certified -- between the question of an effect which is necessary for an abuse and questions of causation and damage which, on the Tribunal's proposal, would be left to a later trial. So that's really our first concern about the proposal: a split which none of the parties has analysed and identified as being a workable split in the circumstances of this case, whether that can really cleanly be achieved.

But the next concern is more of a practical one, which concerns the timing of the steps that remain to be conducted between now and the start of the trial. So the orders that the Tribunal is making at this CMC, in respect of disclosure, are for the provision of information at this stage, explanations as to what disclosure has been given in other proceedings. The parties are then going to seek to reach agreement in the early Autumn about that. But to the extent there are disputes as to what disclosures should be given from those materials, that would be determined at a CMC which, it's agreed, should happen not before the 30 November. So, in all likelihood, in December of this year. So that's when you would be deciding what disclosure from the other proceedings should be given.

Now, as you will have gathered from the materials before you today, disclosure by Amazon of documents from those other proceedings is a potentially very significant exercise. It involves either -- well, now nine sets of other proceedings, or ten sets of other proceedings across five jurisdictions, and millions of documents have been produced in those other proceedings. That's a point that's been made in correspondence.

The disclosure covers a period of at least a decade and we submit that, being realistic about it, it's going to take well into 2027 for that disclosure to be given and, more importantly, for the Class Representatives to review and scrutinise that disclosure and see whether it deals sufficiently with the pleaded issues or whether they wish to come back for further disclosure. If they do, there will be a need for further hearings before the Tribunal in the course of, let's say, mid to late 2027, to rule upon any request that disclosure should be given, for example, beyond those existing pools.

Then again, as you know, sitting in the wings at the moment is the potential ACSO claim which you haven't decided whether to certify. You'll have seen the written observations that they put before you for this hearing, but if I can just draw your

attention to a number of matters. It's in bundle D at tab 11, and then I was going to go to page 208. It probably makes sense to start a paragraph 7. You can see at paragraph 7 that they refer to some correspondence in which they proposed that the "Other Proceedings" be expanded to include seven additional sets of proceedings that they have referred to in their claim form.

At paragraph 8, they make clear that they're not requesting that the Tribunal include those today, but they intend on seeking disclosure in relation to those seven additional sets of proceedings in due course, assuming that the claim was certified. Then if you go on in their note in their written submissions to paragraph 10, they say that they accept that there is an overlap between their claim and Professor Stephan's Abuse (5), but they say:

"... there are also material differences between the allegations which will have implications for disclosure."

If you read on in paragraph 11, just towards the top of page 209. They say that:

"These differences will have potential implications for disclosure sought in the ACSO claim which may be broader than that sought by Professor Stephan [and that's not a point for this CMC]."

So obviously all of that may be disputed in due course but the Tribunal needs to be aware that the position, at least, of ACSO at the moment is that they would be seeking broader disclosure in relation to other sets of proceedings that are not currently the subject matter of the order that you're making at this CMC. So that's dealing with disclosure from Amazon. So very realistically, that will take well into 2027 and there may then be disputes about that.

I'll come back to the timing of the ACSO proceedings in a moment but in addition to disclosure from Amazon, there is a different track in relation to disclosure which is the question of disclosure from the sellers themselves, the sellers who are in

Professor Stephan's class. I think Sir Peter alluded to that this morning. Now, that's not an issue for today but it's an issue which we wish to raise at the next CMC towards the end of the year. But just so that you have seen it, can I draw to your attention the current proposal in relation to that? It's in bundle A at page 417.

THE CHAIR: The core bundle?

MR PATTON: Yes, the core bundle, I'm sorry.

So this is a letter from Covington, I think to the Tribunal on 1 May. Just above paragraph 40, at the foot of the page, you can see the heading "Disclosure from Professor Stephan's class". Would the Tribunal just read paragraphs 40, 41, and 42, please? (Pause)

Just to be clear, I don't think there's been much engagement from Professor Stephan in relation to this yet, so this is really Amazon's position and intention at this stage. But two points that emerge from this: the first is that it's made clear at paragraph 42, this is disclosure that would be relevant to the question of an abuse. So it would be relevant to the issues of the first trial. That, as one can see from the description, that the principal relevance of it; passing on, if the Tribunal's division of the issues were maintained, then (v) at paragraph 42, that might be in a different category. But the main focus of these issues is in relation to the question of an abuse.

Then the second point is that, as you can see, in terms of the procedure that's proposed, it involves a collaborative process where there's an attempt to agree questionnaires to be asked of the sellers, the transmission of those questionnaires to the sellers to ascertain what documents and data they have, followed by the making of disclosure requests to a smaller pool of the sellers, which are then transmitted to them. Then there is always the possibility that the sellers do not engage with those requests, in which case it may be necessary to come back before the Tribunal to seek an order under, I think, rule 89, which provides for disclosure orders to be made

against class members directly.

So this is obviously not a topic for today; it's a topic for the CMC at the end of the year. But one can immediately see in terms of the impact of this on the timing, that is going to take a considerable part of 2027 to be addressed. That's something that's important to bear in mind in considering when would a realistic timetable for trial be.

So that's disclosure from Amazon, disclosure from the sellers. There's then obviously the other steps that have to be taken between now and the trial: factual evidence. As matters stand, I think there's no material before you as to how many witnesses would be called by the class representative from sellers, perhaps who have given disclosure, or from Amazon. That's a point I think that hasn't been discussed.

Then the expert evidence: there's been no identification at the moment of what fields of expert evidence, if any, permission will be sought for beyond the obvious competition economics issues on which it seems inevitable there would be expert evidence.

But going back to the point I made earlier, the questions for the experts in this case are particularly complex, not least because of this question of having to rerun the algorithm. You will recall that at the CPO hearing, there were question marks raised as to how realistic it was going to be as to whether the algorithm really could be rerun in that sense -- how difficult that would be -- and whether, if that doesn't prove possible, the experts have some alternative methodology which will enable them to carry out their effect analysis anyway. But that all remains to be seen.

So those are steps which one would envisage normally will be taking us well into 2028, given that that work would presumably -- or at least the reports would only start to be served after the disclosure is substantially complete, after there's been disclosure from the sellers and after the fact evidence has been served.

So that's why we say that on the face of it, it's difficult to see how March 2028 is

realistic, even if it's possible to separate off questions of causation and quantum. Because that will not obviate the need for the parties and their experts to engage with all of the documents and data relating to the fundamental question of whether there was an abuse, which includes “What were the effects on competition?.”

