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IN THE COMPETITION
APPEAL TRIBUNAL

Case No: 1745/5/7/25

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

Tuesday 14th July 2026

Before:

The Honorable Mrs Kelyn Bacon
John Davies

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Claimant

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

V

Defendant

Whaleco UK Limited

A P P E A R A N C E S

Ali Al-Karim (instructed by Freshfields) on behalf of Roadget Business Pte. Ltd. and Shein
Distribution UK Limited

Daniel Piccinin KC & Nikolaus Grubeck
(instructed by Gibson, Dunn & Crutcher UK LLP, Herbert Smith Freehills Kramer LLP and
Allen & Overy Shearman LLP) on behalf of Whaleco UK Limited

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Lower Ground, 46 Chancery Lane, London, WC2A 1JE
Tel No: 020 7404 1400

(10.30 am)

MRS JUSTICE BACON: Good morning, everyone. Some of you are joining us live stream on our website so I will start with the usual warning. An official recording is being made and an authorised transcript will be produced but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Just to say, apologies for the slight delay in starting this hearing. We had a technical problem, but that's now resolved. Thank you very much. Can I just check that everyone can see and hear us.

MR PICCININ: Yes. Thank you.

MR AL-KARIM: Yes. Yes, madam president, thank you.

MRS JUSTICE BACON: Thank you. Just also to say that I am not sitting as a panel of two. I'm sitting formally as a panel of one but I'm being assisted by Mr Davies, who you know, is one of the ordinary members on our panel for bigger panel cases. All right. Mr Davies will jump in and ask questions if he has any in the usual way.

Housekeeping

Can I just start with some housekeeping. We've had an updated bundle of authorities. I've got a core bundle, which is 506 pages, and a supplemental bundle, which is 296 pages. I do have various other bits and pieces, but I assume that those are the two bundles that I'm likely to need, together with the authorities bundle. Is that right?

MR PICCININ: There is one additional document which is quite important, which is the list of issues for industry experts, a copy of which was provided this morning.

MRS JUSTICE BACON: Good. Got that. And that's today's dated composite list?

MR PICCININ: It is. Yes.

1 MRS JUSTICE BACON: I will also make some reference to the earlier
2 correspondence which set out the agreed issues for the expert economists. We did
3 have a couple of questions on those.

4 MR PICCININ: Yes.

5 MRS JUSTICE BACON: Just start with that. In fact what I want to do is just start with
6 the page limits. I think we could start with the economists' page limits.

7 MR PICCININ: Yes.

8 MRS JUSTICE BACON: What I would very much like to do is set page limits at such
9 a length that we don't end up having to do shorter trial economist reports. That is
10 something that we do if necessary, particularly where the original expert reports are
11 just too long to be manageable at trial. But the ideal is that we set the page lengths at
12 such a length that it is manageable at trial and also manageable in terms of the
13 pre-reading.

14 Now, on the current page lengths, if we assume that the economists' reports are 80
15 and 40 pages, that gives 240 pages in total. If one assumes that the industry experts'
16 are 35 and 15, that's 50 each for four industry experts, which is 200. That's over
17 400 pages of expert reports before you even get into joint reports.

18 Can you remind me how long we've got for pre-reading in the trial timetable? Probably
19 a week.

20 MR PICCININ: I think it's half a week actually. From memory.

21 MRS JUSTICE BACON: There would never be any time for there to be pre-reading
22 of that, at least not on my part because my time is absolutely circumscribed to the
23 pre-reading. There won't be any additional time. So, at the moment, we're ending up
24 with reports that are too long for it to be at all feasible in any way, shape or form to
25 read any material part of those reports prior to trial. They're going to have to be
26 shorter.

1 | My provisional suggestion was that the economist should come down to no more than
2 | 70 pages plus 30 in reply, which would be a total of 100. You will still need to think
3 | about how that is going to be pre-read. If there is only a half a week pre-reading, you
4 | will have to understand that that is half a week and that's not with 20-hour days. Into
5 | that half a week, I also have to read the skeleton arguments.

6 | MR PICCININ: Of course.

7 | MRS JUSTICE BACON: You are going (inaudible) about exactly how long I get for
8 | pre-reading within the trial timetable and if it's not in the pre-reading week, when are
9 | you going to build in days for me to pre-read anything necessary? I do not want to get
10 | to the PTR with an assumption that I'm going to read a thousand pages a day, because
11 | that's not going to happen in the pre-reading period.

12 | So, my suggestion is that the economist's report should be an absolute maximum of
13 | 70 pages each side with 30 in reply. Is even that necessary or can they be shorter?

14 | MR PICCININ: Well, madam, what I would say about that is obviously the parties and
15 | the economists are very keen to produce documents that are useful to you and if you
16 | don't have time to read them, then that makes them considerably less useful. They
17 | will, I'm sure, on both sides make them as short as they possibly can be.

18 | At the moment, I think shorter than 70 pages would be very difficult. The risk is that
19 | they become not useful in another sense, which is that they don't contain the material
20 | that you actually need to decide the case.

21 | MRS JUSTICE BACON: All right.

22 | MR PICCININ: The other point just about that, madam, is that you will have seen that
23 | our proposal of 80 and 40 was excluding annexes and obviously, there is always
24 | a sense in which you can -- or often a sense anyway -- move material from the body
25 | to the annex, if that makes readability easier, then it makes it easier to focus on what
26 | you actually need to have read before the trial rather than just dipping into, when

1 particular points come up.

2 MRS JUSTICE BACON: Okay. But I think what I was going to say is that the page
3 length should exclude purely technical annexes, not annexes (inaudible) stuff that we
4 can't include but which are not technical. By technical annexes, I envisage things like
5 calculations, detailed formulae tables of results, insofar as necessary, that are purely
6 technical, and the assumption will be that the tribunal, or at least this member of the
7 tribunal, me, will not read them. That they are there because they can then be
8 interrogated by the other side and indeed some of them might be in spreadsheet
9 format. But the assumption needs to be that anything that is required for the tribunal
10 to read must be in the body of the expert report and your assumption must be that
11 I will not ever read anything that is in the annex.

12 The aim of that is to ensure that we don't get to the trial and then you expect to refer
13 to material in the annexes and/or expect that anything in the annexes is ever going to
14 make its way into the judgment because it won't. At least, that should be the
15 assumption.

16 MR PICCININ: Yes.

17 MRS JUSTICE BACON: I mean to comply with the experts practice direction, there
18 will need to be some working shown and that would be the place for it.

19 MR PICCININ: Yes. That is what I had in mind, save for a minor point, madam, which
20 is that of course, sometimes disputes arise in relation to those technical details, in
21 which case it's conceivable that there would be cross-examination on something in an
22 annex but ...

23 MRS JUSTICE BACON: But the general expectation should not be that anyone will
24 be cross-examining by reference to the annex in any substantial part but, of course,
25 you're right Mr Piccinin, because the annex is there, then that can be interrogated by
26 the other side and the other side then might take a point on the way that someone has

1 | done some aspect of their working, in which case it will come out.

2 | MR PICCININ: Yes.

3 | MRS JUSTICE BACON: Mr Al-Karim, are you content with a 70 page plus 30 in reply
4 | for the economists?

5 | MR AL-KARIM: My Lady, we are content with that, excluding annexes, but of course
6 | we'll make sure that it only includes technical information of the type that you
7 | contemplate.

8 | MRS JUSTICE BACON: All right. So we need to (audio distortion) technical annex
9 | order. All right.

10 | So then (audio distortion) at the moment this is going to be too long. I cannot imagine
11 | that it's going to be useful for us to get 200 pages of industry evidence for the trial and
12 | again, it just won't be read. My provisional suggestion is that the industry experts
13 | should have, between them, and I understand that there are upstream and
14 | downstream experts so I don't want to micromanage how you allocate the space, but
15 | they should have between them on each side 50 pages in total plus a total of 20 pages
16 | in reply. That would give then, for the industry expert, 70 pages on each side down
17 | from the current 100 and that will still provide 140 pages total of industry evidence,
18 | which I still think is far more than will ever make it into a judgment.

19 | To be honest, my preference would be to bring that down to a total of no more than
20 | about 100 pages. So that would be 50 pages on each side in total. If you think that
21 | that is feasible, then that would be better. But my starting suggestion is that it should
22 | be no more than 50 pages plus 20.

23 | MR PICCININ: Madam, again, I think we've all heard -- sorry, I'm just getting some
24 | echo -- we've all heard what you've said and if we can make it shorter then we will but
25 | at the moment that does seem unlikely to me.

26 | The one other thing of course we can all do to assist the tribunal is, in our skeleton

1 arguments, identify the particular bits that are controversial, that deserve particular
2 close reading in advance of the hearing, but that is something that will emerge through
3 the evidence process.

