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IN THE COMPETITION

Case No: 1749/7/7/25

APPEAL

TRIBUNAL

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP

5th October 2026

Before:

Sir Peter Roth
Charles Banks
Keith Derbyshire

(Sitting as a Tribunal in England and Wales)

BETWEEN:

Association of Consumer Support Organisations Ltd

Proposed Class Representative

V

Amazon.com Inc & Others

Proposed Defendants

A P P E A R A N C E S

Ben Lask KC & James Bourke (Instructed by Stephenson Harwood LLP) On Behalf of
Association of Consumer Support Organisations Ltd

Daniel Piccinin KC, Kristina Lukacova & Alexandra Breckenridge (Instructed by Covington
& Burling LLP) On Behalf of Amazon.com & Others

Daniel Carall-Green & Hannah Bernstein (Instructed by Geradin Partners Limited) On Behalf
of Professor Stephan

Ben Rayment (Instructed by Charles Lyndon Limited and Hagens Berman EMEA LLP) On
Behalf of Robert Hammond

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Monday, 5 October 2026

(10.30 am)

(Proceedings delayed)

(10.41 am)

THE CHAIR: Good morning. We start, as always, with a warning. These proceedings, like all proceedings in this tribunal, are live streamed and an official recording of the proceedings is being made. It's strictly prohibited for anyone to make any unauthorised recording or to take any visual image of proceedings; to do so is punishable as a contempt of court. We will, as usual, take a short break mid-morning for the benefit of the transcriber and indeed probably benefit of everyone, and again in mid-afternoon at a suitable point.

We've of course read the skeleton arguments and a number of the documents. There is very limited confidentiality in some of the documents, so I should probably make the usual order: the fact the tribunal has read those does not mean that they are available for inspection without further order. If that order could be drawn up, I can make it at a suitable point.

On that basis, I think turn to you, Mr Lask.

MR LASK: Good morning. Thank you, sir. May it please the tribunal, I appear for the proposed class representative ACSO, with my learned friend, Mr Bourke. On my right, my learned friends Mr Piccinin, and Ms Lukacova and Ms Breckenridge appear for Amazon. And on my left, my learned friend, Mr Carall-Green and Ms Bernstein appear for Professor Stephan. And my learned friend Mr Rayment appears for Mr Hammond. Before we get started, may I check that everything is in order as regards the tribunal's bundle? It should have a hearing bundle consisting of volumes A through to I, and within that, bundle H is the authorities bundle; bundle G is a slim confidential bundle.

1 | There were some updates --

2 | THE CHAIR: Yes, I think we've got bundle H electronically only.

3 | MR LASK: Thank you. There were some updates to bundle F, which is the

4 | correspondence bundle, yesterday afternoon. I'd just like to check whether they made

5 | their way to the tribunal, at least electronically.

6 | THE CHAIR: They certainly haven't been read by anyone I can tell you that. I don't

7 | know if they're -- I don't think we upload bundles. I've been told that they have been.

8 | MR LASK: I'll proceed on that basis. If any problems arise, we can of course provide

9 | hard copy updates.

10 | THE CHAIR: Yes.

11 |

12 | Submissions by MR LASK

13 | MR LASK: So, there are four broad issues before the tribunal: first, certification;

14 | second, expert evidence; third, Amazon's strike out application; and fourth, the

15 | communications protocol.

16 | Subject, of course, to the tribunal's views, I propose to take them in that order, as the

17 | parties have done in their skeleton arguments. I will address you on the first three

18 | issues and my learned friend, Mr Bourke, will address you on the fourth issue

19 | regarding the communications protocol.

20 | THE CHAIR: Well, might it not be more sensible to park issues three and four? The

21 | strike out application is not your application --

22 | MR LASK: Correct.

23 | THE CHAIR: -- it's Amazon's application. To deal with certification and expert

24 | evidence and then to deal with, separately, the summary judgment strike out

25 | application, which Mr Piccinin, it seems, should open.

26 | MR LASK: Yes.

1 THE CHAIR: You then respond. And then we can have the relatively small issue of
2 the communication. That will mean probably the strike out application and the
3 communication application will be heard tomorrow.

4 MR LASK: Yes, I think --

5 THE CHAIR: That would be more satisfactory.

6 MR LASK: Understood. Thank you, sir.

7 Certification

8 Starting with certification, Amazon's objection to certification is a narrow one: it is
9 based solely on the costs and benefits of the ACSO claim. And even under that
10 heading, solely on the implications that Amazon says arise from the relationship
11 between the ACSO claim and the Hammond and Stephan claims. In my submission,
12 Amazon's objection is unfounded.

13 THE CHAIR: Well, before -- sorry to interrupt you. That may be Amazon's objection.
14 As you know, the tribunal has an obligation under the statute to be satisfied that you,
15 as the proposed class representative, meet the conditions for certification, and that
16 can involve issues that are not raised by Amazon.

17 MR LASK: I fully appreciate that, sir. We've obviously dealt in our claim form and
18 accompanying documents with all of the relevant criteria for certification. I wasn't
19 proposing to take the tribunal through those criteria; no objection has been raised in
20 relation to those.

21 THE CHAIR: We have some issues we want to raise with you. The first one is who
22 this action is actually for, which is the class definition, which is a confined point, but
23 not unimportant. If we look at your claim form, which is in bundle A, tab 1. This is the
24 amended claim form, starts at page 3, but the definitions are on page 16. Under
25 paragraph 29:

26 "All natural persons aged 18 or over (and/or the estates of deceased natural persons

1 | who were 18 or over at the time of death), other than Excluded Persons, who
2 | purchased at least one product from a third-party seller on Amazon's UK based
3 | e-commerce platform at Amazon.co.uk ..."

4 | Aged 18 or over when? What date? The date of certification?

5 | MR LASK: My understanding is the date of purchase, but we can certainly check that,
6 | sir.

7 | THE CHAIR: Date of purchase. Well, I think --

8 | MR LASK: Yes, they need to have been over 18 at the time they made a purchase on
9 | Amazon's marketplace. (Pause)

10 | THE CHAIR: They'll have to know the date of their first purchase.

11 | MR LASK: Well, no, their first purchase may have been before they're 18, but provided
12 | they were over 18 and made a purchase when they were over 18 during the relevant
13 | period, then they'll be within the class.

14 | THE CHAIR: Right, and they recover from the date when they were over 18. So
15 | someone who was 16 at the start of the relevant period would recover for purchases
16 | made from when they reached the age of 18.

17 | MR LASK: When they turned 18, yes.

18 | THE CHAIR: Yes. Well, that can be readily clarified, can it not, by:

19 | "All persons who purchased ..."

20 | Probably better. I don't want to draft it, as it were, in the hearing, but to make clear
21 | that it's "at the date of purchase".

22 | MR LASK: Yes.

23 | THE CHAIR: You can think about the amendment overnight, just to make that clear.

24 | MR LASK: Yes.

25 | THE CHAIR: The next thing we wanted to ask about is ACSO. We've heard a bit
26 | about ACSO in the witness statement of the late Mr Maxwell-Scott, who so sadly died

1 young, essentially in his witness statement, and then Mr Warner.

2 As I understand it, and from Maxwell-Scott's first witness statement, bringing a case

3 like this very much fits with the overall mission and purpose of ACSO; is that fair?

4 MR LASK: Absolutely, sir.

5 THE CHAIR: Yes. And ACSO of course antedates these proceedings. Founded

6 some time ago, and it's a not-for-profit organisation. How is it funded as an entity? It

7 does all these various things that we've read about -- it's in court, responses to

8 consultations, lobbying -- how is it funded?

9 MR LASK: I would have to check that, sir. I assume it's funded by member

10 subscriptions, but I would want to check that before giving you any -- yes, it's

11 membership fees.

12 THE CHAIR: And Mr Warner, who has now stepped in, has been appointed director?

13 MR LASK: Yes.

14 THE CHAIR: He's an executive director, is he?

15 MR LASK: Yes, he is, sir. Yes.

16 THE CHAIR: So he's on a salary from ACSO?

17 MR LASK: I think that's something -- again, I'd want to check, sir. I don't have that at

18 my fingertips.

19 THE CHAIR: He's appointed director?

20 MR LASK: Yes.

21 THE CHAIR: Is he in the tribunal? Is he here?

22 MR LASK: He is here.

23 THE CHAIR: Yes, so you'll be easily able to check that. And it wasn't quite clear, how

24 many staff has ACSO got, employed staff?

25 MR LASK: Two directors, I'm told, sir.

26 THE CHAIR: Two directors, yes, and any staff? I mean, they do all these things, they

1 put in quite a detailed description by Mr Maxwell-Scott of the various things that
2 ACSO's done. They don't have any employees?

3 MR LASK: Let me just take instructions, sir. (Pause)

4 No, I'm told, sir, that it's just the executive team, the two directors, but no staff as such.

5 THE CHAIR: So, when they do these various things that Mr Maxwell-Scott describes,
6 and they do quite a lot -- contributes to consultations, in 2024, produced a detailed
7 report analysing medical data from leading reporting organisations to challenge
8 insurers claims on multiple injury claims -- that's just done by the two directors?

9 MR LASK: I don't want to guess. It's a perfectly fair question, if I may say so, but
10 again, it's something I --

11 THE CHAIR: Yes, well, we need to know --

12 MR LASK: -- the detail of how they work, I will need to take instructions.

13 THE CHAIR: I do want to know more about it. The reason we're asking these
14 questions is: we are a bit puzzled, frankly, that ACSO is proposing to charge a fee to
15 the class, initially quite a high fee, it's now been conceded it should go down to the
16 level that the tribunal indicated in its recent judgment is appropriate. But given that it's
17 a nonprofit organisation whose mission and purpose is to do exactly what it's doing
18 here, it's not quite clear to us why it should be charging a fee.

19 Reference was made to the proceedings brought by Which?, but Which? didn't charge
20 a fee of the consumer association. The proceedings brought by the Road Haulage
21 Association, the Trucks case, I don't think, best I remember, they're charging a fee,
22 because that's what they're there to do. I appreciate it's not a huge sum relative to
23 everything else, we're aware of that. We just wanted to understand that bit better,
24 given the nature of the organisation. And what's said somewhere that -- I mean, this
25 is not going to Mr Warner; it's going into the organisation to help fund its work. Well,
26 I'm not sure that's what class representatives necessarily should be doing, but more

1 generally. But can we leave you with that to think about it?

2 MR LASK: Of course, yes.

3 THE CHAIR: The next thing that we wanted to ask about is the litigation funding
4 agreement, which as you know is something the tribunal always looks at, even though
5 it may be of little interest to the defendants, because it's essentially between you and
6 the funder.

7 That I think is in bundle B and starts at page 204. It's tab 8, bundle B at page 204.
8 I think you recognise -- and I'm sure Woodsford is under other actions as well, is well
9 aware -- that the actual remuneration the funder will be allowed is under the control of
10 the tribunal?

11 MR LASK: Yes.

12 THE CHAIR: Approved by the tribunal. And it's often difficult to say much about that
13 at the outset, because we don't know what the assessment of risk is.

14 It does mean that what's defined as the total entitlement, which is partly a multiple of
15 funds committed as opposed to the funding outlay, depending on when the case
16 settles itself. Something that the tribunal will want to scrutinise if the actual outlay is
17 only any small proportion of the commitment, particularly here, where the commitment
18 at the time the LFA was entered into was based on a litigation budget, which was then,
19 I think £18.2 million.

20 So, you've got commitment of £18.8 million; you have a little leeway. But the budget
21 has now been reduced as a result of cooperation with the other class representatives,
22 the other actions, by over £1.5 million, but the commitment remains the same therefore
23 the return remains the same. It may be that it's reasonable to keep the commitment
24 at the level it is, because there's reference to the potential that happens if the Stephan
25 case should settle, or the Hammond case should settle, and yours doesn't, and then
26 your budget goes up.

1 But if they don't settle and if in fact the realistic budget is your new budget, then there
2 are questions as to whether that commitment is the appropriate baseline. So that's
3 something you just mentioned not going to cite that, and no doubt Woodsford will bear
4 that in mind.

5 But we're looking in particular at the settlement provisions, which are at page 229 of
6 this bundle, clause 21. As we understand your case, Mr Lask -- and this takes one
7 back to the cost-benefit we're about to go into -- you are expecting that if you recover
8 either by settlement or judgment, there will be the potential for an effective means of
9 distribution, as explained by Verita, by either a direct credit to customers' accounts on
10 Amazon or vouchers on Amazon, on that way, Verita indicates they expect a much
11 higher take-up than (inaudible). That would be a much more effective means of
12 distributing, and therefore, as we understand it, that's ACSO's preferred means.

13 MR LASK: Yes.

14 THE CHAIR: Yes. That makes good sense, and we can see a lot of things from that,
15 and that distinguishes this case from, say, Gutmann, where the distribution was pretty
16 hopeless, frankly.

17 But when we look at the agreement under settlement 21, we have 21.4:

18 "Subject to clause 21.5, to ensure sufficient distribution to the Class, to encourage the
19 Defendant to settle the Action ... and to maintain and ensure the economic viability of
20 the Action, the Class Representative will include in any settlement agreement
21 compromising the Action ... reached with the ... provisions that ..."

22 And there we've got not that form of distribution at all; we've got the cash payment.

23 That's 21.4.

24 Then we've got 21.5:

25 "If the Defendant will not agree to the conditions set out at clause 21.4 as part of the
26 settlement (for example, the Defendant will only agree to pay non-monetary

1 Proceeds ... clause 21.4 will not apply, and the Class Representative will agree with
2 the Defendant that a condition of any settlement ... is that the Defendant will pay an
3 amount ... equal to costs ... in connection ..."

4 So, 21.5 is the preferred method of distribution, discounts and vouchers. That's the
5 one you want. But you have entered into an agreement with the funder which says
6 that you will only make settlement on that basis if Amazon refuses a settlement on the
7 basis of the cash payment. Not only that, the cash payment provisions in 21.4 provide
8 that an unclaimed balance reverts to Amazon. Obviously, Amazon's interest is in 21.4;
9 much better for Amazon.

10 We do not understand how you can give an obligation to the funder that you only settle
11 on what you have told us in writing, and confirm now is your preferred basis of
12 settlement, if Amazon refuses to agree to a financial payment. (Pause)

13 MR LASK: Yes. Can I give an immediate reaction to that --

14 THE CHAIR: Yes.

15 MR LASK: -- sir, which is -- and I'm going to come on to show you what we say about
16 distribution arrangements --

17 THE CHAIR: Yes.

18 MR LASK: -- but the preferred method of distribution is not confined to the giving of
19 discounts or vouchers. It encompasses cash payments, albeit cash payments made
20 using Amazon's existing infrastructure, but cash payments made, for example, to the
21 class members' payment methods that are stored with Amazon. So, it's not just about
22 discounts and vouchers.

23 THE CHAIR: Yes, but discounts and vouchers might be a pretty good way of doing it,
24 if it's possible.

25 MR LASK: That might be one way. I think that comes further down the preferred
26 methods.

1 THE CHAIR: But why are you committing to the funder that you're giving Amazon
2 a veto of a possible form of settlement? It seems to us completely inappropriate; and
3 given that one of the concerns in these cases is take-up, and one of the means that
4 you've explained and Verita has explained -- and it's put in a little supplementary note
5 about -- is how there may in this case be more effective means of take-up in others
6 by, as it says, credit options from Amazon; and the credit option, again, doesn't involve
7 a direct payment to ACSO.

8 We regard this as a very significant point, Mr Lask, and at the moment, I have to say,
9 we will take a lot of persuasion it's appropriate, when we get to the cost-benefit, to
10 certify if you are tying your hands to a method of settlement and giving Amazon a veto
11 over an alternative method, which might be much more effective in terms. So, we will
12 need you to consider that, possibly overnight, with the funder as to an appropriate
13 amendment for this provision.

14 MR LASK: We certainly will do, sir, and I --

15 THE CHAIR: Thank you. So, we do regard this as very important --

16 MR LASK: Yes.

17 THE CHAIR: -- and it feeds into what you may say about cost-benefit analysis,
18 because one of the strengths of your cost-benefit analysis argument is, well, there are
19 quite effective means of distribution in this case.

20 The second point under these provisions is the fact that you seem to be tying your
21 hand in settlement agreement to provide for payment of the funders' total entitlement,
22 without any reference to the fact that that might not be approved by the CAT when the
23 settlement comes up for approval. Usually, those sorts of provisions are not part of
24 the agreement with the defendant, because the defendant, frankly, doesn't care very
25 much how much goes to the funder and how much goes to the class. The defendant
26 cares how much it's got to pay, and how it's allocated is a matter between (inaudible)

1 class and the funder.

2 But here, you've committed to the funder that in the agreement with the defendant,
3 you provide that the funder gets their total entitlement, and that has the consequence
4 that if the settlement agreement isn't approved on that basis, because the tribunal
5 considering settlement thinks, "Well, that's too high", you have to then go back and
6 renegotiate your settlement, as opposed to just dealing with distribution. It may be
7 that can be resolved by a fairly small amendment to 21.4.3.2 and 21.5, that where it
8 says:

9 "...including the Funder's Total Entitlement, any Conditional ATE Insurance
10 Costs ... and any conditional fees due to the Solicitors and Counsel ..."

11 Same words appearing in both, I think -- well, perhaps not the last word -- that one
12 takes in something like, "Subject to the approval of the tribunal, including as to the
13 amounts, or in such amount as shall be approved by the tribunal", and that would take
14 care of that. I would find it surprising if that change was in any way resisted by the
15 funder.

16 I think those are our --

17 MR BANKES: (Inaudible) Could I ask one quick thought on ACSO?

18 THE CHAIR: Yes, Mr Bankes.

19 MR BANKES: Very quickly, as I said, there are two directors of ACSO. What role will
20 the second director play in the conduct of this litigation? I haven't seen any
21 governance documents, so which decisions relating to the litigation go to the board,
22 or is it in fact just Mr Warner who's going to run the litigation if he were class
23 representative?

24 MR LASK: Again, if I may take that away as part of the bundle of questions we need
25 to answer, and we'll come back to the tribunal with any helpful answers.

26 MR BANKES: Thank you.

1 MR LASK: And particularly on the point the tribunal has just raised regarding the
2 funding arrangements, we're certainly grateful for the suggestion that we can have
3 overnight to try and resolve those points, because they are clearly important.

4 THE CHAIR: I think the next thing we wanted to raise is, just as one point on -- I know
5 you're going to come on to talk about the expert evidence, but this isn't really on the
6 substance of the expert evidence. It's just about the arrangements with Dr Bagci.

7 If we just look at your amended budget, which is in bundle A, tab 5, page 211, and if
8 we look down the left-hand column, we come to -- below the counsel total is the
9 experts, and there is the economic expert, the Brattle Group, and we see there there's
10 costs per stage 1, 850,000; costs deferred and contingent, 275,000.

11 Please correct me if we've got this wrong, but it appears that Brattle Group will be paid
12 this additional 275,000 only if the claim is certified. It comes out of the -- that's why
13 it's called "deferred and contingent".

14 MR LASK: Yes.

15 THE CHAIR: Is that understanding correct?

16 MR LASK: I think so, sir. (Pause)

17 Yes, it is, sir.

18 THE CHAIR: We are rather troubled by an expert having a not insignificant part of
19 their fee dependent on the results of an application for the tribunal. That is not
20 appropriate. I think it may be contrary to the practice (inaudible). I mean, there it is.
21 That's what's apparently been agreed; but obviously, and you can see why -- everyone
22 can see why -- it means the expert has a direct financial interest in the outcome, and
23 their evidence should be neutral and objective.

24 MR LASK: Yes, sir. Again, let us take that away, please.

25 THE CHAIR: Yes.

26 I think I'm taking you out of course, but (inaudible) matters would have been raised by

1 Amazon and that do affect how we look at it, and when you come to cost-benefit,
2 obviously (inaudible) means of settlement is rather important, because the benefit, as
3 we said, of (inaudible) the Verita methods are quite considerable --

4 MR LASK: Yes.

5 THE CHAIR: -- and are thus on your side of the case, as it were.

6 MR LASK: Absolutely, sir, and the tribunal will appreciate that the submissions I'm
7 going to make to you on the cost-benefit analysis will be made subject to obviously
8 reverting to you on those points.

9 THE CHAIR: Well, I think we've made pretty clear we regard the need to amend that
10 as very important.

11 MR LASK: Yes. Well, that's well heard on this side.

12 THE CHAIR: Yes.

13 MR LASK: What I'd like to do first is summarise briefly ACSO's position in respect of
14 Amazon's objection to certification, and then I'll elaborate on that a bit.

15 In summary, ACSO's position is as follows: on any measure, benefits of the ACSO
16 claim comfortably outweigh the estimated costs. In addition, as we've ventilated just
17 now, ACSO has a credible evidence-based distribution plan which is unchallenged by
18 Amazon and can be expected, in my submission, to achieve a high level of distribution.

19 In those circumstances, and where cost-benefit is the only ground on which Amazon
20 resists certification, we say that for Amazon to contend that certification should be
21 refused is an extraordinary submission, because it misunderstands the way in which
22 overlaps between related collective actions are managed by the tribunal; it fails to
23 recognise the significant efforts that ACSO has made to co-ordinate and share
24 resources with Hammond and Stephan; and it would leave consumers with no viable
25 means of recovering damages for the losses caused by Amazon's price parity conduct.

26 Accordingly, and for all the reasons given in the amended claim form and

1 accompanying materials, ACSO submits that certification should be granted.
2 I propose to elaborate on those points in two parts. First, I'll address you on the
3 estimated costs and benefits of the claim; second, I'll deal with the specific arguments
4 made by Amazon in support of its objection.

5 If we may turn first, please, to ACSO's reply in bundle A, tab 3, page 145, where we've
6 set out some of the basic principles that apply to the cost-benefit analysis, beginning
7 at paragraph 22, with an extract from Lord Briggs's judgment in Merricks, where he
8 says:

9 "... the listing of a number of factors potentially relevant to the question whether the
10 claims are suitable to be brought in collective proceedings ... within the general rubric
11 'all matters it thinks fit' shows that the CAT is expected to conduct a value judgment
12 about suitability in which the listed and other factors are weighed in the balance. The
13 listed factors are not separate suitability hurdles, each of which the applicant for a CPO
14 must surmount."