Now, I've made reference to ACSO previously. Perhaps the only party before you who has recently drawn up a suggested timetable to trial is ACSO, because they have put together an amended litigation timetable for the purposes of their certification application. That's been included in the bundles for this hearing. It's in bundle D, starting at page 199. (Pause)

So, as I understand, this has been updated in the light of your decision at the CMC, concerning the need for the use of common experts, for example, and the use of a common counsel team on certain issues. So you can see that on page 202, there's actually been an updating of this so that in the second row, the date for the hearing of their certification application has now been updated from May to October 2026.

So if one just tracks through the dates which they themselves have put forward as the basis on which their claims are certified. So they assume in the next row that the Tribunal is in a position to issue a judgment, or at least a decision on certification, by November 2026, so within a month.

There is, of course, the need for the pleadings to take place in those proceedings. They've suggested a date of February 2027 for Amazon to file its defence, which on the face of it, is certainly not an unduly generous period of time for the defence to a new claim. That would also be the deadline for class members to opt out or opt in.

Then in March 2027, they proposed that they should file a reply -- so that's just one month later -- and that there should then be a further CMC in May to give directions.

Then they propose that disclosure would be given in their proceedings between June 2027 and June 2028. So that allows for disclosure and production of documents

by Amazon and/or non-parties, presumably in particular, the sellers, including any applications for further disclosure, non-party disclosure and further disclosure pursuant to orders of the Tribunal. Again, that doesn't seem an unduly generous timetable for disclosure essentially to take a year to be completed following the first CMC in their action.

THE CHAIR: Except -- if I may interrupt you -- not of the disclosure. There, they say they want to seek more. Not in very clear terms, they say. That's not a criticism; they're just submitting brief observations. A lot of the disclosure will be common with the disclosure to Stephan.

MR PATTON: Yes, but plainly, a lot of it will overlap. I've shown you what they say. They say that the seven, I think, other sets of proceedings that they say are relevant to the way in which they have (overspeaking).

THE CHAIR: Well, they have got to persuade us of that.

MR PATTON: Absolutely. I'm not --

THE CHAIR: I suspect you may object to that anyway, certainly consistent with the stance taken so far. But I struggle to see why it should take until June 2028.

MR PATTON: I mean, suppose that is overly extended. I mean, for the reasons I've been submitting, it's not at all unrealistic to think that -- the question of disclosure from Amazon -- you might be making orders in the middle of 2027, as to whether there will be further disclosure, beyond disclosure from the existing proceedings, once the class representative has had a chance to assimilate what may be a considerable volume of documentation produced by Amazon and identify any gaps that they contend exist in that disclosure.

So it wouldn't be surprising if one had a CMC in the middle of 2027 where they come back and say, "This is missing, that's missing. We want more material." It certainly wouldn't be surprising, therefore, if that material were being disclosed towards the end

of 2027.

THE CHAIR: They are suggesting a trial in June 2029.

MR PATTON: They are.

THE CHAIR: Yes, which I'm sure is -- even on the unified trial, which is what the Stephan and Hammond classes are seeking. It's considerably delayed from the trial that they're proposing, or (overspeaking).

MR PATTON: Well, (overspeaking) to ask that --

THE CHAIR: We would be very reluctant to allow ACSO's claim, if they're certified and added to the case, to lead to a significant postponement of the trial. So they're just going to have to work rather more quickly. But I take your point: that's what they say; it's how they think it would work.

MR PATTON: If I could, just to complete this part of their timetable. I mean, it may be June 2028, and I don't know whether that is realistic -- a year from essentially the first CMC -- for all the disclosure that they seek. But beyond that, one can see that it's not a particularly leisurely timetable after that. It's a couple of months after the conclusion of disclosure for witness statements in August.

THE CHAIR: Yes. Well, as I said, I think it's an extraordinary extended disclosure period when you're coming into a case where there's been disclosure on very, very similar -- I mean, the fact that they also put their case legally under article 101 shouldn't in itself expand the disclosure; it's just the same documents analysed under different legal provisions.

MR PATTON: But as I say, even if they're wrong to say that it would take until June 2028 for disclosure, the submission I've been making is that there are good reasons to think the disclosure will certainly take us some way through 2027 in terms of: first of all, Amazon producing materials from the other proceedings; second of all, the class reps reading that material and identifying what they say is missing and

formulating targeted requests for further disclosure they say is necessary. That coming before the Tribunal and the Tribunal ruling on that, and then time being allowed for those further targeted requests to be acted on, if any are ordered, it's very foreseeable that that would take you through 2027.

Then beyond that, one then has (stage 4) witness statements and reply witness statements, and then expert reports which, as I've been submitting, are in this case likely to be extremely complicated. I mean, what happens if the experts decide that they're not able to rerun the algorithm as they were hoping to do? That's not an unforeseeable possibility; it's one that was very much front and centre when you were considering questions of certification. That's why other methodologies were put forward to address that prospect. But that's a realistic possibility.

Even if they are able to rerun the algorithm, I mean, this is something, as far as we know, hasn't yet been done in any case in this jurisdiction, or at least as far as I know. It's going to be a time-consuming and probably an iterative process. So that is why we do submit that your provisional view that there could be a trial in all three actions if ACSO is certified, as early as March 2028, which on my submission would be very soon after disclosure may be complete. It is not realistic.

It doesn't help anyone, and I think it's a point the Class Representatives have made. It doesn't help anyone to set a trial date which will then have to be vacated. Not only is that going to be disruptive to the parties, it's going to increase costs, it's going to make life more difficult for the claimants' funders, and it's not in the interest of other court users, because they will potentially have missed out on the opportunity to use that time in the Tribunal's diary.

Just dealing, if I may, with a third strand, and that's the question of the time estimate for the trial. The estimates that were put before you in the skeletons by both of the Class Representatives was something like 12 weeks for trial of all the issues. For our

part, we haven't dissented from that estimate. It's very difficult to do a realistic estimate at this stage. But that sort of length is not surprising when you consider that there are many different abuses being alleged here. This isn't the classic claim that one generally gets before the Tribunal of essentially one abuse, possibly with different causes of action attached to it, or different legal labels but essentially one abuse.

Here -- well, you know very well -- are the five different abuses in *Stephan*. There's the fifth abuse in ACSO, but with some variations, and then the way in which the case is put in Hammond. I mean, if one of those abuses were being tried, perhaps one might say six weeks is a realistic estimate. But given that you've got all of these different abuses to consider, we do see why the Class Representatives have come to 12 weeks as their estimate for a unitary trial.

Now, in terms of if one were splitting off questions of pure quantification, for example, because you've accepted my point that the question of effects and the question of causation, which involves considering what would have happened in the counterfactual, it's a very similar, if not identical, question.