4 I'm sure you're right that the judgment won't be full of 100 pages of expert material
5 from the industry experts, but the work needs to be done in order to enable the debate
6 to be had on the bits that do matter.

7 MRS JUSTICE BACON: All right.

8 Mr Al-Karim, are you content with reducing the industry experts to 50 pages in total for
9 the initial (inaudible) reports on each side and then 20 pages in total on reply, again
10 between the two experts?

11 MR AL-KARIM: Yes, my Lady. Thank you.

12
13 Economists question 6

14 MRS JUSTICE BACON: All right.

15 We'll move on to the questions for the economists. I can see that there is an
16 agreement on these, but we had two questions. I'll ask the first one and then the
17 second one is more for, I think, Mr Davies so I'll leave that to him.

18 My question is, on question 6, it wasn't clear to me that that question added anything
19 that's not already covered by question 5. It seemed rather conclusory, but I don't want
20 to ask additional questions if that's going to give the economists an impression that
21 they have to go and do something separate for that. If I look at the relevant paragraphs
22 for the pleading, they're exactly the same as the paragraphs that are referenced in the
23 chapeau of question 5 and that the content of question 6 seemed to me just putting in
24 a different way, the content of question 5. Can somebody help me as to whether
25 question 6 is really needed?

26 Submissions by MR PICCININ

1 MR PICCININ: Yes, madam. I think I see the point. The first word of it is, of course,
2 "Overall". So I think it was really just an opportunity to draw the threads together on
3 the points that they will have addressed above, rather than it being some specific
4 additional point.

5 Then the background to this is what we've done is we had, as you've ordered us to do,
6 the economists meet, and they prepared this list and reached agreement between
7 them. So we've now put it forward to you. But I do see your point that it's not adding
8 additional analysis, I don't think, to the preceding ones.

9 MRS JUSTICE BACON: Yes. Mr Al-Karim.

10 MR AL-KARIM: My Lady, we quite agree with you, and we're content to remove that
11 question.

12 MRS JUSTICE BACON: All right. Let's remove that question.

13 Right, questions from Mr Davies then.

14
15 Economists question 4

16 MR DAVIES: So on question (4) -- we had a concern about it focuses purely on theory,
17 which leaves a bit of a gap between (4), which is purely theoretical, and then (5), which
18 is about the actual effects in this case, if any. We wondered whether (4) should have
19 somewhere in it, something like, "and what evidence would be useful in identifying
20 which way it goes" -- I'm not quite sure about the wording of that last bit -- but,
21 effectively, so that it's not just a purely theoretical, textbook discussion, but without
22 necessarily getting into the facts of this case, at this point, how would you decide
23 between the two?

24 MRS JUSTICE BACON: Thank you.

25 MR DAVIES: That's a --

26 MRS JUSTICE BACON: That's a good question.

1 | MR DAVIES: Yes, no, no.

2 | Submissions by MR PICCININ

3 | MR PICCININ: Thank you. Yes, sir. Just two observations on that, one is that you

4 | said there's a gap between (4) and (5). But there is also (7) that, I think, is relevant to

5 | that as well in terms of talking about effects. But I don't think that's a complete answer

6 | to your point.

7 | In relation to your addition about what evidence would be useful to distinguish between

8 | pro-competitive and anti-competitive provisions like these, I had understood that that

9 | is what they meant by asking: in what circumstances are they like? That is the point

10 | of asking the question. So if you find it useful to add those words, I certainly wouldn't

11 | have any objection to that to help direct the experts.

12 | MRS JUSTICE BACON: What text is (inaudible) then?

13 | MR PICCININ: Sorry, madam, you're just asking what text are we adding then?

14 | MRS JUSTICE BACON: To add those words, what were you referring to?

15 | MR PICCININ: So I think Mr Davies is saying that he would like to add to question 4,

16 | something along the lines of "And what evidence would be useful to distinguish

17 | between provisions that enhance or restrict competition?" So something like that.

18 | Was that right, Mr Davies?

19 | MRS JUSTICE BACON: All right. So you are happy with that proposal?

20 | Mr Al-Karim, can I have your submission?

21 | MR AL-KARIM: My Lady, we also see the force of what Mr Davies says, and we're

22 | happy to make that amendment.

23 |

24 | Discussion re extensive econometric analysis

25 | MRS JUSTICE BACON: Yes. All right. Okay. We've made a note of that.

26 | By the way, I think what we will need, following this hearing, is an updated list of the

1 | expert issues on both sides as well as, probably, at the top of that list, the revised page
2 | lengths.

3 | All right, is there anything else that we need to address on the economists? Can we
4 | go on to the industry? (Pause)

5 | Oh, yes, that's right, I'm just being reminded. On question 5, we can see why you
6 | need this question. But I did have a gentle concern that, for the purposes of this trial 2,
7 | it looked like the econometric analysis that is proposed is going to -- well, it has the
8 | risk of becoming quite substantial and crossing over into what will be required for
9 | trial 3, if this matter ever gets to a trial 3. I'm just a little bit concerned as to the
10 | proportionality of doing a very extensive econometric analysis. When I see things like
11 | the last paragraph of (5), that seems to me to indicate that multiple regression analyses
12 | may be contemplated, and at least some quite complex econometric analysis may be
13 | envisaged on each side.

14 | I wondered if there is any way of confining that to what is really necessary for this
15 | trial 2, rather than trying to set up the position for anything that may ever come to
16 | trial 3, in this theoretical world in which we do get to trial 3.

17 | Submissions by MR PICCININ

18 | MR PICCININ: Yes, I understand that concern, madam. It certainly wasn't the
19 | intention, I don't think on our side, to do a full quantum analysis. You're quite right that
20 | it's no part of trial 2 to need to quantify exactly what the effect of the conduct was on
21 | Temu's sales. But equally, there is going to need to be some econometric analysis on
22 | each side to show that there were effects.

23 | I wonder if the simplest thing is then -- I think we have a transcript of this hearing -- we
24 | draw that and your observations to the attention of the economists then and that they
25 | can take that into account.

26 | MRS JUSTICE BACON: Yes.

1 MR PICCININ: Rather than trying to wordsmith around it, which might be difficult.

2 MRS JUSTICE BACON: Look, I haven't come up with a way of wordsmithing it;
3 certainly, neither of us had. But it's just a concern. I don't know if there's any way of
4 having a sort of a mid-term review at some future CMC to try and see if there is an
5 agreement between the economists as to how extensive that analysis is going to be
6 and needs to be. Because, for sure, there is bound to be some CMC later in the year
7 or at some appropriate stage.

8 Can you just perhaps just bear that in mind as to whether there is any way of ensuring
9 that analysis doesn't go further than it needs to? Noting, of course, the point made at
10 the top of the list, which is that, already, the experts meeting with some (audio
11 distortion) there. (Audio distortion) what apparently was at the start of June. It said
12 that the thinking may have moved on a little bit.

13 So if there is some way of keeping this within a proportionate bound on both sides,
14 because I don't want either side to be going off and incurring more costs than is
15 needed for this part of the trial. If it would be beneficial for the tribunal to be able to
16 control that for the benefit of all parties so that neither side is going off and doing
17 extensive work that ultimately the tribunal says, "Well, we didn't really need that".

18 Submissions by MR AL-KARIM

19 MR AL-KARIM: My Lady, from Shein's perspective, we, of course, will ensure that our
20 evidence is proportionate. But to be absolutely clear, our position is that, as a matter
21 of law, econometric and quantitative analysis is required in this case. There are two
22 reasons for that.

23 The first is that Temu pleads the lost profits case as part of its effects case. That's the
24 nub of its effects case.

25 The second reason is that causation is being tried in this trial 2 whilst quantum is being
26 deferred. So we're not going to include specific evidence on the loss mechanism that

1 | Whaleco has suffered. That will be deferred for trial 3. But, in our submission, cases
2 | like Compare The Market v CMA established firmly that, for the purpose of effects,
3 | quantitative analysis does play a part. Unless I'm mistaken, we don't understand
4 | your Lady to be taking a different position.

5 | MRS JUSTICE BACON: No.

6 | MR AL-KARIM: But we do say that Temu will have to conduct granular quantitative
7 | analysis to demonstrate effects. It can't simply do it by reference to general correlation
8 | or high-level quantitative analysis. So we will keep our experts apprised of the need
9 | for proportionality, but we don't want to foreclose the level of quantitative analysis that
10 | the experts have to go into at this stage.