15 Then at 25, we have an extract from the tribunal's guide:

16 "... the Tribunal may consider the costs and benefits of continuing the collective
17 proceedings in various ways ... having regard to the likely loss incurred, any potential
18 damages award and the financial cost of continuing proceedings collectively. Where
19 the estimated legal fees and expenses appear disproportionate compared to the likely
20 damages award, the costs of pursuing collective proceedings may outweigh the
21 benefits". Then the following paragraph is an extract from the tribunal's judgment in
22 the Qualcomm case:

23 "... we do not exclude that in a particular case the cost-benefit analysis might so clearly
24 weigh against certification that this might in itself be a ground for finding that the claims
25 were not suitable to be brought in collective proceedings". The tribunal did not
26 consider that the facts in Qualcomm came close to representing such a case. In

1 Waterside:

2 “We accept that there may be cases where questions of cost-benefit analysis are finely
3 balanced and that falling just on the wrong side of the line does not necessarily mean
4 a case cannot be certified: analyses at certification necessarily carry a penumbra of
5 uncertainty. Nevertheless, in those cases where an assessment of the evidence
6 indicates the cost-benefit balance is plainly against continuation of the proceedings it
7 would not ordinarily be appropriate to certify those proceedings.”.

8 So, we take three points from those cases: firstly, the cost-benefit analysis is one of
9 several factors that should be weighed in the balance, not a separate hurdle; second,
10 it's a comparative exercise whereby the tribunal considers whether the benefits are
11 outweighed by the costs; and third, one would typically expect the cost-benefit analysis
12 to weigh clearly against certification in order for certification to be refused on this
13 ground.

14 MR BANKES: Could I just ask you a question about three points, particularly your
15 second point?

16 MR LASK: Yes.

17 MR BANKES: Is it then your submission that so long as the upside is clearly greater
18 than the cost side, it's not necessary or appropriate for us to look at the cost side at
19 all, and determine whether it would easily be reduced, therefore increasing the
20 benefit? Are you saying, so long as it passes that simple arithmetic test, we should
21 let it through without analysis further than costs?

22 MR LASK: Well, in my submission, if as in this case the benefits clearly outweigh the
23 costs, that ought to be sufficient for certification. If the tribunal has concerns that the
24 costs ought to be lower -- the case ought to be capable of being litigated for lower
25 costs -- that is something it should address through case management powers such
26 as cost budgeting; it shouldn't be a matter that goes to the heart of whether the case

1 is certified or not.

2 In order to evaluate Amazon's opposition to certification, one must start, in my
3 submission, by comparing the estimated costs of the ACSO claim with the estimated
4 damages. Now, Amazon prefers not to focus on this, but it is the core exercise
5 required under the cost-benefit analysis. Once that exercise has been carried out,
6 one can then consider whether the presence of the Hammond and Stephan claims
7 alter the analysis. It won't surprise you to hear that in my submission, the answer is
8 they don't.

9 Now, the damages estimate on which ACSO relies is based on the preliminary
10 analysis in Bagci 1. If we could go, please, to Bagci 1, paragraph 278, which is
11 bundle A, tab 6, page 330. (Pause)

12 At 278, Dr Bagci says:

13 "Table 6 sets out my preliminary damages calculation of the overcharge based upon
14 the yardstick approach. Based on my preliminary calculations, which are limited by
15 publicly available data and certain assumptions, the total damages to end-consumers
16 from sales made by third-party sellers on the UK Amazon Marketplace between 2019
17 and 2024 range from GBP 3 billion to GBP 6.3 billion. As discussed earlier, I estimate
18 the Proposed Class Size to range from 45.4 to 48.9 million adults in the UK. Therefore,
19 the total damages per class per [proposed class member] between 2019 and 2024
20 range from GBP 63.50 to GBP 134."

21 Then over the page, the tribunal will see table 6, where the estimate is broken down.

22 THE CHAIR: Yes.

23 MR LASK: And you'll see the first row sets out the assumed pass on rate, 75 per cent.
24 That is explained further at paragraphs 274 to 275. The second row sets out the value
25 of commerce in billions, and you'll see in the final column the total value of commerce
26 is £82.1 billion. Rows 3 and 4 set out the lower and upper bounds of the overcharge

1 estimate in percentage terms.

2 THE CHAIR: Yes, that upper bound is hopeless, isn't it?

3 MR LASK: The 10.3?

4 THE CHAIR: It's absurd. I mean, that's based on entirely on -- what's it
5 called -- AliExpress.

6 MR LASK: Well, it's --

7 THE CHAIR: That's where it comes from. AliExpress hasn't got a single UK seller on
8 it, from what Dr Bagci says.

9 MR LASK: Well, it's --

10 THE CHAIR: I mean, it's a complete pie in the sky.

11 MR LASK: Dr Bagci has explained carefully in this report how she's produced these
12 estimates. I don't need to rely on the upper range of estimates in order to persuade
13 the tribunal the cost-benefit analysis is in favour of certification. I'm very happy to put
14 my case today on the lower bound of Dr Bagci's --

15 THE CHAIR: And that's just -- the lower bound is eBay, I think. That's where it comes
16 from. It's all set out in table 2, the modal rate. This is her yardstick approach, isn't it?
17 That's where these come from.

18 MR LASK: Yes.

19 THE CHAIR: And as she's recognised in her third report, this is rather (inaudible) from
20 the yardstick, because, she says it's a cross check. And she's actually, if one looks at
21 what she says in the third report, which is tab 10, page 488/489.

22 "Mr Holt also criticises my proposed yardstick cross-check. He says that differences
23 in commission rates between Amazon and comparative marketplaces may reflect
24 differences in factors such as business model, customer demand, product mix, quality
25 of service, rather than the WRPOs. I agree that such differences would need to be
26 considered, but I do not propose to attribute any observed difference in commission

1 rates automatically to the WRPOs.

2 "52. As explained in Bagci 1, the yardstick is intended as a cross-check on the adapted
3 Boik and Corts methodology rather than as a standalone method for estimating the
4 effect of the WRPOs."

5 So here, it's not used as a cross check; this is just applying it on its own to get an
6 estimate. I don't know -- I'm not saying this undermines your case, because it's very
7 difficult before doing any of these exercises to know what the effect might be. We
8 have got Dr Houpis who did the same sort of estimate, and he came out with an effect
9 from the abuse of an overcharge of 2.5 per cent. As you know, we have certified on
10 the basis of his price -- if one applied 2.5 per cent to the figures in your table 6, or
11 rather Dr Bagci's table 6, I think you come out with about £1.5 billion as the damages
12 with a 75 per cent pass on.

13 That is a figure you quote as just being half your lower estimate.

14 MR LASK: Yes.

15 THE CHAIR: I interrupted you because I really don't think we can place much reliance
16 on the -- certainly the upper bound, and the lower bound is likely to be exaggerated.
17 But you may say, "Well, even if it's £1.5 billion, that's still a significant claim".

18 MR LASK: Well, I do say that, sir, and that's why I said in my summary that on any
19 measure, the benefits significantly outweigh the costs. But may I respond to your
20 observations on, Dr Bagci's estimate?

21 THE CHAIR: Yes.

22 MR LASK: Of course, we accept that this is only a preliminary estimate. But we do
23 say that it's nevertheless a reasonable basis on which to assess the costs and
24 benefits. And we do say it's the best available basis to the tribunal. If I may make
25 three points by way of elaboration:

26 First, as you recognise, sir, in order to assess the costs and benefits of the proposed

1 | proceedings, a PCR is in practice required to produce a damages estimate as part of
2 | the CPO application.

3 | THE CHAIR: Yes.

4 | MR LASK: And the damages estimate produced at the outset will typically rely on
5 | publicly available data and will inevitably be somewhat crude. That is just an inherent
6 | feature of the regime.

7 | Second point is that Dr Bagci has not plucked these figures from thin air; the estimates
8 | are based on the evidence currently available to her, and a methodology which she
9 | has taken some care to explain in her report.

10 | Then the third point is that because the value of commerce in this case is so large,
11 | even a more modest overcharge percentage than the range presented by Dr Bagci
12 | can be expected to produce very significant results.

13 | If we go back to table 6 on page 331. (Pause)

14 | As you've observed, sir, even the lower bound of Dr Bagci's range produces
15 | a damages estimate of £3 billion, and even 50 per cent of that, at £1.5 billion, would
16 | still constitute an enormous benefit to the class. But also importantly, Dr Bagci's
17 | estimate only goes up to the end of 2024, and in 2024, one sees in column F: value of
18 | commerce was £17.9 billion. Amazon's conduct is ongoing, and ACSO has reserved
19 | the right to apply to add claims arising after the date of the claim form.

20 | The current value of commerce of £82.1 billion, and in turn the aggregate damages,
21 | can be expected to increase. Purely by way of illustration, if one were to update the
22 | value of commerce at the end of 2026 at the same annual rate as 2024, that would
23 | already constitute an additional £36 billion in value of commerce.

24 | THE CHAIR: An additional 36 ...

25 | MR LASK: Billion, approximately, just taking the figure for 2024 of £17.9 billion.

26 | THE CHAIR: Yes.

1 MR LASK: And then --

2 THE CHAIR: This is pre-interest?

3 MR LASK: This is all pre-interest. I think paragraph 279, Dr Bagci updates the figures

4 to include interest.

5 THE CHAIR: Yes, table 7.

6 MR LASK: Yes, and at 279, she summarises the results. £3.6 billion becomes the

7 lower range and £7.5 becomes the upper range. (Pause)

8 Then if I may just address what you said, sir, about Dr Houpis's estimate. If we go to

9 bundle E, tab 3, page 319. (Pause)

10 This is Houpis 1.

11 THE CHAIR: Yes.

12 MR LASK: Dr Houpis explains at paragraph 591 that he's dealing here with the third,

13 fourth and fifth potentially-abusive conducts. Then if you go forward to page 322, you

14 see his estimates, table 10. Bottom of that table: £521 million. However, if you look

15 at page 321, paragraph 600:

16 "Due to data limitations, at this stage I am not able to implement the methodology I set

17 out above. For illustrative purposes, I prepared some preliminary damage estimates.

18 These estimate damages on the assumption that marketplace-related fees were an

19 illustrative 2.5 percentage points higher in the factual than they would have been

20 absent the abuse."

21 MR LASK: That 2.5 per cent figure is purely illustrative.

22 THE CHAIR: Yes.

23 MR LASK: So, I made the point that Dr Bagci hasn't plucked her figures from thin air.

24 With all due respect, Dr Houpis has; and that's not a criticism of Dr Houpis, but we do

25 say that that his estimate is not a suitable comparator when seeking to obtain a view

26 on the potential benefits of the ACSO claim.

1 THE CHAIR: Yes.

2 MR LASK: Similarly, if one goes to page 390, this is annex J of Dr Houpis's report,
3 where he deals with pass-on. Paragraph J.18:

4 "To the extent that there is pass-on, it can be estimated by analysing the extent to
5 which sellers change their prices in reaction to cost changes. For example, if Amazon
6 increased its fees by 10 pence per unit, and sales data indicates that sellers followed
7 this by increasing their average sales prices by 5 pence per unit, then this would
8 suggest a 50% pass-on [rate]."

9 Again, that 50 per cent pass-on rate, which feeds into his lower damages estimate, is
10 purely illustrative. He's not suggesting that that is a realistic rate, whereas Dr Bagci
11 has actually explained by reference to the literature why she uses a 75 per cent
12 pass-on rate. Just for your notes, sir -- we probably don't need to go to it -- but for
13 your note, it's paragraphs 272 to 275 of Bagci 1.

14 THE CHAIR: Your fundamental point is that once you take in 2025, you add interest.
15 Even if it's below 4.4 per cent, whether it's 2.5 or 3 or 3.5 -- nobody can know -- it's still
16 a very, very substantial sum.

17 MR LASK: Yes, and it's not just 2025, because as I say, the alleged abuse is
18 ongoing --

19 THE CHAIR: Yes.

20 MR LASK: -- and ACSO envisages amending the class definition to include claims
21 that have arisen since the claim form was issued. By the time the case is finally
22 decided, the number of years in the relevant period could conceivably have doubled.

23 THE CHAIR: Yes. Can you include conduct post-certification (inaudible) damages?

24 MR LASK: Well, we can apply to include within the class members whose claims have
25 only arisen certainly after the claim form, and I think, yes, after certification as well.
26 I'm not aware that there's any objection in principle.

1 THE CHAIR: I'm trying to think how opting out is going to work. It's an opt-out
2 deadline.

3 MR LASK: Well --

4 THE CHAIR: Usually it's up to certification, I think, with ongoing breaches, because
5 otherwise it gets a bit complicated.

6 MR LASK: We would have to look at what some other cases have said about that.
7 My understanding is that it can go further than certification, and the sorts of issues
8 you've raised, sir, would be ventilated on the application to amend the class.

9 THE CHAIR: Yes (inaudible).

10 MR LASK: So those are the damages.

11 Then turning to the estimated costs, you've already drawn my attention, sir, to the
12 re-amended litigation budget in bundle A, tab 5, and the tribunal will be aware that
13 since the February CMC, budget was amended to reflect savings envisaged as
14 a result of the cooperation with Mr Hammond, and further savings made as a result of
15 some additional streamlining measures, which we've referred to in our skeleton at
16 paragraph 15(b), and also the split trial.

17 So now we have a total estimate in the amended litigation budget of about 16.5 million.

18 That doesn't include various contingent elements, and the tribunal will be aware that
19 its judgment last week in the JLP v Amazon case, the tribunal actually based its
20 cost-benefit analysis on the full entitlement of the funder, insurers and the PCR's legal
21 team in relation to deferred fees. Amazon has also referred to contingent sums in its
22 submissions.

23 In an effort to assist, we have produced a table -- which I hope has found its way into
24 your bundle -- similar to the one that the tribunal relied on in the JLP case, and it sets
25 out in one place all of the information on costs and stakeholder entitlements that has
26 previously been provided, and it should be your bundle G at tab 5, page 87. (Pause)

1 This table includes the estimate in the re-amended litigation budget and everything
2 else. It reflects the maximum that could become due to the funder, insurers and legal
3 team if the ACSO claim succeeds. You will see some narrative at the top of the table
4 explaining that the figures are conservative, because they assume that the legal fees
5 and disbursements are exhausted, including amounts for things like appeals and ADR,
6 and they assume maximum deferred and contingent premia under the ATE policy, and
7 the highest multiples as regards the funders' fee. It's a conservative set of estimates,
8 and you'll see --

9 THE CHAIR: The ATE insurer premium, which is a confidential figure --

10 MR LASK: Yes.

11 THE CHAIR: -- that is the full premium that would be payable if the case is successful?
12 Is that right?

13 MR LASK: Yes. That's the maximum that could be (overspeaking).

14 THE CHAIR: Including IP tax?

15 MR LASK: Yes.

16 MR BANKES: Where on this table do I see the economists' -- the Brattle charges?

17 MR LASK: On page 88 at the top, you'll see the row, "Woodsford litigation funding".

18 MR BANKES: I'm with you.

19 MR LASK: You see, that's the funders' outlay.

20 Then on the final page, page 90, you have the range. It's a maximum of between
21 110 and 127 million.

22 Even on that measure of costs, even 50 per cent of the lower bound of Dr Bagci's
23 damages estimate is an order of magnitude greater than the estimated costs of
24 a successful outcome. One is comparing 127 million in maximum costs and turns to
25 1.5 billion.

26 Then distribution, the other key element of the cost-benefit analysis; Amazon does not

1 argue that ACSO's distribution plan is deficient for certification purposes. I can take
2 the point shortly. I'm conscious that the tribunal is already familiar with the proposed
3 distribution methods. The key point is that ACSO has a plan to use Amazon's own
4 data and infrastructure so as to distribute damages directly to proposed class
5 members without requiring them to do much, if anything, to claim their entitlement; and
6 such methods have already been used in the US in relation to Amazon, and are
7 expected by the claims administrator, Verita, to lead to high rates of distribution.

8 If we could go, please, to Mr Warner's first statement, which is bundle A, tab 13,
9 page 613. He says at paragraph 59:

10 "ACSO has explained the methods it would seek to implement to notify Proposed
11 Class Members of a successful outcome and distribute claim proceeds to Proposed
12 Class Members ... Importantly, ACSO does not propose to rely only on traditional
13 notice and administration methods; it will also seek to leverage Amazon's
14 infrastructure and data to effect direct notice and distribution."

15 "60. ACSO's proposals include (i) directly crediting Proposed Class Members'
16 payment methods; (ii) distributing claim proceeds via alternative digital payment
17 channels, such as automated PayPal payments; (iii) seeking Amazon's agreement to
18 notify, or alternatively a direction from the Tribunal that Amazon shall notify Proposed
19 Class Members of a favourable judgment or settlement via [its] 'Message Centre' [and
20 then over the page]; (iv) using data on Proposed Class Members' order history to
21 efficiently process their claims; (v) using data on Proposed Class Members' contact
22 details, such as email addresses and telephone numbers to notify them of the
23 availability of claim proceeds; and (vi) adding funds to Proposed Class Members'
24 'account balance' on Amazon's platform as a fallback option. Each of these options is
25 discussed in the N&A Plan".

26 Then 63:

1 "I do not repeat the contents of the Addendum here [that's the Verita addendum]. It
2 suffices to note that Verita Global expects that the direct distribution methods
3 discussed in the N&A Plan and Maxwell-Scott 1 would lead to a distribution rate of
4 more than 50 per cent. Redistribution would enable the majority or all of the available
5 claim proceeds to be distributed to the proposed class, resulting in a distribution rate
6 of close to 100% of available claim proceeds."

7 Then if the tribunal would just cast its eye over paragraph 64 to 67, it will see
8 a description of how these sorts of methods have already been used in a case
9 involving Amazon in the US.

10 MR BANKES: Does Amazon have date of birth data? How are we going to assess
11 for each claim whether it's by someone who is or isn't 18?

12 MR LASK: I don't know. I'll have to come back to you on that, if I may, please. (Pause)
13 For the purposes of my submissions, I have been using 1.5 billion illustrative damages
14 estimate, based on 50 per cent of Dr Bagci's lower bound. Even if only 50 per cent of
15 that amount was distributed to the class, it would still equal 750 million, and that's not
16 even including the additional value of commerce for the additional years. Again, still
17 very, very large amounts compared to the costs involved.

18 Just for the tribunal's note, ACSO's proposed direct distribution method is similar to
19 the one proposed by the PCR and the JLP v Amazon case; and in that case, in the
20 judgment issued last week, the tribunal concluded that this provided a reasonable
21 likelihood of distribution to a high proportion of class members. You can see that in
22 paragraph 152, 162 and 166, bundle H2, tab 21, pages 1068 onwards.

23 To sum up on this part of my submissions: in my submission, the cost-benefit analysis
24 is very clearly in favour of certification. First, on any reasonable measure, the
25 prospective value of the aggregate damages is much, much higher than the costs;
26 second, the PCR has a credible evidence-based administration plan, which can be

1 expected to achieve a higher level of distribution to the class; third, if the tribunal were
2 to refuse certification, as Amazon says it should, consumers would have no viable
3 means of recovering damages for the losses caused by Amazon's price parity conduct.
4 Indeed, as the tribunal recognised in its strike-out judgment earlier this year, it would
5 lead to a pure windfall for Amazon if Professor Stephan succeeded on abuse 5.
6 So, in circumstances where Amazon's conduct is at least arguably abusive, and that's
7 not contested, a refusal to certify would in my submission be a very poor outcome for
8 consumers. Actually, in reality, Amazon's submissions, its specific arguments on this
9 part of the case, are really about case management rather than certification. At its
10 heart, Amazon's complaint is that more radical steps should be taken to co-ordinate
11 the ACSO, Hammond and Stephan claims. We say that's wrong, for reasons I'll come
12 on to. But even if there were merit in the point, it would not justify a refusal of
13 certification. It would simply be a matter for the tribunal to consider holistically as part
14 of its active case management of all three claims.

15 That may be a convenient moment if the tribunal wishes to break, before I move on to
16 Amazon's submissions.

17 THE CHAIR: Yes. We will come back at 11.55.

18 (11.50 am)

19 (A short break)

20 (12.04 pm)

21 THE CHAIR: Mr Lask, before you go on, the référendaires have helpfully drawn my
22 attention to amendments in previous, collective proceedings allowing class members
23 to be added, in particular in Neill v Sony, Coll, and in Rodger. Rodger is now settled,
24 but in the settlement the tribunal allowed amendments up to the date of the PTR
25 amendment. Adding class members post-PTR was refused in Kent v Apple. You have
26 got clear precedent to PTR amendments (inaudible) to add class members (inaudible).

1 MR LASK: Thank you, sir. I'm reassured that I wasn't misremembering the position.
2 I'm going to deal now with Amazon's arguments on certification.
3 Amazon does not argue that the actual estimated costs of the ACSO claim outweigh
4 the actual estimated benefits. Its case is that in light of the Hammond and Stephan
5 claims, the benefits can be achieved at what Amazon says is essentially no cost.
6 In my submission, the basic flaw in Amazon's case is that it rests on an extreme and
7 unreasonable view of the measures that ACSO should take to co-ordinate with
8 Hammond and Stephan. In particular, Amazon contends that ACSO should in effect
9 be obliged to adopt a pure watching brief over the Hammond and Stephan claims, or
10 have its application for certification refused.
11 We say that position is unsustainable for four reasons. First, ACSO has already taken
12 the steps that the tribunal required it to take in order to co-ordinate with Hammond.
13 On the issues of market definition and dominance, the tribunal will recall that it ordered
14 ACSO to use the same expert as Mr Hammond and a single legal team, insofar as the
15 issues are identical as between the claims. That's the February order, paragraph 3,
16 which is at bundle D, tab 5, page 93.
17 On the issue of pass-on, the tribunal ordered ACSO to liaise with Hammond and
18 produce revised proposals, although it did not specify the form such proposals should
19 take. Accordingly, ACSO has agreed to instruct Dr Pike jointly with Mr Hammond in
20 relation to market definition, dominance and pass-on. It has agreed to instruct
21 Hammond's counsel team in relation to those issues, at least in respect of the common
22 period, and it is in the final stages of agreeing a co-counselling arrangement with
23 Mr Hammond as regards the solicitor teams. This has already enabled ACSO to
24 reduce its budget by approximately 2 million.
25 Amazon says that ACSO has made only marginal adjustments, reducing its overall
26 cost budget by just a small fraction. In my submission, that's a mischaracterisation.

1 More fundamentally, insofar as Amazon argues that ACSO should adopt a watching
2 brief as regards the Hammond claim, that is an attempt to unpick the tribunal's
3 February order. The tribunal didn't order a watching brief; it ordered co-ordination
4 between the expert and legal teams. It's quite wrong, in my submission, for Amazon
5 to try and reopen the tribunal's decision by the back door. That was my first point.