Pure questions of quantification: one might expect in a trial to involve a couple of days from each of the experts, perhaps, in cross-examination, dealing with questions of quantum, and some additional closing submissions as a result of dealing with that. But we do submit that it's difficult to see how one would save much more than a week from the overall trial estimate by this kind of split. We do submit that six weeks is very, very unlikely to be sufficient for the Tribunal to deal with this in a reasonable way. Even eight weeks, we do submit, would be very difficult; certainly very tight.

Unless I can assist you further, those are the submissions I wish to make.

THE CHAIR: Yes.

Mr Jones.

MR BOURKE: Sir, James Bourke for ACSO. May I make some brief submissions?

THE CHAIR: I think as your litigation timetable was put forward, I think it's fair that you should be (overspeaking).

MR BOURKE: Well, there's been a lot said about us, so it would be great to have an opportunity to comment.

Submissions by MR BOURKE

MR BOURKE: So, the starting point from our perspective -- and I will come to our litigation timetable -- we absolutely understand the Tribunal's determination to get a trial date on quickly, on the basis for a split trial proposal, and we can see why that's in the class members' interests.

ACSO of course is in a different position to Mr Hammond and Professor Stephan because we haven't even been certified yet. So we have some reservations about how we can be feasibly part of a trial that would take place so soon. We accept that we would have to work more quickly, sir, to use your words, and we're willing to work quickly, but there's real concern about how and whether it's feasible for us to be part of a trial that would take place in early 2028.

I would mention that our claim is different, although there are overlaps, our claim is different to Abuse 5 in Professor Stephan's case, and we say that that has a potential to make a difference for disclosure. We have flagged some of those points, including the additional nine proceedings that you're aware of, sir, and you've added in actually the Canadian proceedings into the -- the Canadian proceedings that you added into the other proceedings in today's directions is one of the ones that we're interested in as well.

Obviously we have a Chapter I element to our case, and one question for us is whether Chapter I would be part of the trial that you envisage taking place on liability. Presumably it would because that couldn't be split out, we imagine. So that would

also need to be part of the first stage trial. We are not going to try and make submissions now.

THE CHAIR: I think Chapter I doesn't enlarge the disclosure, does it?

MR BOURKE: I think it might have -- there might be some differences, there might be some additional documents, categories that you might want to -- but I can see that the basic problem is the same. There may be some different -- I don't want to exclude that there could be additional categories at this point, but I'm not saying it would massively --

THE CHAIR: I'm just trying to envisage --

MR BOURKE: I'm not saying it would massively increase disclosure.

THE CHAIR: Yes.

MR BOURKE: But there are certainly aspects to our claim which is different to Abuse 5 in Professor Stephan's claim. So, for example, I mean, we can go into more details of it, but there are two policies that ACSO pleads as being unlawful, which are not, I believe, within the scope of Professor Stephan's claim. That will make a difference to disclosure, because we will need disclosure on those policies.

I'm not going to argue in favour of June 2029 based on our litigation timetable. Yes, that litigation timetable was prepared recently, but it was prepared without visibility as to what was going on in Mr Hammond's and Professor Stephan's proceedings, without visibility as to the directions.

Specifically, I can show, I think we mentioned it in our written observations, but we specifically said that we were prepared to review and reconsider and revise our timetable based on whatever directions are set down in Professor Stephan's and Mr Hammond's case. I can see that there's scope to accelerate some of the steps in our litigation timetable, but I still would repeat the reservation about ACSO being part of a trial, and we would say it should be part of the trial, the first stage trial, and we

think it would be immensely challenging for that to happen.

And, you know, it would really require the ACSO claim to be certified soon and then to be propelled forward on a very tight timeline post-certification. Again, there are some issues on feasibility on that. I would agree and adopt the submissions that I think have been made by basically all my learned friends about the scope of the expert evidence, and the need to reconsider that and where exactly the border line would be.

Thank you sir, thank you to the Tribunal. They are my submissions unless I can assist further.

THE CHAIR: Mr Jones.

Submissions by MR JONES

MR JONES: So if this case was urgent, if you had claimants before you who were at risk of going out of business, and that was the nature of the claim -- so they wanted damages and an injunction, otherwise they go out of business -- you'd list this in six months and the parties would be ready to go in six months. None of us would have a pleasant summer, but we'd do it if we had to do it. That happens in other cases.

When people now make submissions about what is feasible, that always needs to be looked at with that bigger picture in mind. The timetable, sir, which you have suggested is certainly feasible. It might involve Amazon putting more resource on it than they've got on it at the moment, but it is certainly feasible.

Now from the perspective of Professor Stephan, the important point for today's purposes is we do urge you to list a date for a trial, and I'll make some comments about the split trial suggestion, but obviously, having in mind that Professor Stephan is also very happy with a unitary trial, as he suggested. So as between those two, in one sense we are indifferent. But what we're not indifferent about is the notion that the trial should be listed. There is a real value in putting down a timetable and holding

everyone's feet to the flames.

Now, in my skeleton argument, I set out some examples of stances that Amazon have taken, which, frankly, are just too pessimistic. So I don't need to go so far as to say that they are deliberately pushing the trial date out, but they have repeatedly taken stances in this litigation which have been pessimistic about the prospects of progress. For example, saying that today's CMC shouldn't go ahead, but as we know, it's actually been very fruitful.

There is a further example of that in Mr Patton's submissions to you on split trial, because the background to this is that the Tribunal asked for the question of trial structure to be on the agenda for today. Amazon refused to engage in any discussion about that. They even amended the agenda item you may have seen so that it doesn't say scope of trial, it says scope of trial, or whether the scope of trial should be determined today.

And whereas the Class Representatives were saying we are happy with the unitary trial, plus possibly a need to come back to deal with some further issues on damages which might need to be dealt with after the main trial, Amazon's stance until Mr Patton stood up has been it is impossible for us to say whether there could be a split trial, we have to wait until ACSO's certified before we can say anything about that. Then, sir, half an hour after you suggested a split trial which would have moved these proceedings along, Mr Patton had lots of detailed arguments about why that in fact could not happen.

So we are really concerned about the pessimistic approach from Amazon on a series of issues, and we are concerned that unless a trial date is set, we will stagger from CMC to CMC with Amazon having made the minimum amount of progress which they can make consistently with the orders which have been made, and consistently with the spotlight which will be shone on them at the next CMC; that's our concern.

Perhaps the same criticism can be made, perhaps one could point to examples of the Class Representatives not moving as quickly as they should have done, I don't know. But if that criticism can be made in reverse, then the same point applies; we also will have our feet held to the flames.