11 | MRS JUSTICE BACON: I'm not (inaudible) saying otherwise. I'm just exhorting
12 | everyone to keep reigns on this. If there is a point at which there may be a dispute
13 | about what's necessary to do in terms of going further, you can bring that before the
14 | tribunal at an appropriate time.

15 | MR AL-KARIM: Thank you, my Lady. All understood.

16 | MRS JUSTICE BACON: Okay.

17 | Reply submissions by MR PICCININ

18 | MR PICCININ: Just from my perspective, just to say that I'm not going to respond to
19 | all of that. I don't want to get into a pre-argument now about what the test is going to
20 | be for effects at trial. But on the practical point about keeping this under review,
21 | I suppose one moment when it might become acute is after the exchange of the expert
22 | reports-in-chief. So if what we see is something that is disproportionate or that we
23 | perceive might be disproportionate from the other side, rather than rushing off and
24 | producing an extensive response to it, there might be a need for a quick view from the
25 | tribunal.

26 | MRS JUSTICE BACON: Exactly the kind of thing that I have in mind. So that if there

1 | is a point at which one or other of you takes the view that responding to everything is
2 | not necessarily going to be helpful at the end of the day and may be producing material
3 | that is not useful to the tribunal, then that's something that can be brought back.

4 |
5 | Questions 2(a) to 2(c)

6 | MRS JUSTICE BACON: All right, okay, so let's leave it at that for the economists.
7 | Let's move on to the industry experts. Thank you for the revised composite list, which
8 | was sent through this morning. We've had a very detailed look at that already. I would
9 | propose that we take this in chunks. So how about the first chunk being the questions
10 | at 2(a) through to (c). Perhaps, I can just get you to both briefly address us on each
11 | of those.

12 | Before you do so, just to give you our provisional view, provisionally, we think that the
13 | red wording in 2(b) does make sense, because it does give some indication as to the
14 | types of things that you want the industry experts to look at, rather than just being
15 | worded in a very general way. Obviously, we're very mindful that the evidence of the
16 | industry experts needs to be helpful for the economists and for the parties to make
17 | submissions. So we don't want them to just go off and do something which covers
18 | a lot of words but isn't ultimately what you want them to address. So we think that the
19 | red wording in 2(b) is helpful.

20 | We are wondering whether any of (c) is helpful. It seems to me that I'm not sure that
21 | we are going to need to descend to the granular detail of what are the most important
22 | product categories in terms of revenue. Because this could be sending the experts
23 | down a chain of reasoning, which ultimately doesn't really have a bearing on the
24 | pleaded case, which, on this part, is just about market definition, isn't it?

25 | So could we just have submissions from each? I suppose we should start with
26 | Mr Al-Karim, firstly, on the wording of 2(b) and (inaudible) whether (c) (inaudible).

1 MR AL-KARIM: My Lady, apologies, you broke up there. Can you hear me?

2 MRS JUSTICE BACON: Yes, we can hear you.

3 Submissions by MR AL-KARIM

4 MR AL-KARIM: On 2(b), my Lady, I have instructions that Shein is content to adopt
5 the red text. On 2(c), we rather agree with your Ladyship that 2(c) is unnecessary.
6 The parties are giving disclosure on revenue streams and the number and location of
7 suppliers. The critical question for the industry experts to address, in reality, is the
8 potential suppliers who could have done business with Temu. That's for the purpose
9 of market foreclosure. That's of central importance of the upstream expert evidence.
10 We quite agree with your Ladyship that 2(c) will send the experts down a wild goose
11 chase. If there's anybody who's going to conduct an analysis of the product categories
12 and their revenues, it should be the economic experts. So we quite agree with
13 your Ladyship that 2(c) should go.

14 MRS JUSTICE BACON: All right. Mr Piccinin.

15 Submissions by MR PICCININ

16 MR PICCININ: Yes. I'm grateful for that indication on 2(b). In relation to 2(c), we
17 certainly don't have in mind any chases of any fowl of any kind. But we do think it's
18 useful for the upstream issue to address this because then the factual witnesses have
19 already given evidence that there are actually different specialisations and that they
20 interact with different geographic areas as well. So, in particular, Shein has led
21 evidence to the effect that Guangdong is the province with the largest number of
22 suppliers and is focused on women's clothing and has given examples of for example,
23 Huludao -- if I've got the pronunciation right -- where there is a focus on swimwear.
24 So trying to reach an understanding of the extent to which that's the case and also the
25 extent to which that is something that is entrenched or can easily be worked around is
26 important.

1 | So if Shein's position, for example, is that, okay, all of the swimwear producers are in
2 | Huludao that they could switch to making dresses at the drop of a hat, then that would
3 | be one thing, or vice versa, if people in Guangdong could switch to make swimwear
4 | at the drop of a hat, then the significance of those geographic clusters would obviously
5 | decrease. That is what we're trying to get at in 2(c). It's not an exhaustive list of all of
6 | the product categories, but a sense of the extent to which suppliers do specialise and
7 | which ones are particularly important and then to what extent is it possible to switch
8 | between them. That's the idea.

9 | MRS JUSTICE BACON: So in order to cut down the number of geese that are chased,
10 | could we simply say -- could we amalgamate (c) and (ii) because the main point is
11 | about switching, it seems to me from what you've just said, and could it just have one
12 | question which ends, "If yes, are such suppliers able to, and do in practice, switch to
13 | the production of other products and product categories"?

14 | Reply submissions by MR AL-KARIM

15 | MR AL-KARIM: My Lady, if I may, I'm hearing Mr Piccinin's points he's made about
16 | the type of industry evidence that he had in mind with this question. That's already
17 | covered by 3(a) and that's dealing with the geographical distribution of suppliers, their
18 | locations, their abilities, their capabilities, their general competence to meet the
19 | demands of Shein and their regional specialisation. So we do continue to adopt our
20 | primary submission that your Ladyship had it correct the first time and that 2(c) can go
21 | entirely.

22 | Reply submissions by MR PICCININ

23 | MR PICCININ: Just on that, that's actually not correct. If you look at 3(a), it doesn't
24 | ask about specialisations in a particular type of apparel. Those two issues are being
25 | dealt with separately. Now, while of course it would be possible to deal with them all
26 | together, my overarching approach to this list of issues is -- we're not trying to

wordsmith it really. We're not interested in the wordsmithing. What we want to make sure is that everything is covered so that we don't get ships passing in the night, particularly when we have very short reply reports. We don't want a situation where things have not been properly dealt with in the reports-in-chief. We want to make sure that everything that needs to be covered is covered.

The particular suggestion that the tribunal just made to us seems workable to me save that it would be useful for the experts obviously to focus on the specialisations that are the most important. It's not very helpful to go off on random tangents dealing with categories that are unimportant, in terms of their scale. That was the point of (c)(i). It was really to make it more proportionate, not less.

Likewise, (c)(iii) is important because the question isn't just, "Could people switch in theory?" You know, is that something they're capable of doing? But how long would it take and how much would it cost? Those are the critical inputs to a supply side substitution analysis that the economists are going to need to conduct.

Further submissions by MR AL-KARIM

MR AL-KARIM: My Lady, one point, please. Mr Piccinin says that regional specialisation and product differentiation amongst regions is not captured in 3 but his own 3(c)(ii) asks, "How do fashion products produced by some suppliers within the cluster compare with the products produced in other clusters?" So, to the extent he is asking the experts to opine on product differentiation across regions, that's his call, and so 2(c) continues to be redundant.

But if my Lady is now considering retaining 2(c), then we do have submissions about the proper course and we proposed, in green, a 2(e) that we say should be preferred by the tribunal instead of Mr Piccinin's 2(c)(iii) but our primary submission is that 2(c) should go and 3(a) does the work.

MRS JUSTICE BACON: (Several inaudible words). All right. We're going to keep

1 | this but in somewhat truncated form because we want to limit the extent of our inquiry
2 | into something that we don't think that isn't necessarily going to be relevant. So our
3 | proposal is that we truncate it as I have suggested. We'll have the initial wording:

4 | "Do suppliers generally specialise in specific product categories. If yes, are any such
5 | specialised suppliers able to, and do in practice, switch to the production of other
6 | (important) products and product categories".

7 | That would make clear that what we are talking about are the important products and
8 | not something that is not important for these proceedings.

9 | We think that the question about how long it would take them and what costs would
10 | be involved is necessary implicit in the question about whether they are able to and
11 | do in practice. That will hopefully keep this question within reasonably narrow
12 | confines.