6 Second, ACSO agrees that there should be co-ordination between ACSO and
7 Stephan on the issue of abuse, and it is willing to do that, but that co-ordination should
8 involve the parties working together to avoid duplication and promote efficiencies,
9 whilst retaining the ability to advance their cases as they see fit in the interests of the
10 classes they represent. It should not, in my submission, involve one party
11 relinquishing all meaningful control over how its claim is prepared for and litigated at
12 trial. That is why ACSO has proposed to Stephan that the parties use a single group
13 of solicitors and a jointly instructed counsel team.

14 If I could show the tribunal what we've said about that, please, it's in bundle F, tab 2,
15 page 435. (Pause)

16 I hope that the updates have worked smoothly. What you should have there is a letter
17 from Stephenson Harwood dated 8 June 2026.

18 THE CHAIR: Sorry, this is bundle ...

19 MR LASK: Bundle F.

20 THE CHAIR: Oh, I'm sorry, excuse me. Page 435?

21 MR LASK: Page 435. (Pause)

22 THE CHAIR: Yes, do you want us to read it?

23 MR LASK: Well, I was going to read you paragraph 2 if I may. Yes. It's a letter from
24 ACSO's solicitors to Professor Stephan solicitors, paragraph 2.

25 THE CHAIR: I think it's pronounced Stephan; is that right?

26 MR LASK: Sorry, I will try and remember that. Stephan.

1 "We write to inquire whether Professor Stephan would be willing to negotiate an
2 arrangement with ACSO for the purpose of achieving efficiencies and cost savings in
3 the common prosecution of the infringement alleged by ACSO, and the
4 anti-discounting infringement alleged by Professor Stephan. Any such arrangement
5 would, of course, be contingent on the ACSO Claim being certified."

6 In paragraph 3:

7 "As reflected in paragraph 3(b) of the Directions Order, we consider the Tribunal will
8 expect ACSO and Professor Stephan, by the time of the hearing of the CPO
9 Application, to have cooperated and agreed, or at a minimum sought to agree, ways
10 in which the overlapping elements of their respective claims can be litigated in the
11 most cost-effective manner. As you know, Dr Bagci and Dr Houpis produced a joint
12 statement dated 22 April confirming that they consider that their respective
13 methodologies can serve as alternatives and useful cross-checks to one another, and
14 ACSO has suggested that Dr Bagci and Dr Houpis might be jointly instructed following
15 certification of the ACSO Claim. However, we consider the Tribunal will expect the
16 cooperation between ACSO and Professor Stephan to extend beyond collaboration
17 between the experts, and to encompass cooperation between solicitors and counsel."
18 Then if we go forward to page 441, please. If I could ask the tribunal, please, to read
19 paragraph 24 to 27.

20 THE CHAIR: Yes, we'll read that. (Pause)

21 MR LASK: And then at paragraph 32, page 443, the letter says:

22 "In relation to counsel, we propose that ACSO and Professor Stephan agree jointly to
23 instruct, or otherwise rely on, ACSO's counsel team for the purpose of advancing
24 submissions at trial, or at any interlocutory hearing subsequent to the October CMC,
25 on the Common Abuse, and agree appropriate cost sharing arrangements in relation
26 to that joint instruction. Once again, this will serve to reduce costs and ensure that

1 advocacy in relation to the Common Abuse is undertaken by a counsel team that is
2 focused narrowly on that issue, which we consider will be to both parties' benefit."

3 So, the proposal is for a co-counselling approach whereby a single group of solicitors
4 from the respective teams work together on common issues, and both classes would
5 instruct a single counsel team. Now, under ACSO's proposal, Stephan's counsel team
6 would be responsible for abuses one to four in Stephan's claim, and ACSO's counsel
7 team would be responsible for the price parity abuse, which encompasses Stephan's
8 abuse five. In my submission, that is an eminently sensible division of labour.

9 The tribunal will note that ACSO's proposal does not extend to experts. As I'll come
10 on to explain, ACSO does not feel able to rely exclusively on Dr Houpis's evidence in
11 relation to liability. However, subject to that, the proposal is similar to what the tribunal
12 ordered in respect of ACSO v Hammond at the February CMC.

13 Then if we go, please, to tab 69, page 462. We see the response of Stephan's
14 solicitors dated 30 June. If I could just ask the tribunal, please, to read paragraphs 2
15 and 3. (Pause)

16 THE CHAIR: Yes.

17 MR LASK: So, one sees the parties are agreed on the importance of working together
18 to avoid duplication and to ensure that where there is overlap, it's litigated as efficiently
19 as possible; not currently agreed on the means by which to achieve that. But no doubt
20 if the ACSO claim is certified, ACSO and Stephan -- their teams -- can revisit these
21 discussions and agree a sensible way forward.

22 I would emphasise that there is also overlap between the abuses alleged by
23 Mr Hammond and Professor Stephan: both of them allege that Amazon favours offers
24 by Amazon Retail, offers that use Amazon's logistics and delivery network, when
25 selecting which offer should appear in the buy box. The tribunal recognised that in the
26 Hammond and Stephan CPO judgment, paragraphs 25 to 27, but the tribunal didn't

1 make certification of either of those claims conditional on one of the parties adopting
2 a watching brief, or even on the parties sharing a single legal team. In my submission,
3 there's no good reason why ACSO should be subject to a stricter approach in which
4 it's compelled to adopt a passive position in which it differs entirely to Stephan.

5 (Pause)

6 THE CHAIR: Yes.

7 MR LASK: My third point is this: ACSO does not consider it appropriate to adopt
8 a watching brief, or to limit itself to brief submissions at trial, and compelling it to do so
9 in those circumstances would, in my submission, be unfair to the class that ACSO
10 seeks to represent. Now, the starting point is that Amazon has not identified any case
11 in which this kind of outcome has been imposed on a party by the tribunal against that
12 party's will, so what it seeks is unprecedented. Even in Waterside, which appears to
13 be the genesis of Amazon's argument, a watching brief was presented as an option
14 that the PCR might choose to adopt, not as a fait accompli. If we could go please to
15 Waterside, it's in bundle H2, tab 18, page 954. Paragraph 39 --

16 THE CHAIR: Just one moment.

17 MR LASK: Sorry.

18 THE CHAIR: This is in bundle H1 or H2?

19 MR LASK: H2. (Pause)

20 THE CHAIR: Yes.

21 MR LASK: Paragraph 39:

22 "Prior to the question of pass-on, the proposed class has various options open to it to
23 minimise its costs and to seek to maximise return to the class. For example, it might
24 piggy-back on the liability claim and keep only a watching brief until the question of
25 pass-on is argued. Alternatively, if the PCR concludes it is necessary to take an active
26 role in the liability phase, then it could share counsel, share disclosure and share

1 expert witnesses. Indeed, if these matters are heard together, which is our
2 expectation, it is likely to be obliged to do so."

3 So, the tribunal is articulating certain options, but it's quite clear, in my submission, the
4 tribunal is not envisaging a situation where it compels the PCR to adopt a watching
5 brief; it's leaving that decision to the PCR. But it is making clear that if the PCR does
6 want to play an active role, it's going to have to share resources with the other
7 claimants.

8 THE CHAIR: Yes.

9 MR LASK: In my submission, there are very good reasons why the tribunal hasn't
10 ordered a watching brief in cases where the issue has arisen. In short, it would be
11 unfair and contrary to natural justice to require a party to be bound by an outcome in
12 which it had played only a limited role or no role at all.

13 To make that good, could we go, please, to the Ennis ruling, which is in authorities
14 bundle H2, tab 5, page 156. (Pause)

15 This, just by way of background, was a case management ruling concerning whether
16 there should be a joint trial for common issues arising in two sets of collective
17 proceedings, or whether they should carry on independently of each other. Both
18 claims were against Apple. One was brought by Dr Kent on behalf of the consumers,
19 and the other was brought by Dr Ennis on behalf of app developers, but both alleged
20 the same essential abuse.

21 If we see paragraph 33:

22 "Apple mooted the possibility of Dr Ennis taking a limited role in the trial of the Kent
23 proceedings in January 2025, allowing Dr Ennis, for example, to make non-duplicative
24 submissions on the evidence. There was, however, unsurprisingly no agreement by
25 Dr Ennis to be bound by the outcome of the Kent proceedings in circumstances where
26 he had only played a limited role at the trial as it would be unfair and contrary to natural

1 justice. This arrangement would therefore not overcome the risk of inconsistency of
2 outcomes. 'Reading across' determinations in the Kent proceedings to the
3 proceedings, as envisaged in Sportradar, would be equally unfair unless Dr Ennis had
4 had a full opportunity to put forward his case, deploy factual evidence and expert
5 evidence and challenge the evidence of the other parties."

6 That's the point. It's made only briefly by the tribunal, but in my submission, that's
7 because it's blindingly obvious. Of course, it would be unfair to a party to require it to
8 be bound by an outcome where it had had no opportunity to influence that outcome,
9 or only a very limited opportunity.

10 Now, Apple says in its skeleton argument that Ennis doesn't assist because there, the
11 issue arose on the eve of the Kent trial, and there wasn't enough time for Dr Ennis to
12 be ready to participate fully in the forthcoming trial. But in my submission, that misses
13 the point. For present purposes, it makes no difference whether a party plays a limited
14 role in the case because it hasn't had the time to prepare, or whether it's compelled to
15 do so by an order of the tribunal. In either case, the outcome is unfair.

16 THE CHAIR: Yes.

17 MR LASK: Now, in the present case, as Amazon says, ACSO does have time to
18 prepare for trial 1 in 2028. So, there is no reason why the prospect of it playing
19 a limited role in that trial should even arise. The observations in Ennis are consistent
20 with observations made by the supreme Court in Evans, albeit in a different context.

21 But I'd just like to show you the point in Evans at H2, tab 14, page 882. (Pause)

22 The tribunal will, of course be familiar with this judgment, my learned friend relied on
23 it extensively at the February CMC. If we go to page 882, please, we see
24 paragraph 144 under the heading, "Admissibility". What the court was addressing was
25 the admissibility of a commission decision called Sterling Lads, in follow-on
26 proceedings that were not based on that particular decision. So, 144:

1 "It is a general rule of the common law that findings made by another decision-maker
2 are not admissible as evidence of the facts found. This rule is often referred to as 'the
3 rule in *Hollington v Hewthorn*', after the leading case ... where the Court of Appeal
4 held that the defendant's conviction for careless driving was inadmissible in
5 a subsequent civil claim for damages as evidence that the defendant was negligent.
6 As explained by the Court of Appeal in *Rogers* ... the rule is founded on a principle of
7 fairness. That principle requires that a tribunal responsible for finding facts should
8 base its findings on its own evaluation of the evidence and not on the evaluation of
9 someone else who is not the relevant decision-maker."

10 It's 145 that I particularly rely on:

11 It would be particularly unfair to treat findings made by an earlier decision-maker as
12 admissible against a person who was not a party to the earlier proceedings and who
13 therefore had no opportunity to influence the findings made in those proceedings by
14 adducing evidence or advancing arguments. This fundamental objection does not
15 apply to someone who was a party to the earlier proceedings.

16 The context was obviously different, but the observation applies with equal, if not
17 greater force in the present case. If it is unfair to treat findings as even admissible
18 against a party who had no opportunity to influence those findings, because he wasn't
19 a party to the earlier proceedings, it must also be unfair to treat findings as binding
20 against a party who, whilst involved in the proceedings, still had no opportunity to
21 influence the findings.

22 It's also helpful, in my submission, just to dwell for a moment on the practical
23 implications of Amazon's proposed approach. If ACSO were limited to a watching brief
24 or brief legal submissions at trial, it would have no involvement in formulating
25 disclosure requests or reviewing the resulting disclosure; it would have no opportunity
26 to adduce factual evidence of its own; it would be forced to rely solely on the expert

1 evidence of Dr Houpis, notwithstanding its legitimate concerns as to the feasibility of
2 that methodology; it would be unable to challenge Amazon's factual or expert evidence
3 at trial; and if Stephan settled with Amazon, the ACSO case could be left stranded.

4 On all of these matters, ACSO would have to rely entirely on the decisions made and
5 strategies formulated by Stephan and his team. In my submission, it's very hard to
6 see how in those circumstances, ACSO could act in the best interests of the class,
7 and it's perfectly understandable that ACSO does not consider it appropriate to
8 relinquish all meaningful control over the conduct of the litigation.

9 Amazon's only answer to the settlement risk is to cite what the tribunal referred to as
10 an obvious solution in the Brook case, but the solution identified in the Brook case is
11 emphatically not what Amazon is proposing in this case. We can see that from Brook's
12 CPO judgment, bundle H2, tab 20, page 1009, paragraph 82.

13 The issue in this case was the overlap between the claim brought by Dr Brook for
14 which certification was being sought, against Google; the existing claim brought by
15 Stopford against Google, which had already been certified. The tribunal is dealing
16 here with the overlap between the two, and economies to be had by cooperation. 82:
17 "Dr Brook has expressed the concern that if joint issues were left to the Stopford
18 proceedings and that case then settles, then the present claim would be left stranded.
19 The obvious solution to this, as Google submitted, is for there to be an agreement for
20 joint instruction of a single expert and legal team for common issues, on terms that if
21 one class drops away the instruction on behalf of the other can continue. This is
22 a reasonably common sort of arrangement, and we see no reason why it would not
23 work. Mr Beal more or less accepted that it could."

24 Save for the single expert element, that is what ACSO has proposed to Stephan. But
25 it's not what Amazon is proposing, because Amazon says that ACSO should be limited
26 to a pure watching brief, or at most brief legal submissions at trial. That is not the

1 same thing as the co-counselling arrangement envisaged in Brook.

2 The unfairness in Amazon's proposal is also underlined by the differences between

3 the ACSO and Stephan claims.

4 THE CHAIR: The response to your proposal when your solicitors wrote to Stephan's

5 solicitors back in June; the response didn't distinguish Trial 1 from Trial 2 when it's

6 said we're not (inaudible)co-counsel.

7 MR LASK: It didn't.

8 THE CHAIR: It might be different (inaudible).

9 MR LASK: Well, actually --

10 THE CHAIR: -- achieved on trial one, trial two.

11 MR LASK: It might be. I think it's right to say that really it's at Trial 1 where the overlap

12 between the ACSO and Stephan claim arises, because that's --

13 THE CHAIR: Yes, because Trial 2 will look at the extent of the overcharge.

14 MR LASK: Well, yes --

15 THE CHAIR: (Several inaudible words) as high as possible.

16 MR LASK: Yes.

17 THE CHAIR: But Trial 1 is more limited.

18 MR LASK: Yes.

19 THE CHAIR: Therefore (overspeaking).

20 MR LASK: You are right. But no, the letter doesn't distinguish.

21 THE CHAIR: He talks about the difficulties of being on different sides of (inaudible)

22 argument.

23 MR LASK: Yes.

24 THE CHAIR: That only arises with Trial 2.

25 MR LASK: At Trial 2. I don't have the chronology at my fingertips; I'm not sure whether

26 the order for a split trial had been made. (Pause)

1 It had been made. Okay. It's obviously something that would have to be considered
2 between the parties.

3 THE CHAIR: Well, the order for a split trial was made in July. (Overspeaking)

4 MR LASK: Well, the letter from Stephan's team --

5 THE CHAIR: It might have been an order following a CMC. I think there'd been
6 a CMC, and then --

7 UNKNOWN SPEAKER: 15 July, sir.

8 THE CHAIR: Yes, it's the order, but the CMC was on 2 June, so it's in that period.

9 MR LASK: Yes. Absolutely, that would be something to be discussed between ACSO
10 and Stephan.

11 The point I was coming on to concerned the differences between the ACSO and
12 Stephan claims. I don't suggest that ACSO's objection for a watching brief depends
13 on those differences. In my submission, it would be unfair to preclude ACSO from
14 playing an active role in the litigation, even if claims were on all fours; but they do, in
15 my submission, underline the problem, and the essential point is that Stephan's abuse
16 5 only expressly challenges what's referred to as the marketplace fair pricing policy
17 operated by Amazon.

18 The ACSO claim expressly challenges both that policy and what ACSO's pleading
19 refers to as the competitive external price policy. Just to illustrate that, if I could ask
20 you, please, to turn up Stephan's claim form in bundle E, tab 8, page 598,
21 paragraph 120:

22 "As noted at paragraph 102 above, sellers who wish to sell products on the
23 Marketplace must enter into the BSA [that's the Business Services Agreement]. By
24 the BSA, Amazon requires those sellers to comply with various Amazon policies. One
25 such policy is the 'Amazon marketplace fair pricing policy' (the 'Policy'), which prohibits
26 sellers from 'setting a price on a product or service [on Amazon] that is significantly

1 higher than recent prices offered on or off Amazon."

2 "As part of the Policy, Amazon regularly monitors the prices of items on its Marketplace
3 and compares them with other available prices. Amazon has said that, if Amazon
4 deems that a seller is not complying with the policy, it may 'take action, such as
5 removing Buy Box, removing the offer, or in serious or repeated cases, suspending or
6 terminating selling privileges."

7 Paragraph 122 refers to automated pricing.

8 Then if we go forward through the claim form to page 614, you see paragraph 159:

9 "As noted ... above, Amazon historically imposed certain express contractual
10 requirements barring sellers from selling products for lower prices elsewhere.
11 Although Amazon undertook no longer to impose the express contractual
12 requirements, it still pursues anti-discounting practices designed for the same
13 purpose, namely to prevent sellers from selling their products at lower prices on rival
14 e-commerce platforms."

15 "160. In particular, as noted ... above, Amazon:

16 "160.1 requires sellers using the Marketplace to agree to the BSA and the Policy [the
17 wording is set out again]

18 "160.2 publishes guidance notifying sellers that they may be severely punished for
19 non-compliance and encouraging them to use automatic price-matching tools."

20 Finally, at 163 on page 615:

21 "Further, sellers have no knowledge or understanding of the price benchmark(s)
22 against which their prices are assessed, and no knowledge or understanding of what
23 'significantly higher' means."

24 Just pausing there: the reason that's significant is because Amazon says Marketplace
25 fair pricing policy only kicks in where it finds that prices on Amazon are significantly
26 higher than prices off Amazon. That's why the term is quoted:

1 "Thus, the criteria or metrics that Amazon applies are not clearly defined, transparent,
2 non-discriminatory or verifiable ..."

3 That's Stephan's pleading. If we compare it to ACSO's pleading, which is at bundle A,
4 tab 1, page 5, paragraph 7:

5 "Pursuant to the BSA, third-party sellers are required to comply with several
6 'Programme Policies', including:

7 "7.1 The 'Amazon Marketplace Fair Pricing Policy [that's the one we've seen in
8 Stephan's claim form]

9 "7.2 The 'Account Health Rating Policy' ..."

10 Then at paragraph 8:

11 "In addition, Amazon utilises a 'Competitive External Price policy' as a means of
12 conditioning access to the Buy Box. Under the ... policy, sellers are not eligible to win
13 the Buy Box if they offer a lower price for the same product off Amazon. ACSO
14 believes that the Competitive External Price policy complements the Amazon
15 Marketplace Fair Pricing Policy and is reinforced by the Account Health Rating Policy.
16 However [and this is important] the operation of and interaction between the different
17 policies (which are henceforth referred to ... as 'price parity policies') will be a matter
18 for disclosure and/or witness evidence in due course."

19 MR BANKES: Subject to the first four words of paragraph 7, "Pursuant to the BSA".

20 So, the BSA is the origin of all these various policies.

21 MR LASK: There is a dispute about the significance of the BSA to the competitive
22 external pricing policy. It's common ground that the BSA obliges sellers to comply with
23 those two policies described at 7.1 and 7.2.

24 MR BANKES: Similarly, when we looked (inaudible) now, when it talks about "the
25 policies", it defines them as "for example" or "in particular". It doesn't exclude other
26 policies.

1 MR LASK: On the face of it, it doesn't exclude other policies. My submission is not
2 that in a case run purely by Stephan, the CEPP -- the competitive external price
3 policy -- would never come up. I'm not saying it wouldn't come up. What I'm saying
4 is that it's not pleaded, and so at the very least, that suggests it's not going to be the
5 focus or it's unlikely to be the focus of Stephan's claim and the way in which that claim
6 is prepared for trial; whereas by contrast, it is integral to ACSO's claim. So, if ACSO
7 is able to play an active role in the proceedings, it is likely a very important focus of
8 the way ACSO prepares the case, for trial.

9 THE CHAIR: Can I just understand something? Your case is on the basis of price
10 parity, you say, a price parity obligation on the sellers, and that is what you're objecting
11 to.

12 MR LASK: Yes.

13 THE CHAIR: And you say it's a hard core restriction; in other words, that they cannot
14 sell off-Amazon, on another marketplace, for less than they sell on Amazon. That is
15 the conduct that you're objecting to.

16 MR LASK: Yes.

17 THE CHAIR: That's what you described as a retail parity obligation.

18 The Stephan allegation, it seems to go a bit wider, because they apply the policy as
19 covering not only the seller who itself is selling on another marketplace -- their
20 price -- but also that it would apply if a quite separate unconnected seller sells at
21 a significantly lower -- depending on what "significant" means -- price on another
22 market, which is a different restriction or broader restriction. You are not attacking that
23 element.

24 MR LASK: No, we are.

25 THE CHAIR: You are.

26 MR LASK: That element you've described is the market marketplace fair pricing

1 policy, and we do challenge that.

2 THE CHAIR: But that's not a price parity policy. That's saying you've got to be
3 competitive on Amazon with other sellers off-Amazon.

4 MR LASK: What our pleaded case -- it's not important to us whether you call it a price
5 parity policy or not. Our pleaded case is that it prevents or strongly discourages sellers
6 pricing lower off-Amazon than on Amazon. So, we make the same --

7 THE CHAIR: But you describe it repeatedly --

8 MR LASK: We do --

9 THE CHAIR: -- as a price parity policy, and you say it's a hard core restriction. The
10 hard core restriction, as I understood it, is that you're restricted on selling your product
11 more cheaply elsewhere.

12 MR LASK: Yes.

13 THE CHAIR: It's nothing to do with having to have a competitive price with your
14 competitors.

15 MR LASK: But our case is that it does both: it does prevent sellers from pricing lower
16 off Amazon than on Amazon, because it imposes a benchmark that is derived from
17 off-Amazon prices.

18 THE CHAIR: Yes.

19 MR LASK: So, if a seller chooses to price its own product off Amazon lower than on
20 Amazon, that's a surefire way of being in breach of the policy.

21 THE CHAIR: Yes, but if the seller prices its product at the same level off Amazon and
22 on Amazon, but there's another seller, not on Amazon at all --

23 MR LASK: Yes.

24 THE CHAIR: -- and it sells it more cheaply off Amazon.

25 MR LASK: Then it could still be in breach of the policy.

26 THE CHAIR: Yes, that's not price parity as normally understood.

1 MR LASK: Well, in my submission, it goes wider than price parity.

2 THE CHAIR: Yes.

3 MR LASK: The important point for present purposes is that Stephan's claim is not
4 broader than ACSO's; it's narrower, because --

5 THE CHAIR: I just want to understand ACSO's claim at the moment. If I look at
6 paragraph 193, page 61 in the bundle. (Pause)

7 "193.1. The Amazon Marketplace [FPP] ... allows Amazon to [do these various things].
8 If a third-party seller attempts to offer lower prices for their products through other
9 sales channels."