Now, on the particular details of the split trial, those also, in our submission, are exaggerated. There is a clear conceptual distinction between effects and quantum. We do think that there may be some points which one would pick up in the first trial in order to have a proportionate approach, and that can be discussed between the parties. ACSO, if they want to participate, will frankly just need to get their skates on. And if their claim is so different that they can't do that without enormous delay, perhaps one would have to consider at a future stage whether they can even participate or whether there are some issues which get split out.

But there are solutions to all of these problems if one looks at them optimistically and with a can-do attitude. So that is the basis on which I urge you to list something promptly.

THE CHAIR: Thank you.

MR RAYMENT: I'm grateful, sir. I don't really have anything to add to Mr Jones. You've already commented on the ACSO timetable. It seems to me that that is drafted on a standalone basis and takes no account of the overlapping issues. I mean --

THE CHAIR: The point was made, I think it's -- it's not your expert, your expert's Dr Pike.

MR RAYMENT: That's right, Dr Pike. But you know, a year for disclosure starting in June next year, so we don't even get to disclosure for a year. I mean, this is off the charts.

THE CHAIR: I don't think you should be concerned about that.

MR RAYMENT: I, in essence, I adopt what Mr Jones has just pressed upon you, so

there's an urgent need for momentum in these proceedings. Clearly the Tribunal has identified a practical way of achieving that, and a solutions-based approach should be able to achieve that.

THE CHAIR: I think it's 12.50 pm, this is clearly very important. I think we will consider what's been said and come back at 1.50 pm.

(12.50 pm)

(The short adjournment)

(1.58 pm)

THE CHAIR: Yes, Mr Jones.

MR JONES: Sir, I'm only standing up so that I could move on to the next topic, but did you want to ...?

THE CHAIR: Well, I thought it is right that we should tell you where we have got to.

MR JONES: Yes, sir.

THE CHAIR: We have given a lot of careful thought to the submissions we had, and we appreciate the importance for everyone of how the case will proceed. We have had regard to everything that has been said. We do consider that it will be appropriate and helpful to have a split trial in this matter. But we do recognise that the exact delineation of the split is something the parties should have further time to consider. It clearly will include market definition and dominance; it clearly will not include the quantum of damages and pass-through.

What we propose is that the parties should have until 7 July to both discuss and prepare a proposal, or if you cannot agree, your alternative views of the specific issues and list the issues that should be in the trial, and those are to be submitted on the papers and the Tribunal, insofar as necessary, will rule by the end of July as to precisely what the issues will be in trial 1.

We think that that trial should not take any longer than eight weeks on the basis that

the Tribunal will not sit, in general, on Fridays. We have had regard to what is said about various steps necessary, and so we propose that it should start on 25 April 2028; slightly later than we had been raising before, having regard to various steps to be taken. So to start on 25 April, that is the first hearing date; eight weeks is the existing estimate, but not sitting on Fridays except for 28 April, because 25 April is a Tuesday, so it will still be a four-day week. The following Monday is the bank holiday. As regards the CMC for disclosure, we do not see that that need wait for a judgment on the ACSO application. We would like to bring it forward because it is important that disclosure should get underway. We would hope to announce our decision on ACSO's application either at or soon after the conclusion of the hearing, with written reasons to follow. But once it is known whether or not ACSO is in the trial, we think one can move swiftly to a CMC, and that gets the disclosure process going, and we do not see why that should have to wait until December. The dates we propose for the CMC is 14 October, with 15 October in reserve.

On that basis, we will not lose so much time before disclosure gets going. In the light of that, if we look at the draft order that you have produced for us: at paragraph 2, the Defendants are to give that information by 28 August. Then paragraph 3 says:

"By 4pm on 2 October 2026, the Class Representatives shall:

"(i) indicate whether they agree [et cetera]."

We would wish, subject to anything that Mr Jones or Mr Rayment say, to bring that date of 2 October forward by a week to give a bit more time before the proposed CMC. Someone might be able to supply me with the date. It would be obviously late September.

25th. So instead of 4 October, it would be 25 September. We would have thought that should be adequate, Mr Jones, Mr Rayment. It gives you a full month.

MR JONES: Yes. Sir, that would be adequate.

THE CHAIR: Yes, and then --

MR RAYMENT: That's fine for us as well.

THE CHAIR: Yes. So that will help us, then, in having the proposals for disclosure of the CMC.

The other question raised was the second trial, the stage 2 trial. We don't think we should fix a date for that now but we do bear in mind the point made by Mr Jones that it's necessary to maintain momentum and that it's very helpful to have a second trial fixed before the conclusion of the first trial. But we think that's something that should be canvassed at what will no doubt be some CMCs in the course of 2027. Clearly, the second trial won't be until some point in 2029 and that will give one ample time. But we think it's really planning a bit too far ahead to fix that now.

On that basis, we think that the point about the disclosure report and the EDQ, we are proposing it will be a disclosure report and EDQ limited to the issues in the first trial. But we think it should be provided by 11 September because that will inform the CMC. That's so we are ready to hear from any party on the DR and EDQ.

Submissions by MR PATTON

MR PATTON: Yes, sir. Well, it probably falls to me to address you on that. I mean, our position is that it wasn't merely a dispute about the date, it was a dispute about whether you need a DR and EDQ at all, or certainly at this stage of the proceedings. If I can just address you on that, could we begin with the relevant rule which I'm sure you're familiar with; rule 60. It's in the authorities bundle of E, tab 84 -- but it may be you have it separately -- and it's internal page 36 of the rules.

THE CHAIR: Yes.

MR PATTON: So I mean, it's obviously very familiar to at least some of you. But if I can just begin at rule 60(1)(b), which defines what a disclosure report is, just so that

you have reminded yourself of what it would involve. Then:

"(c) an 'Electronic Documents Questionnaire' means a questionnaire in the form of the questionnaire in the Schedule to Practice Direction 31B of the CPR."

That's not in the bundles. I know, Sir Peter, you'll be very familiar with that and probably Mr Bankes as well. You've got it ...? (Pause)

THE CHAIR: So just to get the headline before you develop your submissions. So your point is essentially saying that we don't need them in these proceedings. Is that what --

MR PATTON: You don't need them and you certainly don't need them now because of the approach that's been adopted of focusing, in the first instance, on the documents that have been disclosed in the existing proceedings and the parties seeking to agree and have not agreed coming before the Tribunal to decide what disclosure should be given from there. So that's my first headline point. I've got a point about timing, which I'll come back to.

THE CHAIR: Yes, I see.

MR PATTON: So that's my first headline point.

Have you got the EDQ form in front of you?

THE CHAIR: Yes.

MR PATTON: You've got it in the White Book. We've got another --

THE CHAIR: We've got it.