13 |
14 | Questions 2(d) and 2(e)

15 | MRS JUSTICE BACON: Let's now turn to (d) and (e), which we'll take together. Why
16 | don't we start with Mr Piccinin because it's his pitch, I think, for more extended wording
17 | of (d) and (e) and Mr Al-Karim has got a narrower proposal. So Mr Piccinin --

18 | MR AL-KARIM: Can I just clarify that. In light of your change, we're content to drop
19 | our (e) and it seems to me Mr Piccinin's (e) goes away as well, because your question
20 | has -- the new 2(c) is essentially a general question about switching and that
21 | encapsulates suppliers who want to move into new product lines or suppliers who want
22 | to do business with Shein (inaudible) for the first time.

23 | (d) is a different question about the distinction between exports and imports and that's
24 | a live issue but it does seem that in light of your change to 2(c) both parties rival
25 | competing 2(e) disappears.

26 | MR PICCININ: I don't agree with that, but I'll explain why in my submissions on this

1 point.

2 MRS JUSTICE BACON: So let's have your submissions on (d) and (e) then.

3 Submissions by MR PICCININ

4 MR PICCININ: Yes. So in relation to (d), what we're talking about is suppliers who
5 specialise in supplying goods for China domestically and goods for export. The issue
6 is that we just want to add some additional detail again to make sure that things get
7 covered properly. It's not so that the experts go off and write long tomes on each of
8 these topics. They can't do that with the page constraints. It's just to make sure that
9 the points are covered.

10 If I could show you where it comes up in the pleading. In the core bundle, that's at
11 page 256, which is our pleading on market definition that you directed us to make at
12 the last CMC and it's paragraph 5, which begins at the top of the page, where we are
13 pleading the characteristics of the suppliers, that a UFF platform needs access to in
14 order to succeed.

15 The very first point is about suppliers with the ability to design apparel that aligns with
16 western aesthetic preferences, closely following current seasonal fashion trends, and
17 possessing substantial experience in manufacturing those products, as in products for
18 export. That's really what we're asking for in 2(d). And we want to make sure in 2(d)(i)
19 that they address the question of whether the manufacturing process or business
20 model is actually different, as between domestic and export, and whether the products
21 themselves are different in relation to the styles, which is one point we called out, but
22 also things that are relevant to the manufacturing.

23 At (iii), you get the question -- and we keep asking this about each of our specialisation
24 points -- once you've identified a specialisation, if you have, you then need to ask the
25 switching question to help you decide whether that specialisation is something that
26 actually matters economically. The structure of these questions, you'll see, repeats

1 | itself.

2 | Again, I don't think there's actually any dispute between us about whether this material
3 | should be material that the industry experts are allowed to include in the report. The
4 | question is a slightly arid one. It's one-sided arid, about whether it should be called
5 | out in the list of issues. We say the reason to include wording when you're in doubt
6 | about that is because it comes at no cost. It makes sure that the experts do address
7 | it and you therefore avoid ships passing in the night. There's not really any downside
8 | to including it there. It just makes sure the documents are more useful at the end of
9 | the day. So that's 2(d).

10 | In relation to 2(e), that is another switching question but it's a different kind of
11 | switching. So whereas in 2(c) we were talking about switching between different
12 | product categories, as in different substantive things like swimwear, dresses, that kind
13 | of thing, and then in 2(d) we're talking about switching between different modes -- so
14 | for export versus domestic -- in 2(e), we're talking about something else, which is
15 | switching between suppliers who supply other types of retailers -- so not Shein and
16 | not Temu -- switching to supplying Shein and Temu.

17 | That gets at the critical question of whether you can have supply side substitution from
18 | outside what we call the upstream UFF market, which is the set of people who are
19 | really important suppliers for Shein and Temu. If you take people who currently supply,
20 | I don't know, Primark and Zara, can they switch to supply Shein and Temu and what
21 | barriers would they face? What difficulties and what types of investments and time
22 | frame? They're not the same questions. It's useful to tease them out like this so that
23 | we make sure that everything gets addressed properly.

24 | MRS JUSTICE BACON: All right. Thank you.

25 | Mr Al-Karim.

26 | Submissions by MR AL-KARIM

1 MR AL-KARIM: My Lady, if I may start with our 2(e). What Shein (inaudible) agree,
2 as Mr Piccinin says, there appears to be a great deal of common ground. You'll see
3 from our 2(e) that we're looking here at three types of switching. The first is, if we look
4 at a supplier that wants to enter the upstream market for the first time, that's also
5 a potential supplier and that's not covered by any of Mr Piccinin's questions. The
6 second is, if we look at existing suppliers of Shein and Temu who want to break out
7 into new products and the third is suppliers who want to do enter new commercial
8 relationships with Shein and Temu for the first time.

9 What our 2(e) sought to do was to synthesise Temu's 2(e) and its 2(c)(iii). Its 2(c)(iii)
10 was considering existing suppliers seeking to move into new product lines, and its 2(e)
11 was dealing with suppliers seeking to do business with Shein and Temu for the first
12 time, what Mr Piccinin calls "supplier switching". Our 2(e) is an attempt to synthesise
13 both of those categories and also to make clear that the tribunal needs, when looking
14 at potential suppliers that Temu could have done business with, it also needs to take
15 into account suppliers who could have entered the market for the first time, either
16 because Temu trained them up in the way Shein trained up its own suppliers or by
17 establishing a vertically integrated business. That is obviously relevant to the question
18 of potential suppliers. So that's 2(e).

19 For us, 2(d) is a completely separate question. I can make my submissions on 2(d)
20 now or I can wait for (inaudible).

21 MRS JUSTICE BACON: No, please do 2(d) now.

22 MR AL-KARIM: Again, Mr Piccinin and I are agreed on the substance. This is really
23 a point of drafting. My Lady, you should note that there's a new chapeau at 2(d), which
24 was not in place at the time the skeletons were filed and happily that is common ground
25 between the parties.

26 We say that the new chapeau captures the critical question that the experts need to

1 | opine on: can a domestic supplier effectively switch into an exporting supplier? What
2 | are the factors that influence that? And if they can, quite frankly, it does not matter
3 | what the qualitative difference is between the domestic business model and the
4 | exporting business model.

5 | Of course, there are going to be qualitative differences. It doesn't matter whether there
6 | are differences between the fashion products between domestic suppliers and
7 | exporting suppliers. That's the whole premise of Temu's pleading. So it doesn't need
8 | the additional detail.

9 | If a domestic supplier can switch into becoming an exporting supplier without friction,
10 | then the additional detail in Mr Piccinin's red text falls away and frankly, given the page
11 | restrictions, an exegesis into the differences between business models for domestic
12 | suppliers and exporting suppliers is by-the-by. So we say that the agreed chapeau
13 | captures the critical question that the tribunal will need to grapple with.

14 | MRS JUSTICE BACON: All right. We'll just take (inaudible) discussion.

15 | Reply submissions by MR PICCININ

16 | MR PICCININ: Sorry, can I just respond briefly to what Mr Al-Karim had to say about
17 | 2(e) specifically then? Because I think he now accepts that we do need something at
18 | 2(e), and his argument was that we should have his wording instead of ours. I just
19 | wanted to identify the three flaws in his wording.

20 | The first is at (i), it builds in the concept of fast fashion, which is a contested
21 | categorisation as between us. As you know, our case is that Shein and Temu stand
22 | apart in an ultra-fast fashion market. So we certainly don't want to start directing the
23 | experts. That's why we've tried to avoid that kind of terminology in the question. So
24 | we don't end up sending the -- direct the experts into contested terminological areas.

25 | The second point is, at (iii), it's just not well-directed, in that it's asking about any
26 | instance of an existing supplier wishing to supply new product categories or lines.

1 | Whereas the question that we had up at 2(c) was about situations where suppliers
2 | have actually specialised in categories. So there's a risk that Shein's (e)(iii) is going
3 | to lead to a broader discussion, which isn't very helpful about, I don't know, miniskirts
4 | being added to dresses or what it may be.

5 | Then the final point I wanted to make is actually not a flaw. It's something that we
6 | could accommodate, which is that he says he doesn't like our version of (e), because
7 | it doesn't expressly call out potential suppliers. I thought that probably was implicit in
8 | what we had said; suppliers who do not typically supply retailers or marketplaces such
9 | as Shein or Temu would include suppliers who don't supply any retailers currently at
10 | all. But if he wants to add wording to make that clearer, like "any potential suppliers"
11 | or "suppliers that do not typically supply", et cetera, then that's easily done. We're not
12 | in the business of trying to shut substantive points out here.

13 | MRS JUSTICE BACON: We'll have a short discussion. (Pause)

14 | So on (d), we are minded to do essentially what we did with (c), which is to identify the
15 | most important point in the disputed red text and just bring it into chapeau. So rather
16 | than including all of the subparagraphs, include at the end of (d) something along the
17 | lines of "in particular are suppliers able to, and do in practice, switch from domestic to
18 | export focus or vice versa", which then incorporates the main point that Mr Piccinin
19 | said that he wanted to draw out in this paragraph (d) without going into granular
20 | discussion of points that are less relevant.