10 And then on the other policy, the CEP at 202 on page 63.

11 MR LASK: Yes.

12 THE CHAIR: Amazon's competitive external price policy:

13 "... third-party sellers are not eligible to win the Buy Box if they offer a lower price for
14 the same product through other sales channels, including other e-commerce platforms
15 and online retailers..."

16 So, whatever the policies may be, the abuse that you seem to allege is regarding the
17 restriction on a seller pricing lower for its product on another platform than it does on
18 Amazon. That's, as I understood it, why you invoke the CMA guidance.

19 MR LASK: Yes.

20 THE CHAIR: You describe (inaudible) WRPO. (Pause)

21 You refer to a WRPO at paragraph 153 on page 47.

22 MR LASK: Yes.

23 THE CHAIR: Quoting from the CMA guidance:

24 "... 'a restriction by reference to any of the supplier's indirect sales channels ... which
25 ensures that prices or other terms and conditions at which a supplier's products are
26 offered to end users on a sales channel are no worse than those offered by the

1 supplier on another sales channel."

2 MR LASK: Yes.

3 THE CHAIR: That is a very specific restriction. And that certainly, on the pleading,
4 seems to be what you are attacking. No, you're also saying it's anti-competitive to say
5 (inaudible) price higher than independent sellers for a similar product on another
6 channel, that's rather different and may have quite different connotations. But where
7 is that pleading?

8 MR LASK: May I show you page 65.

9 THE CHAIR: Yes.

10 MR LASK: Footnote 129. Sir, this is why I emphasised a moment ago that the fact
11 that the precise scope and operation of these policies is going to be a matter for
12 disclosure. There is an information asymmetry here; our case is based on publicly
13 available materials. But the point you've been making, sir, is acknowledged at
14 footnote 129, where we say that the policies appear to go even further --

15 THE CHAIR: Yes.

16 MR LASK: -- than traditional (overspeaking).

17 THE CHAIR: Well, you recognise that. That's clear from the quote of the CEPP, but
18 I didn't understand that that is what you are complaining about.

19 MR LASK: Well, sir, if I could show you paragraph 245, page 78. (Pause)

20 This is a paragraph that I'll be coming back to in relation to Amazon's strike-out
21 application.

22 THE CHAIR: Yes.

23 MR LASK: But this really summarises our case under chapter 1:

24 "As explained in Section 6.2 above, Amazon's price parity policies amount to (or are
25 given effect through) the following agreements and/or concerted practice ..."

26 And then you'll see subparagraph 245.1 refers to the BSA; 245.2 refers to the

1 Marketplace Fair Pricing Policy and Account Health Rating Policy; and 245.3 is the
2 CEPP --

3 THE CHAIR: Yes, and then it says Amazon utilises the CEPP policy to ensure they
4 do not offer a lower price for the same product off Amazon.

5 MR LASK: Yes, so the case is that it goes further than simply applying to that seller's
6 own off Amazon prices. But that doesn't diminish the effect it has on that seller's
7 pricing.

8 THE CHAIR: Well, you might be able to run a case, I don't know, and it may be
9 Stephan is. There's a recent German decision dealing with a wider restriction as is
10 referred to in your footnote.

11 MR LASK: Yes.

12 THE CHAIR: But I mean, look at the summary in 245.5.

13 MR LASK: Yes.

14 THE CHAIR: It's all about sellers offering lower prices on rival platforms than on
15 Amazon.

16 MR LASK: Yes.

17 THE CHAIR: It's not about requiring sellers to charge no more on Amazon than other
18 sellers may do for competing products off Amazon.

19 MR LASK: Sir, maybe we're talking at cross purposes. The point I'm making is that
20 whilst the policy goes further than a conventional WRPO, it has at least the effects that
21 a conventional WRPO would have on the pricing of the seller concerned. That's what
22 we've sought to encapsulate at 245.5.

23 THE CHAIR: I understand that. My point is, whether it is the WRPO aspects that you
24 say are unlawful, or whether you say that further aspects are also unlawful. That's
25 what I'm trying -- as I read the pleading, although you recognise that it may go further,
26 you don't seem to be contending that the further aspects are also unlawful. That's

1 what I'm trying to understand.

2 MR LASK: Well, yes. I'll be corrected by those behind me if I misspeak, but I think it's
3 right to say that the challenge is against the WRPO aspects of the policy. However,
4 the fact that the policy goes further than a conventional WRPO is an important part of
5 the factual matrix.

6 Just to illustrate that, if one looks at paragraph 205 on page 64. (Pause)

7 This is similar to a point that Stephan makes:

8 "Amazon defines a 'Competitive External Price' as 'the lowest price for an item, or
9 items that customers may consider to be equivalent, recently found at another
10 reputable retailer outside of the Amazon store.' Importantly, Amazon does 'not reveal
11 the names of the retailers' it monitors, and therefore in practice, third-party sellers must
12 maintain price parity across all sales channels since the 'Competitive External Price'
13 could refer to the price offered at any 'reputable retailer' anywhere else on the internet.
14 As Amazon internally acknowledges, 'we are deliberately providing limited information
15 about how we generate competitive prices.'"

16 THE CHAIR: Yes.

17 MR LASK: The key point for my purposes is although the policy appears to go further
18 than a conventional WRPO, it has at least the same effects as a conventional WRPO,
19 and paragraph 205 is one of the reasons for that. (Pause)

20 THE CHAIR: Yes. Might be relevant to the counterfactual. (Inaudible) what is
21 unlawful.

22 MR LASK: Yes, I accept that, sir.

23 THE CHAIR: Yes.

24 MR LASK: I was addressing you on the differences between the Stephan pleaded
25 case and the ACSO pleaded case. You'll have seen that Stephan has put in some
26 written observations for this hearing in which he says we've misunderstood the

1 pleading. The only point I'd make in response to that is: one can see that the Stephan
2 pleading doesn't mention the competitive external price policy, and neither does its
3 reply to Amazon's defence.

4 As I said, the point is not that it will never come up in Stephan's claim, but the point is
5 it's less of a focus than is in the ACSO claim. Actually, the points that Stephan makes
6 in relation to the pleaded case and what might flow from that in terms of disclosure
7 really underline the point I'm making. Because if ACSO and Stephan are able to work
8 together to advance their price parity claims, they would seek to resolve these sorts of
9 issues collaboratively. They'd be able to exchange views on the similarities and
10 differences and how best to take those claims to trial. But under a watching brief, none
11 of that would be possible.

12 THE CHAIR: Yes, no.

13 MR LASK: Sir, I said I had four points in response to Amazon's case and certification.
14 Fourth point is that it's simply unnecessary to confine ACSO to a watching brief or brief
15 legal submissions at trial. I've already addressed you on the measures ACSO has
16 taken and is taking to co-ordinate with the other class representatives and reduce its
17 costs, but if the tribunal wishes to exercise more active supervision over costs, it has
18 the case management tools to do so.

19 If we could go, please, to bundle I, I'd like to illustrate this point by reference to some
20 observations made by the president in the Airwave case. Bundle I, tab 4, page 158.

21 THE CHAIR: This is a transcript of --

22 MR LASK: The transcript of a CMC on 4 March. 4 March this year.

23 THE CHAIR: Yes.

24 MR LASK: And at 158, line 1:

25 "Well, we will order a cost budget to be provided by the Defendants."

26 I think the dispute was whether there should be a requirement to put in a budget by

1 both sides.

2 THE CHAIR: Yes.

3 MR LASK: "We think that it is right to put the parties on an equal footing, as
4 Mr Armitage has said, in terms of the Tribunal's cost management. As I said in my
5 discussion with counsel, there is a general concern within the Tribunal about the
6 management of the costs of collective actions, and it is important that the Tribunal has
7 oversight of the costs of collective actions along the way if the Tribunal is going to
8 meaningfully exercise control over the costs that are being incurred, and in order to do
9 that properly that needs to be on the basis of information provided on both sides as to
10 the expectations of costs and the costs actually incurred."

11 And at line 15:

12 "There is no suggestion immediately that there should be a separate cost budgeting
13 hearing, but the point is that if there is visibility on both sides, then either side can ask
14 the Tribunal to take action and make appropriate orders along the way, if thought
15 appropriate, but that can't even happen if there isn't proper and comparable visibility
16 of the costs being incurred and anticipated to be incurred on both sides of these
17 proceedings."

18 THE CHAIR: Yes.

19 MR LASK: A similar point was made in the Brook judgment we just looked at
20 a moment ago. I won't take you back to it. It's paragraphs 84 to 85 of that judgment.
21 The point is that unless the cost-benefit analysis weighs clearly against certification,
22 the tribunal's practice is to address any concerns it has about the costs of collective
23 proceedings by exercising cost management, not by refusing certification altogether.
24 In this case, ACSO has been proactive about this, and I can show you that in bundle F,
25 tab 74. (Pause)

26 THE CHAIR: Page?

1 MR LASK: Sorry, page 472. (Pause)

2 This was a letter that ACSO's solicitors wrote to Amazon's solicitors in July.

3 Paragraph 2:

4 "Under Clause 4.1.21 of the LFA, ACSO has agreed to 'make an application for costs
5 budgeting following the [making of a] CPO, unless the Solicitors or Counsel advise
6 that the prospects of such an application succeeding are less than 50 per cent'.

7 Without any waiver of privilege, ACSO confirms it will be seeking an order for cost
8 budgeting following certification of the ACSO Claim. ACSO considers such an order
9 will provide the Tribunal with ongoing visibility over the costs of the ACSO Claim and
10 facilitate the Tribunal exercising control over those costs. ACSO considers this to be
11 plainly in the interests of the consumer class, which it seeks to represent.

12 "3. For the avoidance of doubt, ACSO's proposal would apply to the incurred and
13 estimated future costs of both ACSO and Amazon. Both parties would be required to
14 file cost budgets with the Tribunal, and to keep those budgets updated as the
15 proceedings progress, such that the Tribunal is kept apprised on an ongoing basis of
16 the costs incurred by the parties to the ACSO Claim."

17 MR BANKES: Isn't that just an illustration of the rather unfortunate consequence of
18 the LFA? In the event that you have a striking success but incur very little cost, what
19 you're doing is you're shifting the burden of repaying the LFA from Amazon, because
20 they won't have to pay as much costs as if you were inefficient, onto the class who
21 have to pay more, because the amount to be paid back on the LFA doesn't change.
22 You're just moving cost from Amazon to the class.

23 MR LASK: Well, I'm not sure I quite follow the point, sir.

24 MR BANKES: My point is that the return on the LFA is set by reference to the allocated
25 funds.

26 MR LASK: Yes.

1 MR BANKES: By the (inaudible) funds. So, the repayment amount under the LFA is
2 not moved by cost efficiency. So however efficient your costs, (inaudible) pay the
3 same return. But all that happens is that if your costs are efficient, Amazon pays you
4 less, because you incurred less. Someone else has got to make up the difference,
5 and that's the class.

6 MR LASK: Yes.

7 MR BANKES: So that the consequence. That's why the funder here is --

8 MR LASK: Well, to some extent, at least, that's inherent in the regime.

9 MR BANKES: And unfortunate.

10 MR LASK: Yes. The costs do have to be paid by someone. But the point that I'm
11 making by reference to this letter is that where there is an objection -- and there is an
12 objection by Amazon that the budgeted costs are too high -- that the way to deal with
13 that sort of concern is for the tribunal to exercise cost management, not to refuse
14 certification. Of course, when it comes to returns at the end of a successful claim, as
15 the tribunal has already reminded us, that is always subject to the supervision of the
16 tribunal in any event. But one can see from this correspondence that ACSO is serious
17 about controlling costs in the interests of the class, and it is being proactive in that
18 respect.

19 Amazon's response to this, which is at tab 79, page 489, was essentially to say, "Well,
20 this is all premature, because we don't think you should be certified at all". I do say
21 that one might have expected a more constructive response from Amazon, given its
22 apparent concerns about costs, even if that response was without prejudice.

23 THE CHAIR: That doesn't matter to your point. You're saying that the tribunal --

24 MR LASK: The important point is the tribunal has the tools.

25 THE CHAIR: Yes.

26 MR LASK: Yes. So, the draconian measures intended for by Amazon are not only

1 unfair, they're also unnecessary.

2 Subject to any questions you have, that brings me to the end of my submissions on
3 certification, and the next broad topic is expert evidence. But that might be
4 a convenient moment to break.

5 THE CHAIR: We'll come back at 1.55.

6 (1.00 pm)

7 (The short adjournment)

8 (2.00 pm)

9 THE CHAIR: Yes. Thank you.

10 MR LASK: Moving on now to the second item on the agenda, which is expert
11 evidence.

12 Expert evidence

13 There are two central issues in relation to the expert evidence. First is whether
14 Dr Bagci's methodology satisfies the Microsoft test; we say it does. Second is whether
15 Dr Bagci's methodology should nevertheless be excluded on the grounds that it is
16 unnecessary. We say it should not be.

17 I propose to address the Microsoft issues first, because they are more technical, and
18 it seems to me that earlier in the afternoon is a better time to deal with the more
19 technical issues; and also because, of course, if the tribunal is against us on that issue,
20 then the arguments as to whether Dr Bagci's evidence is necessary fall away.

21 By way of introduction, Dr Bagci has proposed methodologies for both Trial 1 and
22 Trial 2. I propose to address Trial 2 first, because it is the main focus of the party's
23 evidence and submissions.

24 Dr Bagci's primary methodology is a structural model based on the work of
25 Boik and Corts. If I could ask you please, to turn up Bagci 1, bundle A, tab 6,
26 page 298.

1 Here, Dr Bagci introduces the Boik and Corts framework, which is:

2 "A seminal paper by Boik and Corts (2016) provides a theoretical framework to assess
3 the price effects of WRPOs imposed by intermediary platforms on third-party sellers.
4 It has been referred to in various antitrust investigations, including but not limited to
5 the CMA's investigation into price comparison websites ... Given its wide application
6 in the analysis of MFN clauses and WRPOs in an antitrust context, I intend to use the
7 BC model to analyse the retail price effects of Amazon's WRPOs and use the results
8 of that analysis as inputs in my proposed damages calculation."

9 200 introduces the model at a high level. Using a --

10 THE CHAIR: If I can just interrupt you for a second. Of course, I haven't read the
11 article, but as I understand it from this, it is about a WRPO as defined.

12 MR LASK: It is.

13 THE CHAIR: It's not about the sort of broader restriction on --

14 MR LASK: That's certainly my understanding. I'll be corrected if I'm wrong, but that's
15 my understanding, yes.

16 200:

17 "Using a symmetric two-platform model in which both platforms face the same
18 demand, both impose WRPOs and set commissions at the same time. Boik and Corts
19 find WRPOs tend to raise platform commissions and retail prices charged by sellers.
20 Boik and Corts find that, with WRPOs, 'competition among platforms is softened and
21 that fees may increase relative to those in a scenario with more unrestricted
22 competition, with a similar effect on sellers' prices.' They also show that the adoption
23 of WRPOs by an incumbent platform can discourage entry by lower-cost platforms if
24 there is differentiated competition (and encourage entry by higher-cost platforms)."

25 THE CHAIR: Yes.

26 MR LASK: Then on page 301, paragraph 205, Dr Bagci refers to some empirical

1 evidence, "Empirical evidence from the economic literature supports the findings of
2 the BC model". Perhaps I could ask the tribunal to read to itself the rest of
3 paragraph 205. (Pause)

4 THE CHAIR: Yes.

5 MR LASK: We've made the point in our reply at paragraphs 127 to 131 that the model
6 has been used in various competition investigations and is currently being used in the
7 US class action proceedings against Amazon in relation to the same policies. (Pause)

8 Paragraph 127 to 131. That's A, tab 3, page 180.

9 We say at paragraph 131:

10 "In the De Coster and Frame Wilson class actions against Amazon in the
11 United States, the plaintiffs rely on expert evidence based on the Boik and Corts
12 model. Amazon sought to exclude that evidence using very similar arguments to those
13 that it advances in its Response. The US Federal District Court rejected those
14 arguments."

15 Those proceedings, the De Coster and Frame Wilson proceedings, I think I'm right in
16 saying that those form part of the other proceedings for the purposes of the initial
17 disclosure that Amazon is providing in the Stephan and Hammond cases.

18 If one goes to Bagci 3, at bundle A, tab 10, at page 476, one sees Dr Bagci's
19 description of her adaptation of the Boik and Corts model. I say description; this is
20 a summary. At paragraph 10, she makes the point that structural models are
21 particularly useful for counterfactual analysis.

22 Paragraph 11, "My proposed model is adapted from the framework developed by
23 Boik and Corts to analyse platform parity clauses". Then at paragraphs 12 to 13, she
24 describes what she intends to do.

25 Paragraph 14:

26 "The baseline model necessarily simplifies some features of the market ... these are

1 modelling choices rather than factual assumptions about the market. I would assess
2 their appropriateness against the evidence and, where a particular simplification is
3 inconsistent with the factual evidence, test and economically appropriate alternative
4 specification."

5 Paragraph 15, "The model would be implemented using case-specific evidence ..." I'll
6 show you that by way of introduction to the issues, and of course, Amazon's challenge
7 to the Boik and Corts methodology is founded on the Microsoft test.

8 The relevant principles regarding the Microsoft test are, as we understand it, common
9 ground. I'll deal with them briefly.

10 If we could go, please, to bundle D, tab 1, page 32, this is the tribunal's CPO judgment
11 in Hammond and Stephan.

12 THE CHAIR: Yes.

13 MR LASK: If I could ask the tribunal, please, just to cast its eye over paragraph 76 to
14 79(1). This will all be very familiar to the tribunal, but here the tribunal sets out the
15 basic principles that apply to Microsoft. (Pause)

16 We do emphasise what the tribunal says in paragraph 79(1) where it helpfully
17 encapsulates what the test is and is not about. The question is whether the method
18 is plausible, coherent, and workable, as opposed to purely hypothetical or unclear or
19 impractical. Intense granular dissection of the method is therefore to be avoided,
20 because it cannot properly be assessed without cross-examination.

21 In my submission, Dr Bagci's methodology does clearly satisfy the Microsoft test.
22 Amazon's five criticisms of the methodology supported by Mr Holt do not show
23 otherwise, and I say five, because the first of the original objections has fallen away.
24 That was in relation to an alleged oversimplification that Mr Holt raised in his first
25 report, but confirmed in his summary report that it was no longer a significant concern;
26 paragraph 2.2.3 of his summary report.

1 But the objections that do remain: objection 1; the primary argument advanced by
2 Amazon and Mr Holt is that Dr Bagci's model bakes in the result. In particular, they
3 say the model will always show that the price parity policies lead to higher prices,
4 whether that is in fact true or not.

5 Dr Bagci has explained why that is wrong. In summary, it depends on a series of
6 numerical simulations conducted by Mr Holt, which are unreliable because they only
7 test a restricted and unrealistic version of Dr Bagci's model. I'm going to come on to
8 elaborate on this, but in particular, Mr Holt's version of the model and Amazon's entire
9 argument under this heading requires the tribunal to accept at the certification stage
10 that Amazon's platform commissions can have no impact on a seller's assessment of
11 whether to retail its products on Amazon's marketplace, and that the possibility of
12 sellers withdrawing their products from the marketplace because of high selling costs
13 can have no impact on Amazon's commission setting. That is the entire premise for
14 this objection.

15 We say that is inherently improbable, but in any event, it is quite obviously an evidential
16 question to be tested at trial. It's not an issue that can sensibly be determined at
17 certification. Dr Bagci has rerun the simulations without the restriction imposed by
18 Mr Holt, and has shown that the outcome is not baked in. Mr Holt does not dispute
19 the accuracy of Dr Bagci's results.

20 MR DERBYSHIRE: Can I ask a question about that?

21 MR LASK: Yes.

22 MR DERBYSHIRE: Which is: the rerunning of the model where you don't have that
23 restriction; does that assume every seller is on the indifference point between leaving
24 the platform and not leaving the platform?

25 MR LASK: It doesn't.

26 MR DERBYSHIRE: It doesn't.

1 MR LASK: It doesn't, and I'm going to come on and deal with that specifically by
2 reference to Dr Bagci's evidence.

3 MR DERBYSHIRE: Okay.

4 MR LASK: On that point, the tribunal will have seen references in the experts' reports
5 and the written submissions to situations where the participation constraint
6 binds -- that is a technical economic term -- and it means situations where a platform's
7 commission setting is potentially constrained by the possibility of sellers leaving the
8 platform.

9 Now, I'll address the two main arguments raised by Mr Holt: first, I will explain why his
10 numerical simulations are unreliable; and second, I will address Mr Holt's new
11 argument that the participation constraint is not likely to be relevant in reality.

12 If we could start, please, by going to Holt 1, bundle A, tab 9, page 442. You'll see that
13 the heading, two-thirds of the way down the page, "Dr Bagci's model bakes in her
14 result by construction", and then over the page at 443, paragraph 2.3.7:

15 "I examined several million parameter combinations drawn from predetermined
16 intervals and tested the sensitivity of the results to the intervals. The result of that
17 exercise is stark. In every economically realisable parameter combination I examined,
18 Dr Bagci's model predicts that WRPOs raise Amazon's equilibrium commission. I did
19 not identify a single economically realisable combination in which WRPOs lowered
20 equilibrium fees if I restrict the analysis to credible results where quantities are
21 non-negative. In other words, WRPOs necessarily increase equilibrium fees and retail
22 prices in Dr Bagci's model if I focus the assessment on parameter values that satisfy
23 the relevant conditions set out in Dr Bagci's model.

24 "2.3.8. Therefore, the direction of the result is fixed by the construction of the model
25 and does not depend on the facts. Whatever the true values of the demand and cost
26 parameters turn out to be on calibration to real-world data, the model is, so far as I've

1 | been able to establish, incapable of returning any answer other than the WRPOs raise
2 | prices.

3 | "2.3.9. That feature is fatal to the use Dr Bagci wishes to make of the model."

4 | And just halfway through that paragraph:

5 | "... a model that is structurally guaranteed to generate a counterfactual price below the
6 | factual price for every realisable calibration cannot be used to test whether the Alleged
7 | Conduct in fact raises prices: it assumes the very proposition it is being used to
8 | demonstrate. The exercise is, in that sense, circular. The answer to the qualitative
9 | question -- do WRPOs raise prices? -- is not discovered from the data; it is written into
10 | the model before any data is seen."