MR PATTON: I've got a second White Book if you --

THE CHAIR: Yes --

MR PATTON: -- would like.

So if you're on page 970 of the White Book. You can see that the questionnaire is essentially addressing itself to the question of: what does the disclosing party propose as the extent of a reasonable search. So hence the form of the questions:

"1. What date range do you consider that your searches for Electronic Documents should cover ...

"2. Identify the custodians of creators of your Electronic Documents whose repositories of documents you consider should be searched."

Then there's the provision of some information:

"3. What forms of electronic communication were in use ..."

Email, other types, and so on:

"4. Apart from attachments to emails, which forms of Electronic Documents were created or stored by you during the date range?

"5 ... identify database systems, including document management systems, used by you during the date range ...

"6. Do you consider that Keywords Searches should be used as part of the process of determining which Electronic Documents you should disclose?

"If yes, provide details of

"(1) the keywords used or to be used (by reference, if applicable, to individual custodians, creators, repositories, file types and/or date ranges); and

"(2) the extent to which [that] ... will be supplemented by a review of individual documents.

"7. Do you consider that automated searches or automated techniques other than Keyword Searches ... should be used [and then provide details of those]

"10. Do any of the sources ... raise questions about the reasonableness of search which ought to be taken into account? ..."

11: “Are any documents encrypted or password protected”; “do you have reason to believe they will be”; any other points in relation to disclosure. Then we'll get into document retention policies and then more mechanical points about the provision of inspection.

So you can see it's a very big exercise, in our submission. If we could go back to the way in which this is dealt with in the rule; rule 60. Rule 60(2):

"Subject to paragraph (3) and unless the Tribunal otherwise thinks fit -

"(a) at the first case management conference [so that's today], the Tribunal shall decide whether and when the disclosure report and a complete [EDQ] should be filed; and.

"(b) at a subsequent [CMC], the Tribunal shall decide, having regard to the governing principles and the need to limit disclosure of that which is necessary ... what orders to make in relation to disclosure."

So obviously the rule itself makes clear that it's for the Tribunal to decide at this CMC whether to have a disclosure report or an electronic disclosure questionnaire at all. The rule doesn't have any presumption one way or the other about whether there should be one. The presumption it has is that that will be looked at at this CMC, the first CMC.

You can see that the rationale for that is that really the first CMC is about the Tribunal providing itself with information about documents, and then a subsequent CMC -- or CMCs -- is used to actually make orders about what disclosure should be provided. But even that division between the first CMC and subsequent CMCs is subject to the overarching position that the Tribunal might otherwise think fit. But there's no presumption of ordering a DR or EDQ.

Now, we submit that in a standalone case where there haven't been other proceedings pre-dating that case -- which obviously is a form of case that does come before this Tribunal commonly -- it will be natural to consider whether a DR and an EDQ is a good means of identifying the scoping of the disclosure. Because you will be conducting a brand new disclosure exercise starting completely with a blank slate, the Tribunal might well decide in such a case that a DR and an EDQ is the best way of going about

that. It's got a discretion but one can see, in that sort of case, that may be a sensible way to exercise the discretion.

In contrast, this is a case where, as you know, there have been many other sets of proceedings dealing with issues that overlap with the issues in the present proceedings. The parties have identified, as you've heard this morning, a large number of proceedings spanning many different jurisdictions which cover issues that arise in these proceedings, and it's been agreed that Amazon is going to provide information to the Class Representatives and explanations to the Tribunal about what disclosure has been given in those proceedings.

THE CHAIR: Just pause a moment, sorry. One minute. Yes.

MR PATTON: So, members of the Tribunal, we say that, in this case what the parties have agreed with the Tribunal's blessing is effectively a different way of getting at the documents that are likely to go to the heart of the issues in this case. That's to say, by starting with the disclosure that has been given in other sets of proceedings raising the same or similar issues. That is the key information that the Class Representatives need and the Tribunal needs in order to decide at a subsequent CMC what orders for disclosure should be given.

This bespoke procedure that has been agreed doesn't require or involve the production of a disclosure report or an EDQ. It's simply a different way of fulfilling the objective that lies behind rule 60(2)(a), i.e. informing the Tribunal as to what orders about disclosure should be made.

We submit that the next CMC -- the one that you have indicated should happen in the middle of October -- that is going to be focused on any disagreements between the parties about what disclosure should be given from those other sets of proceedings. Obviously, the parties are going to try and agree about that and it may be they will reach a lot of agreement. We'll have to see. But to the extent they don't agree about

that, that will be the main point for determination by you at that CMC.

Again, none of that requires a disclosure report or an EDQ to be generated. We would suggest that the next CMC after that in relation to disclosure, that is going to follow, as I submitted earlier, the Class Representatives actually reviewing the material they have got from these other proceedings and identifying whether there are gaps in that material, whether there are issues in these proceedings that are for some reason not covered by the disclosure that's been given in those proceedings, and making narrow and targeted material with very much in mind what rule 60(2)(b) says about the need to limit disclosure to that which is necessary to deal with the case justly; a point that Sir Peter made this morning.

Again, that doesn't require a disclosure report or an EDQ. So that's why we say you should exercise your discretion when you decide whether to have a disclosure report or an EDQ at all, in this case because of the approach that the parties have jointly adopted to identifying the disclosure that's likely to go to the heart of these issues. That isn't necessary in this case. You should not order one to be given.

Now, if you were against me on that, there is a very real problem about the suggestion that this could be done by 11 September. I'll seek to explain why that is. First of all, as you know, until the end of August -- which is the date in paragraph 1 -- the Defendants are going to be focused on preparing the explanatory note in relation to the other sets of proceedings. So that takes us until almost the same deadline that's now proposed for the disclosure report and EDQ. So that's adding a very significant additional burden.

But it actually goes beyond that, and that was my reason for taking you through what the EDQ is about. The EDQ is about the disclosing party making proposals as to what disclosure should give: who are the other custodians; what are the search terms, if you can identify them, that should be applied to those custodians; what are the issues

that that disclosure would be relevant to?

If one thinks about that, it's obvious that you could only do that exercise properly once -- on the approach we've adopted here -- Amazon has actually given the disclosure that it's going to give from the other sets of proceedings. Because it's only then that you know, well, what are the gaps? What are the lacunae? What are the issues that are not covered, if any, by that other disclosure? Where should we be looking next, if that's required at all?

I think, as everyone has made clear, the whole point of the exercise which the Tribunal is ordering under paragraph 1, is to enable explanations to be given that do not require a detailed re-review of all of that disclosure. So that detailed re-review of the material that's been disclosed in other proceedings, that is not going to happen by the end of August. That's something that would happen as and when disclosure is actually given in these proceedings.