21 | In relation to (e), we agree that the wording -- it should be implicit in the wording that
22 | this includes new suppliers. We find the wording in red, Temu's proposed
23 | wording -- and we think that the wording in red is clearer as to what is required. We
24 | would therefore adopt the red wording rather than the green wording.

25 |
26 | Question 3

1 MRS JUSTICE BACON: That brings us then to question 3. If I can just look at my
2 notes before we go on to that. Yes. Question 3(b), (c) and (d) and the rival version of
3 (b).

4 We are concerned that there is a danger of overkill as to a focus on clusters and
5 regions when actually the main point that is taken in the pleaded case is one about
6 Guangdong. So, provisionally, we were inclined to agree with Shein's wording, the
7 green wording, but modifying that to make clear that we do want consideration of the
8 Guangdong province in particular.

9 How that is done, there may be many ways of doing it; it could be built into (b) or it
10 could be maybe built into (b)(i). But we think that, at the moment, the proposed red
11 wording is just going to be too granular and give us too much detailed information,
12 which is not really going to be necessary.

13 So could I then have your submissions on that? Perhaps, again, because this is
14 Mr Piccinin's proposal, mainly to develop evidence on specific clusters. Why don't you
15 start and then I'll hear from Mr Al-Karim?

16 Submissions by MR PICCININ

17 MR PICCININ: Yes. Madam, it might be useful just to take a brief look at one passage
18 from the witness statements that Shein has very recently filed its witness statement of
19 Kechang Ju. It's in the core bundle. It's page 301, paragraph 48.

20 So the point I wanted to make is that Shein has now -- although Shein's pleading on
21 market definition is extremely sparse, as with all of its pleading, they haven't really
22 responded substantively to the detail that we were required to plead. In their evidence,
23 they have now led evidence about the existence of other clusters. So you can see in
24 that paragraph 48 that they refer to several places within Guangdong, with the focus
25 on womenswear. Then there's a mention of another province, with also a focus on
26 womenswear. Then you can see some other provinces again, with focuses on other

1 specialisations.

2 So while we certainly don't think it's necessary to have a complete account of every
3 place in China in which you have any meaningful production of anything, and the focus
4 should of course be on the important ones, it would be wrong, given the case that
5 Shein is advancing through its evidence, to ignore the existence of other clusters as
6 well.

7 I mean, our case is that, actually, those other clusters with their own specialisations
8 support our position on the overall market definition. There are other examples of
9 geographic concentrations and of upstream UFF market suppliers that are important
10 for the particular things that they relate to.

11 So the wording that we proposed -- I can see it's longer, but actually it wasn't intended
12 to result in anything longer in the expert report of the upstream industry expert. That
13 the structure of it was that -- since, as you know, our case is that this industry is really
14 all about China and then particular regions in China, especially Guangdong, we didn't
15 want to preclude Shein or any expert really from coming along and saying, "Actually,
16 you know, Brazil is important too". So that's why we had 3(b) just to provide an
17 opportunity for a couple of sentences. It might not even need to be any more than
18 that, just to provide the global picture, first, without limiting them down to China.

19 Then the point of (c) was to make them focus on the particular thing that we've
20 pleaded, which is all about China and Guangdong, while, again, leaving open the
21 existence of any notable clusters. That's the way we put it in (c)(ii). We're not asking
22 for every cluster, just the notable ones.

23 Then the information that we've asked for within that in (c)(ii)(1) and (2), is just exactly
24 the information that you'd want to know about them to work out whether they are just
25 accidents of history, it's just where they happen to be, or whether there's something
26 economically significant about the fact that you've got all of these suppliers in one

1 place.

2 For example, do you have so many suppliers in Guangdong? Because what they
3 have there is access to the upstream, further upstream fabric suppliers. Or is it
4 network effects from, you know, skilled employees that can be found in the area or
5 proximity to the logistics facilities?

6 Trying to understand all of that is really important to work out whether these clusters
7 are significant from an economic and market definition perspective. So that's (b) and
8 (c).

9 Then (d) is, once again, asking the switching question, which is, again, important to
10 reach a conclusion on whether these clusters are significant; is it possible to set up
11 a new one outside; if so, over what time frame and at what cost, to work out whether
12 that's really a plausible way for competitive constraints to arise.

13 So that's why we prefer our wording. It looks like there's a lot, but, actually, when you
14 get it down into the detail of what's there and imagine how you write a report in
15 response to these items, it's not going to produce vast amounts of text. It's just going
16 to make sure that they answer with the information that's important.

17 MRS JUSTICE BACON: All right.

18 Mr Al-Karim.

19 Submissions by MR AL-KARIM

20 MR AL-KARIM: My Lady, we agree with -- we do think our green text is more simple
21 and gets to the nub of the issue, which is: what is the size of suppliers around the
22 world who Temu could do business with?

23 We are prepared to make an amendment to Guangdong to our green text to include
24 reference to Guangdong. We think that would then allow for Mr Piccinin's experts to
25 opine on the substantive issues that they wish to opine on.

26 As to Mr Piccinin's red text, my Lady, it is important that there are a number of

1 | fundamental defects with it. The first is that it does cast a disproportionate lens on
2 | China and Guangdong.

3 | My Lady, I just want to show you one document, which is Mr Piccinin's pleaded case.
4 | It's at 256 of the core bundle. If you just let me know when you get there, my Lady.
5 | (Pause)

6 | MRS JUSTICE BACON: Yes, we're there.

7 | MR AL-KARIM: So you see at paragraph 5, Mr Piccinin already took you there. He
8 | pleads a number of characteristics that a supplier must allegedly satisfy in order to be
9 | able to do business with Shein and Temu. Then at 7 -- and this is the crescendo of
10 | his case; it's the high water mark of his case -- he says:

11 | "Few suppliers or manufacturers around the world are capable of meeting these
12 | characteristics." [as read]

13 | So it's not all about China. The litigation is not all about China. In fact, Temu has
14 | a very high bar to meet. It has to show that there are no potential suppliers around
15 | the world who could have met its demands. Mr Piccinin's case is apparently that there
16 | are only a few suppliers in the world who can pile it high and sell it cheap in the fast
17 | fashion market, which is quite a remarkable case on effects, in truth. But that that's
18 | the case they have to make out. So the red text does shine a disproportionate spotlight
19 | on Guangdong and China.

20 | The second defect in the red text, my Lady, is that it risks the experts going off to do
21 | detailed factual investigations into the geographical distribution of Temu and Shein's
22 | existing suppliers. Now, the reason I say that is that actually there's going to be a great
23 | deal of evidence and disclosure on this point. Both Shein and Temu have led evidence
24 | on the geographical distribution of their suppliers -- on their existing suppliers. The
25 | parties are today going to give disclosure on the number and location of suppliers per
26 | country and per Chinese province. That should be more than enough for Temu to

1 | make submissions in due course about the geographical distribution of suppliers in
2 | China. But that's not the start and the end of the inquiry. The red text really does
3 | shine a disproportionate spotlight on China.

4 | By contrast, my Lady, our green text draws a clear distinction between existing
5 | suppliers and potential suppliers. The chapeau asks the critical question, which is:
6 | which suppliers could potentially Temu have done business with -- have the
7 | characteristics and capabilities? That goes to Mr Piccinin's magic formula in
8 | paragraph 7 of his case.

9 | Then we split it into existing suppliers and potential suppliers. On existing suppliers,
10 | in light of the factual evidence and disclosure, all there is for the experts to opine on is
11 | whether the existing suppliers really do have all the characteristics pleaded by
12 | Mr Piccinin at paragraph 5 of his case or whether they have different criteria.

13 | In relation to potential suppliers, we set out some very important questions that need
14 | to be considered. (b)(ii) and (b)(iii) raise some very fundamental questions about the
15 | freerider problem and Shein's investments into its own supply networks. The tribunal
16 | will need to consider whether it's legitimate for Shein to protect its supplier network.
17 | It's invested millions into that. Mr Piccinin's red text doesn't allow for the experts to
18 | consider the possibility that Temu has spent the last half decade freeriding of Shein's
19 | supplier base. So we say our drafting is better. It raises -- our drafting is better and it
20 | allows the experts to opine on issues not covered by Mr Piccinin's red text but which
21 | are important to the litigation.