11 | Now, Mr Holt leaves the reader in no doubt as to his conclusions on Dr Bagci's model.
12 | What he fails to mention, however, is that he imposed a very significant restriction on
13 | Dr Bagci's model before he ran his several million simulations; a restriction which
14 | turned out to be decisive, enabling him to make the argument that Dr Bagci's model
15 | bakes in the result.

16 | Now, in fairness to Mr Holt, he didn't omit the point from his report altogether; it can
17 | be found in a footnote to his technical annex. I'm going to show you. We do say,
18 | however, that one might expect a point of such importance to be ventilated in the main
19 | body of the report, particularly when the expert is expressing his conclusions in such
20 | strident terms.

21 | Now, if we could go, please, to page 455. This is Mr Holt's "Technical Annex", and
22 | one sees in footnote 40:

23 | "I acknowledge that as described by Dr Bagci in Appendix D ... the expression of the
24 | equilibrium fee set by Amazon depends on whether the seller's participation constraint
25 | binds. However, I focus here on the case where this constraint does not bind ... as
26 | this ensures the existence of a closed-form solution (i.e., an explicit formula for

1 Amazon's equilibrium fee). Dr Bagci does not appear to have found a closed-form
2 solution where the participation constraint binds ... which means it is materially more
3 complex to compare equilibrium fees in that case."

4 So, the reason Mr Holt is giving appears to be one of mathematical convenience; he
5 wants to use a closed-form solution, so that's why he restricts the model as he does.
6 What he doesn't say is that it's unlikely to be realistic to have a situation where the
7 participation constraint binds. As you'll see, that argument comes later, but that's not
8 the reason originally given for his modelling choices.

9 Now, Dr Bagci's response to this, as I'm going to show you, is that this restriction
10 imposed by Mr Holt renders the simulations unreliable, because by excluding the
11 participation constraint, he hasn't simulated Dr Bagci's model, but rather a different
12 model that removes a basic element of seller and platform behaviour.

13 Now, whether that is a defensible modelling choice is a question of how the model
14 should be specified, but that needs to be tested on the evidence at trial. What you
15 can't do is slip this restriction into the modelling at the certification stage, and then use
16 it to argue that Dr Bagci's model is unworkable.

17 To show you what Dr Bagci says about this, if we could go, please, to bundle A, tab 10,
18 page 481. (Pause)

19 And could I ask the tribunal, please, to read paragraphs 23 to 25?

20 THE CHAIR: 23 to 25?

21 MR LASK: Yes, please.

22 THE CHAIR: On what page?

23 MR LASK: Page 481. (Pause)

24 This is obviously very important. Mr Holt's simulations ignore the possibility that the
25 platform's commission setting may be potentially constrained by the need to keep
26 sellers on the platform. It assumes that sellers will always find it more profitable to

1 multi-home, regardless of Amazon's commissions, and that the possibility of sellers
2 withdrawing their products from the Marketplace is incapable of constraining Amazon's
3 commissions under his simulations.

4 Dr Bagci considers that, in reality, there is going to be a level of commission that would
5 cause sellers to leave the platform, and that this possibility may affect the platform's
6 commission setting, and she considers that that should be reflected in the model. As
7 you've seen when she reran the simulations without Mr Holt's restriction, her results
8 showed that an effect on commissions is not predetermined by the construction of her
9 model.

10 Now, if we could go, please, to Amazon's skeleton argument, which is in bundle C,
11 tab 2, page 39. (Pause)

12 Two points.

13 THE CHAIR: Can you give me the page number within the skeleton?

14 MR LASK: Sorry, it's the internal page number 10.

15 THE CHAIR: Thank you.

16 MR LASK: There are two points I wish to make in relation to paragraph 31. In the first
17 line, Amazon says:

18 "Dr Bagci does not challenge the results of Dr Holt's simulations."

19 But that is with respect misleading because she challenges the entire premise of his
20 simulations. That's clear from what I've just shown you in Bagci 3. And second, it
21 goes on to say that:

22 "... [she] expressly accepts that in circumstances where the seller prefers to sell on
23 both Amazon and eBay, her model always produces a higher Amazon commission
24 with the WRPO than without."

25 Now, in my submission, that is exactly the sort of proposition that ought to be put to
26 an expert in cross-examination. Without the opportunity for cross-examination, it

1 needs to be treated with extreme caution. Dr Bagci hasn't had a chance to respond.

2 In fact, Amazon's argument does not fairly reflect Dr Bagci's evidence. One can see

3 that by going to her summary report in bundle A at tab 15 at page 652. (Pause)

4 To be clear, the passage I've just shown you from Amazon's skeleton cites

5 paragraph 30 of Dr Bagci's summary report. That's what I want to show you.

6 Paragraph 30, page 652. (Pause)

7 She says in paragraph 30, second sentence:

8 "I do not dispute that, in the restricted cases examined by Mr Holt in which the seller

9 continues to participate on both platforms and the participation constraint does not

10 bind, the model produces a higher Amazon commission with the WRPO than without

11 it."

12 And, so, Dr Bagci does not expressly agree that her model always produces that result

13 whenever the seller continues to sell on both platforms; it only produces that result

14 where the seller continues to sell on both platforms and the participation constraint

15 does not apply. In other words, when the model is restricted, according to Mr Holt's

16 approach. (Pause)

17 I'm instructed that this is because, in Dr Bagci's model, the possibility that a seller may

18 leave the platform if commissions are too high can constrain Amazon's commission

19 setting, even if the seller ultimately elects to remain on Amazon. So, it's therefore --

20 MR PICCININ: What we say in the skeleton argument has just been mischaracterised

21 here. If you look at paragraph 31 of our skeleton, page 39 of bundle C, what we said

22 is that Dr Bagci does not challenge the results of Mr Holt's simulations, and indeed

23 expressly accepts that in circumstances where the seller prefers to sell on both

24 Amazon and eBay -- in other words, where they're not indifferent, where they prefer to

25 sell on both Amazon and eBay -- the model always produces a higher Amazon

26 commission with the WRPO than without, and that's exactly what Dr Bagci says in her

1 report in the paragraph we've just seen.

2 THE CHAIR: How does Amazon know that the seller prefers to sell on both?

3 MR PICCININ: This is entirely theoretical; that's not a thing Amazon could ever do.
4 That's the point I'll get on to.

5 THE CHAIR: No, but --

6 MR PICCININ: But in the model, sir, that's the point.

7 THE CHAIR: Yes, but the reality is Amazon will never know what the seller's
8 preference is, and therefore may have to take into account the possibility that the seller
9 may leave. That's the point.

10 MR PICCININ: Well, no doubt that's right, sir, but the situation where the participation
11 constraint binds is the situation where the only seller -- because Dr Bagci only models
12 one; you could take that to mean all of the sellers -- is exactly indifferent between
13 staying on both Amazon and eBay, or using eBay alone. It is only in the circumstance
14 where Amazon's commission is set at precisely the number of pennies that makes the
15 sellers -- all of them -- completely indifferent between operating on both and operating
16 exclusively on eBay, leaving Amazon in their entirety, that you can get lower prices in
17 the presence of WRPOs in her model. That's what she says in the paragraph of her
18 report to which we referred.

19 THE CHAIR: Thank you. We'll let Mr Lask continue.

20 MR LASK: I don't need to place any gloss on what Dr Bagci says in paragraph 30.
21 The tribunal can read it for itself. The submission I make is that what is said in
22 paragraph 31 of Amazon's skeleton does not fairly reflect what Dr Bagci says in
23 paragraph 30 of her report.

24 The important point is that it is not correct to say that Dr Bagci's model necessarily
25 produces a higher commission with the WRPO whenever the seller sells on both
26 platforms.

1 That takes me to Mr Holt's second argument, and indeed the point that Mr Piccinin has
2 just been making: when Dr Bagci in Bagci 3 pointed out the restriction that Mr Holt had
3 imposed on her model, Mr Holt doubled down and sought to justify his approach with
4 a new argument. Thus, in his summary report, he says:

5 "It is not likely the participation constraint would be binding on sellers in reality."

6 That's what he says at paragraph 2.3.2(a), and also 2.3.11 to 2.3.12. Now, Dr Bagci --

7 THE CHAIR: Sorry, summary report?

8 MR LASK: Yes, Mr Holt's summary report, which is bundle A, tab 14, page 623. You'll
9 see paragraph 2.3.2 and then subparagraph (a). It's really the end of this
10 subparagraph which is on page 624, he says:

11 "... it is, however, not likely that the participation constraint would be binding on sellers
12 in reality. Even if this may be the case for some sellers, there's a question of the
13 proportion of sellers and the length of time for which this would be the case. As such,
14 the points raised in Bagci 3 do not resolve my concerns in this respect."

15 And he elaborates at 627, paragraphs 2.3.11 and the following.

16 THE CHAIR: Yes.

17 MR LASK: Now, Dr Bagci does not agree with Mr Holt that it is not likely that the
18 participation constraint would be binding in reality. There are three points: first is that
19 paragraph 2(d) of her summary report, which is at bundle A, tab 15, page 643:

20 "In his summary report, Mr Holt presents a new argument that he did not run the
21 simulations on my complete model because he considers the inclusion of the
22 participation constraint is unlikely to be empirically relevant. He has not adduced any
23 empirical or documentary evidence to support this claim. My complete model includes
24 the seller's participation decision, allowing the model to capture the possibility that
25 third-party sellers, whose participation is relatively responsive to changes in
26 commissions ... may reduce their presence on Amazon or delist if further increases in

1 commissions make alternative channels more profitable. Whether this possibility
2 materially constrained Amazon's commission-setting is an empirical question that can
3 be assessed against evidence concerning sellers' outside options, multi-homing
4 behaviour, participation decisions and responses to marketplace commissions."

5 Dr Bagci's first point is that the issue raised by Mr Holt is an empirical question; that's
6 obviously important because the tribunal does not have before it the evidence needed
7 to assess whether, in reality, Amazon's commission setting may be constrained by the
8 possibility of sellers reducing their presence on the platform. In other words, the basis
9 on which Amazon is now challenging Dr Bagci's methodology is untestable at this
10 stage.

11 Indeed, I do say that the argument now advanced by Mr Holt and Amazon is precisely
12 the sort of argument that one would expect to encounter at trial, where experts'
13 modelling choices can be properly assessed on the evidence; it does not fall within the
14 Microsoft test. That's the first point.

15 The second point is at paragraph 31 on page 653 of Dr Bagci's summary report.
16 (Pause)

17 Paragraph 31:

18 "Contrary to Mr Holt's assertion, allowing sellers to decide whether to participate is an
19 economically relevant feature of the model: it captures the basic possibility that
20 a platform's charges may affect whether sellers continue to participate. If that
21 participation decision is excluded, the model rules out the possibility that sufficiently
22 high commissions cause some sellers to reduce or cease their participation on
23 Amazon, and therefore removes one potential constraint on Amazon's
24 commission-setting. Whether that mechanism materially constrained Amazon's
25 commission-setting in practice should be determined from the evidence; it cannot, in
26 my view, be resolved by assuming away the seller's participation decision in the

1 simulations used to criticise the model."

2 Dr Bagci's second point is that it is relevant, in her view, from an economic perspective,
3 to consider whether a platform's charges may affect sellers' participation, whether that
4 possibility may constrain commission setting.

5 For the third point can we go, please, to page 651. This is the indifference point. If
6 I could ask the tribunal, please, to read paragraphs 26 to 29. (Pause)

7 This is the indifference point, or what Amazon refers to as the "magic number" in its
8 skeleton argument. This criticism, advanced by Mr Holt and Amazon, is premised on
9 the notion that the participation constraint is only relevant in Bagci's model if, in reality,
10 Amazon seeks to set its commissions at the exact level makes a seller indifferent
11 between selling on both platforms versus selling exclusively on eBay.

12 But what Dr Bagci's evidence shows is that that premise is false. I emphasise two
13 passages from what you've just read. Firstly, the beginning of paragraph 27:

14 "The economic relevance of the participation constraint does not require Amazon to
15 know each seller's costs or to set its commission at the precise rate that makes each
16 seller indifferent."

17 And then at the end of paragraph 29:

18 "This analysis would not require me to identify a precise commission at which each
19 individual seller is exactly indifferent between remaining on Amazon and its best
20 alternative."

21 And the real question, as she identifies in paragraph 28, is whether there are sellers
22 whose participation is sufficiently responsive to Amazon's commissions that the
23 prospect of losing those sellers may constrain Amazon's commission-setting. That's
24 what she wants to examine on the evidence. What Amazon is trying to do now is use
25 this indifference point, this "magic number", as a means to narrow the situations where
26 the participation constraint is relevant or are vanishingly small set of situations. In my

1 submission, it's clear from Dr Bagci's response that her approach does not rely on
2 Amazon being able to identify that "magic number".

3 Now, if we could go back to Amazon's skeleton on page 40, bundle C?

4 THE CHAIR: Internal page ...

5 MR LASK: I'm sorry, internal page 11.

6 THE CHAIR: Yes.

7 MR LASK: Paragraph 33:

8 "To put the same point another way, Dr Bagci implicitly accepts that her model bakes
9 in the answer for any sellers who would continue selling on Amazon if Amazon
10 increased its commission very slightly. That, in itself, is sufficient to render her model
11 inappropriate."

12 Again, I do say that that really is a cross-examination point, because Amazon has
13 sought to draw an inference from Dr Bagci's evidence. Whether it follows from that
14 evidence Dr Bagci would accept a given proposition is a question that would have to
15 be put to Dr Bagci. Again, I'm instructed that the point is not accepted.

16 To explain it in as simple terms as possible, Amazon's argument treats Dr Bagci's
17 model as though it produces a separate commission result for each seller, but it
18 doesn't; not what her model does. So, Amazon is wrong to suggest that there is some
19 identifiable subset of sellers for whom the result is always baked in; there isn't.

20 Moving on then to Amazon's second objection to Dr Bagci's --

21 THE CHAIR: Yes, just pause a moment. (Pause)

22 Yes.

23 MR LASK: Amazon's second objection to Dr Bagci's methodology concerns the use
24 of a single representative seller in the baseline model. Mr Holt says this is unrealistic
25 because there is competition between sellers. He also says that Amazon's policies
26 may have pro-competitive effects by incentivising sellers to decrease their Amazon

1 | prices. The reference for that is Mr Holt's summary report 2.3.2(b) and 2.3.14,
2 | bundle A, tab 14, pages 624 and 628.

3 | Again, there are three points in response. The first is that Dr Bagci explains that the
4 | use of a representative seller in the baseline model is a modelling simplification, for
5 | which there is good reason. If I could show you, please, Bagci 3. Bundle A, tab 10,
6 | page 483. (Pause)

7 | Paragraph 32:

8 | "The representative seller is a modelling simplification, not an assumption that
9 | competition between sellers is absent in the relevant market. Its purpose is to isolate
10 | the cross-platform mechanism relevant to ACSO's theory of harm: whether WRPOs
11 | restricted or discouraged sellers from reflecting lower rival-platform commissions in
12 | lower retail prices and thereby weakened competition between marketplaces. That
13 | mechanism can in principle operate alongside competition between sellers. The
14 | empirical question is whether omitting seller-to-seller competition materially affects the
15 | model's ability to represent the pricing and competitive relationships relevant to the
16 | analysis."

17 | So, it's a modelling simplification in the baseline model. That's the first point.

18 | Second point is that Dr Bagci intends to test on the evidence whether competition
19 | between sellers, including benchmarking against prices offered by other sellers,
20 | materially affects pricing incentives or model results. If it does, she will incorporate an
21 | extension into the model to account for seller-to-seller competition. She considers that
22 | such an extension is feasible, and draws comfort from the fact that it has already been
23 | done in the US proceedings, with no change to the results.

24 | One can see this from paragraphs 33 to 34 of Bagci 3 on page 484. Perhaps I could
25 | ask the tribunal to read 33 and 34, please. (Pause)

26 | THE CHAIR: Yes.

1 MR LASK: So, Dr Bagci recognises the point; she has a plan for testing the relevant
2 empirical question; and adapting her model depending on the answer. She elaborates
3 on this in her summary report, bundle A, tab 15, page 654. (Pause)

4 Firstly, she elaborates on how she would intend to test the point. She explains this at
5 paragraph 36 and 37, if you could please read those paragraphs. (Pause)

6 So that's the second point. The third point --

7 THE CHAIR: Yes. Sorry, I'm going to have to rise.

8 (2.47 pm)

9 (A short break)

10 (3.09 pm)

11 MR LASK: Thank you. I was dealing with Amazon's second objection under Microsoft,
12 concerning the representative seller modelling simplification.

13 THE CHAIR: Yes.

14 MR LASK: And I said we had three answers to Amazon's complaint, and I was just
15 coming on to the third one. The third is this: given what Dr Bagci has said on this
16 issue, which I've just shown you, Amazon's objection now boils down to a complaint
17 that Dr Bagci has not written down the equations that she would use for a multiple
18 seller extension to her model. That's paragraph 35 of Amazon's skeleton.

19 In my submission, that really does misunderstand the Microsoft test. The question, as
20 this tribunal has held, is whether the methodology is plausible, coherent and workable;
21 it is not whether every possible modification that may be justified on the evidence has
22 been specified in advance.

23 THE CHAIR: Yes.

24 MR LASK: If I could show you, please, paragraph 38 of Dr Bagci's summary report.

25 THE CHAIR: Sorry, the bit in the Amazon skeleton, is paragraph ...

26 MR LASK: 35. Second sentence:

1 "... she has not provided Amazon or the Tribunal with the equations for a model that
2 can take this [effect] into account."

3 Those are the equations for the third-party seller competition modelling extension.
4 Then Dr Bagci addresses this point at paragraph 38 of her summary report. Bundle A,
5 tab 15, page 655. Perhaps the tribunal could read 38, please. (Pause)

6 THE CHAIR: Yes.

7 MR LASK: Dr Bagci has explained why she has not at this stage specified the
8 equations for a multiple seller extension; wanted to base the specification on the
9 evidence, rather than assuming it in advance. In my submission, in the context of
10 a Microsoft assessment, that explanation is unimpeachable.

11 THE CHAIR: Yes.

12 MR LASK: Amazon's third objection relates to the timing of commission setting; in
13 particular, the order in which the platforms envisaged by the model set their
14 commissions. I should say that as we go through the Amazon objections, they are
15 getting deeper and deeper into the sort of intense, granular dissection of the
16 methodology the tribunal has recognised as inappropriate.

17 Dr Bagci, in the context of this complaint, has articulated the assumption that she
18 intends to adopt as regards the timing of commission setting. In my submission, the
19 Microsoft test does not require her to explain in detail for each and every modelling
20 choice how she will adjust the model if the evidence suggests that a different
21 assumption is appropriate.

22 In any event, in response to the points raised by Mr Holt and Amazon, Dr Bagci has
23 addressed the point. It's not tenable for Amazon to contend that in light of this point,
24 the model is unworkable.

25 If I can unpack that a little: it is right that in her first report, Dr Bagci envisaged using
26 sequential commission setting, with Amazon setting its commission first. She made

1 this choice for two reasons. First, it reflected the fact that Amazon was likely to be
2 dominant and therefore likely to be a price leader; that's Bagci 1, paragraph 298,
3 bundle A, tab 6, page 400. Second, it helped avoid an approach whereby Amazon
4 was predicted in the model to randomise its commissions, which Dr Bagci considered
5 unlikely. That's Dr Bagci's summary report, paragraph 39, bundle A, tab 15,
6 page 656.

7 My understanding is that randomising means the platform chooses between two
8 different commission rates by randomising according to probabilities attributed to each
9 commission rate. I derive that from Mr Holt's report at paragraph 2.3.24. That's
10 bundle A, tab 9, page 448.

11 The criticism advanced by Amazon and Mr Holt is that the sequential approach to
12 commission setting is unrealistic, because Amazon's commissions aren't set in stone.
13 They then say that the only alternative, namely a simultaneous approach to
14 commission setting, is unworkable. That's Mr Holt's summary report at 2.3.2(c), and
15 2.3.19 to 2.3.25, bundle A, tab 14, pages 624 and 630.

16 Dr Bagci does not accept either of those propositions, or indeed the binary framing of
17 Amazon's argument. In short -- and I'll come on to show you where she says in her
18 report -- Dr Bagci intends to test the appropriateness of the timing assumption against
19 the evidence when implementing the model. If the evidence does not support
20 a leader-follower relationship, she will consider an alternative timing specification and
21 test whether the conclusions are sensitive to that modelling choice. That alternative
22 specification need not be a strict simultaneous model, because there are more
23 nuanced variations available, including specifications in which the commissions are
24 revised periodically.

25 Just to show you how she deals with this point, it's in the summary report, bundle A,
26 tab 15, page 656. If the tribunal could please read paragraphs 40 to 41. (Pause)

1 Amazon's only answer to this is that Dr Bagci has not begun the work on these
2 specifications. That's footnote 77 of Amazon's skeleton, bundle C, tab 2, page 42.

3 (Pause)

4 THE CHAIR: Sorry, internal page?

5 MR LASK: I'm sorry. Give me one moment. (Pause)

6 Page 13, footnote 77.

7 But in my submission, that is not what the Microsoft test requires. Dr Bagci has
8 explained that in her view, alternative specifications will be available if required. That
9 is sufficient at this stage of proceedings.

10 Objection 4 concerns pricing assumptions. Amazon's objection is that Dr Bagci
11 assumes that Amazon and eBay charge linear prices, whereas in fact they have more
12 complex fee structures. A linear price is, as I understand it, a simple per unit
13 commission. At risk of repeating myself, this again concerns the precise
14 implementation of the model, not whether it's capable of providing an initial blueprint
15 to trial. Dr Bagci has explained that the structure and workability of the model do not
16 depend on the exact fee structure that is used to implement the model. After
17 disclosure, she will test whether a linear fee specification provides a sufficiently good
18 fit to observed outcomes, and if it does not, she can adapt the model accordingly. This
19 is explained in her summary report, bundle A, tab 15, page 657. Paragraph 42:

20 "Amazon and Mr Holt say that the model assumes simple linear fees whereas sellers
21 may face percentage fees, fixed fees, and other charges. The existence of more
22 complex fee structures does not make the methodology unworkable. It affects how
23 the model should be implemented."

24 Then paragraph 43:

25 "Following disclosure, I would identify the fees actually faced by sellers, including
26 referral fees, fixed charges and other material components. I would then assess

1 whether a simplified fee specification adequately represents those charges and, if
2 necessary, adapt the model to incorporate the relevant fee structure. The effect of
3 doing so would be tested through the simulations rather than assumed in advance."