But how could one then, for the purposes of the EDQ, make sensible proposals as to search terms, for example. How could one make proposals as to custodians whose emails are relevant? How could one meaningfully answer those questions before you have worked out what is in the existing disclosure? What material is already available to the parties from the disclosure that is going to be given as a result of the explanation of materials that have been produced in the other proceedings?

Logically, if you were going to go down the route of an EDQ -- and I submit you don't need to for the reasons I've given -- that's a process that could only be started once you've actually given disclosure from the other proceedings and reviewed that disclosure to see what are the gaps. What remains not covered by that material, and therefore belongs in an EDQ.

So that's why, in our submission, it cannot possibly happen by 11 September. I mean, quite apart from the point I just made, it could be a very large exercise in an

organisation of this scale to go and identify answers to all of the questions that you've seen listed in the EDQ. So 11 September, we submit, would not allow enough time for that to be done anyway. But in fact, it's not an exercise that can even begin to be done sensibly until you have produced the explanatory note, given the disclosure resulting from that and reviewed it, and then identified: what are the gaps that remain, who are the custodians who've been overlooked, what are the search terms that are needed to cover issues that are not covered?

Now, the reason we say you don't actually need an EDQ for that is that the class representatives are themselves in a position to do that exercise themselves. Once they've received the disclosure, what you'd be expecting them to do is to get into that material, look at it closely, look at it by reference to their pleaded allegations, and see whether it gives them what they need. If not, they will no doubt come to Amazon with appropriately focused, targeted, proportionate requests. But, as I say, that's something they can do without an EDQ so there is no reason to impose the very substantial burden that it would impose on Amazon if you were to require that exercise to be done.

THE CHAIR: Yes, thank you.

Submissions by MR JONES

MR JONES: So the other proceedings will overlap to some extent but not totally with the pleaded abuses. So they won't cover every aspect of the alleged abuses and they won't cover the whole time period. Also, and this is critical and I have to unpack this a little bit, they won't necessarily have been done on the same basis as disclosure is done in this jurisdiction. So they may have answered questions, for example, posed by a regulator and even if those questions were about an issue which is live in these proceedings, the way in which they answered the question and the custodians, for

example, that they went to and the search terms that they used may be quite different to what they'd have to do ordinarily in proceedings here.

So we do expect that there will be material which is not covered by the other proceedings, but which is necessary and proportionate to disclose in these proceedings. That's why, just looking at the order, the agenda for the next CMC at paragraph 8 doesn't only include, "resolution of any matters not agreed" arising out of the other proceedings -- that's (i) -- but it also, at (ii), includes, "further directions for the second stage of disclosure from Amazon".

If you turn back to paragraph 4, you'll see that the way the disclosure report and EDQ have been framed is intended to carve out other proceedings:

" ... no explanation is required of Other Proceedings or the documents and information to which paragraphs 1 and 2 relate ..."

That's to avoid or minimise the potential for duplication.

Now, when defendants produce, ordinarily, disclosure reports and EDQs, as Mr Patton has just shown you, what is required is for them -- the defendant -- to propose custodians, search terms and so on. Why is that? It's because only the defendant will know who the relevant custodians will be. It's not the case that the Class Representatives could get disclosure from the other proceedings and look at it and then go back to Amazon and say, "You've missed the following custodians". We just would have no idea. They need to explain what other documents are relevant and would ordinarily be disclosed in these proceedings.

It's also not the case that they need to wait until they've disclosed the other proceedings documents, because the exercise involves looking at the way in which documents were identified in those other proceedings. Which is essentially what they're having to do under paragraph 1 of this order to tell us the process that they went through to identify documents and other proceedings, and asking themselves,

"Should we do more to make sure that we've covered the issues which are actually live in these proceedings? So are there other custodians? Are there other issues? Are there other search terms?" That's the nature of the exercise.

It does involve having a familiarity with what was done in the other proceedings, of course, so that you can carve it out. But it doesn't involve reviewing the documents in those proceedings as a separate step. So we don't agree that it needs to wait until that disclosure exercise has been completed.

Having said that, I do accept that there is a lot on for Amazon over the next couple of months, and so if the deadline of 11 September slips a bit, then so be it. That will make it more difficult for us to raise things at the next CMC, perhaps impossible. But what would be wrong, in my submission, would be to just let this drift or not happen at all, so that we're back at the next CMC asking for a similar provision. We will struggle to know what documents are relevant and out there, but not within the other proceedings' universe, unless Amazon tells us. The established way of telling us is a disclosure report and EDQ.

Sir, you suggested that it be limited to the issues in trial 1, and we can see the benefit of that. Could I just -- so going back to the wider questions of this staged trial -- make a broader observation, which is: when we, over the course of the next 18 months or so, have further CMCs and seek more disclosure, it may well be proportionate and sensible for that disclosure not only to cover the trial 1 issues, but possibly quantum issues as well, even though the quantum trial will come later. Sir, I appreciate that's not for today, but I just flag that now because otherwise if we delay disclosure on quantum, then the stage 2 trial might end up also being pushed back a long way. So we would want to be raising disclosure points over the next --

THE CHAIR: Well, bear in mind that disclosure on trial 2 issues might involve rather more disclosure from your clients….

MR JONES: Yes, sir. I accept that, but it doesn't --

THE CHAIR: So, the more you'll get into disclosure for trial 2, the more your clients get involved in disclosure.

MR JONES: Sir, we will heed that warning as we take this point forwards, but yes. Sir, those are my submissions.

THE CHAIR: Yes.

Yes, Mr Rayment?

Submissions by MR RAYMENT

MR RAYMENT: Thank you, sir.

Mr Patton very helpfully identified that the key to an efficient disclosure process is the ability of the Class Representatives to be able to make targeted and focused and efficient requests for disclosure from Amazon. Obviously, for that, it's a necessary precondition that we have good information in order to be able to make the targeted requests that he referred to.

Now, as you've heard, the relevant paragraph of the draft order, paragraph 4, doesn't seek to require an EDQ or a disclosure report in relation to the other proceedings, but obviously disclosure in this case is going to go beyond what is provided in relation to the other proceedings. Therefore, at some point we do need clear explanations of the nature and type of documents that Amazon holds, so that we can make those targeted requests that are so essential for an efficient process in a case like this.

From our point of view, that's the key point.

THE CHAIR: Yes.

Reply submissions by MR PATTON

MR PATTON: May I reply briefly, sir?

So my learned friend, Mr Jones, said that the disclosure in the other proceedings might not cover all the issues or all of the time periods. Obviously, at this stage that's necessarily a very speculative question. But, of course, what one will get pursuant to paragraph 1 of the order, (iii), is one will get the date ranges that are covered by the documents produced in other proceedings. One will get, at (iv), the Amazon custodians whose documents were or have been searched in order to produce those documents, and one will get the other explanations that are provided.