22 | Reply submissions by MR PICCININ

23 | MR PICCININ: If I can respond just very briefly with three points. One in, relation to
24 | the focus on China and Guangdong in the pleading, I think it's important to read over
25 | the page (inaudible) to page 257. There are two points there. One is the (a), (b) and
26 | (c) that are the completion of paragraph 7 that Mr Al-Karim took you to. This is where

1 | we get into the reason why there needs to be a confluence of inputs in one location.
2 | These are the reasons why location matters. You can see these are the same sorts
3 | of points that we've called out in our drafting in 3(c)(ii) where we talk about logistics
4 | infrastructure, for example, and supply chain integration. Those are all the same
5 | points.

6 | That's really one of the defects in Shein's drafting, which is that it does ask whether
7 | there is a connection between location of suppliers and ability to meet demands, but
8 | it's only posed in very general terms and it doesn't get into the question of, "Well, what
9 | exactly is it that makes that connection happen?" That is, in turn, the crucial input for
10 | the economists to work out whether it matters from a market definition perspective or
11 | not.

12 | The additional point on page 257 is, of course, paragraphs 8 and 9 that Mr Al-Karim
13 | didn't go to where we said that the upstream UFF market is highly concentrated
14 | geographically in Guangdong province, in China, albeit not exclusively. We plead
15 | specifically that Guangdong has significant geographic advantages, including
16 | satisfying the criteria in paragraph 7 above. So it's important that the industry experts
17 | comment on whether it's right or not that suppliers in Guangdong do have those
18 | advantages that we've pleaded in paragraph 7. That's not covered by Mr Al-Karim's
19 | wording, except potentially inferentially. So it may be that one expert goes on and
20 | talks about those things, but the other doesn't and that just leads to the ships passing
21 | in the night problem.

22 | Then finally on this page 257, still on my first point on the pleading focus, there's also
23 | paragraph 9, where we plead that for all practical purposes, a successful competitor
24 | in the downstream market needs access to the UFF suppliers in Guangdong. So that
25 | is our case and that's why it's so important that we do have the experts on both sides
26 | address that question to see whether we're right or wrong about it and going into the

1 | reasons. You know, what are the characteristics of supplying in these areas that make
2 | it so or not? So that was the first point.

3 | The second point: Mr Al-Karim says that we're going to have disclosure of supplier
4 | numbers later today, which is indeed the case and is good news but that's not
5 | a complete answer. While of course that work won't need to be duplicated, the
6 | questions that we asked, at (c)(i), for example, about the overall scale of the supplier
7 | base in China, we're not only asking about the numbers that supply Shein and Temu
8 | specifically. If Shein says, for example, that there are many fish in the Guangdong
9 | sea, not that it's a sea or that the suppliers are fish, then that would be something that
10 | would be important for the industry expert to address, to say that, actually, there are
11 | many more out there that are not currently supplying Shein or Temu, but who could
12 | do so.

13 | The final point was in relation to investments, which relates to the question of
14 | exclusivity really, rather than to the question of market definition but that then is dealt
15 | with in the following question. That's the subject of question 4. So again, we're not
16 | trying to shut out evidence on the importance of investments. It just didn't seem to us
17 | that it belonged here in this question.

18 | MR AL-KARIM: My Lady, can I respond with one or two points?

19 | MRS JUSTICE BACON: Well, just very (inaudible) just deal with this (inaudible)
20 | because you've got --

21 | MR AL-KARIM: Apologies, my Lady. You broke up. Could you repeat -- do I have
22 | your green light to make a few short and quick points?

23 | MRS JUSTICE BACON: Yes. Very short.

24 | Reply submissions by MR AL-KARIM

25 | MR AL-KARIM: Okay. The first is that we do not demur from the suggestion that
26 | a consideration of China and Guangdong is important for Mr Piccinin's pleaded case,

1 | and I was certainly not trying to pull a fast one by showing you only a part of his
2 | pleading, but my point is that the red text exclusively focuses and shines
3 | a disproportionate spotlight on China and Guangdong. But the case that Temu needs
4 | to meet is not just showing that there's some magic in Guangdong and nowhere else
5 | in China. It needs to show that no other supplier network, not in Brazil, not in Vietnam,
6 | not in Bangladesh, not in India, nowhere else in the world could it have set up shop.
7 | And that's its case and that's why we say our green text is more appropriate.

8 | Just finally, there are just so many ambiguities in its red text -- and I won't go through
9 | it all -- but are there any notable geographic concentrations? Wink, wink, nod, nod.
10 | Notable to who? To Shein, to Temu, to this tribunal, to industry experts? It's just not
11 | clear and it's unsatisfactory drafting and we really do commend the green drafting to
12 | your Ladyship.

13 | MRS JUSTICE BACON: We'll take a few minutes to discuss. Thank you. (Pause)

14 | All right. We'll just give you our decision on this and then we'll take a short break.

15 | We are, I am afraid, not convinced that we need the red text. We are concerned that
16 | this is going to invite inquiry on matters that are not going to be relevant to this case.
17 | We propose as follows.

18 | We will leave the existing text in the chapeau (b). In (i) under (b), we propose that this
19 | should say something along the lines of, "Please consider the geographical locations
20 | of Shein's and Temu's existing suppliers, including specific comment on the position
21 | in China and in Guangdong province".

22 | And then in relation to (ii), this should simply be a general question about the ability of
23 | a supply network to be developed in a new location. So something along the lines of,
24 | "Would it be feasible for a supplier network for Shein and Temu and similar retailers
25 | or marketplaces in the UK to be developed from a new geographic network and if so,
26 | what factors are relevant?" Something along those lines. We will not draft it by

1 | committee, but it needs to be a very short question along those lines because that is
2 | what is really relevant here.

3 | MR AL-KARIM: My Lady, to clarify, is your amendments to Shein's green text?
4 | I understand it to be so, but I just want to clarify.

5 | MRS JUSTICE BACON: The amendments are to the green text, yes.

6 | MR AL-KARIM: Thank you.

7 | MRS JUSTICE BACON: All right. I've described what needs to be achieved in that
8 | and I'll leave the detailed wording of it to you, but it needs to be a very short question,
9 | which just really seeks to elicit an answer as to how feasible it is for a new geographic
10 | location to provide a supplier network for Shein and Temu and similar retailers and
11 | marketplaces. So that then deals with question 3. We'll take a short break and then
12 | we'll come on to question 4.

13 | (11.49 am)

14 | (A short break)

15 | (11.59 am)

16 | MRS JUSTICE BACON: Thank you, everyone for coming back. Let's then rattle off
17 | through the rest. Next chunk, the disputed issues in question 4. Yes. Why don't we
18 | start with Mr Al-Karim.

19 |
20 | Question 4

21 | Submissions by MR AL-KARIM

22 | MR AL-KARIM: My Lady, on 4(c), our primary submission is that it's just not needed
23 | at all because it's covered by 4(a) and 4(b). If the experts haven't understood in
24 | answering 4(a) and 4(b) that they need to opine on the commercial considerations
25 | which may or may not motivate exclusivity, then they're really having a bad day at the
26 | office and we just don't need 4(c) at all. It assumes too much and it's completely

unnecessary but if your Ladyship is against me, then we submit that Shein's green text is enough to really hammer home the point and Temu's red text (inaudible) up the overkill. I'll stop on that one (inaudible).

MRS JUSTICE BACON: What about --

MR AL-KARIM: Forgive me, you broke up, my Lady. Could you ask me that again?

MRS JUSTICE BACON: What about (inaudible) the disputed draft 4 at the end?

MR AL-KARIM: Again, it's really a point of drafting. We don't dispute that the scope of any intellectual property transfer should be considered by the experts. But again, we just think it's obviously covered by the chapeau in that paragraph. A simple point.

MRS JUSTICE BACON: Okay. All right (several inaudible words).

Submissions by MR PICCININ

MR PICCININ: Yes, madam. In relation to 4(c), we say that we do need wording there to make sure that these points are covered by the experts. I don't want to argue too much about the wording, but the key difference between Shein's wording in green and our wording in red is that Shein is arguably covering (c)(i), (ii) and (iv), but isn't covering (c)(iii) and c(v). I just wanted to explain why those are important and why the experts should be directed to address those points as well. And it may be that it could be combined in, in a similar way to the way that you've dealt with other issues.

And so in relation to (c)(iii), it's obviously a key part of our case that Shein is in a dominant position and we say the consequence of that is that for many suppliers, it is effectively a must have. Like a must deal with. Indeed that's why we say that Shein has been able to push or force suppliers to enter into the anti-competitive and seriously disadvantageous agreements that Shein has pushed them into, in fact.

If I could just show you briefly where that is in our main pleading. That's in the core bundle beginning at page 166 is the heading "Dominance", in the middle of the page.

MRS JUSTICE BACON: Yes.