4 In its skeleton argument, Amazon says that Dr Bagci hasn't explained how she would
5 adopt her model. That is paragraph 38 on internal page 13. (Pause)

6 Again, we don't accept that the Microsoft test requires that, but in any event, Dr Bagci
7 has addressed the issue at an appropriate level of detail. In Bagci 3, she explains that
8 the model can be adapted by replacing the per unit commission with category-specific
9 ad valorem commissions, or rates that take into account both fixed and variable fee
10 components. This is Bagci 3, paragraphs 41 to 43, bundle A, tab 10, page 486.

11 (Pause)

12 If the tribunal could please read paragraphs 41 to 43. (Pause)

13 In circumstances where Dr Bagci does not yet have the necessary evidence on
14 platform fee structures, it would in my submission be overkill at this stage to seek to
15 elaborate on the various different ways in which you might adapt the model, depending
16 on the evidence. Done enough for Microsoft purposes.

17 Then objection 5, Amazon's final Microsoft objection, concerns Dr Bagci's approach
18 to demand parameters. There are two aspects to this issue. There is the baseline
19 counterfactual, and Dr Bagci's potential sensitivities.

20 For the baseline counterfactual, Dr Bagci proposes to use the same (inaudible)
21 parameters as in the factual version of her model. She regards this as a conservative
22 starting point, because it gives Amazon the benefit of its observed market position in
23 the counterfactual; assumes that Amazon's market position is unchanged in the
24 counterfactual. The advantage of that, in Dr Bagci's view, is that it isolates the effect
25 of removing the WRPOs by holding things like Amazon's brand strength and customer
26 loyalty fixed.

1 However, Dr Bagci also proposes as a sensitivity to examine a counterfactual in which
2 Amazon's market power and platform differentiation are different without the WRPOs.
3 She explains that any such sensitivity would be evidence-based, and that her analysis
4 would allow the tribunal to test whether the results depended on disputed
5 assumptions. And that is Dr Bagci's summary report, paragraphs 45 to 46, volume A,
6 tab 15, page 658.

7 Mr Holt and Amazon make two points. First, they say that Dr Bagci's baseline
8 approach is not, in fact, conservative; and second, they say that it will be impossible
9 to specify different demand parameters in the counterfactual. Dr Bagci does not
10 accept either of those points, and we see this from paragraph 47 of the summary
11 report, which is volume A, tab 15, page 659. If I can ask the tribunal, please, to read
12 paragraphs 47 and 48. (Pause)

13 In Dr Bagci's view, the adjustments aren't a priori impossible. Whether they can be
14 identified will depend on the evidence, and if they can't be identified reliably, she won't
15 rely on the sensitivity.

16 In those circumstances, there may then be a debate as to whether the baseline
17 approach is conservative, or sufficiently conservative. But in my submission, that is
18 a matter for trial. The existence of a potential debate does not render the model
19 unworkable. (Pause)

20 That was everything I was proposing to say on Amazon's objections to the Boik and
21 Corts model. I can deal briefly with the yardstick method, which is, as you know --

22 THE CHAIR: I don't think she's particularly reliant on that. But can I ask you this? We
23 will have further criticisms, or elaboration of criticisms, from counsel for Amazon; but
24 in her original report, what Dr Bagci proposed, as we understood it, was to use as an
25 alternative, or a cross-check, a multivariate regression.

26 MR LASK: Yes.

1 THE CHAIR: Now that she's had a discussion with Dr Houpis, we've got
2 a memorandum of that, and I think they've had another meeting.

3 MR LASK: Yes.

4 THE CHAIR: I was going to ask you. I think what she said is that she won't do her
5 own regression. She will co-operate with Dr Houpis on his regression, as far as it can
6 be operated. She's not going to try and duplicate it.

7 MR LASK: She's not going to do it.

8 THE CHAIR: That work won't be done, because she will rely on Dr Houpis, so that we
9 will have the Houpis regression, which we've considered separately, and we will have
10 Dr Bagci's simulation method.

11 As we understood their joint memorandum, Dr Houpis also sees Dr Bagci's method as
12 potentially complementary to his method.

13 MR LASK: Yes.

14 THE CHAIR: That's if one looks at the brief joint memorandum, which is at page 426
15 to 431. They say, "In the expert's shared view, the methodologies can serve as
16 alternatives in case one or other cannot be implemented firstly".

17 MR LASK: Yes.

18 THE CHAIR: They will sort of complement each other.

19 MR LASK: Yes.

20 THE CHAIR: On that basis, really, a trial will have the benefit of these two methods.
21 Each has potential difficulties. There may still be some difficulties (inaudible)
22 succession of potential, as it were, adjustments, modulations that Dr Bagci recognises
23 may be necessary, accumulate, may give some concern. But then there is, as I say,
24 the alternative, the regression. So, they work together, and on a claim this size, there
25 may be great benefit in having two, as they put it, complementary alternative methods.
26 The only potential difficulty about that that we can see is: if it should be the case that

1 at some point the Stephan claim should settle, in which case that more the regression
2 would (inaudible) whether that would ever happen, if so, when. The idea that Dr Bagci
3 would then start to do her own regression seemed really disproportionate.

4 One possibility is that if that were to happen, then your clients, ACSO, would then
5 instruct Dr Houpis to continue his work and complete his regression, now solely for
6 you. Given the commitment you have from the funder, (inaudible), it would appear
7 that that's a possible course that could be taken. What we'd like to know is if that's
8 something ACSO is amenable to committing to. As I say, it only rises then if the
9 Stephan case should settle and yours doesn't, what the experts are saying in their joint
10 memoranda is that they would co-operate, and they see their methods as
11 complementary.

12 MR LASK: I think I can confidently say, unless someone tells me that I'm wrong, that
13 ACSO would be amenable, because it's already raised the prospect of jointly
14 instructing Dr Houpis, precisely in order to avoid that settlement risk. Nothing has
15 been agreed yet, but --

16 THE CHAIR: Well, it may not even involve jointly instructing him. It's one possibility,
17 I believe. But it can be simply that if he ceases to be instructed by Stephan because
18 Stephan's case is resolved, then, as it were, you would pick it up and continue, and
19 that as things stand, unless and until that were to happen, (inaudible) instructing
20 Dr Bagci, Stephan is instructing Dr Houpis and they are cooperating, or both relying
21 on both methods.

22 MR LASK: Well, I'm sure at the very least ACSO would want to be in a position to
23 instruct Dr Houpis if Stephan case settled so that ACSO could continue to rely on his
24 methodology at trial.

25 THE CHAIR: Yes, there may be a lot of force in having
26 two alternatives -- a complementary -- in the case like this. And given the size of the

1 claim, that doesn't seem disproportionate.

2 MR LASK: Yes. We would certainly gratefully adopt that proposition. That is what
3 we say in response to the second part of Amazon's case on expert evidence, which is
4 that Dr Bagci's analysis, even if it's Microsoft compliant, we say it's not necessary.

5 THE CHAIR: Yes.

6 MR LASK: We say it is necessary for reasons I can come on to, but also it's not
7 duplicative.

8 THE CHAIR: It's clearly very different, and no doubt like any method in something like
9 this, there are always decisions that can be made, I'm sure. That's the advantage of
10 having two rather different, depending on different data as well.

11 MR LASK: Yes.

12 THE CHAIR: Yes, I think that we find that helpful. The other thing we wanted to ask
13 you is: you've been focusing, I think quite rightly, on Trial 2 --

14 MR LASK: Yes.

15 THE CHAIR: Trial 1, bear in mind, is only about liability; it's not about causation of
16 loss, still less about (inaudible). As far as Trial 1 is concerned, the only question is
17 whether: (a) did this restriction exist, and what -- and that's not a question for the
18 question of fact (inaudible) understanding both of any (inaudible) written policies and
19 then how they were implemented in practice and how they were understood, but that's
20 an expert question. Then whether this potentially affects competition.

21 MR LASK: Yes.

22 THE CHAIR: And on that point, we note what Dr Bagci says she's proposing to do.
23 She says -- I think in her third report, which is at tab 10, I think, on page 492 and
24 493 -- "My Proposed Methodology for Trial 1". It's paragraph 16:

25 "... specify and test the relevant competitive mechanism and counterfactual."

26 The counterfactual is where this policy doesn't apply, so that's pretty straightforward.

1 But it says "how Amazon's policies operated in practice and the market ..." Well, that's
2 not an economic question; that's the factual question. That's what I referred to as:
3 what were the policies; how did they operate?

4 Then she says (c) and (d) -- says:

5 "... whether they affected sellers' cross-platform pricing decisions;

6 "d. use the available evidence to derive evidence-supported values of ranges for the
7 principal ... undertake simulations based on aggregate market data."

8 Well, why on earth is that relevant to just the question whether this potentially affected
9 the competition? If it's, as you confirmed it is, a price parity provision: (a) you've got
10 the CMA guidance, it's a hard core restriction; and (b) one can look at that in a rather
11 more basic economic level without having to undertake simulations. It seems to us
12 completely going beyond the scope of what we envisage for Trial 1.

13 MR LASK: The purpose for which Dr Bagci wants to conduct these high-level,
14 simulations at Trial 1 is to assess what the counterfactual would look like; what would
15 be different, if anything, in the counterfactual, which is if the price parity policies weren't
16 there. That's obviously an integral part of the liability analysis. I think --

17 THE CHAIR: If you're trying to show that it did affect competition.

18 MR LASK: Yes.

19 THE CHAIR: But if you're trying to show that it potentially affects competition --

20 MR LASK: Well --

21 THE CHAIR: -- you don't need to show what -- in a way that seems to us somewhat
22 crude. And if we look at what Dr Houpis says he proposes to do for Trial 1, which is
23 in bundle B at tab 13, page 313. (Pause)

24 He sets it out at paragraph -- leave aside that Dr Houpis has to deal with a whole lot
25 of other abuses for which a different exercise may be necessary, but we're only
26 concerned with what for him is abuse 5. He addresses that at page 327. He says at

1 paragraph 60 what he seeks to do, how the thing actually works, what is meant by
2 significantly higher prices -- well, neither of those are economic questions ... Some
3 data on third-party sellers. Again, he doesn't, it seems to us, need to go to assess the
4 effects, but only potential effects.

5 We don't see why that exercise isn't quite sufficient to cover (inaudible) what is needed
6 for the ACSO claim. That it really isn't necessary to start getting into simulations with
7 all the problems they (inaudible) for Trial 1.

8 MR LASK: Well, sir, can I deal with it in this way: firstly, I think it's common ground
9 that there's going to have to be some assessment of the counterfactual for the
10 purposes of Trial 1. In my submission, one does need to assess the counterfactual in
11 order to look at whether conduct is reasonably likely to have anti-competitive effects,
12 not just whether it has had actual anti-competitive effects. That's the first point.

13 The second point is that whereas here we're dealing with conduct that has been
14 continuing for a very long time, it's very relevant to look at whether it has had actual
15 anti-competitive effects in assessing whether it's reasonably capable of having
16 anti-competitive effects. One sees that, sir, you might recall, from your own Streetmap
17 judgment, where you're dealing with conduct that had been ongoing for a very long
18 time. The court made the point that where you have that sort of situation, it's very
19 relevant to look at actual effects when assessing potential effects. And then --

20 THE CHAIR: Yes, if you can look at -- it wasn't a pure liability trial, I think, but where
21 you were looking at here, if you can show actual effects, it helps you show potential
22 effects. But if you're looking at something that you say is a hard core restriction, then --

23 MR LASK: Well --

24 THE CHAIR: -- you don't generally have to go and start looking at actual effects.

25 MR LASK: We say it's a hard core restriction. That will no doubt be disputed. We
26 obviously have a chapter 1 strikeout application that we're facing. If we're right that it

1 falls within the parameters of a hard core restriction, then we might not have to go and
2 show actual effects, but I imagine that would be hotly contested. So, we think it's
3 important to be able to try and establish actual effects, and not to place all our eggs in
4 the hard core restriction basket.

5 Sir, the Streetmap case, I think, was a liability only case, and there was empirical
6 expert evidence that the court found very helpful.

7 THE CHAIR: In terms of -- yes, but that was a case where because the alleged effect
8 was on a different market, it was held that it needs to be appreciable. Here, it's on the
9 same market, those of the dominant (inaudible). It's the online marketplace, so there
10 is no de minimis.

11 MR LASK: We do also need an effect on competition between sellers.

12 THE CHAIR: Yes.

13 MR LASK: Not just between the platforms.

14 THE CHAIR: You can say it's a matter for case management later, but we say we do
15 not see why that cannot be done by a single expert, instructed for both.

16 MR LASK: Well --

17 THE CHAIR: And that you don't need to get into simulations for that purpose. The
18 idea of simulations based on aggregate market data seems to us over the top and
19 going to really very reliable results.

20 MR LASK: Sir, we don't --

21 THE CHAIR: You've just explained how the sort of simulations that are needed may
22 need all sorts of adjustments to make them (inaudible) that will apply equally at a high
23 level to be relied on. It seems to us that what Dr Houpis has said there is perfectly
24 adequate for ACSO --

25 MR LASK: Well --

26 THE CHAIR: -- at that stage. Once you get to having to deal with what (inaudible)

1 was actually caused and how you can (inaudible) do that, then it's a different
2 (inaudible).

3 MR LASK: Sir, if I'm right that there needs to be some sort of counterfactual
4 assessment at Trial 1, then the next question is: what sort of counterfactual
5 assessment should there be?

6 I don't disagree in principle that it might be possible for ACSO and Stephan to rely on
7 a single expert for Trial 1. Our concerns with the methodology proposed by Dr Houpis
8 is that it isn't very developed. In particular, it's not at all clear to us at this stage how
9 Dr Houpis would propose to assess the counterfactual -- in my submission, a very
10 important part of Trial 1.

11 Now, it has been said in correspondence and in Stephan's written observations, that
12 if necessary, Dr Houpis will do a regression analysis, or a form of regression analysis,
13 at Trial 1. As the tribunal is aware -- and I was going to come on to address you on
14 this -- we have concerns about the proposed regression analysis; not Dr Houpis work,
15 but the feasibility in the factual context that applies, of conducting a reliable regression
16 analysis. If those concerns are well founded, and I'm right that counterfactual
17 assessment is needed at Trial 1, then there's a problem: there's a gap; there's no
18 empirical expert evidence capable of assessing what would have happened in the
19 counterfactual.

20 That's why we say that the high-level simulations that Dr Bagci proposes to do for
21 Trial 1 are necessary and they are appropriate.

22 THE CHAIR: I have (inaudible) doubt whether they will be in any way robust given the
23 modifications that might (inaudible) be necessary when actually applying, because of
24 various points that have been made. If you're satisfied (inaudible) the case
25 management, whether we will allow the two experts. It's very doubtful.

26 MR LASK: Well --

1 THE CHAIR: Can you tell us what happened at (inaudible) table, the without-prejudice
2 meeting (inaudible) there was again in October.

3 MR LASK: Unfortunately, there were technical issues that meant the meeting was
4 only a very short one.

5 THE CHAIR: Right.

6 MR LASK: And not much of substance was covered. But of course, if we're certified,
7 it may well be possible for Dr Bagci and Dr Houpis to speak again, particularly about
8 Trial 1, because they've obviously resolved their position as regards Trial 2. That's
9 what we see in the joint expert statement.

10 But -- particularly in light of the tribunal's observations just now on what's appropriate
11 for Trial 1 -- if we are certified, in my submission, it would be appropriate for them to
12 get together again and see if they can work out a common position on the methodology
13 for Trial 1. I am perfectly content for it to be dealt with as a case management issue,
14 and to address you further in due course on what we say is needed for Trial 1. And it
15 may be that Dr Bagci can respond to the points you've just been making, sir, about the
16 risk of a Trial 1 version of Boik and Corts being unreliable.

17 THE CHAIR: Yes.

18 MR LASK: Because so far, as between ACSO and Amazon, there aren't really any
19 substantive standalone points on the Trial 1 methodology. What Mr Holt has said is
20 that for all the reasons he gives in relation to the Trial 2 methodology, the Trial 1
21 methodology is problematic as well.

22 THE CHAIR: Is that because the (inaudible) methodology proposed for Trial 1 has not
23 really been developed?

24 MR LASK: Not to the same extent.

25 THE CHAIR: Well, I think (inaudible) undertake simulations based on aggregate
26 market data, broad in general.

1 MR LASK: Yes, but if I may say so, Dr Bagci's trial methodology is more fully
2 developed than Dr Houpis's. Again, no criticism of Dr Houpis; it's a product of the fact
3 that Dr Bagci has had to develop her methodology for the purposes of this hearing.

4 THE CHAIR: Yes.

5 MR LASK: But because it's more developed, it's possible for ACSO to have a degree
6 of confidence in relying on that Trial 1 methodology, whereas ACSO can't have that
7 confidence in respect of Dr Houpis's trial methodology, because it's very terse at
8 present.

9 THE CHAIR: There is quite a lot of learning on the potential anti-competitive effects
10 of price parity.

11 MR LASK: Yes.

12 THE CHAIR: Just as there is on other kinds of price control. Very, very different from
13 the self-preferencing that occurred in (inaudible) Streetmap, which was a very early
14 self-preferencing case.

15 MR LASK: Yes.

16 THE CHAIR: There are a number of actions in competition law, as you know well,
17 where if you establish the facts of what happened, you can say that this has a potential
18 anti-competitive effect. There's liability -- what loss it caused is a completely different
19 matter.

20 MR LASK: Sorry, I --

21 THE CHAIR: It's sufficient indeed if it had an anticompetitive effect on competition
22 between sellers, even though that's not the loss you're relying on here.

23 MR LASK: I accept that, but for your note, I think the appropriate counterfactual is
24 explicitly a part of the list of issues. So, it is going to be part of Trial 1. It is something
25 we need to address.

26 But another point is: there have been cases, WRPOs or MFNs, as they were then

1 called, that have been found not to have anti-competitive effects. I'm thinking of the
2 Compare the Market case before this tribunal, where the CMA had reached a decision
3 based on anti-competitive effects and the tribunal overturned it. Really, I think my
4 submission underlines the need for ACSO, and no doubt Stephan, to be able to make
5 their case fully on effects, including actual effects, at Trial 1.

6 THE CHAIR: Yes. You've covered the first two areas, and we said we'll deal with the
7 summary judgment and the communication point.

8 MR LASK: Well, in relation to expert evidence, I've dealt with the Microsoft test. What
9 I was going to come on to deal with was the argument by Amazon that even if Dr Bagci
10 satisfies the Microsoft test, their evidence should be excluded, because it's not
11 necessary. It may be, in light of some of the points you've been putting to me on the
12 complementarity between Dr Bagci's and Dr Houpis's empirical methods -- I don't
13 need to spend very long on this, but there are points that Amazon raises to which I feel
14 I should respond.

15 THE CHAIR: Yes. Well, I think we can wait till we hear from Amazon on that.

16 MR LASK: Then if I may just say something very briefly about the yardstick method,
17 which we were just dealing with. The yardstick method, is proposed by Dr Bagci as
18 a cross-check to her Boik and Corts model. You've made the point, sir, that
19 Dr Houpis's regression analysis is also a cross-check. But to be clear, they are
20 different sorts of cross-checks, because of course the regression is looking at
21 Amazon's own fees before and after 2017, whereas Dr Bagci's yardstick would be
22 looking for suitable comparator platforms.

23 I've heard what you said, but if ACSO's concerns about the feasibility of Dr Houpis's
24 regression are well-founded, there won't be a reliable cross-check unless Dr Bagci is
25 able to run her yardstick methodology alongside her Boik and Corts model.

26 Dr Bagci has articulated concerns about the feasibility of Dr Houpis's regression

1 analysis. None of the other experts before the tribunal have suggested that those
2 concerns are unfounded, and indeed, they're consistent with observations made by
3 the tribunal in the Hammond and Stephan CPO judgment.

4 So they are real concerns, and, just as we would say it would be quite unfair for ACSO
5 to rely exclusively on Dr Houpis's regression in circumstances where there are these
6 unchallenged concerns, we say it would also be unfair to deprive ACSO of
7 a reasonable cross-check on Dr Bagci's Boik and Corts model, and that would be the
8 effect of preventing Dr Bagci from carrying out her yardstick method if it turns out that
9 our concerns about Dr Houpis's regression are well founded.

10 THE CHAIR: Yes. I think Dr Bagci acknowledges at the end of her third report some
11 of the difficulties with the yardstick method. It's paragraphs 52 and 53 of her third
12 report at page 489, and she says, "The usefulness of any such would depend on the
13 comparability of the benchmark". If the evidence doesn't identify a sufficiently
14 comparable benchmark, she won't rely on the benchmark. Clearly if one can find a
15 comparable benchmark, it's the sensible thing to do. There may be difficulties doing
16 that.

17 MR LASK: Yes.

18 THE CHAIR: I don't think one can --

19 MR LASK: Well, my only submission is that Dr Bagci ought to be given the opportunity
20 to take that forward if the case is certified.

21 THE CHAIR: Yes, I see. Yes.

22 Thank you. We think that it's probably sensible. Is there anything else?

23 Litigation budget

24 MR LASK: Well, the only other thing I was going to address you on, if you want me
25 to, is the point you raised earlier in relation to ACSO's litigation budget and the line
26 concerning Brattle's deferred fees.

1 THE CHAIR: Yes.

2 MR LASK: If you have bundle A, you may wish to just remind yourself where this
3 arises. It's tab 5 of bundle A. You see it's the second and third column, £850,000,
4 the 275,000 figure. There is an explanation of this in ACSO's witness evidence. It's
5 at Warner 1, bundle A, tab 13, page 609.

6 THE CHAIR: Yes.

7 MR LASK: It's paragraphs 45 and 46, where he explains what's called the
8 "transferable cap".

9 THE CHAIR: Yes.

10 MR LASK: Perhaps I could ask you to read those paragraphs, and then I'll make four
11 brief points. (Pause)

12 THE CHAIR: Yes.

13 MR LASK: The four points are these. Firstly, an expert giving evidence at the CPO
14 stage will always have an interest in CPO being granted, in that this means it can
15 continue working on the case. There's always some level of interest.

16 Secondly, the point that the tribunal has identified only arises from the fee caps that
17 have been incorporated into the funding arrangement. So, the experts and the legal
18 teams have agreed to fee caps at both stage 1, which is pre-CPO, and stage 2,
19 post-CPO.

20 Thirdly, here, the 275,000 that you see as a deferred item, that amount was previously
21 recorded under stage 2; so previously Brattle would have been able to access that
22 amount at stage 2 if the CPO was granted, in relation to their work at stage 2. The
23 change that Mr Warner describes is that they can now access that in relation to their
24 stage 1 work, if the CPO is granted. It was always in the budget.