That will put the -- what we're not saying is that the Class Representatives are prevented, once they've received this information, from asking us questions about other disclosure that may need to be given, beyond the four corners of the other proceedings. Plainly, they will be free to raise those sorts of questions. But they will be in a position to raise those sorts of questions when they have received the explanations pursuant to paragraph 1 about the date ranges about the custodians, and they'll be able to make focused requests either for information or for documents from Amazon.

The only point I'm making is, what they don't need is for us to go off and do an entirely new exercise of producing a disclosure report and an EDQ, which is going to be extremely onerous and expensive and time consuming to produce.

Now, my learned friend, Mr Jones, said they won't be able to tell whether custodians have been missed, they said, unless we have gone and done that exercise. That cannot be right, because pursuant to (iv) of paragraph 1, they will know the custodians whose documents were or have been searched. Once disclosure is given, they will be able to identify whether there are other recipients of emails who are not among the custodians, and they'll be able to ask why that is, whether there's a good reason for that, and make proposals if they wish for those people to be added as custodians. That's something that happens in every piece of litigation: that those sorts of queries

are raised. So that is something that this information being provided will put them in a position to do.

My learned friend suggested that the approach adopted to disclosure may not be the same as in English disclosure. Again, that's necessarily a speculative concern at the moment. But as I say, if problems arise from the materials that are produced of them, they will be able to make focused and targeted requests.

Now, on those, in competition cases, it's true: what you often get is, for example, a response to a request for further information from a regulator. The Tribunal's experience is that those sorts of responses are actually very helpful, because they distil down the critical information in a way that's easy to understand. You don't necessarily need to go and look at masses of contemporaneous emails or other data. Instead, you've got that information presented in a very neat and intelligible way.

So it's sometimes a benefit that the way in which people answer questions from regulators is by providing these crisp responses. But again, if the Class Representatives take the view that they need the underlying materials that explain how those responses were prepared, that is something that can be raised in the usual way as part of the disclosure process. Again, that happens very frequently in competition litigation.

Both of my learned friends referred to the carve-out in paragraph 4, the brackets, which was added, I think, over the weekend. All that that means is that the DR and EDQ does not literally need to repeat everything that's been in the explanations. So it achieves that much, but that is not very much at all.

What it doesn't do is it doesn't meet the point that I made earlier: that in order to answer an EDQ -- and, for example, suggest search terms or suggest additional custodians or further work that's to be done -- you need to know what is in the existing disclosure, what is not covered by that disclosure, and therefore what further disclosure is needed

for a just trial of the issues.

So the fact that we don't need to literally copy and paste the explanatory memorandum into the DR and EDQ, it doesn't get away from any of those difficulties. In my respectful submission, no answer was put forward to that. My learned friend, Mr Jones, said, "We need to ask ourselves: should we do more?" He accepted that that does require what he called familiarity with the disclosure that had been given. Then he said, "But that doesn't mean you have to review the disclosure."

But how could that be? How could one be familiar with the contents of the disclosure, in a position to identify other custodians, other search terms before that disclosure has been, first of all, produced, and second of all, properly reviewed? It can't be done. That's my submission. I do say that no answer was really put forward to that point.

Therefore, if you were going to order a disclosure report and an EDQ, it is logically something that would have to come after the disclosure has been given, which pursuant to paragraph 6 of the draft order would be on 11 December. Because if it were going to be of any value at all, it would have to be a document that took into account the disclosure that had been given, having reviewed that carefully and identified what are the gaps, what are the issues, if any, that are not covered by that, and from that position onwards, identified some further work, if any, that needed to be done.

So it's not a question, as my learned friend, Mr Jones, suggested, of maybe it'll slip a few weeks beyond 11 September and get closer to the CMC. He has no answer to the fact that logically, this cannot realistically be done until disclosure from the pre-existing proceedings has actually happened.

MR BANKES: If I may (inaudible).

MR PATTON: Yes.

MR BANKES: I think you're raising two closely connected objections. One is that,

where you've already made submissions to regulators, there may or may not be additional material required. But there's a second thing that bothers me, which is that we know the end date of the period; I think it's June 2023 for Hammond and June 2024 for Stephan. Presumably it's a straightforward task to find the latest date of a submission to a regulator. My suspicion is there's going to be a period between that latest date and the end of the period where there will be no material at the moment that you're proposing to disclose. How do you intend to address that latter point, that at the end of the period appears to be not covered by any disclosure currently offering.

MR PATTON: May I have a brief moment? (Pause)

I think the two possible answers to your point, one is that some of the -- as I understand, the litigation is ongoing, so it will not be the case that disclosure has necessarily stopped at a particular date that predates the end of the relevant periods for claims.

THE CHAIR: Is that only in North America?

MR PATTON: I think you're right about that, sir, yes. It's Canada and the United States.

THE CHAIR: Unless Amazon is saying "Our policies and practices in Europe are identical to North America", and if you tell us that those are your instructions, that is helpful. But if you're not in a position to say that, then it seems to me Mr Bankes's point as regards Amazon in Europe may be differently run, is very germane.

MR PATTON: Yes, and so that was going to be -- my second answer is of course, if that kind of gap is identified, that's something that can be dealt with in the normal course of correspondence between the parties, if they said, you know, you've got this class of documents, but only up to January 2023, we would like the same class of documents for the next two years or for whatever the right additional period is. It can be addressed in that way, it doesn't require this exercise of starting, as it were, from

scratch, as if none of these other proceedings had happened, and doing a deal on an EDQ, from a blank slate.

It's simply one of these -- because, as I hope I've been seeking to make clear, in a sense, it's just an example of a gap. We're not in any way seeking to shut out Class Representatives from saying, having received your helpful explanation or having received the actual disclosures that you've given, we consider that the following areas that are not covered, and you should go away and give us a proposal, or you should answer our request as to how that gap should be addressed. The temporal scope point is such a gap, but what it doesn't require is that we do this potentially very onerous and difficult exercise. (Pause)

That was all I --

THE CHAIR: Was there a second point? You said you had two.

MR PATTON: In response to Mr Bankes, I have made both the points I had, yes.

THE CHAIR: Yes, well, I think we'll just go out for ten minutes and then consider.

(2.37 pm)

(A short break)

(2.53 pm)

THE CHAIR: We do not think there is an obviously right answer to this issue, but we do bear in mind that there may be much provided under the terms of the order relating to the other proceedings. Equally, as Mr Bankes pointed out, the other proceedings have in Europe, effectively, we believe, concluded.