1 | MR PICCININ: At the bottom of the page, there's 40.2 where we say in the second
2 | sentence:

3 | "... there is a limited number of specialist suppliers capable of meeting the specific
4 | requirements of UFF retailers and retaining them is a key input in the UFF market in
5 | respect of which Shein exercises significant market power." [as read]

6 | We developed that over the page, at 40.3, where we say that Shein's market power is
7 | further confirmed by Shein's ability to push suppliers into engaging in the
8 | anti-competitive infringing conduct, which includes entering into the exclusivity and IP
9 | transfer agreements that we've referred to.

10 | And then you can see the same point again in the chapeau of 42, where we say that
11 | Shein has forced suppliers to enter into these various agreements. That's really what
12 | 4(c)(iii) is getting at. We've tried to ask it in a non-leading way because we know that
13 | Shein is very concerned about that, but we would like the upstream industry expert to
14 | address the question of whether that's right or not. You could just ask it more bluntly,
15 | if you wanted to. But that's not covered, other than very implicitly in the wording that
16 | Shein has proposed.

17 | And then, finally, (v) is just the usual switching question because otherwise, the text
18 | that Shein has proposed is entirely static. It's just asking about the considerations that
19 | they take into account and what influences their static decision to prioritise or deal
20 | exclusively with one retailer or marketplace doesn't get into the question of when that
21 | might change, which is obviously important for market definition.

22 | MRS JUSTICE BACON: (e)?

23 | MR PICCININ: And then for e(iv), this one really is a small point because I think we
24 | both agree that the experts should address this point. The risk that we're trying to
25 | guard against -- I can see why Mr Al-Karim says it's covered in the chapeau, which
26 | refers to intellectual property rights in the products or the photographs -- what we're

1 | trying to avoid is someone answering that question effectively with a "yes" or "no", with
2 | sentences to follow, without dealing with each one separately. That's what (iv) is kind
3 | of trying to direct them to do is to consider specifically whether the relevant IPRs and
4 | exclusivity rights would commonly cover photographs at all, or whether it would just
5 | be the products or vice versa, and in what circumstances.

6 | So rather than having someone give a report that deals with those things
7 | compendiously without distinguishing between them, this just directs their attention to
8 | deal with them one by one as well.

9 | Reply submissions by MR AL-KARIM

10 | MR AL-KARIM: My Lady, a brief point on 4(b). If you just read that again, please. I'm
11 | completely at a loss as to how the experts would be precluded from opining on any of
12 | the issues in Mr Piccinin's red text. We could make an amendment to say what
13 | commercial factors and market dynamics bear on the decision to do business with
14 | a particular supplier and then stay with a particular supplier, but you just don't need all
15 | the red text. It's completely overkill.

16 | MRS JUSTICE BACON: All right. Thank you (inaudible) to discuss. (Pause)

17 | All right. So in relation to the first point, which is (c), I think this can be dealt with by
18 | some fairly minor amendments to the green text. So I would suggest, at the end of
19 | the green text, "deal exclusively with a particular retailer or marketplace, and if so,
20 | which one". That addresses the (iii). Then just to add to then a further question, "What
21 | factors would trigger substitution across platforms by suppliers?" So that brings in (iii)
22 | and (v).

23 | In relation to (e), we think it's fairly unlikely that somebody might just answer "Yes".
24 | That's not the experts' job to answer just "Yes". It's their jobs to explain the reasons
25 | for their conclusion. So we would suggest rather than including the (iv), which, again,
26 | we have a concern about getting into issues that aren't necessary, in the chapeau, just

1 say, if yes to any of these, and then ask questions (i) to (iii). That ought to ensure that
2 the point is dealt with, and nobody is disputing that it needs to be dealt with, but,
3 perhaps, not in a very extensive and granular way.

4 Now, let's get on to the downstream market issues. 1(a), Mr Piccinin.

5
6 Downstream question 1(a)

7 Submissions by MR PICCININ

8 MR PICCININ: Yes, there are really two differences between the wording that is
9 proposed in 1(a) as between Shein and Temu.

10 One is that we ask the additional question. So we're talking about what other websites
11 and stores people visit when they're shopping with a particular retailer or marketplace.

12 We have the additional question which is: which ones? Because, obviously, that
13 makes a difference. We want to know if people shopping on Temu also look at Shein
14 in particular. That's obviously important to our case on effects, amongst other things.

15 No doubt, Shein would like the answer to be: Pretty Little Thing or ASOS, or the
16 various other ones that they refer to. So that's why (a)(iii) is useful, and it's what's
17 missing from their green text at (a)(ii).

18 The other point is that their texts at (a)(ii) is limited to visiting other websites or stores
19 before shopping on Shein or Temu, whereas ours is more general and allows for the
20 possibility that they might do them in the other order or do them simultaneously, since
21 that's a thing you can do with online shopping: have multiple tabs open. So there are
22 small points, but those are the two points of difference.

23 MRS JUSTICE BACON: Yes.

24 Mr Al-Karim.

25 Submissions by MR AL-KARIM

26 MR AL-KARIM: My Lady, we don't seek to foreclose Mr Piccinin's experts from

1 | considering any of those issues. We agree that there's a question as to how
2 | customers come onto the platform and whether they shop on different sites. We agree
3 | with the scope of the question.

4 | Our concern is simply that -- and I put my hands up as well and say
5 | "mea culpa" -- I think both parties' drafting is quite clunky and doesn't -- the question
6 | could be asked in a single question, and we can either take it away or I'm sure
7 | your Ladyship, in characteristic (inaudible) will have something much more pithy that
8 | will rule out them, but we just don't think it's necessary to have all that text there.

9 | MRS JUSTICE BACON: Right. Let me just have a quick discussion. (Pause)

10 | Right. So, for number (ii), we prefer the green wording, but rather than saying "before",
11 | just say "when":

12 | "To what extent do consumers tend to visit multiple websites and/or stores when
13 | shopping on Shein or Temu?"

14 | Because we can see the force of there not being a time constraint here.

15 | (iii) seems to be entirely speculative and are, in any event, wrapped up in the wording
16 | of (ii), insofar as it can be answered. So that deals with number 1(a).

17 | (1)(c), there's a very small typo that the inverted comma's in the wrong place in the
18 | word "platforms". Just to show that we have read everything that you send us.

19 | At (d), I think that's almost the last of the issues here. So do you want to address us
20 | on the red and green text in (d), Mr Piccinin?

21 |
22 | Downstream question 1(d)

23 | Submissions by MR PICCININ

24 | MR PICCININ: Yes. So in relation to the red text, I don't think there's really any dispute
25 | about whether that's something that the experts should be talking about, but we just
26 | wanted to call it out, because it's obviously particularly important for our effects case

1 | that we have the experts discuss the extent to which product range, both in terms of
2 | the amount of the range and how responsiveness it is to trends and affects consumers
3 | willingness to switch between platforms. I think that's a critical part of our case. So
4 | we would like it to be addressed.

5 | I appreciate that Mr Al-Karim will probably say that they can -- they're not precluded
6 | from doing so by anything in the chapeau or in (d)(i). No doubt, that's true, but this
7 | isn't about preclusion. What it's about is ensuring that both sides actually comment
8 | on it, so that we don't have ships passing in the night. So that's --

9 | MRS JUSTICE BACON: Isn't it already in (b)(i)? Because in (b)(i), you're asking about
10 | the factors that are considered in making purchasing decisions. You say:

11 | "Please comment, in particularly, on [blah, blah, blah] product range." [as read]

12 | MR PICCININ: Yes. That certainly is covered in relation to (b). (d) is now moving on
13 | to consider then switching effectively. So it's specifically the question of whether and
14 | the circumstances in which consumers will move between, say, Temu and Shein.
15 | That's the difference between (b) and (d).

16 | It may be that the experts in drafting their reports can combine them --

17 | MRS JUSTICE BACON: Yes.

18 | MR PICCININ: But (d) is a specific thing which is important to us. That's why we've
19 | posed the question there as well.

20 | MRS JUSTICE BACON: All right. And the green text in ...?

21 | MR PICCININ: Yes, the problem with the green text is that it changes the meaning of
22 | the second question. That's really the problem with that. Because the question that
23 | we wanted to ask is whether consumers who buy from Shein and Temu have any
24 | particular characteristics, and then whether they're different from customers who
25 | predominantly purchase from others. Those "others" would, of course, include
26 | Boohoo and Pretty Little Thing, ASOS, H&M, Zara, Primark and Amazon. That's what

1 | we're trying to get at.

2 | Whether we're right that the customer set for Shein and Temu is particular or whether

3 | they're all the same. So we're certainly not trying to prevent the experts from Shein

4 | from saying that they're all the same and that they're all different from others yet again.