25 THE CHAIR: Yes.

26 MR LASK: But it's not a success fee in the sense that Brattle will earn more than its

1 standard rate if CPO is granted. It's Brattle being paid that part of its standard fees
2 that exceed the stage 1 cap; or not all of the fees that exceed the stage 1 cap, but the
3 fees up to 275,000. So, it's not a percentage uplift. It's not a success fee in that sense.

4 THE CHAIR: If the CPO is not granted, is it payable?

5 MR LASK: Sorry?

6 THE CHAIR: If the CPO is not granted, can Brattle recover the 275?

7 MR LASK: I don't think it. But that's why my first point was that there's always an
8 interest in a CPO being granted, because it allows an expert to continue working on
9 a case and to continue earning fees. In my submission, that's no different here.
10 There's no uplift.

11 THE CHAIR: It's not an uplift. It's a payment for work done.

12 MR LASK: It's payment for work done, but as I say, the issue wouldn't even arise if
13 Brattle hadn't agreed to cap its fees at stage 1.

14 THE CHAIR: Yes. Thank you. That's helpful.

15 MR LASK: Of course, there are a number of other questions that were put to me
16 earlier today, which we will work on overnight and come back to you.

17 THE CHAIR: Yes. Thank you.

18 We think it's sensible, first of all -- we'll say we'll sit till 5.00, if that (inaudible) anyone.

19 We'll hear from Mr Carall-Green now, because that relates to some of the expert
20 (inaudible).

21
22 Submissions by MR CARALL-GREEN

23 MR CARALL-GREEN: Sir, can I ask if there are any points in particular on which it
24 would be helpful for me to address you, because we have obviously been through
25 quite a lot, and you will have had our written observations; so you'll know much of what
26 we say anyway, but I will focus on whatever it is that the tribunal would find helpful.

1 THE CHAIR: Well, I think one thing -- it was the last point raised with Mr Lask, namely
2 of Dr Houpis dealing with, as an expert for both the Stephan class and the ACSO class
3 of Trial 1, the liability side of the price parity (inaudible). As I understood your helpful
4 observations, that was something that you considered as well.

5 MR CARALL-GREEN: Yes, sir. Is this a technical question about whether or not
6 Dr Houpis would be jointly instructed, or simply a question about whether or not it
7 makes sense for Dr Houpis's evidence at Trial 1 to be complemented by Dr Bagci's
8 evidence?

9 THE CHAIR: No. It's about having Dr Houpis as the sole expert on the price parity
10 abuse for Trial 1. He would be jointly instructed for Trial 1 on abuse 5.

11 MR CARALL-GREEN: Yes, sir.

12 THE CHAIR: ACSO's sole abuse claim

13 MR CARALL-GREEN: Yes, sir. You will have seen -- the tribunal has already taken
14 us all to the relevant passages from the split trial memo --

15 THE CHAIR: Yes.

16 MR CARALL-GREEN: -- where Dr Houpis explains, as the tribunal has pointed out,
17 that he sees Dr Bagci's methodology as being complementary to his on the question
18 of assessing the quantum of the overcharge. But the tribunal equally has also taken
19 us to the passage from Dr Houpis where he explains what he thinks needs to be done
20 for the purposes of establishing liability at Trial 1.

21 So Professor Stephan's position is that the tribunal is correct that all that needs to be
22 done at Trial 1 is to establish liability; not causation, loss, quantum. We're just looking
23 at what policy existed and what it meant, and then whether that policy potentially
24 affects competition.

25 I won't ask you to go back to it, because you've already turned up the relevant passage
26 from the split trial memo; but for your pen, sir, it's at bundle B, tab 13, page 328.

1 Dr Houpis has said that what he wants to do is to rely on documents and data from
2 Amazon about how the algorithm works, what the policy means -- the tribunal has
3 made the point that that's not necessarily a question of economics -- and then to
4 examine data on Amazon's practice of removing sellers from the Buy Box; so
5 effectively looking at the information that's available on how Amazon has enforced the
6 policy.

7 In broad strokes, what Dr Houpis is intending to do is to look at what the content of the
8 policy is, how it's enforced, and then from an economic perspective, what incentives
9 that creates. In that regard, it's not clear that any form of econometrics is really called
10 for.

11 One comparison that I might offer to explain why that makes a good deal of sense is
12 the decision of a competition authority, because when one is simply trying to determine
13 whether or not something is an abuse, as a competition authority might do, it's not
14 necessary to perform an econometric analysis of what the prices would have been in
15 the counterfactual, and that is why we are not normally accustomed to seeing
16 econometric analyses in competition authority decisions.

17 That's why we arrive at the position that it makes perfect sense to examine the
18 question of liability at Trial 1 without having to resort to any form of econometrics,
19 whether it's the simulation model or the regression analysis, because you will have
20 seen, sir, from the documents that whether or not Dr Houpis performs his own
21 regression analysis at Trial 1 is an open question. It seems like even that may be
22 unnecessary.

23 That position has been left open, but it seems that even that may be unnecessary if,
24 for example, it can be established that, because of the policy, sellers were less likely
25 to want to use alternative e-commerce platforms and therefore e-commerce platforms
26 competed less vigorously on price.

1 Now, I think this might actually be a helpful elucidation of the discussion that the
2 tribunal had with my learned friend, Mr Lask, because one of the things that Mr Lask
3 said to you was that at Trial 1, what's necessary is to consider "the counterfactual".
4 But of course, that rather raises the question: what is meant by "the counterfactual"?
5 In my submission, if you're not quantifying the difference between the factual and the
6 counterfactual -- which you're not, because you've reserved that to Trial 2 -- then that
7 elucidates why we say that what we're trying to do at Trial 1 is enough.
8 If you were to find that the counterfactual was probably one in which e-commerce
9 platforms would have competed materially more vigorously on price ...

10 THE CHAIR: Yes.

11 MR CARALL-GREEN: ... then we may be home on abuse 5, and that involves no
12 amount of quantification.

13 Sir, I can't go so far as to say that a quantification analysis is irrelevant to the question
14 of whether or not something is abusive, because of course there will be examples of
15 cases where courts, tribunals or authorities will have seen some mathematical
16 modelling, and will say to themselves, "Well, this mathematical modelling shows me,
17 in the counterfactual, something was different". So, I certainly don't say that that's
18 irrelevant, but the question that the tribunal is asking here is a mixed question of cost
19 benefit and case management.

20 It doesn't really matter what lens one looks at it through, but broadly, the question that
21 the tribunal is asking is: is it worthwhile having a simulation model as part of the Trial 1
22 analysis of whether or not there was an abuse, i.e., whether there was a potential
23 effect. So, I feel that I'm --

24 THE CHAIR: Or a regression.

25 MR CARALL-GREEN: Or a regression analysis. Quite right, sir. So, if one puts it in
26 a cascade, we're definitely having what's sometimes called "the demonstrative

analysis", where we look at the policy, some data on how it's enforced, maybe some broad examination of how prices have changed over time. Dr Houpis has said he'd look at that -- and the data about enforcement; the things you've seen in the memo. Then the second step in the cascade, Dr Houpis has said, "Well, maybe that some element of a regression analysis is helpful", but that's left open. The question is whether or not we should add to that the third component of the simulation model. As I've said, and as you've seen from our written observations, we say that it's not clear that the simulation model adds an enormous amount to that discussion. And in fact, what has happened here today during this hearing, rather leads us to believe that the use of the model will be particularly complicated, because Amazon has raised various concerns, for example, about the monopoly seller assumption or the sequential versus the simultaneous game. Again, I don't really want to get into, but we are concerned that the model requires quite a lot to yield robust results. There are many questions that apparently go to the cross-examination of the expert.

THE CHAIR: Yes.

MR CARALL-GREEN: And, so, adding this at Trial 1 is a material, additional evidential burden, when actually the only question is whether the conduct was probably capable of having an effect, or a non-negligible effect, if we add the approachability condition from Streetmap.

THE CHAIR: Under chapter one, and you may not be able to give a definitive answer, but is there any problem that you see from (inaudible) your client of Dr Houpis being jointly instructed (inaudible) with the liability point on abuse 5 for Trial 1 (inaudible) from Trial 2.

MR CARALL-GREEN: Yes, sir. I think a conversation may have just have happened.

May I take instructions. (Pause)

Sir, we don't see a problem with that; it will simply be a question of agreeing the terms.

1 THE CHAIR: Yes, that'll be worked out. That's very helpful

2 MR CARALL-GREEN: Thank you, sir.

3 THE CHAIR: That's all we need to ask you, Mr Carall-Green. Mr Piccinin, as I said,
4 we sit till 5.00 pm.

5 MR PICCININ: Yes.

6 THE CHAIR: We'll take a five minute break then now and then we'll return for
7 45 minutes.

8 (4.14 pm)

9 (A short break)

10 (4.23 pm)

11 THE CHAIR: Yes.

12
13 Submissions by MR PICCININ

14 MR PICCININ: May it please the tribunal. We are resisting certification on
15 three grounds. First, we say that this claim, as it has been formulated, is not suitable
16 for certification because the blueprint for trial that has been presented involves
17 massive waste of cost; principally for the class, but also for Amazon and indeed for
18 the tribunal sitting in front of us. That's the costs and benefits point.

19 I'm going to come back and develop each of these, obviously.

20 THE CHAIR: Yes.

21 MR PICCININ: Our second point is that even if you are otherwise minded to certify
22 the claim, you should not give permission for ACSO to rely upon an additional
23 economist beyond those always already put forward by Mr Hammond and
24 Professor Stephan. That's because there is no conflict of interest between ACSO and
25 Professor Stephan in relation to the abuse issues or in relation to the quantification of
26 overcharge. And then, of course, there's no conflict between ACSO and Mr Hammond

1 in relation to pass on. We say, when you look at the authorities and the modern
2 approach from the tribunal, as blessed by the Court of Appeal, to having multiple
3 experts involved in a single case, that this is not one in which it's appropriate to have
4 a second expert on those issues. That's actually a question that is independent of the
5 methodological criticisms that we have.

6 Our third point, which is that even if you were otherwise minded to certify, and in
7 principle, willing to entertain a third expert economist, the methodologies that Dr Bagci
8 has put forward fail the Microsoft test. I'll take those points in that order, and then
9 tomorrow, I should say that Ms Lukacova will address you on the communications
10 application. You have that pleasure to look forward to.

11 In relation to costs and benefits, the situation as it stands is that this tribunal has
12 already authorised Professor Stephan to go and spend £24 million pursuing not one,
13 not two, three, four -- pursuing five allegations of abuse of dominance against Amazon
14 on behalf of sellers. One of which hopes to establish that Amazon has engaged in
15 allegedly abusive anti discounting practices.

16 In addition, the tribunal has also authorised Mr Hammond to pursue a claim on behalf
17 of Amazon's customers in relation to the alleged FMA conduct concerning the featured
18 offer. As part of that, Mr Hammond hopes to establish a rate of pass on from sellers
19 to customers.

20 With all of that money already being spent by teams that the tribunal has seen fit to
21 authorise to pursue this litigation, if you ask yourself what a single, astute, unfunded
22 claimant in the position of a customer class would do if they wanted to bring a claim to
23 plug the gap, to bring a claim for the anti-discounting abuse that Mr Hammond has
24 chosen not to pursue for reasons that we've not yet heard -- but maybe Mr Raymond
25 will enlighten us.

26 We say it's obvious what the answer to that question would be as to what they would

1 do; someone spending their own money. All they would need to do -- they would see
2 that this tribunal had already authorised Professor Stephan to run that case on the
3 basis of expert evidence from Dr Houpis, that this tribunal has considered at the
4 certification hearing and approved as being fit to go to trial. They would see that
5 Mr Hammond is already going to run a case on pass on -- whoever's expert evidence
6 that goes through. And, so, they could see that they could adopt all of that, take that
7 work that other people are paying for, not spend any more money -- or any more
8 money materially -- and take all of the benefits.

9 Now, instead of taking that course, ACSO, who is of course not a single unfunded
10 claimant spending their own money, is doing something different. They've come along
11 and they've said, "Okay, we see all of that is happening, but we're going to duplicate
12 that work and run a case ourselves, and we want the tribunal to authorise us to go
13 away and spend £16.5 million".

14 That figure is almost 70 per cent of the total amount that Professor Stephan wants to
15 spend on five alleged abuses. And of course, Professor Stephan has to cover market
16 definition and dominance as well. So, 70 per cent of that total, ACSO is going to go
17 and spend investigating just this one allegation of abuse. That's the plan.
18 £16.5 million.

19 On top of that, they have contingent fees, success fees for the lawyers, in the sum of
20 almost £12 million, which is roughly half the total, remember, that Professor Stephan
21 was going to spend on the five abuses. So, the prize for pursuing this one will be half
22 of that. That's £28.5 million in legal and expert fees if they win, plus another
23 confidential amount for the insurer, which you've seen. And then of course, the big
24 prize of the funder's fee.

25 You've seen the table that ACSO helpfully produced for this hearing earlier, which
26 again, if you want to turn it up, is it Tab G page 87. (Pause)

1 The punchline is on page 90. You can see the prize here at the bottom, the total
2 stakeholder entitlements. The prize here they're seeking is a bonanza of well over
3 £100 million. They want £100 million as a prize for doing work that other people are
4 going to do anyway. It's a £100 million reward, plus some for duplicating the work of
5 Stephan and Hammond. That is indefensible, and it is the kind of application -- it's the
6 kind of litigation plan -- it's the kind of claim that gives this regime a bad name. As
7 I said, it's not just about wasting their money; it's going to put this approach, this way
8 of just doing everything from the ground up -- even on abuse after you've told them
9 not to do that for dominance -- it's going to put Amazon to very significant additional
10 cost of meeting different versions of substantially the same complaint that it's already
11 meeting from Professor Stephan.

12 The very first task that we will have to do if you certify this claim as it's been put
13 together, is to plead a defence to 100 pages of text, making more or less the same
14 substantive allegations that we've already answered elsewhere. And in addition --

15 THE CHAIR: That's not a very difficult exercise if you've already answered them.

16 MR PICCININ: Well --

17 THE CHAIR: You can just copy what you've done.

18 MR PICCININ: No, it is, sir, because they haven't copied what Professor Stephan has
19 done. That's the problem. They didn't file the claim that was a one pager saying,
20 "Please see attached the allegations made by Professor Stephan". That would have
21 been an easy job to plead back to. They've started from scratch with a blank sheet of
22 paper and have written an awful lot of text. So even though it relates to the same
23 subject matter -- and at the end of the day, all it adds up to is the same thing -- we do
24 actually have to plead back to it line by line, which is an enormous job.

25 In addition, ACSO will then trouble the tribunal with significant extra work and costs,
26 too, throughout the proceedings, from case management complexities to a longer trial

1 and significantly longer judgment, dealing with the different variations in the way the
2 points are put.

3 I just want to show you briefly that this is completely inconsistent with the current
4 approach that the tribunal is taking to these issues. For that, I want to look at the
5 Brook case, which is in H2, tab 20, page 981. (Pause)

6 It was a claim that was brought by Dr Brook against Google on behalf of a class of
7 advertisers. The allegations mirrored Ms Stopford's claim that had been brought on
8 behalf of consumers in relation to the same conduct. If we can just go forward to
9 page 1008, you can see what the tribunal said about this issue, under the heading at
10 the bottom, "Economies to be had by cooperation with Ms Stopford".

11 The PCR in that case had started with a budget of £30 million, and then they'd cut £2
12 to £3 million as a result of their efforts to co-ordinate with the consumer claim. The
13 tribunal said that that was very disappointing. Dr Brook said, "Don't worry so much
14 about that because those savings are actually very conservative".

15 Over the page at paragraph 80, the tribunal said that it became apparent during the
16 hearing that the savings that had been presented by Dr Brook to the tribunal did not
17 allow for the possibility that the tribunal would make directions explicitly limiting what
18 they could spend.

19 Then paragraph 81 and 82 are really the crux of it. The tribunal said:

20 "We firmly intend that the Tribunal will make such case management directions. Other
21 than in relation to pass-on, where the two classes have a direct conflict, it ought to be
22 possible for there to be only one team of lawyers [one team of lawyers] and (where
23 relevant) one expert [only one] on any part of the case."

24 The next sentence is quite important to understand what that means, because the
25 tribunal went on to say:

26 "We recognise that each of Ms Stopford and the PCR [Dr Brook] will want to have an

1 understanding and oversight of those issues not being run by them, but that should
2 not be too costly."

3 So, when the tribunal refers to there being only one legal team and one expert on any
4 one part of the case, the tribunal does not have in mind a situation where you grab
5 essentially all of the lawyers working on the case for both sides and call it one unified
6 team, and instruct one expert, with everyone being fully involved and commenting on
7 all the drafts and all of that. That's not what the tribunal has in mind. That would
8 actually probably increase costs, rather than decrease them.

9 What the tribunal is talking about is a situation where, effectively, Ms Stopford runs
10 one issue, one part of the case, and Dr Brook just keeps abreast of it, making sure
11 that she's got sufficient knowledge of what's going on to be able to pick it up if
12 something happens, as we'll see in the next paragraph; and Dr Brook has conduct of
13 other parts of the case, and Ms Stopford does the reverse, just keeps abreast of it,
14 sufficient to be able to pick it up if needed. You don't just have a single mega-team.

15 THE CHAIR: I don't know if anyone is talking about a single mega-team, but isn't
16 paragraph 82 saying, rather than having one running the case and the other just
17 watching, the sensible way to do it is to have joint instructions --

18 MR PICCININ: Exactly.

19 THE CHAIR: Which is the point I just put to both Mr Lask and Carall-Green as regards
20 Dr Houpis for Trial 1.

21 MR PICCININ: Yes.

22 THE CHAIR: And a joint instruction, which you have really got, I think, with Dr Pike on
23 certain things here, and having a co-counsel team of solicitors, joint instruction of
24 a legal team for the common issues.

25 MR PICCININ: Exactly, sir.

26 THE CHAIR: That's quite different from having two teams, one (inaudible) case and

1 the other has a watching brief.

2 MR PICCININ: That's right. What the tribunal is considering here is a situation where
3 there is a joint instruction. That's absolutely right. But you can see from paragraph 81,
4 final sentence, that not everyone is going to be engaged in the material, heavily
5 running the case.

6 The core point is this: the cost of running abuse 5, from Stephan, should not be
7 materially greater than it already is by adding the ACSO claim. I don't really mind. In
8 theory, you could have it done by the ACSO team, or you could have it done by the
9 Stephan team. It doesn't really matter, as long as you've got one team doing it. That's
10 a very high-level point. But the cost --

11 THE CHAIR: That was the sort of proposal that was put in the correspondence, that
12 there should be co-counsel.

13 MR PICCININ: That doesn't explain how you come to fees of 16.5 --

14 THE CHAIR: Because that's not calculated on that basis.

15 MR PICCININ: Well --

16 THE CHAIR: Similarly, you look at the fees of Dr Bagci for Trial 1 one, and if the
17 proposal that I was just floating with both Mr Lask and Mr Carall-Green, that there
18 would be only one expert for Trial 1 --

19 MR PICCININ: Resolves that issue.

20 THE CHAIR: -- not the totality of that will fall away, but in the round it would, because
21 no doubt ACSO would have to pay part of Dr Houpis's fee. Stephan's contribution
22 would go down. So, there are significant efficiencies that can be made.

23 MR PICCININ: There certainly could be, sir. So if it were done in the way that's
24 described in paragraph 81 and 82, the blueprint to trial would be radically different
25 from the one that has actually been put before you and that we've been shooting at in
26 responding to this CPO application; because it would be a plan that either involves the

1 ACSO team doing very little, and Professor Stephan continuing with the budget that
2 he already has, and ACSO effectively just running at a very, very low-cost level -- that
3 would be one possibility -- or the other possibility would be a very significant reduction
4 to Professor Stephan's budget to allow the ACSO team to carry more of the load.

5 What you've got before you is no promise of that happening at all. There's lots of
6 warm words about cooperation, but they're not suggesting anything that's going to
7 result in the total costs of taking this issue to trial being the same --

8 THE CHAIR: If we were to say we will only allow one economist on Trial 1 --

9 MR PICCININ: Yes.

10 THE CHAIR: -- it won't be a matter either of Professor Stephan or Dr Bagci that will
11 be our direction. We'll only (inaudible) saving will be made.

12 MR PICCININ: Yes --

13 THE CHAIR: And sometimes it's the tribunal that has to take it into its hands to achieve
14 that, because the parties make suggestions and each is protective of their own position
15 and so on. It will certainly be the case if this is certified. There will be rigorous case
16 management so that the budget will be (inaudible).

17 MR PICCININ: Yes. But in this case, where you have two parties running effectively
18 the same argument, the task of making sure that it is actually being run at close to the
19 costs of having only one party run it --

20 THE CHAIR: That's subject to economic methods, which you'll no doubt come to, and
21 subject to one party wanting to run a legal argument, depending on your summary
22 judgment application, which the other one doesn't seem to run.

23 MR PICCININ: Yes.

24 THE CHAIR: So, there may be certain additions.

25 MR PICCININ: Where there are issues that are not in common, of course. But as you
26 observed at the CMC in these proceedings, those legal issues are not likely to be

1 significantly generative of cost, because they're legal points and they're really only
2 called for fairly short submissions, perhaps a little bit of cross-examination at trial.

3 THE CHAIR: Yes.

4 MR PICCININ: But it is important, in my submission, that this tribunal performs its
5 gatekeeper function by ensuring that there is actually a blueprint in front of you that is
6 specific, that explains how this is going to work. Just certifying it and saying, "Oh, we'll
7 manage it carefully later" is in my submission not good enough, because the risk is
8 that what really happens is both teams continue to work; they call it a single team, but
9 you've got people from both firms doing the work, and the consequence of that is that
10 we face the same multiplicity of arguments and different shades of the same points,
11 different disclosure proposals, all of that that, to be fair to him, Mr Lask is entirely
12 upfront about wanting to do.

13 MR BANKES: Isn't that what happened in Brook?

14 MR PICCININ: They did --

15 MR BANKES: (Inaudible) paragraphs (inaudible).

16 MR PICCININ: That's right, sir.

17 THE CHAIR: On the basis that there was going to be rigorous --

18 MR PICCININ: Rigorous case management of the paragraph 81 to 82 type.
19 I anticipated that you might ask that question, sir: well, why don't we just do the same
20 thing and deal with it later? There are two reasons why that would be the wrong
21 approach here.

22 The first is that in this case, you already told ACSO that it needed to come forward
23 with a plan for dealing with the overlap at the CMC we had in February. That's the
24 order that Mr Lask showed you at B93, paragraph 3(b). The point of this hearing, or
25 a significant part of the point of this hearing, was to address that plan, so that's what
26 I'm here doing. There is a disagreement between Amazon and ACSO about that plan.