What we propose is that we will require Amazon to produce a disclosure report and EDQ for documents from 1 January 2021. As regards the date by which it should be produced, we think that can be put back a bit to give you more time, we recognise the burden involved, to the Friday at the end of September, if someone can give me that date. (Pause)

Yes, 25 September.

In regard to European proceedings being concluded, we did have a query for Amazon. If we go back to the recital and the list of other proceedings, subparagraph (k). It says: "The ongoing investigation by the German federal cartel office." [as read]

We had thought, Mr Patton, that that concluded with the decision in February of this year. But is that not correct?

MR PICCININ: Yes, but there are appeals, I think, but that -- but otherwise (overspeaking).

THE CHAIR: But it's not an investigation by the office?

MR PICCININ: That's right, the investigation, you're right, concluded in a decision.

THE CHAIR: Concluded with a decision, yes. Yes, there may be appeals, well, there are appeals in some of the other cases as well. Yes, I see. So they're all put on that basis, and when it commenced -- yes, I understand. Good, so that deals with that point.

MR PATTON: May I just check so that I'm clear on what you've decided; the date range for the DR and EDQ would be 1 January 2021 until whatever is the end of the relevant pleading period, claim period, in each of the proceedings.

THE CHAIR: Exactly.

MR PATTON: And am I also right that what you're concerned with are documents relating to the position in Europe, including the UK?

THE CHAIR: Well, relating to the issues in the case, which --

MR PATTON: I thought I'd understood --

THE CHAIR: Relevant to the issues in the case.

MR PATTON: No, of course, of course relevant issues in the case, but so far as Europe, including the UK, is concerned, as opposed to North America.

THE CHAIR: If they're not relevant to the issue in the case which concerns the UK,

then they won't be included. If they are setting some worldwide or discussing worldwide strategy, then they would be. If they're purely US, they wouldn't be disclosable anyway, I don't think; would they?

MR PATTON: No, they wouldn't.

THE CHAIR: Yes.

MR PATTON: No, I'd understood that part of your rationale was that although there are ongoing proceedings in America and therefore materials from the United States are likely to be produced in those proceedings, whether they're worldwide or US only.

THE CHAIR: They are less likely to be relevant, that's why.

Is there anything else on our agenda?

MR JONES: So I think we're all agreed here that that is everything. Thank you very much.

THE CHAIR: Well, can I just make one final comment? We are struck by the number of people that are in this room for this CMC, even though it is viewable online. I rather doubt that these are curious members of the public who are keen to observe the excitement of case management in the Tribunal, and it does strike us, the extraordinary large teams that have been brought for this exercise. We really do have some concerns about the number of lawyers being brought along for case management hearings and the costs that that's likely to result in for all the parties. Just to express some concern going forward that each party should consider really what is necessary and proportionate, if at some point there should be costs applications.

Yes, Mr Bourke.

MR BOURKE: Sorry, sir, I was taking instructions. I wanted to make, if I may, just two quick points by way of clarification.

THE CHAIR: Yes.

MR BOURKE: Going back to the process that you've envisaged for July to decide on the list of issues for trial 1; just to clarify, ACSO certainly would very much want to be part of that trial 1, and we will do whatever it takes and we'll get our skates on, to use my learned friend Mr Jones's expression, to be part of that.

Can I just clarify that it's also envisaged that ACSO would be part of the discussions that take place in July this year on the issues for that trial 1.

THE CHAIR: We don't really think so because you're not yet certified.

MR BOURKE: Well, that is part of the problem, sir. Because we're not yet certified, but it is a trial that we will, if we are certified, it's highly likely that we will be part of that trial because of the overlap between our issues and the issues in Professor Stephan's claim. We've also started -- further to the last CMC in our case, we have done a lot of work to try and avoid duplication and cooperation with the other class reps. We envisage, for example, instructing Dr Pike on market definition and dominance and instructing Mr Hammond's counsel team on market definition and dominance. So I cannot see how we can't be part of the discussions, if I may say so, about what's within the scope of trial 1, when we're going to be part of trial 1.

THE CHAIR: The discussion is not going to descend into detail of sort of sub-issues and how they might be presented. So to take the example you've given, yes, you may, if certified, and you almost certainly will be, part of trial 1 on market definition and dominance. But all that needs to be agreed for this purpose is that market definition and dominance will be part of trial 1, and you will slot into that quite neatly.

Similarly, on the scope of abuse, if it will be whether there is a price parity policy and what shape it takes, one doesn't need to then look at the subdivision of the abuse to characterise different kinds of policies. I don't see there'll be any real problem of you slotting in if you're certified, and if necessary, there can be a slight amendment to the definition of the issues. But the general scope, I think, will be clear and shouldn't in

any way, disadvantage you or prejudice you.

MR BOURKE: No, but we may have -- we have views to contribute as to what should be part of trial 1. I mean, for example, Mr Patton earlier on mentioned Dr Bagci. Dr Bagci's been instructed by ACSO as an expert witness, and her analysis, it bakes in pass-through. Her Boik and Corts analysis bakes in the whole pass-through analysis, so it's all one single package. Therefore, to the extent that there's going to be discussions about what makes sense to have in trial 1 vis a vis or by comparison with trial 2, based on what the experts are going to be saying, then we think it might be useful for us to be part of those discussions as well.

THE CHAIR: Mr Bourke -- I'm sorry, I was looking at my list and for some reason your name is not included. Mr Bourke, no. We will have to address that if and when you are certified and then look at the way in which that evidence will be put forward. But the discussion -- you are of course welcome to communicate your views to, well, to anyone, but more particularly to the other Class Representatives and indicate your preferences and they may or may not want to take that forward -- but the discussion on the issues is between the parties currently.

MR BOURKE: Thank you. The second point, sorry, just very briefly. The second point was the week after our certification hearing, I think roughly; you've now envisaged having a CMC on the 14th or 15th.

THE CHAIR: Yes.

MR BOURKE: Presumably we will be, if the actual claim is certified, we'll be able to attend that CMC.

THE CHAIR: Yes.

MR BOURKE: Including (inaudible) on disclosure. Because, for example, the disclosure direction you've given in the case just now on the DR and EDQ; it covers their claim period, but our claim period is longer. So we would have an extended

period that we would be seeking disclosure for.

THE CHAIR: Yes, the fixing of that date was such that we will have announced the decision of whether your claim is certified, and if it is, then it is envisaged absolutely that you will take part in that CMC and will be able to make submissions about disclosure and claim period and so on.

MR BOURKE: Thank you.

THE CHAIR: Is there anything else?

Thank you all very much.

(3.04 pm)

(The court adjourned)