5 | But by building them into the first question, you actually fail to ask the thing that's really

6 | important. That is actually the point between us in this case, which is whether there's

7 | difference between Shein and Temu on the one hand and the others on the other.

8 | That's the issue in the case.

9 | MRS JUSTICE BACON: The wording you want says:

10 | "Do customers who typically purchase from Shein and Temu have any particular

11 | characteristics?" [as read]

12 | MR PICCININ: That's right. Then it goes on to ask whether those differ.

13 | MRS JUSTICE BACON: Yes. So your wording is not "certain retailers or

14 | marketplaces such as Shein and Temu", you just want to ask specifically the question:

15 | do Shein and Temu ...?

16 | MR PICCININ: Oh, I see.

17 | MRS JUSTICE BACON: Yes.

18 | MR PICCININ: Yes, yes.

19 | MRS JUSTICE BACON: It's not (inaudible) in your submission.

20 | MR PICCININ: Yes, you're right.

21 | MRS JUSTICE BACON: All right. Okay. Thank you.

22 | Mr Al-Karim.

23 | Submissions by MR AL-KARIM

24 | MR AL-KARIM: My Lady, on the green text, we are happy to remove it as long as we

25 | can be short. We just think this question needs to consider the

26 | differences -- similarities and differences between Shein and Temu's suppliers and

1 | other retailers and marketplaces. We're not going to die in a ditch on this point. So
2 | we're happy to remove the green text.

3 | On the red text, my Lady, you're right that there's scope to answer that actual question
4 | at (b), but there's also scope to answer it in (d)(i). One of the constraints, relevant
5 | constraints in (d)(i) might be product range. Again, there's only so much one can take
6 | a horse to water. This really is -- it's just too granular. Again, we're not going to die in
7 | a ditch in the point, but we think it's superfluous. (Pause)

8 | MRS JUSTICE BACON: So we will remove (d)(ii), because we think that that's
9 | duplicative and it calls out a specific factor: the wording should be more general and
10 | not leading.

11 | In relation to (d)(iv). I think we're now in agreement that this should read:
12 | "Do consumers who typically purchase from Shein and Temu have any particular
13 | characteristics? How, if at all, do these differ from those of customers who
14 | predominantly purchase from other retailers?"

15 | MR PICCININ: Yes. I'm grateful.
16 |

17 | Downstream question 3

18 | MRS JUSTICE BACON: Right. I think then the only outstanding question is the green
19 | in (3).

20 | This is your text, Mr Piccinin, is it? It is.

21 | MR PICCININ: No.

22 | MRS JUSTICE BACON: I'm sorry?

23 | MR PICCININ: It's Mr Al-Karim's text.

24 | MR AL-KARIM: My Lady, sorry, forgive me, I didn't mean to speak over you.

25 | MRS JUSTICE BACON: (Audio distortion).

26 | MR AL-KARIM: I'm sorry you broke up there for us.

1 MRS JUSTICE BACON: Explain (inaudible).

2 Submissions by MR AL-KARIM

3 MR AL-KARIM: Oh, I see. The short point is that we don't just want our experts to
4 opine on actual consumer responses. We also want them to opine on consumer
5 perceptions about the undertakings in relation to the removal of products or the
6 deterioration in quality. (Inaudible) it's a short point that we're not just concerned with
7 switching, whether they take any positive action. We also want some analysis about
8 perception of brands (inaudible) that (inaudible) products.

9 MRS JUSTICE BACON: All right. Thank you.

10 Mr Piccinin.

11 Submissions by MR PICCININ

12 MR PICCININ: I think the problem in the body of (3) is that the way the words have
13 been added actually limits it to consumer perception. If it was just additive and still
14 asking the experts to discuss what the actual reactions were, then I don't think we'd
15 have a problem. So maybe we can solve that fairly simply by saying "impact on that
16 marketplace, including on perceptions of the marketplace".

17 MRS JUSTICE BACON: But this is not a general question about the marketplace, is
18 it? It's about the consumers buying on the marketplace. So I think that's the problem
19 with removing those words or just making them additive. Because, again, we
20 don't -- we want the experts to be focusing on what's relevant. We're asking here
21 about consumers' reaction to the marketplace, not just any old thing about the impact
22 on the marketplace. So can you propose something that would keep this within the
23 proper confines?

24 MR PICCININ: Yes, I think it's probably something along the lines of what we've got
25 at 3(a), so we could say "have an impact on consumers' reactions to and perceptions
26 of [or including perceptions of]". That might do the trick.

1 MRS JUSTICE BACON: Yes. So in (a), "is consumer reaction to ..." or could we just
2 then -- Mr Al-Karim, the question is: can we just replicate that wording in the chapeau?
3 So:
4 "... have an impact on consumer reaction to or perception of that marketplace?"
5 I think --
6 MR AL-KARIM: My Lady we're happy with that. Thank you.
7 MRS JUSTICE BACON: Are you both happy with (inaudible)?
8 MR PICCININ: Yes.
9 MR AL-KARIM: Yes.
10 MRS JUSTICE BACON: Okay. That deals with that.
11 So all right. So is there anything (inaudible) or have we now covered (inaudible) list?
12 MR PICCININ: I think that is everything.
13 MRS JUSTICE BACON: Okay, I hope someone's been keeping note of this. Well,
14 you'll have the transcript anyway.
15 Thank you very much, both of you, for having this short remote hearing. Can we be
16 sent a draft order which reflects the revised lists of issues for both the economic and
17 the industry experts and the revised page lengths?
18 MR AL-KARIM: Yes.
19 MRS JUSTICE BACON: Of course that will exclude technical analysis which the
20 tribunal won't be expected to read.
21 Are you able to do that by the end of the day?
22 MR PICCININ: We can certainly do our best. I mean experience suggests that that's
23 sometimes difficult.
24 MRS JUSTICE BACON: Let's say a hard stop 9.00 tomorrow morning and if there's
25 anything that is not agreed, can you just put that in comment boxes and I'll just have
26 to resolve that.

1 | MR PICCININ: Yes. I hope there won't be any disagreement. I think that was all
2 | pretty clear. It just takes time once everyone takes instructions, that's all.

3 | MRS JUSTICE BACON: Yes. All right. If you are able to send it today, I'll much
4 | appreciate it but if not 9.00 tomorrow morning. Is there anything else to be dealt with?
5 | What's the cost order? Is it costs in the case?

6 | MR PICCININ: Yes.

7 | MR AL-KARIM: Yes, my Lady, although we do just put a marker down that it was
8 | unnecessary for Temu to instruct an eminent silk to turn up to a hearing of this type
9 | with a leading senior, a junior and a rising star of the -- the junior of the competition
10 | bar. We just notice that in parentheses.

11 | MR PICCININ: I should just say actually, madam, on that, just in reference to the letter
12 | that the tribunal sent to us last week, it might have been under the misapprehension
13 | that we were intending to have three counsel here. That was not the intention. There
14 | were three names on the skeleton because Ms Kelleher made helpful contributions to
15 | it as well, which was an efficient way of dealing with it for various boring reasons at
16 | the time. But it was never the intention to have three of us here. I think Mr Grubeck
17 | is more than capable of cracking the whip, even from a distance, to keep me on track
18 | in a hearing like this.

19 | MRS JUSTICE BACON: The problem is that we do sometimes get five names on
20 | a skeleton and then they all turn up. So we don't know how many are intended to
21 | show up.

22 | MR PICCININ: Well, it wasn't a complaint, madam. I just wanted to reassure you,
23 | really, that we weren't intending to turn up mob-handed on this application.

24 | MRS JUSTICE BACON: I mean, if it's the case that you have a skeleton argument
25 | and some or other person makes some helpful comments on it, to avoid ambiguity, if
26 | it's not intended that that person should be turning up to the hearing then you don't

1 | need to put their name on the skeleton argument, because I'm sure you will have had
2 | lots of people commenting on it from all directions. That would have saved us needing
3 | to write to just clarify the position. But yes, all right. Point made.

4 | I'm not going to say that future CMCs of this nature should be attended only by junior
5 | counsel. It is of course for the parties to consider who they wish to instruct. I will just
6 | say that the tribunal is always very happy to hear from junior counsel and we
7 | encourage appropriate use of junior counsel where they're able to do hearings and it
8 | gives them important experience in advocacy and junior counsel are often entirely able
9 | to do the hearings on their own, as Mr Al-Karim has done in this case.

10 | So we would encourage both of you, where possible, to send along a single junior
11 | counsel, but we're not going to disallow any costs on this occasion. All right. Thank
12 | you. All right.

13 | (12.28 pm)

14 | (The court adjourned)

Key to punctuation used in transcript

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