1 We say it's inadequate, and they should be required to do it again. I'm not saying you
2 can't ever certify them, but I am saying that it does need to be sorted out. That was
3 the order that you made last time, and the tribunal should stick to it.

4 The second point is that we are currently running full steam ahead towards a trial in
5 the Hammond and Stephan proceedings that is already on a very tight timetable. It's
6 an ambitious timetable. We have a CMC, as you know -- I'm afraid I can't be there -- in
7 those proceedings next week, and we need to know for the future management of this
8 case, and for disclosure, what arrangement it is that we're dealing with here. Are we
9 responding to one case on anti-discounting that's being advanced by one legal team,
10 perhaps supplemented by ACSO wanting to take the different point on chapter 1, if
11 that's allowed to go through; but otherwise on abuse of dominance, are we facing
12 one claim for abuse, or are we facing two? We need to respond to them all and plead
13 it out and deal with subtly different requests for documents arising out of each of them,
14 or just different ideas that the different teams put together? Which is it?

15 The tribunal gave a clear answer in Brook that it had to be one team on each point.
16 That itself would be a start, if the tribunal would say that here. But the problem is that
17 we do need to know exactly what that means; and there is a ready answer, which is
18 to make the one team, to make the one case that we have to answer be the one that
19 you've already certified.

20 Those are the two reasons why we say you actually do need to grapple with this
21 urgently, rather than just thinking it's a matter for future case management. I don't
22 know when that future case management would be, but it would be too late if it's later
23 than sometime between now and next week.

24 ACSO's responses to this argument of ours all miss the point. Its principal response
25 is to say, "Never mind the costs; look at the benefits", by which they mean the
26 damages that they hope to be awarded. If I may say so, there was a very helpful

1 exchange between the tribunal and counsel for ACSO on what those damages'
2 estimates that are presented in Dr Bagci's report mean, and I won't go over that. All
3 I would add is that Mr Lask is right to say that Dr Houpis's figure of 2.5 percentage
4 points as the overcharge -- and I emphasise that it's not 2.5 per cent; 2.5 percentage
5 points of commission, which is about 16, 17 per cent as an overcharge -- that is
6 plucked from thin air. Mr Lask is right about that.

7 The additional point there that may have been missed is that Dr Houpis's estimate of
8 that 2.5 percentage points is not specific to abuse 5 at all. It's the cumulative effect of
9 abuses 2, 3 and 5. Dr Houpis doesn't say that the so-called anti-discounting conduct
10 is generative over 2.5 percentage point overcharge on commission. He says that's
11 the cumulative effect of three abuses that he alleges.

12 The only reason I say that is not -- there's a limit to how much progress I can make on
13 what the damages are likely to be, but that there isn't actually any reliable estimate of
14 it in front of you. So, there's no reason to believe that the true figure is closer to
15 £1.5 billion than it is to £1.5 pounds, or £0. You actually just have no material before
16 you to make any kind of judgement about what that is.

17 So of course it could be, and I can't show you that it couldn't be £1.5 billion, but it would
18 be wrong to place evidence, place weight on that, as though it were a proper estimate
19 that is grounded in something in the real world. It's just a figure that was plucked from
20 the air by Dr Houpis.

21 But really, that is all by the by, those benefits, because the point that I'm making on
22 this first round of resistance is that you could achieve the same benefits, whatever
23 they may be, without the costs, or at least without significant costs, and that's the point
24 that the tribunal made in paragraph 81 of Brook that we just looked at. You should be
25 able to do it for the money that Professor Stephan is already going to spend, plus just
26 a little, not costly amount. Those are the tribunal's words in paragraph 81: an

1 additional, not costly amount for each PCR -- the ones who are not taking the lead on
2 particular points -- to keep abreast of what's going on.

3 In addition to that point, the "just look at the benefits", I should say the problem with
4 that "just look at the benefits" point is really the one that you, sir, Mr Banks, put to my
5 learned friend, which is that where that goes is the submission that in any case where
6 you assert that the claim is worth billions of pounds -- or suppose it is worth billions of
7 pounds... So, in any case where the claim is worth billions of pounds, you can put
8 forward a litigation plan that involves spending as much as you like, and as long as it's
9 measured in the tens of millions or maybe the hundreds of millions, then never mind;
10 the benefits outweigh the costs. That isn't right; that isn't consistent with your
11 gatekeeper function, which is to make sure that there is a litigation plan, a blueprint to
12 trial. That is a proper approach to the proceedings being run, and that is supposed to
13 be checked at the outset.

14 In addition to that point, ACSO also says that its case on abuse is different from
15 Stephan's in various subtle ways, but that that also misses the point, with respect.
16 Because the nature of the work that we all do in this tribunal is that if you went away
17 in any given case and offered a second team of lawyers and economists tens of
18 millions of pounds to see what they could do, they could always come up with a slightly
19 different way -- or maybe a very different way -- of putting a case that someone else
20 has already been running. You can always emphasise different documents, different
21 policies, different aspects of the fact pattern that tell the story in a different way, or
22 even put a different legal analysis on those facts. The nature of things is that unless
23 you happened upon the dream team in your first attempt, and it's impossible to do any
24 better -- unless you've got those particular people who just nailed it -- it may even be
25 possible, if you spend another £20 million, to go out and find someone who does it
26 better. It's a better idea.

1 But that is not how we conduct litigation, and it is not how a party spending their own
2 money behaves. And it's contrary to the policy of the collective action regime to allow
3 class representatives to behave in that way when spending other people's money on
4 behalf of class members, and potentially at the expense of the class members,
5 because that swimming pool full of £100 million that ACSO wants to be awarded would
6 come out of the damages. It's completely unnecessary. You could have the same
7 damages without that swimming pool of cash disappearing, being syphoned off.

8 In reality, as the tribunal observed at the first CMC in these proceedings, ACSO's claim
9 is making substantially the same complaint that Professor Stephan is making, and
10 you'll have seen from the helpful submissions from the Stephan team that that is
11 certainly the way that Professor Stephan is looking at it.

12 Insofar as there are any differences at all, they fall into three categories: one is that
13 ACSO has specifically pleaded reliance on a few more policies that Amazon is alleged
14 to operate. Professor Stephan says in response that his case also covers those
15 policies insofar as they matter. That's a debate for another day. But even if ACSO is
16 right, those are just not the kinds of differences that justify a whole further team
17 spending tens of millions of pounds and being rewarded to the tune of more than
18 £100 million.

19 If the tribunal were really persuaded that it was vital to have Mr Lask KC at trial making
20 these points, he could make them in a couple of hours by going through the
21 documents. You've seen the policies, actually -- we'll look at them again in my strike
22 out application. They're very short. I doubt that would be worth tens of millions of
23 pounds in costs. That's the first category of difference.

24 The second category is the chapter 1 claim; obviously, that falls away if my strike out
25 succeeds, and it's telling that Professor Stephan doesn't endorse it. But even if it does
26 go to trial, it's really a legal point. What will happen is we'll have the same argument

1 that we're going to have probably tomorrow again in closing. So that, again, is not
2 a justification for the litigation plan and the piles of cash that this team is asking you to
3 approve today.

4 Then the third category is the additional expert, Dr Bagci, and her additional
5 methodologies. She's the subject of my next point, which is that even if you were
6 going to certify ACSO as an additional class representative, you shouldn't approve the
7 plan to call a second expert at all. Sir, that's the end of my submissions on the first
8 point.

9 Up to you, I'm very happy to continue.

10 THE CHAIR: Why don't you enter your second point, which is the expert point you've
11 just made.

12 MR PICCININ: Exactly --

13 MR BANKES: Can I ask, when you say we should certify without an expert, are you
14 saying it's open to us? That the methodology is such that we can satisfy ourselves on
15 the Microsoft test without relying on her evidence at all? Are you saying it's capable
16 of being certified under Microsoft, absent any reference to Dr Bagci?

17 MR PICCININ: Effectively, if the plan that was presented to you, having heard all of
18 the debates that we had, is that they'll rely on Dr Houpis for his methodologies, and
19 they will instruct him jointly -- and I think we've had it confirmed that everyone is happy
20 with instructing him jointly if that's the only option on the table.

21 MR BANKES: And we've already certified him.

22 MR PICCININ: And you've already certified that, and I'm not about to have that
23 argument again.

24 MR BANKES: Yes, okay. So, the answer is yes?

25 MR PICCININ: Yes.

26 MR BANKES: If we cut out, actually, we could still certify.

1 MR PICCININ: Then the Microsoft problem goes away. I still say you shouldn't do it,
2 but yes.

3 On the expert question, I want to start with the authorities. The reason I want to do
4 that -- it's really one authority -- is that there has in recent years been a sea change in
5 the tribunal's attitude to having more than one expert opine on the same issues on the
6 same side of a case. I think the most recent authority on this point is Spottiswoode,
7 which is a case about the power cables cartel. The defendants in that case, who, of
8 course, were real clients with their own actual money at stake -- both in terms of
9 spending on the litigation and in terms of the damages award that was potentially going
10 to be made against them -- wanted separate expert economists to estimate their
11 individual volume of commerce, and also to investigate the overcharge in relation to
12 each of them.

13 They wanted to do that because they actually had different and potentially diverging
14 interests in showing that their particular overcharges were low. As we'll see, it was
15 actually a much stronger case for having multiple experts than this one, because the
16 tribunal accepted in its ruling on the question of whether there should be multiple
17 experts that the expert might face modelling choices that make the outcomes better
18 for one defendant at the expense of another. That's not a feature of this case.

19 If we can pick that up, it's in bundle H2, tab 17, page 926. Under the heading, "LEGAL
20 FRAMEWORK". If you're there, sir, as you can see, it begins in paragraph 11 by
21 setting out rule 4 and the relevant paragraph from the guide, which will be very familiar
22 to you.

23 Then over the page, we have at paragraph 13 a quote from the new practice direction,
24 which says:

25 "... Where it appears that the interests of two or more parties are aligned on particular
26 issues, the Tribunal may require those parties to instruct a joint expert rather than

1 individual experts."

2 Now, I accept it says "may"; it doesn't say "must", but that is, as we'll see, a strong
3 indication of the way things are meant to go.

4 Then at paragraph 14, there's reference to the court of appeal's decision in Stellantis,
5 which the tribunal then comes back to in its analysis below.

6 In paragraph 15, the tribunal sets out the reasons why the defendants wanted
7 separate experts. The first was that, as I've said, they had a particular interest in
8 interrogating the allegations relating to their own sales. The second point is an
9 important, practical one: that the data would be different for each of them, and there'd
10 be different issues about how the data is presented.

11 Over the page, (3):

12 "It might not be possible to do a 'market-wide' regression ..."

13 So that work might have had to be done on a defendant by defendant basis anyway.

14 Then at (4), money had already been spent, because of course the defendants had
15 begun working before this stage, with separate economists on the volume of
16 commerce.

17 THE CHAIR: Just to interrupt you, this is a ruling at a CMC?

18 MR PICCININ: That's right, refusing permission to have separate experts. The fifth
19 point was that the claim was high value so that it would be proportionate to have
20 separate experts. Then in paragraph 16, the tribunal agreed with the class
21 representative in that case that there would be significant adverse consequences to
22 having separate experts. There would be four in total, so one more than here. There
23 would be four different methodologies for overcharge -- that's actually the same here,
24 since Dr Bagci is offering two. Two plus three plus --

25 THE CHAIR: What does Stephan do for the overcharge here?

26 MR PICCININ: So, two methodologies coming from Dr Bagci for the overcharge.

1 THE CHAIR: One being the simulation?

2 MR PICCININ: And the other one being the yardstick, so far as it goes. Then there's
3 an additional one from Dr Houpis, and then from our side, of course, there'll be one as
4 well.

5 Then the court goes on to say that that would lead to six comparisons in order for the
6 tribunal to identify the one that it prefers the most. The particular numbers don't matter;
7 the point is that it compounds, and that it leads to a significant multiplication of work.
8 That's what the tribunal said.

9 But the point I just want to interject here into the reasoning is an additional point, that
10 it's actually worse than that. It's not just a matter of counting up methodologies and
11 then looking at all the ways they intersect and picking the best one. The proliferation
12 of experts advancing those methodologies causes a further problem because they will
13 inevitably have different opinions; if they're doing the jobs properly and if they're
14 expressing their own independent opinions, they're liable to differ, even on the same
15 sides of the case. They will be duty bound to express their different opinions about
16 each other's work.

17 We've seen that's already starting to happen with each class representative starting
18 to express doubts about the methodology put forward by the other one.

19 Then you can see that the tribunal goes through the defendant's reasons for wanting
20 separate experts and rejects them, but it's important that the tribunal rejects them not
21 because any of them were actually wrong -- you know, of course, it's always better in
22 some sense to have more, if you like, expert methodologies and having more
23 experts -- and if you like economists -- more experts is always good. So, they're not
24 wrong, but they can't justify the extra work that is involved. That's really the sea
25 change that I was referring to in the tribunal's approach to this issue.

26 Sir, paragraph 17 to 19 are important because you can see that even though a single

1 expert would or might have to do separate work for each defendant separately, even
2 though the defendants might have already spent significant sums on doing that work
3 with separate experts, that couldn't justify having separate experts do that work; you
4 could just have one expert go around each individual defendant and look at their data.
5 Then it's perhaps even more striking in relation to overcharge, which is dealt with in
6 paragraph 20 and 21. In paragraph 20, you can see that the tribunal acknowledges
7 the particular interest that each defendant has in determining the overcharge
8 applicable to them. It says that is a "relatively weak interest". That's the quote;
9 a relatively weak interest when weighed against the need to avoid proliferation of
10 competing methodologies.

11 Now, obviously, the interest in having someone deal with the overcharge interest on
12 the defence side is not relatively weak; that's an essential element of the right to a fair
13 trial in this sort of context. But the interest in having a separate expert to focus on your
14 particular and distinct interest in that issue is now characterised by the tribunal as
15 being "relatively weak".

16 If you read on to paragraph 21, you can see that that is even though the tribunal was
17 prepared to accept that it might well turn out to be the case that establishing a lower
18 overcharge for one defendant might reduce their overall liability in subsequent
19 contribution proceedings.

20 Then in paragraph 24, you can see that it's said in second sentence: "one can certainly
21 envisage" that it might be the case that one way of modelling overcharge leads to
22 a better result than another for one defendant at the expense of increasing another
23 defendant's liability. That was accepted.

24 But then in paragraphs 25 and 26, the tribunal essentially says it doesn't care; you
25 only get one expert. You can, of course, make suggestions to them about why the
26 regression that suits you better is objectively superior to the ones that don't suit you

1 better. But ultimately, it's for the expert to decide, in accordance with their duty to the
2 tribunal to give their own independent opinion, which regressions are the ones that
3 should be put forward.

4 Just looking at the time. That's all I wanted to take from the authority. I can make the
5 submission. It will take a few minutes.

6 THE CHAIR: Make the submission and then we will rise.

7 MR PICCININ: Okay. My submission is that that was a much stronger case for
8 multiple experts than this one. While there is obviously a conflict of interest between
9 the consumer and seller classes on the question of pass on, they have an exact
10 identity of interests in establishing the overcharge and the existence of the abuse.
11 While ACSO says that it likes Dr Bagci's models rather than those of Dr Houpis, that
12 is not for any reason that is connected with the different class that they want to
13 represent.

14 ACSO doesn't say, for example, that the simulation model is better for the consumer
15 class -- the customer class -- in some way. It just says it's a better approach for the
16 reasons connected with the merits. Indeed, they both say that each others' models
17 are alternatives or complementary. In those circumstances, I say it would be contrary
18 to the modern approach of the tribunal to permit two experts to opine on the question
19 of abuse and any effects on sellers' commissions. That would be true even if, as in
20 that case, you were talking about someone who's spending their own money.

21 The fact that these are collective actions is a further reason for the tribunal to keep
22 things under control. As the Supreme Court told us in Evans -- and we've seen this
23 a few times -- the regime only exists to provide class members with a "reasonable"
24 opportunity for their claims to be pursued, a reasonable opportunity. This goes way
25 beyond reasonable.

26 Sir, for those reasons, we say this is a case where the tribunal should not permit the

1 class representatives to have two experts addressing the question of abuse. Indeed,
2 you've already said that yourselves at the certification hearing for Stephan and
3 Hammond, where you indicated that they would have to share experts on the
4 overlapping issues.

5 Just for your reference, that's D155, paragraphs 132 to 134. (Pause)

6 Now, I'm conscious that you've effectively indicated an interest in -- I don't know how
7 much more strongly you intended to put it than that -- making that kind of order in
8 relation to Trial 1. But actually, the same goes for Trial 2 in relation to the quantification
9 of overcharge. There is no reason to have a second expert.

10 Again, I emphasise that as a different point from the point about whether the
11 methodology is any good. Indeed, you could in principle have one expert with more
12 than one methodology, but the multiplication of experts is something that should not
13 be entertained.

14 THE CHAIR: Yes, (inaudible) objective if Dr Houpis were to say, "I think there may be
15 problems I don't know now, with data and so on, for a regression, so I will also do
16 a simulation as an alternative and see which: (a) they cross check each other; (b)
17 they're complements; (c) I don't know at this stage what data there'll be (inaudible) my
18 regression and so on".

19 MR PICCININ: Yes and no is the answer. I couldn't make this objection. That's the
20 point that I was just making to you: if the methodology is any good, and if it doesn't
21 impose too much additional burden on the tribunal and on the parties, then you could
22 have one expert run both the regression and the simulation in theory.

23 I have other reasons why you shouldn't do that, which I could equally make if it were
24 Dr Houpis pressing this angle. Sir, it is excessive, and the tribunal does have the
25 power to control these things. Also, it doesn't pass the Microsoft test, so that would
26 be just as good a point in relation to Stephan as it is in relation to ACSO.

1 It's not right that once you've got an expert through the door, they can do whatever
2 they feel like and produce an expert report that just goes on and says, "Well, I'm done
3 with the regression now, I'm going to move on to the simulation". That's not right. But
4 in my submission, that would be greatly preferable to a situation of having both
5 Dr Bagci and Dr Houpis present the same methodologies because of the point I made
6 about proliferation of experts and proliferation of comments. Because each of them is
7 going to comment separately on what Mr Holt does, as well, and what each other does.
8 And you lose that multiplication of work if you stick to one expert.

9 The final point, just very briefly, on this second topic, arises out of the discussion that
10 the tribunal had with counsel for ACSO in relation to the contingent fees, which is not
11 a point that we've made in our skeleton. But having heard that discussion between
12 the parties, that is a further reason why this is not appropriate. We do say that having
13 those contingent fees is not consistent with the practice direction, and is not consistent
14 with an expert's duties and their independence.

15 I absolutely accept what Mr Lask says -- that it is, of course, the case that you've
16 always got an interest in a case going forward. You've also always got an interest in
17 winning the case. But what you can't have is a situation where your remuneration as
18 the expert depends on the outcome of the case or a part of the case, like the
19 certification hearing. That is not acceptable.

20 Those are my submissions on those two points.

21 THE CHAIR: Yes.

22 MR PICCININ: And I'll come back tomorrow for the --

23 THE CHAIR: Tomorrow morning. I think we'll start at 10.00 am.

24
25 Housekeeping

26 MR CARALL-GREEN: Sir, I beg your pardon. Before you rise, may I have a moment

1 to ask a clarificatory question before you rise, because it may affect the instructions
2 that I take overnight? It's not in direct response to anything my learned friend has said,
3 but it arises out of the discussion that the tribunal was having about the Brook case
4 my learned friend raised.

5 I wanted to clarify: when the tribunal was discussing with me and my learned friend
6 Mr Lask about joint instruction, we had understood that to be joint instruction of the
7 expert. If the hypothesis was about the joint instruction of a legal team, then I'd
8 probably need to say more about that, because that engages other considerations,
9 including professional duties. If that's something that is being contemplated, then I'd
10 value the opportunity to elaborate, because the considerations there are different.

11 THE CHAIR: Yes. My question was about the joint instruction for Trial 1, the point
12 made by Mr Piccinin relying on Mr Brook is about a joint instruction, I think.

13 MR CARALL-GREEN: Yes, sir.

14 THE CHAIR: That was a separate point.

15 MR CARALL-GREEN: I'm grateful.

16 MR PICCININ: It's actually solicitors and counsel; it's the whole legal team.

17 THE CHAIR: Yes, although I thought you recognised that on something like the
18 chapter 1, there might be some additional legal --

19 MR PICCININ: Absolutely, sir, where there are differences, there are points that are
20 not common in applying the Brook approach that need to be dealt with separately. It's
21 only in relation to the points that are common.

22 THE CHAIR: Yes.

23 MR RAYMENT: Sir, excuse me. I'm sorry to rise. I just wanted to raise a point, if you
24 don't mind, about the assistance that Mr Hammond can give you for the remainder of
25 this hearing, because I'm conscious --

26 THE CHAIR: Can you clarify for the transcript that you appear for Mr Howard?

1 MR RAYMENT: That's correct, sir. It's been a long day. Obviously, the issues that
2 you've been dealing with are really ones which arise in terms of expert evidence
3 between Dr Bagci on the one part for ACSO, and Dr Houpis on the other for
4 Professor Stephan. You've seen the position that Mr Hammond has arrived at with
5 ACSO, and therefore Mr Hammond doesn't really have anything to add on the expert
6 position as between the ACSO and the Stephan class representatives. So just raising
7 the question as to whether you think you may want to hear from Mr Hammond on any
8 relevant issues, because it doesn't seem to me that obvious that they will arise.
9 I can see the tribunal may have felt that at an earlier stage, issues could arise, but as
10 I say, the hatchet broadly seems to have been buried as between ACSO and
11 Mr Hammond.

12 THE CHAIR: Yes, you've agreed on experts and I think on counsel?

13 MR RAYMENT: Yes, that's right. Yes. There are some minor ancillary points, but
14 they're not significant.

15 THE CHAIR: Yes, but not on Mr Piccinin's further point of (several inaudible words)
16 complications.

17 MR RAYMENT: Yes.

18 THE CHAIR: Yes.

19 MR RAYMENT: I'm in your hands.

20 THE CHAIR: The thrust of your question is whether we're inviting you to return
21 tomorrow?

22 MR RAYMENT: Indeed, sir.

23 THE CHAIR: The answer is that it's always a pleasure to --

24 MR RAYMENT: I'm grateful. There are other ways we can keep track of what you're
25 saying.

26 THE CHAIR: With that, we'll say at 10.00 am.

1	(5.12 pm)
2	(The court adjourned until 10.00 am on Tuesday, 6 October 2026)
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Key to punctuation used in transcript

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